A theory of justice? Securing the normative foundations of EU criminal law through an integrated approach to independence

Received: 30 March 2022 | Revised: 22 August 2022 | Accepted: 5 September 2022

DOI: 10.1111/eulj.12442

ORIGINAL ARTICLE

WILEY

A theory of justice? Securing the normative foundations of EU criminal law through an integrated approach to independence

Leandro Mancano*

Abstract

This paper raises the question as to whether a theory of justice exists in EU law. The focus is on justice as a system. The assumption is that the independence of institutional actors involved in the administration of criminal justice (mainly judges and prosecutors) vis-à-vis each other, and other State powers, is key to that system achieving justice as a value. Against the benchmark of judicial and prosecutorial independence developed in European law, the paper assesses the role for independence in investigative, prosecutorial and adjudicating functions as it emerges from the current state of EU criminal law. The conclusions reveal that the EU's idea of justice remains underdeveloped, and that there is a need for systemic coherence to better protect the rule of law and enhance the legitimacy of EU criminal law.

1 | INTRODUCTION

The continuing observance of the European Union (EU)'s core values by its institutions and Member States is essential to its functioning.[1] Those values, enshrined in Article 2 of the Treaty on EU (TEU), are interconnected with each other,[2] as well as with the constitutive components of the EU legal order.[3] Adherence to the EU values is a precondition to joining the EU[4] and must persist post-accession.[5] In a sense, the EU values are the blood vessels, with EU

*Senior Lecturer in EU Law, Edinburgh Law School. The author thanks the anonymous reviewers and the Editor in Chief for their invaluable comments. The usual disclaimer applies.

[1]Among many contributions on the role of values in EU law, see A. Jakab and D. Kochenov, *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press, 2017); A. Williams, *The Ethos of Europe: Values, Law and Justice in the EU* (Cambridge University Press, 2010).

[2]See, for example, Case C-157/21 *Republic of Poland v. European Parliament and Council of the European Union*, EU:C:2022:98, para. 324.

[3]Purely by way of example and with no claim of completeness, see Articles 3(1) TEU, 8, 10 and 19(1) TEU, Articles 80, 153(1)(i), and Article 157(1) TFEU. A significant number of the provisions of the EU Charter of Fundamental Rights are direct expressions of Article 2 TEU.

[4]See Article 49 TEU and Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 *Euro Box Promotion and Others*, EU:C:2021:1034, para. 162.

[5]Case C-896/19 *Repubblika v. Il-Prim Ministru*, EU:C:2021:311, para. 64.

and national law acting as the blood of the Union legal order: when the mechanisms to ensure that the values are respected throughout the EU fail,[6] it is the whole legal organism that suffers the consequences.

The rule of law and judicial independence perfectly embody this dynamic. The precise contours of the rule of law are notoriously elusive.[7] It is, however, undisputed that the rule of law is essential for the protection of other fundamental values on which the Union is founded,[8] and that an impartial and independent judiciary lies at the core thereof.[9] An expression of the rule of law and the principle of separation of powers,[10] judicial independence is a precondition for effective judicial protection of EU law-based rights.[11] Essential as it is for any legal order based on the rule of law, judicial independence must be preserved in conjunction with certain fundamental principles.[12] The European Court of Human Rights (ECtHR or Strasbourg Court) finds that judicial independence co-exists with *res judicata* and the irremovability of judges.[13] The EU Court of Justice (ECJ or the Court) has tacitly endorsed such a view, by stating that the right to a tribunal previously established by law is likely to be infringed only in particularly serious cases.[14] An integrated understanding of judicial independence is thus important because that requirement inevitably interacts with different—broadly defined—values and interests. Furthermore, independence is an inherently relational concept: it is gauged with reference to the absence of influence or pressure *from* other parties. To assess judicial independence, both the interaction between different state powers *and* amongst the actors involved in the administration of justice matter.

EU criminal law amplifies the themes running through the broader discussion about values and judicial independence. Criminal law possesses a strong normative dimension: the set of values involved in the unfolding of its processes is complex—and at times conflictual. The protection of interests through deterrence and retribution is to be conducted and enforced via fair and certain rules and procedures. The rule of law backsliding in certain EU States[15] has, however, seriously undermined mutual trust between Member States and is posing existential challenges to the Union, especially vis-à-vis the functioning of the area of freedom, security and justice (AFSJ).[16] Mutual trust underpins the decentralised system of EU cooperation in criminal matters (a fundamental component of the AFSJ), which relies heavily on national procedural autonomy and sees Member States' laws and practices feed into judicial cooperation. As mutual trust fundamentally rests on compliance with rule of law standards,[17] ensuring judicial inde-

[6]'Throughout' is here to be understood both geographically and in terms of policy areas.

[7]See, among countless contributions and with specific regard to the EU, M.L. Fernandez Esteban, *The Rule of Law in the European Constitution* (Kluwer Law International, 1999); L. Pech, '"A Union Founded on the Rule of Law": Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' (2010) 6 *EU Constitutional Law Review*, 359; T. Konstadinides, *The Rule of Law in the European Union: The Internal Dimension* (Hart Publishing, 2017).

[8]Reg 2020/2092, recital 6. See the very significant judgment in Case C-157/21 *Republic of Poland v. European Parliament and Council of the European Union*, EU:C:2022:98.

[9]Reg 2020/2092, Recital 3 and further references there cited.

[10]Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982, para. 124.

[11]Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)*, EU:C:2018:586, para. 48. See P. Bárd, 'In Courts We Trust, or Should We? Judicial Independence as the Precondition for the Effectiveness of EU Law' (2022) 27 *European Law Journal*, 185.

[12]S. Adam and P. van Elsuwege, 'L'exigence d'indépendance du juge, paradigme de l'Union européenne comme union de droit' (2018) 9 *Journal de Droit Européen*, 334.

[13]ECtHR, *Guðmundur Andri Ástráðsson v. Iceland*, no. 26374/18, 1 December 2020, para. 240. For an analysis of the ECtHR's views on judicial independence and the rule of law more broadly, see R. Spano, 'The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary', (2021) 26 *European Law Journal*, 1.

[14]Joined Cases C-542/18 RX-II and C-543/18 RX-II, *Réexamen Simpson/Conseil et HG/Commission*, EU:C:2020:232, paras. 79–83. See, for a comment on the topic, M. Leloup, 'The Appointment of Judges and the Right to a Tribunal Established by Law: The ECJ Tightens its Grip on Issues of Domestic Judicial Organization' (2020) 57 *Common Market Law Review*, 1139.

[15]Poland and Hungary, with the Romanian government showing a certain interest in joining this uncommendable club. See, for reference, Joined Cases C-83/19 and Others, *Asociaţia 'Forumul Judecătorilor din România' and Others*, EU:C:2021:393 and Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Criminal proceedings against PM and Others*, EU:C:2021:1034.

[16]As per Article 3(2) TEU, the AFSJ is one of the fundamental objectives of the EU.

[17]Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117, para. 30. It is important to highlight that the rule of law is not understood here – and it should not be – as a monolithic bloc. Some scholars treat it as a principle consisting of different components, as in L. Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law', (2022) *Hague Journal on the Rule Law*. The multifaceted nature of the rule of law seems to be endorsed by the EU legislature as well, as shown by Reg 2020/2092, recital 3. See also P. Popelier, G. Gentile and E. van Zimmeren, 'Bridging the Gap between Facts and Norms: Mutual Trust, the European Arrest Warrant and the Rule of Law in an Interdisciplinary Context' (2022) 27 *European Law Journal*, 167.

pendence is a precondition for the operation of the system.[18] However, a Member State can rebut the presumption of mutual trust and refuse to cooperate only in exceptional circumstances,[19] with the Court of Justice upholding judicial independence *next to* preventing denial of justice[20] and impunity,[21] and protecting the rights of victims.[22] The Court is keen to ensure that the risk of a fundamental right violation is not exploited to obstruct the course of criminal proceedings, and that—broadly speaking—justice is done. However, a polity can be said to uphold justice (another EU value stated in Article 2 TEU) where punitive powers are used to hold wrongdoers to account *in compliance with* the rule of law (of which judicial independence is a cornerstone). In the specific context of criminal law, the role of public prosecutors is particularly important too. Though different from courts and tribunals, their independence is also vital to the rule of law. Moreover, EU law relies on, and requires, institutional independence of certain bodies that are involved in criminal law but which are not part of the judiciary nor involved in the administration of justice.[23] This might be problematic in itself, but it is even more so in contexts where the national executives are exerting undue control and influence over independent institutions, be they judicial or not.[24] This further brings to the fore the need for an integrated approach to independence. This wider look on independence concerns the actors involved and their relationships—beyond courts and tribunals, although the latter remain, of course, key - and works 'thematically', since the way in which other factors (values, rights, principles, interests) interact with independence, and how (e.g. enhancing, or limiting, it), must be considered.

Criminal law ultimately manifests itself through the exercise of public force over the individual, which must occur in cases, and according to procedures, that are strictly defined by the law. These established conditions and procedures imply that only certain types of bodies, meeting certain requirements, can fulfil such sensitive functions. Independence is one of the most—if not the most—important amongst those requirements. There is therefore a clear connection between the need for independence and the functions exercised by the authority in question. As criminal law—and criminal procedure especially—consists of different stages, standards and procedures can apply in slightly different ways depending on the circumstances; that holds true for the required level of independence too.

The status of, and interaction amongst, the institutional actors primarily involved in the daily operation of criminal law are key to the commitment of the EU and its Member States to the Union's values: in other words, the EU's understanding of justice as a system heavily influences its idea of justice as a value. Which task is allocated to which body, what level of independence is required of them, and what mechanisms of independent control exist (ex ante or ex post) are all relevant questions in this regard. Moreover, when investigating a polity's understanding of justice, the duality of criminal law processes poses another related question: to what extent is that polity prepared to tolerate deficiencies in the independence of its criminal justice system(s) (possibly, for the sake of other interests broadly defined)?

By addressing those questions, the article assesses the existence of a 'theory of justice' in EU criminal law through the prism of independence. 'Justice' is understood in the multifaceted way unpacked so far. First, the meaning and scope of independence in European law more generally is discussed (Section 2). By looking at a range

[18]See, more recently, Joined Cases *X (C-562/21 PPU) and Y (C-563/21 PPU)*, EU:C:2022:100, paras. 40–49.

[19]*Opinion 2/13*, EU:C:2014:2454, paras. 191–192.

[20]Case C-791/19 *European Commission v. Republic of Poland*, EU:C:2021:596, para. 137.

[21]Joined Cases C-354/20 PPU and C-412/20 PPU *Openbaar Ministerie (Independence of the issuing judicial authority)*, EU:C:2020:1033, para. 64.

[22]Joined Cases, *X (C-562/21 PPU) and Y (C-563/21 PPU)*, para. 60.

[23]This is true, for example, of national supervisory authorities in the area of data protection. The issue will be discussed more extensively below, but see Dir (EU) 2016/680, Chapter VI specifically. This is, however, part of a broader trend, where institutional independence is necessary in different areas, such as competition or immigration law. See Dir (EU) 2019/1, Chapter 4 and Dir 2008/115/EC, Article 13(1). For a comment on this trend, see G. Butler, 'Independence of Non-judicial Bodies and Orders for a Preliminary Reference to the Court of Justice' (2020) 45 *European Law Review*, 871. A symmetrical dynamic sees the spillover of principles developed in the context of EU criminal law into other areas of EU law. See, more recently, T-791/19, *Sped-Pro S.A. v. European Commission*, EU:T:2022:67.

[24]Other 'contextual' elements that are important to mention but cannot be discussed in this paper are: the proliferation of EU agencies operating in the field of, or closely connected to, criminal law (notably the European Public Prosecutor's Office); the increasing cross-over between the case law of the ECJ, and the ECtHR, on judicial independence and challenges to mutual trust. For a comment, see L. Mancano, 'Judicial Cooperation, Detention Conditions and Equivalent Protection. Another Chapter in the EU-ECHR Relationship: Bivolaru and Moldovan v. France' (2022) 56 *Revista General de Derecho Europeo*, 207.

of sources, including recommendations from the Council of Europe (CoE), this section focuses on courts and tribunals and the less explored issue of prosecutorial independence. Against that benchmark, the article moves on to address the research questions in three areas where independence is relevant in EU criminal law: investigation (Section 3); prosecution (Section 4); and adjudication (Section 5). Section 3 revolves around measures in three main scenarios: purely internal situations (in particular, law enforcement access to personal data and freezing of assets); judicial cooperation, especially the European Investigation Order (EIO) Directive;[25] and hybrid cross-border cooperation, with particular attention being paid to the proposal for a European Production and Preservation Order (EPO) Regulation.[26] Section 4 focuses on the definition of judicial authority in the context of the European Arrest Warrant Framework Decision (EAW FD),[27] and Section 5 discusses the role for the right to an independent tribunal established by law to challenge execution of an EAW.

The conclusions reveal that the EU's theory of justice remains underdeveloped, and that there is a need for systemic coherence in this domain. This, it is argued, can be achieved through an integrated approach to independence which takes account of the complexity of EU (criminal) law and which would, in turn, strengthen the normative foundations of EU criminal law.

2 | RULE OF LAW, INDEPENDENCE AND EFFECTIVE JUDICIAL PROTECTION

2.1 | The independence of courts and tribunals: A multifaceted requirement in need of travel companions

The understanding of judicial independence in EU law has been developed by the Court primarily through the interpretation of Articles 19(1) second sub-paragraph TEU, and 47 EU Charter of Fundamental Rights (CFR or the Charter).[28] Although they have different meanings and scopes of application, both provisions give expression to the rule of law and enshrine the general principle of effective judicial protection.[29] Effective judicial protection entails, inter alia[30] and fundamentally, that courts and tribunals are established by law, independent and impartial.[31] Such an obligation restrains the discretion that Member States still enjoy in organising their own justice systems.[32]

In keeping with the research question and its objectives, this section discusses the multifaceted nature of judicial independence, and highlights the importance of analysing it 'in context' to preserve the rule of law and the legitimacy of EU criminal law. First and foremost, there is the requirement that a tribunal be established by law. This aims to ensure that the organisation of the judicial system is governed by laws adopted by the legislature, rather than left

[25]Dir 2014/41. For comments, see L. Klimek, *Mutual Recognition of Judicial Decisions in European Criminal Law* (Springer, 2017), chapter 11; A. Szabo, 'The European Investigation Order – an Instrument of Cooperation for a Stronger European Union' (2019) 11.3 *CES working papers*, 259; J. Eduardo Guerra and C. Janssens, 'Legal and Practical Challenges in the Application of the European Investigation Order' (2019) 1 *eucrim*, 46.

[26]COM(2018) 225 final. On the relationship between the EPO and the EIO, see S. Tosza, 'All Evidence Is Equal, but Electronic Evidence Is More Equal Than Any Other: The Relationship Between the European Investigation Order and the European Production Order', (2020) 11 *New Journal of European Criminal Law*, 161.

[27]Council Framework Decision 2002/584/JHA.

[28]These articles, and their interpretation, build on the ECJ's pre-Lisbon case law. The ECtHR's interpretation of Articles 6 and 13 ECHR has played an important role in shaping the ECJ's stance. See the comprehensive analysis in the commentary on Article 47, S. Peers et al. (eds), *The EU Charter of Fundamental Rights. A Commentary* (Hart, 2nd edn, 2021). For cross-references with the ECtHR, see *Ástráðsson v. Iceland*, paras. 131 onwards; *Dolińska – Ficek and Ozimek v. Poland*, nos 49868/19 and 57511/19, 8 November 2021, paras. 190 onwards.

[29]Case C-64/16 *Associação Sindical dos Juízes Portugueses*, para. 35.

[30]See, for references to other components of effective judicial protection, Case C-199/11 *Otis and Others*, EU:C:2012:684, para. 48; Case C-249/13 *Boudjlida*, EU:C:2014:2431, paras. 34 and 36; Case C-560/14 *M*, EU:C:2017:101, paras. 25 and 31.

[31]Case C-64/16 *Associação Sindical dos Juízes Portugueses*, para. 37. Among many perspectives on effective judicial protection, see J. Engström, 'The Principle of Effective Judicial Protection after the Lisbon Treaty' (2011) 4 *Review of European Administrative Law*, 53; A. Arnull, 'The Principle of Effective Judicial Protection in EU law: An Unruly Horse?' (2011) 36 *European Law Review*, 51.

[32]Case C-10/97 to C-22/97 *IN. CO. GE.'90 and Others*, EU:C:1998:498, para. 14; Case C-268/06 *Impact*, EU:C:2008:223, paras. 44 and 45; Case C-510/13 *E.ON Földgáz Trade*, EU:C:2015:189, paras. 49 and 50.

to the discretion of the executive.[33] The ECtHR has devised a three-step test to assess the impact of irregularities of judicial appointment procedures on the right to a tribunal established by law.[34] This approach can have a far-reaching impact for three reasons. First, it attributes to that requirement the nature of a right autonomous from—although closely connected to—independence and impartiality.[35] Second, the ECtHR takes care to clarify that 'there may […] be circumstances where a judicial appointment procedure that is seemingly in compliance with the relevant domestic rules nevertheless produces results that are incompatible with the object and purpose of that […] right'.[36] Third, compliance with that right presupposes the possibility to seek and obtain review of, and redress for, breaches thereof.[37]

The test certainly raises a series of questions—including, but not limited to, at what point and in what cases the passage of time can cause legal certainty to prevail over the requirement of a tribunal established by law.[38] It is submitted, however, that the autonomous nature of a 'tribunal established by law'—decoupled but kept closely linked to independence and impartiality—makes sense from the perspective of a fair trial: would we be ready to uphold, without a shred of doubt, the fairness of a trial where one of the judges adjudicating, while not exposed to control from external influence, does not fulfil one or more of the essential requirements for appointment? Importantly, the ECtHR has actually found that appointments on recommendation of a body that is *not* independent result in the appointed court or tribunal lacking the requirement of having been established by law.[39]

The ECJ takes a slightly different route to upholding the 'tribunal established by law' requirement. The Court will find a breach of Article 47(2) CFR *particularly* where an irregularity committed during the appointment of judges within the judicial system concerned is of such a kind and of such gravity as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process.[40] The ECJ also stated that, in certain circumstances, legal certainty and the finality of a decision made by a body not constituting an independent tribunal established by law are without prejudice to the possibility of a national court to declare that decision null and void.[41]

The autonomous nature of the right to a 'tribunal established by law' is thus crucial to determining whether violations thereof have occurred, and what consequences they might produce. This, in light of the complex landscape of EU criminal law, can have significant systemic consequences. The requirement under consideration must be assessed in the broader context of a given legal system. Independence and impartiality are *necessary*, but *not sufficient*, conditions for ensuring protection of that right, as the latter rests on, inter alia, an effective system of review and redress. This confirms the importance of adopting such an integrated approach to independence: the right to an independent and impartial tribunal established by law can only be said to effectively exist if mechanisms to address possible violations are in place.

Zooming in on independence, the ECJ sees the latter as consisting of an internal and external dimension. External independence presupposes autonomy of judicial functions, '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'.[42]

[33]ECtHR, *Ástráðsson v. Iceland*, para. 214.
[34]Spano, above, n. 13.
[35]ECtHR, *Ástráðsson v. Iceland*, paras. 231–233.
[36]Ibid., para. 245.
[37]Ibid., para. 285.
[38]These questions are discussed in the judgment under consideration (see also case law cited there). Interestingly, this innovative approach displeased judges of the ECtHR on either side of the debate. See, partly concurring, partly dissenting opinion of Judge Pinto De Albuquerque; partly concurring, partly dissenting opinion, Judges O'Leary, Ravarani, Kucsko-Stadlmayer and Ilievski.
[39]See ECtHR, *Dolińska – Ficek and Ozimek v. Poland*; ECtHR, *Reczkowicz v. Poland*, no 43447/19, 22 November 2021.
[40]Case C-542/18 RX-II and C-543/18 RX-II, *Review Simpson and HG v. Council and Commission*, para. 75.
[41]Case C-487/19 *W.Ż.*, EU:C:2021:798, para. 160.
[42]Case C-619/18 *Commission v. Poland (Independence of the Supreme Court)*, para. 72.

This requires certain guarantees concerning, especially, protection against removal from office, remuneration commensurate with the importance of the functions, and a disciplinary regime not prone to being used as a system of political control. Internal independence is linked to impartiality and seeks to ensure equal distance from the parties to the proceedings, which comes with objectivity and the absence of any interest in the outcome apart from the strict application of the rule of law.[43] These rules are meant to preclude any influence—direct or indirect—which is liable to have an effect on the decision of the judges concerned.[44] Appearances matter too: 'What is at stake is the confidence which the courts in a democratic society must inspire in the public'.[45] In other words, 'justice must not only be done, it must also be seen to be done'.[46] Independence must therefore be ensured in all aspects of the judicial function. Rules on appointment,[47] transfer, secondment[48] and reassignment[49] are all relevant: the substantive conditions and detailed procedures governing these processes must be drafted in a way that preserves independence and impartiality, and accompanied by a system of effective remedies.[50] The different shapes or forms of a judge's disciplinary responsibility,[51] personal liability for judicial error,[52] as well as institution and conduct of, criminal proceedings[53] are key to independence too; such proceedings must, needless to say, comply with Articles 47 and 48 CFR. Here we can see another fundamental component of the integrated approach espoused in this article: the relationships within courts and tribunal, and the role of prosecution services is key to determining the degree of judicial independence. The same goes for the rules on appointment and operation of bodies tasked with, or involved in, disciplinary proceedings against judges, as well as, once again, remedies.

Lack of compliance with the requirements of independence, impartiality and being established by law (considered in their truly articulated nature) can have far-reaching consequences for the interdependent system of EU criminal justice. First, and just by way of example, EU law requires Member States to recognise each other's financial[54] and custodial penalties,[55] probation measures,[56] and take into account each other's convictions in the context of internal criminal proceedings (which could, in turn, lead to harsher penalties).[57] Against that background, issues affecting judicial independence in a Member State will easily metastasise across the Union. Second, the proper functioning of a wide spectrum of measures of judicial cooperation—though *not* based on a previous conviction in a Member State—is predicated upon the existence of independent judicial control.[58] Third, and relatedly, these numerous instruments cover, when considered together, different stages of criminal proceedings and types of measures for which inter-state cooperation can be sought and obtained. Such breadth in scope is mirrored in the range of issuing and executing authorities empowered to cooperate. While the authority potentially in charge—in most cases referred to as 'judicial authority'—need not always be a court or tribunal, fundamental legal questions have arisen as to their required level of independence. As shown below, these issues concern rules applicable to purely internal

[43]Case C-506/04 *Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg*, EU:C:2006:587, para. 52.
[44]Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. v. Krajowa Rada Sądownictwa, CP, DO v. Sąd Najwyższy*, EU:C:2019:982, para. 125. For a comment, see M. Krajewski and M. Ziółkowski, 'EU Judicial Independence Decentralized: AK' (2020) 57 *Common Market Law Review*, 1107.
[45]Case 791/19 *European Commission v. Poland*, para. 60.
[46]ECtHR, *Micallef v. Malta* [GC], no. 17056/06, 15 October 2009, para. 98.
[47]Case C-791/19 *European Commission v. Republic of Poland*, para. 98.
[48]Ibid., para. 233.
[49]Ibid., para. 171.
[50]Joined Cases C-585/18, C-624/18 and C-625/18 *A. K. e.a. (Indépendance de la chambre disciplinaire de la Cour suprême)*, EU:C:2019:982, para. 145; Case C-192/18 *European Commission v. Republic of Poland*, EU:C:2019:924, para. 122; Case C-619/18 *European Commission v. Republic of Poland (Independence of the Supreme Court)*, EU:C:2019:531, paras. 114–116.
[51]Joined Cases C-357/19 and Others *Euro Box Promotion e.a.*, para. 242. Joined Cases C-357/19 and Others, *Criminal proceedings against PM and Others*, EU:C:2021:1034, para. 262.
[52]Case C-224/01 *Köbler*, para. 42. Joined Cases C-83/19 and Others, *Asociația 'Forumul Judecătorilor din România'*, paras. 232–234.
[53]Joined Cases C-83/19 and Others, *Asociația 'Forumul Judecătorilor din România'*, para. 213 onwards.
[54]Council Framework Decision 2005/214/JHA.
[55]Council Framework Decision 2008/909/JHA.
[56]Council Framework Decision 2008/947/JHA.
[57]Council Framework Decision 2008/675/JHA.
[58]As shown below and especially in Section 3, the adjective 'judicial' can be used in EU law in a wider sense, going beyond courts and tribunals.

situations as well. Such a multi-layered picture further strengthens the case for an integrated approach to independence. While the discussion has so far focused on courts and tribunals, the next sub-section addresses the under-explored issue of the independence of public prosecutors.

2.2 | The independence of prosecutors: An underrated bastion of the rule of law

The independent status and allocated tasks of prosecutors, as well as their relationship with courts, shape the EU's idea of 'justice'. We have seen this latter aspect in the previous section from the perspective of judges, but that proves true from that of prosecutors as well.

Rule of law backsliding has been a wakeup call for the Union with regard to the existential importance of independent courts to EU criminal justice. Beyond that, a debate has flourished on the role of public prosecutors too: to what extent can they fulfil certain functions in criminal proceedings and on what conditions? While the body of law and literature about the independence of courts and tribunals is extensive,[59] it is only recently that more significant developments have occurred in EU law on the systemic role, and the necessary qualities, of public prosecutors.[60] Generally, it is undisputed that 'the trust which justice in a democratic society governed by the rule of law must inspire in individuals' entails protecting the independence and political neutrality of prosecutors too.[61]

What shape or form that independence should take, and to what extent it is required, is far less clear. We know, for example, that public prosecutors are not entitled to make requests for a preliminary ruling. In the specific context of EU judicial cooperation, the ECJ has established a series of important principles concerning the institutional requirements of independence that prosecutors must—or need not—possess (see Sections 3 and 4 below). The connection between independence and public prosecutors emerges from the ECtHR's interpretation of Article 5 (3) ECHR as well, since prosecutors can act as judicial authorities under that provision only if they are not involved in the proceedings at the stage of the arrest or detention under consideration.

These relatively scarce legal references are consistent with a broader context where, at a supranational level, it is mostly soft law measures, rather than binding statutory instruments, that focus on prosecution services and the importance of their independence.[62] A comparative analysis shows that the differences between legal systems[63] are a reason for the diversity of frameworks governing the functions of prosecution services across states, although there are signs of slight and gradual convergence in this regard.[64] Due to the proximity and complementarity of

[59]See, for reference, the primary and secondary sources cited especially throughout Section 2 of this article.

[60]The EP has recently approved a resolution (P9_TA(2022)0240) in which it criticises the European Commission for endorsing the Polish National Recovery Plan, and it encourages the Council not to unlock any funding until full compliance with the rule of law is met. The President of the European Commission reiterated that that funding should be released only when the rule of law 'milestones' (also criticised by the EP as too weak) are achieved (see https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_3528). No explicit reference to the independence of prosecutors is made (at best to the judiciary), despite there being signs that those authorities are being subject to political pressure too. See MEDEL's statement at: https://www.medelnet.eu/index.php/news/europe/723-medel-strongly-condemns-the-decision-of-the-polish-minister-of-justice-acting-as-prosecutor-general-to-transfer-independent-prosecutors-hundreds-of-kilometres-away-from-the-places-they-live

[61]Case 83/19 and *Asociația 'Forumul Judecătorilor din România'*, para. 197. In the context of the public right to have information about undue pressure in the public prosecutor's office, see ECtHR, *Guja v. Moldova*, no. 14277/04, 12 February 2008, paras. 90–91.

[62]See, for example, the 1990 United Nations Havana Guidelines on the Role of Prosecutors; the Standards of Professional Responsibility and Statement of the Essential Duties; the 1999 Rights of Prosecutors, adopted by the International Association of Prosecutors; the 2010 Venice Commission's Report on European Standards as regards the Independence of the Judicial System: Part II – The Prosecution Service. Bureau of the Consultative Council of European Prosecutors, Report on the independence and impartiality of the prosecution services in the Council of Europe member States (2019 edition), CCPE-BU (2020)4. The Council of Europe has issued a series of recommendations in this regard: Rec(2000)19 on the role of public prosecution in the criminal justice system, Rec(2012)11 on the role of public prosecutors outside the criminal justice system, Rec(2000)10 on codes of conduct for public officials, Rec(2003)13 on the provision of information through the media in relation to criminal proceedings.

[63]The variance concerns the most diverse aspects, such as the prosecutor's status as a fully-fledged member of the judiciary or part of the Ministry of Justice, the application in a given legal system of the legality, or opportunity, principle vis-à-vis prosecution, or the possibility for the government to issue general or specific instructions.

[64]See the 2010 Venice Commission's Report on European Standards as regards the Independence of the Judicial System: Part II – The Prosecution Service, CDL-AD(2010)040, para. 9. For an insightful reflection on the role of prosecutors in criminal justice, see A. Heinze and S. Fyfe, 'The Role of the Prosecutor', in K. Ambos, A. Duff, J. Roberts, T. Weigend and A. Heinze (eds.), *Core Concepts in Criminal Law and Criminal Justice: Volume I* (Cambridge University Press, 2020), 343.

judicial (strictly speaking) and prosecutorial functions, it is widely acknowledged that similar guarantees should apply to both categories with regard to appointment and security of tenure of prosecutors,[65] recruitment process,[66] and the possibility of being subject to disciplinary measures.[67] Prosecutors must exercise their functions fairly, impartially and objectively,[68] and respect the impartiality and independence of judges.[69] Mechanisms of accountability should be in place in a way that ensures democratic legitimacy.[70] While general policy instructions from the executive are not considered particularly problematic, there is a sense of—justified, in this author's opinion—wariness towards instructions given by the executive to prosecutors in a specific case, which in turn warrants the implementation of specific constraints on that power of instruction.[71] While hierarchical relationships normally characterise the structure of prosecution services, there still is a need for clear rules governing them.[72] A note on these soft law instruments concern their scope: they focus on the independence of prosecutors, but they do not address—perhaps understandably—the related but different question of what kind of measure can be ordered by a prosecutor without mandatory control by a court (be it ex ante or ex post).

The functions exercised by prosecutors impact on the rule of law, albeit in different ways from judges, and must therefore be governed by a series of fundamental guarantees. A very concrete example of how relevant prosecutors are to the rule of law can be seen in the recent preliminary rulings on the specialised chamber of the Romanian prosecutor office, in charge of proceedings against prosecutors and judges. In Joined Case C-83/19 and Others, the ECJ has set out very clearly why deficiencies in the independence of prosecutors can seriously undermine, inter alia, the fight against high-level corruption. This, in turn, brings to the fore the systemic importance of prosecutors: if the latter can be used as an instrument of the executive, the principle of equality before the law (among others) becomes an illusion. Part of the protection rests, in this case as well, on the existence of effective remedies entrusted to independent courts.

2.3 | A fully-fledged theory of 'justice'? An interim conclusion

This section has set the scene for the discussion of measures of EU criminal law through an integrated approach to independence, which is essential to preserving the rule of law and upholding justice. The organisation of justice, it has been demonstrated, is an essential step in this regard. The independence of both judges and prosecutors—from political pressure and, in a different way, from each other—must be protected through legal requirements governing the different aspects of their profession, and through a proper system of remedies. From the discussion conducted so far, it is submitted that EU law on the independence of courts and tribunals has grown strong and sophisticated. The same may not be said for the prosecutors—neither through soft, nor hard, law—although there are signs of movement recently.[73] Against this legal background, the following sections discuss the mechanisms of protection and control relevant to EU criminal law in relation to three main functions: investigation, prosecution and adjudication.

[65]CCPE-BU(2020)4, para. 26.
[66]Opinion on the Regulatory Concept of the Constitution of the Hungarian Republic CDL-INF (1996)2, and CDL (1995)73, II.11.
[67]CCPE Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, para. 47.
[68]See CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, paras. 40–42.
[69]CDL-AD(2010)040, paras. 18–19.
[70]Ibid., para. 41.
[71]Recommendation Rec(2000)19, para. 13. More specifically, instructions on non-prosecution should be in principle prohibited or limited to exceptional cases.
[72]CCPE-BU(2020)4, paras. 22–23 and 32.
[73]This is partly due to the fact that the law on independence of judges has come into being mostly 'reactively', i.e., through preliminary rulings. Questions about the status of prosecutors have not reached the Court as frequently, one possible explanation being that episodes of pressure and control over them are carried out via practices rather than institutionalised subjugation.

3 | AN INTEGRATED APPROACH TO INDEPENDENCE IN THE PHASE OF INVESTIGATION: OF ADMINISTRATIVE AUTHORITIES, JUDICIAL AUTHORITIES AND NATIONAL PROCEDURAL AUTONOMY

While EU criminal law measures have exponentially increased across the board over the past two decades in particular, investigation is probably the stage where we can find the most significant developments. Given the scope of the relevant EU measures and case law in this area, the integrated approach to independence is used in three key scenarios: purely internal situations; judicial cooperation; and hybrid cross-border cooperation. The themes sketched out in the introduction emerge clearly: the role of administrative authorities in criminal proceedings; the required level of independence imposed on public prosecutors; the mechanisms of control and redress—and whether they are entrusted to courts or not. All these aspects prove relevant to shaping the EU's theory of 'justice'.

3.1 | Investigative measures and independent oversight in purely internal situations

Two types of investigative measures, even if ordered in purely internal situations, are governed by rules of EU law: access to personal data and freezing of assets. Access of public authorities to certain kinds of data for law enforcement purposes has increasingly come under the spotlight of EU law, most notably in the context of Articles 7, 8 and 11 CFR. A series of very important judgments has contributed to establishing principles about the retention of, the access to, and the use as evidence of, data for crime prevention purposes.[74] Directive 2002/58/EC[75] has been the main focus of development. While the rights established in the Directive[76] can be restricted, if necessary, appropriate and proportionate to law enforcement, there are specific requirements with which national law must comply.[77] Access of public authorities to traffic and location data in particular constitutes a serious interference with individual rights, especially when said access allows precise conclusions concerning the private life of the person concerned to be drawn.[78]

Independence requirements are closely related to the decision on access, as the latter must be subject to a prior review either by a court or an independent administrative body, following a reasoned request by the competent authorities in the context of law enforcement procedures.[79] The reviewing body must strike a fair balance between the interests relating to the needs of the investigation and the fundamental rights of the person(s) concerned. Where that review is not carried out by a court, but by an independent administrative body, that body must be able to act objectively and impartially, and must be free from any external influence.[80] It must be a third party in relation to the authority which requests access to the data; it cannot be involved in the conduct of the criminal investigation in question, and must be neutral vis-à-vis the parties to the criminal proceedings. The public prosecutor's office falls outside that definition, and is thus not allowed, under EU law, to carry out such a prior review.[81] Another type of body not meeting the necessary requirements in this respect is the Passenger Information Unit (PIU). Under Directive 2016/681,[82] the PIU is an authority competent for law enforcement[83] and, as such, cannot be entrusted to

[74]See, in particular, Joined Cases C-511/18, C-512/18 and C-520/18 *La Quadrature du Net and Others*, EU:C:2020:791 and case law cited.
[75]Dir 2002/58.
[76]In particular, those established in Arts 5, 6 and 9 Dir 2002/58/EC.
[77]Art 15, Dir 2002/58. See, for example, the prohibition of indiscriminate retention of traffic and location data. Joined Cases C-511/18, C-512/18 and C-520/18 *La Quadrature du Net and Others*, paras. 166–168.
[78]These rules and principles governing data retention and access concern different aspects, such as the type of data and the seriousness of the offence involved, whose person's data can be accessed. See Case C-746/18 *HK*, EU:C:2021:152, paras. 37–40 and 45; Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB*, para. 119.
[79]Joined Cases C-511/18, C-512/18 and C-520/18 *La Quadrature du Net and Others*, para. 189.
[80]Case C-518/07 *Commission v. Germany*, EU:C:2010:125, para. 25; *Opinion 1/15 (EU-Canada PNR Agreement)*, EU:C:2017:592, paras. 229 and 230.
[81]Case C-746/18, *HK*, paras. 51–59.
[82]Dir 2016/681.
[83]See Art 4(1) and (3), and 6(2)(b), Dir 2016/681.

approve disclosure of the full passenger name record (PNR) data 'upon expiry of the period of six months after the transfer of those data to the PIU'.[84]

On the one hand, access to data (like traffic and location data) capable of offering a precise picture of a person's private life is considered to be a particularly serious interference with individual fundamental rights, which is why the access must be authorised ex ante rather than validated ex post. The strength of the mechanism of control is thus directly related to the level of intrusiveness of the measure. On the other hand, the overseeing body need not possess a judicial nature, but it can also be an independent administrative body.[85] Such an expansion aims—most probably—to cover national supervisory authority in the field of data protection. The fact that limitations are placed on the power of public prosecutors in this context—regardless of whether they are considered to be independent members of the judiciary in their Member State—somehow resembles the additional guarantee of impartiality that is required of them to perform judicial functions under Article 5(3) ECHR.[86] The prosecutors' inherent lack of impartiality in criminal proceedings (assuming they are the one leading the prosecution in the specific case) justifies the need for an independent check by a judicial or administrative body.[87]

Even if one had to accept that line of reasoning, the attribution of an important (quasi)judicial function to a body that is not involved in the administration of justice or a member of the judiciary is significant. Despite the requirement of independence imposed by EU law, three fundamental questions arise: what kind of safeguards must be attached, in order to guarantee the independence of the administrative body in question? For what kind of data is such a prior review required? What kinds of mechanism of 'redress' (broadly understood) exist? With regard to the first question, the author argues that the performance of quasi-judicial functions must be accompanied by quasi-judicial protection in relation to the key aspects of those functions (appointment procedures, dismissal, removability and disciplinary measures). Otherwise, it would not be hard to bypass the requirements imposed on courts and tribunals and involve bodies which do not ensure sufficient guarantees of independence in criminal proceedings. Second, the seriousness of interference caused by access to data, and the strictness of requirements imposed to grant access, vary in relation to what conclusions can be drawn from those data. While the Court has established the principle that non-serious interferences justify the access to data for fighting crime in general, and not only the most serious offences, that should not be read as an endorsement of access without prior authorisation.[88] It is indeed submitted that, as other conditions are relaxed, it is important that a form of prior independent control is kept in place. Third, 'the principle of effectiveness requires national criminal courts to disregard information and evidence obtained by means of the general and indiscriminate retention of traffic and location data in breach of EU law or by means of access of the competent authority thereto in breach of EU law, in the context of criminal proceedings against persons suspected of having committed criminal offences, where those persons are not in a position to comment effectively on that information and that evidence and they pertain to a field of which the judges have no knowledge and are likely to have a preponderant influence on the findings of fact'.[89] The access to data by public authorities without prior independent review, or where access was given by a competent authority in violation of the established requirements, would constitute a breach capable of triggering the obligation to exclude the admissibility of the evidence. This could be the case when the body authorising access did not satisfy the requirement of independence, or (probably less likely) should a court find that the body giving access erred in the assessment of whether the interest of the investigation warranted interference with the person's fundamental rights. In this sense, and bearing in mind the requirement of necessity and proportionality of allowing access, the ECJ has framed the need for balancing the protection of fundamental rights quite broadly against the importance of fighting crime.

[84]See Art 12(3)(b), as interpreted in Case 817/19 *Ligue des droits humains ASBL v. Conseil des ministres*, EU:C:2022:491, paras. 238–247. See, relatedly, V. Mitsilegas, E. Guild, E. Kuskonmaz and N. Vavoula, 'Data Retention and the Future of Large-scale Surveillance: The Evolution and Contestation of Judicial Benchmarks' (2022) *European Law Journal*, https://doi.org/10.1111/eulj.12417, and Sections 5 and 8.3 especially.

[85]See, more recently, Case 140/20 *G.D. v. The Commissioner of the Garda Síochána and Others*, EU:C:2022:258, para. 108.

[86]ECtHR, *Pantea v. Romania*, no. 33343/96, 3 March 2003, paras. 236–239.

[87]Case 140/20, *G.D. v. The Commissioner of the Garda Síochána and Others*, para. 109.

[88]Joined Cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net and Others*, paras. 140 and 146.

[89]Case C-746/18, *HK*, paras. 41–44.

Freezing of assets is another intrusive measure, the use of which in the context of internal criminal proceedings is partially governed by EU law.[90] In providing that the freezing shall be ordered by a 'competent authority', EU law allows Member States to entrust bodies that are not courts or tribunals to take such a decision.[91] To be sure, the person has the right to challenge a freezing order before a court, in accordance with procedures established by national law. Such procedures *may* provide that when the initial freezing order has been taken by a competent authority other than a *judicial authority*, the freezing order shall first be submitted for *validation or review* to a judicial authority before it can be challenged before a court (emphasis added).[92] This specific provision is particularly relevant to the discussion of what mechanisms of control exist, in EU criminal law, with regard to measures impinging upon individual rights. First, the Directive imposes no obligation on the Member States to provide for the involvement of a judicial authority in the context of adopting a freezing order. Second, to the extent that it allows Member States to do so, it also refers to *judicial authority* in a wider sense than just courts and tribunals—presumably, to include public prosecutors. The analysis conducted over the next few pages shows that, under EU law, and especially in the phase of investigation, the latter authorities are not expected to possess a degree of independence as high as in other stages of criminal proceedings. Third, Article 8(4) of the Confiscation Directive refers to the possibility to involve judicial authorities via validation or review. These are, however, two rather different mechanisms of control and with varying degrees of safeguard. There exists no requirement of *prior* control, as is the case with access to traffic and location data. Furthermore, the (optional) form of control can be entrusted to bodies other than courts or tribunals. Once again, this is quite different from prior independent (judicial or otherwise) authorisation. Whether the different nature of data access, on the one hand, and asset freezing, on the other, justifies such a difference of treatment, is open to debate.

So far, we have observed that EU law entrusts, in different ways, authorities other than courts and tribunals with very important tasks related to criminal proceedings. This opens questions about the mechanisms to ensure the independence required of administrative bodies, and the degree of independence that *judicial authorities* (i.e., prosecutors) must possess to exercise certain functions. The next two sections focus on intra-EU cooperation and build on the previous discussion. By unpacking issues around the definition of 'issuing' and 'judicial authority', they highlight the importance of jointly analysing the role and status of, and interaction amongst, these authorities to achieve better systemic coherence of independence in EU criminal law.

3.2 | Investigative measures and independent oversight in judicial cooperation

The European Investigation Order (EIO) Directive constitutes a remarkable step forward in intra-EU cooperation in criminal matters. Based on a high level of trust between the Member States, the Directive aims to replace the fragmented framework for the gathering of evidence in criminal cases with a cross-border dimension, and seeks to facilitate and accelerate judicial cooperation.[93] The definition of the types of authorities empowered to cooperate is key to answering the research question of this article, as it reveals the state of EU law with regard to the degree of independence required of the cooperating bodies, as well as the relationship between different judicial authorities, including the existing mechanism of control.

The EIO Directive defines an issuing authority as: a judge, a court, an investigating judge or a public prosecutor competent in the case concerned; or any other competent authority as defined by the issuing State which, in a specific case, is acting in its capacity as an investigating authority in criminal proceedings with competence to order the gathering of evidence in accordance with national law. In such cases, before being transmitted to the executing

[90]Dir 2014/42 (Confiscation Directive). See E. Calvanese, 'Enforcement of Confiscation Orders', in R. Kostoris (ed.), *Handbook of European Criminal Procedure* (Springer, 2018), 423.
[91]Art 7, Confiscation Directive.
[92]Art 8(4), Confiscation Directive.
[93]Case C-584/19, *Staatsanwaltschaft Wien (Ordres de virement falsifiés)*, EU:C:2020:1002, para. 39.

authority, the EIO shall be validated by a judge, court, investigating judge or a public prosecutor in the issuing State, after examination of its conformity with the conditions for issuing an EIO under this Directive. Where the EIO has been validated by a judicial authority, that authority may also be regarded as an issuing authority for the purposes of transmission of the EIO.[94] The issuing authority must be the authority competent for the investigation in the context of the ongoing proceedings, as well as the authority competent for ordering the acquisition of the evidence in line with national law.[95]

The EIO thus defines the range of bodies empowered to issue—or request—an EIO in a rather broad way. The scope of the instrument underlies that choice, since the Directive homes in on cross-border cooperation at a stage of criminal proceedings where prosecutors and law enforcement agencies play a particularly prominent role. Furthermore, the Directive establishes a framework that must be workable for 27 different criminal justice systems. That being said, the EU legislature also introduced mechanisms to balance that wider definition. Other than the proportionality check at the moment of issuing the EIO, a judicial authority must validate the EIO when it is being issued by a non-judicial body competent to gather that piece of evidence under national law. This means prior review, to be carried out by a *judicial authority* (including public prosecutors) which would then 'step in' as the actual issuing authority for the purposes of EIO procedures. Furthermore, an important principle is established, which we could refer to as *parallel competence*: an authority is competent to issue an EIO *provided that* it is competent to order that measure under national law as well.

The principle of parallel competences applies to the executing end of the EIO procedures as well. The executing authority is defined as an authority having competence to recognise an EIO and ensure its execution, in accordance with the Directive and the procedures applicable in a similar domestic case. Such procedures may require a court authorisation in the executing State, where provided by its national law. Where the authority in the executing State which receives the EIO has no competence to recognise the EIO, or to take the necessary measures for its execution, it shall transmit the EIO to the executing authority.[96] When the EIO has not been issued by an authority as defined by the Directive, the executing authority shall return it to the issuing State.[97] This, it is argued, would also be the case for requested measures that have not been 'validated' in the sense discussed above. If an EIO has been issued by an authority which would not be empowered to order the requested measure under its national law, the executing authority cannot 'cure' such a violation by simply recognising the EIO.[98] At best, it can choose a less intrusive measure if the latter can lead to a similar result.

In particular, the Court has extended to judicial cooperation the principle—mentioned in the previous section—that access to certain data can only be authorised on the basis of prior review by an independent body. The cross-fertilisation is remarkable, and we see how national procedural autonomy is 'contaminated' with/mitigated by uniform rules. It is worth noting that, by extending the principles, the Court also extends to judicial cooperation the questions concerning its application to internal situations discussed at the end of the previous section.

The EIO sets up an intricate system of 'checks and balances', where the institutional framework governing the interaction between criminal justice actors—within the issuing and the executing States, and between them—is key. It is also clear that, because of the widespread use of legal parallelisms, national laws and practices are important for shaping the functioning of the system, creating a delicate equilibrium between EU-wide rules and national procedural autonomy. Furthermore, and consistent with what was observed in the previous section, each measure (or group of measures) is associated with a level of control and certain requirements—in terms of what body is empowered to issue a certain type of EIO, and what qualities that body must possess. Against that background, the definition of 'issuing' and 'judicial authority' represents the cornerstone of the EIO. In this regard, the Court found that public

[94]Art 2(c), EIO Directive.
[95]Art 6(1)(b), EIO Directive. For an application of this principle to investigative measures to obtain traffic and location data associated with telecommunication, see C-724/19, *HP*, EU:C:2021:1020.
[96]Art 7(6), EIO Directive.
[97]Art 9(3), EIO Directive.
[98]Case C-724/19, *HP*, para. 45.

prosecutors are 'issuing' and 'judicial authorities' even if they are exposed to the risk of being subject to instructions from the executive in the specific case.[99] In *A and Others*, the ECJ refused to apply by analogy its own case law on the concept of *judicial authority* developed in the context of the EAW, which would have required compliance with certain requirements of independence.[100] First, Article 2(c)(i) EIO Directive explicitly includes public prosecutors in the list of authorities that can issue an EIO—unlike the EAW. Second, the Directive lays down a series of procedural guarantees.[101] Third, the EIO concerns a phase of criminal proceedings where the law enforcement authorities and prosecution offices are usually more involved. Most importantly, it does not entail—unlike the EAW—deprivation of liberty of the person concerned for around 70 days, assuming the time limits of the FD are complied with.

Despite the objective differences between the EIO and the EAW, the conclusion of the judgment in *A and Others* leaves a bitter aftertaste. Much of the Court's reasoning is based on the parallel obligations in national and, by extension, EIO procedures established in the Directive. This means that the quality of the control mechanisms under the EIO is as good as those established by the relevant national law. The presumption of mutual trust—crystallised by reliance on national procedural autonomy throughout the EIO—explains that; does it also justify it? By building its response entirely on the obligations on and powers of the issuing and executing authorities, the Court deflected the fundamental question about the objective characteristics that an issuing or judicial authority must possess under the EIO system. Or, more accurately, the ECJ answered that question by setting a low standard, since an authority receiving instructions from the executive in a specific case is now empowered, under EU law, to issue *and* validate EIOs. While it is true that an EIO can be refused where the executing authority believes that execution might be in breach of an obligation under EU law, including effective judicial protection, that is not as effective as proactively defining the qualities with which an issuing authority in this context should be endowed—as the Court did with the EAW. It is possible that the legal background influenced the Court's response, since the law of the executing State in the specific case—Austria—indeed required court authorisation for the requested measure. Therefore, it remains to be seen whether, in the absence of such a guarantee, the Court would nuance its view. In the long term, upholding such an interpretation might be rendered difficult by systemic considerations.

A first test in this regard will be the question as to whether, for example, the German tax office (GTO) can be considered a 'judicial authority' and an 'issuing authority' in the context of the EIO.[102] The GTO is empowered, under national rules, to carry out independent investigations, exercise the rights and fulfil the obligations of the public prosecutor's office in relation to certain offences. In the specific EIO underlying the reference from the national court, the GTO defined itself as 'judicial authority', so that the Order was not validated by another body. In Germany, tax authorities act as judicial authorities for the purposes of the EIO Directive. The question, obviously focused on the specificities of German law, raises fundamental dilemmas—including, but not limited to, the broader trend of involving non-judicial authorities in important tasks related to criminal proceedings.

It is submitted that the wording, context and objective of Article 2(c)(ii) militate against the extension of the concept of 'issuing' and 'judicial authority'. First, that provision exhaustively lists a series of authorities fulfilling the two-fold role of issuing *and* validating authority. Nothing in the wording of that provision seems to leave any room for an expansive interpretation of those concepts. This idea is reinforced by looking at the context and objective thereof. Article 2(c)(ii) refers to 'any other authority' which, in the specific case, is acting in its capacity as an investigating authority with competence to order the gathering of evidence. An EIO issued by such bodies must be validated by one of the authorities under Article 2(c)(i)—also referred to as *judicial authorities*. Extending the application of Article 2(c)(i) to a body such as the GTO would render that distinction meaningless and undermine its objective: namely, ensuring that an EIO issued by a non-judicial authority is subject to a form of prior validation by one of the judicial authorities listed in the Directive. While this would be the sound course of action to take, the existing case law on

[99]Case C-584/19, *Staatsanwaltschaft Wien v. A and others*, para. 75.

[100]See Section 4 below.

[101]See, in particular, Arts 2(d), 6(1), 6(3), 10, 11(1)(f) and 14(1), EIO Directive.

[102]Case C-16/22, *Staatsanwaltschaft Graz*. The case concerns a request for a preliminary ruling, pending before the Court, raising the question as to whether the GTO can be considered a judicial authority and issuing authority.

'issuing' and 'judicial' authority might result in the paradoxical situation where a body acting 'independently' (such as the GTO) might be subject to the requirement of validation by a prosecutor exposed to the risk of instructions from the executive in the specific case. One more reason for the Court to nuance its stance.

The issue of remedies complements the picture. On the one hand, the absence of remedies in the issuing State would constitute a breach of that State's obligations under Article 47 CFR. On the other, the executing State can refuse, on a case-by-case basis, the execution of an EIO where that would be incompatible with its obligations under the Charter. The absence of any legal remedy in the issuing State would, however, make the application of that provision automatic, which would be contrary both to the general scheme of the EIO Directive and to the principle of mutual trust.[103] The absence of a remedy in the issuing State is such a serious breach that the Court has gone as far as saying that the very issuing of an EIO would be incompatible with the principle of mutual trust and sincere cooperation, and be precluded by Article 6 EIO Directive, read in conjunction with Articles 47 CFR and Article 4 (3) TEU.[104] This consolidates the understanding that the quality of oversight is fundamentally determined both by the quality of the overseer as well as of the overseeing mechanisms themselves.

The scenario makes clear that the EU's theory of 'justice' relies significantly on mutual trust: national procedural autonomy entails that the organisation of the relationship between different types of judicial authorities is left almost entirely to the Member States, reinforced by a loose standard of independence required of public prosecutors. The last sub-section complements the picture, and brings to the fore the importance of heightening the degree of independence in instruments of judicial cooperation at the investigation stage.

3.3 | Investigative measures and independent oversight in cross-border hybrid cooperation

This section discusses hybrid examples of cross-border cooperation relevant to (primarily) the investigation stage in criminal proceedings. 'Hybrid' here refers to the nature of the cooperation, where it takes place between public authorities and private parties.[105]

The European Commission's proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters falls squarely within this category. Unsurprisingly, the proposed Regulation mentions mutual trust as an essential precondition for the proper functioning of this instrument.[106] The Regulation concerns the production or preservation of electronic evidence by service providers offering services in the Union, upon the request of Member States' authorities and regardless of the location of data.[107]

The European Production Order (EPO) and the European Preservation Order (EPrO) are defined as binding decisions by an issuing authority of a Member State, compelling a service provider offering services in the Union and established or represented in another Member State, to produce electronic evidence or preserve electronic evidence in view of a subsequent request for production. EPOs and EPrOs can only be issued for criminal proceedings, during the pre-trial and trial phase, and only for data related to the services mentioned above.[108]

An EPO for subscriber data and access data may be issued by: a judge, a court, an investigating judge competent in the case concerned; or any other competent authority as defined by the issuing State which, in the specific case, is acting in its capacity as an investigating authority in criminal proceedings with competence to order the gathering of evidence in accordance with national law. In such a case, the EPO shall be validated by a judge, a court, or an

[103]Case C-852/19, *Ivan Gavanozov*, EU:C:2021:902, para. 59.

[104]Ibid., para. 52.

[105]The article does not address forms of cooperation where the hybridity lies in the nature of the involved bodies themselves, acting as a liaison between private parties and law enforcement institutions. See, for an example, V. Mitsilegas and F. Mouzakiti, 'Data-driven Operational Co-operation in Europe's Area of Criminal Justice', in C. Billet and A. Turmo (eds.), *Coopération opérationnelle en droit pénal de l'Union européenne* (Bruylant, 2020), 129–164.

[106]Recital 11, EPO Regulation proposal.

[107]Art 1, EPO Regulation proposal.

[108]Art 3, EPO Regulation proposal.

investigating judge in the issuing State, after examination of its conformity with the conditions for issuing it. Prosecutors can only issue or validate EPOs for subscriber or access data, or EPrO.[109] Once again, we see the connection between the extent of control and the type of measure. In this case, the type of data is relevant, as we have also learned from the case law on access to traffic and location data. Just as happens with the EIO, in certain cases prosecutors can be validating authorities too. This makes the establishment of the qualities required of that actor particularly important.

EPOs and EPrOs shall be addressed directly to a legal representative designated by the service provider for the purpose of gathering evidence in criminal proceedings.[110] On the one hand, the grounds for not complying with an EPO include the situation where it is apparent that the EPO Certificate (EPOC) manifestly violates the Charter or is manifestly abusive.[111] On the other, Member States shall lay down the rules on, and implement effective, proportionate and dissuasive pecuniary sanctions applicable to infringements of the obligations provided for in the Regulation.[112] Such obligations include—beyond, obviously, the provision of information—complying with the deadlines, informing the issuing authority if that is not possible and providing reasons. It is plain to see how the sanctions are very likely to work as a sword of Damocles dangling above the heads of service providers, which might be discouraged from carrying out thorough fundamental rights checks.

Furthermore, it is not clear how the obligation to sanction the providers' breach squares with the provisions on enforcement. If the addressee does not comply with an EPOC or with an EPrO Certificate (EPOC-PR) within the deadline without providing reasons accepted by the issuing authority, the latter may transfer the EPO or the EPrO to the competent authority in the enforcing State with a view to its enforcement by any means capable. The enforcing authority shall, without the need for further formalities, recognise an EPO or EPrO, unless a specific ground for refusal applies. These include, inter alia, the fact that the EPO or the EPrO has not been issued or validated by an issuing authority as laid down in the Regulation, or that it is apparent from the Certificate that it manifestly violates the Charter or that it is manifestly abusive.[113] There seems to be an overlap between the reasons for enforcement and sanction, but it is not clear whether the two are mutually exclusive: a teleological interpretation would probably suggest they are not, since enforcement and sanctions follow two different purposes.

These aspects are only apparently unrelated to issues of independent control over the issuing of intrusive measures. We have seen that, in the context of the EIO, the Court found that instructions from the executive to the prosecutor in a specific case have no bearing on its capacity to act as issuing *and* validating authority. That interpretation, it has been forcefully submitted, is controversial enough when applied to the EIO. Should a similar question arise in relation to the EPO Regulation, this author argues that the case law on 'issuing' and 'judicial authority' concerning the EIO would not be applicable by analogy to the EPO Regulation. While it is true that another judicial authority might become involved in the phase of execution, this is only in the case of the addressee's refusal to comply with the Order. The mechanism of 'privatisation of mutual trust'[114] set up by the proposal does away with the form of judicial control in the executing State. It will be for private service providers to assess the manifest abusiveness or incompatibility with fundamental rights standards. Not only is the capacity for service providers to carry out such checks debatable. The high standard set for refusal—it is apparent that the order is *manifestly* in breach—further exempts the service provider from the obligation to raise concerns unless they are particularly obvious. The removal of judicial control in the phase of execution, combined with the low—or non-existent—degree of independence required of prosecutors as issuing authorities established in the EIO, would significantly compromise the protection of the individual.

[109]Art 4, EPO Regulation proposal.
[110]Art 7, EPO Regulation proposal.
[111]Art 9, EPO Regulation proposal.
[112]Art 13, EPO Regulation proposal.
[113]Art 14, EPO Regulation proposal.
[114]V. Mitsilegas, 'The Privatisation of Mutual Trust in Europe's Area of Criminal Justice' (2018) 25 *Maastricht Journal of European and Comparative Law*, 263.

The proposed Regulation introduces a further element of judicial control, where the addressee considers that compliance with the EPO would conflict with the applicable laws of a third country and the issuing authority intends to uphold the EPO.[115] It is, however, significant that a court within the EU would be responsible for considering the applicability of the law of a third country to the case under consideration, and whether that would conflict with the Order. A proper review might require, depending on the circumstances, an in-depth understanding and knowledge of the applicable law of the third country. That being the case, and considering the linguistic difficulties involved, the question arises as to whether the effectiveness of judicial scrutiny could be guaranteed in such a case.

While the proposed Regulation requires that Member States ensure remedies equivalent to those available at national level in a similar situation,[116] the framework discussed in the previous pages casts serious doubts on the compatibility of the proposed Regulation with fundamental rights standards.[117]

The stratification of EU criminal law over the decades has created a legal picture that, when it comes to independence and the relationship among the actors involved in criminal proceedings, is far from coherent. The EU's theory of 'justice', seen through the prism of independence, is based on a high degree of mutual trust. The latter shapes a decentralised system, mitigated by common rules mostly governing access to certain data by law enforcement bodies and the functioning of judicial cooperation instruments. In a sense, the EPO Regulation proposal takes mutual trust one step further, by removing judicial control on the execution side and treating the AFSJ as *one* legal space. The results leave uncertainty on the table, with regard to the way in which independence of administrative authorities should be ensured, and the standards of independence required of prosecutors. The next section offers a useful comparison with the definition of 'issuing authority' in the context of prosecution and the EAW.

4 | INDEPENDENT PUBLIC PROSECUTORS AND JUDICIAL OVERSIGHT: APPLYING THE EU'S THEORY OF JUSTICE

The questions around what kind of measure can be ordered, by what kind of authority, what degree of independence is required of that authority and what mechanisms of control are in place, are relevant in the context of prosecution as well. Some of the instruments discussed in the previous section have a 'spillover' effect into this phase of criminal proceedings as well. This is true for the proposed EPO Regulation, which would apply to the trial phase too. Though not as wide-ranging as in the case of investigation, the subject matter of the main legal developments in this area has been particularly important: namely, the definition of 'issuing judicial authority' for the purposes of the EAW mechanism. The EAW FD is the jewel in the crown of judicial cooperation in criminal matters within the EU. It replaces extradition with a swifter mechanism of surrender of suspects or convicted persons between Member States based on mutual recognition and mutual trust.[118] According to a joint reading of Articles 1(1) and 6(1) FD, an EAW is a judicial decision issued by a judicial authority of a Member State for the purposes of (a) prosecution or (b) enforcement of a penalty already issued. The assessment of independence in relation to the (issuing and executing) judicial authorities under the EAW must be distinguished from that concerning the trial court in the issuing State—prospective or past, depending on the purpose for which the EAW has been issued. Both aspects are vital, and connected, to the questions about independence. Nonetheless, and while it is appropriate to 'read together' these situations, it is equally important they are kept conceptually separate.

Unlike other, more recent instruments of judicial cooperation in criminal matters, no further explanation is provided in the EAW FD about what constitutes a judicial authority. Therefore, the elaboration on the expected features of such an authority has been left to the interpretation of the Court. The ECJ has carried out a form of judicial

[115]See Arts 15 and 16, EPO Regulation proposal.
[116]Art 17, EPO Regulation proposal.
[117]For a critical discussion of the proposal, see also F. Galli, 'Information Sharing as a Tool in the Fight against Impunity in the European Union', in L. Marin and S. Montaldo (eds.), *The Fight Against Impunity in EU Law* (Hart, 2020), 171–190.
[118]EAW FD, recitals 5 and 10.

harmonisation, by defining 'judicial authority' as an autonomous concept of EU law.[119] This thread of ECJ judgments forms an integral part of the debate about independence in EU criminal law. Furthermore, it directly affects the validity of EAWs issued by national authorities: an EAW issued by a body that does not qualify as a 'judicial authority' is legally non-existent, which would thus entail an obligation not to recognise and execute the warrant.

4.1 | The concept of judicial authority: The ground rules

The Court's interpretation of the concept of *judicial authority* is founded on the premise that the high level of confidence on which the EAW is built requires proper judicial oversight, which in turn can be guaranteed in the presence of respect for judicial independence and separation of powers.[120] Therefore, EAWs issued by the police service or Ministry of Justice cannot be considered valid.[121]

The Court has clarified that *judicial authority* covers authorities of a Member State which, although not necessarily judges or courts, participate in the administration of criminal justice in that state—such as, most prominently, prosecutors.[122] This broader understanding of judicial authority accommodates the diversity of national systems of criminal justice[123] and the wide range of scenarios where judicial cooperation in criminal matters governed by EU law occurs.[124] There must be, however, statutory rules and an institutional framework in the issuing State capable of guaranteeing the independence of the issuing authority in the exercise of the responsibilities flowing from the EAW FD.[125] Such a legal framework stands in stark contrast with the qualities of a prosecutor (not) required in the context of the EIO.

Since a valid EAW must be based on a national arrest warrant,[126] the EAW system entails a dual level of protection: the first level relates to the adoption of the national decision; whereas the second must be afforded when an EAW is issued.[127] The second level entails that the judicial authority competent to issue an EAW must review observance of the conditions necessary for the issuing of the warrant, and examine whether it is proportionate to issue that warrant.[128] Where the law of the issuing Member State confers the competence to issue an EAW on an authority which is not itself a court, the decision to issue such an arrest warrant must be capable of being the subject, in that Member State, of court proceedings.[129]

For the purposes of this discussion, it is important to identify the two separate bodies involved in the EAW mechanism: the issuing authority (which can be an independent public prosecutor) and the overseeing court or tribunal (which must, by definition, be independent, impartial and established by law). Would an EAW issued by a public prosecutor exposed to instructions from the executive be legally valid? If so, on what conditions? Must the judicial oversight be guaranteed in the form of judicial review, or could it be necessary for 'validation' in a similar way to what is provided for the measures discussed in the previous section? By building on the existing literature, the next section unpacks these questions and shows that they are inextricably linked.

[119]L. Mancano, 'Judicial Harmonisation through Autonomous Concepts of European Union Law: The Example of the European Arrest Warrant Framework Decision' (2018) 43 *European Law Review*, 69; V. Mitsilegas, 'Autonomous Concepts, Diversity Management and Mutual Trust in Europe's Area of Criminal Justice' (2020) 57 *Common Market Law Review*, 45.

[120]Case C-477/16, *Ruslanas Kovalkovas*, C:2016:861, para. 44.

[121]Case C-452/16, PPU *Krzystof Marek Poltorak*, EU:C:2016:858; Case C-477/16, *Kovalkovas*.

[122]Case C-477/16, *Kovalkovas*, para. 31.

[123]For example, public prosecutors in Italy are independent members of the judiciary.

[124]As discussed earlier, e.g. in the investigation phase or as far as the exchange of evidence is concerned, where public prosecutors are equally or more likely to be the main institutional actors involved in the cooperation.

[125]Joined Cases C-508/18 and C-82/19 PPU, *Minister for Justice and Equality v. OG and PI*, EU:C:2019:456, para. 74.

[126]This is understood as a measure adopted by a judicial authority to arrest a person subject to criminal proceedings, with the objective of bringing that person before a court for the purposes of fulfilling the acts of criminal procedure. See EAW FD, Art 8(1)(c) and Case C-414/20 PPU, *MM*, EU:C:2021:4, para. 57.

[127]Case C-241/15, *Niculaie Aurel Bob-Dogi*, EU:C:2016:385, para. 56.

[128]Case C-477/16, *Kovalkovas*, para. 47.

[129]Joined Cases C-508/18 & 82/19 PPU, *OG and PI*, para. 75.

4.2 | Independence and judicial oversight in the EAW mechanism

The increasing body of case law on the issuing judicial authority offers valuable insight into the different systems of criminal justice in the EU. The Court's interpretation has mostly focused on the independence of national public prosecutors' offices, and their capacity to meet the necessary requirements of *issuing judicial authority*.[130] With regard to the Prosecutor General of Lithuania,[131] the ECJ observed that the prosecutor prepares the ground for the exercise of judicial power by the criminal courts of that Member State. Therefore, they are capable of being regarded as participating in the administration of criminal justice.[132] In exercising the powers conferred on them, the Prosecutor General of Lithuania must satisfy themself that the requirements necessary to issue an EAW are met. The constitutional framework of Lithuania guarantees the Prosecutor General of Lithuania the benefit of that independence. This led the Court to the finding that that authority is covered by Article 6(1) EAW FD. However, the ECJ took care to clarify that the executing authority should determine whether a decision of the Prosecutor General to issue an EAW may be the subject of court proceedings which meet, in full, the requirements inherent in effective judicial protection,[133] thus reiterating the principle that independence of the prosecutor must be accompanied by the availability of a level of judicial control.

The assessment of the German public prosecutors led to a different outcome.[134] According to German law, the German Minister for Justice has an 'external' power to issue instructions in a specific case to the public prosecutor's office, which in turn enables the Minister to have direct influence over a decision concerning the EAW.[135] Though safeguards concerning dismissal of officials and modality of writing and notification of the instructions are present, the exercise of the Minister's power is not specifically regulated.[136] Therefore, the influence of the executive on the decision of issuing of an EAW could not be wholly ruled out and the public prosecutor's office could not be considered a judicial authority under Article 6 EAW FD.[137]

The practice shows that the picture acquires further complexity when other variables are considered. Is the constitutionally guaranteed independence of the public prosecutor's office undermined when, like in France, the Ministry of Justice can issue *general* policy instructions, or where the judges attached to the prosecutor's office issuing the EAW must comply with directions from hierarchically superior magistrates within that office?[138] The Court's answer is in the negative. Public prosecutors possess the quality of *judicial authority*, provided that they demonstrate *in particular* independence from other State powers and specifically in relation to instructions in the specific case. On the one hand, independence from *within* the judiciary seems to cause no serious concern to the Court. On the other, and crucially, the issuing State is still under the obligation to ensure that a system of effective judicial oversight is in place.[139] On that basis, the Court's approach to prosecutorial independence seems broadly consistent with that developed by the Council of Europe.

[130]One of them concerned EAWs issued for enforcement of judgments, discussed in the next part on adjudication. See Case C-627/19 PPU, *Openbaar Ministerie v. ZB*, EU:C:2019:1079.

[131]Case C-509/18, *Minister for Justice and Equality v. PF*, EU:C:2019:457.

[132]Case C-509/18, *PF*, EU:C:2019:457, para. 42.

[133]Ibid., para. 56.

[134]Joined Cases C-508/18 and C-82/19 PPU, *OG and PI*.

[135]Ibid., paras. 76–77.

[136]Ibid., paras. 81–83.

[137]For Germany's reaction to the judgment, see K. Ambos, 'The German Public Prosecutor as (No) Judicial Authority within the Meaning of the European Arrest Warrant: A Case Note on the CJEU's Judgment in OG (C-508/18) and PI (C-82/19 PPU)', (2019) 10 *New Journal of European Criminal Law*, 406. See, also, the note of Germany, available at <www.ejn-crimjust.europa.eu/ejnupload/News/WK-6666-2019-INIT.PDF>. See also Eurojust and EJN joint document about the situation in the Member States, available at <www.ejn-crimjust.europa.eu/ejn/EJN_RegistryDoc/EN/3079/98/0>.

[138]Joined Cases C-566 & 626/19 PPU *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie v. JR and YC*, EU:C:2019:1077.

[139]As the judgment shows, in the French legal system, an EAW is based on a national warrant issued by a court (usually an investigative judge) who also reviews the conditions for the issuance of the EAW and its proportionality. Furthermore, the person can challenge the validity of the decision for the basis of the EAW.

What if the body tasked with issuing EAWs can be—even indirectly—subject to instructions from the executive, but then a legally mandated validation by a court is a condition in order for the EAW to produce any legal effects?[140] Confronted with this question in relation to the status of the Austrian public prosecutor's offices, the Court found that judicial oversight (guarantee of effective judicial protection) 'saves' the validity of an EAW. The Court is therefore introducing a case law-based equivalent of judicial validation provided in 'younger' measures of judicial cooperation such as the EIO. The prosecutor's lack of independence is only tolerated because there is a *prior* review by a court.[141]

What if the national legislation of the issuing State does not provide for a judicial remedy against the decision to issue an EAW taken by an authority which, though in line with the requirements of independence set by the ECJ, is not a court or tribunal? This is the point where independence and effective protection slightly part ways. The former is a precondition for the latter, but the converse is not true. The existence of a judicial remedy against the decision, taken by an authority other than a court to issue an EAW, is not a condition for classification of that authority as an issuing judicial authority within the meaning of Article 6(1) FD, as long as that authority has institutional independence. The requirement of judicial oversight of a decision taken by a body that is not a court or tribunal does not fall within the scope of the statutory rules and institutional framework of that authority, but concerns the procedure for issuing such a warrant, which must satisfy the requirement of effective judicial protection.[142] That protection must be in place in the issuing State and accessible *before* execution of the EAW: a national law providing for judicial review only *after* surrender would not meet the requirements inherent in Article 47 CFR.[143]

Judicial oversight is equally important in the phase of execution of the warrant. This is especially the case since 'the intervention of the executing judicial authority constitutes the sole level of protection provided for by [the EAW FD]' to guarantee that, in executing the warrant, the appropriate safeguards were afforded to the person concerned.[144] Just like the issuing judicial authority, the body responsible for executing an EAW must act independently and exercise its responsibilities under a procedure which complies with the requirements inherent in effective judicial protection.[145] There is no reason to believe that the logic governing the interaction between the independence of the issuing authority and the strength of the oversight would not extend to the phase of execution. A less independent executing authority would then require a validation/prior review by a court or a tribunal.

4.3 | A system of effective protection?

The complex landscape emerging from the previous section has attracted mixed opinions.[146]

That the concept of 'judicial authority' also covers public prosecutors makes sense in light of their legal status across the EU. The role they play in criminal proceedings, and in the administration of justice more broadly, explains why their exclusion from the concept of 'judicial authority' would considerably limit the functioning of judicial cooperation in the EU. They are neither impartial (see the case law on access to traffic and location data), nor (always) internally independent. However, they must, under EU law, be independent from other State powers to validly issue an EAW. Not only that; judicial review in the issuing State before surrender must be available. The degree of judicial supervision is inversely proportional to the independence of the prosecutor empowered to issue EAWs in a given Member State: the lower the latter, the higher the former.

[140]They are hierarchically subordinate to higher public prosecutor's offices, which in turn are subordinate to the Federal Minister for Justice. However, the warrants must be endorsed by a court which carries out a review of the conditions and proportionality. In the absence of such an endorsement, arrest warrants do not produce legal effects and cannot be transmitted.

[141]Case C-489/19 PPU, *NJ*, EU:C:2019:849.

[142]Joined Cases C-566 & 626/19 PPU *Parquet général du Grand-Duché de Luxembourg*.

[143]Case C-648/20, PPU *PI*, EU:C:2021:187, para. 60; Case C-414/20, PPU *MM*, para. 72.

[144]Case C-510/19, *AZ*, EU:C:2020:953, para. 53.

[145]Ibid., para. 70.

[146]See M. Böse, 'The European Arrest Warrant and the independence of public prosecutors: OG & PI, PF, JR & YC' (2020) 57 *Common Market Law Review*, 1278; Ambos, above, n. 137.

An efficient system of intra-EU law enforcement requires an effective mechanism of judicial protection. Important questions remain on the table, however. The most pressing one, it is argued, concerns situations where (1) the independence of the public prosecutor is not protected by statutory rules and the institutional framework, while the court or tribunal tasked with validation of EAWs offers no sufficient guarantees of independence either. Relatedly, in isolation or combination with the scenario just mentioned, the question arises as to what would be the legal implications of (2) a prosecutor de facto—for example due to systemic deficiencies—exposed to instructions from the executive, despite the institutional rules in place. These dilemmas involve the issuing and executing State alike. As for case (2), the present author believes that de facto or de jure lack of independence of prosecutors should both trigger the need for judicial validation. A factual lack of independence should be assessed by the executing authority via the two-step test, at least until the law is revised (see Section 5 below): the existence of systemic deficiencies should be ascertained, followed by an assessment of the potential impact of those deficiencies on the specific case.[147] Similar considerations apply to scenario (1). If concerns are raised before the executing authority about the compliance with Article 47 CFR of the supervising court or tribunal (tasked with validation and/or subsequent review), that executing authority should not execute the warrant if the real risk cannot be discounted that the supervising body is not an independent and impartial tribunal established by law.

The question of what authority can lawfully issue and execute EAWs is obviously central to the functioning of the mechanism. As the details of the FD reveal, that question extends to a series of other important tasks that might need to be fulfilled, pending execution. For example, the two judicial authorities shall agree on a new date for surrender, if the first deadline could not be met due to *force majeure*.[148] Once the deadline has expired (the first, or the second one if need be), the person must be released.[149] The Court has further added that the assessment of *force majeure*, the agreement of a new date and the decision about prolonging detention cannot be delegated to the police service. Were that to happen, those decisions would be non-compliant with the FD. The initial deadline would have to be considered as expired, thus creating an obligation to release the person.[150]

While this is the only logical conclusion to be drawn, it is still very important as it brings to the fore more clearly the wider implications of defining the required feature of a *judicial authority* (in the EAW, and throughout the body of EU criminal law). The principles and requirements established in this regard should then apply every time the FD refers to *judicial authority*. Linking this discussion back to that on investigation, one may wonder whether this case law would apply by analogy to the issuing and judicial authority in the context of the EIO. It is argued that while that analogical interpretation would not be objectionable per se, the problem is that it would be premised on a controversial interpretation of 'issuing' and 'validating authority' as covering a prosecutor subject to instructions from the executive in the specific case. If anything, it highlights even further the importance of defining the requirements of independence of that authority: since the use of that concept is widespread in instruments of judicial cooperation, adopting or accepting loose standards of independence has far-reaching legal implications.

The area of law discussed in this section is probably the one where EU law has reached a greater level of maturity and balance. While mutual trust and national procedural autonomy are still very much the cornerstones of the mechanism, the principles concerning the requirements of independence of prosecutors are synchronised with the type and degree of oversight by courts and tribunals. While the analysis shows quite neatly the contours of the relationship between different authorities involved in the administration of justice, questions remain as to what to do in case of deficiencies in the independence of prosecutors and the overseeing authorities. Or else, what other factors must be considered, and how do they relate to the assessment and role of independence?

These questions are addressed in the final section, which focuses on the task of (prospective or past) adjudication. By complementing the discussion about investigation and prosecution, it brings to the fore the wide-ranging implications of independence and effective protection for the EU system of criminal justice.

[147]Obviously, that would not be possible in situations where doubts arise in relation to the executing authority instead.
[148]Art 23(3), EAW FD.
[149]Art 23(5), EAW FD.
[150]C-804/21 PPU, *C, CD, v. Syyttäjä*, EU:C:2022:307, paras. 59–76.

5 | ADJUDICATION

The landscape of independence and effective protection when it comes to adjudication is complex as well. Unsurprisingly, the issue that has come mostly under the spotlight is the risk of breaches of fair trial rights following execution of an EAW. Since an EAW can be issued for prosecution or enforcement, it is appropriate to keep the analysis of these two situations separate. The execution of an EAW for prosecution in situations of concern for the person's right to an independent tribunal might be a vector for unlawful convictions and, in light of the wider body of measures of EU criminal law, lead to the propagation of injustice and illegality on a Union scale.

After some reluctance,[151] the ECJ has established the conditions on which the presumption of mutual trust must be rebutted, and the EAW not executed, on grounds of possible fundamental rights violations. In this context, the Court relied on Article 1(3) FD to develop the *exceptional circumstances* doctrine with regard to two fundamental rights (so far), i.e., the absolute prohibition of degrading treatments and the right to an independent tribunal.

When it comes to the right to an independent tribunal, the assessment must first revolve around the operation of the system of justice in the issuing State.[152] Second, there must be precise and specific elements showing that systemic deficiencies are *liable to* have an impact at the level of the State's courts with jurisdiction over the proceedings *and* there must be substantial grounds for believing that the person will run a real risk, having regard to their personal situation, as well as to the nature of the offence for which they are being prosecuted and the factual context that form the basis of the EAW. Systemic deficiencies concerning the independence of a State's judiciary, even if worsened over time, do not automatically affect every decision issued by every court of that State.[153] The two-step test still stands; the examination involves an analysis of the information obtained on the basis of different criteria, and the steps cannot overlap one another.[154] An interpretation to the contrary would amount to a de facto suspension of the EAW, while the preamble of the EAW FD empowers other EU institutions to do so.[155] Accepting that judges or courts of a Member State can no longer be considered independent *en masse* would deprive those courts and judges of the possibility to make use of the preliminary ruling mechanism, while precisely that mechanism has played a key role in relation to resisting the 'reforms' of the Polish government. It would also entail a high risk of impunity of requested persons present in a territory other than that in which they allegedly committed an offence, thereby undermining a fundamental objective of the EAW and the EU more broadly.[156] Thus the tension—if not contradiction—unfolds between the pursuit of justice through the conduct of criminal trials, on the one hand, and the recognition that the independence of the system concerned is seriously undermined.

The present author argued that the test is more flexible than it first appears. The diverse implementation of the test at national level shows that its application is far from straightforward.[157] Through such a test, the executing court is required to carry out a probability assessment: they must ascertain the existence of a situation of danger that is not purely hypothetical and is based on materials portraying the violation as a concrete possibility. With that in mind, it is submitted that an overly strict interpretation of the standard of 'real risk'—an interpretation that might take it closer to 'near certainty'—would not do justice to the nature of the test itself, and should therefore be avoided. Furthermore, the debate about execution of EAWs and possible breaches of Articles 47 CFR has expanded to include the right to a tribunal established by law.[158] In relation to the Polish National Judicial Council (NJC), the ECtHR has recently found that if the body directly involved in judicial appointments is not independent, then courts or tribunals formed on the basis of an appointment proposed by that body are not tribunals established by law.[159]

[151]Case C-396/11, *Ciprian Vasile Radu*, EU:C:2013:39.
[152]Case C-216/18 PPU, *LM*, para. 61.
[153]Joined Cases C-354 and C-412/20 PPU, *L. and P.*, para. 40.
[154]Ibid., para. 56.
[155]Recital 10 EAW FD.
[156]Joined Cases C-354 and C-412/20 PPU, *L. and P.*, paras. 62–64.
[157]See L. Mancano, 'You'll Never Work Alone: A Systemic Assessment of the European Arrest Warrant and Judicial Independence' (2021) 58 *Common Market Law Review*, 701–704.
[158]Joined Cases C-562/21 PPU and C-563/21 PPU, *X and Y*, and Case C-480/21, *WO, JL*, EU:C:2022:592.
[159]ECtHR, *Dolińska – Ficek and Ozimek v. Poland*.

Given the hundreds of appointments made upon the NJC's recommendations since it has been effectively placed under political control, the risk exists that a trial was, or will be, conducted by a tribunal not established by law, since it will be partly or completely composed of judges appointed on the recommendation of a non-independent body.[160] Furthermore, while the person has the right to recuse a judge under Polish law, an irregular appointment of members of the court with jurisdiction over the proceedings cannot be challenged.

In this more recent thread of case law on refusal of execution of EAWs and the right to a tribunal established by law, mutual trust is still upheld firmly by the Court. Non-execution is seen as the exception, and can be chosen by the executing authority only after carrying out the two-step test. That being said, the Court's approach has evolved and important developments can be seen in relation to three aspects: the role of national judicial councils; the criteria and materials that can be used to challenge execution of EAWs; and the issue of remedies to possible violations of Article 47(2) CFR.

As for the first aspect, the ECJ found that a judicial appointment on the recommendation of a body composed for the most part of members nominated by the legislature and the executive is not sufficient in itself to cause a breach of the right to a tribunal established by law.[161] This seems to differ from the ECtHR's findings in *Dolińska*. It is, however, important to remember that the latter examined the specific facts of the case, whereas the ECJ is establishing a broader principle that would work for all Member States' constitutional systems. It does not prevent executing authorities from reaching the same conclusion as the ECtHR, should the circumstances warrant it.

Second, the Court still requires that the executing court perform the second step, with the person concerned still bearing the burden of proof. Crucially, the Court clarified the standard of proof and widened the range of information that can be relied on by the person or the executing authority. The systemic deficiencies must be *likely* to materialise (*susceptible* in French) in case of surrender.[162] As to EAWs issued for enforcement, the information should show that systemic deficiencies in the issuing State had a tangible influence on the trial and *in particular* on the composition of the panel that judged on the case.[163] That information can relate to the appointment procedures and possible secondment of one or more of the judges hearing the case, showing that there are substantial grounds to believe that the composition of the panel affected that person's fundamental right to a fair trial before an independent and impartial tribunal previously established by law.[164] As for EAWs issued for prosecution, the second step of the test can be carried out by relying on *any* information available concerning the panel of judges likely to have jurisdiction to hear the case in the issuing State.[165] Moreover, it stated that lack of sincere cooperation by the issuing authority can be considered as a relevant factor for assessing the real risk—for example, if the issuing authority does not provide the information requested by the executing State, which has happened in other cases.[166] In doing so, the ECJ has explicitly and definitively dispelled doubts surrounding the previous wording of the test: to refuse execution, there is no need to show that the trial court holds a bias against the specific case or the person concerned. In essence, the Court's response seems to align with the ECtHR's finding that 'the requisite "proximity" between the irregularities [and a person's] case [is] attained when, and only when, the irregularly appointed judge [sits] on the bench [which hears the] case'.[167]

Third, the issue of legal remedies in the issuing State deserves a mention. As for EAWs issued for enforcement, the executing State *must* take account of the possibility for a person to reject one or more members of the panel, as well as the exercise of that right and the outcome of the request.[168] The existence of such a possibility *may* be taken into account in case of EAWs issued for prosecution.[169] The Court emphasised the importance of the effectiveness

[160]The different tenses refer to the fact that an EAW can be issued for enforcement or prosecution.
[161]Joined Cases C-562/21 PPU and C-563/21 PPU, *X and Y*, para. 75.
[162]Case C-480/21, *WO, JL*, para. 39.
[163]Ibid., paras. 40–41.
[164]Ibid., para. 42.
[165]Ibid., para. 53.
[166]Joined Cases C-562/21 PPU and C-563/21 PPU, *X and Y*, para. 85.
[167]ECtHR, *Ástráðsson v. Iceland*, para. 285.
[168]Joined Cases C-562/21 PPU and C-563/21 PPU, *X and Y*, para. 90.
[169]Ibid., para. 99.

of the remedies formally provided by law, when assessing the real risk. Despite the fact that, according to Polish law, a person can request the recusal of one or more judges composing the panel, the Irish Supreme Court considered that it is no longer possible to effectively challenge the validity of the appointment of a judge or the lawfulness of the performance of the judge's judicial functions. In that regard, the ECJ found that 'any evidence available to the executing judicial authority enabling it to conclude [...] that the recusal procedure or the legal remedies [...] are ineffective, will be relevant'.[170]

It is argued that challenges to execution should extend to possible violations of Article 47(1) CFR, which enshrines the right to an effective remedy before a tribunal—in this case, for violations of Article 47(2) CFR. This, jointly with the broadened set of evidence that can be relied on and the clearer standard of proof, should considerably strengthen the position of defendants and assist executing authorities in deciding not to surrender while acting in compliance with EU law. The question remains as to whether effective recusal procedures are sufficient to ensure effective judicial protection (especially in a context where there are systemic issues concerning judicial appointments), or rather, whether an overall assessment of the legal framework should be carried out, an important factor being the possibility of obtaining redress on the basis of new information coming to light post judgment.

The issue of remedy, therefore, is crucial but—once again—it should be part of an integrated assessment. The risk of over-reliance on legal remedies in cases on the execution of EAWs and Article 47 CFR emerged clearly from the recent AG's Opinion in *Puig Gordi*.[171] The reference concerns the possibility to refuse execution of an EAW where doubts exist about the lack of competence of the court or tribunal that issued the warrant *in the absence of systemic deficiencies in the justice system* of the issuing State, an aspect that was not necessarily related to independence in this specific case, but which is still relevant for meeting the requirements of a tribunal established by law. The AG concluded that both steps of the test must be satisfied, failing which the principle of mutual trust must operate fully. A fundamental argument underpinning the AG's view was that, in the absence of systemic deficiencies, there is no reason to doubt that the person will have any infringements of their rights 'established and, where appropriate, rectified or penalised'.[172] While that seems perfectly reasonable, a more nuanced approach would not do any harm to the principle of mutual trust. If there is a real risk, based on reliable and objective evidence, that the execution of an EAW will lead to a breach of the right to a tribunal established by law, why surrender anyway and allow that likely breach to happen only for the latter to then be rectified? One may opine that the absence of systemic deficiencies is an argument in favour of refusal based only on the second step of the test. First, the refusal would still happen only in the exceptional circumstances where the real risk of an infringement of Article 47 CFR materialises. Second, a healthy judicial system should be able to quickly 'absorb' and rectify the disruption *before* surrender, so that the EAW can be issued by an authority in compliance with the requirements of effective judicial protection.

The application of the two-step test to situations where the deficiencies affecting the independence of the judiciary in a Member State are so pervasive and blatant remains controversial. The Court, within the systemic constraints it is under, has widened the range of information the executing authorities and defendants in EAW procedures can rely on, with the view to facilitating challenges to surrender in situations where there are genuine concerns for the fundamental rights of the person concerned. It is generically stated that victims' rights and the fight against impunity must be considered by executing authorities when carrying out the risk assessment to reinforce the idea that mutual trust must be upheld firmly. It will be interesting to see how the Court will engage with the question of whether the first step of the test must always be carried out, and whether it will follow the AG's Opinion. At the end of this three-scenario analysis, it is clear that the two-step test is potentially applicable to a series of situations that have not yet come to the fore. In light of this possible wider use, the 'walking on a tightrope' exercise run by the Court has undoubted consequences in terms of legal certainty and shows—on this aspect at least—the need for further development.

[170]Case C-480/21, *WO, JL*, para. 56.
[171]Case C-158/21, *Puig Gordi*, EU:C:2022:573.
[172]Ibid., point 116.

6 | CONCLUSIONS

The enduring commitment to the EU values is an essential precondition to secure the normative foundations of EU criminal law. Part of that endeavour must be centred on the protection of the rule of law, with an independent system of effective protection lying at its core. The understanding of the rule of law and independence shapes the EU's idea of justice as a value *and* organisation. The two meanings of 'justice' are inextricably linked, as the relationship between its institutional actors, and between them and other state powers, has a significant bearing on the legitimacy of its processes. This comes with a reflection on the status of courts and tribunals, but also of public prosecution services.

EU criminal law unfolds through an increasingly wide spectrum of measures, which significantly affect individual rights to different degrees and in different ways. The implementation of those instruments, mostly pertaining to the three macro-functions of investigation, prosecution and adjudication, is facilitated by a heavily decentralised system of cooperation based on mutual trust and national procedural autonomy.

Against that background, the qualities required of a body empowered to order a certain intrusive measure, and the mechanisms of control and redress against that measure, are two fundamental areas of analysis. The assessment carried out in the present article has brought to the fore a complex landscape where—unsurprisingly—the standards applied vary in relation to the measure and stage of criminal proceedings. The comprehensive discussion has highlighted the stratification of different generations of instruments of EU criminal law, which in turns raises question about the systemic coherence of the mechanisms of scrutiny provided for in these instruments. In this regard, another important factor at play is the delicate balance between the need to establish common principles, on the one hand, and the preservation of national diversity, on the other. The principle of parallelism, embedded in a number of instruments, is an expression of that dynamic: the translation, at the level of EU-wide cooperation, of standards applied in comparable domestic situations.

Investigation is the area from whence such complexity emerges more clearly, from purely internal situations through to judicial and public-private cross-border cooperation. A series of overarching themes shape the functioning of this area, as well as the exercise of prosecuting and adjudicating powers (although to different extents): the roles of independent supervisory bodies and judicial authorities, and the way both are defined. First, non-judicial bodies are entrusted with functions as important as authorising public authorities' access to traffic and location data *provided that* those non-judicial bodies are independent. While the way in which that independence should be guaranteed has not been addressed so far, this author argues that the exercise of quasi-judicial functions should be flanked by quasi-judicial safeguards. Second, judicial authorities can validate or review measures such as freezing assets in purely domestic proceedings, or issue an EIO and EPO in cross-border cooperation. The judicial nature of the body empowered is accompanied by a relaxation of the requirements concerning its independence. Of the three examples discussed in the paper (asset-freezing orders, EIO and EPO), only the definition of *judicial authority* in the context of the EIO has been the subject of clarification by the ECJ, with the latter finding that the exposure of a public prosecutor to instructions from the executive in a specific case does not undermine its status of judicial authority. That interpretation was partly justified by the existence of a series of safeguards built into the EIO Directive, and it is hard to say to what extent the specific national legal background impacted on the Court's conclusions. With that in mind, the extension of that definition to either the freezing of assets or the EPO would be particularly problematic, considering the absence of comparable mechanisms of safeguards in both instruments.

Where the Court has established a clearer relationship between the requirements of independence and the need for oversight is in the context of the authorities tasked with issuing EAWs: the intensity of the oversight must increase from availability of an effective remedy post-issuance/pre-surrender to mandatory validation by a court, depending on the level of independence possessed by the public prosecutor. While the categorisation thereof as a judicial authority in the context of the EAW as well is not contested by the Court, the statutory rules and the institutional framework must protect prosecutors from influence from other State powers.

The guarantees of independence are a precondition for the healthy functioning of instruments of judicial cooperation (including, but not limited to, the EAW) built on the assumption that all Member States can guarantee a fair mechanism of (past or prospective) adjudication. Independent adjudication and control (through validation or review) are the life-blood of EU criminal law, which should not be facilitating unfair convictions via, for example, surrender in cases where the right to an independent adjudicator established by law might be / might have been violated. The Court's balancing exercise, by the two-step test, between that right and impunity avoidance and victims' rights has sparked serious criticism, not least in terms of the understanding of justice underlying such an approach. The development of the law shows the ECJ's willingness to use the flexibility of the test on which defendants and executing authorities might rely, with the question about remedies being the most likely front of evolution in this saga.

The EU's theory of justice, as a system and a value, and the role that independence might play in that regard, is still in its infancy. It is safe to say, however, that such an idea is destined to influence significantly the normative foundations of EU criminal law, and thus its functioning and legitimacy.

ORCID


Leandro Mancano https://orcid.org/0000-0003-3694-5914

How to cite this article: Mancano L. A theory of justice? Securing the normative foundations of EU criminal law through an integrated approach to independence. *Eur Law J*. 2022;1-25. doi:10.1111/eulj.12442