

Provisional text

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 26 November 2019 (1)

Joined Cases C-566/19 PPU and C-626/19 PPU

Parquet général du Grand-Duché de Luxembourg

v
JR

(Request for a preliminary ruling from the Cour d'appel (Chambre du conseil) (Court of Appeal
(Investigation Chamber), Luxembourg))

and
Openbaar Ministerie

v
YC

(Request for a preliminary ruling from the Rechtbank Amsterdam (District Court, Amsterdam,
Netherlands))

(Reference for a preliminary ruling — Police and judicial cooperation in criminal matters — Framework Decision 2002/584/JHA — European arrest warrant — Issuing judicial authority — Independence of the public prosecutor's office — European arrest warrant issued by a French public prosecutor — Public prosecutor's office responsible both for conducting a criminal prosecution and for reviewing the conditions of issue and proportionality of a European arrest warrant — Condition as to the existence of an effective judicial remedy against the decision to issue a European arrest warrant granted by a public prosecutor)

1. The Court of Justice is again faced with references for a preliminary ruling in which it will have to adjudicate on whether a public prosecutor's office (in this case, in the French Republic) can be regarded as the 'issuing judicial authority' for a European arrest warrant (EAW), within the meaning of Article 6(1) of Framework Decision 2002/584/JHA. (2)

2. The doubts raised by a court in Luxembourg (Case C-566/19 PPU) and another court in the Netherlands (Case C-626/19 PPU) concern, in particular, the interpretation to be given to the judgment of the Court of Justice in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau, Germany)*. (3)

3. The same doubts have arisen in relation to the Public Prosecutor's Offices in Sweden (Case C-625/19 PPU) and Belgium (Case C-627/19 PPU), in which cases I am also delivering my Opinion today.

4. Although my position in principle continues to be that which I put forward in *OG (Public Prosecutor's Office in Lübeck)* and *PI (Public Prosecutor's Office in Zwickau)* (4) and in *PF (Prosecutor General of Lithuania)*, (5) it now falls to me to look at the interpretation of the aforementioned judgment, as well as of the judgment delivered on 9 October 2019 (6) in another similar case.

I. Legal framework

A. EU law

5. I refer to the reproduction of recitals 5, 6, 8, 10 and 12 and Articles 1 and 9 of the Framework Decision which is contained in the Opinion in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*.

B. National law. Code de procédure pénale (7)

6. In Chapter I *bis* ('Powers of the Minister for Justice') of Title I ('Authorities responsible for conducting criminal justice policy, criminal prosecution and pre-trial investigation') of Book I of the CPP, Article 30 provides:

'The Minister for Justice shall conduct the criminal justice policy determined by the Government. He shall ensure that it is applied consistently throughout the territory of the [French] Republic.

To that end, he shall issue general instructions to the judges attached to the Public Prosecutor's Office.

He cannot issue any instructions to them in individual cases.

Every year, he shall publish a report on the application of the criminal justice policy determined by the Government, setting out the conditions under which that policy was implemented and the general instructions issued under the second paragraph. The report shall be forwarded to Parliament. It may give rise to a debate in the National Assembly and the Senate'.

7. In Section 2 ('Powers of the Principal Public Prosecutor attached to the Courts of Appeal') of Chapter II of the aforementioned Title I of Book I, Article 36 states:

'The Principal Public Prosecutor [attached to the Courts of Appeal] may, by written instructions included in the case file, direct the public prosecutors to bring prosecutions, or arrange for prosecutions to be brought, or to refer to the competent court such written submissions as the Principal Public Prosecutor considers appropriate'.

II. Disputes and questions referred for a preliminary ruling

A. Case C-566/19 PPU

8. On 24 April 2019, the Deputy Principal Prosecutor attached to the Public Prosecutor's Office at the Tribunal de Grande Instance de Lyon (Regional Court, Lyon, France) issued an EAW for the purposes of conducting a criminal prosecution against JR.

9. By decision of 19 June 2019, the Chambre du Conseil du Tribunal d'arrondissement de Luxembourg (Investigation Chamber of the District Court, Luxembourg) approved JR's surrender to the French authorities.

10. JR appealed against that decision before the referring court, requesting, for the purposes of the present proceedings, that the EAW be declared invalid because the authority which had issued it is not a ‘judicial authority’ within the meaning of Article 6(1) of the Framework Decision. He claimed that the French Public Prosecutor’s Office may be subject to indirect instructions from the executive, which is incompatible with the criteria established by the Court of Justice in this regard.

11. It was in those circumstances that the Cour d’appel (chambre du conseil) (Court of Appeal (Investigation Chamber), Luxembourg) decided to refer the following question for a preliminary ruling:

‘Can the French Public Prosecutor’s Office at the investigating court or trial court, which has jurisdiction in France, under the law of that State, to issue a European arrest warrant, be considered to be an issuing judicial authority, within the autonomous meaning of that term in Article 6(1) of [the] Framework Decision ..., in circumstances where, deemed to monitor compliance with the conditions necessary for the issue of a[n] EAW and to examine whether such a warrant is proportionate in relation to the details of the criminal file, it is, at the same time, the authority responsible for the criminal prosecution in the same case?’

B. Case C–626/19 PPU

12. On 27 March 2019, the Public Prosecutor at the Tribunal de Grande Instance de Tours (Regional Court, Tours, France) issued an EAW for the purposes of conducting a criminal prosecution against YC, who was arrested in the Netherlands on 5 April 2019.

13. The Rechtbank Amsterdam (District Court, Amsterdam, Netherlands), which has to decide whether to execute that EAW, has referred the following questions for a preliminary ruling:

I. Can a Public Prosecutor who participates in the administration of justice in the issuing Member State, who acts independently in the execution of those of his responsibilities which are inherent in the issuing of a European arrest warrant, and who has issued an EAW, be regarded as an issuing judicial authority within the meaning of Article 6(1) of [the] Framework Decision ... if a judge in the issuing Member State has assessed the conditions for issuing an EAW and, in particular, the proportionality thereof, prior to the actual decision of that Public Prosecutor to issue the EAW?

II. If the answer to the first question is in the negative, has the condition been met that the decision of the Public Prosecutor to issue an EAW and, in particular, the question of its proportionality, must be capable of being the subject of court proceedings which meet in full the requirements inherent in effective judicial protection as referred to in paragraph 75 of the judgment [in *OG and PI (Public Prosecutor’s Offices in Lübeck and Zwickau)*] if, after his actual surrender, the requested person can avail of a legal remedy under which the invalidity of the EAW may be invoked before a court in the issuing Member State and under which that court examines, inter alia, whether the decision to issue that EAW was proportionate?’

III. Procedure before the Court of Justice and the positions of the parties

14. Case C–566/19 was registered at the Court of Justice on 25 July 2019, the referring court not having requested that the case be dealt with under the urgent preliminary ruling procedure.

15. Case C–626/19 PPU was registered at the Court of Justice on 22 August 2019. Given the decision made in the main proceedings to remand YC in custody, the referring court requested that the urgent preliminary ruling procedure be applied.

16. The Court of Justice ordered that both cases be dealt with under the urgent procedure and joined them for the purposes of processing and giving judgment on them.

17. Written observations have been lodged by JR, the French and Netherlands Governments, the Luxembourg Principal Public Prosecutor, the Netherlands Public Prosecutor's Office and the Commission.

18. The hearing took place on 24 October 2019 and was held in conjunction with the hearings in Cases C-625/19 PPU and C-627/19 PPU. The hearing was attended by JR, YC, XD, ZB, the Luxembourg Public Prosecutor's Office, the Netherlands Public Prosecutor's Office, the Netherlands, French, Swedish, Belgian, Irish, Spanish, Italian and Finnish Governments and the Commission.

IV. Analysis

A. *Preliminary considerations*

19. Both references for a preliminary ruling seek to determine whether the French Public Prosecutor's Office is an 'issuing judicial authority' within the meaning of Article 6(1) of the Framework Decision. Each reference asks that question from a different perspective:

– The Luxembourg court asks whether the French Public Prosecutor's Office satisfies the condition as to the independence which the authority issuing an EAW must exhibit.

– The Netherlands court starts from the premiss that the French Public Prosecutor's Office is independent, but doubts whether the EAWs which it may issue may be subject to judicial review.

20. As I have already observed, those questions have arisen in the context of the uncertainty created for the referring courts by the judgment in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*, and in particular by the finding therein that the concept of an 'issuing judicial authority' in Article 6(1) '[does] not includ[e] public prosecutors' offices [...] which are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive'. (8)

21. It must, therefore, be determined:

– Whether the French Public Prosecutor's Office is an independent institution, as any judicial authority issuing an EAW must be (Case C-566/19).

– If the answer is in the affirmative, whether a judicial examination of the requirements for an EAW can be carried out before the 'actual decision' made by the public prosecutor's office issuing it (first question in Case C-626/19 PPU).

– Whether, in the event that such a review must take the actual form of a legal action against the decision of the public prosecutor's office, it is sufficient for that action to be brought after surrender has taken place (second question in Case C-626/19 PPU).

22. In order to give an answer to the Luxembourg court (Case C-566/19), it will be necessary to examine the reasoning applied in the judgments in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)* and *NJ (Public Prosecutor's Office in Vienna)*; the resolution of Case C-626/19 PPU calls for an interpretation to be found which reconciles paragraphs 68 and 75 of the first of those judgments.

B. *The independence of the Public Prosecutor's Office in France*

23. To my mind, the Public Prosecutor's Office cannot be classified as an 'issuing judicial authority' under Article 6(1) of the Framework Decision, for the reasons I have given previously, which are concerned, in brief, with safeguarding the liberty of citizens, which can be restricted only by order of a court. (9) An EAW could not, therefore, be issued by the German Public Prosecutors, the Prosecutor General of Lithuania or, now, the French Public Prosecutor's Office.

24. Although the Court of Justice also starts from the premiss that the authority issuing an EAW must be independent, it has adopted a different approach which, in my view, varies depending on whether regard is had to the judgment of 25 July 2018 in *Minister for Justice and Equality (Deficiencies of the system of justice)*, (10) or the judgments of 27 May 2019 in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)* and *PF (Prosecutor General of Lithuania)*. (11)

25. It is appropriate, therefore, to set out the circumstances in which that case-law was established.

1. *The case-law of the Court of Justice on this matter*

26. In the view of the Court of Justice, it is sufficient for the issuing judicial authority to be 'capable of exercising its responsibilities objectively, taking into account all incriminatory and exculpatory evidence, without being exposed to the risk that its decision-making power be subject to external directions or instructions, *in particular from the executive*, such that it is beyond doubt that the decision to issue a European arrest warrant lies with that authority and not, ultimately, with the executive'. (12)

27. According to that line of argument:

– The issuing judicial authority must 'give assurances to the executing judicial authority that, as regards the guarantees provided by the legal order of the issuing Member State, it acts independently in the execution of those of its responsibilities which are inherent in the issuing of a European arrest warrant'.

– There must be 'statutory rules and an institutional framework capable of guaranteeing that the issuing judicial authority is not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, *inter alia*, to an instruction in a specific case from the executive'. (13)

– The possibility of exposure to any instructions in a specific case from the executive appears to be the key factor in assessing the independence of the public prosecutor's office as an issuing judicial authority.

28. In the judgment in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*, the decisive factor was that the Minister for Justice of the Federal Republic of Germany, or his counterparts in the Federal *Länder*, were able to issue instructions to the public prosecutor's offices. (14) This carried more weight than the finding that 'German public prosecutor's offices are required to act objectively and must investigate not only incriminating but also exculpatory evidence'. (15)

29. In the judgment in *NJ (Public Prosecutor's Office in Vienna)*, the Court of Justice held, for similar reasons, that the Austrian public prosecutors did not satisfy the requirements inherent in the independence required to issue an EAW. (16)

30. Conversely, the Court held that the Prosecutor General of Lithuania could be regarded as an 'issuing judicial authority' since, being responsible for issuing the EAW, he enjoys an independence from the executive that is guaranteed by the national Constitution. (17)

31. I should point out that, in its case-law to date, the Court has not clearly ruled on the dependence or independence of each of the public prosecutors, subject to instructions from their hierarchical superiors. (18)

2. *The Public Prosecutor's Office in France*

32. According to the information in the documents before the Court, until 2013 the Minister for Justice in France could issue instructions to public prosecutors in specific cases. It would, therefore, follow from the case-law established in the judgments in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)* and *NJ (Public Prosecutor's Office in Vienna)* that, before that date, the French Public Prosecutor's Office could not be regarded as an 'issuing judicial authority'.

33. The position of the French Public Prosecutor's Office as being subject to potential instructions from the executive in specific cases disappeared when the CPP was reformed in 2014. The right of the Minister for Justice to issue general instructions (Article 30 of the CPP) remains, however. As does, of course, the hierarchical structure characteristic of the Public Prosecutor's Office, with the result that its members are organisationally and functionally subordinate to the Principal Public Prosecutor at each court. Each public prosecutor, therefore, works 'under the direction and control of [his/her] hierarchical superiors'. (19)

34. This raises two issues:

– First, whether the right of the executive to issue general instructions to public prosecutors is capable of adversely affecting their independence.

– Secondly, whether the hierarchical structure characteristic of public prosecutor's offices is innocuous from the point of view of the independence of their members.

(a) *Instructions in specific cases and general instructions*

35. In the operative part of the judgment in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*, the Court of Justice only expressly referred to instructions in specific cases. In paragraph 73 thereof, however, it held that the public prosecutor's decision-making power could not be 'subject to external directions or instructions', without further clarification.

36. In that case, as it was obvious that the Minister for Justice could give instructions to German public prosecutors *in specific cases*, it was unnecessary to rule on the effect of *general* instructions on their actions.

37. In my view, however, the latter type of instructions may be relevant too. In my Opinion in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*, I recalled the entirely correct approach the Court of Justice had taken when ruling in the judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)* on the independence of the judicial authority issuing the EAW. Such independence presupposes that 'the authority in question "exercises its functions wholly autonomously, *without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever*, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions"'. (20)

38. It is inconceivable that an (independent) judge should have to comply with instructions from the executive, however general they may be, when called upon to adjudicate on something as precious as the liberty of his fellow citizens. The judge is subject only to the law, not to any criminal justice policy instructions which a government (acting through the Minister for Justice) may issue.

39. Such general instructions may, legitimately, be binding on public prosecutors in Member States which choose to permit them. It is for that very reason (in other words, that their capacity to act autonomously is restricted notwithstanding that they are subject only to the law) that members of a public prosecutor's office who are bound by general government instructions when it comes to deciding whether or not to issue an EAW cannot be accorded the *status* of issuing judicial authority.

40. It is not inconceivable that such general instructions may express a given government's criminal justice policy, (21) requiring members of the public prosecutor's office, for example, to issue EAWs for some offences, in all cases, or for certain categories of offender. How can a decision be said to be independent if it is adopted by someone who, when issuing an EAW, is compelled to comply, even against his own better judgment, with the (general) instructions issued by the Government?

41. The counter-argument to the foregoing might be that this is not the norm. I would emphasise, however, that, in cases involving deprivation of liberty, the only way to safeguard against binding instructions from the executive (not only general instructions but also, a fortiori, specific instructions) in

connection with EAWs is to ensure that the person adjudicating upon a person's liberty does so from a position of absolute independence and is subject only to the law, not to the guidance or instructions, whether particular or general, of the executive.

42. It is my view, therefore, that the Court of Justice would have to revert to the principle it set out in paragraph 63 of the judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)* and confirm that an entity called upon to issue an EAW cannot be subject to any hierarchical constraint or subordinated to any other body, or 'tak[e] orders or instructions from any source whatsoever'.

(b) *The hierarchical subordination of the Public Prosecutor's Office in France*

43. As I maintained in the Opinion in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*, again citing the judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*, 'independence [...] is incompatible with any "hierarchical constraint or subordinat[ion] to any other body"'. In relation to judges and courts, independence presupposes that 'members of the judiciary are also independent from the higher courts, which — although they can review and annul the rulings of lower courts a posteriori — cannot, however, dictate to them how they should adjudicate'. (22)

44. In my opinion, independence must also be a feature of the public prosecutor's office as an 'issuing authority' within the meaning of the Framework Decision. If, then, as appears to have been established, French public prosecutors, in addition to acting in accordance with general instructions issued by the Minister for Justice, are also required to comply with the orders of their hierarchical superiors within the structure of the Public Prosecutor's Office, (23) it would be difficult to describe them as independent in their role as the 'issuing judicial authority' for an EAW.

45. That, moreover, was the position adopted by the Court of Justice in the judgment of 16 February 2017, *Margarit Panicello*, paragraphs 41 and 42, when it held that another official (a *secretario judicial* (registrar)) acting in an ancillary capacity in the administration of justice could not refer questions for a preliminary ruling to the Court of Justice. That official's lack of independence was due to the very fact that he was required to 'comply with instructions from his hierarchical superior'. (24)

46. Although the criteria for interpreting Article 267 TFEU (25) are not entirely the same as those applicable to Article 6(1) of the Framework Decision, it is my view that, in substance, they express the same concern.

47. I would draw attention once again to paragraph 63 of the judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*, concerning the absence of 'hierarchical constraints or subordination' as an essential and inseparable component of independence.

48. In the case which gave rise to the judgment in *PF (Prosecutor General of Lithuania)*, the Court of Justice held that the Prosecutor General of Lithuania could be classified as an 'issuing judicial authority' because he enjoyed a constitutional status affording him a guarantee of independence from the executive in the issue of an EAW. In the French Republic, on the other hand, there is no equivalent constitutional guarantee.

(c) *The impartiality of the public prosecutor's office*

49. The Luxembourg referring court expresses uncertainty as to whether the French Public Prosecutor's Office may be regarded as an 'issuing judicial authority' for an EAW not only because of the status of that institution but also because public prosecutors, '... deemed to monitor compliance with the conditions necessary for the issue of a[n EAW] and to examine whether such a warrant is proportionate in relation to the details of the criminal file, [are], at the same time, the authority responsible for the criminal prosecution in the same case'.

50. To my mind, the referring court's misgivings have more to do with the impartiality of the public prosecutor's office than with its independence.

51. The public prosecutor's office is, by definition, the '[party] prosecut[ing] in the proceedings'. (26) In so far as it is a *party* in criminal proceedings against another *party* (the suspect or the accused), it should not fall to the public prosecutor's office but rather to the court adjudicating upon those proceedings to determine the personal situation of the opposing *party* to the point of depriving him of his liberty.

52. That premiss might be qualified, however, if the law obliges the public prosecutor's office to act with full objectivity, assessing and presenting to the court both the incriminatory and exculpatory evidence against or in favour of the suspect or the accused.

53. In particular, if the public prosecutor's office is required to discharge that duty of objectivity during the investigation phase of a criminal prosecution, its position is analogous to that of an investigating judge (in countries which have this function), whose customary powers include the issue of EAWs, if the domestic law of the country concerned so provides.

54. I therefore take the view that the formal status of a public prosecutor's office as a *party* in criminal proceedings is not incompatible with its being recognised as exhibiting *impartiality*, to the extent that this constitutes a rule of procedural conduct (not only as a matter of professional ethics but also as a matter of law). Accordingly, national legislation may specify, as it does in France, that the public prosecutor's office conducts criminal prosecutions and enforces the criminal law 'with due regard for the principle of impartiality by which it is bound'. (27)

55. In any event, since it is clear from the foregoing, in my opinion, that the institutional framework of the French Public Prosecutor's Office provides no guarantee that it acts without any influence whatsoever from the executive when issuing EAWs, I consider that the question raised by the referring court in Case C-566/19 must be answered in the negative.

56. An answer to that effect would in and of itself make it unnecessary to reply to the Netherlands court's questions in Case C-626/19 PPU, since they assume that the Public Prosecutor's Office in France is independent, which I consider not to be the case. Nonetheless, I shall examine them in the alternative.

C. Judicial review of an EAW issued by a public prosecutor's office

1. Preliminary considerations

57. The Rechtbank Amsterdam (District Court, Amsterdam) is uncertain whether the third requirement laid down in the judgment in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*, which has to be met in order for an authority — which, without being a judge or court, participates in the administration of justice and acts independently — to be able to issue EAWs, that is the requirement that its decisions be capable of being the subject of court proceedings, is fulfilled.

58. Paragraph 75 of the judgment in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)* states that, 'where the law of the issuing Member State confers the competence to issue a[n EAW] on an authority which, whilst participating in the administration of justice in that Member State, is not itself a court, the decision to issue such an [EAW] and, inter alia, the proportionality of such a decision must be capable of being the subject, in the Member State, of court proceedings which meet in full the requirements inherent in effective judicial protection'.

59. The Netherlands Public Prosecutor's Office argues that the proceedings referred to in paragraph 75 of the judgment in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)* are not required where, at the first of the two levels of protection on which the system provided for in the Framework Decision is based, a decision fulfilling the requirements of effective judicial protection had already been adopted. (28)

60. On that basis, therefore, the requirements set out in paragraphs 68 and 75 of the judgment in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)* would be mutually exclusive. According to the referring court, however, those two requirements co-exist and are therefore simultaneously applicable. I share that view.

61. The assertions contained in paragraphs 68 and 75 of the judgment in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)* certainly raise some questions.

62. Paragraph 68 states that the dual level of protection afforded by the EAW system 'means that a decision meeting the requirements inherent in effective judicial protection should be adopted, *at least, at one of the two levels of that protection*'. (29) Those levels are:

– That applicable at the time when 'a national decision, such as a national arrest warrant [NAW], is adopted'. (30)

– That applicable when the EAW itself is issued. (31)

63. The correct meaning of the expression 'at least, at one of the two levels of that protection' used in paragraph 68 of the judgment in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)* can be gleaned only by reading the following paragraphs.

64. According to paragraph 69, 'it follows' from the statement contained in paragraph 68 that, where domestic law confers the competence to issue an EAW on an authority which, like the public prosecutor's office, participates in the administration of justice but is not a judge or a court, the EAW must be based on a 'national judicial decision, such as a national arrest warrant'. The latter (the NAW) must meet the requirements laid down in paragraph 68, that is to say, those 'inherent in effective judicial protection'.

65. Consequently, an EAW issued by a public prosecutor must be based on an NAW issued by a judge or court, in other words, by a judicial authority in the strict sense. 'A decision meeting the requirements inherent in effective judicial protection', within the meaning of paragraph 68 of the judgment in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*, must, therefore, be understood as being one adopted by a judge or court.

66. According to paragraph 71 of the judgment in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*, the second level of protection means that the judicial authority competent to issue an EAW 'must review [...] observance of the conditions necessary for the issuing of the European arrest warrant and examine whether, in the light of the particular circumstances of each case, it is proportionate to issue that warrant'.

67. It follows that an EAW based on an NAW granted by a judge or court can be issued by the public prosecutor's office in those Member States in which that institution participates in the administration of justice and does so fully independently.

68. In those circumstances, the 'requirements inherent in effective judicial protection' (that is to say, inherent in the intervention of a court in the strict sense) will already have been satisfied at the first level of protection, when the NAW on which the EAW is based was issued.

69. According to paragraph 75 of the judgment in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*, however, the decision of the public prosecutor's office to issue an EAW must 'be capable of being the subject ... of court proceedings which meet in full the requirements inherent in effective judicial protection'.

70. The need for such proceedings is not a condition which a public prosecutor's office must fulfil in order to be able to issue an EAW, that is to say, in order to be capable of being classified as an 'issuing judicial authority' within the meaning of Article 6(1) of the Framework Decision. Rather, it is a condition

relating to the *lawfulness of the issuing of an EAW* by a public prosecutor's office and, therefore, to its effectiveness. (32)

71. This follows from the judgment in *PF (Prosecutor General of Lithuania)*, in which the Court, after finding that the Prosecutor General of Lithuania could be considered to be an 'issuing judicial authority', inasmuch as he participates in the administration of justice and his independence from the executive is guaranteed, observed that it could not be ascertained whether his decision to issue an EAW was capable of being the subject of court proceedings. (33) This did not prevent the Court from finding that the Prosecutor General was an 'issuing judicial authority' within the meaning of Article 6(1) of the Framework Decision.

72. In other words, it follows from the case-law of the Court of Justice that a public prosecutor's office can be regarded as an 'issuing judicial authority' within the meaning of Article 6(1) of the Framework Decision if it exhibits two characteristics: (a) it participates in the administration of justice; and (b) its organisational and functional status is such as to guarantee its independence.

73. If it exhibits both those characteristics, a public prosecutor's office can issue an EAW. However, an EAW issued in this way must be capable of being the subject of proceedings before a judge or court in the true sense. The non-existence of such proceedings would affect not its status as an 'issuing judicial authority' but the effectiveness of an EAW issued by it.

2. *The first question referred for a preliminary ruling in Case C-626/19 PPU*

74. If the foregoing interpretation were correct, the first of the questions raised by the referring court would have to be reworded.

75. The Rechtbank Amsterdam (Amsterdam District Court) asks whether a public prosecutor who participates in the administration of justice and acts independently can be regarded as an 'issuing judicial authority' within the meaning of Article 6(1) of the Framework Decision if his decision to issue an EAW is preceded (not followed) by a judicial examination.

76. I take the view, for the reasons given, that what matters is not whether, under the conditions specified, the public prosecutor is an 'issuing judicial authority', but whether the EAW which he has issued can be enforced in the executing Member State. Our examination must, therefore, focus on the lawfulness of the process for adopting an EAW rather than on the status of the person issuing it.

77. The question would therefore have to be reworded as follows: 'May the examination of compliance with the requirements for issuing an EAW adopted by a public prosecutor who warrants the description of 'issuing judicial authority' within the meaning of Article 6(1) of the Framework Decision take place before the EAW is issued?'

78. According to the information provided by the referring court, the EAW in this case was issued by a French public prosecutor further to a request from the court which had just issued the NAW. In the course of adopting the NAW, that court would therefore have analysed the requirements for issuing the EAW, in particular, its proportionality.

79. Of course, the fact that the court adopting the NAW assesses at that early stage whether the conditions necessary for the public prosecutor to be able to issue an EAW (in particular, whether it is proportionate to issue it) are also met, represents a significant guarantee that the mechanism provided for in the Framework Decision is being correctly applied.

80. If the NAW and the EAW are adopted simultaneously or almost immediately, there is no risk that the assessment as to the proportionality of the EAW will be out of date. Conversely, that risk *is* present if the EAW is issued long after the NAW. In that event, after all, the proportionality assessment originally made by the court may have become obsolete and circumstances arising subsequently may be sufficient to warrant its amendment.

81. The Court of Justice refers to that possibility in the judgment in *NJ (Public Prosecutor's Office in Vienna)* when it emphasised that the review of proportionality carried out by the judge (34) must also take into account impingement on the rights of the person concerned which goes beyond the infringements of his right to liberty. To that end, the judge must assess the effects of the EAW on the social and family relationships established by someone already resident in a Member State other than that in which the EAW was issued.

82. Aside from the foregoing examination by a court of its own motion of the conditions for issuing an EAW, paragraph 75 of the judgment in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)* expressly mentions 'court proceedings', that is to say a review sought by the person against whom the EAW is directed.

83. When adopting a NAW, the judge carries out his own assessment (of his own motion) of the circumstances warranting the issuing of the NAW, which may be followed by an EAW. As the Luxembourg Principal Public Prosecutor's Office pointed out, the person requested will not have participated in those proceedings, for obvious reasons. (35)

84. By its very nature, however, that judicial assessment is not such as to satisfy 'the requirements inherent in effective judicial protection' mentioned in paragraph 75 of the judgment in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*. Such protection is always requested by the person concerned and takes the form of proceedings in which that person is able to intervene and participate, in exercise of his right of defence.

85. For that reason, the proceedings referred to in paragraph 75 of the judgment in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)* cannot be replaced by a judicial review such as that carried out when the NAW is adopted. As a form of 'appeal', those proceedings may relate only to an EAW which has already been issued, which raises the question of when the option to bring them must be made available. This is the issue raised by the second question in Case C-626/19 PPU.

3. *The second question referred for a preliminary ruling in Case C-626/19 PPU*

86. The referring court proceeds on the premiss that the option to bring court proceedings against the decision of the public prosecutor's office to issue an EAW must be available. Starting from that assumption, it wishes to ascertain whether the option to bring such proceedings must be available before the EAW is executed or whether it is sufficient that they can be brought after the requested person is actually surrendered.

87. The judgment in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)* does not expressly address that question. Nonetheless, I agree with the Commission that, given the risk of impingement on the right to liberty that is inherent in the issuing of an EAW, the option to challenge it by way of court proceedings should be available as soon as the decision to issue it has been adopted. (36) Cases where, for reasons of investigative confidentiality or in the interests of ensuring that the person concerned does not abscond, immediate notification of the EAW is inadvisable until that person is arrested, should be excluded, however.

88. It goes without saying that proceedings brought after the requested person has been surrendered will enable him to obtain judicial protection, albeit less extensive than that which he would have been able to enjoy if he had had the opportunity to challenge the measure in order to avert the harm inherent in the execution of an EAW (in particular, the deprivation of liberty).

89. In any event, as the Prosecutor General of Luxembourg observed, (37) Article 10(5) of Directive 2013/48/EU (38) provides that the Member State issuing the EAW has the obligation to facilitate the appointment by the requested person of a lawyer from the executing Member State, with a view, obviously, to making it easier for him to exercise his right to effective judicial protection before the courts of the issuing Member State without having to wait for his surrender.

90. The fact that paragraph 75 of the judgment in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)* is silent as to the point in time at which the option to bring proceedings against an EAW in the issuing Member State must be made available should not, therefore, be interpreted as meaning that the mere option of bringing proceedings after the person concerned has been surrendered pursuant to the EAW is sufficient for the purposes of compatibility with EU law.

91. In my view, a national system which provides for such proceedings only *ex post* and does not allow the EAW to be challenged at its outset (39) does not satisfy 'in full the requirements inherent in effective judicial protection' in the issuing Member State, to which the Court of Justice refers. The person concerned must have access to a remedy which is capable of guaranteeing full judicial protection, given the serious implications for his right to liberty.

92. It is important to emphasise, however, in line with the position adopted by the Commission, (40) that the bringing of proceedings before the issuing Member State cannot adversely affect the processing of the EAW in the executing Member State, whose judicial authority must comply with the conditions laid down in the Framework Decision and observe the time limits prescribed there. All of which, ultimately, operates to the benefit of a requested person who is deprived of his liberty while the surrender procedure is being conducted.

93. In short, the two questions referred for a preliminary ruling by the Netherlands court may be answered by way of a single reply emphasising that, in any event, the person concerned must be given the opportunity to bring proceedings before a judge or court in the strict sense against an EAW issued by the public prosecutor's office, even if that EAW is preceded by an NAW granted by a judge.

4. A final consideration

94. In my view, the foregoing conclusion follows inevitably from bringing to bear the ultimate consequences of the requirement laid down in paragraph 75 of the judgment in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*.

95. As I have already explained, it is not essential that that requirement be fulfilled in order for a public prosecutor's office to be capable of being regarded as an 'issuing judicial authority' within the meaning of the Framework Decision. It is the case, however, that, even if a public prosecutor's office bore that title, an EAW issued by it would be seriously defective if there were no means of bringing court proceedings against it.

96. In the final analysis, there would be little point in recognising a public prosecutor's office as having the status of 'issuing judicial authority' if an EAW issued by it could not be executed because the warrant originates from a national system that does not allow court proceedings to be brought against it.

97. In order to avoid such an undesirable effect, the Court of Justice could declare that, pending the relevant legislative reforms, (41) the courts of issuing Member States whose rules authorise their public prosecutors to issue EAWs must interpret their procedural legislation as meaning that proceedings such as those referred to in paragraph 75 of the judgment in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)* can be brought.

98. If such an interpretation in conformity with EU law were not viable (because it would be *contra legem* in the national order), there might, in my view, be another way of ensuring that the application of the Framework Decision is not frustrated.

99. The principle of mutual trust between the Member States, and its corollary of mutual recognition, call for a simplification of the procedure provided for in the Framework Decision. From that point of view, I do not think it appropriate simply to add to the grounds for 'refus[ing] to execute' an EAW another, not expressly provided for in the Framework Decision, to the effect that, in the case of EAWs issued by a

public prosecutor's office, it must be demonstrated that the national legislation of the issuing State allows proceedings to be brought before the judicial authority of that State.

100. Imposing that requirement on the executing judicial authority would make the processing of an EAW even more complex, because that authority would have to be (more than basically) familiar with the individual characteristics of the procedural systems of the other Member States, or else request additional information about them. [\(42\)](#)

101. Against that background, it should fall to the courts of the issuing State themselves, once an EAW has been executed, to determine the appropriate conclusions to be drawn, in their domestic law and in the light of the requirements of EU law as interpreted by the Court of Justice, from the fact that the EAW cannot be challenged under their own national legislation.

102. In short, if an independent public prosecutor who is not subject to instructions from the executive in this regard issues an EAW, that warrant, in so far as it is issued by an 'issuing judicial authority' within the meaning of the Framework Decision, must be processed by the executing judicial authority even if there is nothing to indicate to it that the issuing of the warrant may be the subject of court proceedings in the issuing Member State.

V. Conclusion

103. In the light of the foregoing, I propose that the Court of Justice give the following answer to the Cour d'appel (Chambre du conseil) (Court of Appeal (Investigation Chamber), Luxembourg) and the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands):

'Article 6(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as meaning that:

A public prosecutor's office cannot be regarded as an 'issuing judicial authority' if, when adjudicating on a European arrest warrant, its members must comply with general instructions on criminal justice policy, issued by the Minister for Justice, which are binding in relation to such warrants and with instructions issued to them by their hierarchical superiors.

In the alternative:

A person requested under a European arrest warrant issued by a public prosecutor's office in a Member State which participates in the administration of justice and has a guaranteed independent status must be able to challenge that warrant before a judge or court in that State, without having to wait until he is surrendered, as soon as the warrant has been issued (unless this would jeopardise the criminal proceedings) or notified to him'.

[1](#) Original language: Spanish.

[2](#) Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24; 'the Framework Decision').

[3](#) Judgment of 27 May 2019, C-508/18 and C-82/19 PPU, EU:C:2019:456; 'Judgment in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*'.

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- [4](#) Cases C-508/18 and C-82/19 PPU, EU:C:2019:337; ‘Opinion in *OG and PI (Public Prosecutor’s Offices in Lübeck and Zwickau)*’.
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- [5](#) Case C-509/18, EU:C:2019:338; ‘Opinion in *PF (Prosecutor General of Lithuania)*’.
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- [6](#) Case C-489/19 PPU, *NJ (Public Prosecutor’s Office in Vienna)*; EU:C:2019:849; ‘Judgment in *NJ (Public Prosecutor’s Office in Vienna)*’.
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- [7](#) Code of Criminal Procedure (‘CPP’).
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- [8](#) Judgment in *OG and PI (Public Prosecutor’s Offices in Lübeck and Zwickau)*, paragraph 90.
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- [9](#) Opinions in *PF (Prosecutor General of Lithuania)* and *OG and PI (Public Prosecutor’s Offices in Lübeck and Zwickau)*.
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- [10](#) Case C-216/18 PPU, EU:C:2018:586; ‘judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*’.
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- [11](#) Case C-509/18, EU:C:2019:457; ‘judgment in *PF (Prosecutor General of Lithuania)*’.
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- [12](#) Judgment in *OG and PI (Public Prosecutor’s Offices in Lübeck and Zwickau)*, paragraph 73. Italics added.
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- [13](#) *Ibidem*, paragraph 74.
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- [14](#) *Ibidem*, paragraph 76.
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- [15](#) *Loc. ult. cit.*
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- [16](#) Judgment in *NJ (Public Prosecutor’s Office in Vienna)*, paragraph 40, *in fine*.
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- [17](#) Judgment in *PF (Prosecutor General of Lithuania)*, paragraphs 55 and 56.
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- [18](#) The fact that public prosecutors are subordinate to their hierarchical superiors is mentioned in the judgment in *NJ (Public Prosecutor’s Office in Vienna)*, paragraph 40: ‘in the case of the Austrian Public Prosecutor’s Offices, [it is apparent] that they are directly subordinate to the higher public prosecutor’s offices and subject to their instructions and that the latter are in turn subordinate to the Federal Minister of Justice’.
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- [19](#) Article 5 of the Basic Law on the status of the judiciary (Ordinance No 58-1270 of 22 December 1958).
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[20](#) Opinion in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*, point 87, which reproduces paragraph 63 of the judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*, paragraph 87. Italics added.

[21](#) In Decision No 2017-680 QPC, of 8 December 2017, the Conseil Constitutionnel (Constitutional Council, France) confirmed that 'it is for the [French] Government to determine and conduct national policy, in particular in matters falling within the remit of the Public Prosecutor's Office' (point 5).

[22](#) Opinion in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*, point 96.

[23](#) Article 36 of the CPP provides, after all, that public prosecutors 'are obliged to follow the instructions given to them by their hierarchical superiors', other than in their oral interventions (French Government's observations, paragraph 16). The issue of an EAW does not require oral intervention and, to that extent, is subject to the general rule.

[24](#) Case C-503/15, EU:C:2017:126.

[25](#) In the judgment of 12 December 1996, *Criminal proceedings against X* (Cases C-74/95 and C-129/95, EU:C:1996:), the Court of Justice held that the Italian Public Prosecutor's Office did not have standing to refer questions for a preliminary ruling to the Court, as its role 'is not to rule on an issue in complete independence but, acting as prosecutor in the proceedings, to submit that issue, if appropriate, for consideration by the competent judicial body' (paragraph 19).

[26](#) Judgment of 12 December 1996, *Criminal proceedings against X* (Cases C-74/95 and C-129/95, EU:C:1996:491), paragraph 19. No italics in the original.

[27](#) Article 31 of the CPP, following its reform of 25 July 2013.

[28](#) Paragraph 2.10, fourth subparagraph, of the order for reference.

[29](#) Italics added.

[30](#) Judgment in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*, paragraph 67.

[31](#) *Loc. ult. cit.*

[32](#) The same view is expressed by the Commission (paragraphs 23 to 26 of its written observations) and the Luxembourg Principal Public Prosecutor (p. 4 of the Principal Public Prosecutor's written observations).

[33](#) Judgment in *PF (Prosecutor General of Lithuania)*, paragraph 56.

[34](#) The review of proportionality ‘relates, in the context of the endorsement of a national arrest warrant, to the effects of the deprivation of liberty alone caused by it and, in the context of the endorsement of a European arrest warrant, to the impinging on the rights of the person concerned which goes beyond the infringements of his right to freedom already examined. The court responsible for the endorsement of a European arrest warrant is required to take into account, in particular, the effects of the surrender procedure and the transfer of the person concerned residing in a Member State other than the Republic of Austria on that person’s social and family relationships’ (paragraph 44).

[35](#) Written observations of the Luxembourg Principal Public Prosecutor, p. 5.

[36](#) Paragraphs 30 to 32 of the Commission’s written observations.

[37](#) Written observations of the Luxembourg Principal Public Prosecutor, p. 5 *in fine*.

[38](#) Directive of the European Council and of the Parliament of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ 2013 L 249, p. 1).

[39](#) Or which, as in French law, limits the possibility of bringing such proceedings at an earlier stage for a requested person who is already a party to the corresponding criminal proceedings, as the French Government states in paragraphs 35 and 37 of its written observations.

[40](#) Commission’s written observations, paragraph 33.

[41](#) At the hearing, the French, Netherlands and Swedish Governments argued that, if their laws had to be revised as a consequence of the ruling given by the Court of Justice, the temporal effects of that ruling should be limited. I opposed a similar request in my Opinion in *Poltorak* (C-452/16 PPU, EU:C:2016:782), to which I refer (points 69 and 70).

[42](#) At the hearing, it became apparent that some of the Member States’ legal systems offer indirect (and, on occasion, very elaborate) routes to obtaining a judicial review of an EAW. Deciding in each case whether such a remedy is available requires a knowledge of the procedural law of the issuing Member State which it would be unreasonable to expect of the executing judicial authority.