

# VARIA

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## If You Are a Judicial Authority and You Know It, Raise Your Hands – Case Note on C-452/16 PPU, Poltorak, C-453/16 PPU, Özçelik, C-477/16 PPU, Kovalkovas

### *Abstract*

Since it entered into force, Framework Decision 2002/584/JHA on the European Arrest Warrant has given rise to a number of interpretative issues that have been referred to the European Court of Justice through the preliminary reference procedure. This case note provides an analysis of the most recent conundrum, which concerned the meaning of the words 'issuing judicial authority' under Article 6(1) of said Framework Decision. In three judgements at the end of last year, the Court held that this is an autonomous expression of EU law and clarified what circumstances one has to take into account in order to assess whether a national authority issuing a European Arrest Warrant may be regarded as a judicial authority. Thus, the case note presents the Court's reasoning and compares it to what the same Court has constantly ruled with regard to the judicial nature of courts and tribunals of the Member States that are either entitled or obliged to raise a reference to the European Court of Justice under Article 267 TFEU.

### *I. Introduction*

Under Article 3(2) of the Treaty on European Union (the "TEU"), the European Union (the "EU") shall offer its citizens an area of freedom, security, and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration, and the prevention and combating of crime.<sup>1</sup> This has led, *inter alia*, to abolishing

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1 On the area of freedom, security, and justice, see generally *N. Walker (ed.)*, *Europe's Area of Freedom, Security and Justice*, 2004, *U. Draetta, N. Parisi, D. Rinoldi (eds.)*, *Lo spazio di lib-*

extradition between Member States and adopting Framework Decision 2002/584/JHA establishing the European Arrest Warrant<sup>2</sup> (the “EAW”) as a new and simplified system of surrender between judicial authorities that has replaced the system of multilateral extradition built upon the European Convention on Extradition of 13 December 1957 and which is based on the principle of mutual recognition.<sup>3</sup> Said principle must be regarded as the cornerstone of judicial cooperation that makes it possible for judicial decision in civil and criminal matters to freely move within the EU.

The analysis provided here concerns three cases the European Court of Justice (the “ECJ”) had to deal with very recently<sup>4</sup> and where the main issue regarded the meaning of the words ‘issuing judicial authority’ under Article 6(1) of the above-mentioned Framework Decision. More specifically, the ECJ had to assess whether this expression is an autonomous term of EU law and under what circumstances a national authority issuing a EAW may be considered as a ‘judicial authority’.

## II. The Relevant Law

Article 47 of the Charter of Fundamental Freedoms of the EU states that everyone whose rights and freedoms, as guaranteed by the law of the Union, are violated, has the right to an effective remedy before a tribunal. More specifically, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law and everyone has the possibility of being advised, defended, and represented.

ertà, sicurezza e giustizia dell'Unione europea: principi fondamentali e tutela dei diritti, 2007, *Valsamis Mitsilegas*, The Transformation of Criminal Law in the Area of Freedom, Security and Justice, Yearbook of European Law 2007, p. 1 et seq., *J. Monar (ed.)*, The Institutional Dimension of the European Union's Area of Freedom, Security and Justice, 2010, *C. Eckes, T. Konstadinides*, Crime within the Area of Freedom, Security and Justice: A European Public Order, 2011.

- 2 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002 L 190/1.
- 3 On the EAW, see generally *S. Alegre, M. Leaf*, Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – The European Arrest Warrant, *European Law Review* 2004, p. 200 et seq., *J. Komárek*, European Constitutionalism and the European Arrest Warrant: In Search of the Limits of “Contrapunctual Principles”, *Common Market Law Review* 2007, p. 9 et seq., *Massimo Fichera*, The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?, *European Law Journal* 2008, p. 70 et seq., *Libor Klimek*, European Arrest Warrant, 2015. On the principle of mutual recognition, see generally *Mar Jimeno-Bulnes*, European Judicial Cooperation in Criminal Matters 2003, p. 614 et seq., *Valsamis Mitsilegas*, The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU, *Common Market Law Review* 2006, p. 1277 et seq.
- 4 *European Court of Justice (ECJ)* 10.11.2016, case C-452/16 PPU (*Poltorak*), [2016] published in the electronic Reports of Cases, *European Court of Justice (ECJ)* 10.11.2016, case C-453/16 PPU (*Özçelik*), [2016] published in the electronic Reports of Cases, *European Court of Justice (ECJ)* 10.11.2016, case C-477/16 PPU (*Kovalkovas*), [2016] published in the electronic Reports of Cases.

Pursuant to Article 1 of Framework Decision 2002/584/JHA, the EAW is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order. The Member States must execute any EAW on the basis of the principle of mutual recognition and in accordance with the provisions of the Framework Decision, which does not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

Under Article 6 of the Framework Decision, the issuing judicial authority is the judicial authority of the issuing Member State which is competent to issue a EAW by virtue of the law of that State, while the executing judicial authority is the judicial authority of the executing Member State, which is competent to execute the EAW by virtue of the law of that State. The Member States must inform the General Secretariat of the Council of the competent judicial authorities under their laws.

As provided for in Article 7(1)(2) of the Framework Decision, the Member States may designate a central authority or, when their legal systems so provide, more than one central authority to assist the competent judicial authorities. If it is necessary as a result of the organisation of their internal judicial systems, they may make their central authorities responsible for the administrative transmission and reception of EAWs, as well as for all other official correspondence.

Pursuant to Article 8(1)(c) of the Framework Decision, the EAW must contain evidence of an enforceable judgement, an arrest warrant, or any other enforceable judicial decision having the same effect.

### *III. The Facts and the Questions referred to the ECJ*

For what concerns *Poltorak*, the Swedish National Police Board (the “SNPB”) had issued a EAW for the arrest and surrender of Mr Poltorak, who at the time was held in a detention centre in the Netherlands. Some questions were referred to the ECJ by the Amsterdam Court of First Instance in order to ascertain whether the SNPB was a judicial authority within the meaning of Article 6(1) of Framework Decision 2002/584/JHA, which can issue a judicial decision within the meaning of Article 1(1) of the same Framework Decision.

In *Özcelik*, the Veszprém District Court (Hungary) issued a EAW requesting the surrender of a Turkish national that was held at a detention centre in the Netherlands. The basis of this EAW was a national arrest warrant issued by the police and confirmed by a Public Prosecutor's Office. The Amsterdam Court of First Instance asked the Hungarian authorities for clarification concerning the role played by the Public Prosecutor's Office in the procedure, especially with regard to its independence of the executive, the validation of warrants issued by the police, and the criteria followed for that purpose. The answers did not convince the Dutch court, which decided to stay the

proceedings and refer some questions to the ECJ in order to determine what a 'judicial decision' within the meaning of Article 8(1)(c) of the Framework Decision is.

As far as *Kovalkovas*, a EAW was issued by the Ministry of Justice of the Republic of Lithuania, concerning the arrest and surrender of a Lithuanian national being held in a detention centre in the Netherlands. The Amsterdam Court of First Instance referred some questions to the ECJ for a preliminary ruling in order to assess whether the Ministry of Justice may be considered as a judicial authority within the meaning of Article 6(1) of Framework Decision 2002/584/JHA, and the EAW it had issued was a judicial decision within the meaning of Article 1(1) of the same Framework Decision.

#### *IV. The Opinions of Advocate General Campos Sánchez-Bordona*

For what concerns the *Poltorak* case, Advocate General ("AG") Campos Sánchez-Bordona highlighted that neither Article 6(1), nor Article 1(1) of the Framework Decision make any reference to national law for the purpose of determining their meaning and scope. As such, the expressions 'judicial authority' and 'judicial decision' are autonomous terms of EU law that must be given a uniform interpretation within the EU territory. This makes it possible to ensure both uniform application of EU law and the principle of equality.<sup>5</sup>

For what concerns the main questions, the AG proposed a re-wording, underlying that the term that really required clarification was that of 'judicial authority'. In fact, if the SNPB were not a judicial authority, it could not issue a judicial decision.<sup>6</sup> Provided that there is no definition of 'judicial authority' in the text of the Framework Decision, AG Campos Sánchez-Bordona stated that it would be necessary to adhere to the usual criteria of interpretation of the ECJ, meaning the literal meaning of the words, their context, and their objectives.<sup>7</sup>

So, taking into account the literal meaning of the words, an authority is "an entity which exercises control in some sphere of public life, because it has been allocated powers and has the legal capacity to do so", while a judicial authority is an authority that belongs to the administration of justice.<sup>8</sup>

For what concerns the context, the AG considered that Article 6 and Article 7 of the Framework Decision outline the EAW institutional architecture which is based on the

5 See the Opinion presented by AG Campos Sánchez-Bordona in *ECJ, Poltorak* (fn 4), margin no 27-29. In this regard, see *European Court of Justice* (ECJ) 28.7.2016, case C-294/16 PPU (*J.Z.*), [2016] published in the electronic Reports of Cases, margin no 35, and *European Court of Justice* (ECJ) 14.11.2013, case C-60/12 (*Balázs*), [2013] published in the electronic Reports of Cases, margin no 24-32.

6 See the Opinion presented by AG Campos Sánchez-Bordona in *ECJ, Poltorak* (fn 4), margin no 33-34.

7 See the Opinion presented by AG Campos Sánchez-Bordona in *ECJ, Poltorak* (fn 4), margin no 36.

8 See the Opinion presented by AG Campos Sánchez-Bordona in *ECJ, Poltorak* (fn 4), margin no 39.

different roles played by authorities judicial in nature and central authorities administrative in nature.<sup>9</sup>

With reference to the objectives, the EAW must be regarded as a new, simplified, and more effective system for the surrender of persons convicted or suspected of having infringed criminal law. In this regard, the dialogue between judicial authorities that share similar constitutional features and ensure respect for fundamental rights and freedoms, is key to the objective set for the EU to become an area of freedom, security, and justice by basing itself on the high degree of confidence which should exist between the Member States.<sup>10</sup>

Furthermore, one should consider the legal basis of Framework Decision 2002/584/JHA, that is to say Article 31(1)(a) and (b) of the former Treaty on European Union. Under these provisions, the common action on judicial cooperation in criminal matters included facilitating and accelerating cooperation “between competent ministries and judicial or equivalent authorities of the Member States”. However, under Article 82(1)(d) TFEU, the mention of the ministries has been removed.<sup>11</sup>

As such, the SPNB forms part of the police and its decisions are not taken over by any judge. It would be possible to consider the Swedish system consistent with the Framework Decision if two requirements were met: “(a) the SPNB would have to act by mandate and under the supervision of a judicial authority, within the meaning of Article 6 of the Framework Decision; and (b) it could not have discretionary powers or a margin of appreciation concerning the issue of the EAW, and would have to adhere to the mandate received from the judicial authority.”<sup>12</sup> However, the SPNB does not satisfy these requirements, so it cannot be classified as a judicial authority. As a consequence, a EAW issued by the SPNB is not a judicial decision.<sup>13</sup>

As far as the same issues concerned the *Özçelik* case and the *Kovalkovas* case, AG Campos Sánchez-Bordona merely referred to the Opinion he had presented in *Poltorak*.<sup>14</sup> With specific regard to *Özçelik*, the AG stressed that the participation of the Public Prosecutor’s Office in the investigation and in the criminal proceedings is at the discretion of the legal order of each Member State. It may be, therefore, that the Public Prosecutor’s Office is an authority responsible for administering criminal jus-

9 See the Opinion presented by AG Campos Sánchez-Bordona in *ECJ, Poltorak* (fn 4), margin no 42-48.

10 See the Opinion presented by AG Campos Sánchez-Bordona in *ECJ, Poltorak* (fn 4), margin no 49-50.

11 See the Opinion presented by AG Campos Sánchez-Bordona in *ECJ, Poltorak* (fn 4), margin no 52.

12 See the Opinion presented by AG Campos Sánchez-Bordona in *ECJ, Poltorak* (fn 4), margin no 60.

13 See the Opinion presented by AG Campos Sánchez-Bordona in *ECJ, Poltorak* (fn 4), margin no 67.

14 See the Opinion presented by AG Campos Sánchez-Bordona in *ECJ, Özçelik* (fn 4), margin no 29-30, 38 and the Opinion presented by Campos Sánchez-Bordona in *ECJ, Kovalkovas* (fn 4), margin no 33-34 with regard to the expressions ‘judicial authority’ and ‘judicial decision’ as autonomous terms of EU law and the criteria to ascertain whether a national authority is judicial in nature.

tice in the national legal system concerned.<sup>15</sup> This is how the Hungarian criminal procedure system works so that a national arrest warrant, issued by a police authority and confirmed by the Public Prosecutor's Office, may actually be classified as a 'judicial decision', within the meaning of Article 8(1)(c), in order to serve as a basis for a EAW.<sup>16</sup>

In the *Kovalkovas* case, the AG was of the view that the Ministry of Justice cannot be classified as a judicial authority in that it is a political body.<sup>17</sup> As he had done in the Opinion he presented in *Poltorak*, AG Campos Sánchez-Bordona expressed the idea that the Lithuanian system could comply with the Framework Decision if the Lithuanian Ministry of Justice would have to act by mandate and under the supervision of a judicial authority, within the meaning of Article 6 of the Framework Decision, could not have discretionary powers or a margin of appreciation concerning the issue of the EAW, and would have to adhere to the mandate received from the judicial authority.<sup>18</sup> Given that the Ministry is not subject to the mandate and control of a judicial authority, then the Lithuanian system is not consistent with the system outlined in the Framework Decision.<sup>19</sup> Therefore, the Ministry of Justice cannot be classed as a judicial authority and the EAW it issued did not constitute a judicial decision.

## V. *The judgements*

In *Poltorak*, the ECJ held that although Article 6(1) of the Framework Decision refers to the law of the Member States, that reference is limited to designating the judicial authority with the competence to issue the EAW. As a consequence, that reference does not concern the definition of the term 'judicial authority' which requires an autonomous and uniform interpretation throughout the EU.<sup>20</sup>

For what concerns the meaning of the words 'judicial authority', the Court stressed that they are not limited to designating only the judges or courts of a Member State, but may extend to the authorities required to participate in administering justice. However, they cannot be interpreted as also covering the police services of a Member State.<sup>21</sup> In fact, judicial authorities are those authorities that administer justice, while administrative authorities or police authorities are within the province of the executive.

15 See the Opinion presented by AG Campos Sánchez-Bordona in *ECJ*, *Özcelik* (fn 4), margin no 49, 53. See also *European Court of Justice* (ECJ) 29.6.2016, case C-486/14 (*Kossowski*), [2016] not yet published, margin no 39.

16 See the Opinion presented by AG Campos Sánchez-Bordona in *ECJ*, *Özcelik* (fn 4), margin no 65.

17 See the Opinion presented by AG Campos Sánchez-Bordona in *ECJ*, *Kovalkovas* (fn 4), margin no 32.

18 See the Opinion presented by AG Campos Sánchez-Bordona in *ECJ*, *Kovalkovas* (fn 4), margin no 36.

19 See the Opinion presented by AG Campos Sánchez-Bordona in *ECJ*, *Kovalkovas* (fn 4), margin no 41, 45.

20 See *ECJ*, *Poltorak* (fn 4), margin no 30-32. See also *ECJ*, *Kovalkovas* (fn 4), margin no 32-33.

21 See *ECJ*, *Poltorak* (fn 4), margin no 33-34.

As such, it may be that the central police services of a Member State are covered by the term 'central authority', but they cannot be regarded as judicial authorities.<sup>22</sup> In this regard, one should remember that the surrender procedure between Member States is carried out under judicial supervision in order to ensure that decisions relating to EAWs fully respect all the guarantees appropriate for decisions of such a kind.<sup>23</sup>

One should also consider that judicial cooperation in criminal matters, as laid down in Article 31 of the former Treaty on the European Union, must be distinguished from police cooperation, as laid down in Article 30 of the same treaty, and remember that Framework Decision 2002/584/JHA seeks to facilitate judicial cooperation.<sup>24</sup>

Therefore, the term 'judicial authority' is an autonomous concept of EU law and the Framework Decision must be interpreted as meaning that a police service, such as the SNPB, is not covered by the term 'issuing judicial authority'. Thus, the EAW issued by that police service was not a 'judicial decision'.<sup>25</sup>

In *Özçelik*, the ECJ held that the confirmation, by the Public Prosecutor's Office, of the national arrest warrant issued by the police is a legal act by which the Public Prosecutor's Office verifies and validates said arrest warrant. As a consequence, the Public Prosecutor's Office must be regarded as the authority responsible for the issue of the national arrest warrant and it is of no relevance the fact that the national arrest warrant has been issued by the police in the first place.<sup>26</sup>

Thus, when it comes to the EAW, the term 'judicial authority' must be interpreted as referring to the Member State authorities that administer criminal justice and the term 'judicial decision' must be referred to decisions of the Member State authorities that administer criminal justice. Therefore, the decision of such an authority must be regarded as a judicial decision, within the meaning of Article 8(1)(c) of the Framework Decision. As a consequence, a confirmation by the Public Prosecutor's Office of a national arrest warrant issued by a police service in connection with criminal proceedings constitutes a 'judicial decision', within the meaning of Article 8(1)(c).<sup>27</sup>

In *Kovalkovas*, the Court confirmed *Poltorak*: More specifically, they considered that designating an organ of the executive as an issuing judicial authority would run counter to the objectives pursued by the EAW system in that the Framework Decision aims to prevent the involvement of decision-making organs in the procedure for surrendering wanted persons.<sup>28</sup> Of course, a Ministry may be covered by the term 'central authority', within the meaning of Article 7 of the Framework Decision,<sup>29</sup> but it is generally accepted that the term 'judiciary' does not cover the ministries of Member States

22 See *ECJ, Poltorak* (fn 4), margin no 35, 42.

23 See *ECJ, Poltorak* (fn 4), margin no 39.

24 See *ECJ, Poltorak* (fn 4), margin no 25, 37. See Article 82 TFEU and Article 85 TFEU.

25 See *ECJ, Poltorak* (fn 4), margin no 59.

26 See *ECJ, Özçelik* (fn 4), margin no 30.

27 See *ECJ, Özçelik* (fn 4), margin no 33-38.

28 See *ECJ, Kovalkovas* (fn 4), margin no 40-42.

29 See *ECJ, Kovalkovas* (fn 4), margin no 39.

in that they are organs of the executive branch.<sup>30</sup> In light of this, the Court held that it is precluded to designate an organ of the executive as an issuing judicial authority and an arrest warrant issued by it cannot be regarded as a judicial decision.<sup>31</sup>

## VI. *Some Thoughts on What Constitutes a Judicial Authority under EU Law.*

The ECJ has already dealt with the issue of what constitutes a judicial authority: Truth be told, judicial cooperation in criminal matters is not the first law field that has given rise to this conundrum.

In fact, one should consider the text of Article 267 TFEU, concerning the preliminary reference procedure. This Article refers to courts and tribunals of the Member States that are either entitled or obligated – depending on the case – to raise a reference on the interpretation or the validity of EU law.<sup>32</sup>

The Treaties do not define what a national court or tribunal is for the purposes of the preliminary reference but over time, the ECJ has listed the features they must have to be classified as such. According to the Court, these bodies must be established by law, have a permanent existence, exercise binding jurisdiction, apply the rule of law, be independent, and their procedure must be *inter partes*. Furthermore, there must be a case pending before the court and it must be called upon to give judgment in proceedings that lead to a decision judicial in nature.<sup>33</sup>

The ideas expressed by the Court in the above-mentioned cases may therefore be considered consistent with this settled case-law insofar as they focus on the function of the national judicial authority and the link between said authority and the administration of justice.

However, one must remember that when it comes to the preliminary reference procedure, the Court has held that a reference cannot be made to it by a Public Prosecu-

30 See *ECJ, Kovalkovas* (fn 4), margin no 35-36.

31 See *ECJ, Kovalkovas* (fn 4), margin no 48.

32 On the preliminary reference procedure, see generally *T. Tridimas*, Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure, *Common Market Law Review* 2003, p. 9 et seq., *J. Komárek*, In the Court(s) We Trust? On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure, *European Law Review* 2007, p. 467 et seq., *A. Barav*, Études sur le renvoi préjudiciel dans le droit de l'Union européenne, 2011.

33 See for instance *European Court of Justice (ECJ) 17.9.1997, case C-54/96 (Dorsch Consult)*, [1997] ECR I-4961, margin no 23, *European Court of Justice (ECJ) 12.11.1998, case C-134/97 (Victoria Film)*, [1998] ECR I-7023, margin no 14, *European Court of Justice (ECJ) 21.3.2000, joined cases C-110/98 to C-147/98 (Gabalfrisa and Others)*, [2000] ECR I-1577, margin no 33, *European Court of Justice (ECJ) 30.11.2000, case C-195/98 (Österreichischer Gewerkschaftsbund)*, [2000] ECR I-10497, margin no 24, *European Court of Justice (ECJ) 30.5.2002, case C-516/99 (Schmid)*, [2002] ECR I-4573, margin no 34, and *European Court of Justice (ECJ) 31.5.2005, case C-53/03 (Syfait and Others)*, [2005] ECR I-4638, margin no 29.



tor's Office in that it does not rule on an issue in complete independence. Actually, its task is to submit the issue for consideration by the competent judicial body.<sup>34</sup>

It does not, therefore, come as a surprise that in the Opinion he presented in *Özçelik*, AG Campos Sánchez-Bordona pointed out that to consider the Public Prosecutor's Office a 'judicial authority' for the purposes of Framework Decision 2002/584/JHA does not mean to equate it to a judicial body that is authorized to refer a question to the ECJ for a preliminary ruling. In this regard, he wrote:

Apart from the fact that not everything 'legal' has to be, strictly speaking, 'judicial', the bodies, which may or must refer questions for a preliminary ruling are those which have to settle the disputes brought before them, for which they require the assistance of the Court of Justice. The Public Prosecutor's Office is not one of those bodies, but it may nevertheless be accorded the status of 'judicial authority', in accordance with the Framework Decision, if the national legislation allows it to adopt national arrest warrants. These, therefore, may be classified as arrest warrants or executive judicial decisions having the same force, for the purposes of Article 8(1)(c) of the Framework Decision.<sup>35</sup>

So, one must keep the two mechanisms – meaning, the EAW and the preliminary reference procedure – separated and the Public Prosecutor's Office, while being a judicial authority for the purposes of the former, cannot be considered a judicial authority for the purposes of the latter.

## VII. Conclusion

As is well-known, one of the features that makes extradition slow and uncertain is that the process is not only legal, but also political in that the consent of both courts and the executive is required. This explains why extradition is said to follow a request model, while surrender under the EAW follows an order model.<sup>36</sup> In fact, the EAW has made it possible for the transfer of suspects and convicted persons between EU Member States to become a purely legal matter.<sup>37</sup>

Thus, the interpretation provided by the ECJ in *Poltorak*, *Özçelik*, and *Kovalkovas* is consistent with the EAW mechanism's features but also – and most importantly – with the need to reach a balance between two needs: On the one hand, one must consider the need to swiftly surrender suspect and convicted persons; on the other hand, one must not forget the need to guarantee real and effective judicial protection as provided for in Article 47 of the Charter of Fundamental Rights of the EU.

34 See *European Court of Justice* (ECJ) 12.12.1996, joined cases C-74/95 and C-129/95 (X), [1996] ECR I-6629, margin no 18-19.

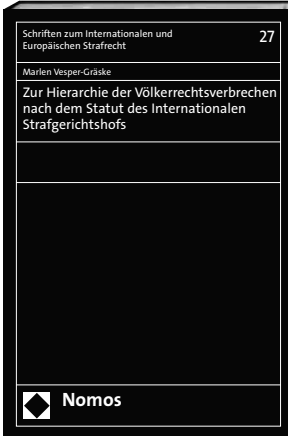
35 See the Opinion presented by AG Campos Sánchez-Bordona in *ECJ, Özçelik* (fn 4), margin no 62.

36 See A. Klip, *European Criminal Law: An Integrative Approach*, 2016, p. 281 et seq.

37 See J. R. Spencer, *EU Criminal Law*, in: C. Barnard/S. Peers (eds.), *European Union Law*, 2014, p. 767-768.

Only genuine judicial authority can ensure that this balance is achieved and preserved from any form of political – meaning, non-legal – influence. As such, driven by a sort of Montesquieuian spirit, the Court has confirmed the fundamental principle of separation of powers for the purposes of the EAW and this should lead to a reinforcement of the mechanism resulting from Framework Decision 2002/584/JHA.

For what concerns the functioning of the preliminary reference procedure, as stated above, AG Campos Sánchez-Bordona spent a few words denying that the Public Prosecutor's Office is authorized to refer a question to the ECJ for a preliminary ruling, and in this regard he confirmed what the Court had previously held. Anyway, one should be aware that the Court itself did not consider the issue at all, not even by way of *obiter dictum*. Of course, this does not equate to expressly admitting that Public Prosecutor's Offices may refer questions to the ECJ: The *Özcelik* case concerned the EAW, not the preliminary reference mechanism. However, given the express recognition of the nature of judicial authority to the Public Prosecutor's Office for the purposes of the EAW, and given that only judicial authorities are allowed to refer questions to the ECJ for a preliminary ruling, the silence kept by the judges on this topic may have left room for an element of inconsistency in the whole system.



## Zur Hierarchie der Völkerrechtsverbrechen nach dem Statut des Internationalen Strafgerichtshofs

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