ERA
Academy of European Law

YOUNG LAWYERS CONTEST 2020

220DT36 Trier, 13-14 Februrary 2020

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With the support of the Justice Programme
2014-2020 of the European Union

EU Law in Practice
Young Lawyers Contest 2020

Trier, 13-14 February 2020

Professional Training (CPD) www.era.int

List of Jurors

Antigoni Alexandropoulou
Chair of the Company Law Committee of the CCBE; Lawyer in Private Practice; Assistant Professor of Corporate and Commercial Law, European University Cyprus, Nicosia

Wojciech Bagiński
Chairman of the International Relations Committee, Warsaw Bar Association

Wendy De Bondt
Assistant Professor of Criminal Law and Rights of the Child, Faculty of Law and Criminology, Department of Criminology, Criminal Law and Social Law, University of Ghent

Gráinne Gilmore
Barrister, Member of the Bar of Ireland, Dublin

Vanessa Knapp OBE
Independent Consultant; Visiting Professor, Queen Mary University of London

Łukasz Lasek
Partner, Wardyński & Partners Law Firm, Warsaw

Key topics

- Criminal law and public procurement
- Fundamental rights
- Company law
- Data protection

Language
English

Event number
220DT36

Organiser
Florence Hartmann-Vareilles (ERA)

Partner
Warsaw Bar Association (Izba Adwokacka w Warszawie)

Supporting organisation
Council of Bars and Law Societies of Europe (CCBE)

Co-funded by the Justice Programme of the European Union 2014-2020

Young Lawyers Contest 2020

Thursday, 13 February 2020

08:30 Arrival and registration of participants

08:45 **Opening and introduction to the rules of the contest**
Florence Hartmann-Vareilles, Head of Business Law Section, ERA
Room: K1

I. FIRST ROUND: ORAL DEFENSE SESSION OF THE WRITTEN REPORT

09:00 **Teams' briefing before the oral defence of their written reports**

Team 1: *Room B1*
Team 2: *Room B2*
Team 3: *Room B3*
Team 4: *Room B4*
Team 5: *Room K2*
Team 6: *Room A 104*
Team 7: *Room A 105*
Team 8: *Room A 106*
Team 9: *Helena*
Team 10: *Gratianus*

09:30 **Defence of teams' written reports (four parallel sessions)**
Each team is given 20 minutes in order to present its written report

Team 9 and Team 2: *Room K1*
Topic: Criminal law and public procurement
Jury: *Antigoni Alexandropoulou and Wojciech Bagiński*

Team 10, Team 5 and Team 7: *Room K2*
Topic: Criminal law and public procurement
Jury: *Wendy de Bondt*

Team 6, Team 4 and Team 3: *Room B3*
Topic: Data protection
Jury: *Gráinne Gilmore*

Team 1 and Team 8: *Room B4*
Topic: Data protection
Jury: *Vanessa Knapp and Łukasz Lasek*

10:30 **Questions by Teams and Jury**
Each Team is given 10 minutes in order to ask 1 to 2 questions to the other team(s), before the Jury is invited to ask questions to the different Teams.

11:15 Coffee break

11:30 **Answers by Teams**
Teams have 10 minutes each in order to answer the questions

12:00 **Wrap-up session with Jury and Teams: what went right and wrong?**
Jury comments on Teams' presentations and gives tips and tricks

12:30 **Deliberation of the Jury**
Room K1

13:00 Lunch

II. SECOND ROUND: NEGOTIATION EXERCISE

14:00 **Preparation of negotiation exercise**

Team 1: *Room B1*
Team 2: *Room B2*
Team 3: *Room B3*
Team 4: *Room B4*
Team 5: *Room K2*
Team 6: *Room A104*
Team 7: *Room A 105*
Team 8: *Room A 106*
Team 9: *Helena*
Team 10: *Gratianus*

About the contest

The competition will bring together future lawyers from different European countries at a time when they are undergoing entry-level training to enable them to share common values, exchange new experiences and discuss fresh perspectives in areas of shared interest. Building a genuine European legal culture and fostering valuable synergies among legal professionals from different Member States will contribute to strengthening the area of freedom, security and justice in the EU.

Eligible contestants

Trainee lawyers or, in jurisdictions in which initial training does not include a period of legal practice, newly qualified lawyers.

Key competences

- Identify and deal with European issues in legal practice
- Develop skills necessary to work successfully with colleagues from other Member States
- Defend the rule of law through a moot Court on the promotion of European perspectives and values
- Develop critical thinking and communication skills in negotiation

"I strongly recommend to young lawyers and trainee lawyers across Europe to enrol in the next Young Lawyers Contest. It is a great opportunity to meet and work with colleagues from different cultures and backgrounds."
Vincent Berthier-De Bortoli
Member of 2018 winning team

Venue

Academy of European Law
Metzer Allee 4
54295 Trier
Germany

15:00 Coffee Break

15:30 **Oral negotiation**
Each Team is given 20 minutes in order to present its position before the negotiation continues in order to reach an agreement

Team 2 and Team 3: *Room K1*
Jury: *Wojciech Bagiński*

Team 1 against Team 5: *Room K2*
Jury: *Gráinne Gilmore*

Team 4 against Team 9: *Room B1*
Jury: *Łukasz Lasek*

Team 10 against Team 8: *Room B2*
Jury: *Antigoni Alexandropoulou*

Team 6 against Team 7: *Room B3*
Jury: *Wendy de Bondt*

17:30 **Wrap-up session with the Jury: what went right and wrong?**
Room K1

18:00 End of first day and jury deliberation

19:30 Dinner at Brasserie

Friday, 14 February 2020

08:45 **Announcement of the two finalist Teams for the final round**
Room K1

III. THIRD ROUND: MOOT COURT

9:00 **Teams' Briefing before pleading**
The two winning Teams prepare their pleading. Meanwhile the 8 other Teams chose their counterpart Team, so as to be regrouped in 4 teams (2x4 teams). Each of these 4 teams are invited to prepare one question for the two winning teams (the same question should be asked to both finalist teams).

First team: *Room B1*
Second team: *Room B2*
Jury and main room for pleading: *Room K1*
All the other Teams: *Room K2*

10:00 **Oral Pleading by Team X**

10:30 **Oral Pleading by Team Y**

11:00 **Questions by Jury and by the other Teams**

11:30 **Response by Team Y**

11:45 **Response by Team X**

12:00 **Wrap up session with the Jury: what went right and wrong?**

12:15 **Deliberation by Jury**
Room K2

13:00 **Announcement of winning Team and prize awards**

13:15 Lunch

14:15 End of the Contest

For programme updates: **www.era.int**
Programme may be subject to amendment.

Your contact persons

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Save the date for your colleagues who could fulfil the conditions of participation next year!

Young Lawyers Contest 2021
4-5 February 2021
Registration will be possible between the 10 April and 1July 2020 for this new contest!

e-Learning

The Academy of European Law (ERA) leads the way in the provision of continuous professional training for legal practitioners on EU law. You and your colleagues can benefit from this training direct from your workplace thanks to introductory and specialised e-courses, high-quality e-presentations and interactive live streams.

www.era.int/elearning

This programme has been produced with the financial support of the Justice Programme 2014-2020 of the European Union.

The content of this programme reflects only ERA's view and the Commission is not responsible for any use that may be made of the information it contains.

Dear guests,

We are pleased to welcome you to the
"Young Lawyers Contest 2020 ".
Your contact person is Nathalie Dessert.
Marlene Dietsch at the reception desk on the ground floor in "Building A" is also available to assist you.

We wish you a successful event and a pleasant stay in the ERA Congress Centre!

Forence Hartmann-Vareilles

Europäische Rechtsakademie
Academy of European Law
Académie de Droit Européen
Accademia di Diritto Europeo





Library

The ERA library on the ground floor, which is a European Documentation Centre, will be open throughout your stay in the ERA Conference Centre. Daily newspapers in English, French and German are also available.

WiFi

During the event, our WiFi system is available for participants free of charge. If you do not have your own WiFi compatible equipment, there are computers with internet access in the library.

Printer

A printer is available in the foyer. You may print directly from your computer.

Coffee breaks / lunch

Coffee will be available in the foyer of the main conference room.

For lunch times, please consult the "Young Lawyers Contest Programme".

Dinner

Dinner on 13. February will be at 19h30 at the "Brasserie" Fleischstr. 12, 54290 Trier.

Shuttle Service

The taxi service "Finkelgruens Taxi" provides transport to Luxembourg airport and railway station, as well as to Frankfurt Hahn airport. Please contact the check-in desk and the booking will be made for you.

Bus connections

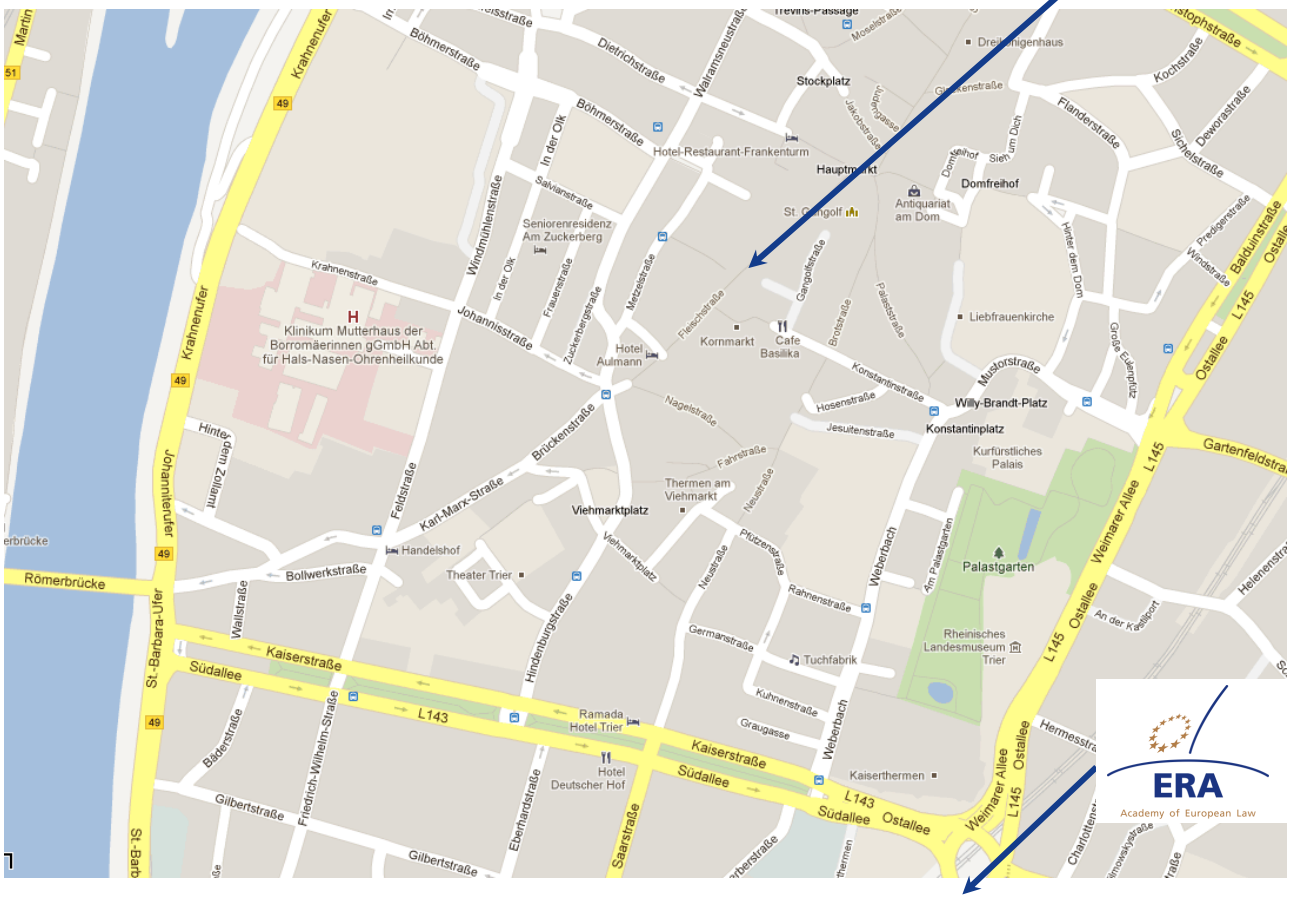
Bus route 8 (or 82) will take you into town (bus stop "Treveris"). For onward travel to the main station change to bus number 3 (or 83) or number 40.

Thursday, 13 February 2020

Today's evening programme:

19:30 Dinner at the restaurant "BRASSERIE"

BRASSERIE
FLEISCHSTRAßE 12
54290 TRIER



YOUNG LAWYERS CONTEST 2020

Final list of Candidates

1.	Linas Mockevicius (LIT)
2.	Olga Vinieri (GRC)
3.	Maja Karczewska (POL)
4.	Elisabeth Dewulf (BEL)
5.	Sven Cordes (GER)
6.	Andrew Clarke (IRL)
7.	Jana Brezovicova (SVK)
8.	Clement Claesens (BEL)
9.	Maryna Kapustina (SLO)
10.	Sofia Stigmar (SWE)
11.	Gierada Adam (POL)
12.	Quentin Pelletier (FRA)
13.	Andrei Diaconescu (ROU)
14.	Miguela Caldeira (PRT)
15.	Olivia Vansteelant (BEL)
16.	Anu Vuori (FIN)
17.	Ognyan Yankov (BGR)
18.	Jaroslaw Pogorzelski (POL)
19.	Andrea Sorge (ITA)
20.	Jakub Zabraniak (POL)
21.	Päivi Heinonen (FIN)
22.	Cristina Valcauan (ROU)
23.	Sarah Emmes (GER)
24.	Manon Ombredane (BEL)
25.	Tudor Grigorean (ROU)
26.	Roskana Maria Strubel (POL)
27.	Patricia Scholczova (SVK)
28.	Oonagh O'Sullivan (IRL)
29.	Nelson Briou (BEL)
30.	Marek Ballaun (POL)
31.	Milos Pupik (CZE)

Composition of the teams

TEAMS	MEMBERS	AREA OF EU LAW FOR THE WRITTEN REPORT
Team 1	Linas Mockevicius (LIT) Olga Vinieri (GRC) Maja Karczewska (POL)	Data Protection & Fundamental rights
Team 2	Elisabeth Dewulf (BEL) Sven Cordes (GER) Andrew Clarke (IRL) Jana Brezovicova (SVK)	Criminal Law & Public Procurement
Team 3	Clement Claesens (BEL) Maryna Kapustina (SLO)	Data Protection & Fundamental Rights

	Sofia Stigmar (SWE) Gierada Adam (POL)	
Team 4	Quentin Pelletier (FRA) Andrei Diaconescu (ROU) Miguela Caldeira (PRT)	Data Protection & Fundamental Rights
Team 5	Olivia Vansteelant (BEL) Anu Vuori (FIN) Ognyan Yankov (BGR)	Criminal Law & Public Procurement
Team 6	Jaroslaw Pogorzelski (POL) Andrea Sorge (ITA)	Data Protection & Fundamental Rights
Team 7	Jakub Zabraniak (POL) Päivi Heinonen (FIN) Cristina Valcauan (ROU)	Criminal Law & Public Procurement
Team 8	Sarah Emmes (GER) Manon Ombredane (BEL) Tudor Grigorean (ROU)	Data Protection & Fundamental Rights
Team 9	Roskana Maria Strubel (POL) Patricia Scholczova (SVK) Oonagh O'Sullivan (IRL)	Criminal Law & Public Procurement
Team 10	Nelson Briou (BEL) Marek Ballaun (POL) Milos Pupik (CZE)	Criminal Law & Public Procurement

Topics for the Young Lawyers Contest 2019-2020

One topic to be chosen among the following two questions

Question 1: *How would prior criminal records of applicants in a public procurement procedure need to be taken into account in light of the diversity in criminal law provisions and the equal treatment principle – generally enshrined in European Union law and specifically applicable in public procurement procedures?*

Because the scope of the offences varies between member states, it is possible to convict someone in one member state for behavior that is not an offence in another member state. The European courts have consistently held that the difference in criminalization is not a problem, because there is no rule or legal basis that says that there needs to be equal treatment between citizens on that level.
However, things might change if you use those different convictions in a procedure which does require equal treatment. Public procurement procedures are an example thereof. According to the public procurement directive (2014/24/EU) you need to treat all candidates equal (see clause 90) and you cannot contract with a candidate that has been convicted for the listed offences (see Art. 57). The list included refers to specific types of offences that may be expected to be criminalized in all EU member states. Would it be possible to extent this list to include other convictions? Would it be possible to exclude candidates for a form of corruption e.g. beyond what is included in the listed convention? Or would the equal treatment principle not allow that? How can a contracting authority take account of those prior convictions given the diversity in criminal law whilst still ensuring equal treatment of the candidates?

Question 2:

"The Working Party recognizes that the concrete application of the concepts of data controller and data processor is becoming increasingly complex. This is mostly due to the increasing complexity of the environment in which these concepts are used, and in particular due to a growing tendency, both in the private and in the public sector, towards organisational differentiation, in combination with the development of ICT and globalisation, in a way that may give rise to new and difficult issues and may sometimes result in a lower level of protection afforded to data subjects." [Opinion 1/2010 of the Article 29 Data Protection Working Party]

Provide a critical legal analysis of how this complexity has been addressed in case-law of the CJEU concerning the concept of "controller". In circumstances of joint controllership, is the legal framework for distribution of responsibilities between controllers (as it arises from the General Data Protection Regulation and case-law of the CJEU) sufficiently clear and is it capable of ensuring complete protection of the rights of data subjects?

YOUNG LAWYERS CONTEST 2019/2020

EU Law in Practice

WRITTEN REPORT

Team 1

Olga Vinieri

Maja Karczewska

Linas Mockevičius

2020

Introduction

The distinction between a data "controller" and a data "processor" constitutes one of the most central and controversial issues in the context of the EU Regulation 679/2016 (hereinafter referred to as the "**Regulation**" or "**GDPR**"), since the characterization of a party as a controller or a processor of personal data also determines its legal responsibility for complying with the respective obligations under data protection law.

The definition of a controller according to the GDPR is the same as in the Directive 95/46 (hereinafter referred to as the "**Directive**"). The main aspects of such a definition can be identified as follows: (1) the personal aspect ("a natural or legal person, public authority, agency or any other body"), (2) the pluralistic control ("which alone or jointly with other"), and (3) the essential element to distinguish the controller from other actors ("determines the purposes and means of the processing of personal data"). In addition, the Regulation introduces the new Article regarding joint controllership which refers to a situation where two or more controllers jointly determine the purposes and means of data processing. However, it is not a prerequisite that the joint controllers should participate equally in the processing activities, a fact that the Opinion 1/2010 of the Article 29 Data Protection Working Party expressly clarified.

The main differentiating factor between a controller and a processor is that the latter processes personal data on behalf of the controller. This means that the controller (being a separate entity of that of the processor) is the one determining the purposes and means of personal data and has the overall responsibility for supervising the activities of the processor and that these activities comply with data protection legislation as well as with its own instructions.

Although the aforementioned distinction is clearly established in the Regulation, experience has proven that establishing whether a party is a controller, or a processor is a particularly complicated and challenging legal issue. In particular, some of the factors blurring the lines between the concepts of the controller and the processor can be identified in the increasing use of cloud computing and web 2.0 and 3.0 models, the complexity and diversity in terms of collaborative structures between businesses as well as globalisation and cross-border transfer of personal data, especially through the use of internet and social networks.

The CJEU has actively contributed in providing guidance regarding the distinction between the concepts of the controller and the processor as well as in identifying circumstances where the parties engaged in data processing fulfil the criteria to be deemed as joint controllers. Although the decisions

of the CJEU examined the relevant cases in light of the Directive, they should also be considered as relevant and applicable under the GDPR, since there are no significant differences in terms of the definitions of the controller and processor. In addition, although the concept of joint controllership has been first introduced in the context of the GDPR, the CJEU case law provides useful guidance in relation to the interpretation of such concept and its practical application.

II. The view of the CJEU with regards to the complexity of the concept of 'controller'

The Opinion 1/2010 of the Article 29 Data Protection Working Party provided some useful clarifications regarding the distinction between the concepts of the controller and the processor many of them were affirmed and further analysed in the CJEU case law. More specifically, the CJEU dealt with the aforementioned distinction and interpreted data protection law with a view to ensuring the effective and complete protection of the data subjects.

Notably, the CJEU interpreted the concept of the controller in a broad sense by expressly stating in its reasoning that a party needs not to have access to the personal data processed in order to be considered as a controller. The imbalance in degree of controllership as well the context in which the data processing takes place are not critical factors for the characterization of a party as a controller, as soon as this party determines the purposes of such data processing. Indeed, this broad interpretation ensures that data controllers do not escape their responsibilities and associated liability in circumstances where multiple parties are engaged in data processing, in a way that it is not clear which specific party has complete and direct control over the whole procedure.

Furthermore, the CJEU adopted a pragmatic approach as regards the identification of the controller in its case law by highlighting that the factor of factual influence plays a central role in the context of data protection law. Although the parties' agreements regarding the allocation of their responsibilities are relevant for the purposes of the characterization of the controller, it is crucial that the party that retains effective control over the processing of personal data is also identified as a processor. This interpretation is especially helpful in circumstances where there is an imbalance in terms of negotiation power between the parties engaged in the procedure of data processing, so that the responsibility is not artificially placed on the party with less negotiation power by virtue of an arrangement between them.

The following analysis of the CJEU decisions specifically addresses the issue of the distinction between the controller and the processor and provide significant guidance for the interpretation of the two concepts.

Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González (C-131/12)

The CJEU's judgment issued in 2014 is of great importance primarily because, trying to face the new challenges for personal data protection in the digital world, it has laid the foundations for the 'right to be forgotten', currently explicitly regulated in the GDPR. However, it was not the case in 2014, when the Directive was still in force.

The case concerned a Spanish citizen, who in 2010 raised a complaint against a nationwide newspaper La Vanguardia, as well as Google Spain and Google Inc. (hereinafter: 'Google') with the Spanish data protection supervisory authority. The complaint was related to the fact that at that time by entering the complainant's name in the Google search engine, an internet user would obtain access to articles published in the internet by the newspaper in 1998, which provided information on a real-estate auction carried out due to proceedings for the recovery of the social security debts of the complainant. In the complainant's opinion there was no justification to maintain the articles in question available to the public, as the proceedings concerning him had been already finished for several years. Therefore, he requested both removing or altering the articles by the newspaper so that the personal information relating to him no longer appeared or using by the newspaper certain tools made available by search engines in order to protect the data by the newspaper (the so-called 'exclusion protocols'), and removing or concealing the personal data from the search results by Google.

The CJEU decided that a data subject exercising his rights granted by the Directive (i.e. right to rectification, erasure or blocking of data the processing of which does not comply with the provisions of the Directive and the data subject's right to object) could request the operator of a search engine to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person, also in case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful. The operator of a search engine can deny removing the links only in case there are some specific circumstances, such as the role played by the data subject in public life, which may justify the need to maintain the information in order to make it available to the public. It should be stressed out, however, that according to CJUE it is the public interest consisting in the society's right to be informed that may override in specific cases the data subject's rights, and not the economic interests of the operator of a search engine.

The above conclusion could not be reached without determining previously that the operator of a search engine is a controller in the meaning of the Directive, which was one of the questions referred for a preliminary ruling in this case. Although this issue currently does not raise big controversies, in 2014 it seemed much less clear.

During the proceedings, Google endeavoured to prove that it should not be regarded as controller of the personal data, which can be found on third parties' web pages displayed in the list of search results. According to its argumentation, Google as an operator of a search engine does not distinguish between personal data and other information available on such web pages, which prevents the CJEU from classifying its activities as 'data processing'. Moreover, even in case its activities shall be regarded as 'data processing', Google cannot be considered to be the controller, as, unlike the publishers of websites, it has no knowledge of those data and does not exercise control over it.

The CJEU did not follow the Google position. According to the CJEU, the actions performed by Google, such as searching automatically, constantly and systematically for information published or placed on the interned by third parties, indicating it, storing it temporarily and finally, disclosing it to the public, should be regarded as 'data processing' in the meaning of the Directive, which defined 'processing of personal data' as 'any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction'. In this respect, the CJEU found irrelevant for the case the fact that Google processes also other type of information (i.e. not 'personal') and does not perform any selection between this information and the personal data. It should be also regarded as irrelevant that the personal data in question has already been published on the internet and was not subsequently altered by Google, as the definition of processing of personal data quoted above mentioned alteration of personal data as one of the data processing activities, and did not require that each data processing activity would involve such action.

Google shall be regarded as the controller with regard to the abovementioned data processing activities, as it determines their purposes and means, which stays in line with the controller's definition included in the Directive ('the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data'). In the view of the CJEU, adopting a different position could undermine the Directive's objective, which was 'effective and complete protection of data subjects'.

Determining that an operator of a search engine should be considered as the controller, independent from the publishers of websites, led to acknowledging that in some cases even if the content published on a particular website has been published lawfully, there may be need to request from the operator of a search engine removal of the search results. In this regard, the CJEU has taken into account the scale and impact of search engines' activities with respect to dissemination of information (which cannot be compared with individual websites) and the fact that the search engines permit the internet users who search for information about a particular individual to establish a more or less detailed profile of such individual. Therefore, the CJEU has noticed a greater potential of the search engines to affect the fundamental rights to privacy and to the protection of personal data pertaining to the data subject, which, consequently, may impact the scope of their responsibilities.

In this case, the CJEU has considered also the matter of 'establishment' under the EU law. It decided that even though the Google search engine, which is responsible for the data processing activities, i.e. Google Search, is operated by Google Inc., the parent company of the Google group with a seat in the United States, the Spanish legislation transposing the Directive shall be applied due to the activity of its subsidiary - Google Spain.

According to the Directive, the national legislation adopting the Directive shall be applied when, among others, the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State. Google Spain's activities focus on promoting and selling, as a commercial agent, the advertising space offered by Google Search on the territory of Spain. As the business activity of Google Spain supports the profitability of Google Inc.'s services, and both the search results containing personal data and the advertising linked to the search terms are displayed on the same webpage, the CJEU determined that the activities of both companies are 'inextricably linked'. Therefore, as the Directive requires the processing to be carried out 'in the context of the establishment's activities' and does not require the establishment to perform the processing activities itself, in this case the Spanish legislation implementing the Directive shall be applied, which leads to confirming the Google's responsibility under the Directive with regard to the functioning of its search engine in Spain. This approach was later confirmed by the CJUE in the Google LLC v. Commission nationale de l'informatique et des libertés (CNIL) case (*C-507/17*).

Tietosuojavaltuutettu v Jehovan todistajat — uskonnollinen yhdyskunta (C-25/17)

In the Jehovah witness case (C-25/17) the CJEU was faced with the task of analysing door-to-door data collection by preachers from the Jehovah's Witness Community and determining among others

whether a religious community may be regarded as a controller, jointly with its members who engage in preaching in the context of Directive. It should be noted that although this case is devoid of any complicated technological issues, it raised important questions regarding the interpretation of data protection legislation and the responsibilities of the persons/entities that are engaged in activities that may be considered as processing of personal data.

As aforementioned, the case concerns Jehovah's Witnesses, a religious community that preaches door-to-door. The members of the religious community take notes during their door-to-door preaching and they collect data that may consist of the name and addresses of persons contacted, as well as information on their religious beliefs and their family circumstances. Those data are collected as a memory aid and in order to be retrieved for any subsequent visit without the knowledge or consent of the persons concerned.

As background information it should also be mentioned that main proceedings took place in Finland. More specifically, at the request of the Data Protection Supervisor the Finnish Data Protection Board adopted a decision by virtue of which the Jehovah's Witnesses Community was prohibited from collecting or processing personal data in the course of door-to-door preaching unless the legal requirements (set out in Finnish data protection law that transposed the Directive) for processing such data were observed. In particular, the Finnish Data Protection Board considered that (a) the collection of personal data carried out by members of the Jehovah's Witnesses Community constituted processing of personal data and (b) that both the Jehovah's Witnesses Community and its members were both data controllers.

However, this decision was subsequently annulled on the grounds that the Jehovah's Witnesses Community was not a controller of personal data within the meaning of the Finnish data protection law and that its activity did not constitute unlawful processing of such data. Finally, the Data Protection Supervisor challenged that judgment before the Supreme Administrative Court of Finland (Korkein hallinto-oikeus) which made a request for a preliminary ruling to the CJEU.

According to the referring court, the case required consideration with respect to the following issues: Firstly the scope of application of the Directive and more specifically whether the activity of door-to-door preaching could be considered an exclusively personal or household activity and thereby outside the scope of application of the Directive. Secondly, whether the definition of a "filing system" as referred to in the Directive should also include the personal data collected otherwise than by automatic means in connection with the door-to-door preaching described above. In turn, questions

three and four, which were relevant if the Directive was to be applied, concerned the definition of controller and if the Jehovah's Witnesses Community should be regarded as a controller, taking into consideration the allegations of the religious community that only the individual members who engage in preaching have access to the data that they gather.

The CJEU after deciding that the activity of door-to-door preaching falls within the scope of the Directive, since it does not constitute a purely personal or household activity, went on to say that "through a broad definition of the concept of 'controller', effective and complete protection of persons can be ensured." In addition, the court highlighted that the definition given of the controller as given by the Directive (i.e. any natural or legal person who alone or jointly with others determines the purposes and means of the processing of personal data) does not require that "the determination of the purpose and means of processing must be carried out by the use of written guidelines or instructions from the controller". Finally, the CJEU confirmed that a person may qualify as a controller even if it does not have access to the personal data concerned; it suffices that such person exerts influence over the processing of personal data, for his own purposes, and participates, as a result, in the determination of the purposes and means of that processing.

As a concluding observation, it should be mentioned that although the Jehovah witness case concerned a scenario where the court did not have to address any complex technological issues, it clarified and confirmed important questions regarding the concept of the processor in circumstances where there are multiple participants in the processing of personal data.

Fashion ID GmbH & Co. KG v Verbraucherzentrale NRW eV (C 40/17)

The Fashion ID case reaffirms the broad definition given by the CJEU regarding the concept of the controller. In this decision the court dealt with the issue of who has the responsibility for complying with data protection legislation in the context of embedding third-party features that regularly takes place on websites.

The request for a preliminary ruling has been made in proceedings between Fashion ID GmbH & Co. KG and Verbraucherzentrale NRW eV and concerned the fact that Fashion ID, an online clothing retailer, embedded a social plugin (the Facebook "Like" button) provided by Facebook Ireland Ltd on the website of Fashion ID. The main proceedings of the case in question were initiated in Germany by Verbraucherzentrale NRW, a public-service association tasked with safeguarding the interests of consumers on the ground that the use of that plugin results in a breach of data protection legislation.

In particular, Verbraucherzentrale NRW alleged that such transmission of personal data was made without the prior notification of the data subjects and without the prior consent of them.

The core issue that the CJEU had to deal with is that the embedding of such third-party content allows to transmit to the server of the third-party provider certain personal data in relation to the visitor of the website (namely the IP address of that visitor's computer, as well as the browser's technical data). It should also be noted that in the present case the transmission could take place irrespectively of whether the visitor of the website of Fashion ID is a member of the social network Facebook or has clicked on the Facebook 'Like' button. In this context the CJEU had to address the question whether Fashion ID must be classified as a controller with regard to the data processing taking place, and if so how its obligations as a controller can be fulfilled in accordance with the data protection legislation.

In its ruling the CJEU repeated that the aim of the Directive is to ensure a high level of protection of the fundamental rights and freedoms of natural persons, in particular, their right to privacy, with respect to the processing of personal data. It further stated that the objective of the Directive is to ensure, through a broad definition of the concept of 'controller', effective and complete protection of data subjects. Finally, the CJEU clarified that the processing of personal data may refer to a specific operation or a set of operations, each of which may be related to one of the different stages that the processing of personal data involves.

In view of the aforementioned the CJEU reached the following conclusions:

- By embedding the Facebook 'Like' button on its website, Fashion ID made it possible for Facebook to have access to personal data of its website visitors. This way, Fashion ID exerted a decisive influence over the collection and transmission of such personal data, in the sense that Facebook Ireland would not have access to them without the embedding of the plugin. Fashion ID was deemed therefore to be a controller as regards the personal data of its website visitors which were collected and transmitted to Facebook Ireland.
- It was further mentioned that the fact that Fashion ID did not itself have access to the personal data collected and transmitted to Facebook Ireland does not preclude it from being a controller.
- Notably, it was highlighted that Fashion ID could not be considered as a controller regarding any subsequent operations that Facebook Ireland carries out with respect to the personal data transmitted to the latter. In other words, Fashion ID's liability is limited only to collection and

disclosure by transmission of the data at issue to Facebook Ireland and could not be held liable for any data processing conducted by Facebook Ireland following the transmission.

The Fashion ID case provided useful guidance on the responsibility of operators of websites including links to third-party content and clarified that the liability of such operators is only limited to the operations they control, namely the data that they collect and transmit to third-party providers.

III. Joint controllership - legal evaluation and critical analysis of case law of the Court of Justice of the European Union

1. Joint controllership in the light of GDPR

To begin with, it shall be mentioned that the legal basis of joint controllership is Article 26 of the GDPR. This article is considered as a novelty since the concept of joint controllership was regulated rather vaguely - the Directive 95/46/EC did not have a separate article.

Under the above-mentioned Article 26 of the GDPR, where two or more controllers jointly determine the purposes and means of processing, they shall be joint controllers. This means that the status of joint controllership is only applicable when two or more controllers determine the purposes and means of processing together. In other words, if one of the controllers solely determines the purposes of processing of personal data, such collaboration shall not be considered as joint controllership.

Joint controllership also means that the controllers share the same personal data pool for the same purposes, e. g. their purposes of processing match. This shall not be confused with the situation where two or more controllers use the same personal data pool for different purposes. This is known as the concept of ‘controllers-in-common’.

Further to what has been mentioned, Article 26 not only describes the definition of joint controllership but also sets basic principles under which joint controllers shall operate. For instance, the data controllers are required to sign an agreement in which the responsibilities for complying with the European and national data protection laws, especially with regards to the data subjects’ rights. Joint controllers have a right to designate a contact point towards the execution of data subjects’ rights, nevertheless, the data controllers would remain jointly and severally liable in the light of data subjects’ requests and/or claims.

Article 26 of the GDPR only sets basic guidelines for controllers who tend to determine the purposes and means of processing jointly, without any further guidance related to, for example, controllers’

right to limit their liability or controller's right to conduct an audit to ensure the other controller's compliance with respective laws. Such requirements are not detailed in the legal acts, specifically GDPR, and may cause some discord between the controllers.

2. Legal complexity of the notion of joint controllership in the case-law of the Court of Justice of the European Union

Fashion ID case

Besides what has been mentioned above, the Fashion ID case is also crucial in the light of legal relationship regarding the joint controllership. Not only that, according to the CJEU, Fashion ID is responsible for the collection and transmission to Facebook of the personal data of visitors to its website, such website holds joint responsibility. This means that, with regards to the GDPR provisions, data subjects may execute their rights towards either Facebook or Fashion ID. However, such right of data subjects is limited only with regards to data processing once the personal data is transferred to Facebook. As the Court stated in its decision, 'Fashion ID cannot be considered to be a controller in respect of the operations involving data processing carried out by Facebook Ireland after those data have been transmitted to the latter', as it is rather 'impossible' that Fashion ID has any right or possibility to determine the purposes of personal data processing that is carried out solely by Facebook.

The Court argues that such joint controllership arises from the Company's commercial motives. In other words, CJEU based its conclusion that both Fashion ID and Facebook are joint controllers on the finding that Fashion ID established the Facebook 'Like' button to 'benefit from that commercial advantage', e. g. to advertise its goods. As for the Facebook's purpose of processing of such data, it is worth mentioning that such purpose has not been discussed by the CJEU and therefore it was left for the Oberlandesgericht Düsseldorf, the court that requested for the preliminary reference, to determine the purpose for processing for Facebook in the relationship of joint controllers.

Based on the situation in the case, it seems that Facebook would not have the same commercial purpose of advertising goods of Fashion ID in its network. On the contrary, in the light of joint controllership relations, e. g. when the personal data of data subjects is transferred from Fashion ID website to Facebook, the purpose of Facebook would rather be to advertise its social network.

Having this in mind, it might be considered that Facebook and Fashion ID share different purposes with regards to processing personal data of data subjects who visit the Fashion ID website. This means

that Facebook and Fashion ID do not define the common purposes of processing and therefore they should not have been qualified as joint controllers. Instead, we are of the opinion that the Court could have defined the parties as collaborating controllers who share the same personal data but for different purposes.

Wirtschaftsakademie Schleswig-Holstein GmbH (C-210/16)

Fashion ID decision was by a large part influenced by the Wirtschaftsakademie decision. This is the first data protection-related case after the 25 May 2018 when the GDPR became directly applicable.

Wirtschaftsakademie has a Facebook fan page in which it promotes and provides educational services. However, neither Facebook nor Wirtschaftsakademie informed the followers of the fan page that their personal data was collected by using the cookie technology. The regional data protection authority then ordered Wirtschaftsakademie to deactivate the fan page since it has breached the local data protection laws. The case then went to courts and the Federal Administrative Court of Germany referred to the CJEU several questions related to the interpretation of Directive 95/46/EC.

The court began the interpretation by stating that both the USA Facebook company and its subsidiary in Ireland shall be deemed as controllers in the light of data subjects using Facebook social network since both of these companies 'primarily determine the purposes and means of processing that data'.

Furthermore, the CJEU continues by deciding that Wirtschaftsakademie, as an administrator of the Facebook page, shall also be considered as a controller, jointly with Facebook Ireland (Facebook). The EU's top court further elaborates that even though the data processing is 'essentially carried out by Facebook' by placing cookies and storing the information received from cookies, by creating the fan page, Wirtschaftsakademie 'gives Facebook the opportunity to place cookies on the computer or other device of a person visiting its fan page, whether or not that person has a Facebook account'. Moreover, the Court states that 'the administrator of the fan page can ask for demographic data – and thereby request the processing of that data – concerning its target audience'. This means that Wirtschaftsakademie can receive anonymised data from Facebook regarding the users of the fan page and then benefit from it as such data would allow to tailor the promotion of its products according to the personal data received.

According to the Court, joint controllership does not always mean equal responsibility. The Court further explains that in the joint controllership relations, various controllers 'may be involved at different stages of that processing of personal data and to different degrees', hence, there might be

cases where an inequality of responsibilities might exist. The Article 26 of the GDPR does not elaborate on how the responsibility shall be distributed between joint controllers. This might cause some nuisance in the pre-contractual relations whereas the controllers might not share the same view on the level of responsibility to be assigned to each controller. Additionally, from a technology perspective, without clear rules on establishing the level of responsibility, it is rather complicated to evaluate the respective level applicable to each of controllers as there might be cases where, for example, data controllers might share different views on to what extent should the network operator or the infrastructure holder be responsible.

Both Wirtschaftsakademie and Fashion ID judgements are similar in their nature. Both decisions describe the relationship of joint controllers, whereas one of the parties is Facebook. Also, in both cases, the social network was used for the purpose of commercialization, e. G. in order to improve the promotion of the company's products. Nevertheless, the cases were different to a certain point. In Fashion ID case, only a social network plugin (a Facebook 'Like' button) was used to establish the connection between the joint controllers, in other words, a website was operating separately from the whole social network, whereas in Wirtschaftsakademie, a fan page was established in the Facebook itself. Hence, in the latter case, the connection between the controllers is deemed to be much closer.

Jehovah witness case (C-25/17)

The last case to be discussed in the light of joint controllership is the so-called Jehovah witness case. Further to what has been mentioned above, the CJEU found that the Jehovah's Witnesses Community is a controller (jointly with its members) regarding the personal data collected in the abovementioned manner. More particularly, the CJEU emphasized the following factors and circumstances in order to reach its findings regarding joint controllership:

- The Jehovah's Witnesses Community not only had knowledge on a general level of the fact that such processing is carried out in order to spread its faith, but also organised and coordinated the preaching activities of its members, in particular, by allocating areas of activity between the various members who engage in preaching.
- The congregations of Jehovah's Witnesses Community kept lists of persons who no longer wanted to receive a visit from those data which are transmitted to them by members who engage in preaching.

From the conclusions of CJEU it is seen that the Court has taken a broad approach towards the notion of joint controllership. This might be justified by the fact that the CJEU sees this as an opportunity to

ensure greater protection of data subjects rights. In other words, when there are two controllers who act jointly, according to the GDPR, data subject can execute his or her rights towards any of the joint controllers. As for the responsibility of joint controllers, the Court furthermore elaborated, by reciting the Wirtschaftsakademie case, that 'the existence of joint responsibility does not necessarily imply equal responsibility of the various operators engaged in the processing of personal data'. The CJEU explains that to the opposite of what was mentioned above, 'those operators may be involved at different stages of that processing of personal data and to different degrees, so that the level of responsibility of each of them must be assessed with regard to all the relevant circumstances of the particular case'. The Court, unfortunately, did not provide any guidance on how the level of responsibility should be established. Also, it is not clear how different levels of responsibilities correlate with the Article 26 Para 3 of the GDPR allowing the data subject to execute their rights in respect of and against each of the controllers. No information regarding that was mentioned in the mentioned case-law. Such a situation might create some confusion when data subject decides to use his or her rights enshrined in the GDPR towards the joint controller, but the controller might not be objectively able to respond to data subject's request.

IV. Conclusion

The controller versus processor distinction is one of the most significant and challenging legal issues arising from the data protection legislation, since it determines the parties' respective responsibilities and role in the data processing procedure. It should be noted that after the GDPR entered into force, processors are now obliged to comply with many legal provisions which are also applicable to controllers (e.g. the obligation of processors to safeguard the security of processing activities by implementing appropriate technical and organisational measures, the obligation to keep records of all categories of processing activities, the obligation to appoint a Data Protection Officer in certain circumstances etc.). In this sense it can be argued that although the distinction between the concepts of the controller and the processor still lies at the heart of the data protection legislation, many of the responsibilities set out in GDPR are now common for both controllers and processors.

As analysed above, the CJEU has addressed complex issues regarding the concept of controller, which gradually broadens due to the development of new technologies (as shown in the Google Spain case) as well as allocation of responsibilities between the parties engaged in data processing by interpreting the concept of the processor in a broad sense based on the factual elements or circumstances of each case. In the reasoning of the aforementioned case law it has been specifically highlighted that such a broad interpretation ensures the efficient and complete protection of the rights

of the respective data subjects. Notably, in circumstances where two or more parties jointly determine the purposes and means of processing, the CJEU has clarified that they should be considered as joint controllers, even if their participation in the processing activities is unequal. Again, the purpose of such broad interpretation of the concept of joint controllership is ensuring that the necessary degree of flexibility is provided in order to deal with the data protection reality nowadays.

Similarly, the Regulation has adopted a flexible provision as regards joint controllership (Article 26 of GDPR) according to which the joint controllers are obliged to enter into an arrangement in which their respective responsibilities are specified and allocated. Although this arrangement should be made available to the data subject, it is expressly stated that the latter is able to exercise its rights in respect of and against any of the controllers. This essentially means that even in circumstances where the participation of a joint controller in the data processing procedure is limited or the joint controller does not have access to the data processed, this processor will still be obliged under the GDPR to fulfil the requests of the data subjects (e.g. the processor shall be obliged to provide access to the data subject under Article 15 of GDPR).

Although Article 26 of GDPR regarding joint controllership in conjunction with the relevant case law of the CJEU are structured in a way that is intended to provide efficient and complete protection of data subjects, in practice the existence of joint controllership between parties that exercise unequal control over the processing procedure may result in certain practical obstacles with respect to the exercise of the rights of the data subjects. In other words, the roles and responsibilities of the joint controllers may not grant them the same means of granting data subjects the exercise of their rights as they are provided in the Regulation. It is essential therefore that a significant degree of cooperation is also needed between the joint controllers in order to be able to effectively respond to their responsibilities. Thus, although the current line of reasoning of the CJEU provides effective protection for the rights of data subjects, it remains to be seen how this will adapt in the light of the GDPR.

V. List of references

Case law of the Court of Justice of European Union

1. Case C-131/12. Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González;
2. Case C-210/16. Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH;

3. Case C-25/17. Tietosuojavaltuutettu;
4. Case C-40/17. Fashion ID GmbH & Co.KG v Verbraucherzentrale NRW eV;
5. Case (C-507/17). Google LLC v. Commission nationale de l'informatique et des libertés (CNIL).

Legal acts of the European Union

6. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data;
7. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance).

Additional materials

8. Fundamental Rights Agency. Handbook on European data protection law. 2018 edition;
9. European Data Protection Supervisor. Guidelines on the concepts of controller, processor and joint controllership under Regulation (EU) 2018/1725;
10. Article 29 Data Protection Working Party. Opinion 1/2010 on the concepts of "controller" and "processor".

YOUNG LAWYERS CONTEST
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The consideration of prior criminal records in public procurement procedure – a challenge for the guarantees of the equal treatment principle

- question 1 -

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I. Introduction

In our written report, we decided to deal with the first question regarding the consideration of prior criminal records of applicants in a public procurement procedure in the light of diversity in criminal law provisions among European Union (hereinafter referred to as "***EU***") Member States and the equal treatment principle. The only way how can a contracting authority collide with the equal treatment principle in this regard is that the candidate will be excluded from the public procurement procedure, based on the assessment of prior criminal convictions in a way that is inconsistent for all candidates. Simply put, an example of a discriminatory situation is when a contracting authority requires a clear criminal record of candidates and it excludes candidates from other Member States, who were convicted for offenses which are not an offense in the Member State of the contracting authority.

Formally, the report is divided into five chapters. The first chapter is the introduction, which provides the readers with a brief overview and the structure of the report. The second chapter deals with the exclusion grounds from public procurement procedure, as established in Article 57 of the Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (hereinafter referred to as "***Directive 2014/24***"). This chapter covers different but intertwined issues – the mandatory and discretionary exclusion grounds, the possibility to extent the list of mandatory exclusion grounds and self-cleaning mechanism.

The third chapter contains the exclusion for a non-listed prior convictions of the applicants in the public procurement procedure and is divided into three sub-chapters. The first covers the general possibility of this exclusion, the second elaborates the equal treatment principle and the third describes the country specific approached towards such exclusions, while focusing on the four countries of the authors – namely Belgium, Germany, Ireland and Slovakia.

The fourth chapter aims at provision of guidelines for taking into account the prior non-listed convictions of the applicants in the public procurement selection process. This chapter mostly provides authors´ own suggestion and ideas on how to proceed in the situations of having a candidate with prior criminal convictions (pursuant to the legislation of another Member State) in the public procurement procedure. Due regard was paid to ensure the equal treatment principle while creating own suggestions.

The fifth chapter is conclusion, which provides clear and concise summary of the report as well as presentation of authors´ own thoughts on the relevant issues, even though these are presented throughout the whole report. The conclusions reached in this report are based on a detailed research of all specific issues and the discussion of the authors.

II. Exclusion grounds from the public procurement procedure

Exclusion grounds from public procurement procedure are established in Article 57 of Directive 2014/24 (hereinafter referred to as "***Art. 57***"). Section 1 of Art. 57 contains the mandatory exclusion grounds, whereas Section 4 of Art. 57 contains a list of grounds for exclusion, which contracting authorities can use, but are not required to do so (discretionary exclusion grounds). Furthermore, Section 6 of Art. 57 establishes rules on self-cleaning to reverse an exclusion. In the following, these grounds for exclusion will be explained with the focus on criminal records.

1. Mandatory exclusion grounds

Mandatory exclusions grounds protect the integrity of the procurement procedure by ensuring that the economic operators are reliable and have not committed any serious crimes. Taking this into account, the exclusion grounds listed in Art. 57 (1) include the situations when the economic operator has been convicted by a final judgment for one of the following reasons:

(a) participation in a criminal organisation (as defined in Article 2 of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime);

(b) corruption (as defined in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and Article 2(1) of Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, as well as corruption as defined in the national law of the contracting authority or the economic operator);

(c) fraud (within the meaning of Article 1 of the Convention on the protection of the European Communities' financial interests);

(d) terrorist offences or offences linked to terrorist activities (as defined in Articles 1 and 3 of Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism), or inciting or aiding or abetting or attempting to commit an offence (as referred to in Article 4 of that Framework Decision);

(e) money laundering or terrorist financing (as defined in Article 1 of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing);

(f) child labour and other forms of trafficking in human beings (as defined in Article 2 of Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on

preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA).

Looking at the list, it can be seen that almost all offences are based on a unified European definition, only the definition of corruption (b) is being left also to the Member States. The problems arising from this will be discussed later. Even though the provisions of EU directives are not directly applicable in Member States (unless certain requirements are met), all Member States have transposed the mandatory exclusion grounds enshrined in Art. 57 (1) into their national law.

Nevertheless, it is important to emphasize that not only the conviction for above listed criminal offences of economic operator itself leads to its exclusion, but this obligation to exclude an economic operator applies also when its high-ranking representative (such as a member of the administrative, management or supervisory body) was convicted by a final judgment for those criminal offences. The aim of this provision is to keep the possibility to exclude the economic operators for those convictions also in Member States which do not recognize the principle of criminal responsibility of legal persons, and thus is impossible to hold the economic operator itself as a legal person criminally liable for any criminal offenses.

Except from the mandatory exclusion grounds related to the conviction for criminal offences, Art. 57 (2) imposes the obligation on Member States to exclude an economic operator which breached its obligation to pay taxes or social security contributions and this was established by final and binding judicial or administrative decision. Since this mandatory exclusion ground is not relevant to the topic of our report, we decided not to further elaborate it.

It is also important to add that these mandatory exclusion grounds are not absolute, but can be subject to derogations on exceptional basis listed in Art. 57 (3), which include overriding reasons relating to the public interest – e.g. public health or protection of the environment. The example of a situation can be the case mentioned in Recital 100 of Directive 2014/24, where urgently needed vaccines or emergency equipment can only be purchased from an economic operator to whom one of the mandatory grounds for exclusion otherwise applies.

2. Possibility to extent the list of mandatory exclusion grounds

The list of mandatory grounds for exclusion has been updated and adapted to new developments in the EU's political orientations, in particular with regard to the fight against corruption and terrorism[1]. This leads to the question, whether it would be possible to extent the

[1] STEINICKE, M., VESTERDORF, P.L. *EU Public Procurement Law - Brussels Commentary*. 1st edition. Baden-Baden: Nomos Verlagsgesellschaft, 2018. ISBN 978-3-8487-0120-9.

list again to include other convictions. In general, Art. 57 (4) enables Member States (and contracting authorities) to extent the list of mandatory exclusion grounds by adding some or all of the discretionary exclusion grounds into their legislation.

3. Discretionary exclusion grounds

The discretionary grounds established in Art. 57 (4) include the following actions conducted by the economic operators:

(a) violation of applicable obligations in the fields of environmental, social and labour law – the contracting authority can demonstrate this violation by any appropriate means (the term appropriate means is not defined in the Directive 2014/24, therefore contracting authorities need to decide on a case-by-case basis what evidence is sufficient to be considered as appropriate means[2]);

(b) bankruptcy, insolvency, winding-up proceedings and similar procedures – financial capability of the economic operators is crucial to the successful fulfilment of the public contracts (exception for exclusion is when the contracting authority can establish that the economic operator will be able to perform the public contract);

(c) grave professional misconduct – the contracting authority can again demonstrate by appropriate means that the economic operator was guilty of grave professional misconduct, which rendered its integrity questionable; the term was defined in the Court of Justice of the European Union (hereinafter referred to as "***CJEU***") case law as *"all wrongful conduct which has an impact on the professional credibility of the operator at issue"*[3];

(d) distortion of competition – covers the situations where economic operators enter into agreements with the aim to distort the competition (generally known as cartels) and the contracting authority has sufficiently plausible indications thereof;

(e) conflict of interest – as defined by Art. 24 of Directive 2014/24 (persons involved in the decision process of the contracting authority are not perceived as impartial or independent due to their direct or indirect interest in the economic operator) and applied as *ultima ratio*, i.e. where it cannot be effectively remedied by less intrusive measures;

[2] MARIQUE, Y., WAUTERS, K. *EU Directive 2014/24 on public procurement - A new turn for competition in public markets?* 1st edition. Brussels: Larcier, 2016. ISBN 978-2-8044-9045-4.

[3] CJEU. Judgment of the Court (Third Chamber) of 13 December 2012. *Forposta SA, ABC Direct Contact sp. z o.o. v Poczta Polska SA*. (Case C‑ 465/11). EU:C:2012:801.

(f) prior involvement in the preparation of the procurement procedure – as defined by Art. 41 of Directive 2014/24 (e.g. advising the contracting authority or other involvement with the result of distorting competition) and applied as *ultima ratio* measure;

(g) deficiencies in the performance of a public contract – such deficiencies may include e.g. the failure to deliver or perform, significant shortcomings of the product or service delivered, misbehaviour that casts serious doubts as to the reliability of the economic operator (as stated in Recital 101 of Directive 2014/24), and have to lead to the early termination of that prior contract, damages or other comparable sanctions;

(h) misrepresentation of information – covers serious misrepresentation of information required for the verification of the absence of exclusion grounds or the fulfilment of selection criteria, withholding these information or inability to submit supporting documents;

(i) influence on the procurement procedure – by undertaking undue influence the decision-making process of the contracting authority, by obtaining confidential information conferring undue advantage in the procurement procedure, or by providing misleading information that may have a material influence on decisions.

Member States may implement the above mentioned discretionary exclusion grounds into their legislation, as a consequence of what these implemented grounds become in fact mandatory. Deriving from the wording of this provision, Member States also have the possibility to include these grounds into their legislation as discretionary, which means that the contracting authorities have the possibility to choose from these exclusion grounds the ones they want to apply in their procurement procedure. However, this may lead to a problem with the different regulatory frameworks within the EU and consequent fragmentation of the EU public procurement legal norms. Therefore, when applying discretionary exclusion grounds, Member States as well as contracting authorities need to take due account to the general principles of public procurement, such as proportionality, transparency and equal treatment, which are further explained in this report.

4. Self-cleaning

Art. 57 (6) enables economic operators to un-exclude themselves from the application of the above mentioned mandatory and discretionary exclusion grounds by taking certain self-cleansing measures, which can sufficiently demonstrate their reliability. In case that the self-cleaning is sufficient, the respective economic operator need to be admitted by the contracting authority to the procurement procedure. Sufficiency of self-cleaning measures is assessed by the contracting authorities on the basis of the type and gravity of the misconduct leading to an

exclusion ground.[4] It consist of several steps, including compensation for any damage caused by the criminal offence or misconduct, clarification of the facts and circumstances by collaborating with the investigators, and adoption of concrete technical, organisational and personnel measures to prevent further criminal offences or misconduct (e.g. appropriate staff reorganisation measures, the adoption of internal liability and compensation rules, breaking all connections with persons or organisations involved in the misbehaviour, etc.).

In addition, the Directive 2014/24 established in Art. 57 (7) the maximum exclusion period, which can be set by Member States in case that the economic operators do not undertake the self-cleaning measures. First of all, the exclusion period can be set by the final judgment. If this is not the case, the exclusion period is maximum of 5 years from the date of the final judgment conviction for mandatory exclusion grounds listed above, and 3 years from the date of the relevant event for discretionary exclusion grounds listed above.

III. Exclusion for a not-listed prior conviction

After having shown the exclusion grounds in general, it is necessary to have a more detailed examination of the possibilities of excluding an economic operator from the procurement procedure on the basis of a previous conviction which is not explicitly defined in Art. 57 (1).

1. General possibility

Resulting from the above, there are two possibilities to exclude economic operators on the basis of a previous non-defined conviction: firstly, if he has committed a crime of corruption as defined in the national law of the contracting authority or the economic operator (Art. 57(1)b); secondly, if he is guilty of grave professional misconduct, which renders its integrity questionable. However, the discretion of the Member States regarding the definition of 'corruption' and 'grave professional misconduct' might cause problems for the equal treatment principle. The different application of these terms by the Member States and the contracting authorities can lead to a violation of the equal treatment principle. On the other hand, we think that overall, Member States are not restricted to broaden their lists of convictions for criminal offences as exclusion grounds, but they are obliged to include the criminal offences in Art. 57 (1) as mandatory exclusion grounds in their procurement national rules. Additionally, the

[4] STEIN, R. *Exclusions from Public Procurement Procedures in the EU*. Available at: https://informaconnect.com /exclusions-from-public-procurement-procedures-in-the-eu/.

general principles of EU procurement law, mainly the equal treatment principle, must still be observed and complied with.

2. Equal treatment principle

The equal treatment is one of the main principles of EU procurement law. All of them are established in Article 18 of Directive 2014/24 where it is stated that *"contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner"*. Deriving from this provision, we can say that the general principles are proportionality, transparency, equal treatment and non-discrimination.

Article 18 of Directive 2014/24 is in many aspects similar to Article 18 of the Treaty on the Functioning of the European Union (hereinafter referred to as "***TFEU***") as it does not allow discrimination based on nationality. However, this article does not only refer to discrimination based on nationality, but also to any kind of discrimination in connection with a procurement procedure[5]. Subsequently, the principle of equal treatment can be seen as a positive manifestation of the prohibition of discrimination, but with a more extensive understanding and application[6]. It is violated when equal situations are treated unequally, or unequal situations are treated equally.

The equal treatment principle was mentioned for the first time in the *Storebaelt* case[7], from which it can be concluded that the primary function of the principle is to guarantee that the competitive situation between the economic operators is maintained.[8] It is used to interpret Directive 2014/24, supplement specific provisions and to fill in the gaps in the regulations.[9]

a) Corruption

Regarding the corruption issue mentioned above, Directive 2014/24 defers the decision, whether to include a national definition of corruption as a mandatory exclusion ground or not, indirectly to the national level. Economic operators, which have committed corruption as defined in national the law of its Member State, are to be excluded from the procurement procedure. Additionally, all economic operators must be excluded who committed corruption as defined in the national law of the contracting authority. The problem is that a behaviour could

[5] *Supra* No. 1.
[6] *Supra* No. 1.
[7] CJEU. Judgment of the Court of 22 June 1993. *Commission of the European Communities v Kingdom of Denmark*. (Case C-243/89). EU:C:1993:257.
[8] *Ibid.*
[9] *Supra* No. 1.

be interpreted as corruption in one Member State, whereas it would be exempt from criminal prosecution in another. For both conclusion options, it is necessary that the economic operator has *"committed corruption"* which means that he was convicted. If economic operator A and B have done the same action, but A is convicted in his Member State, whereas B is not convicted in his Member State, this leads only to the exclusion of A, even if the behaviour itself should lead to an exclusion in the Member State of the contracting authority. The contracting authority cannot assume that the economic operator has committed an action because this would be a prejudgement and a violation of the rule of law. Therefore, the same behaviour of two different economic operators in two different Member States is treated unequally.

It could be assumed that this constitutes an infringement of the equal treatment principle. However, the principle is only used to interpret Directive 2014/24 or fill in the gaps. It does not override the general construction of the Directive 2014/24 itself which is very unambiguous. Since the unification of criminal law is not on the agenda and area of competence of the EU, the European legislators could only refer to unanimous European definitions for establishing mandatory exclusion grounds. The ground of corruption is an exemption. It refers to the efforts made by the EU to combat corruption in general and especially in cases related to public involvement. Therefore, the European legislators included any kind of corruption in the Directive 2014/24 as an exclusion ground. Having no competence to define corruption, the legislators used the system of mutual recognition, which means that every Member State accepts the definition and application of the laws of the other Member States regarding the issue. This construction itself leads to a different and unequal treatment of certain behaviours, but with the benefit that more behaviours are covered, and more convicted economic operators are excluded than without this provision. Since the provision establishes an unequal treatment by itself, there is no scope of application for the equal treatment principle and economic operators are treated lawfully unequal in this regard.

b) Other criminal records

Even more difficult is the situation of criminal records not related to corruption. As mentioned above, Member States can include a broader list of offences which result in a mandatory exclusion. It is obvious that due to the equal treatment principle, an economic operator must be excluded if he has committed an offense in his home country when the offense is comparable to the one resulting in a mandatory exclusion in the country of the procurement

procedure. A useful indicator for the comparability is the ECRIS-Code[10]. What remains unclear is, however, how offences or criminal record in other Member States must be considered by the contracting authorities within the procurement procedure when they are not regarded as mandatory exclusion grounds.

The definition of *"grave personal misconduct which renders (the economic operators') integrity questionable"* as *"all wrongful conduct which has an impact on the professional credibility of the operator at issue"* is the relevant criteria for this. It allows Member States to take into account all wrongful conduct as long as it is related to the profession of the economic operator, such as some criminal records in other Member States. However, it must be interpreted according to the equal treatment principle and the principle of proportionality to guarantee a fair procurement procedure. The principle of proportionality shall be taken into account within the definition of what is necessary to have an impact on the professional credibility of the economic operator. As a rule, significant impacts are to be assumed if legal interests requiring special protection have been violated in such a way that considerable damage has been or is likely to be caused. Therefore, only criminal records related to the profession and with a certain severity can be considered as meeting the criteria to order to justify an exclusion. However, a concrete individual case examination is always necessary.[11] Consequently, the equal treatment principle binds contracting authorities to exclude economic operators when they have committed a crime which is comparable to a crime that leads to an exclusion in their own jurisdiction.

When there is no comparable offence in the national legislation of the contracting authority, it must examine whether the crime can be considered as wrongful conduct which has an impact on the professional credibility of the economic operator. Presumably, it would be useful to take the legislation of the other Member State into consideration. A mandatory exclusion there should probably be regarded as a discretionary exclusion ground in all Member States. However, the decision is at the discretion of the contracting authority. In any case, it would be useful for the contracting authority to contact an authority in the other Member State.

3. Country specific approaches

Since each Member State has different national legislation, also the rules applicable to the public procurement slightly differ. Nonetheless, under the principle of supremacy of EU law,

[10] Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA, Annex 1.
[11] *Supra* No. 3.

the national rules still have to comply with EU law, particularly with Directive 2014/24. In the following paragraphs, we will explain the different approaches regarding the Member States of the authors, namely Belgium, Germany, Ireland and Slovakia.

a) Belgium

In Belgium, the most recent legislation applying the Directive 2014/24 is the Act of 17 June 2016 on public procurement (hereinafter referred to as "***Belgian PP Act***"). Specifically, the seat of the material exclusion is in the Articles 67 to 70 of this act. Art. 68 contains grounds for exclusion relating to tax and social debts, then Art. 69 contains discretionary exclusion grounds and finally Art. 70 consists of the self-cleaning measures. For this report, we will focus on Art. 67, which contains the mandatory exclusion grounds. Additionally, Art. 67 of the Belgian PP Act involves one more ground compared to the Directive 2014/24, respectively point 7 as *"occupation of illegally staying third-country nationals"*.

The list of grounds for exclusion has considerably grown over the years. Belgian PP Act of 2016 brings two news grounds on which contracting authorities must exclude an economic operator from participation in the procedure: firstly, the candidates who have been the subject of a final conviction for a terrorist offense, an offense linked to terrorist activities or an incitement to commit such an offense, an accessory to or an attempt to commit such an offense, secondly the conviction for criminal offences of child labor or trafficking in human beings.

Furthermore, the candidate or the tenderer who does not meet the obligations relating to the payment of taxes or social security contributions, now constitutes a ground for mandatory exclusion (and no longer a discretionary one). However, the economic operator may comply with these tax and social obligations during the open procedure after having first ascertained that the latter did not meet the requirements. On account of this information, he will then have 5 days to bring evidence of his regularization.

Unlike Art. 57 (7) of the Directive 2014/24, Belgian law provides for the exclusion from participation in public markets by virtue of the mandatory exclusion grounds for a period of 5 years from the date of the final judgment.[12] In conclusion, this 2016 Belgian PP Act replaced the 2006 Belgian PP Act in its entirety and generally we can observe that this most recent 2016 Act faithfully applied the main principles contained in the Directive 2014/24.

12 DURVIAUX, A.-L., *La passation des marchés publics dans la directive 2014/24: amplification et réduction in EU Directive 2014/24 on public procurement*. 1st edition. Brussels: Larcier, 2016.

b) Germany

The German legislation regarding the exclusion grounds can be found in Art. 123 (compulsory grounds for exclusion) and Art. 124 (facultative grounds for exclusion) GWB (Act against Restraints of Competition). Germany has adopted the Directive 2014/24 in this aspect largely without amendments. The offences regarded as corruption are listed in Art. 123 Section 1 Numbers 3, 6-10 GWB. Violations such as unlawful appropriation according to Art. 246 StGB (German Criminal Code); handling stolen goods according to Art. 259 StGB; fraud, especially submission fraud according to Art. 263 StGB; embezzlement and abuse of trust according to Art. 266 StGB; forgery according to Art. 267 StGB, have resulted in the exclusion of economic operators under the ground of grave personal misconduct (Art. 124 (1) – 3 GWB).[13] Since Germany does not recognise the criminal liability of legal persons, the German system refers to management positions in an undertaking (Art. 123 (3) GWB). However, the system of mutual recognition allows the German authorities also to take criminal records of the legal entity in other Member States into account.

c) Ireland

Article 28 TFEU mandates that directives which are issued by Community institutions *"shall be binding, as to the result but shall leave to the national authorities the choice of form and methods"* and thus affords a discretion to Member States as to how directives might be implemented, whether by statute, as we have seen from the examples of Austria and Slovakia, by statutory instrument or otherwise.

In Ireland, Directive 2014/24 is implemented by way of Statutory Instrument. S.I. No. 284/2016 - European Union (Award of Public Authority Contracts) Regulations 2016, (hereinafter referred to as "***the Irish Regulations***") and had the effect of transposing the Directive 2014/24 into Irish law directly.

As such there are minimal changes in terms of phrasing and section identifiers between the Directive 2014/24 and the Irish Regulations. It is noteworthy that while there is a certain amount of format alteration, the substantive part of many provisions is virtually identical.

With respect to the focus of this report, specifically, the exclusion of economic operators based on certain conduct, Ireland's direct transposition of the Directive 2014/24 opens the door to some comment.

[13] PÜNDER, H., SCHELLENBERG, M. *Vergaberecht – Handkommentar*. 3rd edition. Baden-Baden: Nomos, 2016. ISBN 978-3-8487-3043-8.

The manner in which Ireland has transposed this Directive 2014/24 into national law might suggest that there is effectively no margin of appreciation whatsoever in terms of applying the Directive 2014/24. In fact, the Directive 2014/24 itself provides for a derogation from the mandatory exclusion of an economic operator on behalf of a contracting authority at Art. 57 (3). Indeed, given the doctrine enumerated in Article 28 TFEU, it may be the case that a direct transposition of the Directive 2014/24 facilitates any discretion therein to operate to its fullest extent, as opposed to Member States who might opt to temper the discretion in some way.

A derogation from mandatory exclusion of an economic operator can occur where overriding public interest factors such as public health or the protection of the environment are relevant. Ireland has elected to offer such a derogation and has bestowed discretion on contracting authorities. While this discretion to derogate should only be applied on an exceptional basis, the mere existence of such a provision creates a useful margin of appreciation for Member States. While EU law enjoys supremacy over national law in a general sense, it is clear from the existence of this discretion, that the Directive 2014/24 envisages a situation where application across the board would be undesirable and the natural order of supremacy may be compromised in certain circumstances.

Member States may also provide for a derogation where an exclusion would be clearly disproportionate, in particular where only minor amounts of taxes or social security contributions are unpaid or where the economic operator was informed of the exact amounts due following its breach of obligations relating to the payment of taxes or social security contributions at such time that it did not have the possibility of taking measures before the expiration of the deadline for requesting.

As such, and to conclude: while the direct transposition of the Directive 2014/24 into Irish Law by way of Statutory Instrument leaves little room for country specific analysis, it is noteworthy that even an effectively direct transposition contains the flexibility required by Member States in determining whether or not a mandatory exclusion is subject to any margin of appreciation.

d) Slovakia

In the Slovak Republic, public procurement is governed by the Act No. 343/2015 Coll. on public procurement as amended (hereinafter referred to as "***Slovak PP Act***"). Adopted with the aim to comply with new EU public procurement rules and consisting of 190 articles altogether, it consists of the following structure: general provisions (containing definitions of notions used throughout the act), procedural provisions (divided into several parts with regard to various

types of public procurement procedures), administrative provisions (establishing the Office for Public Procurement and setting its rules), control mechanism and final provisions.

In regard to our report, the most important provision of Slovak PP Act is Art. 32 named as *"the personal status"* (of the economic operators) and is included in the part named as *"the selection criteria"*. Art. 32 in fact contains the exclusion grounds and the conditions thereof, similar to Art. 57 of Directive 2014/24. Section 1 contains mandatory exclusion grounds applicable in the Slovak public procurement, letter a) more or less corresponds with the mandatory exclusion grounds established in Art. 57 (1) of Directive 2014/24, i.e. convictions for the criminal offences. The names of the relevant criminal offences were adjusted to the provisions of Act No. 300/2005 Coll. Criminal Code as amended (hereinafter referred to as "***Slovak Criminal Code***") and the list of the offences is broader than in Art. 57 (1) of Directive 2014/24, including all necessary criminal offences under Slovak law to correspond to offences listed in the Art. 57 (1) of Directive 2014/24.

Additionally, this provision includes as mandatory exclusion ground also the final conviction for criminal offence of *"deceitful practices in public procurement and public auction"*, which can be compared with the discretionary exclusion ground under Art. 57 (4) i) of Directive 2014/24. Provision of Art. 32 (1) a) of Slovak PP Act also stipulates that not only the economic operators itself cannot be convicted for listed offences, but also its high-raking officials. In Slovakia, both the criminal liability of natural persons as well as the criminal liability of legal persons is recognized in its legal system, therefore the criterion of non-conviction must be met for both the economic operator and its high-ranking officials.

Pursuant to Art. 32 (2) a) of Slovak PP Act, the fulfilment of this criterion must be proved by submitting the criminal records not older than three months for both the economic operators and the members of its statutory body. In some cases, criminal records of Slovak residents and companies can be obtained by providing the contracting authority with certain information and the contracting authority itself requests the relevant authority to send the criminal records. For foreign residents of companies, it is necessary to submit the criminal records (or similar document issued in the country of residence), together with sworn Slovak translation.

Mandatory exclusion grounds set out in Art. 32 (1) of Slovak PP Act include also the mandatory exclusion grounds of Art. 57 (2) of Directive 2014/24 - breach of obligations of economic operator relating to the payment of taxes or social security contributions, and additionally the payment of health insurance and custom taxes. Other mandatory exclusion grounds include some of the discretionary grounds listed in Art. 57 (4) of Directive 2041/24, namely the exclusion grounds based on violation of applicable obligations in the fields of

environmental, social and labour law; bankruptcy, insolvency, winding-up and similar proceedings; and grave professional misconduct. In addition, some mandatory exclusion grounds listed in the Art. 32 (1) are not listed in the Directive 2014/24, such as not having the authorization to deliver goods, to pursue construction works, to provide services; and having imposed a sanction of restriction of attendance in public procurement procedure by a final decision of relevant authority.

To sum up, the approach of Slovakia towards the exclusion of economic operator on the basis of grounds not listed in Art. 57 of Directive 2014/24 is quite benevolent. All the mandatory exclusion grounds arising from Art. 57 (1) and (2) of Directive 2014/24 were implemented into national law, considering also the discretionary exclusion grounds from Art. 57 (4) a), b), c), and i) as mandatory, and adding some of its own exclusion grounds. The approach of Slovakia is thus a proof of the possibility of extension of exclusion grounds for non-listed criminal offences, while still complying with the equal treatment principle.

IV. Guidelines for consideration of non-listed prior convictions in the procedure

In our report above, we have shown that the contracting authorities must take prior convictions of economic operators in other Member States into account during the procurement procedure. To ensure the equal treatment principle, we deem it appropriate and necessary to evaluate the criminal records based on the following guidelines, providing basic questions to be answered and the following steps.

Firstly, is the criminal offence regarded as corruption in the Member State? If yes, then the economic operator is to be excluded from the procurement process.

Secondly, is the criminal offence comparable to a mandatory exclusion ground under the national legislation of the contracting authority? If yes, then the economic operator is to be excluded from the procurement process.

Thirdly, is the criminal offence comparable to a discretionary exclusion ground under the national legislation of the contracting authority? If yes, then the economic operator is to be excluded from the procurement process. If the criminal offence cannot be compared, the contracting authority has to examine the concrete individual case. Therefore, it should consider how the offence is considered in the Member State of the economic operator and the severity of the offence itself.

Lastly, the contracting authorities also need to take into account the possibilities of self-cleaning under their national legislation, because they also apply to non-domestic economic operators.

V. Conclusion

At the end of our report, we would like to make a comprehensive summary of the report and to offer some concluding remarks. In our report, we tried to provide theoretical as well as practical view on the questions imposed. Firstly, we identified the issue at hand in a way that the only challenge to equal treatment principle regarding prior criminal convictions is the possibility of exclusion of economic operators for this reason. Therefore, we decided to start with the theoretical part containing the EU procurement law regulation of exclusion grounds. The initial chapter was divided according to the types of exclusion grounds – mandatory and discretionary. We took a broader view on those issues in order to provide a complete analysis, which resulted in the description of all exclusion grounds and not only those related to criminal convictions. Since everybody deserves a second chance, even economic operators in public procurement, we decided also to slightly elaborate the self-cleaning measures.

After explaining the theory in general, we decided to examine the practical issues of the matter. At first, we aimed at explaining the possibility of contracting authorities to exclude the economic operators on the basis of prior criminal convictions not listed in Art. 57 of the Directive 2014/24. We concluded that this is generally possible since Art. 57 of Directive 2014/24 represents only the minimum standard which Member States have to comply with. It is not restricted for Member States to extent their lists of prior criminal convictions as mandatory exclusion grounds, as long as they apply those rules equally to all economic operators. Secondly, we examined this issue even more practically – by comparing our theoretical conclusions with the practises of our Member States relating to the exclusion grounds on the basis of prior criminal convictions. Our theory that the extension of the list is possible within the national legislation of Member States, was approved at least for Belgium Germany, Ireland and Slovakia, since all these Member States have extended their list of exclusion grounds compared to the Directive 2014/24.

We dedicated the last part of the report to propose practical guidelines for the Member States on how to deal with those issues. We created those guidelines based on the legal norms, knowledge and conclusions that we acquired throughout writing this report. Nonetheless, we hope that we provided comprehensive overview, useful and reasonable arguments on the question of the consideration of prior criminal records in public procurement procedure as a challenge for the guarantees of the equal treatment principle.

On the rights of data subjects in cases of joint controllership:

Can we read between the blurred lines?

Written report of team 3

ERA Young Lawyers Contest 2019-2020

Adam Gierada

Clément Claesens

Marina Kapustina

Sofia Stigmar

Chosen topic

Team 3 has chosen to answer the Question 2:

The Working Party recognizes that the concrete application of the concepts of data controller and data processor is becoming increasingly complex. This is mostly due to the increasing complexity of the environment in which these concepts are used, and in particular due to a growing tendency, both in the private and in the public sector, towards organisational differentiation, in combination with the development of ICT and globalisation, in a way that may give rise to new and difficult issues and may sometimes result in a lower level of protection afforded to data subjects." [Opinion 1/2010 of the Article 29 Data Protection Working Party]

Provide a critical legal analysis of how this complexity has been addressed in case-law of the CJEU concerning the concept of "controller". In circumstances of joint controllership, is the legal framework for distribution of responsibilities between controllers (as it arises from the General Data Protection Regulation and case-law of the CJEU) sufficiently clear and is it capable of ensuring complete protection of the rights of data subjects?

I. Introduction

1. An increasing number of interactions take place in the online environment. To make these interactions smooth and efficient, businesses and authorities have changed their methods and process more and more personal data. Against this background, there is a need to ensure that companies and authorities do not process data in an unlawful way, and that they preserve data subjects' rights. The behavioural change contributed to a complex regulatory framework, including the General Data Protection Regulation ("**GDPR**")[1]. With the GDPR, which entered into force on the 25th of May 2018, many questions raised regarding the application of concepts of "controller", "processor" and joint controllership, and regarding their respective responsibilities, return to the

[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

forefront of the debate on the adequacy of the current legal framework to ensure complete protection data subjects' rights.

2. While the national courts and authorities are still in the process of interpreting the GDPR, the digital environment keeps developing at a fast pace. For instance, in most cases where a data subject visits a website, many different kinds of data must be processed by different entities to complete the experience of the online visit. The processing of different kinds of data often means there is more than one entity that qualifies as a "controller".

3. Although the judgments analysed below (see no. 10 and following) relate to the Data Protection Directive ("**DPD**")[2], the findings of the Court of Justice of the European Union ("**CJEU**") still remain very relevant to interpret the provisions under the GDPR[3]. This is because the repealed DPD already acknowledged the concept of joint controllership in its definition of "controller"[4].

4. The guidance of the CJEU is welcome, as the GDPR goes further than the DPD by introducing an expanded legal framework for "joint controllership" (e.g. article 26 GDPR)[5], aiming to avoid inconvenient situations for data subjects that may arise in case of independent controllership.[6]

5. The objective of this paper is to provide a critical analysis of the CJEU case law on (joint) controllership (see part. II.3). To ensure a proper understanding of the applied concepts, this analysis is preceded by a legal analysis of the current legal framework (part II.1) as well as a brief summary of the most important arguments of the CJEU (part. II.2).

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[2] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

[3] J. CHEN, L. EDWARDS, L. UQUHART, D. MCAULEY: *Who is Responsible for Data Processing in Smart Homes? Reconsidering Joint Controllership and the Household Exemption*, 18 November 2019, available at SSRN: https://ssrn.com/abstract=3483511 (access on 13 January 2020), p 2 ; J. GLOBOCNIK, *On Joint Controllership for Social Plugins and Other Third-Party Content – A Case Note on the CJEU Decision in Fashion ID*, *International Review of Intellectual Property and Competition Law*, 2019/50, 1034, J. BYRSKI, H. HOSER: *Social media oraz technologie umożliwiające śledzenie użytkowników Internetu a współadministrowanie danymi osobowymi*, Monitor Prawniczy, 2019/21, Dodatek specjalny – Prawo nowych technologii, p 6.

[4] Article 2 (d) of the DPD.

[5] The DPD did not subject "joint controllership" to further regulation as such. See also: M. BASSINI: *Data Controller: A Shifting Paradigm in the Digital Age*, Bocconi Legal Papers, 2019/13, p. 119.

[6] S. HESS: *The GDPR: joint controllership and independent controllership. Should the SWIFT criteria determine the difference?*, Tilburg University, 2019, pp. 1-2.

II. Analysis

II.1 STARTING BLOCKS: THE DPD, THE GDPR AND THE 2010 WORKING PARTY OPINION ON THE CONCEPTS OF "CONTROLLER" AND "PROCESSOR"

6. Legal definitions. Within the current legal framework, the concepts of "controller" and "processor" of data processing are defined in the provisions of the GDPR, pursuant to which, a "controller" is a natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data[7], while a "processor" is a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller.[8] The aforementioned definitions are reproduced in Regulation 2018/1725 of the European Parliament and of the Council of 23 October 2018, OJ L 295/39[9] ("**Regulation (EU) 2018/1725**").

7. Broad interpretation. The current definitions of "controller" and "processor" remain unchanged in substance in comparison to the DPD[10] and derive from the Council of Europe Convention 108[11] ("**Convention 108**"). When studying the development of the definitions of "controller" and "processor" in provisions of international and EU law, two main conclusions can be drawn. Firstly, the EU legislator considered the definitions under the DPD still relevant in 2016 and 2018, as their substance was not amended during the GDPR and Regulation 2018/1725 legislative procedures. Secondly, the definition of "controller" should be understood widely (in order to ensure effective and complete protection of data subjects[12]). There is a sufficient factual

[7] Art. 4 (7) of the GDPR.
[8] Art. 4 (8) of the GDPR.
[9] Art. 3 (8) and (12) of Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 295/39.
[10] Art. 2 (d) and (e) of the DPD.
[11] Art. 2 (d) of Council of Europe Convention 108 opened for signature on 28 Jan 1981, which introduced the static concept of "controller of the file" (*the natural or legal person, public authority, agency or any other body who is competent according to the national law to decide what should be the purpose of the automated data file, which categories of personal data should be stored and which operations should be applied to them*).
[12] Judgment of 13 May 2014, *Google Spain and Google*, C-131/12, para 34; judgment of 5 June 2018, *Wirtschaftsakademie Schleswig-Holstein*, C-210/16, para 28; judgment of 10 July 2018, *Jehovan Todistajat*, C-25/17, para 21 and 66; judgment of 29 July 2019, *Fashion ID*, C-40/17, para 70.

basis to support this broad interpretation, as the definition of "controller" intentionally refers to the dynamic concept of "data processing" and to broad notions of "purposes" and "means" of data processing[13].

8. Opinion 1/2010 and factual approach. The Article 29 Data Protection Working Party ("**WP29**") provided guidance on the concepts of "controller" and "processor" in its Opinion 1/2010 ("**Opinion 1/2010**")[14]. In Opinion 1/2010, WP29 recommends a factual approach, in which the circumstances of each case determine who qualifies as a "controller" or a "processor", irrespective of any contractual designation or formal appointment[15]. Furthermore, it suggests a pragmatic approach, placing *emphasis on discretion in determining purposes and on the latitude in making decisions*[16]. WP29 acknowledges the functional character of the "controller" concept and states that it must serve to allocate responsibilities where the factual influence is[17]. For instance, it is preferable to qualify a company as a "controller", rather than a specific person within that company.[18] Finally, Opinion 1/2010 stresses the importance of joint controllership, specifying that it may occur in various forms, in which the purposes and means of data processing are determined by more than one party[19].

9. Allocating responsibility and liability. The correct application of the concepts of "controller" and "processor" is crucial under the GDPR and the DPD, as it determines who is accountable and liable for the data processing[20]. It also decides on who should be addressed by the data subject wishing to exercise its rights, especially those recognised in Chapter III of the GDPR.

The liability regime for the controllers essentially remains the same in the GDPR as under the DPD, with the exception that the GDPR expressly introduced a joint liability regime in article 82 (4),

[13] By contrast, Convention 108 referred to a static "file" and exhaustively listed the actions which could be performed in relation to data processing by the controller. See also M. CLÉMENT-FONTAINE, *La plasticité de la notion de responsable de traitement*, Rev. Aff. Eur., 2018/1, p. 35-42, who identifies a *generalization* of the data controller qualification.

[14] Opinion 1/2010 on the concepts of "controller" and "processor" adopted on 16 February 2010, WP 169.

[15] *Ibidem*, pp 8-9, 15, 26.

[16] *Ibidem*, p 13.

[17] *Ibidem*, p 11.

[18] *Ibidem*, pp. 9,15.

[19] *Ibidem*, pp. 17-24.

[20] S. HESS: *The GDPR: joint controllership and independent controllership. Should the SWIFT criteria determine the difference?*, Tilburg University, 2019, pp 13-14.

which B. VAN ALSENOY compares to solidarity liability[21]. Equally important is the provision that a controller shall be exempt from (joint) liability if it proves that it is not in any way responsible for the event giving rise to the damage[22].

II.2 LAW IN ACTION: "CONTROLLER" AND JOINT CONTROLLERSHIP CONCEPTS EXPLAINED BY THE CJEU

10. ***Google Spain***. In *Google Spain*[23], the CJEU was given the opportunity to clarify the concept of "controller" in a case of data processing involving the use of modern ICT. Above all, it recognized the principle of a broad definition of "controller", which aims to ensure the effective and complete protection of data subjects[24]. Accordingly, a search engine (Google Search) was recognized as a "controller" which determines the purposes and means of data processing within the framework of its activities[25]. The data processing carried out by Google Search was considered to be *distinct* from the data processing of the publishers of the Internet pages which can be found through the search engine[26].

11. ***Wirtschaftsakademie***. Next, in case C-210/16 (*Wirtschaftsakademie*)[27], the CJEU was asked to clarify the definition of joint controllership relating to the use of social media, i.e. administering a fan page on Facebook. The CJEU firstly approved the principle of a broad definition of "controller"[28] and secondly qualified a Facebook fan page administrator as a joint controller together with the social media operator (Facebook Ireland), notably because it *gives Facebook the opportunity to place cookies on the computer or other device of a person visiting its fan page,*

[21] B. VAN ALSENOY: *Liability under EU Data Protection Law. From Directive 95/46 to the General Data Protection Regulation*, 7 (2016) Jipitec, p 288.
[22] Article 82 (3) of the GDPR.
[23] Case C-131/12 (G*oogle Spain*).
[24] *Ibidem*, para 34.
[25] *Ibidem*, para 33,41.
[26] *Ibidem,* para 35-40.
[27] Case C-210/16 (*Wirtschaftsakademie*).
[28] *Ibidem*, para 56-57 ; C. DUCUING, J. SCHROERS, and E. KINDT: *The Wirtschaftsakademie Fan Page Decision: A Landmark on Joint Controllership – A Challenge for Supervisory Authorities Competences (Case C-210/16 Wirtschaftsakademie Schleswig-Holstein [2018] ECLI:EU:C:2018:388, Judgment of the Court (Grand Chamber) of 5 June 2018)*, European Data Protection Law Review, Vol. 4, Issue 4 (2018), pp. 547-553 (548).

whether or not that person has a Facebook account[29]. In *Wirtschaftsakademie*, the CJEU expanded its established approach and interpreted joint controllership broadly (in order to ensure complete protection of data subjects[30]). The expansion is revealed especially by the finding of the CJEU that a case of joint controllership does not require each of the joint controllers to have access to the processed personal data. As a result, the fact that the fan page administrator only received *anonymous* statistical information was deemed irrelevant[31].

12. *Jehovan todistajat*. All the guidelines of the aforementioned judgment C-210/16 (*Wirtschaftsakademie*) were approved and followed in case C-25/17 (*Jehovan todistajat*)[32], in which the CJEU categorized both a Jehovah's Witnesses community and its members as joint controllers of data processing occurring relating to preaching activities. The CJEU added that determination by the joint controller of the purposes and means of data processing does not have to be carried out by the use of written guidelines or instructions[33].

13. *Fashion ID*. Finally, all the judgments discussed above were approved in case C-40/17 (*Fashion ID*), in which the CJEU recognized both a social media operator (Facebook) and a small online clothing retailer (Fashion ID) embedding a social plugin (the Facebook "like" button) as joint controllers[34].

II.3 THE BLURRED LINES OF THE CONCEPT OF "CONTROLLER" CONCEPT AND ITS IMPLICATIONS FOR DATA SUBJECTS

14. Outlook. Following the successive rulings of the CJEU, it is clear that the outlines of the definition of "controller" are getting blurry, even in the current legal framework. This is particularly the case in situations which may involve joint controllership. It becomes uncertain applies not only

[29] Case C-210/16 (*Wirtschaftsakademie*), para 35-39.
[30] *Ibidem,* para 42.
[31] *Ibidem,* para 38.
[32] Case C-25/17 (*Jehovan todistajat*), para 65-71.
[33] *Ibidem,* para 67.
[34] Case C-40/17 (*Fashion ID*), para 79-85.

how to qualify a situation of possible (joint) controllership, but also how to determine the responsibility (especially liability) of each of joint controllers.

15. Expansive interpretation. Could everybody be a (joint) controller nowadays? In the analysed judgments, the CJEU consistently confirmed and expanded the potential scope of joint controllership. The CJEU uses the factual, pragmatic and functional approach recommended by the WP29 to introduce a very broad understanding of the notion of joint controllership. In particular, it does not require that each of the joint controllers should use a common infrastructure, nor even have access to the processed data[35]. The CJEU continued to push back the boundaries of the broad interpretation of "controller", ruling that website operators should be regarded as "controllers" insofar as they exercise a decisive influence over the purposes and means of the processing of personal data of website visitors. In *Fashion ID,* this was deemed to be the case as the website operator, by integrating the Facebook like button, decided to transfer personal data to a social media platform through a plugin (means) in order to optimise its publicity and thus obtain a commercial advantage[36].

16. Joint controller responsibility. On top of the expanded interpretation of the definition of "controller", the CJEU specified in *Wirtschaftsakademie, Jehovan todistajat* and *Fashion ID,* that joint responsibility does not imply equal responsibility of the joint controllers, and that the level of liability must be assessed with regard to all the relevant circumstances of the particular case[37]. This finding is a double-edged sword for data subjects. However the CJEU supports a very broad subjective scope of controller responsibility (as even a small influence on the purposes and means of the processing can lead to joint controller responsibility), it also recognizes that not all controllers bear the same level of responsibility (thus reinforcing the possible exemption of liability provided in article 82 point 3 of the GDPR[38]). The exemption of liability becomes an even more important issue, given the fact that in *Fashion ID,* the CJEU confirms fragmenting of the

[35] Case C-25/17 (*Jehovan todistajat*), para 69, case C-210/16 (*Wirtschaftsakademie*), para 38.
[36] *Ibidem,* para 78,80.
[37] Case C-40/17 (*Fashion ID*) para 70, case C-25/17 (*Jehovan todistajat*), para 66; case C-210/16 (*Wirtschaftsakademie*), para 43.
[38] *A controller or processor shall be exempt from* ***liability*** *under paragraph 2 if it proves that it is not in any way* ***responsible*** *for the event giving rise to the damage* [emphasis added].

controller's responsibility per data processing stage[39]. This fragmenting potentially weakens the importance of joint liability of data controllers prescribed by article 82 (4) of the GDPR, as joint controllers could argue they are not involved in the same processing of data.

17. Article 26 of the GDPR. The new provision of article 26 GDPR on joint controllership may bring relief to the fragmenting of the data subjects' protection, by means of obliging joint controllers to determine transparently, in an arrangement between them, their respective responsibilities *in particular as regards the exercising of the rights of the data subject*. The need to eliminate uncertainties and loopholes regarding the data subjects' rights was already mentioned in Opinion 1/2010[40]. Practice and subsequent case-law will show to what extent an arrangement between joint controllers will address this need, and to what extent joint controllers might be able to effectively limit their respective responsibilities by concluding such an arrangement. Nevertheless, the wording of the GDPR should not leave any doubt, that a data subject may exercise his or her rights under the GDPR in respect of and against each of the joint controllers involved[41].

18. Technical aspects. The CJEU's application of the concept of joint controllership, notably in *Fashion ID,* could be troublesome in various ways and does not per se enhance data subject's rights. The CJEU seems not to sufficiently consider the current technical reality of data processing[42], particularly it does not entirely follow the pragmatic approach rightly suggested in Opinion 1/2010. The CJEU does not duly take into account, that the influence of a small company on the data processing, controlled mainly by a social media operator might only be marginal[43] and that social media marketing and website plug-ins are ubiquitous in the online world. As a result, the guidelines of the CJEU may lead to placement of responsibilities on subjects which may not have sufficient resources for their correct performance (see, to that effect, no. 19 and following).

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[39] The CJEU already paved the way for this fragmenting in case C-210/16 (*Wirtschaftsakademie*), para 39 and confirmed it in case C-40/17 (*Fashion ID*).

[40] Opinion 1/2010, p. 26: *Against this background, it can be argued that joint and several liability for all parties involved should be considered as a means of eliminating uncertainties, and therefore assumed only in so far as an alternative, clear and equally effective allocation of obligations and responsibilities has not been established by the parties involved or does not clearly stem from factual circumstances*.

[41] Art. 26 (3) of the GDPR.

[42] J. GLOBOCNIK, "On Joint Controllership for Social Plugins and Other Third-Party Content – A Case Note on the CJEU Decision in Fashion ID", *International Review of Intellectual Property and Competition Law*, 2019/50, p 1036.

[43] J. BYRSKI, H. HOSER: *Social media…, op. cit.,* p 10.

19. Consent. A key element in ensuring complete protection of data subjects' rights is the obtaining of consent. The CJEU recommends that the consent should be obtained by the controller before the data subject's data is being processed, i.e. by the website operator rather than the provider of an embed plug-in[44]. It also stressed, that the duty to provide information to the data subject should be performed immediately, in other words, when the data collection starts[45]. This is a highly unpractical solution, as website operators often do not have any influence or even knowledge of the specifics of data processing of the social media operator.

20. Contractual imbalance between joint controllers. The approach recommended by the CJEU may lead to an uneven increase of responsibility of small businesses (in comparison with large ICT companies, especially social media operators) against data subjects by means of joint controllers' arrangements referred to in article 26 of the GDPR, determining their respective responsibilities for compliance with the obligations under the GDPR. In most cases of negotiations of these arrangements, big ICT companies such as social media operators are going to be in a dominant position, as the modern market often requires use of social media marketing. This position may enable the big companies to impose in the joint controllers' arrangements solutions which are profitable only for them. In the current legal framework, it is even possible to use arrangement templates in electronic form (as the GDPR does not need the arrangement between joint controllers to be executed in any specific form[46]). Therefore, the negotiations on the distribution of responsibility against data subjects make take a form as simple as ticking a box before registration of a fan page or installation of a plug-in.

21. Data Protection Authorities. Since the CJEU failed to provide sufficient guidance on the applicability of the GDPR (as well as the e-Privacy directive), the national Data Protection Authorities ("**DPAs**") are publishing their own guidance instead. This creates a risk of diversification of the level of protection of the rights of data subjects. This situation surely does not comply with the main idea of the GDPR, which is to provide full and equal protection of all

[44] Case C-40/17 (*Fashion ID*), para 102.
[45] Case C-40/17 (*Fashion ID*), para 104 and, to that effect, judgments of 7 May 2009, C-553/07 (*Rijkeboer*), para 68, and of 7 November 2013, C-473/12 (*IPI*), para 23 .
[46] J. HARTUNG, B. BUCHER: *Datenschutz-Grundverordnung / BDSG. Kommentar*, Munich 2018, p 564.

data subjects of the EU. Therefore, a special responsibility lies on the European Data Protection Board ("**EDPB**") to give clear and detailed guidance to national authorities[47].

22. Distribution of responsibility between joint controllers. In the judgments discussed above, CJEU does not give clear and specific guidelines on the distribution of responsibility and liability of joint controllers, which is a topic of crucial importance for the market practice. On one hand, GDPR provides, that joint controllers should determine their respective responsibilities by means of an arrangement between them, which shall duly reflect the respective roles and relationships of the joint controllers *vis-à-vis* the data subjects[48], but where more than one controller is involved in the same processing and responsible for damage caused by processing (unable to prove that it is not in any way responsible for the event giving rise to the damage), each controller shall be held liable for the entire damage[49]. On these grounds, B. VAN ALSENOY argues, that every joint controller in principle remains liable towards data subjects for the entire damage even if there exists an appropriate arrangement between them[50], as joint controllers are subject to a joint liability regime, compared to solidarity liability[51]. The same author recognised joint controllers' liability to be in principle solidary in nature also under the provisions of DPD[52].

Therefore, the issue of distribution of responsibilities between joint controllers under current legal framework remains uncertain. While literal interpretation of the provisions of GDPR suggests a model similar to solidary liability[53], CJEU strictly limits the liability of a joint controller[54]. However, the aforementioned judgments of CJEU were adopted on grounds of the DPD, repealed by the GDPR. This opens a possibility of questioning if the argumentation provided in the CJEU case-law remains up to date. This leads to a confusion, which desperately needs guidelines and clarification, from which CJEU so far restrained.

The inconsistence of the limitation of joint controller's responsibility in *Fashion ID* with previous judgments of the CJEU has been noted and critically responded to by J. GLOBOCNIK, who provided an alternative solution – to abandon this limitation and consider the webpage operator (such as

[47] See, to that effect, J. CHEN, L. EDWARDS, L. UQUHART, D. MCAULEY: *Who…*, op. cit., p 9.
[48] Article 26 (1) and (2) of the GDPR.
[49] Article 82 (3) and (4) of the GDPR
[50] B. Van Alsenoy: *Liability…*, op. cit., p 278.
[51] *Ibidem*, p 288.
[52] *Ibidem*, p 281.
[53] B. Van Alsenoy: *Liability…*, op. cit., p 278.
[54] Case C-40/17 (*Fashion ID*), para 74, 85.

Fashion ID) as a joint controller of the data processing in its entirety[55] (which covers also the operations controlled by social media operator such as Facebook Ireland). Such a view raises serious doubts. First of all, it surely does not follow a factual or pragmatic approach, as it places the responsibility for data processing in its entirety on an entity which often has no influence over (and even no knowledge of) all operations constituting the data processing. The aforementioned alternative would lead to placement of a great amount of blind responsibility for data processing on website operators, which are often small companies. This can harm the data subjects, as the website operators often may not be able to correctly fulfill their excessive duties.

II.4 WHAT NEXT?

23. Hopefully, there are many new guidelines to come, especially from the EDPB and the CJEU, as the present situation surely needs clarification. What is more, the legal framework may become even more complex together with adoption of a new regulation on ePrivacy[56]. One of the main objectives of the new regulation is to protect data subjects from unfair processing of data in electronic communications. It may only be accomplished if the new legal act, as well as its relation to the GDPR is efficient and clear. These issues need to be addressed by appropriate authorities (especially EDPB).

24. The new guidelines should not lead to discrimination of small companies against huge ICT companies such as social media operators. Currently, it is possible to notice a pattern of behaviour of the DPAs and consumer protection groups which aim at the smaller businesses, instead of going straight after the multinational companies with the actual power to protect data subjects[57]. It is understandable, since it is more feasible and cheaper to proceed against the smaller actors. However, to get real change in the online environment, the actions s should be focused on the big

[55] J. GLOBOCNIK, *On Joint…,* op. cit., pp 1036-1039.
[56] Proposal for a Regulation of the European Parliament and of the Councul concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications), COM/2017/010 final.
[57] E.g. Case C-40/17 (*Fashion ID)*, case C-210/16 (*Wirtschaftsakademie*).

companies providing the popular services and not the small businesses, who are merely their clients.

III. Conclusion

25. In accordance to the CJEU's case law, all subjects which have any influence on data processing, including its collection and transmission, is to be considered a (joint) controller. In this respect, entities which were not previously considering themselves as "controllers" may be forced to do so. According to the GDPR, this means, that they should be ready to handle requests of data subjects wishing to exercise their rights (such as for access and deletion of data) or even claiming damages.

26. As far as broad interpretation of the definition of "controller" can contribute to better protection of data subjects (as the CJEU fairly argued in its case-law), a broad interpretation of joint controllership may lead to confusion and even harm the data subjects. It favors big ICT companies such as social media operators against small businesses, who are merely their clients. This point of view has been already presented in literature[58] and is even (at least partly) recognized by the CJEU, which suggests a limited liability of joint controllers, especially in *Fashion ID* case.

27. Above all, the current case-law of the CJEU deserves criticism as it does not provide any clear practical guidelines on application of the concepts of "controller", joint controllership, and distribution of responsibility (and liability) between the joint controllers within the current legal framework. In particular, the CJEU restrained from any interpretation of provisions of the GDPR in this regard (especially articles 26 and 82).

28. Consequently, in our opinion, in circumstances of joint controllership, the legal framework for distribution of responsibilities between controllers (as it arises from the GDPR and case-law of the CJEU) is not sufficiently clear and is not capable of ensuring complete protection of the rights of data subjects. The current case-law, which does not give clear guidelines and restrains from

[58] J. BYRSKI, H. HOSER: *Social…,* op. cit.,

interpretation of the GDPR, leaves the market with many unanswered questions and blurred lines, very hard to read between.

YOUNG LAWYERS CONTEST

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Data is considered as 'the new oil': the rush for data is recent but it was collected decades ago: the real challenge today is to exploit this data with new technologies and more particularly the new uses related to Big Data, Machine Learning or Artificial Intelligence

This exploitation of data is hampered in practice by the existence of silos in the entities, despite advances in communication and information technologies (*hereinafter 'ICT'*).

It remains relatively complicated because of the existing silos existing, or in other words because of what the Article 29 Data Protection Working Party (*hereinafter the 'WP29')* calls the differential organizations (*i.e.* the evolution of the company towards distinct structures like branches, divisions, departments, qualifications, etc).

Yet the European legislation, both with the Directive 95/46/EC (*hereinafter the 'Directive')* and the Regulation (EU) 2016/679 (*hereinafter the 'GDPR'*) replacing it could not necessarily respond to this issue because it would only fit to an environment of centralised data processing with independent relationships between data subjects and data controllers[1].

While companies tend to break down the silos within themselves, the fact remains that the data economy is clearly based on collaboration between players, due to the building of a networked world. Therefore, nearly no system that processes personal data can work on its own[2]. For instance, just think about a mobile application: it will probably integrate third party services for prospection or navigation. Modules across boundaries as presented may, according to some authors, make it 'increasingly complex to apply the linear controller-processor model'[3].

If the Directive and the GDPR define the notion of data controller as a 'natural or legal person, public authority, agency or other body which alone or jointly with others, determines the purposes and means of the processing of personal data'[4], it is quite possible that the distinction between the qualifications of controller and processor may be difficult to draw. In that case article 26(1) of the GDPR provides

[1] René Mahieu and others, 'Responsibility for Data Protection in a Networked World: On the Question of the Controller, "Effective and Complete Protection" and its Application to Data Access Rights in Europe' [2019] 85 JIPITEC [11].
[2] ibid abstract.
[3] ibid [12].
[4] Article 4(7) of the REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ 2 119/1; similar to article 2(d) of the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ 2 281/31.

that ‘Where two or more controllers jointly determine the purposes and means of processing, they shall be the joint controllers’.

Therefore, determining the status of the actors in the data processing process is essential. The European Court of Justice *(hereinafter the ‘ECJ’ or ‘the Court’)* has handed down several major rulings in order to clarify the scope of the concept of data controller (I). Such an intervention raises the question of the clarity of the legislative framework to respond to this problem of qualification and its consequences on the data subjects, especially since these data subjects must be able to benefit from the protection of their rights (II).

I. ECJ’s broad vision of the data controller to the prejudice of a sufficient definition of responsibilities

The Court adopts a broad vision of the concept of controller that includes search engines (1), so that this vision leads to a facilitated qualification of joint controller both in the digital space (2) and for other more traditional actors (3). Nevertheless, this qualification in a complex system is subject to risks (4).

1. Qualification of the search engine as data controller

Google is the most widely used search engine in the world. However, can it be considered as a controller in the legal sense of the term? In the Google Spain case[5], the ECJ answered positively to the question and stated that the operator of an Internet search engine is responsible (*i.e* must be qualified as a controller) for the processing of personal data appearing on web pages published by third parties[6].

The decision came as a surprise in 2014 because it went against the opinion of the Advocate General, who had held in June 2013 that Google was not responsible for the personal data appearing on its pages (which is surprising in our opinion because Google's business is precisely to scan the web in order to index it as well as possible) and that the right to erasure could therefore not be invoked against

[5] Case C-131/12 Google Spain SL, Google Inc v Agencia Españolade Protección de Datos (AEPD) and Maria Costeja González [2014] EU:C:2014:317.

[6] Thierry Vallat, 'Le droit à l’oubli numérique après l’arrêt Google de la CJUE du 13 mai 2014' (Village de la Justice, la communauté des métiers du droit by Legi Team, 16th May) <https://www.village-justice.com/articles/droit-oubli-numerique-apres-arret,16901.html> accessed 6 January 2020.

it[7]. The fact remains that following this decision the data subject can contact the controller *(i.e. Google)* directly in order to ask for the erasure of a link from the list of results.

Indeed, the Court considered that Google's processing of personal data 'can be distinguished from and is additional to that of the original publisher'[8] and that its 'data processing [...] affects the data subject's rights additionally'[9]. This distinction between the initial processing and the new proceeding is fundamental because Google also must be considered as a controller.

Therefore, as a controller, Google has to guarantee an 'effective and complete protection of data subjects'[10]. It has to ensure that processing meets the requirements of the law 'within the framework of its responsibilities, powers and capabilities'[11].
This framework, developed in a situation of joint controllership (even if the Google Spain case does not deal with joint controllership), raises questions regarding the responsibilities of the controllers. Two options may exist at this stage:

- each controller is responsible for what it can do, even without proper coordination with other joint controllers[12];
- if a controller can prevent infringement of the law, he should do so (either by asking the joint controller to comply or by not integrating the infringing service).

If this case offers some insight into how partial responsibilities should be assigned, namely the part of processing operations, a more recent case refines this interpretation.

2. The introduction of joint controllership in the digital space

The Wirtschaftsakademie Schleswig-Holstein case[13] is a very influential ruling in data protection law. Once again, a Gafa is involved. Here the issue involves Facebook. The ECJ determined the requirements for being a joint controller, and the responsibility that follows from being a joint controller.

[7] Ibid.
[8] Case C-131/12 (n 5) [35].
[9] Ibid [38].
[10] Ibid.
[11] Case C-131/12 (n 5) [38], [83] This criterion is also referenced by AG Bot in Case C-210/16 Wirtschaftsakademie Schleswig-Holstein [2018] EU:C:2018:388, Opinion of AG Bot [63].
[12] This interpretation is in line with Article 24 of the GDPR which states that 'whenever one of the controllers is able to prevent infringement of data protection laws, they should do so'.
[13] Case C-210/16 Wirtschaftsakademie Schleswig-Holstein [2018] EU:C:2018:388.

Indeed, the ECJ ruled that the administrator of a social network page (in this case Facebook) is qualified as a joint controller of the processing of personal data collection, in the same way as the social network on which it operates.

The fan page administrator may contribute to the Facebook's processing by asking for specific statistics to Facebook. Without it Facebook would not start any personal data processing. The administrator thereby 'contributes to determining the purposes and means'[14], and the Court concluded that the responsibility of a controller should be dependent on the stages of the processing in which it is involved and on the degree of this involvement[15].

In its reasoning the crucial step the Court takes to arrive at the qualification of joint controllership is that, instead of only looking at the general purposes and means of Facebook as a whole, it looks at the individual data processing operations within the system[16].

Thus, the Court has a broad view of the concept of controller. This approach is justified by the Court because the aim of the Directive was to 'ensure a high level of protection of the fundamental rights and freedoms of natural persons'[17]. Hence, the interpretation helps to ensure 'effective and complete protection'[18] : this decision is not surprising on this point if one considers the interpretation of the concept of controller considering the purpose of the Directive in the Google Spain case[19].
This idea of effectivity and completeness applied to the concept of joint controller implies that in many situations one personal data processing system will have a large variety of joint controllers[20].

However, this extension does not enable to set clear criteria for determining how responsibilities should be allocated between joint controllers[21], it only refers to the WP29 which considers that actors who are joint controllers should have determined their respective responsibilities amongst each other[22].

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[14] Mahieu (n 1) [41].
[15] Case C-210/16 (n 13) [43] and René Mahieu, 'Fashion-ID: Introducing a phase-oriented approach to data protection?' (European Law Blog, 30th September) <https://europeanlawblog.eu/2019/09/30/fashion-id-introducing-a-phase-oriented-approach-to-data-protection/> accessed 2 January 2020.
[16] Mahieu (n 1) [41]
[17] Case C-210/16 (n 13) [26].
[18] Ibid.
[19] Case C-131/12 (n 5) [32] – [34].
[20] Mahieu (n 1) [44].
[21] Mahieu (n 1) [47].
[22] Article 29 Data Protection Working Party, *Opinion 1/2010 on the concepts of "controller" and "processor"*, 15, <https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2010/wp169_en.pdf> accessed 6 January 2020 and the GDPR which is similar in this respect, providing in Article 26(1) & (2) that "*1[...]They shall in a transparent manner determine their respective responsibilities for compliance with the obligations under this Regulation. [...] 2. The arrangement referred to in*

If the joint controllers do not distribute the responsibilities, in case of litigation, the level of responsibility for each operator will be determined by the court in front of which a case is brought: the Court stated here that 'operators may be involved at different stages of that processing of personal data and to different degrees', but the ECJ left it to the referring court to determine the extent of the responsibilities of the Facebook fan page administrator[23].
This situation leads to the everlasting purpose of a consistent application of the GDPR[24].

The Court's decision has been criticized for several reasons and especially because:

- It only considers phases of data processing, whereas systems such as Facebook can have much greater overall effects[25].

- The ECJ's interpretation of the postulate of a phase-oriented analysis seems erroneous to some authors because the list of examples of operations that may constitute a processing[26] was never intended as a methodology for determining the proper unit of analysis for determining responsibilities and compliance questions[27].

Either way, the Court clarifies the Google Spain ruling in the sense that Google controlled in every conventional sense the purposes and means of their independent processing. On the contrary, in the present case all data protection obligations could in principle be enforced through Facebook, but the ECJ decided to distinguish between different stages.

3. The extension of joint controllership to religious communities

The Jehovan todistajat case[28] was the opportunity for the ECJ to confirm its position of a broad interpretation of the notion of controller.

It stated that the religious community of Jehovah Witnesses is a controller of 'the processing of personal data carried out by its members in the context of door-to-door preaching organised,

paragraph 1 shall duly reflect the respective roles and relationships of the joint controllers vis-à-vis the data subjects. The essence of the arrangement shall be made available to the data subject."
[23] Mahieu (n 15).
[24] Article 51 (2) of the GDPR: 'Each supervisory authority shall contribute to the consistent application of this Regulation throughout the Union. For that purpose, the supervisory authorities shall cooperate with each other and the Commission in accordance with Chapter VII'.
[25] Mahieu (n 15)
[26] REGULATION (EU) 2016/679 (n 4) Article 4(2).
[27] Mahieu (n 15).
[28] Case C-25/17 Jehovan todistajat [2018] ECLI:EU:C: 2018:551.

coordinated and encouraged by that community, without it being necessary that the community has access to those data, or to establish that that community has given its members written guidelines or instructions in relation to the data processing'[29].

More precisely, the religious community is a joint controller with its members who engage in preaching.

This said, the ECJ confirmed its Witschaftsakademie decision by stating that the joint responsibility does not necessarily require to have access to the personal data[30].

In other words, previous case law is applied to religious communities. No other specific details can be extracted from this decision. This nevertheless confirms the difficulties encountered in the scope of the qualification of controller.

4. <u>The complexity of the digital space, a source of risks for the qualification of data controller</u>

The Fashion ID case was, like the Wirtschaftakademie case in 2018, a turning point in 2019 for data privacy[31]. The ECJ considered that the operator of a website equipped with Facebook's 'Like' button may be jointly liable with Facebook for the collection and transmission to Facebook of the personal data of visitors to its site.

Indeed, the ECJ notes that 'by inserting Facebook's 'Like' button on its website, Fashion ID appears to have given Facebook Ireland the opportunity to obtain personal data from visitors to its website'[32]. However, it is in principle not responsible for the further processing of such data by Facebook alone.

The classification as joint controller by the ECJ is based on a common economic interest between the actors and on the 'consideration which each of the joint controllers derives from this common economic interest'[33], even if the actor does not get any benefit from the actual use of the data.

[29] Case C-25/17 (n 28) [75].
[30] Case C-25/17 (n 28) [75].
[31] Case C-40/17 Fashion ID GmbH & Co.KG v Verbraucherzentrale NRW eV [2019] ECLI:EU:C: 2019:629.
[32] Case C-40/17 [78] 'Moreover, by embedding that social plugin on its website, Fashion ID exerts a decisive influence over the collection and transmission of the personal data of visitors to that website to the provider of that plugin, Facebook Ireland, which would not have occurred without that plugin'.
[33] Mahieu (n 15).

Consequently, this common economic interest has enabled the Court, for the first time, to distribute responsibilities for joint controllers according the data processing stages in which that data controller is involved[34]. The Court considered that the Fashion ID responsibility is 'limited to the operation or set of operations involving the processing of personal data in respect of which it actually determines the purposes and means the collection and disclosure by transmission of the data at issue'[35].

The ECJ then confirms its adoption of a broad concept of the concept of controller and confirms its jurisprudence. As René Mahieu and Joris van Hoboken noticed, in Google Spain case the Court highlighted a chain of processing operations in which the search engine intervenes in order to collect, extract, organise and store information, including personal data, which has been previously published by third parties (in this case a press publisher) who are themselves data controllers. It is therefore understandable that the search engine platform also has a direct economic interest in the aggregation of data with a view to making them available to users[36], as well as Facebook which is in the same situation.
Reactions to this decision have been divergent in that two sides were opposed: the first one considered the Court places too much responsibility on websites, regardless of their size, while others considered that companies can no longer use the Facebook responsibility to escape any responsibility. Still, some conclusions can be drawn from this case law.

Conclusion on the ECJ case-law

In our analysis of the Court's case law, we noted that the Court has a broad view of the concept of controller because it considers that 'any actor who has a purpose for a data processing operation, and can directly influence that processing, can be considered a data controller'[37]. However, this qualification does not offer all the guarantees: The Court does not sufficiently address the framework of the division of responsibilities. Joint controllers will have to determine by themselves the responsibilities[38].

[34] Mahieu (n 15).
[35] Case C-25/17 (n 28) [85].
[36] Guillaume Busseuil, 'La qualification de responsable conjoint de traitement appliquée à l'utilisation d'un module de partage sur un réseau social : quelle effectivité pour la protection des données personnelles ?' [2019] 164 Revue Lamy Droit de l'Immatériel
[37] Mahieu (n 1) [1].
[38] Mahieu (n 1) [47].

In fact, even if the Court gives a semblance of assistance in the allocation of responsibilities in the last decision under consideration, the fact remains that the solution adopted by the Court does not solve all the problems.

For this reason, it can be considered that joint controllership is a 'major trend'[39] and came up because the ECJ ruled about the concept of controller several times in a short period of time[40]. This makes us say that this notion is becoming important and that the risks of qualifying as a joint controller have greatly increased.
In fact, data protection law lacks a clear system for determining the distribution of responsibilities in situations where multiple actors are involved in the processing of personal data[41], and that is what we want to demonstrate in the second part.

II. The lack of a legislative framework as a potential obstacle to the effective exercise of rights

While the scope of the data controller's (and therefore joint controllership) obligations is broad[42], recital 50 of the GDPR also puts the 'clear allocation of the responsibilities' as a *sine qua non* condition for the protection of the rights and freedoms of data subjects[43].

We will demonstrate in this second part that while European legislation and case-law attribute rights to individuals (transparency, access), these rights may be difficult to implement because of data controllers, partly because of the new system, which operates independently in the form of accountability, in contrast to the previous system, which operated on the basis of declaration.

Indeed, despite recent developments, European legislation and case-law do not make it possible to address the problem of joint controllership in a certain way (1), which means that controllers must make up for these shortfalls (2).

[39] Dataguidance, 'Interview with: Ulrich Baumgartner' (Platform DataGuidance, November 2019) <https://platform.dataguidance.com/video/ulrich-baumgartner%C2%A0partner%C2%A0-osborne-clarke-llp> accessed 6 January 2020
[40] DataGuidance (n 39).
[41] Karel Van Alsenoy, Data Protection Law in the EU: Roles, Responsibilities and Liability (1st edn, Intersentia 2019).
[42] REGULATION (EU) 2016/679 (n 4) Article 24 and following.
[43] European Data Protection Supervisor, 'EDPS Guidelines on the concepts of controller, processor and joint controllership under Regulation (EU) 2018/1725' [2019] 26.

1. An uncertain legislative and case-law framework

Article 26(1) of the GDPR states that 'where two or more controllers jointly determine the purposes and means of processing, they shall be joint controllers'. It may then be easy to be qualified as a joint controller: the EDPS considers that a specific agreement (*hereinafter named the 'Agreement'*) between some parties may lead to a common determination of the purpose and essential elements, and 'is sufficient to trigger a situation of joint controllership'[44]. The ICO seems to be more cautious in its approach and simply provides a checklist online on its website[45].

These prevarication on the possibility to qualify an actor as a joint controller are all the stranger because the concept of joint responsibility already existed in the Directive even if it was rejected in some countries (for instance France and Germany). Nevertheless, in practice the concept was still applied in France despite these rejections[46].

The qualification of joint controller is important because of the numerous implications of it and imply for instance a clear information of who is the joint controller[47] and mainly concerns the issue of responsibility[48]. In any case joint controllers are all liable for any damage caused by the breach of the GDPR in its entirety even if one of them may be exempted if he proves that the event giving rise to the damage is not attributable to him[49].

In any case this situation should not hide the fact that a 'clear allocation of responsibilities' is required in Recital 79 of the GDPR[50].

This situation may, however, be adjusted contractually by controllers (the above mentioned allocation of responsibilities), as the WP 29 specified it: the participation of the parties in the joint controllership can take different forms (and through distinct stages of data processing) and is not necessarily shared equally (including several concrete examples like installation of video-surveillance cameras, head-

[44] European Data Protection Supervisor (n 43) 23.
[45] Ico, 'Data protection self-assessment' (ICO, 2019) <https://ico.org.uk/for-organisations/data-protection-self-assessment/> accessed 6 January 2020.
[46] CNIL Case 2008-008 (22nd January 2008) authorizing the implementation of a treatment by two actors and decree of 26 October 2010 on the national register of incidents involving the repayment of loans to individuals provides for a clear division of roles between the Banque de France and banks and credit institutions.
[47] REGULATION (EU) 2016/679 (n 4) Article 13.
[48] Ibid Article 82 (1) and (2): '1. Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered. 2. Any controller involved in processing shall be liable for the damage caused by processing which infringes this Regulation'
[49] Ibid.
[50] Ibid, recital 79.

hunters, travel agencies, social networks, etc.)[51]. In other words, the WP 29 introduces a difference of granularity in the responsibility[52] (partial responsibility) but does not develop a consistent framework to determine the exact scope and limit of this partial responsibility[53].

The GDPR, which came into force after this opinion, explicitly states that joint controllers should determine their respective responsibilities among each other[54] (*i.e.* who informs the individuals, who manages the rights of the individuals, who is responsible for securing the data, purging them once the conservation period has been reached, etc). In other words, the distribution of responsibilities is free if all responsibilities and obligations are met: that is probably why the ECJ did not previously allocated the responsibilities, by maintaining a balance with the freedom of the parties. It may also be hard to create a general rule on how they should be allocated, as it will always remain a case where it could not apply.

However, a data subject access request cannot fall between two stools: the exercise of the right must be answered[55]. Indeed, Article 26 of the GDPR, in its third paragraph, merely specifies that data subjects can still exercise their rights in relation to each of the data controllers, irrespective of the terms of the agreement between the joint controllers[56].

Some authors and in accordance with the texts explained that this agreement between the controllers is only useful in order to distribute the practical details of the tasks but will not have any effect on the legal responsibility regarding data subjects' rights[57]. We agree this position and understand that while they try to clarify how responsibility is to be apportioned, the GDPR and the Directive left (as we expressed in above) questions unanswered. Therefore, the actors must manage these uncertainties themselves.

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[51] Article 29 Data Protection Working Party (n 22) 17 – 21
[52] Mahieu (n 1) [26].
[53] Mahieu (n 1) [28].
[54] REGULATION (EU) 2016/679 (n 4) Article 26(1), confirmed by Article 29 Data Protection Working Party (n 22) which states that: 'the first and foremost role of the concept of controller is to determine who shall be responsible for compliance with data protection rules and how data subjects can exercise the rights in practice. In other words: to allocate responsibility'.
[55] Hordern Victoria, 'EU: More complexity for controller and processor concepts under GDPR?' (Platform DataGuidance, November 2018), <https://platform.dataguidance.com/opinion/eu-more-complexity-controller-and-processor-concepts-under-gdpr>, accessed 6 January 2020 and Mahieu (n 1) [61]
[56] Like the Article 29 Data Protection Working Party (n 22) Opinion which states that *'a controller will remain in any case ultimately responsible for its obligations and liable for any breach to them'.*
[57] Mahieu (n 1) [61].

2. The need for joint controllers to fill gaps

Joint controllers must discuss their agreement in order to determine which tasks are to be carried out by whom and to allocate responsibilities. For this, we have seen that the texts are not pronounced, creating a source of legal uncertainty[58]. These uncertainties are all the greater because in loads of cases parties consider themselves as independent controllers 'in common' using the same personal data but are not constrained by an arrangement concerning the joint determination of purposes for use of that personal data[59].

Every lawyer knows that a fundamental aspect of a right is that it should be able to be exercised without hindrance, or at least as simply as possible. That is why we believe the agreement must exist. Since the essence of the GDPR is transparency and accessibility of information especially for data subjects, the agreement information should be provided to data subjects through the data protection notice[60]. In that sense the section 28 (2) of the GDPR provides that '[T]he essence of the arrangement shall be made available to the data subject'.

As a result, there are many issues to be resolved (knowing that some questions remain unanswered to this day). The two main ones can be summarized as follows:

- What content for this agreement? (a)
- What difficulties may be encountered during the drafting? (b)

a. What content for the agreement?

The first element to highlight is that each situation is unique, meaning that one cannot imagine a contractual 'kit' with a generic rule in this area. Each contract drafting needs to be adapted and even more so today in view of the complexity of the relations. Indeed, there are nowadays very transversal and complex sectors: online digital advertising (with the very great variety and complexity of players in this market), commercial distribution relationships (between brands and franchisees or concessionaires), business groups (with decision-making parent companies and operational subsidiaries), marketplace, etc.

[58] Mahieu (n 1) [28].
[59] Hordern (n 55).
[60] European Data Protection Supervisor (n 43) 29.

In our opinion, it is necessary to examine the structure's activities on a case-by-case basis and not to hesitate to cut out the activities of the structure. Indeed, the analysis must be carried out treatment by treatment, in order to define, each time, who determines its ends, the structuring means, and the purely technical means of execution.

Therefore the parties will have to discuss the different process, *i.e.* the exercise of rights (a clause guaranteeing compliance with the legislation on personal data and an obligation of mutual assistance be inserted in the contract binding the joint controllers, particularly in the event of a request from a data subject (access, rectification, erasure, limitation, portability), the information statements (with contact details of the correct Data Protection Officer), the information carrier, the case of data breach.

Regarding Article 13 of the GDPR relating to 'Information to be provided where personal data are collected from the data subject', it may be understood after the Wirtschaftakademie case that providing information is also incumbent on the publisher, not only for Facebook. In that case, how will the publisher of the site be able to obtain informed consent and provide transparent information when it does not know itself the modalities of the collection and processing by Facebook? One may also wonder if the site editor's obligations are limited to obtaining consent and providing information to the data subject?

This issue of information also arose in the Fashion ID case where the ECJ stated that the information that the website manager must provide to the data subject must relate only to the operation or set of operations involving the processing of personal data, the purposes and means of which it effectively determines[61]. One may ask if this ruling implies that the JC is not allowed to inform about other's JC set of operations. There are 2 possible interpretations:

- Fashion ID limits the possibility of an entity to inform the data subject about the processing performed by a different entity (including joint controllers);
- The ECJ wanted to establish that the duty of information is incumbent only as regards the personal set of operations of processing, without limiting the possibility of informing the data subjects regarding the processing made by a Joint Controller (like a mandate)

  According to us, Article 26 is clearly not intended to limit the information. Therefore, the second interpretation seems more feasible, including the fact that the protection of the personal

[61] Case C-40/17 (n 31) [105] – [106]

data should be complete. It would otherwise mean that the possibility to allocate responsibilities would be limited.

Concerning the detection of security incidents and the data breach qualification, a specific process will also have to be drafted. Indeed, in this case it may not be possible to respect the 72-hour time limit applicable to the violation of personal data (Articles 33 and 34[62]): get closer to the joint controller may take longer than 3 days. The notification will in this case have a high chance of not arriving on time. What if the starting point (as soon as one of the joint controllers is informed or when the last joint controller is informed) for the 72 hours is not determined? What if the joint controller does not share the qualification of data breach (which is already often discussed in-house)? Does each joint controller have a veto, which would allow them to prohibit the other joint controller from notifying the Data Protection Authority or each joint controller is free to pull first by notifying the Data Protection Authority and communicate to the people concerned? All these questions should be answered in the agreement.

Joint controllers should also determine whom among them is responsible (competent, liable) for which of the data subjects' rights[63]. So, for example, in the case of a shared information infrastructure (pool) among banks, the WP29 states that it should be decided who answers data access requests[64]. This may be either the bank of the data subject or the organization that operates the infrastructure.

It may also be useful for the data subjects to designate a contact point for data subjects: the European Data Protection Supervisor recommends it so that controllers may forward the requests in the exercise of their rights by the data subjects[65], even if there is no formal answer on the obligation or faculty to designate one. As we expressed it data subjects may still exercise their rights under the GDPR 'with respect to and against each of the controllers'. Therefore, a procedure should be organized to transfer requests to the relevant controller (and quickly, given the short time allowed by the DPO to respond).

But what if the joint controller, for instance Facebook, does not provide access to the data? Some authors suggested that the data subject should address his request to the joint controller (in our case the website administrator) while some others consider that the responsibility for data access rights

[62] REGULATION (EU) 2016/679 Articles 33 and 34
[63] Article 29 Data Protection Working Party (n 22) [22],[24]: 'Parties acting jointly have a certain degree of flexibility in distributing and allocating obligations and responsibilities among them, as long as they ensure full compliance'
[64] Ibid [23]
[65] European Data Protection Supervisor (n 43) 31.

should be restricted to Facebook alone, and argues that Facebook and the website operator do not have to make an agreement about this[66].

b. What difficulties may be encountered during the drafting?

Even if every situation is different, the players will certainly want to have a model for negotiating their agreement. Nevertheless, our research on models has not been very conclusive: we found only one model freely available online (an Iris model in higher education[67]), and almost none on the databases we have access to. It is, however, entirely possible to imagine the actors using the subcontracting contract models as a basis, even if they will not be 100% suitable.

The major risk concerning the contract is the power imbalance between the parties due to lack of an obligation for a balanced distribution of responsibilities[68].
The parties are supposed to negotiate the agreement but it is clear that providers of digital services may present 'take it or leave' offers[69] which will be a kind of adhesion contract.

This imbalance is also found particularly when the parties do not have equal information and that would challenge, more generally, the independence of the DPO[70] (in other words, will there be a pre-eminence of the DPO designated by the most influential joint controller, with the other DPOs having only a handkerchief to put on their own analysis and recommendations?)

We are, however, divided on the imbalance risk because the fact remains that the reality of the relations will prevail on the agreement[71] even if economic constraints could force some actors to endure the situation. That's why we do not necessarily think the more powerful contracting party could withdraw from any responsibility and leave it entirely to the less dominant even if for instance Facebook may be tempted to leave the responsibility in its entirety to the administrator of a fan page following the ECJ case-law.

[66] Mahieu (n 1) [78]
[67] Cao, 'Joint Controller Agreement' (CAO, 25 May 2018) <http://www2.cao.ie/downloads/documents/privacy/cao_joint_controller_agreement.pdf> accessed 13 January 2020
[68] Case C-210/16 (n 13) [43]; Case C-25/17 (n 28) [66].; Case C-40/17 (n 31) [70], [85]
[69] René Mahieu, Joris van Hoboken and Hadi Asghari, "Responsibility for Data Protection in a Networked World: On the Question of the Controller, "Effective and Complete Protection" and its Application to Data Access Rights in Europe" [2019] JIPITEC 85 para 91.
[70] REGULATION (EU) 2016/679, Article 37
[71] Article 29 Data Protection Working Party (n 22) 18

Parties may also encounter difficulties regarding responsibility: they would not spontaneously draw up an agreement between the parties. If officially they do not have a lack of distribution of responsibilities between actors, the real reason is the fear of the stick (new sanctions [fines]) and the need to protect their own interest.

The result is that the data protection contractual position becomes more complex for organisations to navigate rather than more straightforward[72]. It remains to be seen whether, despite a potential agreement, all the rights of the data subjects will be respected.

CONCLUSION:

We demonstrated in this report how the concept of controller is addressed into the ECJ case-law, *i.e.* broadly, both because of organizational differentiation and because of the complexity of new systems, especially digital systems.

We can therefore conclude that although legislation and case-law provide a framework for the allocation of responsibilities, this does not mean that the rights guaranteed by the texts will be available to the data subjects.

More precisely, it is indeed the cooperation between the actors (both internal and external) that will ensure the complete protection of the rights of data subjects.

[72] Hordern (n 55)

15 January 2020

YOUNG LAWYERS CONTEST 2020

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WRITTEN REPORT

Question 2 – EU Public Procurement procedure

TEAM 5

Anu Vuori

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TABLE OF CONTENTS

INTRODUCTION

The current report examines the eligibility of economic operators to participate in public procurement procedures in view of their prior criminal convictions. This legal analysis is presented in three chapters, whilst considering the specific characteristics of EU law in this area and the diversity of the Member States' (hereafter: MS) criminal law systems.

At the outset it shall be borne in mind, that the public procurement legislation throughout the EU MS is extensively communitarised. National implementation is often the mere adoption of the provisions of the Union's public procurement directives, which delineate the scope of substantive and procedural public procurement law. This process is also strongly influenced by the case-law of the Court of Justice of the EU (hereafter: ECJ).

The first chapter of the present report provides an extensive analysis of the equal treatment principle as a fundamental concept, generally enshrined in European Union law, and more specifically, in public procurement legislation.

Chapter II examines the list of exclusions as stipulated in the Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (hereafter: Public Procurement Directive) and analyses if the Directive provides for a discretional power of the EU MS's to exclude candidates from the public procurement procedure on the basis of additional conviction-based exclusion grounds.

Chapter III assesses the extension of the conviction-based exclusion grounds in light of the principle of equal treatment. Furthermore, this Chapter elaborates the practical issues in the application of the equal treatment principle, arising from the diversity of the MS' criminal law systems.

In connection with the cited jurisprudence and legal doctrine regarding the mandatory and discretionary exclusion grounds, it should be noted that some of the judgements and doctrine deal with already repealed EU legislation. However, these arguments are valid for the interpretation of the currently applicable Public Procurement Directive, given the explicit provisions of its Article 91, § 2.

I. THE PRINCIPLE OF EQUAL TREATMENT

A. THE LIMITED FREEDOM OF CHOICE AND EQUAL TREATMENT IN PUBLIC PROCUREMENT

1. The principle of equal treatment characterizes a certain scarcity since only one of the interested parties can enter into the exclusive two party agreement with the contracting authority. The scarcity leads to a distribution problem: who is eligible to conclude a contract? Who can be excluded from the selection procedure? This essentially boils down to the question of whether the contracting authority is fully free in its choice for its other party and if not, in what way its freedom of choice is limited.

The freedom of the contracting authority to choose its other party is indeed limited. The starting point in the field of public procurement is that a contracting authority must always adhere to the principle of equal treatment. This implies that the contracting authority is not completely free, but is obliged to offer all potential economic operators equal opportunities.

2. The principle of equal treatment has a guaranteeing function. Its purpose is to ensure effective competition, which lies at the core of the functioning of the European internal market, and, on the other hand, to prevent discrimination between competitors, as part of the foundation of the rule of law.

3. Article 2 of the Directive 2004/18/EC of 31 March 2004 explicitly stipulates the principle of equal treatment for the first time.[1] This article is the result of a judgement of the ECJ from which it follows that the fundamental principles of Community law must be respected.[2] This objective was already set up in the 1970s since the European integration dominates the public procurement regulation, and has been confirmed in numerous ECJ judgements, and the Europe 2020-strategy.[3]

B. THE DIVERSITY IN CRIMINAL LAW PROVISIONS ACROSS THE EUROPEAN UNION

4. It follows from the above that the contracting authority must adhere to the principle of equal treatment enshrined in the European Union law, and in particular, public procurement law.

[1] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004, p. 114–240.
[2]; ECJ, Case C-324/98 *Telaustria*, 7 December 2000, at § 60; ECJ, Case C-59/00 *Bent Mousten Vestergaard*, 3 December 2001, at § 20.
[3] ECJ, Case C-87/94 *Kingdom of Belgium v. Commission*, 25 April 1996, at § 51, ECJ, Case C-243/89 *Commission v Kingdom of Denmark*, 22 June 1993, at § 68-70; ECJ, Joint cases C-285/99 and C-286/99 *Impresa Lombardini*, 27 November 2001, at § 36; Vermeulen, De Bondt, Ryckman and Persak (2012), p. 301.

However, equality in public procurement requires that the law must not differentiate between economic operators. According to ECJ case-law, the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless this is objectively justified.[4]

However, economic operators of all the 28, soon to be 27, EU MS, are subject to different national laws and regulations, such as criminal law.

5. Between the EU MS, the scope of criminal offences differs therefore making it possible to convict a legal entity (or natural person) in one MS for criminal behaviour that is not criminally sanctioned in another EU MS, or the criminal liability can differ in other forms.[5]

In addition, the discrepancy between national criminal law results inevitable in a difference of the legal framework that governs prior conviction. This in turn affects the exclusion grounds in the European public procurement procedure, a field that goes beyond the criminal law *sensu stricto* and reminds us of the dissimilarity in ethical principles across the European continent.

6. The question arises if these offence diversities, and in turn diversity in prior convictions, can be overcome to ensure the principle of equal treatment, and if so, to what extent they can be taken into account in the course of the public procurement procedure. This research question can solely be answered in the context of the general principles that underpin the functioning of the European Union and its internal market in the first place.

Throughout the text of the 2014 Public Procurement Directive reference is made to the specific principle of equal treatment, making it clear that the European regime of public procurement must assure the functioning of the internal market.

In addition, the ECJ ruled in the 1990s that the principle of equal treatment is at the root of the objective of the Public Procurement Directive and that EU MS need to make certain that they adhere to the general principle of equal treatment.[6]

[4] ECJ, Case C-304/01 *Kingdom of Spain v Commission*, 9 September 2004 , § 31; ECJ, Case C-434/02 *Arnold André GmbH&Co. KG v Landrat des Kreises Herford*, 14 December 2004, § 68; ECJ, Case C-210/03 *Swedish Match v Secretary of State for Health*, 14 December 2004, § 70; ECJ, Joined cases C-21/03 and 34/03 *Fabricom v Belgium*, 3 March 2005, § 27.
[5] De Bondt (2014), p. 305.
[6] ECJ, Case C-243/89 *Commission v Kingdom of Denmark*, 22 June 1993 – Report of the hearing, § 68-70.

7. However, the problematic character of the diversity of national legal systems consists of the lack of a positive obligation for the EU MS to adopt a uniform criminal legal framework. The supranational level must thus necessarily cope with the national diversity in criminal legislation.[7]

C. THE SCOPE OF PRIOR CRIMINAL RECORDS OF ECONOMIC OPERATORS IN A PUBLIC PROCUREMENT PROCEDURE

8. As stated above, the diversity in criminal law across the EU partially results in the dissimilarity of prior convictions. More generally, EU MS are not allowed to take into account *any* conviction – foreign or national – that does not pass the double criminality test on the sole basis of the largest common denominator in criminalisation for which there is a legal basis in the EU.[8]

Such an assessment requires the comparison of the criminal law applicable to all economic operators in order to identify the largest common denominator of criminalisations.

9. The equal treatment principle requires that the contracting authority treats all competing candidates equally by ensuring that equal behaviour has equal consequences. In this way, same behaviour has the same excluding effect from the contract award procedure. This behaviour equality can only be achieved if the prior convictions can be taken into account to the extent that they relate to behaviour that would equally constitute an offence in each of the jurisdictions in which the other competing actors operate.

However, this behaviour equality across the EU is not absolute. The EU MS can adopt a stricter approach, when determining to which extent they would consider prior criminal convictions in the assessment of the eligibility of candidates in a public procurement procedure.[9]

As a result, the Public Procurement Directive provides a list of prior convictions which define a common denominator for all the EU MS. However, it is important to note that this does not result in an absolute behaviour equality. Within the scope of the common denominator, the EU MS can still define the margin of certain criminal behaviour such as the criminal conduct of corruption that will be discussed in chapter II, section C.

[7] Colson and Field (2016), p. 37.
[8] De Bondt (2014), p. 303.
[9] Arrowsmith (2012), p. 194.

10. In order to fully comprehend the EU public procurement legislation, and the parallel systems of the common denominator and the EU MS' discretionary power in defining prior offences in exclusion grounds, it is imperative to analyse the European directives, but moreover, the historical and socio-political context in which they were adopted. In that sense, the fundamental principles of the EU and the General Principles of Law developed by the ECJ shall act as a guidance to interpret and understand the directives and their applications in the various EU MS.

II. THE EXCLUSION GROUNDS IN ARTICLE 57 OF THE PUBLIC PROCUREMENT DIRECTIVE

A. THE POSSIBILITY TO EXTEND THE GROUNDS OF EXCLUSION STIPULATED IN ARTICLE 57

11. Article 57(1) of the Public Procurement Directive includes a list of offences, which cause the mandatory exclusion of an economic operator from the procurement process. These apply in a situation, where it has been established that an economic operator has been the subject of a conviction for the listed offences. The offences included in Article 57(1) are such that they are typically criminalized in the EU MS. The Public Procurement Directive requires to specify, in accordance with their national law and in compliance with EU law, the conditions for implementation of the grounds for exclusion.[10] Support can be found for the argument that it is possible to extend this list to include other convictions in the national legislation. Moreover, considering the question solely from the perspective of the Article 57, the wording of the Article and the nature of the Directive indicate that the EU MS have a wide discretion on this issue.

12. The possibility to include other convictions as mandatory grounds for exclusion can be interpreted from the nature of the Public Procurement Directive that does not aim for maximum harmonisation: EU MS may introduce rules that are stricter than those in the Directive.[11] In practice, this means that while the EU MS must apply the listed offences in their national legislation as a ground for exclusion, they can broaden the list as the Public Procurement Directive does not regulate additional grounds for exclusion. That is, EU MS have the freedom to establish additional grounds for exclusion subject to limitations that will be discussed hereafter.[12]

[10] Hill (2016), p. 5.
[11] See the definition of maximum harmonisation as opposed to minimum harmonisation in Eur-Lex website: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=LEGISSUM%3Al14527. 22 December 2019.
[12] Lemke (2018), p. 27.

B. INCLUDING NEW CONVICTIONS BY IMPLEMENTING DISCRETIONARY GROUNDS AS MANDATORY

13. Article 57(4) lists a number of situations, where the authorities and EU MS are permitted – but not obliged – to exclude economic operators.[13] EU MS may choose to make these discretionary grounds for exclusion mandatory in their national legislation.[14] Not all discretionary grounds laid down in Article 57(4) are of such nature that they are likely to constitute a criminal conviction in some of the EU MS. However, the paragraph (c) of Article 57(4), which refers to "*grave professional misconduct"* of an economic operator as a ground for exclusion, provides the EU MS with a wide discretion in terms of defining grounds for exclusion. The scope of the concept of *grave professional misconduct* is well illustrated by the ECJ judgement in the case *Forposta SA v Poczta Polska SA*, where the ECJ stated that it should be understood as conduct with "*a wrongful intent or negligence of certain gravity*".[15]

14. The wording and the interpretation of the paragraph (c) of Article 57(4) allows to include in its scope situations that most likely in some EU MS jurisdiction would result in criminal liability – as it has been established that even behaviour that does not explicitly constitute a breach of a professional code, suffices for the purpose of the paragraph.[16] Violation of environmental or labour law is an example of situations falling into the scope of grave professional misconduct since wrongdoings in this field of legislation are a form of corporate crime in some of the EU MS. Establishing this type of convictions as mandatory grounds under the legal framework of the Directive is within the discretion of the EU MS.

15. An example of adding this type of conviction as mandatory ground for exclusion is found in the Finnish legislation where discrimination at the work place is a criminal conviction under the Finnish Criminal Code[17] and the Finnish Act on Public Procurement and Concession Contracts Section 80(2) ("*mandatory exclusion criteria*") states, inter alia, that:

> "*The contracting entity **shall** issue a decision excluding a candidate or tenderer from competitive tendering if the contracting entity is aware that a member of the candidate's or tenderer's administration or management, or a person exercising representative, managerial or regulatory authority therein, has a*

[13] See Article 57(4) "*Contracting authorities may exclude or may be required by EU MS to exclude from participation in a procurement procedure any economic operator in any of the following situations:--"*
[14] Lemke (2018), p. 6.
[15] ECJ, Case C-465/11, 13 December 2012, *Forposta SA v Poczta Polska SA*, § 30.
[16] Evangelou and Hadiyann (2018), p. 2.
[17] Criminal Code of Finland (39/1889), Chapter 47 Section 3 Work Discrimination.

criminal record indicating a legally final conviction --- for work discrimination, as referred to in section 3 in Criminal Code of Finland."[18]

16. It should be noted that the additional mandatory grounds adopted by the EU MS are diverse, although they all aim to implement legitimate policies in order to tackle particular domestic issues.[19] This is not surprising, as the public procurement procedure is consistently linked to governmental policies, related to employment and environment, for example.[20]

C. POSSIBILITY TO EXCLUDE CANDIDATES FOR A FORM OF CORRUPTION BEYOND WHAT IS LISTED IN THE DIRECTIVE

17. As stated above, the European public procurement regulation is essentially linked to the functioning of the common market and the core principles of the EU, in order to prevent and eliminate public procurement policies which favour national operators.[21] At the same time - as it has been recognised that public procurement is susceptible to corruption for instance due to the extensive financial interest of the procedure,[22] the corruption control can also be defined as an objective of the procurement regulation.[23] Therefore, the question regarding the use of procurement disqualification as a measure to combat corruption is of high importance for the efficiency of procurement legislation in the EU.

18. The wording of the Article 57(1) section b) 3), which imposes corruption-based convictions as mandatory ground for exclusion, requires a closer examination. This Article suggests that ultimately the extent of the corruption convictions is to be defined by the national law. Indeed, in addition to the Directive based definition, the wording of the Article explicitly allows exclusion on the ground of *"corruption as defined in the national law of the contracting authority or the economic operator"*. This entails that the substantive law of each MS will determine the exact scope of the types of wrongdoings that will be implemented as a ground of mandatory exclusion based on corruption. The forms corruption that result in criminal liability may vary from MS to MS not only by the actual form of a conduct but also by the persons subject to exclusion.[24]

[18] Act on Public Procurement and Concession Contracts of Finland (1397/2016).
[19] Lemke (2018), p. 32.
[20] McCrudden (2007), pp. 373 – 374.
[21] Bovis (2005), pp. 14-34.
[22] Williams-Elegbe (2012), p. 25.
[23] Williams-Elegbe (2012), p. 3.
[24] See table 2 in Medina Arniaz (2006).

19. Professor Medina Arnaiz illustrates this perception: while the legislators in the EU MS are bound by the obligation to include crimes of corruption in their legislation for disqualification from the procurement process, there is no consensus to determine what activities are to be qualified as excluding conduct.[25] Hence, the possibility to include other forms of corruption to the list of mandatory exclusions is dependent on the MS's criminal policy and the legislative approach taken to regulate corruption. As EU MS have extensive discretion regarding criminal legislation, the possibility to include different forms of corruption is linked to the national criminal legislation.

20. Furthermore, paragraph (c) of Article 57(4) provides an interesting argument. This Article refers to "*grave professional misconduct"* of an economic operator, which can be applied to a broad category of offences. To the contrary, as Chapter III will clarify, the ECJ has taken the view that the exclusion grounds in connection with the professional behaviour of the economic operator are exhaustively listed. Nonetheless, considering in particular the broad application of the "*grave professional misconduct",* it has been argued that professional misconduct could include breaches of anti-corruption legislation where these breaches occurred in the context of the business or profession.[26] While this argument is supported by legal doctrine, the question could *per se* have significant implication, as Article 57(4) – as opposed to Article 57(1) – does not require conviction by final judgement, but allows the exclusion in the given *situation.* Therefore, implementing different forms of corruption into the national legislation on the grounds of grave professional misconduct could result in the application of corruption related behaviour as a ground for exclusion.

D. LIMITATIONS TO THE POSSIBILITY TO INCLUDE OTHER CONVICTIONS

21. The discretion of the EU MS as described in Chapter III, sections B and C has, however, limitations originating from the case-law of the ECJ. Firstly, as above stated, the additional grounds for exclusion shall not relate to the professional qualities of the economic operator. That is, they shall not relate to professional honesty, solvency, and economic and financial capacity.[27] Secondly, the EU MS or contracting authorities are not to use additional exclusionary measures that violate the general principles of transparency and equal treatment.[28] Furthermore, the ECJ has ruled that the additional grounds must be proportionate, i.e. not to go beyond what is necessary to achieve

[25] Medina Arniaz (2006), p. 8.
[26] Willliams-Elegbe (2012), p. 83.
[27] Lemke (2018), p. 32.
[28] Medina Arniaz (2006), p. 8.

their objective.[29] Thirdly, when EU MS implement exclusion provisions, they must ensure that the rules and procedures they apply are non-discriminatory, support the freedom of establishment and the freedom to provide services.[30]

22. It appears however that the application of the limitations stated above is subject to a case-by-case consideration. No explicit jurisprudence on conviction-based exclusion grounds exists. Therefore it leaves the MS a possibility to apply a variety of exclusion grounds as mandatory grounds for exclusion.

III. COMPATIBILITY BETWEEN THE EQUAL TREATMENT PRINCIPLE AND THE ADDITIONAL CONVICTION-BASED EXCLUSION GROUNDS

A. OBSERVANCE OF THE EQUAL TREATMENT PRINCIPLE IN THE PROCESS OF INTRODUCTION OF ADDITIONAL CONVICTION-BASED EXCLUSION GROUNDS

23. According to the ECJ, the equal treatment principle not only does not stipulate a general prohibition for the EU MS to introduce additional grounds for exclusion of economic operators from participation in procurement procedures, but to the contrary – such measures may be envisaged namely in order to ensure the observance of the requirement for equal treatment.[31]. In addition, another cornerstone[32] of the public procurement procedure shall be taken into consideration - the proportionality of the measures in question. Hence, the introduction and the implementation of the additional exclusion grounds must not go beyond what is necessary to achieve their objectives.[33]

24. The legal possibility for the introduction of an exclusion ground based specifically on a criminal conviction that is not listed in Article 57 para. 1 from the Public Procurement Directive, whilst observing the equal treatment principle, can also be justified.

25. Firstly, it shall be pointed out, that according to the explicit provision of recital 41 from its preamble, the Directive should not in any way prevent "*the imposition or enforcement of measures*

[29] ECJ, Case C-538/07, *Assitur Srl v Camera di Commercio, Industria, Artigianato e Agricoltura di Milano*, 19 May 2009, at § 24.
[30] Hill (2016), p. 6
[31] ECJ, Case C-144/17 *Lloyd's of London*, 8 February 2018, at § 30, ECJ, Case C-376/08 *Serrantoni and Consorzio stabile edili*, 23 December 2009, § 31, ECJ, Case C-538/07 *Assitur*, 19 May 2009, § 21 and 23; ECJ, Case C-213/07 *Michaniki*, 16 December 2008, § 44 and 47.
[32] Both the equal treatment principle and this of proportionality are explicitly indicated in the first recital of the preamble of Directive 2014/24/EU.
[33] ECJ, Case C-144/17 Lloyd's of London, 8 February 2018, at § 30, ECJ, Case C-538/07 Assitur, 19 May 2009, at § 21, ECJ, Case C-213/07 Michaniki, 16 December 2008, at § 48.

necessary to protect public policy, public morality, public security…". There is no doubt, that the introduction of an additional ground for exclusion regarding criminal conviction is namely a measure, aimed to protect the said public interests, and, thus, it is an action, permissible by the Directive and the equal treatment principle, generally enshrined in it. Furthermore, recital 100 provides, that public contracts shall not be awarded to economic operators *"that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests, terrorist offences, money laundering or terrorist financing."* It can be concluded from the wording of the provision, that it envisages a **general** prohibition (not only regarding the criminal acts under Article 57, para. 1) for the awarding of a contract to an economic operator, engaged in criminal activities. Recital 101 further supports the enabling of the contracting authorities to exclude tenderers, *"which have proven unreliable"*. Persons, convicted for crimes, shall undoubtedly be categorized as unreliable and their disqualification is a step towards the observance of the equal treatment principle, since their situation is definitely not comparable with this of economic operators, which have not been engaged in criminal activities.

26. Another argument, based on the Directive's text, is the fact, that the EU legislator has explicitly provided for the introduction of an additional exclusion grounds (at least in connection with corruption) – see Article 57, para. 1, letter (b), *in fine*. According to this provision, the contracting authority shall exclude an economic operator, convicted for not only the explicitly defined criminal acts, but also for "*corruption as defined in the national law of the contracting authority or the economic operator".* Several conclusions may be derived therefrom: the list of the convictions, indicated as exclusion grounds, is not exhaustive – it shall be supplemented with complementary national definitions of criminal acts, if such are present. Secondly, the fact, that the contracting authority is obliged (*"shall"*) to exclude a tenderer for acts, defined in national law as crimes, makes the introduction of additional exclusion grounds of that type not only permissible under the equal treatment principle, but compulsory, namely for the sake of conformity with this principle. If a contracting authority complies with this obligation in one instance and it does not in another, this can have as an effect, that economic operators in comparable situations (e.g. all of them convicted for a specific criminal act) are not treated equally – or the contrary: convicted and unconvicted tenderers would be treated equally, when their situations are objectively not comparable. It shall be clarified, that the measures for implementation of the Directive, undertaken

by some EU MS, provide for additional exclusion grounds, including such referring to the national criminal legislation – e.g. Scotland[34], Malta, Hungary.[35]

27. The theoretical elaborations on the issues of the public procurement procedures also indicate that the compulsory application of the equal treatment principle does not preclude the EU MS from broadening the grounds for exclusion of tenderers. It is stated, that they are allowed *"to introduce other and more extensive conviction based exclusion grounds into their national legal provisions".*[36] They "*have the freedom to establish additional grounds for exclusion, provided that those grounds are not based on criteria relating to the professional qualities of the candidate or tenderer".*[37] The latter specific is underlined in the relevant and cited case-law. Thus, inclusion of additional exclusion grounds, related to criminal activity, is permissible.

B. OPTIONS FOR THE OVERCOMING OF THE COMPLICATIONS, CAUSED BY THE DIVERSITY OF THE CRIMINAL LAW SYSTEMS OF THE EU MS

28. The main obstacle for the application of the equal treatment principle, when introducing an additional exclusion ground relating to criminal activity, is the diversity in the criminal law systems of the EU MS. Hence, the broadening of the exclusion criteria is limited by the necessity to observe a balance between these systems. The determination of the so called *largest common denominator amongst the criminalizations*[38] might be an appropriate measure for this purpose. Only a behaviour, that falls within this denominator, would be suitable to become an additional exclusion ground, because it would be criminalised in the EU MS of all stakeholders. Thus, equal treatment among the tenderers would be guaranteed - it would not be possible to exclude an economic operator for a conviction, whereas a competitor with the same behaviour would continue to participate in the procedure for reason of lacking criminalisation in his jurisdiction. Or vice-versa – a foreign tenderer would not be excluded for a behaviour, which is criminalised in the contracting authority's state, but not in the candidate's own country.

29. The researchers propose two options for the determination of the largest common denominator: an EU-wide approach or an *ad-hoc* identification in view of the background of the tenderers in a specific procedure.[39] Advantages and disadvantages of both can be outlined. The

[34] Due to national specifics, Scottish implementation measures differ from these in the rest of the UK.
[35] Lemke (2018), p. 28-30.
[36] De Bondt (2014), p 306.
[37] Lemke (2018), p. 31.
[38] Vermeulen, De Bondt, Ryckman and Persak (2012), p. 150.
[39] *Ibid.*, p. 150.

EU-wide method would lead to a universal denominator, which could be used by contracting authorities in the whole EU and in every procurement procedure. On the other hand, *"the more member states involved in the analysis, the smaller the largest common denominator will be"*.[40] The *ad-hoc* approach is, in first place, not so much time and effort consuming – research would be conducted only upon the criminal law systems of the participating economic operators and not on EU level. It is considered, that this method is compatible with the equal treatment principle, insofar the latter shall be observed between the participants in the **particular** procedure. However, it should be borne in mind, that the accordance of the *ad-hoc* approach with the requirements for legal certainty, consistency and most importantly – legality (all of which are fundamental for criminal law matters) can be put into question. The principle *Nulla poena sine lege* cannot be observed, if the contracting authority (and not the legislator generally) is entitled to provide for exclusion grounds for each separate procurement procedure.

30. None of the above explained approaches solves another practical problem, related to the still insufficiently adequate possibilities for criminal record information exchange between the EU MS. This is a major issue, that might jeopardize the observance of the equal treatment principle, since the evaluation of the situations of the stakeholders requires sufficient information. The introduction of the European Criminal Records Information Exchange System (ECRIS)[41] in 2012 was an important step towards tackling the problem. However, the European Commission's first statistical report on the use of ECRIS[42] showed, that the full functionality of the system is not yet achieved, whereas not all EU MS are actively taking part in its development and the information exchange itself. There is no doubt, that the further sophistication of ECRIS is crucial for the observance of the equal treatment principle in the complicated criminal law ecosystem of the EU. However, until this moment, the contracting authorities should also rely on other options for receipt of conviction information.

31. According to recital 84 from the preamble of Public Procurement Directive, further elaborated in its Article 59, para. 4 and Article 60, para. 2, the contracting authority is entitled to require from the tenderer the submission of an extract from a criminal record system or an equivalent document, issued by an authority in the member state of the candidate. In case the information in the ECRIS or the above-mentioned official documents is not sufficient for the

[40] *Ibid.*, p. 151.
[41] Taking into account previous convictions, retrieved online on 5 January 2020 from https://e-justice.europa.eu/content_taking_into_account_previous_convictions-95-en.do
[42] Report from the Commission to the European Parliament and the Council concerning the exchange through the European Criminal Records Information System (ECRIS) of information extracted from criminal records between the EU MS, COM (2017) 341 final.

purposes of the exclusion evaluation and the observance of the equal treatment principle, the contracting authority may seek the cooperation of the competent authorities of the tenderer's MS to obtain information relating to the conviction.[43]

32. The least reliable and however explicitly envisaged by the EU legislator[44] source for EU-wide conviction information is the self-declaration by the economic operator. The latter method shall not be ignored – the cooperation between the contracting authority and the tenderer is a fundamental principle in the public procurement. Moreover, the candidate is interested to honestly state its status, so that it can eventually make use of the self-cleaning mechanisms, envisaged in the Public Procurement Directive.

CONCLUSION

European public procurement law is subject to ongoing European harmonisation, codification, modification, and corresponding transposition into national law. The systematic communitarisation is crucial to ensure the functioning of the internal market and effective competition and non-discrimination in the EU.

A fundamental principle that underpins European public procurement law is the principle of equal treatment, which the Public Procurement Directive clearly stipulates in clause 90. Chapter I clarifies the meaning of this principle and the importance of the ECJ places the principle of equal treatment, and the principle of competition intrinsically linked to it in this context, are essential for the integration of the EU and its underlying treaty principles.

However, discrepancies between national criminal legal systems inevitably create differences in legal framework governing prior convictions in each EU MS. This in turn affects the grounds on which a contracting authority can exclude an economic operator convicted of certain specified offences, stipulated in Article 57 (1) and (2) of the Public Procurement Directive.

Chapter II analyses the possibility for the EU MS to extend this list of exclusion grounds and it is concluded that there is a significant discretion on the part of the MS to adopt grounds for discretionary exclusion for criminal convictions, such as corruption related crimes.

[43] Communication from the Commission to the Council and the European Parliament. Disqualifications arising from criminal convictions in the European Union, COM (2006) 73 final, p 6.
[44] See to that effect Article 60, § 2 from Directive 2014/24/EU.

Nevertheless, this discretionary power does not give a free rein to arbitrariness, but must always be exercised in accordance with the principles of the EU law. Particular attention must be given to the principles of equal treatment, proportionality and the self-cleaning measures.

Despite the obligation to respect the fundamental principles of Union law, Chapter III outlines the practical issues that arise in the assessment of extending the conviction-based exclusion grounds in light of those principles.

Clear public procurement law safeguards the functioning of the European internal market that is essential for Europe's growth, jobs and competitiveness. Communitarising current public procurement regulation does not meet existing needs. As the report elucidates, there are several legal limitations and practical obstacles, in particular regarding the principle of equal treatment and the challenges presented by an increasingly digitalised economy. The conviction-based exclusion grounds are to an extent subject to MS's discretion. This ultimately leads to a possibility to apply diverse conviction-based exclusion grounds throughout the EU, which is likely to cause inconsistency with the principle of equal treatment.

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The Young Lawyers Contest

2019/2020

Written Report by

JAROSLAW POGORZELSKI

&

ANDREA SORGE

on the

Opinion 1/2010 on the concepts of "controller" and "processor"

adopted on 16 February 2010

The Working Party recognizes that the concrete application of the concepts of data controller and data processor is becoming increasingly complex. This is mostly due to the increasing complexity of the environment in which these concepts are used, and in particular due to a growing tendency, both in the private and in the public sector, towards organisational differentiation, in combination with the development of ICT and globalisation, in a way that may give rise to new and difficult issues and may sometimes result in a lower level of protection afforded to data subjects.

WRITTEN REPORT

Purpose

This Report (the "Paper") was prepared and submitted as a part of the first phase of the 2019 / 2020 Young Lawyers Contest hosted by the Academy of European Law

and provides

critical legal analysis of how the above mentioned complexity has been addressed in case-law of the CJEU concerning the concept of "controller"

and answers if

in circumstances of joint controllership, the legal framework for distribution of responsibilities between controllers (as it arises from the General Data Protection Regulation and case-law of the CJEU) is sufficiently clear and is it capable of ensuring complete protection of the rights of data subjects

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Table of Content

I. ABSTRACT

The objective of this paper is to assess whether and to what extent in the circumstances of joint controllership, the legal framework for distribution of responsibilities between the controllers is sufficiently clear and capable of ensuring complete protection of the rights of data subjects.

The critical analysis focuses on the Working Party Opinion 1/2010 evaluating the concepts of "controller" and "processor" adopted at 16th February 2010 (the "**Opinion**"), the Directive 95/46/EC of the European Parliament and of the Council of 24th October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the "**Directive**"), the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27th April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (the "**GDPR**"), the EDPS Guidelines on the concepts of controller, processor and joint controllership under Regulation (EU) 2018/1725 (the "**EDPS Guidelines**") and the relevant case-law of the Court of Justice of the European Union (the "**CJEU**").

It is going to be considered, from theoretical and practical point of views, if the current regulations are in line with the present days realities and do not need to be adjusted as binding in era of ever-changing globalised world.

The conceptual model of this assessment ponders that, despite its common comprehension and concerned importance, the regulated matter was not fully regarded and understood at the time of its creation. As result of that, the CJEU judgements and the further decisions of national courts and regulators have to addressed the majority of concerns by taking data subject friendly approach with a relatively broad interpretation when considering someone as a joint controller.

II. THE IMPORTANCE OF INFORMATION

In a nutshell, we shall consider why management and control over the information is so important nowadays, and why it become the subject of such extensive regulation at the EU level.

Today, to say that modern technologies (including the internet) do change our lives is to say almost nothing- we all have Gmail accounts, use WhatsApp messenger and drive Uber. But if Facebook, YouTube or Twitter are the businesses, then what is the product? A product kind is our time being a valuable information about what attracts our attention; in the economics of the internet, it is known as the attention span- the time we spent on a given topic via given application- the time of our interest.

Tim Wo in his book, The Attention Merchants (2016) uses the term of crops; the companies gather the information about the time of our interest and then sell it to the intermediaries, producers, politicians, spies, governments, to everyone.

An American economist and Nobel Prize laureate, Herbert Alexander Simon, long before the internet came into its current form, stated in his book, The Sciences of the Artificial (1969), that an abundance of the information will cause a deficit of our concentration; thereof our attention will became a kind precious metal, a fossil fuel in exhaustion; it will become the most desired good on earth.

Recently, in a relatively short period of time, our capacity to absorb the information (the above mentioned attention span) has been mostly filled with social media, which in a short period of time has also overturned the classical principles upon which the traditional free market did operate. Social media revolutionised the economy in terms of both; the quantity (via mobile phones, smartwatches, satellite navigation, etc.) and quality (increased the efficiency of the transferred information). What is more, easiness of gathering the information flow caused a shift of importance in values; from production and distribution, to the management of our awareness- to the information management.

The traditional relationships among the customers, producers, and state regulators does no longer apply, as in the social media we are both: the client and the provider of information about ourselves.

Probably that's why the EU lawmakers were trying to deviate from the classic legal concepts and created the concept of joint controllership.

III. REGULATION AND ITS EVOLUTION

1. The Data Controller and Data Processor

The concept of data controller and its interaction with the concept of data processor play a crucial role, since they determine who shall be responsible for the compliance with the data protection rules, and how data subjects can exercise their rights in practice.

In essence, the Directive and GDPR defines the controller as the person or entity that determines, alone or jointly with others, the purposes and the means of the processing of personal data. The processor, on the other hand, is the person or entity that processes personal data on behalf of the controller; it is a separate legal person or entity with respect to the data controller and processes personal data on the data controller's behalf. The data processor is called on to implement the data controllers' instructions at least with regard to the purposes and the essential means of the processing. The lawfulness of the processors' data processing therefore depends on the specific mandate given by the controller. A data processor exceeding that mandate could be viewed as assuming the responsibilities of a joint controller.

The definition of the controller per Directive; article 2 (d) provide that controller shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes

and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by national or Community law.

In many cases the responsibility of data controller can be attributed on the basis of an assessment of the factual circumstances. Contractual terms can often clarify the issue, although they are not decisive under all circumstances. Even if a contract is silent on who is the controller, it can still contain sufficient elements to assign the responsibility of controller to the party that apparently exercises a dominant role in that regard.

The data controller shall determine the purposes and the means, i.e., the "why" and the "how" of certain processing activities. The crucial question, however, is to which level of detail somebody should determine purposes and means in order to be considered as a data controller. According to Opinion, whoever decides on the "purposes" of a data processing operation should be the controller. The data controller can delegate the determination of the "means" of the data processing, as far as technical or organizational measures are concerned. Substantial decisions that may affect the lawfulness of the data processing (e.g., how long will the data be stored) are reserved to the data controller.

Definition of the controller addressed by GDPR per article 4 (7) provides that the controller means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law.

Going further, article 24 provides the responsibility of the controller: taking into account the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for the rights and freedoms of natural persons, the controller shall implement appropriate technical and organisational measures to ensure and to be able to demonstrate that processing is performed in accordance with this Regulation. Those measures shall be reviewed and updated where necessary.

Where proportionate in relation to the processing activities, the measures referred to shall include the implementation of appropriate data protection policies by the controller. Adherence to approved codes of conduct as referred to in the article 40 or approved certification mechanisms as referred to in article 42 may be used as an element by which compliance with the obligations of the controller are demonstrated.

2. The Joint Controllership

The GDPR speaks about joint controllership when two or more controllers jointly determine the purposes and means of processing. The joint decision-making process is central to determine joint controllership and requires that each controller must actually have a word to say in the collection

and processing of data. A mere contractual agreement on one party processing personal data and other parties benefiting from such processing does not suffice for the establishment of joint controllership. For example in the Facebook case (please refer to the Wirtschaftsakademie case below), the fanpage administrator has neither got a say, nor has he got insights on how Facebook is processing visitors' data. Otherwise any agreement on processing personal data would constitute joint controllership. In other words: The test for joint controllership is thus a practical one rather than – in the first place – one based on mere contractual analysis.

Article 26 of the GDPR refers the concept of joint controllership; where two or more controllers do jointly determine the purposes and means of processing, they shall be joint controllers. Joint controllers shall in a transparent manner determine their respective responsibilities for compliance with the obligations under this GDPR, in particular with regards to the exercising of the rights of the data subject and their respective duties to provide the information referred to by the articles 13 and 14. This can be fulfilled by means of an arrangement between the parties unless, and in so far as, the respective responsibilities of the controllers are determined by the EU or the Member State law to which the controllers are subjects to. The arrangement may designate a contact point for data subjects. The arrangement referred shall duly reflect the respective roles and relationships of the joint controllers vis-à-vis the data subjects. The essence of the arrangement shall be made available to the data subject. Irrespective of the terms of the arrangements, the data subject may exercise their rights under GDPR in respect of and against each of the controllers.

Pre-GDPR data protection regulation did not contain any specific rules for joint controllership, nor did it impose any direct responsibilities on companies that process data on behalf of a controller – the processors.

IV. TODAYS COMPLEXITY OF PERSONAL DATA PROCESSING

Applying the concept of joint controllership to a practical case may have been straightforward in the early days of the Directive, but in today's world many can perceive the concept as archaic and, most importantly, unworkable in practice- let's try to consider Internet of Things (the "**IoT**"), social media environments, applications developers, and a bit of other entities.

The expression Internet of Things describes the growth of modern society in everyday used smart and connected objects, capable of collecting, processing and transmitting information on the surrounding environment and activities; that includes personal data. The Opinion identifies three categories of such "things": that of usable and wearable computing, such as smartphones or smartwatches, that of the "quantified self", such as pedometers or sleep trackers and that of domotics "connected", such as thermostats or alarm systems. Naturally, these are a subdivision of grater cluster of convenience; in reality most of those devices are already on the market and fall within more than one, or all, of these categories. The commercial success of the above mentioned

“things” derives an exponentially high risk of accessing an incredible amount of their users’ (or third parties’) personal data. This personal data can be further used without any real awareness or control given to the individuals concerned. Home automation devices, for example, can reveal detailed information about the lifestyle of the inhabitants of a given home in which they are installed. Quantified self-devices potentially allow access to sensitive data on the health of individuals. Many other devices can reveal the user’s geo-location and movements- in example, infer driving habits from the data collected by the smartphone.

The European personal data protection laws come into play only if the two premises are jointly met: there is a relevant processing of personal data and the conditions for its applicability does apply. In itself, the fact that a device is capable of collecting and transmitting personal information does not necessarily imply that the processing of personal data pursuant to the relevant EU legal framework. In the abstract, data collected by the device might remain exclusively available to its user(s), and later on it could be used only for personal purposes. Or the data might be completely anonymised, severing any ties to an identifiable individual.

But there is also another very real possibility, namely that the data related to an identified or identifiable individual is transmitted from the device to an entity other than the user which will store it, process it and possibly share it with third parties; this the most common and typical business model of the IoT according to the Opinion. The Opinion identifies various stakeholders potentially involved in processing data from IoT devices: device manufacturers; device lenders or renters; application developers; social platforms; data brokers. Each of these stakeholders, if the conditions for the application of EU legislation are met, may qualify as a data controller to the extent that they collect and process personal information for purposes that have been pre-determined- this is where the joint controllership might come into play.

In this respect, social media platforms almost always are in play because of its nature; the users’ share almost every king of data collected on these platforms through smart devices; where the operators of these platforms use shared data for the purposes they determine- so they become a data controllers. To quote an example made by the Option: “a social network could use the information gathered from a pedometer to infer that a particular user is a regular runner and show ads for running shoes”.

Applications Developers also become data controllers as they access personal data collected by means of the device, possibly in addition to the manufacturer.

Other third parties may also use connected devices to collect and process information about individuals; for example, the Opinion notes that insurance companies may provide their customers with pedometers produced by third parties in order to monitor how often they exercise, and adjust insurance premiums accordingly.

However from a data subject's perspective, joint controllership per se is clearly not a bad thing. Yet, joint controllership and the entailing additional obligations for joint controllers shall be restricted to cases where data processing activity indeed goes beyond a standard controller-processor arrangement or a mere data transfer from one controller to the other (i.e. a separate controller – separate controller relation).

V. THE CASE LAW

In the case C - 210/16, Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein vs Wirtschaftsakademie Schleswig-Holstein GmbH (WSW)[1], a German private school created a fan page on Facebook website. When users visited the fan page, by means of cookies, visitors data were collected by Facebook without the visitors being informed. Cookies are text files that are downloaded onto an Internet user's computer whenever the user visits a website- those can create a valuable source of information for commercial and marketing purposes as tracks the history of browsing.

The Data Protection Authority of the state Schleswig-Holstein ordered Wirtschaftsakademie to deactivate its Facebook fan page because the users were not informed about the related personal data processing.

The school brought an appeal against the order, arguing that it was not responsible for the processing of the data made by Facebook. After that, the Federal Administrative Court of Germany requested for a preliminary ruling of the European Court of Justice.

In its opinion the Advocate General, Y. Bot, argued that a fan page administrator such as Wirtschaftsakademie should be regarded as joint controller with Facebook for the processing of personal data. The reason is that the fan page administrator made a decision to create a Facebook fan page and by making this decision become the administrator determining the possibility for Facebook to collect the data of users.

What is more, the fan page administrator affects how Facebook process the personal data by selecting the criteria for the collection. For example, the fun page administrator might choose filters that determine to whom the fan page will be shown. This influence over the processing constitutes participation in the purposes and means of processing and therefore leads to the conclusion that the administrator has to be considered a joint controller with Facebook. Y. Bot concluded that Wirtschaftsakademie shall to be considered a controller at least with regard to the part of personal data processed, namely concerning the people who visited the fan page.

[1]http://curia.europa.eu/juris/document/document.jsf?text=&docid=202543&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=91831

The CJEU ruled in line with the arguments of the Advocate General; an administrator of a fun page such as Wirtschaftsakademie must be regarded as a personal data controller (together) jointly with Facebook.

The CJEU said that by opening the fan page, Wirtschaftsakademie made it possible for Facebook to collect data about the visitors. In return, the Wirtschaftsakademie received statistics and other information about their visitors which they could use to optimise their trade and marketing offers. In this regard the Court stated very clearly that joint responsibility does not require that each of the controllers has an access to the personal data concerned.

Moreover the Court emphasized that joint responsibility does not necessarily involve equal responsibility of the different parties in the processing personal data. More specifically the Court argued that the "operators may be involved at different stages of that processing of personal data and to different degrees, so that the level of responsibility of each of them must be assessed with regard to all the relevant circumstances of the particular case".

The keystone of the ruling is that the CJEU developed an extensive interpretation to the concept of controller. In particular the ECJ adopted a granular approach of the data processing by taking into account the individual data processing operations within the system (social media platform). This is also called "phase oriented approach"- the Court evaluates whether an entity might be qualified as a joint controller related to a different phases of the data processing.

Case C – 40/17,Fashion ID GmbH & Co. KG vs Verbraucherzentrale NRW eV[2], also known as the "like case". Fashion ID Gmbh is a German online clothing retailer that had placed the Facebooks "Like" button on its website. Through this button, Facebook collected the personal data such as IP addresses of each visitors of the Fashion ID website. The transfer of the user information took place regardless the website visitor have a Facebook account or whether they had actually clicked on the "Like" button. The German consumer protection association (Verbraucherzentrale NRW e.V.) took legal action against Fashion ID claiming that the use of the Facebook "Like" button entailed a breach of the Directive.

The Higher Regional Court of Düsseldorf, which was hearing the dispute, requested the CJEU to interpret several provisions of the Directive in course of the trial.

CJEU has ruled that Fashion ID and Facebook Ireland are joint controllers with respect to the collection and transmission of the website users' personal data to Facebook. By applying the principle of "effective and complete protection" CJEU concluded that the German clothing retailer and Facebook Ireland jointly determined the means and purposes of collection and transmission of personal data.

[2]http://curia.europa.eu/juris/document/document.jsf?text=&docid=216555&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=96929

In other words the Court states that the Fashion ID took part in the data processing by placing the like button on his website and has also determined, together with Facebook, the means of processing. As Fashion ID case followed the Wirtschaftsakademie judgement it is widely known as having broader interpretation about the means determining the purposes of personal data processing.

In its last decision of 10 July 2018 concerning Tietosuojavaltuutettu[3], the CJEU found that a religious community may be– jointly with members of its congregations be responsible for collecting personal data in course of door-to-door preaching activities, by which members of the congregations who engage in preaching spread the faith of their community. Although the personal data gathered is never shared with the religious community, the CJEU considered that as being sufficient for the establishment of joint controllership that the community organised, coordinated and encouraged the preaching activities of its congregations.

Implications of the above mentioned cases firmed up the concept of joint controllership and respective joint controller obligation. Therefore, it can be expected that the following data subject friendly approach taken by the CJEU will lead to a similar decisions in the future. In each case the CJEU adopted a phase oriented- microscopic approach on joint controllership. Instead of looking at the general purposes and means of the data processing as a whole, CJEU pointed out every single data processing operation to determine whether a joint controllership took place. In other words the CJEU introduced a broad interpretation of what it means to "determine the purposes and means of processing".

This kind of a wide approach taken may sometimes lead to a legal uncertainty. Through the extension of the concept of controller in some cases it might not be easy to understand who act as controller for an individual stage of the operation and the allocation of responsibility between two or more joint controller might not be possible to establish. This consequences may be linked with the lack of a specific system for the attribution of responsibility in situations of joint controllership in the GDPR; especially, if the joint controller did not have a detailed agreement concerning their responsibility.

Also, this raises a question, whether the function of a processor still has any scope of application. Following the presented approach, in practice, it will hardly possible to distinguish whether two parties have agreed on one party doing the processing and the other party profiting from this processing (this is a joint controllership according to the CJEU) or the processing party is processing the personal data on behalf of the non-processing party (this is processor-controller relationship). As the CJEU seems to favour joint-controller relations over processor-controller

[3]http://curia.europa.eu/juris/document/document.jsf?text=&docid=203822&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=99761)

relations, the scope for processors seems to have narrowed. By default, joint controllers are each responsible for compliance with all GDPR obligations, even if they are not involved in the processing of personal data. In contrast, in a processor-controller relationship, both, the processor and the controller, would only be responsible and liable for violations of their respective own obligations.

VI. EDPS GUIDELINES

The European Parliament and the Council Regulation 2018/1725 was adopted at 23rd of October 2019 (the "**Regulation**") and repealed the Regulation (EC) No 45/2001. It provides specific rules to protect natural persons with regard to the processing of personal data by the EU institutions, bodies, offices and agencies.

The aim of the Regulation is to align the data protection rules for European and Member States Institutions with the GDPR. The Regulation introduced some novel elements; for instance, it clarified the definition of the controller, provided the new principle of accountability for the data controllers and add new obligation to notify personal data breaches to the European Data Protection Supervisor (the "**EDPS**").

With regard to the concept of controller, article 3 (8) has modified its definition. In specifics, the controller is the EU Institution, body, the directorate-general or any other organisational entity which, alone or jointly with others, determines the purposes and means of the processing of personal data. It also underlines the possibility that the EU institutions could be responsible for the processing of personal data alone or jointly with others. Therefore in the same way as GDPR the Regulation adopted a functional approach of the controller. Moreover article 3 (12) defined the processor as the natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller.

Following the adoption of the Regulation, the EDPS released guidelines about the concept of controller, processor and joint controllership.

The scope of these Guidance is aimed to provide the explanations and instructions for the EU Institutions in order to clarify the definition of controller, processor and joint controllership. In other words, the aim of the Guidelines is to make EU Institutions clearer about the processing of personal data by EU institutions. For those reasons the guidance address, among others, some case studies related to the concepts of controller, processor and joint controllership providing a checklist related to the duties of the controller and processor.

First of all the EDPS explains what it means to determine the purposes and means of the personal data processing. The Authority highlighted that the controller is the entity who determine the 'why' and the 'how' the processing of personal data take place.

Determination of the purpose, means the reason for which a certain processing would take place. Determination of the means, "refers to the technical and organisational measures that are put in place when carrying out a specific processing operation".

Concerning the role of processor, the EDPS clarify that acting on behalf of the controller means that the processor is serving the controller's interest in carrying out a specific task, so it have to follow the instructions provided by the controller at least with regards to the purpose and the essential elements of the means.

About the joint controllership the EDPS Guidelines tried to explain when this situation is taking place and emphasized that joint controllership may happen not only between two or more controllers in EU institutions but also between and European Institutions and an external actor. For instance an external provider or a national public authority.

Therefore, EU institutions may be a joint controller and subject to the GDPR.

The EDPS suggests for the EU institutions to use a private services so the private companies only act as processors. EDPS stated: "it would not be appropriate for a private party to exercise the kind of influence that would result in them being a joint controller".

EDPS Guidelines having roughly the same key element as the Opinion, highlighted practice in which there are several doubtful situations of joint controllership. The Data Protection Authority admitted that sometimes it may be difficult to determine a situation of joint controllership or a situation in which two controller act independently or a controller - processor case.

For those reasons the EDPS suggested to EU authorities to provide for a detailed allocation of responsibilities in the relevant legislative acts, in order to ensure a clear distribution of roles between joint controllers. In case of lack in the allocation of responsibilities determined by law, the EDPS explained that the arrangement need to fill any gap that remain.

VII. CONCLUSIONS

It is certainly worth noting that the problem of joint controllership is recognised by both: the Opinion and the EDPS Guidelines- they both say that some cases raise doubts regarding the existence of joint controllership. Nevertheless, none of those papers does not offer any practically applicable solution(s) which could solve the issue in question.

Opinions solution staying that: "Although contractual arrangements can be useful in assessing joint control, they should always be checked against the factual circumstances of the parties' relationship" is nothing like a discovery- it just says: "please use the common sense".

On the other hand the same Opinion stays that: "Contractual terms can often clarify the issue, although they are not decisive under all circumstances"; again, it just says: "please use the common sense".

About the EU institutions, the EDPS provide “a clear allocation of responsibilities in the relevant legislative acts, in order to ensure a clear distribution of tasks between joint controllers. When the roles and responsibilities of joint controllers are only partially determined by law, the arrangement needs to fill any gaps that remain.”

With respect to the common sense, clearly, presented examples of the rulings do indicate that the CJEU applies a very broad interpretation when considering someone as a joint controller; even if the data processing activity is carried out only by one of the parties and there is no transfer of data to the other party, provided that the other non-processing controller somehow (directly or indirectly) benefits from the respective data processing activity or exerts influence over the processing of personal data for his own purposes.

CJEU aims for a broad understanding of the term controller in order to ensure effective and comprehensive protection of data subjects, what is being achieved by keeping responsible and liable as many parties as possible.

In our view, speaking of “jointly determining the purposes and means of processing” just because the fan page administrator enters into a contract with Facebook on receiving anonymised usage reports, makes CJEU interpretation going way beyond the letter of the law, as well as its intention, or intended use.

What is more, it is worth noting that the analysed CJEU judgements, at the section V of this paper, were not very complex and did not concerned many joint controllers bounded by many contracts; we don’t know the consequences that data subject friendly approach may lead to if any of those cases would concern examples presented by section IV of this paper.

Under the GDPR there is no need to over-extensively construct the concept of the (joint) controller, hardly allowing room for processors; GDPR does not call for an extensive interpretation of joint controllership; GDPR does not have any written down specific system for the allocation of responsibilities in situations of joint controllership.

Summarising, it cannot be denied that the very broad interpretation with respect to the joint controllership (creating so called data subject friendly approach) is clearly capable of ensuring complete protection of the rights of data subjects, however the legal framework for distribution of responsibilities between the controllers is not sufficiently clear (yet).

How would prior criminal records of applicants in a public procurement procedure need to be taken into account in light of the diversity in criminal law provisions and the equal treatment principle – generally enshrined in European Union law and specifically applicable in public procurement procedures?

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1. Introduction to the Directive 2014/24/EU

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EU (the **Directive**) is a result of legislative efforts that go as far as 2011. On 27 January 2011 the European Commission published a *Green Paper on the modernisation of EU public procurement policy – Towards a more efficient European Procurement Market*, which launched the public consultations on the required changes. Subsequently, proposal for a new directive on public procurement was introduced – a new generation that meant to replace the directives 2004/17/EC and 2004/18/EC. The revision was then justified by concerns voiced by the relevant stakeholders. They demanded simplifying the rules governing the public procurement procedure, increasing their efficiency and effectiveness to adjust them to the evolving political, social and economic context[1]. Upon the negotiations with the Council, the Compromise Text was published on 12 July 2013 for submission to the European Parliament for a first reading. The final text was approved by the European Parliament on 15 January 2014 and subsequently published in the Official Journal of the European Union on 28 March 2014[2].

The Directive is based on three principal objectives: (i) increasing the efficiency of public spending, (ii) ensuring the transparency and eliminating corruption-causing phenomena, and (iii) ensuring fair competition and market access to the widest possible audience, specifically small and medium enterprises. To achieve that, not only does the Directive provide and build upon the previous procedural regulations, but also – for the first time – introduces a set of comprehensive and completely new provisions that directly touch upon the actual contract performance, the area which was scarcely regulated in the previous directives[3] (Chapter 4 of the Directive).

One of the areas that particularly aims to reach these objectives is the catalogue of exclusion grounds stipulated in Article 57 of the Directive. It provides for two types of grounds that justify the exclusion: (i) the obligatory grounds, when the exclusion of the economic operator is mandatory – these include the final convictions for the listed offences and the breach of the obligations related to the payment of taxes or social security contributions[4], and (ii) the facultative grounds, when the exclusion can be exercised by the contracting authorities or may be required by Member States –

[1] *Proposal of the European Commission for a Directive of the European Parliament and of the Council on public procurement*, available online:https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52011PC0896, (accessed 10 January 2020).
[2] A. Sanchez-Graells, *Exclusion, Qualitative Selection and Short-listing in the New Public Sector Procurement Directive 2014/24* in F Lichere, R Caranta and S Treumer (ed.) *Novelties in the 2014 Directive on Public Procurement*, vol. 6 European Procurement Law Series, (Copenhagen, Djøf Publishing, 2014), p. 97-98.
[3] W. Hartung in W. Hartung, M. Bagłaj, T. Michalczyk, M. Wojciechowski, J. Krysa, K. Kuźma (ed.), *Dyrektywa 2014/24/UE w sprawie zamówień publicznych. Komentarz, (Directive 2014/24/EC on public procurement, Commentary),* Warsaw 2015, p. 80-82.
[4] Article 57 (1) and (2) of the Directive.

these generally include circumstances that undermine the economic operator's credibility to perform the contract properly[5].

The exclusion grounds aim to protect the integrity of the process. Considering the Directive's objectives it would be generally wrong to award a contract to a tenderer who has, for example, committed a crime against public authority because public funds are related to public procurement procedure. The common goal concerning the exclusion is also to prevent and to stop tenderer from continuing its unlawful actions and to exclude fraudulent economic operators from this competition. It also encourages the economic operators to pay attention to their own actions and make sure a member of their administration or management, or a person exercising representative, managerial or regulatory authority does not have a criminal record regarding any of the offences mentioned in the Directive and/or national law. It would be wrong if fraudulent tenderer got profit do the detriment of fair competition. Frauds, money laundering or terrorist financing are severe crimes that may be expected to be criminalized in all Member States and no one wants to provide financial support for economic operators which have involved those criminal issues, also mentioned in the Directive (Article 57 (1) points c, d and e of the Directive). For example, it would be possible to offer lower price in contracts if the working conditions are worse and employees are underpaid.

The catalogue of exclusion grounds is not an entirely new concept – rather an evolution from the previous generation. In fact, Article 57 of the Directive builds upon and further develops Article 24 of the directive 93/37/EEC and Article 47 of the directive 2004/18/EC, which also means that the judgements of the European Court of Justice that considered the previous regulations might still serve as the guideline aiding with the interpretation.

The Directive introduces a completely new concept that is inseparably tied with the discussed exclusion grounds – the European Single Procurement Document (the **ESPD**). It is a standard form that the economic operator submits at the time of submission of requests to participate or of tenders, which contains the economic operator's statement confirming that it is eligible to participate and that none of the exclusion grounds apply. In principal, these statements will need to be formally confirmed only by the economic operator who was selected.

It is clear that introduction of the ESPD aims to relieve the participants of the administrative burden by limiting the amount of required documentation. In turn, the Directive favours the statement of the economic operators at the initial stage of the proceedings, which will be in any case verified after the selection, thus preventing the abuse of this concept. The contracting authority still remains

[5]Article 57 (4) of the Directive.

competent to demand the official confirmation at any time, but in principal, this surely benefits the pace of the proceedings and encourages participation, especially of the small and medium enterprises[6].

Knowing the context of the exclusion grounds, the question remains whether the Member States are restricted by the scope provided in the Directive or rather have a certain degree of discretion? This is specifically questionable in terms of the final convictions serving as the basis for exclusion – due to the difference in criminalization among the Member States it is possible that certain behaviours may result in conviction in one Member State, but not the other. On the other hand, it would seem that Member States possess a country-sensitive knowledge regarding what behaviours should be particularly scrutinized to ensure the credibility of the economic operators, which would justify providing the Member States with a certain level of discretion.

2. Equal treatment principle

2.1. The relevant judgments of the European Court of Justice - equal treatment

The importance of the equal treatment principle is well established within the ECJ's judgments. It requires that comparable situations should not be treated differently unless such differentiation is objectively justified[7]. The importance of equal treatment in the context of public procurement is recognised by its explicit emphasis in recitals 1 and 90 of the Directive. Additionally, the European Court of Justice (the **ECJ**) has repeatedly indicated that even where this principle is not explicitly included in the body of the text, it is so fundamental, that procurement procedure cannot function without it. In the Storebcelt case, the ECJ judged a Danish call for tender with respect to the construction of a bridge, which required all candidates to use as much of the Danish resources as possible. One of the candidates took this matter to court arguing that such a requirement would result in the unequal treatment of foreign candidates. It was argued that Danish resources are better known and more accessible for Danish candidates. The requirement to use Danish resources was said to constitute a disadvantage for foreign candidates. With the Storebalt case, the ECJ clarified that even where directives do not expressly mention *in casu* the principle of equal treatment of candidates, the duty to observe that principle lies at the very heart of the directive's purpose, which it is to ensure the development of effective competition in the field of public contracts. Furthermore, it also lays down criteria for selection and for award of the contracts by means of which such

[6] J. Pawelec (ed.), *Dyrektywa 2014/23/UE w sprawie udzielania koncesji. Dyrektywa 2014/24/UE w sprawie zamówień publicznych. Dyrektywa 2014/25/UE w sprawie udzielania zamówień przez podmioty działające w sektorach gospodarki wodnej, energetyki, transportu i usług pocztowych. Komentarz (Directive 2014/23/EU on the award of concession contracts. Directive 2014/24/EU on public procurement. Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors. Commentary)*, Warsaw 2017, p. 470-471.
[7] Judgment of 16 October 1980, *Hochstrass*, Case 147/79, ECLI:EU:C:1980:238.

competition is to be ensured[8]. The principle requires an objective comparison of the tenders submitted by the various candidates[9]. Undeniably, equal treatment is a fundamental principle in a public procurement context and the interpretation and application of procurement legislation should be done with respect for the equal treatment principle[10].

Contracting authorities may apply measures, which result in exclusion of private sector undertakings from participating in tendering procedures on grounds of equal treatment and transparency, only if these measures are **proportionate**[11]. In the Assitur[12], the ECJ ruled that Italian law, prohibiting affiliates from the same group from submitting separate bids in a tendering procedure, contravenes the public procurement procedure. It was concluded that such a legislation, which is based on an irrebuttable presumption that tenders submitted for the same contract by affiliated undertakings will necessarily had been influenced by one another, breaches the principle of proportionality. This was justified by stating that it denies those undertakings an opportunity to demonstrate that, in their case, there is no real risk of occurrence of practices capable of jeopardizing transparency and distorting competition between tenderers. Thus, where it extends the prohibition on participation in the same procedure for the award of a contract to situations in which the relationship of control between the undertakings concerned has no effect on their conduct in the course of such procedures, national legislation goes beyond what is necessary to achieve the objective of ensuring the application of the principles of equal treatment and transparency.

2.2 Final judgments as the basis for the exclusion

The Directive restricts the possibility of implementing self-cleaning measures for economic operators that have *been excluded by final judgment from participating in procurement procedures* [which] *shall not be entitled to make use of* [this] *possibility … during the period of exclusion resulting from that judgment in the Member States where the judgment is effective*[13]. This shows a lack of trust in self-cleaning measures and imposes exclusion as an irreversible sanction in the Member State adopting that decision (but, oddly, not in other Member States), which can sometimes disproportionately reduce competition (as well as creating a dual standard applicable in *domestic* and *cross-border* participation in procurement by that operator). Therefore, self-cleaning should also be available in these cases, which may justify a particularly tough approach to the evaluation of the sufficiency of the measures implemented by the economic operator. At least, an

[8] Judgment of 22 June 1993, *Storebalt*, C-243/89, ECLI:EU:C:1993:257, para. 33.
[9] *Ibidem*, para. 37. In emu the ECJ decided that the requirement to use domestic resources would amount to an unequal treatment of the foreign candidates.
[10] W. De Bondt, Ch. Ryckman, G. Vermeulen (ed.), *Liability of legal persons for offences in the* EU, 2012, p.147.
[11] Judgment of 16 December 2008, *Michaniki*, C-213/07, ECLI:EU:C:2008:731.
[12] Judgment of 19 May 2009, *AssiturSrl*, C-538/07, ECLI:EU:C:2009:317.
[13] Article 57 (6) of the Directive.

escape clause should exist in these cases to waive, substitute or defer the exclusion on grounds of public interest if having the economic operator excluded actually harms the interests of the contracting authority (which may be the case in highly concentrated or specialized markets).

However, even if the exclusion in Art 57 (6) *in fine* of the Directive can be criticised, it clearly imposes that '*[a]n economic operator which has been excluded by final judgment from participating in procurement or concession award procedures shall not be entitled to make use of the possibility provided for under this paragraph during the period of exclusion resulting from that judgment in the Member States where the judgment is effective*'[14]. This provision certainly has direct effect, meaning that the contracting authorities *must* apply it[15].

3. The public procurement procedure, fundamental freedoms and equal treatment principle in the EU

All public procurement procedures must comply with the principles of the Treaty on the Functioning of the European Union (the **TFEU**), and in particular the fundamental freedoms as well as the principle of equal treatment. Also the principles such as non-discrimination, mutual recognition, proportionality and transparency must be considered in the public procurement procedures. Competition, confidentiality and efficiency must be also respected. This makes the matter multidimensional, especially when there is diversity in Member States' legislation. Members State has to ensure that those above-mentioned principles are given practical effect[16].

There is no simple rule that says how to ensure equal treatment of the candidates in light of the diversity in criminal law provisions. We have to remember equal treatment's status – it is a principle that has been mentioned specifically in the Directive (the abovementioned recitals 1 and 90), but public procurement procedure connects to the fundamental freedoms (in particular the free movement of goods, the freedom of establishment and the freedom to provide services). Is it possible to except equal treatment by virtue of fundamental freedom? The question is not that simple. If you restrict fundamental freedom, the restriction should be in right proportional according to action[17]. But if you except equal treatment principle like in case of indirect discrimination, it might be possible only if it's objectively justified by a legitimate aim and the means of achieving

[14] *Ibidem*
[15] A. Sanchez-Graells, *How to crack a nut – a blog on EU economic law*, [web blog] www.howtocrackanut.com (accessed 8 January 2020).
[16] See rec. 1 of the Directive.
[17] Article 52 (1) of Charter of Fundamental Rights 2000; see also the Judgment of 12 June 2003, *Schmidberger*, Case C-112/00, ECLI:EU:C:2003:333 para. 79 and 81.

that aim are appropriate and necessary[18]. When there is difference in criminalization between Member States, there is a risk that the contracting authorities may treat candidates indirectly unequally. But if contracting authorities follows the legal rules and has legitimate aim and respect the essence of principle and that fundamental freedom, the equal treatment should allow that kind of exception.

When you consider the Directive's aim and purpose, equal treatment plays a huge role in the public procurement procedure.[19] All EU economic actors should have effective and non-discriminatory access to the EU market. The Directive aims at the same time to reduce risk of fraud and corruption, and also to protect the integrity of the public procurement process[20]. The ideal situation is that every Member State in the EU plays fair and all the candidates know and respect the rules because it is equal for all and for their own benefit. That is why the equal treatment principle is enshrined in the EU law and specifically in the public procurement procedures. However, if contracting authorities and Member State can justify its actions and ensures the Directive's main objectives, the procedure can be legitimate.

4. Extending the exclusion grounds

Knowing what principles restricted the Member States in the process of implementation of the Directive, it is now possible to assess whether extending the exclusion grounds provided in Article 57 was a viable option and consider the specific scenarios.

In fact, one could substantially argue that the catalogue provided in Article 57 of the Directive is an exhaustive one and does not allow for any extensions. In this context, an opinion of Advocat General submitted in the case regarding the exclusion grounds in the previous public procurement legislation is worth citing: *Indeed, certain factors strongly suggest that the grounds, referred to in Article 24 of that directive* [93/37/EEC]*, for exclusion of contractors from procurement procedures in respect of public works contracts are exhaustive. The very aims of the directive support this conclusion. While the directive seeks to develop competition in the field of public works contracts by encouraging as wide a participation as possible in procurement procedures, the addition of new grounds for exclusion of tenderers necessarily reduces the access of candidates to those procurement procedures and, therefore, restricts competition*[21]. However, the Advocat General

[18]Indirect discrimination: discrimination caused when an apparently neutral provision, criterion or practice would lead to particular disadvantage compared with other persons. See also https://eur-lex.europa.eu/summary/glossary/nondiscrimination_principle.html?locale=en and https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/indirect-discrimination

[19] See above Chapter 1 and 2.

[20] See articles 26 and 56 of the TFEU and also www.europarl.europa.eu/factsheets/en/sheet/34/public-procurement-contracts (accessed 5 January 2020).

[21]Opinion of Advocat General Poiares Maduro delivered on 8 October 2008, *Michaniki*, Case C-213/07, ECLI:EU:C:2008:544, para. 21.

finally concludes that an approach which would entirely exclude such a possibility would be too restrictive and actually could undermine other principles pursued by the legislation, in particular the principal of equal treatment[22].

The case in question was initiated against the following background. Greek company Erga issued a call for tenders for the construction of the technical infrastructure for a railway line between Corinth and Kiato. The proceedings were held under the Greek law, which provided (Article 14 (9) of the Greek Constitution) for a prohibition of combining functions within the mass media and the public procurement sector. Furthermore, prior to awarding a public contract, the relevant contracting authority had to apply to the National Radio and Television Council (Ethniko Simvoulio Radiotileorasis) for a certificate attesting that the candidate indeed did not exercise such a combination. The exclusion was based on the assumption that the economic operator who has such a connection with the mass media sector might seek to use it to unlawfully influence the decision awarding that contract, by holding out the prospect of a supportive mass information campaign or, on the contrary, a mass information campaign of a critical nature, depending on whether the decision was favourable or unfavourable to the undertaking[23].

The contract was awarded to one of the participants, Sarantopoulos and the unsuccessful competitor Michaniki followed with an appeal. In the course of the dispute, the referring court questioned whether the directive 93/37/EEC allowed for the addition of grounds for exclusion such as the ground provided for by Article 14 (9) of the Greek Constitution. The European Court of Justice concluded that the directive does not preclude a Member State from providing for further exclusionary measures designed to ensure observance of the principles of equal treatment of tenderers and of transparency, provided that such measures do not go beyond what is necessary to achieve that objective[24]. It also explained that *it is appropriate to grant the Member States a certain discretion for the purpose of adopting measures intended to safeguard the principles of equal treatment of tenderers and of transparency*[25] and emphasised that *[e]ach Member State is best placed to identify, in the light of historical, legal, economic or social considerations specific to it (see, to that effect, La Cascina and Others, paragraph 23), situations propitious to conduct liable to bring about breaches of those principles*[26]. This conclusion also applies to the current Directive.

Considering the above, while the Article 57 of the Directive should be in principal considered an exhaustive catalogue, it does not preclude the Member States from implementing additional

[22] *Ibidem*, para. 23.
[23] Judgment of 16 December 2008, *Michaniki*, C-213/07, ECLI:EU:C:2008:731 para. 58.
[24] *Ibidem*, para. 49.
[25] *Ibidem*, para. 56.
[26] *Ibidem*, para. 57.

exclusion measures provided that they guarantee the observance of the equal treatment principal, transparency and that the consequences will be proportionate in comparison to the assumed objective. As explained, the rationale behind this is that only the national government knows all legal, social and historical circumstances regarding the particular Member States and as such, will be best suited to determine which situations might particularly benefit bypassing the abovementioned principles in the particular country, and stipulate the exclusive measures to prevent this[27].

Having explained the possibility and conditions for applying the additional exclusive measures, now the specificity of adding the criminalization grounds can be considered[28]. There are two principal issues emerging. The first issue regards **the variety**, meaning the situation where certain behaviour is criminalized in one country which decides to add it as an exclusive measure, but which is not an offence in others. The second issue is **the implementation**, meaning that within the process of implementation, many Member States simply *translated* the catalogue comprised in the Article 57 (1) of the Directive into the particular provisions of the national criminal codes. This would in turn suggest that for the exclusion to happen in the particular country, the final conviction would need to be based on these particular provisions. Consequently, the conviction for the analogous crime, but in other country, would not exclude the economic operator from participation. This paragraph will tackle the first issue, while the second will be explained against the background of implementation in particular countries.

The issue of variety stems from the fact that the scope of the offences differs between the Member States. In other words, a certain behaviour might be considered an offence in one country (and subsequently result in a conviction) while the same behaviour is not criminalized in other countries. This is likely why the Article 57 (1) of the Directive refers to specific types of offences that may be expected to be criminalized in all Member States.

It might be discussed that it becomes a problem when such a country-specific crime is added to the exclusion grounds. It would then mean that multiple economic operators, from different countries, that participate in the procurement procedure could exercise an identical behaviour in the past but only one of them – the one that was convicted in a Member State with such a country-specific crime would be excluded from the procedure. At the same time, due to the fact that particular behaviour is not penalized in other countries, the remaining economic operators would be free to participate, despite actually undertaking the same type of actions. In such a hypothetical case, the only

[27] W. Hartung in W. Hartung, M. Bagłaj, T. Michalczyk, M. Wojciechowski, J. Krysa, K. Kuźma (ed.), *Dyrektywa 2014/24/UE w sprawie zamówień publicznych. Komentarz, (Directive 2014/24/EC on public procurement, Commentary),* Warsaw 2015, p. 565-567.
[28] Article 57 (1) of the Directive.

difference between the excluded economic operator and the ones that are free to participate would be a mere conviction, even though they both undertook the same action, just in different countries. This might be seen as problematic as the credibility of the economic operator should be assessed by virtue of its actions – conviction is just a consequence that undeniably confirms that the prohibited action was actually taken. Consequently, it could be argued that, in this hypothetical case, these two economic operators are treated differently – only one of them is excluded even though the others basically undertook the same action that was assumed by the government to undermine the credibility and was consequently added as the exclusion basis.

However, as already explained, the equal treatment principle is actually not about applying the same assessment to everybody, but rather treating comparable situation in a similar manner, unless the differentiation is objectively justified. It must be emphasised that in the abovementioned, hypothetical situation, the two economic operators would not actually be in similar situations. Despite the fact that both economic operators undertook the same type of action, only the one that undertook the action in the Member State with a country-specific crime could be convicted. The party who wishes to conduct its business activity in a particular country is expected to know the applicable regulations. In this case, such an economic operator would be expected to realize that a specific behaviour is an offence in the particular country, even though it is not in others. On the contrary, the assessment of the economic operator that undertook the same action in another country, where it is not a criminal offence, should be different, as such an economic operator (acting outside the borders of the country with a specific regulation) could not be expected to know and remain compliant with such a country-specific regulation.

In summary, this variety in criminalization does not preclude the Member States from adding certain country-specific crimes as the basis for the exclusion. The equal treatment principle dictates that the situation of every economic operator should be evaluated separately and only then the assessment can be made. Considering the above analysis, the variety in criminalization does not present itself as a danger to this principle.

5. Directive's implementation in Finland

In Finland due to Finnish Act (Chapter 10 Section 79.1.2) on Public Procurement and Concession Contracts the contracting entity shall check that the specific conditions are satisfied before selecting tenders. According to the Finnish Act, one condition is *the tender has been submitted by a tenderer that is not excluded from procedure pursuant to section 80 or section 81* (corresponding to Article

56 (1b) of the Directive). The Mandatory exclusion criteria are in Section 80 and discretionary exclusion criteria are in section 81.

According to Section 80, the contracting entity shall exclude a candidate or tenderer from competitive tendering if the contracting entity is aware that the candidate or tenderer, a member of its administration or management, or a person exercising representative, managerial or regulatory authority therein, has a criminal record indicating a legally final conviction in specific offences. Then there is the list corresponding almost entirely to Article 57 of the Directive.

Furthermore, Finland has extended the Directive's list by adding the following offences (Section 80 subsection 2): a work safety offence, working hours offence, work discrimination, extortionate work discrimination, violation of the right to organise, and unauthorised use of foreign labour, as referred to in the Criminal Code of Finland.

In Finnish Act the listed offences refer to the Criminal Code of Finland by explicitly stating *as referred to in*, which leaves more discretion, for example if another Member State has differently criminalized a given crime, but which can be nevertheless comparable to offence defined in the Criminal Code of Finland.

Finnish national law provides that it would be possible to extend the list and there are legitimate grounds in the Directive. According to Article 56 (1) of the Directive [*c*]*ontracting authorities may decide not to award a contract to the tenderer submitting the most economically advantageous tender where they have established that the tender does not comply with the applicable obligations referred to in Article 18 (2)*. Article 18 (2) allows Member States to take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations, among other things, in the fields of labour law established by Union Law, national law, collective agreements or by the labour law provisions listed in Annex X. Finland's extensions concerns obligations in the field of labour law. In Annex X is a list of international social and environmental conventions. Mentioned ILO Conventions (87, 98, 29, 105, 138, 111, 100 and 182) concerns also the offences mentioned in Finnish Act (Section 80.2) and part of the labour law obligations[29] are also established by national law and collective agreements. This is why it is possible to extent the Directive's list (Article 57) as in Finland. In reference to above mentioned, the extensions (added offences) are well argued and justifiable and it is legitimate.

In Finland, according to the Finnish Act (80.3) *the contracting entity shall also exclude a candidate or tenderer from competitive tendering on the basis of a final conviction for an offence in another*

[29] Such as protecting employees and working conditions and prevent offences.

state that corresponds to an offence referred to in Section 80. This means also subsection 2. Before concluding the procurement agreement, the contracting entity shall require the selected tenderer to submit current certificates and accounts in order to investigate whether it is subject to any mandatory grounds for exclusion, as referred to in section 80. It is the same situation for all candidates and tenderers, also for those from another states, and this is how the situation is equal to all.

According to the Directive (Article 60) and Finnish law (Act 88) contracting entity has right to demand criminal record extract of applicant. In Finland it is possible to get specific criminal records extracts for the procurement procedure and there are lists of convictions referred to Finnish Act, including added convictions (work safety offence, working hours offence, work discrimination, extortionate work discrimination, violation of the right to organise, and unauthorised use of foreign labour).So, every candidate and tenderer has obligations to provide necessary and relevant documents to the contracting entity. If the contracting entity uses the ESPR, there is possibility *via* ESPD to ensure equal treatment and at the same time to extent the list (Article 57) by adding specific national exclusion grounds and possibly clarify the content of national extensions. According to Article 59 of the Directive, *the ESPD shall consist of the formal statement by the economic operator that the relevant ground for exclusion does not apply and/or that the relevant selection criterion is fulfilled and shall provide the relevant information as required by the contracting authority*. Also according to Article 59 (4), *a contracting authority may ask tenderers and candidates at any moment during the procedure to submit all or part of the supporting documents where this is necessary to ensure the proper conduct of the procedure.* This have to concern also the situation if documents are not adequate and when Member State tires to ensure equal treatment of candidates. According to the Finnish law, contracting authority has the same rights (Act's Section 87 and 88). Thit is why the Finnish authorities has the right to ask for an extended criminal record extract or comparable document (including convictions work safety offence, working hours offence, work discrimination, extortionate work discrimination, violation of the right to organise, and unauthorised use of foreign labour) and the candidates are obligated to deliver it in the risk of exclusion. The procedure is same towards all candidates from different Member States.

Of course, there might be a problem if similar action is not crime in other Member State (*according to The Charter of Fundamental Rights, Article 49 Principles of legality no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed*) or there is not

yet a final conviction. On the other hand, we have to remember that the contracting authority shall at any time during the procedure exclude an economic operator once it becomes aware that particular economic operator is in breach of its obligations[30]. Similarly, when tenderer or economic operator practice questionable business and against specific obligations[31]. There is are different kinds of judicial cooperation[32] between the Member States' authoritties and possible to get requested document or receive a statement of reasons for why requested information is not possible to deliver. Also, if other candidates have incentive to bring relevant information to the contracting authority during the process which can lead to disqualification, it would be interest to fair procedure in public procurement. If the contracting authority pursues the equal treatment but fails in custom, is the equal treatment ensured adequately, it depends on what kind of interpretation problems it caused between Member States. After all, there is always a possibility to appeal the contracting authority's decision and to examine if the procedure has been legitimate.

6. Directive's implementation in Poland

In Poland, the Directive was implemented and incorporated into the Act of 29 January 2004 - Public Procurement Law (**Polish PPL**) with a two-months delay. This was mainly due to the fact that the original intention of the Polish legislator was to prepare a completely new regulation on public procurement. It was introduced in January 2016 but it quickly faced a backlash due to its shortcomings. Consequently, given a very limited amount of time to implement the Directive, the amendment to the current regulation was rapidly prepared[33].

Article 57 (1) of the Directive was implemented in Article 24 (1) points 13-14 of the Polish PPL, but the catalogue of crimes was substantially extended in comparison with the Directive and includes, among others, the crimes related to the documents forgery. Similar to Finland, the Polish legislator also implemented the Directive by referring to the specific provisions of the Polish Criminal Code. However, it did not decided to add a clause similar to 80.3 of the Finnish Act which ensures the exclusion of the economic operator if the final conviction for an analogous crime in another state was issued. Furthermore, the guidance issued by the Polish regulatory also corresponds directly to the specific provisions of the national criminal regulations[34].

[30] Article 57 (5) of the Directive.
[31] See also Articles 56 and 18 (2) of the Directive
[32] https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation_en
[33] J. Górski, *Amendment to Polish Public Procurement Law: Implementation of the fifth-generation directives and beyond,* in *European Procurement Public Private Partnership Law Review 60*, The Chinese University of Hong Kong Faculty of Law, Research Paper No. 2017-08.
[34] Guidance available online: https://www.uzp.gov.pl/__data/assets/pdf_file/0015/32415/Instrukcja-wypelniania-JEDZ-ESPD.pdf

Such a direct reference to the Polish criminal regulations might in fact suggest that the conviction must have occurred on the basis of these particular, national regulations for the exclusion to happen. This would in turn mean that the conviction for an analogous crime in the country of origin of the economic operator would not result in exclusion, which defeats the rationale that dictated the introduction of the exclusion grounds in the first place[35]. Although the Article 7 of the Polish PPL provides for the observance of the equal treatment principle, there is no doubt that the current wording of the Article 24 leaves space for doubts in that regard.

7. Directive's implementation in Romania

Romania adopted two national measures for the transposition of the Directive, namely the Law no. 98/2016 on public procurement[36] and Government Decision no. 395/2016[37]. Starting from the latter[38], we find the grounds of exclusion in Articles 164-171 of Law 98/2016, representing a transposition of Article 57 of the Directive.

The exclusion grounds of the candidate/tenderer stipulated by Romanian legislation are those provided by the Directive. All exclusion grounds are stipulated as mandatory under national law, the contracting authority thus being bound to exclude the economic operators falling under such cases. The exclusion grounds stipulated in Article 57 (1) of the Directive was implemented with the offenses as defined in the Romanian criminal law or in the law of the state in which the economic operator was convicted. The corresponding article from the national legislation was extended with the point g) which is very similar with point c) under Article 57 of the Directive, because they are both referring to offenses against European financial interests. In the point added, there are enumerated other offenses in direct connection with corruption offenses against the European financial interests, in addition to the grounds referred to under article 1 from the Convention from point c). It seems that this additional ground of exclusion was added to emphasize the importance of the consequences of committing crimes against European financial interests.

Where the Directive let the possibility for exceptions, the Romanian legislation took advantage and added the following derogations. First, the possibility of the tenderer/candidate to prove the taking of appropriate self-cleaning measures in relation to the exclusion grounds; second, for imperative

[35]K. Śliwak, *Podstawy wykluczenia w projekcie nowego PZP (Grounds for exclusion in the proposed new Public Procurement Law: Closer to the directive)*,[website], 2019, http://www.codozasady.pl/podstawy-wykluczenia-w-projekcie-nowego-pzp-blizej-dyrektywy/ (accessed 12 January 2020).
[36] The Law n.98/2016 on public procurement, published in the Official Journal of Romania, Part I, n.390 of 23 May 2016; was subsequently amended by the Government Emergncy Ordinance n. 80/2016, approved and supplemented by the Law n. 80/2017.
[37] Government Decision n. 395/2016 for the approval of the methodological standards regarding the award of public procuement contracts/framework agreements, published in the Official Journal of Romania, Part I, n. 423 of 6 iunie 2016.
[38] In this context, it is useful to specify that, similar provisions can be found in Law no. 99/2016 on sectoral acquisitions, published in the Official Gazette no. 391 of May 23, 2016 and Law no. 100/2016 regarding the concessions of works and the concessions of services published in the Official Gazette no 392 of May 23, 2016.

reasons such as public health or environment protection even if the economic operator is in one of the exclusion grounds; third, it fulfils its obligations to pay taxes and contributions to the general budget prior to the exclusion decision and fourth, the amount of outstanding taxes and contributions to the general budget, falls within the following limits: < 4000 RON (approx. 1000 EUR) , > 4000 RON and < 5% of the total debt at the latest due date.

8. Conclusion

The exclusion grounds provided in the Directive are clearly meant to be *specific* in a way that not just any conviction should lead to exclusion. The *ratio legis* behind the introduction of these exclusion grounds relates firstly to protecting the procuring governments from contracting with an unreliable candidate and secondly to adding weight to the criminal policies with respect to those specific offences increasing the deterred effect by adding an additional *sanction*[39]. However, this specificity does not preclude the Member States from adding new crimes as the exclusion grounds - quite the contrary. The governments of the particular Member States were repeatedly recognized within the ECJ's judicature as being best qualified to actually highlight the areas that are vulnerable to abuse and subsequently implement country-specific measures to prevent it. At the same time, this discretion is not boundless. The changes should serve preserving the basic principles that govern the public procurement procedures.

This is however easier said than done. It is clear that the exclusion grounds such as the economic operator's bankruptcy or insolvency are somewhat objective as they describe the current status of the economic operator in a way that is directly applicable for most jurisdictions. Given the variety in criminalization in the Member States, it is not the same case with adding new crimes as the exclusion grounds. As follows from the above analysis, preserving the equal treatment principle in this particular instance requires the observance of the analogous convictions in other Member States - an approach more subtle than translating the catalogue of Article 57 of the Directive into the counterparts in the national criminal legislation.

[39] Rec. 43 of the Directive.

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ACADEMY OF EUROPEAN LAW (ERA)

YOUNG LAWYERS CONTEST 2019 – 2020

REPORT

on Question 2:

"The Working Party recognizes that the concrete application of the concepts of data controller and data processor is becoming increasingly complex. This is mostly due to the increasing complexity of the environment in which these concepts are used, and in particular due to a growing tendency, both in the private and in the public sector, towards organisational differentiation, in combination with the development of ICT and globalisation, in a way that may give rise to new and difficult issues and may sometimes result in a lower level of protection afforded to data subjects." [Opinion 1/2010 of the Article 29 Data Protection Working Party]

Provide a critical legal analysis of how this complexity has been addressed in case-law of the CJEU concerning the concept of "controller". In circumstances of joint controllership, is the legal framework for distribution of responsibilities between controllers (as it arises from the General Data Protection Regulation and case-law of the CJEU) sufficiently clear and is it capable of ensuring complete protection of the rights of data subjects?"

Concluded by **TEAM 8**

Sarah EMMES – Germany

Manon OMBREDANE – Belgium

Tudor GRIGOREAN - Romania

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Chapter 1. Preliminaries.

I. The concept of *"data controller"* and *"data processor"*

A. Definition of "data controller and "data processor".

1. In accordance with the European Law regarding data protection, the concepts of *data controller* and *data processor* have been broadly analysed and defined accordingly, in order to properly lay down the foundations of legislative acts throughout the Member States.

2. As such, after the draft proposal for the Directive 95/46/EC of the European Parliament and of the Council of the 24th of October 1995, on the *protection of individuals with regard to the processing of personal data and on the free movement of such data* (hereinafter *"DPD"*), as it was negotiated in the early 1990's, these two concepts have been eventually taken from the Council of Europe's Convention 108 concluded in 1981[1] and thus defined in article 2 d) and e) of the Directive as per the following:

3. *"(d) 'controller' shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by national or Community law.*"

4. *"(e) 'processor' shall mean a natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller."*

5. Thus, the European bodies have ensured at that time a general regulation of data protection law, protecting the fundamental rights and freedoms of natural persons, assuring them the right to privacy, recognised in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[2] and as well in the general principles of Community law.

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[1] **ARTICLE 2. Definitions:** (d) *"controller of the file" means the natural or legal person, public authority, agency or any other body who is competent according to the national law to decide what should be the purpose of the automated data file, which categories of personal data should be stored and which operations should be applied to them."*

[2] **ARTICLE 8. Right to respect for private and family life**. *"1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

6. These two definitions have stood in force for over 20 years, upon the adoption of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27th of April 2016, on the *protection of natural persons with regard to the processing of personal data and on the free movement of such data*. This legislative act has repealed the above-mentioned Directive 95/46/EC, becoming the General Data Protection Regulation (hereinafter *"GDPR"*).

7. This new Regulation, the GDPR has almost assumed the exact phrasing of the DPD, the new definitions of *data controller* and *data processor* being, as per article 4 paragraphs 7 and 8:

8. *"(7) 'controller' means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law."*

9. *"(8) 'processor' means a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller."*

10. We can see that the only modifications are of certain words and not of the actual meaning of the concept of *data controller,* as the GDPR provides for *"[...] purposes and means of such processing are determined by* ***Union or Member State law****"* instead of *"[...] determined by* ***national or Community laws or regulations****".* Also, the concept of *data processor* has been maintained exactly as the previous form.

11. Thus, it can be deducted that the initial approach of the European bodies on the definition of these two concepts have been in accordance with the scope of the data protection regulation in general. And this is more impressive if we take into consideration the fact that the world as we know it has evolved in a considerable way, with significant breakthroughs in many domains which, despite their obvious usefulness, have indeed put a lot of pressure on data protection regulations. The above-mentioned statement withstands as we need to take into consideration also the fact that the European Union (hereinafter *"EU"*) have adopted other legislative acts that were applicable alongside the DPD.

B. Obligations and liability of the "data controller" and "data processor".

12. As we can see from the definitions presented in the previous subchapter, a very big part of data protection regulation especially revolves around the *data controller*, but also the *data processor*. The DPD had previously provided in article 6 (2) that *"it shall be for the controller*

to ensure that paragraph 1 is complied with", a paragraph 1 in which a number of obligations are explicitly set out, in order to ensure that the personal data is properly processed.

13. Throughout these obligations we can find that the *controller* had the obligation to process personal data *"fairly and lawfully"*, to collect it in the sole purpose for which it was initially intended, to keep it in an adequate manner, in order to provide protection from possible breaches that may result in an unauthorized disclosure or access to the personal data, as well as other obligations derived therefrom.

14. As such, basically, article 6 (2) of the DPD determined the allocation of the responsibility to comply with the obligations set out in this regulation to the *controller*. Consequently, chapter III of the DPD, containing articles 22, 23 and 24 have stipulated the remedies, liability and sanctions, respectively, for non-compliance with these obligations.

15. The previous paragraph also previews a very important part of the concept of the *data controller*, namely the determination of which national law to apply to a processing operation or a set of processing operations. Thus, article 4 (1) (a) of the DPD provides that the national law applicable is the one determined by the territory of the establishment of the controller.

16. The concept of the *data processor* is also an important one in this regulation, with regard to confidentiality and security of processing, as it is provided in articles 16 and 17 from the DPD. Through them, we again find ourselves in front of the term of allocation of responsibility, as we analyse the involvement in the processing of personal data, to determine who is responsible.

17. Having presented the ground base offered by the DPD, bearing in mind that a period of more than 20 years have passed since its application, the GDPR eventually came into force and in general assumed these obligations, as per article 5, but also took care to adapt them to the evolution of the many areas in which personal data was being processed and, of course, based upon the case-law of the Court of Justice of the European Union (hereinafter *"CJEU"*), which interpreted various situations in relation to these obligations.

18. In the GDPR, the obligations of the *data controller* and *data processor* are greatly broadened, as the objective is to cover all the situations that may arise in different domains, whether it's about the type of personal data being processed, or its storage, or any of the other obligations. The main thing we observe is that all of the other obligations set out in the GDPR derive from the main ones initially set out in the DPD, which also contain years of conclusions upon situations that appeared and were treated either nationally, or by the case-law of the CJEU.

II. Preliminary conclusion.

19. Having all of these preliminary aspects properly presented, we can now turn open minded to the legal analysis of the complexity addressed in the case-law of the CJEU concerning this concept of *data controller*, as well as the aspect regarding the joint controllership and the capability to ensure complete protection of the rights of the data subjects between the controllers.

Chapter 2. Introduction.

I. Article 29 Data Protection Working Party

20. European and national legal practitioners are supported in data protection law by various interpretation guidelines. The Article 29 Data Protection Working Party (hereinafter *"WP"*) is named after Article 29 of DPD and was only replaced by the European Data Protection Committee when the GDPR came into force in 2018. The function of these bodies, of which there are others at national level, is to provide guidelines for the interpretation of data protection law. The Article 29 Working Party was composed of one representative of each of the national data protection authorities, the European Data Protection Supervisor and a non-voting representative of the European Commission, and met several times a year for advisory meetings.[1]

21. Due to the entry into force of the GDPR only on 25th of May 2018, the previous views of the WP should continue to apply for the time being, provided that the provisions of the former Directive and the now applicable Regulation are at least comparable. Although the guidelines of the European bodies have an important orientation function, the power of final decision on questions of interpretation is in the nature of the CJEU under the second sentence of Article 19 (1) from the Treaty on European Union and Article 263 from the Treaty on the Functioning of the European Union (hereinafter *"TFEU"*)[3]. Therefore, Opinion 1/2010 of Article 29 WP must also be seen in this light.

II. Complexity of the concepts of *data controller* and *data processor*

22. In art. 4 (2) GDPR, the connecting factor for authorisation is generally "processing", which is the relevant concept for assessing relevant operations involving the handling of personal data. This complexity of the concrete application of the concepts of *data controller* and *data*

[3] Opinion 1/2010 on the concepts of controller and processor of the Article 29 Data Protection Working Party; cf. Conrad/Treeger, Auer-Reinsdorff/Conrad, Handbuch IT- und Datenschutzrecht, 3rd edition 2019, München, § 34, 160-162

processor has been addressed mainly in the Safe Harbour Decision of the CJEU[4]. The decision is based on the following circumstance: The claimant is an Austrian citizen and Facebook customer. Facebook Ireland transfers the user data from Europe to the parent company in the USA. The legal basis for this data transfer was the so-called Safe Harbour Decision 2000/520 of the EU Commission based on Article 25(VI) of the DPD, that the Safe Harbour Principles issued by the US Department of Commerce would ensure an adequate level of data protection. Because of the activities of the NSA revealed by Edward Snowden, the claimant demanded that the Irish Commissioner for Data Protection (Commissioner) prohibit the transfer of his personal data to the USA. The commissioner considered that he was not obliged to do so. It was now for the CJEU to decide on the question referred for a preliminary ruling in the legal dispute.

23. The CJEU ruled that the level of protection was not guaranteed in the absence of any review by the US authorities and, finally, that the principles of primacy of US Law applied. **The Court thereby invalidates the Commission's Safe Harbour Decision concerning the USA.** There was no Commission statement as to whether EU citizens were thereby sufficiently protected from invasion of their privacy and whether effective legal protection was available to them in the event of breaches. The WP had therefore asked the Commission to conclude a new agreement with the USA. However, this did not fully guarantee the level of protection required by the CJEU, as these clauses still contained lacunae. On 01.08.2016, the Privacy Shield Agreement came into force as its successor. It remains a matter for free self-regulation by companies. However, a significant change has taken place with the strengthening of the rights of those affected compared to Safe Harbour Agreement. It has nevertheless also been criticised by the WP for its non-binding nature.

24. The Safe Harbour decision **illustrates the complexity of the concept of *data controller*** and the importance of the **CJEU to help move the legal line in accordance with the evolution of the society.** Similarly, the Court also helps **draw the line of the concept of *data controller*** in **the context of joint controllership**.

III. Introductory conclusion

25. The GDPR is basically to be qualified as it sees itself: as a comprehensive set of rules both for material claims and their enforcement. Because of its comprehensive design, it can also be used to solve previously little-noticed or unknown cases. The constant development by the courts

[4] CJEU, C-362/14 – Safe Harbour

completes the still young framework of rules. Nevertheless, orientation institutions such as the former WP, supervisory authorities, practitioners and ultimately the courts are still required to react to the increasingly complex relationship between controllers (among themselves) and processors. Without the interaction of the national institutions under the umbrella of the jurisdiction of the CJEU, a continuous development of the standardisation of the application of the GDPR cannot be achieved.

Chapter 3. Legal Framework.

I. Protection of the "data subjects", the "personal data" and its processing

26. Could anyone in 1995 predict that twenty years later we would have internet in our pocket, Artificial Intelligent assistant at home or that we could buy a computer with cryptocurrency? As pointed out by the Advocate General Jääskinen in the Case C-131-12 Google Spain *"When the Directive was adopted the World Wide Web had barely become a reality, and search engines were at their nascent stage."* [5]

27. It is true that new technologies evolve much faster than the law can, but the concepts designed in the early 90' to protect individuals against the risks that result from the processing of their data remain in use today. But in the maze of the technology world, can the law ensure an efficient protection of individuals against the risks that result from the processing of their data? Building on the work of the European Community, the European Union, created a strong legal framework aiming to protect individuals against the risks that result from the processing of their data.

28. The DPD provides the rights for the data subjects in articles 10 to 12 and 14, stipulating that they have the right to information, to access, to rectification, erasure and blocking, and to object to the processing of their personal data. The GDPR again came and expanded these rights, in accordance with all of the aspects mentioned at the previous subchapter. As from our previous analysis of the concepts of *data controller* and *data processor,* it comes to no surprise that these rights of the data subjects actually create all of the obligations we mentioned that the controller and processor have with regard to the processing of their personal data.

29. It is undeniable that the first objective of the DPD, and, of course, the GDPR, is to protect the natural persons in respect of processing their personal data. Thus, both of these legislative acts

[5] OPINION OF ADVOCATE GENERAL JÄÄSKINEN, delivered on 25 June 2013, Case C-131/12 Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González, ECLI:EU:C:2013:424, par. 78

provide that the controller must take all the appropriate measures in order to ensure the protection of the personal data processed. The first effect of the DPD and GDPR is a preventive one, stipulating legal provisions for complying with the rights of data subjects. Subsequently, if we are in a non-compliance situation, both legislative acts activate their second effect, which is a repressive one, as they provide for liability and sanctions on behalf of the controller and processor, in order to ensure proper compensation for any relevant damage incurred by the data subjects.

30. Protection of natural persons in relation to the processing of personal data is a fundamental right[6] and recital 25 of the DPD adds that: "*the principles of protection must be reflected, on the one hand, in the obligations imposed on persons, public authorities, enterprises, agencies or other bodies responsible for processing [data] and, on the other hand, in the right conferred on individuals"*.

II. Joint Controllership and protection of the rights of the data subjects

31. The establishment and definition of the conditions for joint controllership inevitably leads to the question of the benefit of the legal concept from the perspective of the data subject. The GDPR sets out not only the substantive claims of the data subjects, but also those for effective enforcement of these rights.[7] The decisive factor for the person concerned is that he/she has a claim for information, injunctive relief, but also damages against the controller. Pursuant to art. 77 GDPR, the person has the right to appeal to the Supervisory Authority, in addition to the ordinary legal action, in order to bring about an individual decision. Since the supervisory authority is obliged under Art. 57 (1) (a) GDPR to enforce its provisions, it must decide without error of assessment whether and what measures it will take to put an end to the breach of data protection.

32. The proceedings therefore end with a decision on remedial action or with the termination of the complaint procedure. However, as can be seen from the Safe Harbour decision mentioned above, the person concerned is initially dependent on the decision of the national supervisory authority. As these are based on common institutions such as WP or the European Data Protection Committee, a uniform interpretation can be assumed. This also requires the individual authorities to be equipped with personnel and material resources that are

[6] Article 1 of the DPD

[7] Spiecker gen. Döhmann/Bretthauer, Dokumentation zum Datenschutz, 75th edition, 2019, Frankfurt, G 2.1.25 Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679 (WP 251), D.

commensurate with the actual number of complaints.[8] Thus, it is up to the parties to decide whether to bring an appeal to the CJEU or not.

33. Under the EU data protection law being either the DPD or the GDPR, the controller plays an important role as it is the responsible entity for data protection compliance. Hence the EU legislation on data protection aims at balancing the obligations on persons responsible for the processing of data with the right conferred on individuals. But where to put the cursors for this balance to be sound and fair had to be clarified by the CJEU. A set of recent case-law has provided further indication as to how the joint controllership should be addressed

Chapter 4. Case-law analysis

I. Case C-131-12 Google Spain SL, Google Inc.v AEDP

34. In 2010, M. Costeja Gonza González, a Spanish national, had lodged a complaint with the Agencia Española de Protección de Datos (AEPD) against La Vanguardia Ediciones a daily newspaper and against Google Spain and Google. M. González claimed that, when an internet user entered his name into the Google group's search engine, the list of results displayed links to two pages of the daily newspaper La Vanguardia, which, inter alia, announced a property auction organised following a seizure intended to recover its debts. M. Gonzalez didn't want those personal data to appear. One of the questions asked to the Court was whether the scope of the definition of 'controller' must be interpreted broadly enough in order to qualify an operator of a search engine as a 'controller'.

35. In the conclusions, the Court explained that it would be contrary not only to the clear wording of the definition of 'controller' pursuant to Article 2(d) DPD, but also to its objective *"**which is to ensure, through a broad definition of the concept of 'controller', effective and complete protection of data subjects**"*, to exclude the operator of a search engine which determines the purposes and means of that activity and thus of the processing of personal data (paras 33-34). With this interpretation the Court set a firm precedent for a wide interpretation of the concept of controller relying on the criterion of "effective and complete protection of data subjects".

36. The Court of Justice further pointed out that while the EU legislation (DPD) indeed *"seeks to ensure a high level of protection of the fundamental rights and freedoms of natural persons, in*

[8] Gernot, Sydow, Europäische Datenschutzgrundverordnung, 2nd edition, 2018, Münster, Art. 7, 1-48; CJEU, C-498/16 - Maximilian Schrems/Facebook Ireland Limited.

particular their right to privacy, with respect to the processing of personal data" , a fair balance should nevertheless be sought in particular between the (economic) interest of the data controller and the data subject's fundamental rights. The Court concluded that *"inasmuch as the data processing carried out in the context of the activity of a search engine can be distinguished from and is additional to that carried out by publishers of websites and affects the data subject's fundamental rights additionally, the operator of the search engine as the controller in respect of that processing must ensure, within the framework of its responsibilities, powers and capabilities, that processing meets the requirements of Directive 95/46, in order that the guarantees laid down by the directive may have full effect."*

37. Additionally, the Court pointed out that a case by case assessment with a fair balance of the interest of the parties involved should be made to appropriately address the question of responsibility. But while a broad interpretation of the notion of 'controller' should avoid lacuna of responsibility leading a to a lesser protection of the rights of data subject, it remains that the concrete application of the broad concept might be difficult to apply in practice. As pointed out by the Advocate General Jääskinen *"In the current setting, the broad definitions of personal data, processing of personal data and controller are likely to cover an unprecedently wide range of new factual situations due to technological development. [...] This obliges the Court to apply a rule of reason, in other words, the principle of proportionality, in interpreting the scope of the Directive in order to avoid unreasonable and excessive legal consequences."*[9].

38. In this current case, the Court additionally concluded that the fact that publishers, if they wish, have specific information published on their site to be wholly or partially excluded from the search engines' automatic indexes does not remove any of the operator of a search engine's responsibility *"as Article 2(d) of Directive 95/46 expressly provides that that determination [of the purpose and mean] may be made 'alone or jointly with others'."(para. 40)*

II. Case C-25/17 Tietosuojavaltuutettu

39. In the Case C-25/17 Tietosuojavaltuutettu, the Court highlighted and clarified two key aspects of the notion of '*data controller'*. First, that the concept of 'controller' does not necessarily refer to a single natural/legal person and may concern several actors taking part in the processing of personal data, with each of them then being subject to the applicable data protection provisions. Secondly, that the existence of joint responsibility does not necessarily

[9] Opinion of advocate general Jääskinen, delivered on 25 June 2013, Case C-131/12 Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González, ECLI:EU:C:2013:424, par.30

imply equal responsibility of the various operators engaged in the processing of personal data: *"on the contrary, those operators may be involved at different stages of that processing of personal data and to different degrees, so that the level of responsibility of each of them must be assessed with regard to all the relevant circumstances of the particular case."(para. 66)*

40. In 2013, at the request of the Finnish Data Protection Supervisor, the Finnish Data Protection Board adopted a decision prohibiting the Jehovah's Witnesses religious community to collect or process personal data in connection with its door-to-door preaching if it did not comply with the legal requirements of data protection law. Of interest, the Finnish Data Protection Board took the view that the religious community and its members should be consider data controllers. Therefore, the Court was notably asked once again to clarify the notion of data controller.

41. The Court recalls that the case-law broadly defines the concept of 'controller' for an effective and complete protection of the persons of which the data are processed and, quoting the WP Opinion 1/2010, mentioned the importance of the 'effective control' and the conception that the data subject has of the controller. The Court further pointed out that *"a natural or legal person **who exerts influence** over the processing of personal data, for his own purposes, and who participates, as a result, in the determination of the purposes and means of that processing, may be regarded as a controller within the meaning of Article 2(d) of Directive 95/46"* and further explained that *"**the joint responsibility of several actors for the same processing, under that provision, does not require each of them to have access to the personal data concerned."***

42. Hence, for the Court the relevant criterion to be found 'joint controller' is that of exerting influence over the personal data for one's own purpose. In line with the position of the WP[10], the Court therefore applied a factual rather than a formal analysis and concluded that *"a religious community is a controller, without it being necessary that the community has access to those data, or to establish that that community has given its members written guidelines or instructions in relation to the data processing."*

III. Case C-210/16 - Wirtschaftsakademie Schleswig-Holstein

43. In 2011, the Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein, a regional data-protection authority in Germany ('ULD') ordered the Wirtschaftsakademie which provides education and training services via a fan page hosted on the website of the social

[10] See also OPINION OF ADVOCATE GENERAL MENGOZZI delivered on 1 February 2018, Case C-25/17, Tietosuojavaltuutettu Other party: Jehovan todistajat — uskonnollinen yhdyskunta, ECLI:EU:C:2018:57, par. 64

network Facebook to deactivate the fan page. Indeed, neither the Wirtschaftsakademie nor Facebook informed visitors of the fan page that personal data were collected via cookies and sent to Facebook, regardless on whether the person visiting the fan page was a Facebook user. The Wirtschaftsakademie challenged that decision before the German Administrative Court.

44. **One of the key issues that the Court was asked to decide** was whether Wirtschaftsakademie **should be considered as a joint controller together with Facebook for the phase of the data processing which consists in the collection by Facebook of personal data**.[11]

45. First, the Court recalls that the DPD defines the concept of 'controller' broadly and to ensure effective and complete protection of the natural person (para. 28). The Grand Chamber acknowledged that several data controllers might be involved as: *"concept of 'controller' relates to the entity which 'alone or jointly with others' determines the purposes and means of the processing of personal data, that concept does not necessarily refer to a single entity and may concern several actors taking part in that processing, with each of them then being subject to the applicable data protection provisions."(para. 25)*

46. The Grand Chamber qualified Facebook Inc. and Facebook Ireland as data controller but, contrary to the position of the Advocate General Bot[12], the Court concluded that *"while the mere fact of making use of a social network such as Facebook does not make a Facebook user a controller jointly responsible for the processing of personal data by that network."* While keeping a broad interpretation of the conception of 'controller' the Court however balances the interest of the parties involved and did not follow the position of Advocate General Bot which would have imply that anyone *"inasmuch as he agrees to the means and purposes of the processing of personal data"*[13] would have been qualified as a data controller.

47. Nevertheless, the threshold to be considered a 'controller' remains very thin as the Court concluded that the same cannot be said for the administrator of a fan page hosted on Facebook (para. 32 and 35). Indeed, as the Wirtschaftsakademie must be regarded as taking part in the determination of the purposes and means of processing the personal data of the visitors to its fan page, **it must be considered a (joint) 'controller'**. **The fact that Wirtschaftsakademie**

[11] OPINION OF ADVOCATE GENERAL BOT delivered on 24 October 2017, Case C-210/16, Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH, in the presence of Facebook Ireland Ltd, Vertreter des Bundesinteresses beim Bundesverwaltungsgericht, ECLI:EU:C:2017:796, par. 74
[12] Opinion of Advocate General Bot, Case C-210/16 Wirtschaftsakademie Schleswig-Holstein, paras. 55-56
[13] *Ibid.*, Para. 56

does not have access to the personal data concerned nor further process the personal data is irrelevant to qualify the academy of (joint) data controller.

48. Accordingly, the Court concluded that Wirtschaftsakademie, Facebook Inc. and Facebook Ireland are 'data controllers' pursuant to the DPD and in this respect, emphasized that *"the recognition of joint responsibility of the operator of the social network and the administrator of a fan page hosted on that network in relation to the processing of the personal data of visitors to that page contributes to ensuring more complete protection of the rights of persons visiting a fan page."*

49. Finally, as the Court tried to obtain a fair balance of the interest of the parties involved when it comes to data protection, it is therefore not surprising that the CJEU further concluded that the administrator of a fan page was a controller and that *"the existence of joint responsibility does not necessarily imply equal responsibility of the various operators involved in the processing of personal data. On the contrary, those operators* ***may be involved at different stages of that processing of personal data and to different degrees,*** *so that the* ***level of responsibility of each of them must be assessed with regard to all the relevant circumstances of the particular case.****"* In other words, the Court confirm that **joint controllership is possible**, but the **actual responsibility of the joint controllers should be regarding the joint processing of the data.**

IV. Case C-40/17: Fashion ID Case

50. Fashion ID, an online clothing retailer, embedded on its website the 'Like' social plugin from the social network Facebook. Due to the presence of the Facebook 'Like' button, when individuals visited Fashion ID website, data from their browsers were transmitted to Facebook Ireland regardless of the fact that the individuals were Facebook users or not. Verbraucherzentrale NRW eV, a German consumer association questioned the legality of such social plugin given that the individuals were not informed nor asked to consent to the processing of their personal data.

51. After recalling the state of the case law regarding the notion of (joint) controller and the fact that *"the processing of personal data may consist in one or a number of operations, each of which relates to one of the different stages that the processing of personal data may involve"*, **the Court applied the broad concept of 'controller' to the case at stake.**

52. The Court pointed out that *"a natural or legal person may be a controller, within the meaning of Article 2(d) of Directive 95/46,* ***jointly with others only in respect of operations involving the processing of personal data for which it determines jointly the purposes and means****. By*

contrast, and without prejudice to any civil liability provided for in national law in this respect, that natural or legal person ***cannot be considered to be a controller****, within the meaning of that provision, in the* ***context of operations that precede or are subsequent in the overall chain of processing*** *for which* ***that person does not determine either the purposes or the means****."*

53. The Court concluded that the **means** of processing are determined jointly by Fashion ID and Facebook even though the social plugin is embedded on Fashion ID website by Facebook because Fashion ID was perfectly aware that Facebook will further process the personal data. Regarding the purpose, the Court concluded that it was also jointly determined by Fashion ID and Facebook which both used the "Like" button for their own economic and the Court to further emphasize that the fact that Fashion ID *"does not itself have access to the [personal data collected and transmitted to the provider] which it determines jointly the means and purposes of the [their] processing does not preclude it from being a controller" (para. 82)*.

Chapter 5. General Conclusion

54. While the DPD did not expressly specify the existence of joint controllership, given the broad definition of controller which "alone or jointly with others determines the purposes and means of the processing of personal data", **responsibility in case of joint controllership is now explicitly included in the GDPR under article 26**. In the maze of different actors that modern technology allows it would have been easy to dilute the responsibility to the point that nobody would have been responsible for the processing of personal data. **By consistently interpreting the concept of 'data controller' broadly,** the **Court tries to avoid the lacuna of responsibility to ensure a complete and effective protection of the person**. The broad interpretation of the concept of 'controller' given by the Court should **allow the natural person whose personal data are being processed to be sure that someone will be responsible**. But the Court, in balancing the right of the parties involved also placed some limits and had the opportunity to recall that if it holds everybody responsible, it will be depending on their degree of involvement in the processing. **The balance which the Court is trying to strike will now have to be put into practice through the application of the new GDPR.**

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Academy of European Law

Young Lawyers Contest 2019/ 2020

Written Report

Question 1:

How to take prior criminal records into account in the Public Procurement procedure in light of the diversity in criminal law and the equal treatment principle in Directive 2014/24/EU.

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I. Introduction:

Law: The diversity of Criminal Law in European Law

1. In accordance with Article 4 and Article 5 of the Treaty on the Functioning of the European Union (TFEU), **criminal law falls into a non-harmonised areas of law and it therefore falls into one of the shared competences at Member State level and not the sole competence of the European Union**.

2. Article 4(2) of the TFEU states specifically that the Union shall respect *"essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."*

3. In *M.A.S* [1] the Court held that the protection of the financial interests of the Union by the enactment of criminal penalties fell within Article 4(2) and the Italian Republic was thus, at that time, free to provide that in its legal system those rules, like the rules on the definition of offences and the determination of penalties, form part of substantive criminal law, and are thereby, subject to the principle that offences and penalties must be defined by law.

4. In that respect, the national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not compromised. [2]

5. European Union Law therefore permits diversity in Criminal Law across different Member States, provided that the level of protection provided does not compromise the level of protection and effectiveness as guaranteed by the European Charter, in particular those rights guaranteed under Chapter VI 'Justice' Articles 47-50 and the scope of protection under Articles 51-54.

Law: The principle of equal treatment within the Public Procurement procedure

6. Clause 90 of the Directive 2014/24/EU on Public Procurement states that **contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment**, with a view to ensuring an

[1] C-42/17, *M.A.S* judgment delivered 5 December 2017.
[2] *Ibid*, para 43-47.

objective comparison of the relative value of the tenders in order to determine, in conditions of effective competition, which tender is the most economically advantageous tender.

7. The classic categorisation of the principle of equal treatment within the Public Procurement procedure in case-law can be found in *SIAC Construction Ltd* [3] judgment which states that **there are three elements to the principle of equal treatment**.

8. First, **tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed** by the adjudicating authority. Secondly, the principle of equal treatment implies **an obligation of transparency in order to enable compliance with it to be verified**. Thirdly, **when tenders are being assessed, the award criteria must be applied objectively and uniformly to all tenderers**.

9. Furthermore, in *Parking Brixen GmbH* [4] the Court held that: *"Equal treatment conceptually corresponds to the principles of the right of establishment and the freedom to provide services, they are specific expressions of the principle of equal treatment."* [5]

10. It is clear that **the principle of equal treatment is similar in nature to the long established principle of non-discrimination on grounds of nationality**. This was stated by the Court in *ANAV* [6]*;"Besides the principle of non-discrimination on grounds of nationality, the principle of equal treatment of tenderers is also to be applied to public service concessions even in the absence of discrimination on grounds of nationality (Parking Brixen, paragraph 48."* [7]

11. The Court has held that the principle also applies outside of the Public Procurement procedure as it **exists as a general principle of European Union Law**. See for example the judgment of *Cartiera dell'Adda SpA* [8] where the Court stated that:

> *"...at the material time, service concession contracts were not governed by any of the directives by which the EU legislature regulated public procurement, the public authorities which concluded such contracts were nevertheless required to comply with the fundamental rules of the FEU Treaty, in particular the principles of equal treatment and transparency*

[3] C-19/00 *SIAC Construction Ltd* judgment delivered 18 October 2001. Also stated in C-275/98 *Unitron.*
[4] C-458/03 *Parking Brixen GmbH* judgment delivered 13 October 2005.
[5] *Ibid* para 46, 47, 48.
[6] C-410/04 *ANAV* judgment delivered 6 April 2006.
[7] *Supra* 6, para 20.
[8] C-42/13 *Cartiera dell'Adda SpA* judgment delivered 6 November 2014.

(see, to that effect, judgments in Parking Brixen, C-458/03, EU:C:2005:605, paragraphs 46 to 49, and Wall, C-91/08, EU:C:2010:182, paragraph 33), where the services concession concerned has a certain cross-border interest in the light, inter alia, of its value and the place where it is carried out (see, to that effect, judgment in Ordine degli Ingegneri della Provincia di Lecce and Others, C-159/11, EU:C:2012:187, paragraph 23 and the case-law cited)." [9]

12. Furthermore, in *ExxonMobil Production Deutschland GmbH* [10] the Court held that:

"In accordance with the Court's settled case-law, the principle of equal treatment, as a general principle of EU law, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see, inter alia, judgments of 16 December 2008, Arcelor Atlantique et Lorraine and Others, C-127/07, EU:C:2008:728, paragraph 23, and of 29 March 2012, Commission v Estonia, C-505/09 P, EU:C:2012:179, paragraph 64)." [11]

13. Recently the Court stated in in *MT Højgaard A/S* [12] and *Telecom Italia SpA.* [13] that:

" In that regard, it must be recalled that the principle of equal treatment and the duty of transparency mean, in particular, that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority, and constitute the basis of the EU rules on procedures for the award of public contracts.

"The principle of equal treatment of tenderers, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure, requires that all tenderers must be afforded equality of opportunity when formulating their tenders, and therefore implies that the tenders of all competitors must be subject to the same conditions. A strict application of the principle of equal treatment of tenderers, in the context of a negotiated procedure, would lead to the conclusion that only those economic operators who have been preselected can in that capacity submit tenders and be awarded contracts." [14]

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[9] *Supra* 8, para 47.
[10] C-682/17 *ExxonMobil Production Deutschland GmbH*, judgment delivered 6 November 2014.
[11] *Supra* 10 para 90.
[12] C396/14 *MT Højgaard A/S* judgment delivered 24 May 2016.
[13] C-697/17 *Telecom Italia SpA* judgment delivered 11 July 2019.
[14] C396/14 *MT Højgaard A/S*, para 37-39 and C-697/17 *Telecom Italia SpA*, para 32-33.

II. Sub-Questions 1 & 2:

Can Article 57 of the directive be extended to include other convictions? Would it be possible to exclude candidates for a form of corruption beyond which is included in the list of Article 57?

14. Article 57 Directive 2014/24/EU on Public Procurement refers to a number of exclusion grounds where an economic operator will be automatically excluded from participation in the public procurement procedure if they have been subject to any of the listed offences. Furtheremore, Article 57 (3) states that a Member State has discretion to derogate from the list, but according to Article 57 (7) the offences must be specified by law.

15. In *Michaniki AE* [15] the Court dealt with the question of the exhaustiveness of the grounds of exclusion in Article 24 of Directive 93/37, which was the predecessor of the 2014 directive. The question referred was whether a Member State may prescribe grounds for exclusion other than those provided for in the Article.

16. The Advocate General in his opinion referred to the first impression that such a question is an *"apparent contradiction"* with those maintaining the exhaustive nature of the grounds of exclusion listed in the relevant provisions of the directives concerning the coordination of public procurement procedures and he continued to note that:

> "*This is particularly the case with regard to the principle of equal treatment of the candidates for a public contract. That principle – necessarily implying an obligation of transparency (27) – which stems from the fundamental freedoms of establishment and provision of services (28) and underlies all the Community rules concerning public procurement (29) can justify the exclusion of competitors from participation in a contract inasmuch as competition between service providers, which the public procurement directives seek to encourage and which involves the widestpossible participation in procurement procedures, is genuine only if it respects the principle of equal treatment of candidates."*[16]

17. The Advocate General therefore found it difficult to contemplate that Community law prevents the very principle of the establishment by a Member State of an incompatibility between the exercise of certain public duties and candidature for a public contract.

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[15] C-213/07 *Michaniki AE* judgment delivered 16 December 2008.
[16] C-213/07 *Michaniki AE* Opinion of Advocate General Poiares Maduro delivered on 8 October 2008, paragraph 23.

18. The Advocate General concluded that the list is therefore not exhaustive and that:

"It is therefore necessary to accept that the Member States may provide for cases of exclusion other than those appearing in the list in Article 24 of Directive 93/37, ***if that proves necessary in order to prevent potential conflicts of interest and, thus, to ensure transparency and equal treatment."*** [17]

19. The Court agreed with the Advocate General that the list does not preclude the option for Member States to maintain or adopt substantive rules designed, in particular, to ensure, in the field of public procurement, observance of the principle of equal treatment and of the principle of transparency entailed by the latter, principles which are binding on contracting authorities in any procedure for the award of a public contract.

20. The Court noted that in addition to the well settled principle of equal-treatment, that a Member State is entitled to provide for exclusionary measures designed to ensure observance, in procedures for the award of public contracts, of the principles of equal treatment of all tenderers and of transparency.

21. However, **the Court added that in accordance with the principle of proportionality, which constitutes a general principle of Community law, such measures must not go beyond what is necessary to achieve that objective**:

"In view of the foregoing, the answer to the first question must be that the first paragraph of Article 24 of Directive 93/37 must be interpreted as listing exhaustively the grounds based on objective considerations of professional quality which are capable of justifying the exclusion of a contractor from participation in a public works contract. However, that directive does not preclude a Member State from providing for further exclusionary measures designed to ensure observance of the principles of equal treatment of tenderers and of transparency, provided that such measures do not go beyond what is necessary to achieve that objective." [18]

22. In *Forposta SA* [19] the Court summarised the position as follows; according to the case-law of the Court the directive does not preclude a Member State from providing grounds for

[17] C-213/07 *Michaniki AE* Opinion of Advocate General Poiares Maduro delivered on 8 October 2008, paragraph 23.
[18] C-213/07 *Michaniki AE* judgment delivered 16 December 2008, para 49.
[19] C-465/11 *Forposta SA* judgment delivered 13 December 2012.

exclusion other than those provided in the Article, and which are not based on objective considerations of the professional qualities of economic operators, to the extent that they are proportionate to the objective pursued. But noted that, EU law precludes national rules which provide for the automatic exclusion of an operator from participation in a procedure for the award of a contract or the automatic rejection of tenders, and the application of measures which are disproportionate to the aim pursued.

23. In *Impresa di Costruzioni,* [20] which cites *Connexxion Taxi Services* [21] the Court stated in accordance with settled case-law, Article 45(2) of Directive 2004/18 does not provide for uniform application at EU level of the grounds of exclusion it mentions, since the Member States may choose not to apply those grounds of exclusion, or to incorporate them into national law with varying degrees of rigour according to legal, economic or social considerations prevailing at national level. In that context, **Member States have the power to make the criteria laid down in Article 45(2) less onerous or more flexible. Member States therefore enjoy some discretion in determining the requirements governing the application of the optional grounds for exclusion**.

24. While the Court has agreed the principles are now settled law and apply to the newer provision of Article 57 of the Directive 2014/24/EU on Public Procurement, the application of same can differ on a case-by-case basis.

25. In *Forposta SA* [22] the Court held that on the facts, not only did the national provision at issue apply automatically but, in addition, **it went beyond what was necessary to attain the aim of protecting the public interest, namely to eliminate contractors that are genuinely unreliable**.

26. In *Impresa di Costruzioni* [23] the Court agreed in principle with the Advocate General to allow an optional ground for exclusion, which authorises contracting authorities to exclude from participation in a tendering procedure a tenderer who has been the subject of a judgment order. The Court stated that European Union Law is based on the premise that legal persons act through their representatives and that conduct contrary to the professional ethics of those

[20] C-178/16 *Impresa di Costruzioni Ing* judgment delivered 20 December 2017.
[21] C-171/15 *Connexxion Taxi Services* judgment delivered 14 December 2016.
[22] C-465/11 *Forposta Sa* judgment delivered 13 December 2012.
[23] C-178/16 *Impresa di Costruzioni Ing* judgment delivered 20 December 2017.

representatives may thus constitute a relevant factor in assessing the professional conduct of an undertaking.[24]

27. Member States can therefore retain, as part of their powers to determine the requirements governing the application of the optional grounds for exclusion, the possibility that certain actions of directors of that company are contrary to professional ethics as one of the relevant factors in assessing the integrity of the tendering company. **But ultimately the Court categorised that this was an implementation of the exclusion grounds and not an extension of the exclusion grounds**.

28. In *Lloyd's* [25] where the Court held that while the provision sought to safeguard the equal treatment of candidates, the exclusion concerning the signature of a similar was unjustified and **went beyond what was necessary to safeguard equal treatment**. [26]

29. Following the interpretation of the non-exhuastive nature of the exclusion grounds of Article 57 of the Directive 2014/24/EU on Public Procurement (and the preceding directive) from case-law, it is clear that if a contracting authority may add additional exclusionary grounds must that these must be specified by the national law and the contracting authority must conduct an assessment of proportionality and strike a balance between the justification of its treatment and be cognisant that the grounds do not go beyond what is necessary to safeguard equal treatment.

III. Analysis:

How can a contracting authority take account of prior convictions given the diversity in criminal while still ensuring equal treatment of the candidates?

30. In light of the aim and function of the principle of equal treatment and the duty of transparency as stated by the Court in *MT Højgaard A/S*, [27] *Telecom Italia SpA*, [28] and *Cartiera dell'Adda SpA* [29] the starting point is that tenderers must be in a position of equality both when they formulate their tenders and the implication that the tenders of all competitors must be subject to the same conditions.

[24] *Supra* 23, para 34.
[25] C-144/17 *Lloyd's* judgment delivered 8 February 2018.
[26] *Supra* 25, para 31-39.
[27] C396/14 *MT Højgaard A/S* judgment delivered 24 May 2016.
[28] C-697/17 *Telecom Italia SpA* judgment delivered 11 July 2019
[29] C-42/13 *Cartiera dell'Adda SpA* judgment delivered 6 November 2014.

31. In *Cartiera dell'Adda SpA* the referring Court queried whether the exclusion grounds must be interpreted as precluding an economic operator from a tendering process who failed to comply with a documentation requirement in the contract and submit a statement that the operator's technical director has not been the subject of criminal proceedings. The Court noted that in accordance with the principle of equal treatment and the obligation of transparency, the contracting authority must comply strictly with the criteria which it has itself established and is required to exclude from the contract an economic operator who has failed to provide a document or information which he was required to produce under the terms laid down in the contract documentation, on pain of exclusion.[30]

32. The Court upheld the decision of the contracting authority that the omission was *"not a purely formal irregularity"* and its decision not to allow the tenderer subsequently to remedy the omission in any way after the expiry of the deadline for submitting bids.[31]

33. The Court added:

> *" Furthermore, in such circumstances, Article 51 of Directive 2004/18, which provides that the contracting authority may invite operators to supplement or clarify the certificates and documents submitted pursuant to Articles 45 to 50 of the directive, cannot be interpreted as permitting that authority to accept any rectification of omissions which, as expressly provided for in the contract documentation, must result in the exclusion of the bid."* [32]

34. In *Impresa Edilux Srl* [33] the Italian contracting authority required the parties to fill out a legality protocol, the purpose of which is to prevent organised crime infiltrating the public procurement sector. The Court held that:

> *"The Court has already held that, as regards the principles of equal treatment and transparency, the Member States must be recognised to have a certain discretion for the purpose of adopting measures intended to ensure observance of those principles, which are binding on contracting authorities in any procedure for the award of a public contract. Each Member State is best placed to identify, in the light of historical, legal, economic or social considerations specific to it, situations propitious to conduct liable to bring about breaches*

[30] *Supra* 29, para 44 &43.
[31] *Supra* 29, para 45.
[32] *Supra* 29, para 46.
[33] C-425/14 *Impresa Edilux Srl*.

of those principles (see, to that effect, judgment in Serrantoni and Consorzio stabile edili, C-376/08, EU:C:2009:808, paragraphs 31 and 32 and the case-law cited).” [34]

35. The objective of the protocol was to prevent and combat the phenomenon of organised crime, firmly entrenched in some regions of southern Italy, from infiltrating, in particular, the public procurement sector. It also serves to protect the principles of competition and transparency underlying Italian and EU public procurement legislation.

36. The Court held that:

“*It is clear that, by preventing criminal activity and distortions of competition in the public contracts sector, a measure such as the obligation to declare acceptance of that type of legality protocol appears to be such as to strengthen equal treatment and transparency in procurement procedures. In addition, inasmuch as that obligation is incumbent upon every candidate or tenderer without distinction, it does not conflict with the principle of non-discrimination.”* [35]

37. But the Court referred to the limits of this discretion and that it is to be exercised in accordance with the principle of proportionality, which constitutes a general principle of EU law, and that such a measure must not go beyond what is necessary to achieve the intended objective.

38. The Court held that: “*Such commitments and declarations concern the honest conduct of the candidate or tenderer towards the contracting authority at issue in the main proceedings and cooperation with law enforcement. They do not, therefore, go beyond what is necessary in order to prevent organised crime infiltrating the public contract awards sector.”*[36]

39. The Court referred to the case-law of the Court that the automatic exclusion of candidates or tenderers who are in such a relationship with other candidates or tenderers goes beyond what is necessary to prevent collusive behaviour and, therefore, to ensure the application of the principle of equal treatment and observance of the obligation of transparency.[37] Such an automatic exclusion constitutes an irrebutable presumption of mutual interference in the respective tenders, for the same contract, of undertakings linked by a relationship of control or

[34] *Supra* 33, para 26
[35] *Supra* 33, para 28.
[36] *Supra* 33, para 34.
[37] C-538/07*Assitur* judgment delivered 19 May 2009, parag 28 to 30, and C-376/08 *Serrantoni and Consorzio stabile edili* judgment delivered 26 December 2009 , para 39 and 40.

of association. Accordingly, it precludes the possibility for those candidates or tenderers of showing that their tenders are independent and is therefore contrary to the EU interest in ensuring the widest possible participation by tenderers in a call for tenders.

40. However, the Court isolated some of the declarations within the legality protocol as going beyond what is necessary to safeguard the principle of competition in the public procurement sector. These declarations included that the tenderer was not in a relationship of control or of association with other tenderers, has not concluded and will not conclude any agreement with other participants in the tendering procedure and will not subcontract any type of tasks to other undertakings participating in that procedure.

41. It is clear as previously referenced by the Court in *ExxonMobil Production Deutschland GmbH* [38] that if a contracting authority chooses a difference in treatment between both comparable and different situations, this difference must be *"objectively justified"* on the factual situation at hand. Otherwise is runs the risk of infringing the principle of equal treatment.

42. While the cases above illustrate the Court's willingness to safeguard competition within the public sector by on the one hand, deterring the illfultration of organised crime and on the other hand, supporting a contracting authority's decision to exclude explanatory documentary evidence that was delivered out of time, attention should be drawn to the express provisions of the Directive 2014/2014/24/EU on Public Procurement.

43. For example, Article 57 (6) states that an economic operator may supply evidence despite the existence of a relevant ground for exclusion to be considered, however this possibility does not exist where final judgment has been made eg. being found guilty of corruption. Article 57 (6) states once documentary evidence has been supplied, *"the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct."*

44. Recital 102 of the Directive also states that allowance should be made for the possibility that economic operators can adopt compliance measures aimed at remedying the

[38] C-682/17 *ExxonMobil Production Deutschland GmbH* judgment delivered 20 June 2019.

consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour. It states specificially that: *''Where such measures offer sufficient guarantees, the economic operator in question should no longer be excluded on those grounds alone."*

45. However, it is important to note the hierarchy of Directives as a source of secondary legislation and that the implementation of any review mechanism of documentary evidence or suggested conditions supplied by economic operartors who have committed criminal offences or acts of misconduct, should be left to Member States to determine the exact procedural and substantive conditions applicable in such cases. **Specificially in reference to recital 102, Member States should, in particular, be free to decide whether to allow the individual contracting authorities to carry out the relevant assessments or to entrust other authorities on a central or decentralised level with that task. The discretion is therefore left to the contracting authorities of Member States to implement the provisions**.

46. Therefore based off the express provisions of the Directive, there appears to be sufficient safeguards in place for economic operators to take account of prior convictions given the diversity in criminal law while still ensuring equal treatment of the candidates, given the positive obligation placed on economic operators to prove they considered the documentary evidence and considered alteranative conditions.

47. Following the interpretation of the Directive 2014/2014/24/EU on Public Procurement (and the preceding Directive) from case-law, it is clear that the contracting authority must in consideration of a tenderer found guilty of criminal offence or act of misconduct within the grounds of Article 57, conduct an assessment of proportionality and strike a balance between the justification of its treatment and be cognisant that the requirements will not be perceived as an automatic exclusion.

European Arrest Warrant

48. The significance of fundamental rights and rules of the European Union law in the implementation process in each Member State can also be observed in the area of European Arrest Warrants. As the **European Union Law permits some diversity and discretion** in the implementation process and treatment of situation of criminal offences **across different**

Member States, however all measures shall be taken in accordance with above-mentioned EU fundamental rights and rules.

49. In *Jeremy F* [39] the Court stated that:

"Finally, it should be observed that even in criminal proceedings for the enforcement of a custodial sentence or detention order, or indeed in substantive criminal proceedings, which lie outside the scope of the Framework Decision and of European Union law, ***the Member States are still obliged to respect fundamental rights as enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms or laid down by their national law****, which may include the right to a second level of jurisdiction for persons found guilty of a criminal offence by a court."*[40]

50. The Courts also concluded that:

"In the absence of further detail in the actual provisions of the Framework Decision, and having regard to Article 34 EU, which ***leaves to the national authorities the choice of form and methods needed to achieve the desired results of framework decisions, it must be concluded that the Framework Decision leaves the national authorities a discretion as to the specific manner of implementation of the objectives it pursues, with respect inter alia to the possibility of providing for an appeal with suspensive effect against decisions relating to a European arrest warrant."*** [41]

51. However, a **margin of discretion does exist:**

"*Although the Framework Decision makes no provision on any right of appeal with suspensive effect against decisions relating to a European arrest warrant, it follows from the decision that* ***certain limits must be set as regards the margin of discretion enjoyed by Member States in this respect."*** [42]

52. In relation to **the margin of discretion**, this was also referenced by Advocate General Bot in *Raugevicius.* [43] It should be noted that the Article 6(1) of the European Convention on Extradition allows State parties to refuse to extradite their own nationals. However, the Advocate General concluded ***that discretion must be exercised in accordance with primary***

[39] C 168/13, *Jeremy F* judgement delivered 30 May 2013.
[40] *Supra* 39, para 48.
[41] *Supra* 39, para 52.
[42] *Supra* 39, para 56.
[43] C-247/17, *Raugeviciu* opinion of Advocate General Bot delivered 25 July 2018.

law and, in particular, with the rules of the FEU Treaty on equal treatment and the freedom of movement of Union citizens.[44]

53. Accordingly the Advocate General indicated that;*"the application by a Member State of a provision of its domestic law under which no national is to be extradited* ***must comply with the FEU Treaty****, in particular with Articles 18 and 21 thereof.*" [45]

54. The Advocate General noted that:

" *In that regard, the Court has held that national rules of a Member State on extradition which give rise to a difference in treatment depending on whether the person concerned is a national of that Member State or a national of another Member State, in so far as they result in nationals of other Member States who have moved to the requested Member State not being granted the protection against extradition enjoyed by nationals of the latter Member State, are liable to affect the freedom of nationals of other Member States to move within the European Union.*

"*It follows that, in a situation such as that at issue in the main proceedings, the unequal treatment which allows the extradition of a Union citizen who is a national of a Member State other than the requested Member State, such as Mr Raugevicius, represents a restriction on freedom of movement, within the meaning of Article 21 TFEU.*" [46]

55. It has been clearly indicated by the Advocate General that ***such a restriction can be justified only where it is based on objective considerations and is proportionate to the legitimate objective of the national extradition rules at issue.***[47]

56. The Advocate General finally stated: "*I note in that regard that a difference in treatment between Finnish nationals and the nationals of other Member States residing in Finland* ***cannot be justified****, in the present case, by the objective of preventing impunity for persons who have committed an offence, as the Court made clear in its judgment of 6 September 2016, Petruhhi."* [48]

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[44] C-247/17, *Raugeviciu* opinion of Advocate General Bot delivered 25 July 2018, para 18.
[45] *Supra* 44, para 19.
[46]*Supra* 44, para 20.
[47] *Supra* 44, para 21 and 22. This proportionality assessment of objective considerations and pursuing legitimate objectives has been re-iterated by the Court in subsequent case-law; C-191/16 *Pisciotti* judgment delivered 10 April 2018, para 44-48; C-391/09 *Runevič-Vardyn and Wardyn* judgment delivered 12 May 2011, para 83 and the case-law cited; C-182/15 *Petruhhin* judgment delivered 6 September 2016, para 34.
[48] C-247/17, *Raugeviciu* opinion of Advocate General Bot delivered 25 July 2018, para 38.

57. The same position was held by the Court in *Pisciotti*;

"*The Court has held that the objective of preventing the risk of impunity for persons who have committed an offence is to be seen in the context of the prevention and combating of crime.* ***That objective must be considered, in the context of the area of freedom, security and justice without internal frontiers referred to in Article 3(2) TEU, to be a legitimate objective of EU law****."* [49]

58. The Court also stated:

"*However,* ***measures which restrict a fundamental freed om, such as that laid down in Article 21 TFEU, may be justified by objective considerations only if they are necessary for the protection of the interests which they are intended to secure and only in so far as those objectives cannot be attained by less restrictive measures****."* [50]

59. It is submitted that the approach adopted in the case-law concerning European Arrest Warrants concerning Member State's exercise of discretion to treat criminal offences differently, is analogous to the approach as adopted in Public Procurement proceedings. It is clear that a difference in treatment will only be justified where it **is based on objective considerations and is proportionate to the legitimate objective of the national extradition rules at issue.**

IV. Conclusion:

60. It follows that in response to the questions raised:

(i)**It is settled case-law that contracting authorities in Member States can add additional exclusion grounds to those listed at Article 57 of the Directive 2014/24/EU on Public Procurement and that they are non-exhaustive in nature**. Following the interpretation of the non-exhuastive nature of the exclusion grounds from case-law, it is clear that if a contracting authority adds additional exclusionary grounds, that these must be specified by the national law and the contracting authority must conduct an assessment of proportionality and strike a balance between the justification of its treatment and be cognisant that the grounds do not go beyond what is necessary to safeguard equal treatment. (C-213/07 *Michaniki AE*, C-465/11 *Forposta SA* & C-178/16 *Impresa di Costruziono* as referenced);

[49] C-191/16 *Pisciotti* judgment delivered 10 April 2018, para 47.
[50] *Ibid*, para 48.

(ii) Following clause 90 of the Directive 2014/24/EU on Public Procurement in order to ensure compliance with the first limb of the principle of equal treatment in the award of contracts, **contracting authorities in Member States should be obliged to create the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied in the contract award decision**. (C-19/00 *Siac Construction Ltd*, C-396/14 *MT Hojgaard* A/S & C-697/17 *Telecom Italia Spa* as referenced);

(iii) **It has been left to contracting authorities in Member State to determine the exact procedural and substantive conditions applicable in the situations** when the economic operators adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehavior, and such measures offer sufficient guarantees (Including but not limited to Article 57 (6) and Recitial 102 of Directive 2014/24/ EU on Public Procurement);

(iv) Following the interpretation of the Directive 2014/2014/24/EU on Public Procurement (and the preceding Directive) from case-law, it is clear that **the contracting authority must if a tenderer is found guilty of criminal offence or an act of misconduct within the grounds of Article 57, conduct an assessment of proportionality and strike a balance between the justification of its treatment and be cognisant that the requirements will not be perceived as an automatic exclusion**. (C-42/13 *Cartiera dell'Adda SpA* and C-425/14 *Impresa Edilux Srl* as referenced);

(v) It is submitted that the approach adopted in the case-law concerning European Arrest Warrants concerning the exercise of discretion to treat criminal offences differently, is analogous to the approach as adopted in Public Procurement proceedings. It is clear that a difference in treatmùent will only be justified where it **is based on objective considerations and is proportionate to the legitimate objective of the national extradition rules at issue.**(C-247/17, *Raugeviciu Pisciotti* C-391/09 C-191/16 *Pisciotti, Runevič-Vardyn and Wardyn* C-182/15 *Petruhhin* as referenced);

(vi) **The rationale behind the principle of equal treatment that should always be borne in mind by contracting authorities in Member States** is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure. *(* C396/14 *MT Højgaard A/S*, and C-697/17 *Telecom Italia SpA*, as referenced).

Introduction

We set out to discuss and answer several questions in this paper, which were proposed by the ERA staff. Specifically, we identified that the main question is to answer if and how prior criminal records of applicants in a public procurement procedure need to be taken into account in light of the diversity in criminal law provisions and the equal treatment principle in the public procurement.

It is important to note that identifying the criminal past of economic operators[1] is only a small fraction of the selection process in public procurement, which starts way before this qualitative selection by setting up the rules by which the contract shall be awarded. Selective rules, among other things, may also create a discriminatory environment within the public procurement process, however, this paper shall not focus on anything else but on whether discrimination occurs while comparing the criminal history against a list of convictions in Article 57 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (the "Directive").

Apart from reaching the conclusion to the main question written above, we shall also explore several preliminary questions.

Would it be possible to extend this list to include other convictions?

Would it be possible to exclude candidates for a form of corruption e.g. beyond what is included in the listed convention or would the equal treatment principle not allow that?

How can a contracting authority[2] take account of those prior convictions given the diversity in criminal law whilst still ensuring equal treatment of the candidates? – Which should also be our conclusion.

1. Preliminary analysis

a. Would it be possible to extend this list to include other convictions?

The list in Section 1. of Article 57 of the Directive is exhaustive and cannot be further extended. This is without prejudice to other possibilities of extending the reasoning of excluding an economic operator (e.g. Section 2. of Article 57).

[1] Article 2, Section 1., subsection (10), the Directive
[2] Article 2, Section 1., subsection (1), Ibid.

b. Would it be possible to exclude candidates for a form of corruption e.g. beyond what is included in the listed convention or would the equal treatment principle not allow that?

Yes, this would be possible as we can see the list in Section 1. of Article 57 of the Directive specifically calls for the use of national law of both contracting authority and an economic operator[3]. Contracting authority, therefore, may exclude an economic operator that has been convicted by a final judgement of corruption as defined in the law of the Member State of its establishment or in the law of the Member State of the contracting authority.

Additionally, Member States are able to certainly change the scope of the Article through existing case law (see below).

To our knowledge, however, European Court of Justice (the "ECJ") has not yet decided on the case on whether the "*corruption as defined in the national law of the contracting authority or the economic operator*"[4] shall be a discriminatory measure in view of equal treatment in public procurement. As we suspect that was the reason why such a topic was presented to us to write about, this paper is further going to explore the basis of public procurement and criminal records in primary and secondary law of the European Union and its judiciary to explore answers to the main question and the last preliminary question as set out above.

2. The primary law of the European Union

a. Equal treatment

Public procurement, and more specifically equal treatment in public procurement, has, unlike competition law and state aid law, no explicit provisions in the Treaty on the Functioning of the European Union (the "TFEU"). However, it is undeniable that equal treatment, equality and non-discrimination are fundamental principles of the European Union, as the words *equal, equality* or *equally* appear 20 times in TFEU. Specifically, for our situation, we see the importance of Article 18 of TFEU, which states that "*[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.*"[5] As we can see, the principle of non-discrimination is enshrined with a

[3] Article 57, Section 1., the Directive
[4] Ibid.
[5] Article 18, TFEU

certain caveat, as Article 18 does not prohibit limitations of this rule if, such limitation (i) is in the scope of application of the Treaties (TFEU and TEU) and (ii) is contained within their texts. Additionally, further limitations may be found in the case-law of ECJ, which is further clarifying the texts of TFEU and TEU through its decisions.

Furthermore, as there are no specific provisions on public procurement in the TFEU, we shall derive more rules on the rules of equal treatment in public procurement from the *four freedoms* of the European Union, which in particular for our case are *free movement of goods* (Article 28 TFEU), *freedom of establishment* (Article 49 TFEU) and *freedom to provide services* (Article 56 TFEU). These freedoms directly relate to potential public procurement. The Treaties do not further constitute any limitation within the meaning of Article 18 relevant to us and as such are exhausted in this area.

b. Criminal law

Criminal law is currently not harmonized in the primary law of the European Union. Even though that is not the case, TFEU in its Chapter 4 brings at least some clarity on how differences among Member States' legislations shall work on the European Union level and tries to limit the differences by setting at least minimum rules in Article 82 et seq. TFEU (in the form of secondary EU law). It is important to note, that according to the last paragraph of Section 2 of Article 82 "*[a]doption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.*"[6] It is, therefore, possible for Member States to implement stricter rules.

Even more interesting is the Article 83 of the TFEU, which sets up the ability for the European Parliament and Council to adopt directives concerning certain areas of crime that are particularly serious with a cross-border dimension[7]. Here we can see *corruption* as one of them which brings us back directly to the Directive, where, as presumed in Article 83 of TFEU, it sets out through Section 1. of Article 57 several criminal offences that are defined strictly by legal instruments of the European Union. As was noted before, letter (b) of Section 1 of Article 57 of the Directive, allows Member States to exclude an economic operator that was convicted by a final judgement of corruption as is defined in the national law of the contracting authority or the economic operator[8].

[6] Article 82, TFEU
[7] Article 83, TFEU
[8] Article 57, Section 1., letter (b), the Directive

3. Secondary law and case law

As was noted before, ECJ to this day has not ruled on whether exclusion of an economic operator on the grounds of corruption based from national law is a discrimination and a violation of equal treatment under European Union law. Fortunately, there are other decisions that may help us guide our answer under the principle of *analogia juris* (as decisions of ECJ is considered law).

Such a decision is Case T-10/17, in which the applicant sought a remedy against a breach of an equal treatment due to the fact that the winning economic operator benefited from knowledge acquired during performance of a similar contract concluded with the contracting authority previously. The ECJ held that "*the alleged advantage of the successful tenderer, on the assumption that it is proven, is not the consequence of any conduct on the part of the contracting authority*[9]" and as such the potential breach of an equal treatment principle cannot be attributed to the contracting authority. Moreover, it is *inevitable* that it constitutes an "*inherent de facto advantage*"[10].

By using the analogy, we might be able to constitute a similar situation in our case, although instead of an *inevitable de facto advantage,* we might see an inevitable de facto disadvantage. Should the economic operator that is part of the tender be discriminated due to a stricter corruption law in the Member State of its incorporation, it is not the breach of an equal treatment principle on the part of the contracting authority, but rather an inherent disadvantage of the applying economic operator. Inability to exclude an economic operator with previous corruption charges does not seem wise nor advantageous for the quality of public procurement process in the European Union. After all, equal treatment principle is not a prerequisite to dealing with all applying economic operators in the same manner, but rather treat the applying economic operators based on the situation they are – preventing different treatment for same or substantially similar situations[11].

Additionally, economic operators have the liberty to change the place of their establishment and, effectively, prevent a negative outcome based on their criminal history. However, this begs the question if Article 57 of Directive 2014/24/EU is an effective tool of preventing corrupted entities in joining the public procurement.

[9] Para 187, Idib.
[10] Idib.
[11] Para 207, T-704/14

Such conduct, however, would be in strong contrast to what we consider is the essential reasoning behind applying national law regarding corruption in public procurement. As the Advocate General pointed out in points 42 and 43 of his Opinion in C-41/18, these grounds for exclusion are based on an essential element of the relationship between the successful tenderer and the contracting authority, namely reliability of the contractor, on which the confidence which the contracting authority places in him. Thus, the first paragraph of recital 101 of the Directive states that contracting authorities may exclude economic operators who have proven to be *unreliable*, while its second paragraph takes account of the performance of public contracts earlier, *faulty behaviour seriously casting doubt on the reliability of the economic operator*. Applying the exclusion grounds without acknowledging the reasoning behind them (the existence of trust between contracting authority and economic operator) would inevitably defeat their purpose, as we understand it.

For further case law, we shall first briefly explore the secondary EU law, which, in Article 57, Section 1., letter (b) of the Directive tell us to take corruption in public procurement as broadly "*as defined in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and Article 2(1) of Council Framework Decision 2003/568/JHA as well as corruption as defined in the national law of the contracting authority or the economic operator*".

Article 3 (1) of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (the "Convention") drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (the "Treaty")[12] defines *active corruption*[13] as "*the deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties*".

Article 2, Section (1) of Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (the "Council Framework Decision")[14] concern both

[12] Official Journal C 195, 25/06/1997 P. 0002–0011
[13] It is quite logical that the Directive only targets "active" corruption since "passive" corruption is that of the official, and therefore of the contracting authority. An authority cannot exclude itself ..from it own public procurement...
[14] Official Journal L 192, 31/07/2003 P. 0054–0056

active and passive corruption: "*[t]he Member States shall take the necessary measures to ensure that the following intentional conduct constitutes a criminal offence when it is carried out in the course of business activities: (a) promising, offering or giving, directly or through an intermediary, to a person who in any capacity directs or works for a private-sector entity an undue advantage of any kind, for that person or for a third party, in order that that person should perform or refrain from performing any act, in breach of that person's duties; (b) directly or through an intermediary, requesting or receiving an undue advantage of any kind, or accepting the promise of such an advantage, for oneself or for a third party, while in any capacity directing or working for a private-sector entity, in order to perform or refrain from performing any act, in breach of one's duties*".

To answer the question of whether the Member States can go beyond that definition, Article 11 of the Convention states, that: "*[n]o provision in this Convention shall prevent Member States from adopting internal legal provisions which go beyond the obligations deriving from this Convention*".

It is, however, difficult to know precisely what the national measures are, since the Convention, signed in 1997, has to be firstly ratified by the Member States, with possible reservations, as in so typical in public international law[15].

The Council Framework Decision, on the other hand, is a binding instrument for the Member States that needs no ratification. Article 19 provides that "*Member States shall take the necessary measures to comply with the provisions of this Framework Decision before 22 July 2005*". However, it should be noted that several countries, such as Belgium, the Czech Republic, Denmark, Slovenia, Sweden and the United Kingdom, have not adopted transposition measures within the time allowed. For these countries, it seems unlikely that they have gone further than the criminalization provided for in the legislation of the European Union.

The ECJ nevertheless revealed certain interesting applications of Article 57 of the Directive, most often in cases related to Italy. As the ECJ pointed out in its judgment C-63/18, "*Italian law provides for numerous measures explicitly intended to prohibit undertakings suspected of belonging to the mafia, or in any event of being linked to the interests of the main criminal organisations operating in the country, from having access to public tendering procedures*"[16] .

[15] See Article 13 to 15 of the Convention
[16] Para 42, C-63/18

For example, in C-425/14, the Regional Administrative Court for Sicily explains that the Italian law introduced *legality protocols* or *integrity agreements* to prevent and combat the pernicious phenomenon of the infiltration of organised crime, firmly entrenched in some regions of southern Italy, into the public procurement sector. More precisely, Article 1 (17) of Italian Act no. 190/2012 states "*that a contracting authority may require, on pain of exclusion, the prior acceptance of such protocols, which is necessary in order for the terms of those protocols to be binding*"[17]. Can Member States do that within EU Law?

The ECJ held that, as regards the principles of equal treatment and transparency, the Member States must be recognised to have a certain discretion for the purpose of adopting measures intended to ensure observance of those principles, which are binding on contracting authorities in any procedure for the award of a public contract. Each Member State is best placed to identify, in the light of historical, legal, economic or social considerations specific to it, situations propitious to conduct liable to bring about breaches of those principles[18].

However, in accordance with the principle of proportionality, which constitutes a general principle of EU law, such a measure must not go beyond what is necessary to achieve the intended objective[19].

In the end, the ECJ considered that the majority of the commitments and declarations contained in the legality protocols "*concern the honest conduct of the candidate or tenderer towards the contracting authority at issue in the main proceedings and cooperation with law enforcement. They do not, therefore, go beyond what is necessary in order to prevent organised crime infiltrating the public contract awards sector*"[20]. In C-63/18, the question of corruption in public procurement was approached from the angle of subcontracting, because Article 71 of the Directive provides that contracting authorities may verify, or may be required by the Member States to verify, whether there are grounds to exclude subcontractors pursuant to Article 57 of the Directive due to, inter alia, participation in a criminal organisation, corruption or fraud.

In this case, Italy had adopted national rules which limited the share of the contract which the tenderer was authorized to subcontract to third parties to 30%. "*By limiting the share of the contract that can be subcontracted, the national legislation makes participation in public*

[17] Para 13 and 14, C-425/14.
[18] Para 31 and 32, C-376/08
[19] Para 33, Ibid.
[20] Para 34, Ibid.

purchasing less attractive to criminal organisations, and this is capable of preventing the phenomenon of mafia infiltration in public purchasing and thus protecting public policy"[21].

The ECJ, however, has ruled, that the Directive is "*precluding national legislation, such as that at issue in the main proceedings, which limits to 30% the share of the contract which the tenderer is permitted to subcontract to third parties*"[22].

We, therefore, see that the ECJ operates a balance of interests between the legitimate objectives pursued by the Member States in the framework of public procurement legislation (in particular the fight against corruption) and the general principles of equality and non-discrimination. The criterion it adopts is that of the principle of proportionality, which assumes that the measure must be necessary to achieve the objective sought.

4. Directive 2014/24/EU

Article 57 is further organized in such a way that it distinguishes between compulsory and optional causes of exclusion of economic operators from public procurement.

Sections 1. and 2. of Article 57 are grounds for a mandatory exclusion, while Section 4., which covers the gross negligence of an economic operator, is optional. Moreover, neither Article 57 by itself nor the preamble (specifically Preamble 100, 101 and 105 of the Directive) allow for more grounds of exclusion. Section 3., however, allow Member States to "*also provide for a derogation from the mandatory exclusion provided in [sections[23]] 1 and 2, on an exceptional basis*"[24]. Exceptional basis, in this case, is connected with public interests such as public health or protection of environment. A specific case, for example, could be a shortage of important vaccine or of emergency equipment, that is needed to protect the public from a direct threat. Moreover, contracting authorities shall ensure that an exclusion will not be *disproportionate*[25] when it comes to exclusions based on Section 2. of Article 57. This shall not be a blank pardon for constant, although small, violations. As Recital 101 states, "*repeated cases of minor irregularities can give rise to doubts about the reliability of an economic operator which might justify its exclusion*"[26]. Ultimately, it seems as if the legislation presumes a moderate application

[21] Para 32, C-63/18
[22] Para 46, Ibid.
[23] changed from "paragraphs" due to the language used in this paper
[24] Article 57, Section 3., the Directive
[25] Ibid.
[26] Preamble 101, Ibid.

of exclusion grounds since they are, in its core and among other things, an obstacle to free competition.

Further in, this view is strengthened by the derogatory mechanism of Section 6. of the Article 57, which states that "*[a]ny economic operator who is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to attest that the measures he has taken are sufficient to demonstrate his reliability despite the existence of a ground for exclusion relevant. If this evidence is deemed sufficient, the economic operator concerned is not excluded from the procurement procedure.*"[27] We consider this Section to give extraordinary power to the contracting authorities, which subsequently have a hard task at hand ensuring that the use of this derogatory mechanism will not result in discriminatory behaviour. We, therefore, welcome the existence of Section 7. of Article 57, which further allows the Member States to specify the implementing conditions of Article 57. Sections 6. and 7. of Article 57, therefore, provide enough means for contracting authorities to derogate from strict rules of the Directive and ensure a fair and non-discriminatory public procurement selection.

5. Conclusions

In concluding our paper, based on the legislation and case law that we provided herein, we would argue that the list in Section 1. of Article 57 of the Directive cannot, in fact, be further extended, just as we stated in our preliminary part. The list is indeed exhaustive; however, the letter (b) of the list allows for use of national law to define corruption criminal offences and thus allowing additional exclusions grounds into the relevancy.

In the event that conduct is criminalized under a corruption charge in one Member State yet not in another, it appears possible to compensate for the absence of compulsory exclusion by applying the *serious professional misconduct* criterion mentioned in Article 57, Section 4., letter (c) of the Directive. Thus, a contracting authority can always decide to exclude an economic operator when it has knowledge of facts likely to call into question its integrity. One could imagine that a company whose manager's record displays a criminal conviction would be dismissed or not[28], depending on whether the contracting authority considers that the alleged facts are likely to shake confidence or not. This would restore balance with national companies subject to other national law. It is important to note that the contracting authority must ensure that such conduct will not result in a discriminatory outcome.

[27] Article 57, Section 6., Ibid.
[28] As seen in C-178/16

We do not think that the fact of broadening the corruption criminal offences through national laws of contracting authority and economic operator is discriminatory by itself – as this can easily be avoided by freedom of establishment and also through remedying processes of the contracting authority, as was mentioned previously. The ability to "escape" an exclusion from public procurement by relocating to a different, more lenient Member State towards corruption, pushes the problem just a little further if a stronger protection of public interest in regard to preventing fraudulent entities from joining the public procurement would not be better served by a clear definition within the EU Law, instead of allowing (soon only) 27 jurisdictions to define for themselves.

Finally, the ability of contracting authorities to widen the scope of corruption charges does not seem to be over the criterion set by the ECJ – that of proportionality in the view of the result sought – and shall not prove as discriminatory when used in practice. After all, even the *Standard Form for the European Single Procurement Document (ESPD)*[29] reminds us that "*[t]his exclusion ground also includes corruption as defined in the national law of the contracting authority (contracting entity) or the economic operator*[30]".

[29] Standard Form for the European Single Procurement Document (ESPD)
[30] Page 6, Ibid.

ERA-CCBE Young Lawyers Contest – Negotiation exercise

Background information

Company A is incorporated as a private company in Latvia. It is a company that sells clothing online with sales mainly in Latvia, Italy and also in various other EU member states. The shareholder of Company A, who is also one of the directors, is in discussions with Company B. The other directors of Company A are planning to resign at completion.

Company B is incorporated as a private company in Italy and is a manufacturer of clothing similar to the clothing Company A sells. It has some sales in Latvia and would like to expand this. Its online website is not very good. Company B wants to buy all the shares of Company A. Discussions have been in English. Company A has been experiencing some financial difficulties as one of the important suppliers of clothing to Company A has itself been in financial difficulties and getting stock has been difficult. However, the shareholder of Company A is sure that, if Company A had access to a new reliable source of clothing, the company would do very well. Company A has particular expertise in online selling which will be very valuable to Company B, but this depends on the shareholder of Company A remaining as a director and the current senior management team remaining in place. Company B is planning to appoint three of its directors to the board of Company A at completion.

Company B has confirmed that it has sufficient cash available to pay for the shares in cash. The shareholder of Company A thinks the business will be very profitable over the next few years and wants Company B to pay a price to reflect that. Company B is willing to pay part of the consideration when the sale is completed and to make a further payment or payments depending on how Company A does over the next three years. The parties have agreed that this payment or payments will be based on the profits earned by Company A (net of tax) and have agreed what the amounts will be depending on the amount of net profits earned. Discussions are going well and the shareholder of Company A has agreed, in principle, that she will give Company B the "normal warranties and indemnities" in connection with the sale of the company. The parties are about to meet to discuss any remaining points of concern, including what law should govern the agreement for the acquisition of Company A, more detail about what the provisions relating to the further payments in the three years after completion should say and how any disputes that arise in connection with the sale should be resolved. They have

agreed that they will not renegotiate the price to be paid on completion or the price payable if net profits in the three years after completion meet the relevant targets.

Company A's shareholder is a Latvian citizen. Company A's year end is 31 December and its accounts are audited by an independent accounting firm. Audited accounts for the year ending 31 December 2019 are already available and it is expected that audited accounts for 2020 will be available by early February 2021.

Instructions to both teams

The team for Company B will have a maximum of 15 minutes in which to put forward their negotiating position, including:

1. any points on what law should govern the agreement,

2. its proposals for provisions relating to the consideration payable to reflect performance over the three years after completion (other than the amount of the consideration) and

3. how any disputes should be resolved.

The team for Company A's shareholder will then have 15 minutes to respond to this and put forward their point of view and any other points of concern. The teams will then take it in turns to respond in order to progress the negotiation. Each further response will have a maximum time of 5 minutes.

At the 55 minute point the invigilator will call time and the parties will take a 5 minute break to regroup before trying to achieve a final agreement within the overall time of 90 minutes. Both parties are very keen to reach agreement. You need not worry about any provisions of Latvian or Italian law or any tax aspects of the transaction.

Provisional text

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

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

Parquet général du Grand-Duché de Luxembourg
v
JR

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

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

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

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

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

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

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

I. Legal framework

A. EU law

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

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

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

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

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

He cannot issue any instructions to them in individual cases.

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

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

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

II. Disputes and questions referred for a preliminary ruling

A. Case C-566/19 PPU

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

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

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

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

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

B. Case C-626/19 PPU

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

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

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

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

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

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

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

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

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

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

IV. Analysis

A. Preliminary considerations

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

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

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

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

21. It must, therefore, be determined:

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

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

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

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

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

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

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

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

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

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

27. According to that line of argument:

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

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

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

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

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

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

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

2. The Public Prosecutor's Office in France

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

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

34. This raises two issues:

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

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

(a) Instructions in specific cases and general instructions

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

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

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

to impair the independent judgment of its members and to influence their decisions"'. (20)

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

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

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

41. The counter-argument to the foregoing might be that this is not the norm. I would emphasise, however, that, in cases involving deprivation of liberty, the only way to safeguard against binding instructions from the executive (not only general instructions but also, a fortiori, specific instructions) in connection with EAWs is to ensure that the person adjudicating upon a person's liberty does so from a position of absolute independence and is subject only to the law, not to the guidance or instructions, whether particular or general, of the executive.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Preliminary considerations

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

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

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

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

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

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

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

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

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

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

protection'.

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

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

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

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

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

70. The need for such proceedings is not a condition which a public prosecutor's office must fulfil in order to be able to issue an EAW, that is to say, in order to be capable of being classified as an 'issuing judicial authority' within the meaning of Article 6(1) of the Framework Decision. Rather, it is a condition relating to the *lawfulness of the issuing of an EAW* by a public prosecutor's office and, therefore, to its effectiveness. (32)

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

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

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

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

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

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

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

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

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

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

80. If the NAW and the EAW are adopted simultaneously or almost immediately, there is no risk that the assessment as to

the proportionality of the EAW will be out of date. Conversely, that risk *is* present if the EAW is issued long after the NAW. In that event, after all, the proportionality assessment originally made by the court may have become obsolete and circumstances arising subsequently may be sufficient to warrant its amendment.

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

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

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

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

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

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

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

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

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

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

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

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

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

93. In short, the two questions referred for a preliminary ruling by the Netherlands court may be answered by way of a single reply emphasising that, in any event, the person concerned must be given the opportunity to bring proceedings before a

judge or court in the strict sense against an EAW issued by the public prosecutor's office, even if that EAW is preceded by an NAW granted by a judge.

4. A final consideration

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

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

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

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

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

99. The principle of mutual trust between the Member States, and its corollary of mutual recognition, call for a simplification of the procedure provided for in the Framework Decision. From that point of view, I do not think it appropriate simply to add to the grounds for 'refus[ing] to execute' an EAW another, not expressly provided for in the Framework Decision, to the effect that, in the case of EAWs issued by a public prosecutor's office, it must be demonstrated that the national legislation of the issuing State allows proceedings to be brought before the judicial authority of that State.

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

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

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

V. Conclusion

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

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

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

In the alternative:

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

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1 Original language: Spanish.

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

'the Framework Decision').

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

4 Cases C-508/18 and C-82/19 PPU, EU:C:2019:337; 'Opinion in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*'.

5 Case C-509/18, EU:C:2019:338; 'Opinion in *PF (Prosecutor General of Lithuania)*'.

6 Case C-489/19 PPU, *NJ (Public Prosecutor's Office in Vienna)*; EU:C:2019:849; 'Judgment in *NJ (Public Prosecutor's Office in Vienna)*'.

7 Code of Criminal Procedure ('CPP').

8 Judgment in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*, paragraph 90.

9 Opinions in *PF (Prosecutor General of Lithuania)* and *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*.

10 Case C-216/18 PPU, EU:C:2018:586; 'judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*'.

11 Case C-509/18, EU:C:2019:457; 'judgment in *PF (Prosecutor General of Lithuania)*'.

12 Judgment in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*, paragraph 73. Italics added.

13 *Ibidem*, paragraph 74.

14 *Ibidem*, paragraph 76.

15 *Loc. ult. cit.*

16 Judgment in *NJ (Public Prosecutor's Office in Vienna)*, paragraph 40, *in fine*.

17 Judgment in *PF (Prosecutor General of Lithuania)*, paragraphs 55 and 56.

18 The fact that public prosecutors are subordinate to their hierarchical superiors is mentioned in the judgment in *NJ (Public Prosecutor's Office in Vienna)*, paragraph 40: 'in the case of the Austrian Public Prosecutor's Offices, [it is apparent] that they are directly subordinate to the higher public prosecutor's offices and subject to their instructions and that the latter are in turn subordinate to the Federal Minister of Justice'.

19 Article 5 of the Basic Law on the status of the judiciary (Ordinance No 58-1270 of 22 December 1958).

20 Opinion in *OG and PI* (*Public Prosecutor's Offices in Lübeck and Zwickau)*, point 87, which reproduces paragraph 63 of the judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*, paragraph 87. Italics added.

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

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

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

24 Case C-503/15, EU:C:2017:126.

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

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

27 Article 31 of the CPP, following its reform of 25 July 2013.

28 Paragraph 2.10, fourth subparagraph, of the order for reference.

29 Italics added.

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

31 *Loc. ult. cit.*

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

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

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

35 Written observations of the Luxembourg Principal Public Prosecutor, p. 5.

36 Paragraphs 30 to 32 of the Commission's written observations.

37 Written observations of the Luxembourg Principal Public Prosecutor, p. 5 *in fine*.

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

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

40 Commission's written observations, paragraph 33.

41 At the hearing, the French, Netherlands and Swedish Governments argued that, if their laws had to be revised as a consequence of the ruling given by the Court of Justice, the temporal effects of that ruling should be limited. I opposed a similar

request in my Opinion in *Poltorak* (C-452/16 PPU, EU:C:2016:782), to which I refer (points 69 and 70).

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

JUDGMENT OF THE COURT (Grand Chamber)

27 May 2019 (*)

(Reference for a preliminary ruling — Urgent preliminary ruling procedure — Police and judicial cooperation in criminal matters — European arrest warrant — Framework Decision 2002/584/JHA — Article 6(1) — Concept of 'issuing judicial authority' — European arrest warrant issued by a public prosecutor's office of a Member State — Legal position — Whether subordinate to a body of the executive — Power of a Ministry of Justice to issue an instruction in a specific case — No guarantee of independence)

In Joined Cases C-508/18 and C-82/19 PPU,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Supreme Court (Ireland), made by decision of 31 July 2018, received at the Court on 6 August 2018, and from the High Court (Ireland), made by decision of 4 February 2019, received at the Court on 5 February 2019, in proceedings relating to the execution of European arrest warrants issued in respect of

OG (C-508/18),

PI (C-82/19 PPU),

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Arabadjiev, A. Prechal, M. Vilaras, T. von Danwitz, C. Toader, F. Biltgen, K. Jürimäe (Rapporteur) and C. Lycourgos, Presidents of Chambers, L. Bay Larsen, M. Safjan, D. Šváby, S. Rodin and I. Jarukaitis, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: L. Hewlett, Principal Administrator,

having regard to the High Court's request of 4 February 2019, received at the Court on 5 February 2019, that the reference for a preliminary ruling in Case C-82/19 PPU be dealt with under the urgent procedure, pursuant to Article 107 of the Rules of Procedure of the Court,

having regard to the decision of 14 February 2019 of the Fourth Chamber to grant that request,

having regard to the written procedure and further to the hearing on 26 March 2019,

after considering the observations submitted on behalf of:

– OG, by E. Lawlor, Barrister-at-Law, and R. Lacey, Senior Counsel, instructed by M. Moran, Solicitor,

– PI, by D. Redmond, Barrister, and R. Munro, Senior Counsel, instructed by E. King, Solicitor,

– the Minister for Justice and Equality, by J. Quaney, M. Browne, G. Hodge and A. Joyce, acting as Agents, and by B.M. Ward, A. Hanrahan, J. Benson, Barristers-at-Law, and P. Caroll, Senior Counsel,

– the Danish Government, by P.Z.L. Ngo and J. Nymann-Lindegren, acting as Agents,

– the German Government, initially by T. Henze, J. Möller, M. Hellmann and A. Berg, acting as Agents, and subsequently by M. Hellmann, J. Möller and A. Berg, acting as Agents,

– the French Government, by D. Colas, D. Dubois and E. de Moustier, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and by S. Faraci, avvocato dello Stato,

– the Lithuanian Government, by V. Vasiliauskienė, J. Prasauskienė, G. Taluntytė and R. Krasuckaitė, acting as Agents,

– the Hungarian Government, by M.Z. Fehér and Z. Wagner, acting as Agents,

– the Netherlands Government, by M.K. Bulterman and J. Langer, acting as Agents,

– the Austrian Government, by G. Hesse, K. Ibili and J. Schmoll, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by R. Troosters, J. Tomkin and S. Grünheid, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 April 2019,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 6(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24) (‘Framework Decision 2002/584’).

2 The requests have been made in proceedings in Ireland concerning the execution of two European arrest warrants issued respectively in Case C-508/18 on 13 May 2016 by the Staatsanwaltschaft bei dem Landgericht Lübeck (Office of the Public Prosecutor at the Regional Court, Lübeck, Germany) (‘the Public Prosecutor’s Office in Lübeck’) for the purposes of the prosecution of OG and in Case C-82/19 PPU on 15 March 2018 by the Staatsanwaltschaft Zwickau (Office of the Public Prosecutor, Zwickau, Germany) (‘the Public Prosecutor’s Office in Zwickau’) for the purposes of the prosecution of PI.

Legal context

European Union law

3 Recitals 5, 6, 8 and 10 of Framework Decision 2002/584 read as follows:

‘(5) The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.

(6) The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the “cornerstone” of judicial cooperation.

…

(8) Decisions on the execution of the European arrest warrant must be subject to sufficient controls, which means that a judicial authority of the Member State where the requested person has been arrested will have to take the decision on his or her surrender.

...

(10) The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) [EU], determined by the Council pursuant to Article 7(1) [EU] with the consequences set out in Article 7(2) [EU].’

4 Article 1 of Framework Decision 2002/584, under the heading ‘Definition of the European arrest warrant and obligation to execute it’, provides:

‘1. The European arrest warrant 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.

2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.

3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [EU].’

5 Articles 3, 4 and 4a of Framework Decision 2002/584 list the grounds for mandatory and optional non-execution of the European arrest warrant. Article 5 of the framework decision sets out guarantees to be given by the issuing Member State in particular cases.

6 Under Article 6 of Framework Decision 2002/584, under the heading ‘Determination of the competent judicial authorities’:

‘1. The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a

European arrest warrant by virtue of the law of that State.

2. The executing judicial authority shall be the judicial authority of the executing Member State which is competent to execute the European arrest warrant by virtue of the law of that State.

3. Each Member State shall inform the General Secretariat of the Council of the competent judicial authority under its law.'

Irish law

7 The European Arrest Warrant Act 2003, in the version applicable to the cases in the main proceedings ('the EAW Act'), transposes Framework Decision 2002/584 into Irish law. The first paragraph of section 2(1) of the EAW Act provides:

'"judicial authority" means the judge, magistrate or other person authorised under the law of the Member State concerned to perform functions the same as or similar to those performed under section 33 by a court in the State.'

8 Section 20 of the EAW Act provides:

'(1) In proceedings to which this Act applies the High Court [(Ireland)] may, if of the opinion that the documentation or information provided to it is not sufficient to enable it to perform its functions under this Act, require the issuing judicial authority or the issuing state, as may be appropriate, to provide it with such additional documentation or information as it may specify, within such period as it may specify.

(2) The Central Authority in the State may, if of the opinion that the documentation or information provided to it under this Act is not sufficient to enable it or the High Court to perform functions under this Act, require the issuing judicial authority or the issuing state, as may be appropriate, to provide it with such additional documentation or information as it may specify, within such period as it may specify. …'

German law

9 Under Paragraph 146 of the Gerichtsverfassungsgesetz (Law on the Judicial System; 'the GVG'):

'The officials of the public prosecutor's office must comply with service-related instructions of their superiors.'

10 Paragraph 147 of the GVG provides:

'The power of supervision and direction shall lie with:

1. the Bundesminister der Justiz und für Verbraucherschutz [(Federal Minister for Justice and Consumer Protection)] in respect of the Federal Prosecutor General and the federal prosecutors;

2. the Landesjustizverwaltung [(*Land* authority for the administration of justice)] in respect of all the officials of the public prosecutor's office of the *Land* concerned;

3. the highest-ranking official of the public prosecutor's office at the Higher Regional Courts and the Regional Courts in respect of all the officials of the public prosecutor's office of the given court's area of jurisdiction.'

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C-508/18

11 OG is a Lithuanian national residing in Ireland. On 13 May 2016 his surrender was sought pursuant to a European arrest warrant issued by the Public Prosecutor's Office in Lübeck for the prosecution of a criminal offence which OG allegedly committed in 1995 which that public prosecutor's office identifies as 'murder, grievous bodily injury'.

12 OG brought an action before the High Court challenging the validity of that European arrest warrant, on the ground, inter alia, that the Public Prosecutor's Office in Lübeck is not a 'judicial authority' within the meaning of Article 6(1) of Framework Decision 2002/584.

13 In support of that contention, OG relied on a legal opinion of a German lawyer which stated, inter alia, that under German law the public prosecutor's office does not enjoy the autonomous or independent status of a court of law, but is subject to an administrative hierarchy headed by the Minister for Justice, so that there is a risk of political involvement in surrender proceedings. Furthermore, the public prosecutor's office is not a judicial authority with competence to order detention or arrest of any person except in exceptional circumstances. Only a judge or court has those powers. It is the public prosecutor's office which is responsible for executing a national arrest warrant issued by a judge or court, where appropriate, by issuing a European arrest warrant. Accordingly, no 'judicial authority', within the meaning of Article 6(1) of Framework Decision 2002/584, was involved in the issuing of the European arrest warrant in respect of OG.

14 In those circumstances, the High Court sought further information from the Public Prosecutor's Office in Lübeck, via the Central Authority for Ireland, in relation to the evidence presented by OG as to whether that public prosecutor's office is a 'judicial authority', having regard, in particular, to the judgments of 10 November 2016, *Poltorak* (C-452/16 PPU,

EU:C:2016:858), and of 10 November 2016, *Özçelik* (C-453/16 PPU, EU:C:2016:860).

15 On 8 December 2016 the Public Prosecutor's Office in Lübeck replied to that request and stated that under German law the public prosecutor's office is a body within the criminal justice system (as are the national courts) which is responsible for the prosecution of criminal offences, and also participation in criminal proceedings. Its role is, inter alia, to ensure the legality, objectivity and proper conduct of investigations. The public prosecutor's office prepares the ground for the exercise of judicial power and enforces judicial decisions. It has the right to initiate investigations, which the courts do not.

16 As regards its relationship to the Schleswig-Holsteinischer Minister für Justiz (Minister for Justice of the *Land* of Schleswig-Holstein, Germany), the Public Prosecutor's Office in Lübeck stated that that minister has no power to issue instructions to it. It added that under national law only the Staatsanwaltschaft beim Schleswig-Holsteinischen Oberlandesgericht (Public Prosecutor General's Office at the Higher Regional Court of the *Land* of Schleswig-Holstein, Germany) ('the Public Prosecutor General's Office'), at the head of the public prosecutor's office of that *Land*, can issue instructions to the Leitender Oberstaatsanwalt der Staatsanwaltschaft Lübeck (Senior Public Prosecutor of the Public Prosecutor's Office in Lübeck, Germany). In addition, the power to issue instructions is circumscribed by the Basic Law of the Federal Republic of Germany and by the principle of legality, which governs criminal proceedings, that principle being itself derived from the principle of the rule of law. Although that minister could, where relevant, exercise an 'external' power to issue instructions in respect of the Public Prosecutor General's Office, he would be bound to comply with those principles. In addition, in the *Land* of Schleswig-Holstein, the minister is required to inform the President of the Landtag (State Parliament) whenever instructions have been issued to the Public Prosecutor General's Office. In the present case, as regards OG, no instructions were issued by that minister to the Public Prosecutor General's Office or by the Public Prosecutor General's Office to the Public Prosecutor's Office in Lübeck.

17 On 20 March 2017 the High Court rejected OG's submission that the Public Prosecutor's Office in Lübeck is not a 'judicial authority' within the meaning of Article 6(1) of Framework Decision 2002/584. In an appeal brought before the Court of Appeal (Ireland), the judgment of the High Court was upheld.

18 The referring court, the Supreme Court (Ireland), granted leave to appeal against the judgment of the Court of Appeal.

19 On the evidence before it, the referring court is uncertain whether the Public Prosecutor's Office in Lübeck meets the test of independence or the test of administering criminal justice in the sense required by the Court's case-law resulting from the judgments of 29 June 2016, *Kossowski* (C-486/14, EU:C:2016:483), of 10 November 2016, *Poltorak* (C-452/16 PPU, EU:C:2016:858), of 10 November 2016, *Özçelik* (C-453/16 PPU, EU:C:2016:860), and of 10 November 2016, *Kovalkovas* (C-477/16 PPU, EU:C:2016:861), in order to be capable of being considered a 'judicial authority' within the meaning of Article 6(1) of Framework Decision 2002/584.

20 According to that court, as regards the institutional status of the public prosecutor's office in Germany, the Public Prosecutor's Office in Lübeck appears to be subordinate to the authority and to the instructions of the executive. The referring court is therefore uncertain whether the principles identified in the abovementioned case-law can be met by such a public prosecutor's office and whether the independence of the latter, in the case before the referring court, can be established solely on the ground that no direction or instruction was given by the executive in relation to the European arrest warrant issued in respect of OG.

21 In addition, the referring court states that, although the public prosecutor's office in Germany has an essential role in relation to the administration of justice, its responsibilities are distinct from those of the courts or the judges. Thus, even if the independence test is met, it is unclear whether that public prosecutor's office meets the test of administering justice or participating in the administration of justice in order that it may be classified as a 'judicial authority' within the meaning of Article 6(1) of Framework Decision 2002/584.

22 In those circumstances the Supreme Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the independence from the executive of a public prosecutor to be decided in accordance with his position under the relevant national legal system? If not, what are the criteria according to which independence from the executive is to be decided?

(2) Is a public prosecutor who, in accordance with national law, is subject to a possible direction or instruction either directly or indirectly from a Ministry of Justice, sufficiently independent of the executive to be considered a "judicial authority", within the meaning of Article 6(1) of Framework Decision 2002/584?

(3) If so, must the public prosecutor also be functionally independent of the executive and what are the criteria according to which functional independence is to be decided?

(4) If independent of the executive, is a public prosecutor who is confined to initiating and conducting investigations and assuring that such investigations are conducted objectively and lawfully, the issuing of indictments, executing judicial decisions and conducting the prosecution of criminal offences, and does not issue national warrants and may not perform judicial functions a "judicial authority", for the purposes of Article 6(1) of Framework Decision 2002/584?

(5) Is the [Public Prosecutor's Office in Lübeck] a "judicial authority" within the meaning of Article 6(1) of Framework Decision 2002/584?'

Case C-82/19 PPU

23 On 15 March 2018, PI, a Romanian national, was the subject of a European arrest warrant issued by the Public Prosecutor's Office in Zwickau (Germany) for the prosecution of a criminal offence identified as 'organised or armed robbery'. That arrest warrant was endorsed for execution by the referring court, the High Court, on 12 September 2018. PI was arrested on 15 October 2018 pursuant to that arrest warrant and has remained in custody since that date.

24 The referring court states that it is confronted with the same difficulties raised by the Supreme Court in Case C-508/18.

25 PI objected to his surrender in execution of the European arrest warrant issued in respect of him on the ground, inter alia, that the Public Prosecutor's Office in Zwickau is not a 'judicial authority', within the meaning of Article 6(1) of Framework Decision 2002/584, which is competent to issue such a European arrest warrant.

26 In support of that contention, PI relied on the same legal opinion referred to in paragraph 13 of the present judgment concerning the Public Prosecutor's Office in Lübeck and on a legal opinion of the same lawyer as regards the Public Prosecutor's Office in Zwickau.

27 In those circumstances, the referring court sought further information from the Public Prosecutor's Office in Zwickau, via the Central Authority for Ireland, in relation to the evidence presented by PI as regards the status of that public prosecutor's office.

28 In a response of 24 January 2019, the Public Prosecutor's Office in Zwickau sent the referring court the national arrest warrant issued by the Amtsgericht Zwickau (Local Court, Zwickau, Germany) on which the European arrest warrant in respect of PI is based, and made clear that the national arrest warrant was issued by an independent judge. In addition, the Public Prosecutor's Office in Zwickau stated that it was, in accordance with Article 6(1) of Framework Decision 2002/584, the competent authority for issuing a European arrest warrant.

29 A further request was sent to the Office of the Public Prosecutor's Office in Zwickau asking whether it was adopting the same stance as that of the Public Prosecutor's Office in Lübeck in Case C-508/18. The Public Prosecutor's Office in Zwickau replied on 31 January 2019 as follows:

'I refer to your message of 28 January 2019 and the enclosed documents of the [Public Prosecutor's Office in Lübeck (Germany)]. With regard to the position of the [public prosecutor's office] within the legal system of the Federal Republic of Germany, I share the opinion of the [Public Prosecutor's Office in Lübeck]. I would like to add that the investigations by the [Public Prosecutor's Office in Zwickau] [concerning the prosecuted] person are carried out independently and without any political interference. Neither the [Generalstaatsanwaltschaft Dresden (Public Prosecutor General in Dresden, Germany)] nor the [Justizminister des Freistaats Sachsen (Minister for Justice of the Free State of Saxony, Germany)] have issued any instructions at any time.'

30 In that context, the High Court seeks to ascertain, as does the Supreme Court in Case C-508/18, what criteria a national court must apply in order to determine whether or not a public prosecutor's office is a 'judicial authority' within the meaning of Article 6(1) of Framework Decision 2002/584.

31 In those circumstances, the High Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the independence from the executive of a public prosecutor to be decided in accordance with his position under the relevant national legal system? If not, what are the criteria according to which independence from the executive is to be decided?

(2) Is a public prosecutor who, in accordance with national law, is subject to a possible direction or instruction either directly or indirectly from a Ministry of Justice, sufficiently independent of the executive to be considered a "judicial authority" within the meaning of Article 6(1) of Framework Decision 2002/584?

(3) If so, must the public prosecutor also be functionally independent of the executive and what are the criteria according to which functional independence is to be decided?

(4) If independent of the executive, is a public prosecutor who is confined to initiating and conducting investigations and assuring that such investigations are conducted objectively and lawfully, the issuing of indictments, executing judicial decisions and conducting the prosecution of criminal offences, and does not issue national warrants and may not perform judicial functions a "judicial authority" for the purposes of Article 6(1) of Framework Decision 2002/584?

(5) Is the [Public Prosecutor's Office in Zwickau] a "judicial authority" within the meaning of Article 6(1) of Framework Decision 2002/584?'

Procedure before the Court

Case C-508/18

32 The referring court requested that Case C-508/18 be dealt with pursuant to the expedited procedure under Article 105(1) of the

Rules of Procedure of the Court.

33 That request was dismissed by order of the President of the Court of 20 September 2018, *Minister for Justice and Equality* (C-508/18 and C-509/18, not published, EU:C:2018:766).

34 By decision of the President of the Court, Case C-508/18 was given priority over others.

Case C-82/19 PPU

35 The referring court requested that Case C-82/19 PPU be dealt with pursuant to the urgent preliminary ruling procedure under Article 107 of the Rules of Procedure.

36 In support of that request, it relied on, inter alia, the fact that PI is at present in custody, pending his being actually surrendered to the German authorities.

37 It should be noted, in the first place, that the reference for a preliminary ruling in this case concerns the interpretation of Framework Decision 2002/584, which falls within the scope of the fields referred to in Title V of Part Three of the FEU Treaty on the area of freedom, security and justice. It may therefore be dealt with under the urgent preliminary ruling procedure.

38 In the second place, according to the case-law of the Court, it is appropriate to take into account the fact that the person concerned in the main proceedings is currently deprived of his liberty and that the question of whether he remains in custody depends on the outcome of the dispute in the main proceedings (see, to that effect, judgment of 10 November 2016, *Poltorak*, C-452/16 PPU, EU:C:2016:858, paragraph 21 and the case-law cited). According to the explanations provided by the referring court, the detention measure to which PI is subject was ordered in the context of the execution of the European arrest warrant issued in respect of him.

39 In those circumstances, on 14 February 2019 the Fourth Chamber of the Court, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decided to accede to the referring court's request that Case C-82/19 PPU be dealt with under the urgent preliminary ruling procedure.

40 It was also decided to remit Case C-82/19 PPU to the Court in order for it to be assigned to the Grand Chamber.

41 Given the connection between Cases C-508/18 and C-82/19 PPU, it is appropriate that they be joined for the purposes of the judgment.

Consideration of the questions referred

42 By their respective questions, which it is appropriate to consider together, the referring courts ask, in essence, whether the concept of an 'issuing judicial authority', within the meaning of Article 6(1) of Framework Decision 2002/584, must be interpreted as including the public prosecutors' offices of a Member State which are responsible for the prosecution of criminal offences and are subordinate to a body of the executive of that Member State, such as a Minister for Justice, and may be subject, directly or indirectly, to directions or instructions in a specific case from that body in connection with the adoption of a decision to issue a European arrest warrant.

43 As a preliminary matter, it should be noted that both the principle of mutual trust between the Member States and the principle of mutual recognition, which is itself based on the mutual trust between the latter, are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly as regards the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 36 and the case-law cited).

44 In particular, as far as concerns Framework Decision 2002/584, it is clear from recital 6 thereof that the European arrest warrant established by that framework decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition.

45 That principle has been applied in Article 1(2) of Framework Decision 2002/584, which lays down the rule that Member States are required to execute any European arrest warrant on the basis of that principle and in accordance with the provisions of that framework decision. Executing judicial authorities may therefore, in principle, refuse to execute such a European arrest warrant only on the grounds for non-execution exhaustively listed in Articles 3, 4 and 4a of the framework decision. Similarly, execution of the arrest warrant may be made subject only to one of the conditions exhaustively laid down in Article 5. Accordingly, while execution of the European arrest warrant constitutes the rule, refusal to execute is intended to be an exception which must be interpreted strictly (see, to that effect, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 41 and the case-law cited).

46 However, the principle of mutual recognition proceeds from the assumption that only European arrest warrants, within the meaning of Article 1(1) of Framework Decision 2002/584, must be executed in accordance with the provisions of that decision. It follows from that article that such an arrest warrant is a 'judicial decision', which requires that it be issued by a

'judicial authority' within the meaning of Article 6(1) of that framework decision (see, to that effect, judgments of 10 November 2016, *Poltorak*, C-452/16 PPU, EU:C:2016:858, paragraph 28, and of 10 November 2016, *Kovalkovas*, C-477/16 PPU, EU:C:2016:861, paragraph 29).

47 Under Article 6(1) of Framework Decision 2002/584, the issuing judicial authority is to be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State.

48 Although, in accordance with the principle of procedural autonomy, the Member States may designate, in their national law, the 'judicial authority' with the competence to issue a European arrest warrant, the meaning and scope of that term cannot be left to the assessment of each Member State (see, to that effect, judgments of 10 November 2016, *Poltorak*, C-452/16 PPU, EU:C:2016:858, paragraphs 30 and 31, and of 10 November 2016, *Kovalkovas*, C-477/16 PPU, EU:C:2016:861, paragraphs 31 and 32).

49 That term requires, throughout the European Union, an autonomous and uniform interpretation, which, in accordance with the settled case-law of the Court, must take into account the wording of Article 6(1) of Framework Decision 2002/584, its legislative scheme and the objective of that framework decision (see, to that effect, judgments of 10 November 2016, *Poltorak*, C-452/16 PPU, EU:C:2016:858, paragraph 32, and of 10 November 2016, *Kovalkovas*, C-477/16 PPU, EU:C:2016:861, paragraph 33).

50 In the first place, in that regard, it should be noted that the Court has previously held that the words 'judicial authority', contained in that provision, are not limited to designating only the judges or courts of a Member State, but must be construed as designating, more broadly, the authorities participating in the administration of criminal justice in that Member State, as distinct from, inter alia, ministries or police services which are part of the executive (see, to that effect, judgments of 10 November 2016, *Poltorak*, C-452/16 PPU, EU:C:2016:858, paragraphs 33 and 35, and of 10 November 2016, *Kovalkovas*, C-477/16 PPU, EU:C:2016:861, paragraphs 34 and 36).

51 It follows that the concept of a 'judicial authority', within the meaning of Article 6(1) of Framework Decision 2002/584, is capable of including authorities of a Member State which, although not necessarily judges or courts, participate in the administration of criminal justice in that Member State.

52 That interpretation is borne out, first, by the legislative scheme of Article 6(1) of Framework Decision 2002/584. In that regard, it must be stated that that framework decision is a measure governing judicial cooperation in criminal matters, which concerns mutual recognition not only of final judgments delivered by the criminal courts, but more broadly of decisions adopted by the judicial authorities of the Member States in criminal proceedings, including the phase of those proceedings relating to criminal prosecution.

53 Judicial cooperation in criminal matters, as provided for in Article 31 EU, which is the legal basis for Framework Decision 2002/584, referred, inter alia, to cooperation between judicial authorities of the Member States both in relation to proceedings and the enforcement of decisions.

54 The word 'proceedings', which should be understood in a broad sense, is capable of encompassing the entirety of criminal proceedings, namely the pre-trial phase, the trial itself and the enforcement of a final judgment delivered by a criminal court in respect of a person found guilty of a criminal offence.

55 That interpretation is supported by the wording of Article 82(1)(d) TFEU, which replaced Article 31 EU, and which now states that judicial cooperation in criminal matters in the Union covers cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

56 Second, the above interpretation is also supported by the objective of Framework Decision 2002/584, which, as is clear from recital 5 thereof, is to establish a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.

57 Framework Decision 2002/584 seeks, by the establishment of a simplified and effective system for the surrender of persons convicted or accused of having infringed criminal law, to facilitate and accelerate judicial cooperation with a view to contributing to the objective set for the European Union to become an area of freedom, security and justice, founded on the high level of trust which should exist between the Member States in accordance with the principle of mutual recognition (judgment of 22 December 2017, *Ardic*, C-571/17 PPU, EU:C:2017:1026, paragraph 69 and the case-law cited).

58 The issuing of a European arrest warrant may thus have two distinct aims, as laid down in Article 1(1) of Framework Decision 2002/584. It may be issued either for the purposes of conducting a criminal prosecution in the issuing Member State or for the purposes of executing a custodial sentence or detention order in that Member State (see, to that effect, judgment of 21 October 2010, *B.*, C-306/09, EU:C:2010:626, paragraph 49).

59 Therefore, in so far as the European arrest warrant facilitates free movement of judicial decisions, prior to judgment, in relation to conducting a criminal prosecution, it must be held that those authorities which, under national law, are competent to adopt such decisions are capable of falling within the scope of the framework decision.

60 It follows from the considerations set out in paragraphs 50 to 59 of the present judgment that an authority, such as a public prosecutor's office, which is competent, in criminal proceedings, to prosecute a person suspected of having committed a

criminal offence so that that person may be brought before a court, must be regarded as participating in the administration of justice of the relevant Member State.

61 In the present case, it is clear from the information in the case file before the Court that, in Germany, public prosecutors' offices have an essential role in the conduct of criminal proceedings.

62 In that regard, in its observations to the Court, the German Government stated that, in accordance with the provisions of German law governing criminal proceedings, the public prosecutors' offices have the power to issue an indictment, such that only they are competent to initiate criminal prosecutions. In addition, by virtue of the principle of legality, the public prosecutor's office is, in principle, required to open an investigation in respect of any person suspected of having committed a criminal offence. Thus, it follows from that information that, in general, the part played by the public prosecutor's office is to prepare the ground, in relation to criminal proceedings, for the exercise of judicial power by the criminal courts of that Member State.

63 In those circumstances, such public prosecutors' offices are capable of being regarded as participating in the administration of criminal justice in the Member State in question.

64 In the second place, in the light of the requirement that courts must be independent, the referring courts harbour doubts as to whether the public prosecutors' offices at issue in the main proceedings satisfy that requirement, in so far as they belong to a hierarchical structure subject to the Minister for Justice of the *Land* in question and in which that minister may exercise a power of supervision and direction, or even instruction, in relation to bodies, such as those public prosecutors' offices, which are subordinate to him.

65 In that regard, it must be borne in mind that Framework Decision 2002/584 aims to introduce a simplified system of surrender directly between judicial authorities designed to replace a traditional system of cooperation between sovereign States — which involves the intervention and assessment of the executive — in order to ensure the free circulation of court decisions in criminal matters, within an area of freedom, security and justice (see, to that effect, judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, EU:C:2016:861, paragraph 41).

66 In that context, where a European arrest warrant is issued with a view to the arrest and surrender by another Member State of a requested person for the purposes of conducting a criminal prosecution, that person must have already had the benefit, at the first stage of the proceedings, of procedural safeguards and fundamental rights, the protection of which it is the task of the judicial authorities of the issuing Member State to ensure, in accordance with the applicable provisions of national law, for the purpose, inter alia, of adopting a national arrest warrant (judgment of 1 June 2016, *Bob-Dogi*, C-241/15, EU:C:2016:385, paragraph 55).

67 The European arrest warrant system therefore entails a dual level of protection of procedural rights and fundamental rights which must be enjoyed by the requested person, since, in addition to the judicial protection provided at the first level, at which a national decision, such as a national arrest warrant, is adopted, there is the protection that must be afforded at the second level, at which a European arrest warrant is issued, which may occur, depending on the circumstances, shortly after the adoption of the national judicial decision (judgment of 1 June 2016, *Bob-Dogi*, C-241/15, EU:C:2016:385, paragraph 56).

68 As regards a measure, such as the issuing of a European arrest warrant, which is capable of impinging on the right to liberty of the person concerned, enshrined in Article 6 of the Charter of Fundamental Rights of the European Union, that protection means that a decision meeting the requirements inherent in effective judicial protection should be adopted, at least, at one of the two levels of that protection.

69 It follows that, where the law of the issuing Member State confers the competence to issue a European arrest warrant on an authority which, whilst participating in the administration of justice in that Member State, is not a judge or a court, the national judicial decision, such as a national arrest warrant, on which the European arrest warrant is based, must, itself, meet those requirements.

70 Where those requirements are met, the executing judicial authority may therefore be satisfied that the decision to issue a European arrest warrant for the purpose of criminal prosecution is based on a national procedure that is subject to review by a court and that the person in respect of whom that national arrest warrant was issued has had the benefit of all safeguards appropriate to the adoption of that type of decision, inter alia those derived from the fundamental rights and fundamental legal principles referred to in Article 1(3) of Framework Decision 2002/584.

71 The second level of protection of the rights of the person concerned, referred to in paragraph 67 of the present judgment, means that the judicial authority competent to issue a European arrest warrant by virtue of domestic law must review, in particular, observance of the conditions necessary for the issuing of the European arrest warrant and examine whether, in the light of the particular circumstances of each case, it is proportionate to issue that warrant (see, to that effect, judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, EU:C:2016:861, paragraph 47).

72 It is for the 'issuing judicial authority', referred to in Article 6(1) of Framework Decision 2002/584, namely the entity which, ultimately, takes the decision to issue the European arrest warrant, to ensure that second level of protection, even where the European arrest warrant is based on a national decision delivered by a judge or a court.

73 Thus, the 'issuing judicial authority', within the meaning of Article 6(1) of Framework Decision 2002/584, 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 European arrest warrant lies with that authority and not, ultimately, with the executive (see, to that effect, judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, EU:C:2016:861, paragraph 42).

74 Accordingly, the issuing judicial authority must be in a position to give assurances to the executing judicial authority that, as regards the guarantees provided by the legal order of the issuing Member State, it acts independently in the execution of those of its responsibilities which are inherent in the issuing of a European arrest warrant. That independence requires that there are statutory rules and an institutional framework capable of guaranteeing that the issuing judicial authority is not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, inter alia, to an instruction in a specific case from the executive.

75 In addition, where the law of the issuing Member State confers the competence to issue a European arrest warrant 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 arrest warrant and, inter alia, the proportionality of such a decision must be capable of being the subject, in the Member State, of court proceedings which meet in full the requirements inherent in effective judicial protection.

76 In the present case, it is, on the one hand, clear from the information set out in the orders for reference, which were confirmed by the German Government at the hearing before the Court, that German public prosecutors' offices are required to act objectively and must investigate not only incriminating but also exculpatory evidence. Nevertheless, the fact remains that, according to that same information, in accordance with Paragraphs 146 and 147 of the GVG, the Minister for Justice has an 'external' power to issue instructions in respect of those public prosecutors' offices.

77 As that government confirmed at the hearing before the Court, that power to issue instructions enables that minister to have a direct influence on a decision of a public prosecutor's office to issue or, in some cases, not to issue a European arrest warrant. That government made clear that that power to issue instructions could be exercised, in particular, at the stage when the proportionality of issuing a European arrest warrant is examined.

78 Admittedly, it should be noted that, as is argued by the German Government, German law provides safeguards which are capable of circumscribing the power to issue instructions enjoyed by the Minister for Justice in respect of the public prosecutor's office, so that the situations in which that power could be exercised are extremely rare.

79 Thus, first, that government stated that the effect of the principle of legality which applies to the actions of the public prosecutor's office is to ensure that any instructions in a specific case which it may receive from the Minister for Justice cannot in any event exceed the limits of the law, statutory or otherwise. It stated that the public prosecutors' offices of the *Länder* of Schleswig-Holstein and of Saxony are, in addition, staffed by officials who cannot be dismissed from their positions simply on account of failure to comply with an instruction. Second, the German Government stated that, in the *Land* of Schleswig-Holstein, instructions from the minister to the public prosecutor's office must be made in writing and notified to the President of the State Parliament. According to the German Government, in the *Land* of Saxony, the coalition agreement for the government of that *Land* provides that the minister for justice's power to issue instructions is not to be exercised in a certain number of specific cases for the duration of that agreement.

80 However, it is clear that such safeguards, assuming that their existence were to be established, cannot wholly rule out the possibility, in all circumstances, that a decision of a public prosecutor's office, such as those at issue in the cases in the main proceedings, to issue a European arrest warrant may, in a given case, be subject to an instruction from the minister for justice of the relevant *Land*.

81 First of all, although, in accordance with the principle of legality, an instruction from the minister which is manifestly unlawful should not, in principle, be followed by the relevant public prosecutor's office, it should be noted that, as is clear from paragraph 75 of the present judgment, that minister's power to issue instructions is laid down in the GVG, and the GVG does not specify the conditions governing the exercise of that power. The existence of that principle is not therefore, in itself, capable of preventing the minister for justice of a *Land* from influencing the discretion enjoyed by the public prosecutors' offices of that *Land* in deciding to issue a European arrest warrant, which the German Government did moreover confirm at the hearing before the Court.

82 Second, although in certain *Länder*, such as the *Land* of Schleswig-Holstein, instructions from the minister must be given in writing, the fact remains that, as stated in the previous paragraph, such instructions are nevertheless authorised by the GVG. In addition, it is clear from the submissions made at the hearing before the Court that, in the light of the fact that that law is couched in general terms, it cannot, in any event, be ruled out that such instructions may be given orally.

83 Last, as regards the *Land* of Saxony, although, at this particular point in time, the executive has decided not to exercise the power to issue instructions in certain specific cases, the fact remains that that safeguard does not appear to cover all cases. In any event, that safeguard has not been enacted in statutory form, so that it cannot be ruled out that the situation may be changed in the future by political decision.

84 As set out in paragraph 73 of the present judgment, the risk that the executive may influence a public prosecutor's office in such a way in a specific case means that it cannot be ensured that, in fulfilling its responsibilities for the purposes of the issuing of a European arrest warrant, that public prosecutor's office satisfies the guarantees referred to in paragraph 74 of the present judgment.

85 That finding cannot be called into question by the fact that, as argued by the German Government at the hearing before the Court, the decision of public prosecutors' offices, such as those at issue in the main proceedings, to issue a European arrest warrant may be the subject of an action brought by the person concerned before the relevant German court having jurisdiction.

86 As regards the information provided by that government, it does not appear that the existence of such an action is capable per se of protecting public prosecutors' offices from the risk that their decisions may be the subject of an instruction, in a specific case, from the minister for justice in connection with the issuing of a European arrest warrant.

87 Although the effect of that legal remedy is to ensure that the exercise of the responsibilities of a public prosecutor's office is subject to the possibility of review by a court a posteriori, any instruction in a specific case from the minister for justice to the public prosecutors' offices concerning the issuing of a European arrest warrant remains nevertheless, in any event, permitted by the German legislation.

88 It follows from the foregoing that, in so far as the public prosecutors' offices at issue in the main proceedings are exposed to the risk of being influenced by the executive in their decision to issue a European arrest warrant, those public prosecutors' offices do not appear to meet one of the requirements of being regarded as an 'issuing judicial authority', within the meaning of Article 6(1) of Framework Decision 2002/584, namely the requirement that it be guaranteed that they act independently in issuing such an arrest warrant.

89 In the present case, it is, in that regard, irrelevant, for the reasons stated in paragraph 73 of the present judgment, that, in connection with the issuing of the European arrest warrants at issue in the main proceedings, no instruction in a specific case was issued to the public prosecutor's office in Lübeck or in Zwickau from the ministers for justice of the *Länder* concerned.

90 In the light of all the foregoing, the answer to the questions referred is that the concept of an 'issuing judicial authority', within the meaning of Article 6(1) of Framework Decision 2002/584, must be interpreted as not including public prosecutors' offices of a Member State which are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a Minister for Justice, in connection with the adoption of a decision to issue a European arrest warrant.

Costs

91 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national courts, the decision on costs is a matter for those courts. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Cases C-508/18 and C-82/19 PPU are joined for the purposes of the judgment.**

2. **The concept of an 'issuing judicial authority', within the meaning of Article 6(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as not including public prosecutors' offices of a Member State which are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a Minister for Justice, in connection with the adoption of a decision to issue a European arrest warrant.**

[Signatures]

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* Language of the case: English.