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THE INFLUENCE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION ON THE ISSUANCE OF EUROPEAN ARREST WARRANTS IN LITHUANIA

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ABSTRACT

The European arrest warrant system is one of the greatest achievements in the development of cooperation in judicial matters among EU Member States. However, its implementation has raised many questions, resulting in referrals by national courts to the Court of Justice of the European Union (CJEU) for preliminary rulings. This article analyses

the impact of the CJEU's preliminary rulings on Lithuanian law concerning European arrest warrants. Specifically, the focus of the paper is institutional configuration and corresponding regulation in this field because/after the CJEU decided that (1) the Ministry of Justice cannot be considered a judicial authority because as part of the executive branch it cannot guarantee the protection of the parties' fundamental rights; (2) however, the Prosecutor General of Lithuania can be considered a judicial authority because it participates in the administration of criminal justice and is independent of executive governance, and because its decisions to issue European arrest warrants are subject to judicial review.

KEYWORDS

European arrest warrant, judicial authority, autonomous concepts of EU law, fundamental rights, Court of Justice of the European Union

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INTRODUCTION

In 2002 (with subsequent amendments in 2009), the European Union adopted Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (hereafter "Framework Decision"). [1] EU Member States were required to transpose this decision into national law by the beginning of January 2004. The main purpose of the Framework Decision was to replace the prior, complicated extradition system with a simpler and faster European arrest warrant system for use when a country seeks to have a person handed over for criminal prosecution or to place a person in custody or detention.

The European arrest warrant system is one of the greatest achievements in the development of cooperation in judicial matters among EU Member States. However, its implementation has raised many questions, resulting in referrals by national courts to the Court of Justice of the European Union (CJEU) for preliminary rulings. In most instances, these referrals have involved issues related to proper protection of the fundamental rights of the subject of the arrest warrant, as the European arrest warrant system is based on the principles of mutual trust and mutual recognition.

By formulating an autonomous concept of EU law, the CJEU seeks to establish uniform minimum standards for the protection of fundamental rights across all Member States. The Framework Decision states that "the European arrest warrant is a judicial decision" (Art. 1) and that "the issuing authority shall be the judicial authority" (Art. 6). However, national courts have referred to the CJEU with the question of which institutions can be considered a judicial authority within the meaning of Article 6 of Framework Decision.

This article analyses the impact of the CJEU's preliminary rulings on Lithuanian legal regulation concerning the European arrest warrant. Our main purposes in this article are (1) to reveal the main features of autonomous concept of EU law; (2) to analyse the interpretation of the term "judicial authority" given by the CJEU; and (3) to evaluate the impact of the preliminary rulings interpreting the term "judicial authority" on the designation of the appropriate authority to issue arrest warrants in Lithuania.

First, we examine the evolution of autonomous concepts of EU law, their aims and their main characteristics. Second, we analyse the CJEU's preliminary rulings

[1] *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, OJ L (190, 18 July 2002), 1–20.

and present a detailed analysis of the term "judicial authority" within the meaning of Article 6 of the Framework Decision. We then discuss the impact of these preliminary rulings on the designation of an issuing authority for arrest warrants in Lithuania.

1. AUTONOMOUS CONCEPTS OF EU LAW

Any particular autonomous concept of EU law is inseparably linked with the overall concept of the autonomy of EU law. Therefore, we will begin by presenting the main features of the autonomy of EU law.

Even though the principle of autonomy of the EU legal order was developed by the CJEU in its early cases,[2] many scholars have taken for granted the principle of the autonomy of EU law.[3] In its *Van Gend en Loos* judgement, the CJEU stated that the "Community constitutes a *new legal order of international law* for the benefit of which the Member States have limited their sovereign rights"[4], and in *Costa v E.N.E.L*, the CJEU added that "the EEC Treaty has created its own legal system."[5] The autonomy of the EU legal order was reviewed once again after the CJEU delivered in December 2014 its Opinion 2/13 concerning the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms.[6] The concept of autonomy was understood as a new category of law, a "new legal order" not subject to external legal norms.[7] The CJEU stressed that "the very nature of EU law […] requires that relations between the Member States be governed by the EU law to the exclusion […] of any other law."[8]

Autonomy has two dimensions: internal and external. In this paper, we will examine the internal dimension of autonomy. External autonomy means that the EU legal order is not subject to external legal norms; the internal dimension involves the independence of EU law from the legal systems of Member States.

The internal autonomy of EU law aims to maintain the unity of the EU legal system and to protect it from distortions due to the divergent application of EU law by Member States. The internal autonomy of EU law "means that Union law is not

[2] *NV Algemene Transporten Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, Court of Justice of the European Union (CJEU) (Case 26–62, ECLI:EU:C:1963), 1; *Flaminio Costa v E.N.E.L.*, CJEU (Case 6–64, ECLI:EU:C:1964), 66.
[3] Tamas Molnar, "The Concept of Autonomy of EU Law from the Comparative Perspective of International Law and the Legal Systems of Member States," *Hungarian Yearbook of International Law and European Law* (2015): 434.
[4] *Flaminio Costa v E.N.E.L.*, *supra* note 2, 66.
[5] *Ibid*.
[6] *Draft Agreement Providing for the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, CJEU (Opinion 2/13 ECLI:EU:C:2014), 2454 (hereafter *Draft Agreement*).
[7] Tamas Molnar, *supra* note 3: 434.
[8] *Draft Agreement*, *supra* note 6, para. 40.

dependent on Member States' legal orders for its validity and application at the domestic level, but EU law is valid and applicable in the territory of the Member States by virtue of this legal order alone."[9] Scholars characterize this internal autonomy in terms of three features: (1) EU law's self-integration into the national legal orders; (2) direct effect and supremacy of EU law; and (3) the CJEU's monopoly over the authentic interpretation of EU law.[10]

One element of the autonomy of EU legal order is the presence of autonomous concepts of EU law. Initially, such concepts were developed in the field of the internal market (including specifically the definition of worker), and they later spread into other areas, such as EU citizenship (legal residence*)* in criminal law (ne bis in idem).[11]

The idea of autonomous concepts of law is also widely used by the European Court of Human Rights (ECtHR), which has developed a significant number of autonomous concepts, including criminal charges,[12] civil rights and obligations,[13] victims,[14] civil servants[15] and lawful detention.[16] It has been argued that it is impossible to avoid the formulation of autonomous concepts, since there exist no shared criteria to identify the meaning of terms in all Member States. However, the interpretation of these concepts by European courts can give them a completely different meaning from how the concept is understood in a national state.[17] The main argument against the formulation of autonomous concepts is that they give courts the power not just to interpret law but to create it.

Autonomous concepts of EU law increase integration among the Member States. As one scholar has stated, they "achieve effectiveness by managing legal diversity to create a level playing field."[18] The CJEU usually defends the formulation of autonomous concepts based on the need for a uniform application of Union law and the principle of equality. Consequently, the national margin for discretion is reduced.[19]

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[9] Tamas Molnar, *supra* note 3: 441.
[10] *Ibid*.
[11] Leandro Mancano, "Judicial Harmonisation through Autonomous Concepts of European Union Law: The Example of the European Arrest Warrant Framework Decision," *European Law Review* 43 (2018).
[12] *X v Germany*, European Court of Human Rights (1972 Collection 40), 11–14.
[13] *Beyler v Italy*, European Court of Human Rights (2000 Reports 2000-I).
[14] *Asselbourg and 78 others and Greenpeace Association-Luxembourg v Luxembourg*, European Court of Human Rights (1999 Reports 1999-VI).
[15] *Pellegrin v France*, European Court of Human Rights (1999 Reports 1999-VIII).
[16] *Eriksen v Norway*, European Court of Human Rights (1997 Reports 1997-III).
[17] George Letsas, "The Truth in Autonomous Concepts: How to Interpret the ECHR," *European Journal of International Law* 15 (2004).
[18] Valsamis Mitsilegas, "Managing Legal Diversity in Europe's Area of Criminal Justice: The Role of Autonomous Concepts": 127; in: Renaud Colson and Stewart Field, eds., *EU Criminal Justice and the Challenges of Diversity: Legal Cultures in the Area of Freedom Security and Justice* (Cambridge: Cambridge University Press, 2016).
[19] Leandro Mancano, *supra* note 11.

Scholars have concluded that "despite the little harmonizing effect of the EAW FD [i.e. the European arrest warrant Framework Decision], the Court's use of the *autonomous concept* has resulted in significantly boosting the—potential—approximation of different state legal regimes."[20] The concepts developed by the CJEU lie at the centre of the European arrest warrant mechanism and leave little discretion to Member States in this regard.

The discussion presented above leads to the conclusion that the CJEU, by formulating the definitions of autonomous concepts of EU law, strongly impacts the legal systems of Member States. In the next section, we will analyse in detail the preliminary rulings that directly determined which authority in Lithuania can take responsibility for issuing European arrest warrants.

2. ISSUING JUDICIAL AUTHORITY: ANALYSIS OF PRELIMINARY RULINGS BY THE CJEU

The CJEU has delivered two preliminary rulings concerning the validity of Lithuanian institutions that were issuing European arrest warrants. First, in the *Kovalkovas* case (C-477/16 PPU),[21] the question was raised concerning the Ministry of Justice of the Republic of Lithuania; subsequently, in *Minister for Justice and Equality v PF* (C-509/18),[22] the question was raised concerning the Office of the Prosecutor General of the Republic of Lithuania. The main question in both cases was whether the Ministry of Justice or the Office of the Prosecutor General was a permissible issuing authority according to the Framework Decision.

2.1. WHETHER THE MINISTRY OF JUSTICE OF THE REPUBLIC OF LITHUANIA IS A VALID ISSUING JUDICIAL AUTHORITY WITHIN THE MEANING OF ARTICLE 6(1) OF THE FRAMEWORK DECISION

In 2016, the District Court of Amsterdam (the executing judicial authority of the European arrest warrant) called into question the feasibility of the Lithuanian Ministry of Justice as an issuing institution, since the Framework Decision requires that the issuing authority must be the judicial authority.

This was not a new question for Lithuania. Nearly a decade earlier, in its report of 14 December 2007 concerning national practices relating to the European arrest warrant, the European Council recommended that Lithuania reconsider its legal system and empower the judicial authority to issue European arrest warrants.

[20] *Ibid*.
[21] *Openbaar Ministerie v Ruslanas Kovalkovas*, CJEU (C-477/16 PPU, ECLI:EU:C:2016), 861.
[22] *Minister for Justice and Equality v PF*, CJEU (C-509/18, ECLI:EU:C:2019), 457.

In response, the Lithuanian authorities acknowledged that the European arrest warrant should be issued by judicial authorities and that the Lithuanian Ministry of Justice cannot be considered a judicial authority. In particular, in cases where a European arrest warrant is initiated by the Prison Department, the judicial authority is completely absent from the proceedings; this situation is clearly not in line with the Framework Decision. Also, the Lithuanian Ministry of Justice indicated that it intended to allow the courts to issue European arrest warrants directly in the future. Originally Lithuania stated that it had decided to grant the Ministry of Justice the power to issue European arrest warrants for one year after the Framework Decision entered into force, to gain time for judges to gain expertise and confidence in applying the new document. However, in 2016 the Lithuanian Ministry of Justice was still the issuing authority for European arrest warrants.[23]

Similar questions arose in other Member States. On 16 November 2016, for example, the CJEU delivered two judgements concerning issuing institutions: C-477/16 PPU concerning Lithuania's Ministry of Justice and C-452/16 PPU [24] concerning the authority of Swedish police. These two cases are parallel in the sense that in both judgements the CJEU explained the terms "judicial institution" and "judicial decision". In the opinion[25] delivered in the Lithuanian case, Advocate General Campos Sánchez-Bordona stated that the Lithuanian and Swedish cases were quite similar. Neither of the two institutions could be considered a "judicial authority" and neither of them can guarantee respect for fundamental rights and freedoms, as Sánchez-Bordona declared in Paragraph 32 of the Lithuanian case.

In the Kovalkovas case, Jonava District Court imposed on Mr. Kovalkovas a custodial sentence of four years and six months. Later, the Lithuanian Ministry of Justice issued a European arrest warrant against Mr. Kovalkovas, seeking the execution of the remainder of the sentence in Lithuania.

The CJEU employed a three-step analysis. First, it reviewed the aims of the Framework Decision. Second, it considered whether the term "judicial authority" is an autonomous concept of EU law. Third, the CJEU explained the main characteristic of the term "judicial authority".

At the beginning of its judgement, the CJEU indicated that the Framework Decision aimed at the "establishment of a new simplified and more effective system for the surrender of persons convicted or suspected of having infringed criminal law to facilitate and accelerate judicial cooperation" (C-477/16 PPU, para. 26). It then explained that the system is workable only if the principles of mutual trust, which

[23] Human Rights Monitoring Institute, "Beyond Surrender: the Practice of the European Arrest Warrant in Lithuania" (2018) // http://hrmi.lt/wp-content/uploads/2018/07/Beyond-Surrender_2018_HRMI.pdf.
[24] *Openbaar Ministerie v Krzysztof Marek Poltorak*, CJEU (C-452/16 PPU, ECLI:EU:C:2016), 858.
[25] *Openbaar Ministerie v Ruslanas Kovalkovas*, *supra* note 21, 784 [opinion of Advocate General].

require all Member States to comply with provisions that protect individuals' fundamental rights (C-477/16 PPU, para. 27), and mutual recognition, which means that "the Member States are in principle obliged to give effect to a European arrest warrant" (C-477/16 PPU, para. 28), are implemented. The CJEU emphasized that only the European arrest warrant, which constitutes a "judicial decision" and is issued by the "judicial authority" within the meaning of Article 6 of the Framework Decision, must be executed by Member States (C-477/16, para. 28). Later, the CJEU stated that the designation of an organ of executive government to function as judicial authority would run counter to these aims (C-477/16, para. 40).

The CJEU then moved to the second step of its analysis, considering "whether the terms 'judicial decision' and 'judicial authority', within the meaning of the Framework Decision on the European arrest warrant, are to be interpreted as autonomous concepts of EU law or whether the Member States are free to define their meaning and scope."[26]

As a rule the CJEU considers a term autonomous where provisions of EU law do not refer to the laws of Member States. As noted above, establishing an autonomous concept helps to ensure uniform application of EU law and preserves the principle of equality while reducing the national margin of discretion; in this case, it offers sufficient judicial protection at the stage of the issuance of a European arrest warrant. In *Kovalkonas* the CJEU decided that terms "judicial decision" and "judicial authority" are autonomous concepts of EU law. The CJEU explained that the procedural autonomy of Member States permits them to designate only institutions that fall within the meaning of "judicial authority" as their "issuing judicial authority", but it added that the term "judicial institution" itself requires an autonomous and uniform interpretation (C-477/16 PPU, paras. 31–33). Once the CJEU has decided that a certain term is an autonomous concept of EU law, it then gives a uniform definition that is applicable in all Member States.

Finally, the CJEU moved to the third step of its analysis, the interpretation of the term "judicial authority." The CJEU explained that the term refers to the judges or courts of a Member State, or the authorities participating in the administration of justice; however, it cannot be an institution of the executive branch of government (C-477/16 PPU, paras. 34-35). The CJEU explained the meaning of the term "judicial authority" in the context of the aims of the Framework Decision, which requires that a decision to issue a warrant must be attended by all the guarantees appropriate for decisions of such a kind, and that it must be taken by a judicial authority (C-477/16 PPU, para. 37). Moreover, that judicial authority must assume

[26] *Openbaar Ministerie v Ruslanas Kovalkovas*, *supra* note 21, 861.

judicial control of the legitimacy of the procedure (C-477/16 PPU, para. 44). For this reason, the designation of an executive authority as the issuing institution was viewed as not in line with the Framework Decision's intent to "introduce a simplified system of surrender directly between judicial authorities" (C-477/16 PPU, para. 41) and to prevent the participation of executive institutions in decisions related to the procedure for securing the surrender of wanted persons (C-477/16 PPU, para. 42).

The Republic of Lithuania argued that the Ministry of Justice was the issuing authority only in cases of execution of judgements handled by a court that had become legally binding, and at the request of the court (C-477/16 PPU, para. 46). However, the CJEU decided that even though the Ministry of Justice acts on the request of the court, it still has a very wide range of discretion the issuance of warrants. For example, it evaluates the presence of required conditions for issuing a warrant, considers consistency with the principle of proportionality, and takes the final decision on whether to issue a warrant.

On this basis the CJEU concluded that as part of Lithuania's executive branch the Ministry of Justice could not be designated an "issuing judicial authority" and that its decisions to issue European arrest warrants could not be considered "judicial decisions" within the meaning of the Framework Decision, because as an executive agency it fails to meet the Framework Decision's aim to ensure adequate protection of fundamental rights.

In the Lithuanian case the CJEU determined that an organ of executive governance cannot fall within the meaning of "judicial institution"..Once it reached this conclusion, the result of the case was clear, as the Ministry of Justice is a typical organ of executive government. The Swedish case was quite similar, except that the question concerned the validity of the Swedish police authority, rather than the Ministry of Justice, as an "issuing judicial authority." In this case, the Gothenburg District Court had imposed a custodial sentence on a Mr Poltorak, and the Swedish police board issued a European arrest warrant for him. The matter came before the Amsterdam District Court, as the executing judicial authority of that warrant (C-452/16 PPU, paras. 10, 11).

Here the CJEU referred to the opinion of Advocate General Campos Sánchez-Bordona, delivered on 19 October 2016 (para. 39):[27] "thus, judicial authorities are traditionally construed as the authorities that administer justice, unlike, inter alia, administrative authorities or police authorities, which are within the province of the executive" (C-452/16 PPU, para. 35). The CJEU declared that police authority is part of executive government. It further pointed out that the Treaty on the

[27] *Openbaar Ministerie v Krzysztof Marek Poltorak*, *supra* note 24, 782.

Functioning of the European Union[28] has separate articles for judicial cooperation and police cooperation.

But in the Swedish case the question remained why the police authority cannot be considered one of "the authorities participating in the administration of justice." However, the CJEU did not give any reasoning on this matter. It simply stated that "it is necessary to interpret the term 'judicial authority', in the context of the Framework Decision, as covering the Member State authorities that administer criminal justice, but not police services" (C-452/16 PPU, para. 35).

The arguments why the police authority cannot be considered among "the authorities participating in the administration of justice" and thus eligible to issue a European arrest warrant can be found in later CJEU cases related to the feasibility of a public prosecutor's office as the institution issuing such a warrant.

2.2. WHETHER THE OFFICE OF THE PROSECUTOR GENERAL OF LITHUANIA IS A VALID ISSUING JUDICIAL AUTHORITY WITHIN THE MEANING OF ARTICLE 6(1) OF THE FRAMEWORK DECISION

On 27 May 2019, the CJEU delivered two judgements that further clarified the concept of "judicial authority" within the meaning of Article 6(1) of the Framework Decision. In these two cases, the question concerned the capacity of the Office of the Public Prosecutor in both Lithuania and Germany to issue European arrest warrants. In these judgements, the CJEU underscored the importance of the independence of an "issuing judicial authority" from the executive branch, but it reached different conclusions in the Lithuanian[29] and German[30] cases. In view of the purpose of this article, we will focus our primary attention on the Lithuanian case.

Before we look at that case directly, it is important to consider an earlier case, C-453/16 PPU.[31] The main question raised in this case is "whether the confirmation, as in the present case, by a member of the Public Prosecutor's Office of a national arrest warrant previously issued by the police constitutes such a 'judicial decision'" (C-453, para. 15). In this case the CJEU decided that a decision by a public prosecutor's office qualifies as a "judicial decision" within the meaning of Article 8(1)(c) of the Framework Decision. The difference between this case and the later Lithuanian and German cases is that in this earlier case the public prosecutor's

[28] *Treaty on the Functioning of the European Union*, Official Journal C 326, 26/10/2012 P.0001–0390.
[29] *Minister for Justice and Equality v PF*, *supra* note 22.
[30] *Minister for Justice and Equality v OG and PI*, CJEU (C-508/18 and C-82/19 PPU, ECLI:EU:C:2019), 456.
[31] *Openbaar Ministerie v Halil Ibrahim Özçelik*, CJEU (C-453/16 PPU, ECLI:EU:C:2016), 860.

office only *confirmed* a national arrest warrant that had previously been issued by the court. In the Lithuanian and German cases, however, the European arrest warrant was issued by the public prosecutor's office.

In Lithuanian case C-509/18, "the request has been made in proceedings in Ireland concerning the execution of a European arrest warrant issued on 18 April 2014 by the Lietuvos Respublikos generalinis prokuroras [Prosecutor General's Office of the Republic of Lithuania] for the purposes of the prosecution in Lithuania of PF".[32] The question was raised "whether the concept of an 'issuing judicial authority', within the meaning of Article 6(1) of Framework Decision 2002/584, must be interpreted as including the Prosecutor General of a Member State who, whilst institutionally independent from the judiciary, is responsible for the conduct of criminal prosecutions and is independent from the executive."[33]

The CJEU applied a three-step analysis to decide whether the Prosecutor General may issue a European arrest warrant. First, in line with its previous rulings, the CJEU once more analysed the definition of judicial authority. Second, it clarified the required scope of independence of issuing authority. Third, it explained the need for judicial review of the decisions of the Prosecutor General with regard to the issuance of European arrest warrants.

In analysing the concept of "issuing judicial authority" within the meaning of Article 6(1) of the Framework Decision, the CJEU repeatedly confirmed that the definition of "judicial authority" is broader than the definition of "court" as it also includes "the authorities participating in the administration of criminal justice in that Member State"[34] should these authorities fulfil additional requirements. As it is obvious that the Prosecutor General is not the court, the CJEU asked whether the Prosecutor General of Lithuania can be considered as one of "the authorities participating in the administration of criminal justice" in Lithuania.

In response to this question, the CJEU emphasized that the aim of the European arrest warrant is not only to execute a custodial sentence or detention order in the issuing Member State but also to conduct a criminal prosecution in that Member State (C-509/18, para. 37). Accordingly, institutions that are competent to adopt "judicial decisions", prior to judgment, in relation to conducting a criminal prosecution," are institutions participating in the administration of criminal justice and fall within the scope of an issuing institution (C-509/18, para. 38). The CJEU stated that "authority, such as a public prosecutor's office, which is competent, in criminal proceedings, to prosecute a person suspected of having committed a

[32] *Minister for Justice and Equality v PF*, *supra* note 22.
[33] *Ibid*.
[34] *Ibid*.

criminal offence so that that person may be brought before a court, must be regarded as participating in the administration of justice of the relevant Member State" (C-509/18, para. 39). The CJEU concluded that in Lithuania the Prosecutor General can be regarded as participating in the administration of criminal justice for three reasons: (1) the Prosecutor General has an essential role in the conduct of criminal proceedings in Lithuania (C-509/18,para. 40); (2) the functions of the public prosecutor include the organization and direction of criminal investigations and the power to issue an indictment, and those functions may be exercised only by the public prosecutor; and (3) the main task of the Prosecutor General of Lithuania is to prepare the ground, in relation to criminal proceedings, for the exercise of judicial power (C-509/18, para. 41).

The CJEU has arrived at similar conclusions in several German cases (C-508/18, C-82/19 PPU). It concluded that German public prosecutors' offices can be considered authorities participating in the administration of criminal justice, since the main function of the public prosecutor's office is "to prepare the ground, in relation to criminal proceedings, for the exercise of judicial power by the criminal courts" (C-508/18, C-82/19 PPU, paras. 62, 63). The reasoning was the same as in the Lithuanian case.

However, in order to fall under the scope of an "issuing judicial institution" it is not enough to be considered an "authorit[y] participating in the administration of criminal justice". The CJEU has also clarified that the independence of the issuing authority is extremely important, because only an independent institution can guarantee the fundamental rights of the person being sought. The cornerstone of the principle of separation of power is that in order to protect the fundamental rights of a subject the absence of any political consideration should be guaranteed (C-509/18, paras. 51, 53).

The CJEU holds that the ability of an institution to act independently and not be exposed to external direction, especially from an executive authority, should be guaranteed by statutory rules and the institutional framework. The CJEU found that the Prosecutor General of Lithuania exercises his functions in an independent manner, as Article 118 of Lithuania's Constitution guarantees the independence of prosecutors (C-509/18, paras. 54, 55). It states that, "when performing their functions, prosecutors shall be independent and shall obey only the law."

However, in the German cases the CJEU reached the opposite conclusion. It determined that the minister could have a direct influence on a decision by a German public prosecutor's office whether to issue a European arrest warrant (C-508/18, C-82/19 PPU, para. 77). Existing safeguards in German law do not rule out the possibility that the decision of a public prosecutor's office may be influenced by

instructions received from the Minister for Justice in connection with the issuing of a European arrest warrant (C-508/18, C-82/19 PPU, paras. 80, 85). For these reasons the CJEU decided that the public prosecutors' offices at issue were "exposed to the risk of being influenced by the executive in their decision to issue a European arrest warrant" and that therefore "those public prosecutors' offices do not appear to meet one of the requirements of being regarded as an 'issuing judicial authority', namely the requirement that it be guaranteed that they act independently in issuing such an arrest warrant" (C-508/18, C-82/19 PPU, para. 88).

The third question raised by the CJEU was related to judicial review. The CJEU noted that if the issuing judicial authority is not the court but an authority participating in the administration of justice, its decision to issue a European arrest warrant, including the proportionality of such a decision, should be subject to judicial review (C-509/18, para. 53). As in the Lithuanian case, no information was available on the authority's ability to carry out a judicial review; the CJEU left this circumstance for the referring court to decide (C-509/18, para. 57).

The Code of Criminal Procedure of the Republic of Lithuania does not establish any special appeal procedure against the decisions of the Prosecutor General on whether to issue a European arrest warrant; however, such decisions are not on the list of decisions that cannot be appealed. This means that the decisions of the Prosecutor General to issue a European arrest warrant can be appealed by an ordinary appeal procedure as described in Article 63 of the Code of Criminal Procedure.[35]

In summary, the Office of the Prosecutor General of Lithuania can be considered a judicial authority because (1) it participates in the administration of criminal justice, (2) it is independent of the executive branch, and (3) its decision to issue the European arrest warrant is subject of the judicial review.

3. THE IMPACT OF AUTONOMOUS EU LAW ON THE NATIONAL LEGAL SYSTEM AND ITS LIMITS

The Criminal Code of the Republic of Lithuania and the Code of Criminal Procedure of the Republic of Lithuania implement the Framework Decision on the European arrest warrant. Also, sub-statutory Rules for Issuing the European Arrest Warrant have been adopted. Article 69–1 (amended in 2017) of the Code of Criminal Procedure lists the institutions responsible for issuing a European arrest warrant. In Lithuania, the Prosecutor General's Office or a regional court can issue

[35] *Code of Criminal Procedure of the Republic of Lithuania*, Official Gazette (2002, no. 37-1341), art. 63.

such a warrant. If it concerns a person wanted for a criminal prosecution, the Prosecutor General's Office, based on a court's preliminary order of pre-trial detention for the person, issues the warrant. If it is for the execution of a custodial sentence, a regional court issues the warrant.

When Article 69–1 was initially adopted, it listed both the Prosecutor General's Office and the Ministry of Justice as institutions responsible for issuing a European arrest warrant. As we have seen, the eligibility of both institutions to issue warrants within the meaning of the Framework Decision has been examined by the CJEU. Since the Ministry of Justice failed to meet the CJEU's criteria, the law was amended and the power to issue European arrest warrants was passed from the Ministry of Justice to regional courts. However, with the CJEU's blessing, the Prosecutor General's Office retained this power.

To ensure adequate protection of fundamental rights during the procedure of issuing a European arrest warrant, the CJEU has defined the term "judicial authority" as an autonomous legal concept and established its uniform interpretation for all Member States. Lithuania had to change its statute indicating who could issue a warrant because, as part of the executive branch, the Ministry of Justice cannot properly protect the fundamental rights of the person concerned. However, the formulation of this autonomous concept of EU law provides sufficient protection of fundamental rights only if all systems of governmental institutions are properly established and the principle of separation of powers is implemented.

For example, some courts of EU Member States refused to execute European arrest warrants issued by Lithuania, because in 2009 the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment reported[36] on poor detention conditions in two Lithuanian prisons (Lukiškės and Šiauliai) that it considered inhuman and degrading.[37] In 2013, the High Court of Justice in Belfast found that extraditing a Mr. Campbell to Lithuania would expose him to a real risk of inhuman and degrading treatment and refused to surrender him. Also, in 2017 the Constitutional Court of Malta ruled that extradition of a Maltese national to Lithuania would breach his fundamental rights.[38]

Even more complicated are cases where the question arises as to whether a Member State's judicial system can guarantee the right to a fair trial. One example

[36] "Report to the Lithuanian Government on the Visit to Lithuania Carried Out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 to 30 April 2008" (2009) // https://rm.coe.int/1680697335.
[37] Human Rights Monitoring Institute, *supra* note 23.
[38] *Ibid*.

of such a situation is Poland, where the independence of the judiciary is questionable and therefore the right to a fair trial is uncertain.[39]

Concerning the situations in both Lithuania and Poland, the CJEU has ruled[40] that to refuse the execution of a European arrest warrant it is not enough to have information on the general dysfunction of the system. Rather, the national court should obtain information that gives substantial grounds for believing that the fundamental rights of the person concerned in the specific case is at risk. Regardless, these provisions show that in cases of the systemic dysfunction of governmental institutions and judicial systems, the uniform interpretation of certain concepts cannot guarantee adequate the protection of fundamental rights. The national judicial authorities that execute the European arrest warrant are the last-resort guards of fundamental rights protection.

CONCLUSIONS

The existence of autonomous concepts of EU law is one of its defining features. The CJEU usually defends the formulation of autonomous concepts on the basis of the need for a uniform application of Union law and the principle of equality. Autonomous concepts of EU law harmonize the legal systems of the Member States and increase integration among them.

By analysing the appropriateness of the authorities designated by the Member States to be "issuing institutions," we reach the following conclusions:

1. Mutual trust among the Member States is a basic principle underpinning the functioning of the European arrest system. This principle requires that fundamental rights are properly protected in all Member States.

2. Only a uniform interpretation of the term "judicial authority" can ensure adequate protection of fundamental rights at the time of the issuance of an arrest warrant in all Member States. For this reason, the terms "judicial decision" and "judicial authority" have been made autonomous concepts of EU law.

3. Acceptable forms of "judicial authority" under the scope of the Framework Decision can include judges, courts or other authorities if they fulfil three requirements: (1) they should be regarded as participating in the administration of criminal justice in that Member State; (2) the independence of

[39] Sergio Carrera and Valsamis Mitsilegas, "Upholding the Rule of Law by Scrutinising Judicial Independence: The Irish Court's Request for a Preliminary Ruling on the European Arrest Warrant" (2018) // https://www.ceps.eu/ceps-publications/upholding-rule-law-scrutinising-judicial-independence-irish-courts-request-preliminary/.

[40] *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, CJEU (C-404/15 and C-659/15 PPU, ECLI:EU:C:2016), 198; *Minister for Justice and Equality v LM,* CJEU (C-216/18 PPU, ECLI:EU:C:2018), 586.

such institutions, especially from the executive authority, should be guaranteed by statutory rules and the framework of the institution; (3) the decision to issue a European arrest warrant, including the proportionality of such a decision, should be subject to judicial review.

When the validity of the Lithuanian Prosecutor General's Office and the Ministry of Justice as institutions responsible for issuing a European arrest warrant were questioned before the CJEU, it rendered the following rulings:

1. The CJEU decided that the Ministry of Justice cannot be considered a judicial authority because as part of the executive branch it cannot guarantee the protection of the parties' fundamental rights.

2. The CJEU found that the Prosecutor General of Lithuania can be considered a judicial authority because it participates in the administration of criminal justice and is independent of executive governance, and because its decisions to issue a European arrest warrant are subject to judicial review.

Lithuania had to amend its national law because of the CJEU's ruling regarding the Ministry of Justice. The amendment caused the power to issue a European arrest warrant to pass from the Ministry of Justice to regional courts. However, it is obvious that in cases of systemic dysfunction of governmental institutions and the judicial system, the uniform interpretation of certain concepts cannot by itself guarantee the adequate protection of fundamental rights.

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