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**The CJEU's Evolving
Perspective on
Judicial Oversight: A
Critical Analysis of
the EIO Case-law**

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Assumption: *The question of whether the prosecutor is independent of the government appears to have lost substantial impact on the CJEU's judgments regarding the necessity for a measure to be issued or reviewed by a “judicial authority”*

1) Substantiate the assumption:

- EAW case-law
- EIO case-law
- Data retention

2) The ongoing factors driving the trend:

- Emphasis on PPO's function and proportionality
- Deferential approach
- Facts at stake in EIO case-law

3) Critical evaluation and concerns in EIO proceedings:

- Traditional role of judicial review
- Powers and role of prosecutors
- A deferential approach?
- Risk of a deadlock

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EAW case-law | Prosecutor's independence at the center of the scene

C-452/16 PPU, 10.11.2016, Poltorak

35. The judiciary must be distinguished, in accordance with the principle of the **separation of powers** which characterises the operation of the **rule of law**, from the executive

C-477/16 PPU, 10.11.2016, Kovalkovas

42. Designating an organ of the executive as EAW issuing JA would accord the executive a decision-making power in the procedure, which the FD aims to prevent
44. It does not provide the executing JA with an assurance that the issue of that EAW has undergone judicial approval

GC, C-508/18, 27.5.2019, OG and PI

74. **The independence of the issuing JA requires that there are statutory rules and an institutional framework capable of guaranteeing that it is not exposed to any risk of being subject, inter alia, to an instruction in a specific case from the executive.**

75. **In addition**, where the law of the issuing MS confers the competence to issue a EAW on an authority which, whilst participating in the administration of justice in that Member State, is not itself a court, the decision to issue such an EAW and, inter alia, its proportionality must be capable of being the subject, in the MS, of court proceedings which meet in full the requirements inherent in effective judicial protection

GC, C-509/18, 27.5.2019, PF

51. The issuing JA must be capable of exercising its responsibilities objectively, taking into account all incriminatory and exculpatory evidence, without being exposed to the risk that its decision-making power be subject to external directions or instructions, in particular from the executive, such that it is beyond doubt that the decision to issue a EAW does not lie with the executive

EAW case-law | Something changed

C-489/19 PPU, 9.10.2019, NJ

EAWs are valid even if issued by prosecutors exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case, from the executive, if they are subject to endorsement by a court which reviews independently and objectively, having access to the entire criminal file, the conditions of issue and the proportionality of arrest warrants

C-566/19 PPU, 12.12.2019, JR and YC

C-625/19 PPU, 12.12.2019, XD

C-627/19 PPU, 12.12.2019, ZB

Independent prosecutors still need Court's judicial review

GC, C-510/19, 24.11.2020, C-510/19, AZ

An **exception** for executing JA

OG and PI and PF most quoted judgments...

EIO case-law | GC, C-584/19, 8.12.2020, A and Others



Prosecutors can issue an EIO, regardless of any relationship of legal subordination that might exist between them and the executive and of their exposure to the risk of being directly or indirectly subject to orders or individual instructions from the executive

Data retention | Judicial oversight

GC, C-746/18, 2.3.2021, H.K.

- Access to digital data requires **prior review by a court** or an independent administrative body
- Where that review is carried out by a different body, it must have a status enabling it to act objectively and impartially and must be free from any external influence
- **A prosecutor which is independent from the executive does not meet the requirement, since it is in charge of conducting the investigation and bringing the public prosecution**

C-724/19, 16.12.2021, HP

Prosecutors cannot issue, during the pre-trial stage of criminal proceedings, an EIO, seeking to obtain traffic and location data associated with telecommunications, where, in a similar domestic case, the judge has exclusive competence to adopt an investigative measure seeking access to such data

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The focus on prosecutor's function and proportionality

AG Campos Sánchez Bordona in OG and PI

66. Effective judicial protection is, in essence, the protection provided by a judge

67. **Prosecutors** are not, like the judge, subject only to the law, **are not independent to the same degree as judges**, and are always subject to the final decision of the court

71. **Only the judge or court is capable of properly assessing the proportionality of issuing an EAW**

82. **The level of independence required depends on the activity in question**

AG Campos Sánchez Bordona in PF

26. For the prosecutor, **the legal system is a means to achieve an end**

29. Classifying the prosecutor as an independent institution does not make it equivalent to the judiciary

31. **Its independence cannot be confused with judicial independence**

AG Pitruzzella in H.K.

110. From **a functional point of view**, where national law provides that the authority which carries out a prior review of the proportionality of the access, is the prosecutor, the latter must, in this particular regard, demonstrate a degree of independence similar to that of a court

GC, H.K.

54. The requirement of independence means that the authority must **be a third party in relation to the authority which requests access to the data**, in order that the former is able to carry out the review objectively and impartially and free from any external influence. Thus, **it must not be involved in the conduct of the criminal investigation in question and have a neutral stance *vis-à-vis* the parties to the criminal proceedings**

The need for clarification of different features of judges



INDEPENDENCE

Freedom from the influence of superiors (internal independence) or other powers of the State (external independence)



IMPARTIALITY

Duty to treat the parties equally and objectively



NEUTRALITY

Equal distance from the parties



Never applies to prosecutors

Effects of the emphasis on **neutrality** and **proportionality** | Judicial review or nothing

EAW

Personal liberty is at stake



Judicial review always needed

DATA RETENTION

Assessment on a measure determining a serious interference in the right to private life



Judicial review always needed

EIO

No judicial review for textual reasons and the nature of the requested measures



NO requirement for independence of the prosecutor

Two more reasons against a call for PPO's independence in EIO case-law

A deferential approach

AG Campos Sánchez-Bordona in *A and Others*

91. To ask for the independence of the prosecutor issuing an EIO would necessitate a redefinition of the distribution of powers between the issuing authorities in the Member States, which would lead to distortion of the intentions of the EU legislature, which was seeking to respect the institutional and procedural systems of the Member States

The facts at stake

GC, *A and Others*

- Request to send copies of bank statements
- Court authorisation needed in the executing Member State

C-16/22 2.3.2023, *Staatsanwaltschaft Graz v MS*

- Request to collect from a bank documents relating to bank accounts
- Court authorisation needed in the executing Member State

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Critical evaluation and concerns in EIO proceedings



TRADITIONAL ROLE OF JUDICIAL REVIEW

Separation of powers

Has it lost importance?



POWERS AND ROLE OF PROSECUTORS

Prosecutors tend to become increasingly powerful

Prosecutors must assess the proportionality of their acts



A DEFERENTIAL APPROACH?

Risk of undermining **delicate balances at the investigative stage** (adversarial vs inquisitorial systems)



RISK OF A DEADLOCK

C-66/20, 2.9.2021, XK, denying the PPO as executing authority the right to make a reference for a preliminary ruling, creates a **blind spot** (AG Campos Sánchez-Bordona, 61)

**“Plus on transfère de
pouvoirs au parquet,
plus son
indépendance
devient nécessaire”**

—Mireille Delmas-Marty

CJEU Case-law and AG Opinions

CJEU, 10 November 2016, C-477/16 PPU, Kovalkovas

CJEU, 10 November 2016, C-452/16 PPU, Poltorak

CJEU, GC, 27 May 2019, C-508/18, OG (Parquet de Lübeck) (*OG and PI*)

CJEU, GC, 27 May 2019, C-509/18, PF (Prosecutor General of Lithuania)

CJEU, 9 October 2019, C-489/19 PPU, NJ (Parquet de Vienne)

CJEU, 12 December 2019, C-566/19 PPU, Parquet général du Grand-Duché de Luxembourg and de Tours (*JR and YC*)

CJEU, 12 December 2019, C-625/19 PPU, Openbaar Ministerie (Swedish Public Prosecutor's Office) (*XD*)

CJEU, 12 December 2019, C-627/19 PPU, Openbaar Ministerie (Public Prosecutor, Brussels) (*ZB*)

CJEU, GC, 24 November 2020, C-510/19, Openbaar Ministerie (Faux en écritures) (*AZ*)

CJEU, GC, 8 December 2020, C-584/19, Staatsanwaltschaft Wien (Ordres de virement falsifiés) (*A and Others*)

CJEU, GC, 2 March 2021, C-746/18, Prokuratuur (Conditions d'accès aux données relatives aux communications électroniques) (*H.K.*)

CJEU, 2 September 2021, C-66/20, XK

CJEU, 16 December 2021, C-724/19, Spetsializirana prokuratura and à la localization (*HP*)

CJEU, 2 March 2023, C-16/22, Staatsanwaltschaft Graz (Service des affaires fiscales pénales de Düsseldorf) (*Staatsanwaltschaft Graz v MS*)

Opinion of AG Campos Sánchez-Bordona, 30 April 2019, *OG and PI*, ECLI:EU:C:2019:337

Opinion of AG Campos Sánchez-Bordona, 30 April 2019, PF, ECLI:EU:C:2019:338

Opinion of AG Pitruzzella, 21 January 2020, H.K., ECLI:EU:C:2020:18

Opinion of AG Campos Sánchez-Bordona, 16 July 2020, *A and Others*, ECLI:EU:C:2020:587

Opinion of AG Campos Sánchez-Bordona, 11 March 2021, XK, ECLI:EU:C:2021:200

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- L. Cecchetti, *MAE e tutela giurisdizionale effettiva: alcune precisazioni in relazione al sistema austriaco*, in *Cass. pen.*, 2020, 784-797
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- T. Harkin, *The case law of the Court of Justice of the European Union on 'judicial authority' and issuing European arrest warrants*, in *New Journal of European Criminal Law*, 2021, n. 4, 508-530
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Thank you for your attention!

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