Reports of Cases

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 9 December 2020[1]

Case C-414/20 PPU

Criminal proceedings against
MM
Interested party:
Spetsializirana prokuratura

(Request for a preliminary ruling
from the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria))

(Reference for a preliminary ruling – Urgent preliminary ruling procedure – Judicial cooperation in criminal matters – European arrest warrant – Framework Decision 2002/584/JHA – Article 6(1) and Article 8(1)(c) – Surrender procedures between Member States – European arrest warrant issued on the basis of a national measure putting a person under investigation – Concept of an 'arrest warrant or any other enforceable judicial decision having the same effect' – Charter of Fundamental Rights of the European Union – Article 47 – Effective judicial protection)

I. Introduction

1. This request for a preliminary ruling concerns the interpretation of Article 6(1) and Article 8(1)(c) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States,[2] as amended by Council Framework Decision 2009/299/JHA of 26 February 2009,[3] and of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2. The request has been made in the context of criminal proceedings in which the validity of the European arrest warrant issued for MM is being called into question in support of a request for a review of the provisional detention order to which he has been subject.

3. The questions submitted by the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria) relate, in essence, to the concept of a 'national arrest warrant' as the legal basis for a European arrest warrant and to both the detailed rules governing and the scope of the effective judicial protection that must be guaranteed, in the issuing Member State, for a person for whom a European arrest warrant has been issued once that person has been surrendered.

1 Original language: French.

2 OJ 2002 L 190, p. 1.

3 OJ 2009 L 81, p. 24, 'Framework Decision 2002/584'.

II. Legal context

A. Framework Decision 2002/584

4. Article 1(1) and (3) of Framework Decision 2002/584 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.

…

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 of the Treaty on European Union.'

5. Article 6(1) and (3) of Framework Decision 2002/584 provides:

'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.

…

3. Each Member State shall inform the General Secretariat of the Council of the competent judicial authority under its law.'

6. Article 8 of that framework decision, which is entitled 'Content and form of the European arrest warrant', provides, in point (c) of paragraph 1 thereof:

'The European arrest warrant shall contain the following information set out in accordance with the form contained in the Annex:

…

(c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2;'

7. The annex to the Framework Decision provides a specific form which the issuing judicial authorities are required to complete, furnishing the specific information requested.[4] Point (b)(1) of that form refers to the decision on which the arrest warrant is based, namely an 'arrest warrant or [a] judicial decision having the same effect'.

B. Bulgarian law

8. Framework Decision 2002/584 was transposed into Bulgarian law by the zakon za ekstraditsiata i evropeiskata zapoved za arest (Extradition and European Arrest Warrant Act, 'ZEEZA'),[5] Article 37 of which sets out the provisions on the issuing of an European arrest warrant in almost identical terms to those of Article 8 of that framework decision.

4 See, inter alia, judgment of 6 December 2018, *IK (Enforcement of an additional sentence)* (C-551/18 PPU, EU:C:2018:991, paragraph 49 and the case-law cited).

5 DV No 46 of 3 June 2005.

9. Pursuant to Article 56(1)(1) of the ZEEZA, the public prosecutor is competent, in the preliminary stage of the trial, to issue a European arrest warrant for the accused person. During that stage of the criminal proceedings, the Bulgarian legislation makes no provision for the possibility of a court participating in the issuing of the European arrest warrant, either before or after it is issued.[6] In particular, that legislation does not appear to afford the opportunity of bringing proceedings before a court against the decision taken by the public prosecutor to issue a European arrest warrant. Under Article 200 of the nakazatelno protsesualen kodeks (Code of Criminal Procedure, 'NPK'), read in conjunction with Article 66 of the ZEEZA, the European arrest warrant is open to appeal solely before the higher authority of the public prosecutor's office.

10. *Orders to appear*, the purpose of which is to bring a person suspected of having committed an offence before the police investigating bodies, are governed by Article 71 of the NPK. An appeal against such an order to appear cannot be brought before a court. It may be appealed only before the public prosecutor.

11. *The process of putting under investigation* a person suspected of having committed an offence is governed, inter alia, by Article 219 of the NPK.

12. Article 219(1) of the NPK states that, 'where there is sufficient evidence of the guilt of a specific person …, the investigating body submits a report to the public prosecutor and puts the person under investigation by drawing up an order for that purpose'. This is a measure adopted by the investigating body under the supervision of the public prosecutor. That order is designed to notify the person suspected of having committed an offence that he has been put under investigation and to give him the opportunity to defend himself (Article 219(4) to (8) and Article 221 of the NPK).[7] The order does not have the legal effect of placing the accused person in detention. To that end, other categories of order may be made: an order to appear before the court having jurisdiction pursuant to Article 64(2) of the NPK and an order that the person concerned be brought before the police investigating bodies pursuant to Article 71 of the NPK.

13. An appeal against the investigating body's order for a person to be put under investigation cannot be brought before a court. It may be appealed only before the public prosecutor. Article 200 of the NPK provides that 'the investigating body's order is open to appeal before the public prosecutor. The public prosecutor's decision, which is not subject to judicial review, is open to appeal before the public prosecutor's office of the higher court whose decision is final'.

14. *The placement in provisional detention* of a person who is the subject of a criminal prosecution is governed, during the stage prior to the criminal trial, by Article 64 of the NPK.

15. Under Article 64(1) of the NPK, 'the provisional detention order shall be adopted during the preliminary proceedings by the court of first instance having jurisdiction on application by the public prosecutor'.

16. In order to make such an application, the public prosecutor must assess whether the conditions required under Article 63(1) of the NPK[8] are met in order to request that that court impose on the accused person, after he has been put under investigation, the strictest measure, namely provisional detention during the preliminary proceedings.

6 However, during the trial stage, the court having jurisdiction is the 'issuing judicial authority', which alone has the power to issue a European arrest warrant. In addition, in the post-conviction stage, once a verdict has been given and an enforceable sentence pronounced, the public prosecutor is once again the 'issuing judicial authority' which has the power to issue a European arrest warrant.

7 The order putting a person under investigation must contain a summary of the main offences of which the person suspected of having committed a crime is accused and a legal characterisation of those offences.

8 Article 63(1) of the NPK provides that a provisional detention order is to be adopted where there are reasonable grounds for assuming that the accused person has committed a crime punishable by a custodial sentence or another more severe penalty and the evidence in the case file indicates that there is a genuine risk of the accused person absconding or committing an offence.

17. In accordance with Article 64(2) of the NPK, the public prosecutor may adopt a measure ordering the detention of the accused person for a maximum of 72 hours with a view to allowing that person to be brought before the court with jurisdiction to make a provisional detention order, if appropriate.

18. Article 64(3) of the NPK provides that 'the court shall immediately examine the case … with the participation of the accused person'.[9]

19. Under Article 64(4) of the NPK, the court is the competent authority to examine the application to place the accused person in provisional detention and to assess whether such detention should be ordered, or to choose to impose a less severe measure or refuse generally to impose a binding procedural measure on the accused person.

20. Article 270 of the NPK, which is entitled 'Decisions on coercive measures and other measures of pre-trial judicial supervision during the trial stage', provides:

'1. The question of the commutation of the coercive measure may be raised at any point in the trial procedure. In the event of a change of circumstances, a new application concerning the coercive measure may be made before the court having jurisdiction.

2. The court shall rule by way of order in open court

…

4. The order referred to in paragraphs 2 and 3 may be appealed …'.

III. The dispute in the main proceedings and the questions referred for a preliminary ruling

21. Criminal proceedings were initiated in Bulgaria against forty-one persons for having participated in a criminal drug trafficking organisation. Sixteen of them, including MM, absconded.

22. By an order of 8 August 2019, which amounted to an order to appear issued pursuant to Article 71 of the NPK,[10] the investigating body issued a wanted notice for MM so that he could be automatically brought before the police services. That order had the legal effect of placing MM in detention in the national territory.

23. The order to appear is issued by the public prosecutor or by a police authority responsible for the investigation, which remains under the supervision of the public prosecutor. The referring court explains that Bulgarian legislation does not require the prior or subsequent approval of the public prosecutor or a judge to issue or enforce the order in question. The decision to issue an order to appear may therefore be taken by the investigating police force on account of the wanted person's refusal to present himself to that police force.

24. The referring court states that, in the case in the main proceedings, the order to appear was issued by a police investigator (Glavna direktsiya 'Borba s organiziranata prestapnost' ('Organised Crime' Directorate-General)) at the Ministerstvo na vatreshnite raboti (Ministry of Internal Affairs, Bulgaria) and that that order was never actually enforced.

9 In this regard, the referring court explains that, at this stage of the criminal proceedings, a decision to place the accused person in provisional detention can be adopted only in the presence of that person.

10 In its reply to the request for clarifications made by the Court, the referring court states that this measure constitutes an arrest warrant under national law. It then proceeds to refer to it as an 'order to appear'.

25. In view of the characteristics of the order to appear as described, the referring court has doubts whether such a national measure can be defined as an 'arrest warrant' within the meaning of Article 8(1)(c) of Framework Decision 2002/584. The reasons for those doubts are that the order to appear is issued merely by a police investigator, without any involvement of a public prosecutor or a judge (before or after it is issued), and that it entails a period of detention that is limited to what is necessary in order to bring the wanted person before that police investigator.

26. In addition to the order of 8 August 2019, which constitutes an order to appear, the referring court states that, by order of 9 August 2019,[11] the investigating body, with the authorisation of the public prosecutor, put MM under investigation for having participated in a criminal drug trafficking organisation. Since MM had absconded, that order – which, according to the referring court, did not have the legal effect of placing MM in detention – was served only on his public defender. That court explains that the sole effect of that order to put MM under investigation, which must be regarded as having been adopted by the public prosecutor, is to notify a person of the charges against him and to afford him the possibility to defend himself by furnishing explanations or presenting offers of evidence.

27. On 16 January 2020, the public prosecutor issued a European arrest warrant for MM. Under the section relating to the 'decision on which the arrest warrant is based', in point 1, which is entitled 'arrest warrant or judicial decision having the same effect', reference is made only to the order putting a person under investigation of 9 August 2019 issued by the investigating body, on the basis of which MM was put under investigation. However, MM remained impossible to locate and, therefore, he could not be arrested.

28. On 25 March 2020, the case was brought before the referring court for an examination of its substance. On 16 April 2020, the public prosecutor submitted an application requesting the provisional detention of the persons who had absconded, including MM. At a public hearing on 24 April 2020, the referring court rejected that application on the ground that, under national law, it was not possible to order such detention in the absence of the accused person. That refusal by the referring court to rule on the application was not contested by the public prosecutor.

29. The referring court points out that MM's situation differs from that of several accused persons who had absconded. Other than the order to appear arising from the order of 8 August 2019, no other national arrest warrant was issued for MM. In this regard, the referring court clarifies that there was no order based on Article 64(2) of the NPK adopted against MM.[12]

30. On 5 July 2020, in execution of the European arrest warrant, MM was arrested in Spain. On 28 July 2020, MM was surrendered to the Bulgarian judicial authorities. On the same day, the public prosecutor applied for MM to be placed in provisional detention. On the basis of that application, on the same day the referring court adopted a decision requiring MM to attend the hearing.

31. On 29 July 2020, following the hearing at which MM appeared and was heard, the referring court ordered that he be placed in provisional detention.

11 'The order putting a person under investigation of 9 August 2019'.

12 It is likewise apparent from the clarifications provided by the referring court that the practice adopted with a view to locating and arresting the persons accused of having participated in a criminal drug trafficking organisation was not uniform. That court states that 18 European arrest warrants were issued. For some of them, the order putting the person concerned under investigation was stated as the national arrest warrant; for others, reference was made to the order pursuant to Article 64(2) of the NPK (placement in detention for a maximum of 72 hours), with the referring court clarifying in this regard that this is the standard basis in Bulgaria on which a European arrest warrant is used during the preliminary stage; in other cases still, the order pursuant to Article 71 of the NPK (order to appear) is stated; and in yet further cases, reference is made to a combination of two or three of those national measures.

32. It is clear from the order for reference that, when it adopted that measure, the referring court was of the view, having referred to case-law of the Court,[13] that the European arrest warrant at issue had been issued by an authority lacking due competence, namely by a public prosecutor only without the involvement of a court.

33. The referring court also took the view that that European arrest warrant had been issued without mention of the existence of a valid detention order, but rather solely by reference to the order putting a person under investigation of 9 August 2019, which does not have the result of MM being placed in detention.

34. In the light of those factors, the referring court came to the conclusion that the European arrest warrant at issue was unlawful.

35. However, that court has doubts whether, at this stage of the proceedings, it could find that European arrest warrant to be unlawful since, first, the procedure of issuing and executing that arrest warrant had already concluded definitively and, second, it would thus be reviewing indirectly the public prosecutor's decision. Such a review is prohibited under Bulgarian law.

36. The referring court also took the view that such a review would lead it to assess the lawfulness of the decision taken by the Spanish judicial authority to execute the European arrest warrant and to surrender MM to the Bulgarian authorities. Furthermore, the referring court expressed reservations whether and to what extent that defect affecting the European arrest warrant, if it were duly established, could impact on the possibility of placing MM in provisional detention.

37. Faced with those difficulties of assessing the scope of the unlawfulness of the European arrest warrant in the context of the subsequent procedure initiated with a view to placing MM in provisional detention, the referring court had, at that stage of the proceedings, already taken the view that a reference for a preliminary ruling was necessary. However, since there is no obligation to make such a reference on the part of the courts of first instance, the referring court, as the court of first instance, had left it to the court of second instance to take that step.

38. On 5 August 2020, MM appealed against the decision ordering that he be placed in provisional detention, arguing inter alia that the European arrest warrant was unlawful, relying on the case-law of the Court, and requested that the court of second instance refer the matter to the Court for a preliminary ruling.

39. On 14 August 2020, the court of second instance upheld MM's detention; it did not address the questions relating to the defects capable of vitiating the European arrest warrant and rejected the defence's application that the matter be referred to the Court for a preliminary ruling.

40. On 27 August 2020, MM submitted a fresh application to the referring court, pursuant to Article 270 of the NPK, seeking a review of the lawfulness of the provisional detention order adopted against him.[14]

13 The referring court cites, in this connection, the judgments of 27 May 2019, *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)* (C-508/18 and C-82/19 PPU, EU:C:2019:456); of 12 December 2019, *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyon and Tours)* (C-566/19 PPU and C-626/19 PPU, EU:C:2019:1077, 'the judgment in *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyon and Tours)*'; and of 12 December 2019, *Openbaar Ministerie (Swedish Public Prosecutor's Office)* (C-625/19 PPU, EU:C:2019:1078, 'the judgment in *Openbaar Ministerie (Swedish Public Prosecutor's Office)*').

14 By letter dated 1 December 2020, the referring court informed the Court that the arrangements for MM's provisional detention were altered due to his illness. MM is since then subject to house arrest, which prohibits him from leaving his residence and involves the use of electronic surveillance.

41. At the public hearing held on 3 September 2020, MM relied inter alia on the unlawfulness of the European arrest warrant, arguing that its unlawful nature had not been taken into consideration by the Spanish judicial authority which executed it, because MM had agreed to his surrender to the Bulgarian authorities. MM claimed the right to rely on the unlawfulness of the European arrest warrant before the referring court and submitted that such unlawfulness vitiated his placement in provisional detention. MM therefore requested that that detention be lifted. On the other hand, the public prosecutor argued that the European arrest warrant was perfectly lawful under Bulgarian law.

42. Although the referring court considers that the European arrest warrant is indeed lawful under Bulgarian law, it is, however, of the view that there are serious grounds for regarding it as unlawful in the light of EU law. That court states that it finds it extremely difficult to take into account the impact of such unlawfulness on the provisional detention which, in itself, appears to it to be entirely lawful.

43. In those circumstances, the Spetsializiran nakazatelen sad (Specialised Criminal Court) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

‘(1) Is a national law which provides that the European arrest warrant and the national decision on the basis of which that warrant has been issued are to be adopted only by the public prosecutor, and does not permit the court to participate in or to exercise prior or subsequent review, consistent with Article 6(1) of Framework Decision 2002/584?

(2) Is a European arrest warrant which has been issued on the basis of the order for the requested person to be put under investigation, and that order does not involve his detention, consistent with Article 8(1)(c) of Framework Decision 2002/584?

(3) If the answer is in the negative: if, where a court has not participated in the issue of the European arrest warrant or in the review of its legality, and that warrant has been issued on the basis of a national decision which does not provide for the detention of the requested person, that European arrest warrant is in fact executed and the requested person is surrendered, should the requested person be granted an effective remedy in the same criminal proceedings as those during which that European arrest warrant was issued? Should the effective remedy involve placing the requested person in the situation in which he would have been if the infringement had not taken place?’

44. The Court granted the request for the preliminary ruling to be dealt with under the urgent procedure.

IV. Analysis

45. In my view, the questions submitted by the referring court can be divided into three categories. The first category concerns the validity of the European arrest warrant issued for MM. The second category relates to whether the validity of that warrant may be reviewed by the referring court as part of proceedings regarding MM’s continued provisional detention, even though, according to that court, national procedural law does not provide that that warrant, issued by the public prosecutor, can form the subject matter of judicial proceedings but rather merely an appeal before the higher authority of the public prosecutor’s office. Finally, the third category concerns the potential consequences of the finding that the European arrest warrant at issue in the main proceedings is invalid on MM’s provisional detention.

46. Before turning to those three aspects of this reference for a preliminary ruling, I will make some preliminary observations to explain that that reference does not encompass the decision taken by the Spanish judicial authority to execute the European arrest warrant at issue in the main proceedings or the classification of the Bulgarian public prosecutor as an 'issuing judicial authority', within the meaning of Article 6(1) of Framework Decision 2002/584.

A. Preliminary observations on the scope of the reference for a preliminary ruling

1. The role of the executing judicial authority

47. The scope of the obligations on the executing judicial authority when it is required to examine a European arrest warrant and decide whether or not to execute it is a complex issue, the limits of which the Court has yet to outline in its case-law, even though that case-law does already contain a wealth of information that can serve as guidelines for that authority.[15] It is a fact that the executing judicial authority is often forced to walk a tightrope between ensuring that a European arrest warrant is executed speedily and reviewing its legality.[16]

48. In its written observations and at the hearing, the Spanish Government set out different arguments in support of the decision taken by the executing judicial authority to surrender MM to the issuing judicial authority.

49. It is important to note that the questions submitted by the referring court do not invite the Court to assess, directly or indirectly, that decision of the executing judicial authority.

50. The main proceedings are pending before a court of the issuing Member State and, in accordance with the case-law of the Court that observance of the rights of the person whose surrender is requested falls primarily within the responsibility of the issuing Member State,[17] the questions which that court puts to the Court concern the detailed rules governing and the scope of such observance in the issuing Member State.

2. The classification of the Bulgarian public prosecutor as an 'issuing judicial authority'

51. In the light of the wording of its first question referred for a preliminary ruling, the referring court appears to be working on the assumption that the status of 'issuing judicial authority', within the meaning of Article 6(1) of Framework Decision 2002/584, is conditional, inter alia, on the availability of a review by a court of the decision to issue the European arrest warrant and of the national decision upon which that warrant is based.

52. Indeed, the referring court states that the present case concerns a provision of national law, namely Article 56(1)(1) of the ZEEZA, which provides that the public prosecutor has exclusive competence to issue a European arrest warrant in the pre-trial stage. Similarly, the national measure putting a person under investigation, on the basis of which the European arrest warrant at issue in the present case was

15 See, inter alia, judgment of 3 March 2020, *X (European arrest warrant – Double criminality)* (C-717/18, EU:C:2020:142, paragraphs 28, 35, 37, 38 and 41 and the case-law cited).

16 With regard to the limits on the obligations on the executing judicial authority, see Opinion of Advocate General Campos Sánchez-Bordona *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyon and Tours)* (C-566/19 PPU and C-626/19 PPU, EU:C:2019:1012, points 99 to 101).

17 See judgment of 23 January 2018, *Piotrowski* (C-367/16, EU:C:2018:27, paragraph 50 and the case-law cited).

issued, must, according to that court, be regarded as having been adopted by the public prosecutor. The court explains that Bulgarian law does not provide for a judicial review of those two decisions, and is therefore of the view that the Court must give a ruling on the compliance of that law with Article 6(1) of Framework Decision 2002/584.

53. The latter provision defines the issuing judicial authority as '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'.

54. The Court has held that the existence of a judicial remedy against the decision taken by an authority other than a court to issue a European arrest warrant is not a condition for classification of that authority as an 'issuing judicial authority' within the meaning of Article 6(1) of Framework Decision 2002/584. Such a requirement does not fall within the scope of the statutory rules and institutional framework of that authority, but rather concerns the procedure for issuing such a warrant. [18]

55. In those circumstances, the view must be taken that the referring court is, in essence, asking the Court to rule on whether Framework Decision 2002/584 is to be interpreted as meaning that, where the competence to issue a European arrest warrant for the purposes of a criminal prosecution is conferred on an authority which, whilst participating in the administration of justice in that Member State, is not itself a court, the requirements inherent in effective judicial protection are satisfied where, under the legislation of the issuing Member State, the conditions under which that warrant was issued and the national decision on the basis of which the warrant was issued cannot be the subject of a judicial review in that Member State, whether before the requested person is surrendered or thereafter.

56. However, the referring court appears not to cast doubt on the classification of the Bulgarian prosecutor as an 'issuing judicial authority' within the meaning of Article 6(1) of Framework Decision 2002/584, in the light of the criteria highlighted by the Court in order to be eligible to enjoy that classification.

57. With regard to those classification criteria, I would simply state that the Court has ruled that 'the term "issuing 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 and act independently in the execution of those of their responsibilities which are inherent in the issuing of a European arrest warrant, that independence requiring 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'. [19]

58. In the present case, the participation of Bulgarian public prosecutors in the administration of criminal justice is uncontested.

18 See, inter alia, judgments in *Openbaar Ministerie (Swedish Public Prosecutor's Office)* (paragraphs 30 and 31) and in *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyon and Tours)* (paragraphs 48 and 49). See also Opinion of Advocate General Campos Sánchez-Bordona in *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyon and Tours)* (C-566/19 PPU and C-626/19 PPU, EU:C:2019:1012, point 70), in which he observes that the existence of such a remedy is 'a condition relating to the *lawfulness of issuing a [European arrest warrant]* by a public prosecutor's office and, therefore, to its effectiveness'.

19 See, inter alia, judgment in *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyon and Tours)* (paragraph 52 and the case-law cited).

59. With regard to whether those public prosecutors act independently in the execution of those of their responsibilities which are inherent in the issuing of a European arrest warrant, it is apparent from the written reply by the Bulgarian Government to a question put by the Court concerning, amongst other things, this aspect that, in accordance with Article 117(2) of the Konstitutsiya (Bulgarian Constitution), the judiciary is independent and judges, juries, prosecutors and examining magistrates are subject solely to the law in the execution of their duties. Article 1a(1) of the zakon za sadebnata vlastta (Law on the Judiciary)[20] states that the judiciary is an arm of the State which protects the legal rights and interests of citizens, legal persons and the State. Paragraph 2 of the same article again enshrines the principle of the independence of the judiciary. Pursuant to Article 3 of the Law on the Judiciary, the decisions of judges, public prosecutors and examining magistrates are to be based on the law and on the evidence gathered during the proceedings. The Bulgarian Government explains that, in the Bulgarian judicial system, a public prosecutor is a judicial authority which is constitutionally independent from the legislative and executive authorities.[21] In accordance with Article 14(1) of the NPK, a public prosecutor is to take his decisions in accordance with his personal conviction, on the basis of an objective, impartial and thorough examination of all the facts of the case and in accordance with the law.

60. Furthermore, on the basis of all the information contained in the order for reference and the 2020 EU Justice Scorecard,[22] the European Commission concludes that Bulgarian public prosecutors participate in the administration of criminal justice in Bulgaria and act independently in the execution of those of their responsibilities which are inherent in the issuing of a European arrest warrant.

61. However, MM expresses doubts as to whether Bulgarian public prosecutors satisfy the criteria of independence and impartiality, and points to their dependence vis-à-vis the public prosecutor of the higher authority and the General Public Prosecutor of the Republic of Bulgaria.

62. Since, in the light of the grounds stated in its order for reference, the referring court does not raise any question regarding the independence of public prosecutors in the execution of those of their responsibilities which are inherent in the issuing of a European arrest warrant, there is no need, in my view, for the Court to rule on that point.

63. The questions submitted for a preliminary ruling by the referring court must therefore, in my view, prompt the Court to focus its examination on the lawfulness of the procedure of issuing a European arrest warrant, which is a condition for the validity of that warrant.

B. The lawfulness of the procedure of issuing a European arrest warrant as a condition for the validity of that warrant

64. The referring court has doubts that the procedure of issuing the European arrest warrant at issue in the main proceedings was conducted in compliance with the dual level of protection of the rights of the requested person as required by the Court. Specifically, that European arrest warrant is not based on a '[national] arrest warrant or any other enforceable judicial decision having the same effect', within the meaning of Article 8(1)(c) of Framework Decision 2002/584, and, in any event, neither the national measure forming the basis of the European arrest warrant nor that arrest warrant, both of

20 DV No 64 of 7 August 2007, in the version thereof applicable to the dispute in the main proceedings (DV No 11 of 7 February 2020).

21 The Bulgarian Government refers, in this regard, to the judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)* (C-508/18 and C-82/19 PPU, EU:C:2019:456, paragraph 50).

22 See Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, 2020 EU Justice Scoreboard (COM(2020) 306 final, figure 55, p. 62).

which were adopted by the public prosecutor, are open to review before a court. Accordingly, the procedure of issuing the European arrest warrant at issue in the main proceedings failed to observe the requirements associated with effective judicial protection, with the result that that warrant is invalid.

65. In order to answer the questions put by the referring court on these aspects, it is necessary to recall the case-law of the Court on the dual level of protection of the rights which must be guaranteed for persons who are the subject of European arrest warrants.

66. It follows from that case-law that, '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'. [23]

67. The European arrest warrant system thus 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'. [24]

68. Thus, '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, 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'. [25]

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'. [26]

70. In addition, 'the second level of protection of the rights of the person concerned requires that the issuing judicial authority review observance of the conditions to be met when issuing a European arrest warrant and examine objectively – taking into account all incriminatory and exculpatory evidence, without being exposed to the risk of being subject to external instructions, in particular from the executive – whether it is proportionate to issue that warrant'. [27]

23 See, inter alia, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)* (C-508/18 and C-82/19 PPU, EU:C:2019:456, paragraph 66 and the case-law cited).

24 See, inter alia, judgments in *Openbaar Ministerie (Swedish Public Prosecutor's Office)* (paragraph 38 and the case-law cited) and in *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyon and Tours)* (paragraph 59 and the case-law cited).

25 See, inter alia, judgments in *Openbaar Ministerie (Swedish Public Prosecutor's Office)* (paragraph 39 and the case-law cited) and in *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyon and Tours)* (paragraph 60 and the case-law cited).

26 See, inter alia, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)* (C-508/18 and C-82/19 PPU, EU:C:2019:456, paragraph 69).

27 See, inter alia, judgments in *Openbaar Ministerie (Swedish Public Prosecutor's Office)* (paragraph 40 and the case-law cited) and in *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyon and Tours)* (paragraph 61 and the case-law cited).

71. Furthermore, 'where the law of the issuing Member State confers 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'.[28]

72. According to the Court, 'such proceedings against a decision to issue a European arrest warrant for the purposes of a criminal prosecution taken by an authority which, whilst participating in the administration of justice and having the necessary independence from the executive, does not constitute a court serve to ensure that judicial scrutiny of that decision and of the conditions to be met when issuing that warrant and, in particular, the proportionality of such a warrant complies with the requirements inherent in effective judicial protection'.[29]

73. In the light of that case-law, it is necessary to determine whether the procedure for the issuing of the European arrest warrant at issue in the main proceedings was carried out in compliance with the dual level of protection of the rights of the person concerned, as required by the Court.

74. I am of the view that this was not the case as early as the first stage of the procedure.

75. On the basis of the information available to the Court and subject to the checks that are a matter for the referring court, the European arrest warrant at issue in the main proceedings does not appear to have its legal basis in a national arrest warrant or an enforceable judicial decision having the same effect, contrary to the requirement laid down in Article 8(1)(c) of Framework Decision 2002/584, as interpreted by the Court in its judgment of 1 June 2016, *Bob-Dogi*.[30] That requirement is directly linked to that of ensuring effective judicial protection for the person concerned.

76. In his Opinion in *Bob-Dogi*,[31] Advocate General Bot set out in detail the reasons why it is essential that a European arrest warrant is based on a national judicial decision, which constitutes the legal basis for that warrant, which has the legal effects of a national arrest warrant. He thus described the European arrest warrant as being 'the original instrument created by … Framework Decision [2002/584], by which the issuing judicial authority requests execution of the national decision within the area of freedom, security and justice';[32] the European arrest warrant 'is not to be confused with the request for arrest for the enforcement of which it is issued', and thus constitutes 'an act enabling an enforceable court decision ordering the arrest of the requested person to be enforced within the European judicial area'.[33] Put simply, the European arrest warrant and the national arrest warrant each has its own function, with the first being 'an instrument of legal cooperation which does not constitute an order for the arrest of the person concerned in the territory of the issuing Member State'.[34]

77. According to Advocate General Bot, 'any failure to issue a national arrest warrant or other enforceable act having the same effect … deprives the European arrest warrant of any legal basis',[35] which has the effect of depriving 'the requested person of the procedural safeguards attaching to the issue of a national judicial decision and are additional to the safeguards connected with the European

28 See, inter alia, judgments in *Openbaar Ministerie (Swedish Public Prosecutor's Office)* (paragraph 41 and the case-law cited) and in *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyon and Tours)* (paragraph 62 and the case-law cited).

29 See judgment in *Openbaar Ministerie (Swedish Public Prosecutor's Office)* (paragraph 42). See also judgment in *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyon and Tours)* (paragraph 63).

30 C-241/15, EU:C:2016:385.

31 C-241/15, EU:C:2016:131 ('the Opinion in *Bob-Dogi*').

32 See Opinion in *Bob-Dogi* (point 50).

33 See Opinion in *Bob-Dogi* (point 51).

34 See Opinion in *Bob-Dogi* (point 72).

35 See Opinion in *Bob-Dogi* (point 51).

arrest warrant procedure'.[36] He thus pointed to the 'risks of weakening the rights of the defence where there is no national judicial decision on which the European arrest warrant is based'[37] and took the view that 'the strict terms in which the grounds for non-execution of the European arrest warrant have been framed presuppose that there must, by way of counterweight, be specific and effective procedural safeguards of the rights of the defence in the Member State issuing the European arrest warrant. If not, the essential balance between the requirements of an effective criminal justice system and the need to safeguard fundamental rights, which forms an integral part of the creation of a European judicial area, will be lost'.[38] In addition, 'the condition relating to the existence of a national arrest warrant distinct from the European warrant, far from constituting a pedantic and pointless formality, in fact represents an essential safeguard to preserve that balance in the system established by … Framework Decision [2002/584]',[39] and that condition is 'essential to mutual confidence and to the observance of the rights of the requested person'.[40]

78. Thus, the condition that the European arrest warrant is based 'on a common procedural foundation comprising a national judicial decision guaranteeing the involvement of an independent and impartial court when a coercive measure is imposed … endows the principle of effective and equivalent [judicial] protection with a minimum level of substantive content and therefore represents the concrete judicial embodiment of the principle of mutual confidence'.[41] Moreover, 'the fact that there is a national arrest warrant serving as the basis of a European arrest warrant must … be understood as an expression of the principle of legality, which implies that the coercive power under which an order for arrest and detention is made cannot be exercised outside the legal limits determined by the national law of each Member State and within which the public authority is authorised to search for, prosecute and try persons suspected of having committed an offence'.[42]

79. From a substantive viewpoint, the absence of a national arrest warrant or any other enforceable judicial decision having the same effect as the legal basis of a European arrest warrant, contrary to the requirement laid down in Article 8(1)(c) of Framework Decision 2002/584, means that, 'because there is no act other than the European arrest warrant that may be challenged, the requested person is deprived of the possibility of challenging his arrest in the issuing Member State on the ground that it is unlawful and thus his detention under the provisions of that State. Inasmuch as the executing judicial authority has jurisdiction only to rule on the grounds of non-execution provided for in [that] [f]ramework [d]ecision, a whole facet of the lawfulness of the arrest and detention is thus unlikely to be subject to judicial scrutiny'.[43] Therefore, according to Advocate General Bot, 'it was … specifically to avoid the risk of depriving a person of the safeguards associated with the intervention of a court, as the guardian of individual freedoms, that the Union legislature provided that the European arrest warrant should be based on the existence of a judicial decision adopted in compliance with the procedural rules of the issuing Member State'.[44]

80. Adopting the approach expounded by Advocate General Bot, the Court held that 'Article 8(1)(c) of … Framework Decision [2002/584] is to be interpreted as meaning that the term "arrest warrant", as used in that provision, must be understood as referring to a national arrest warrant that is distinct from the European arrest warrant'.[45] In addition to the literal interpretation, the Court specifically took into account the fact that, without a prior national arrest warrant, the procedural safeguards and

36 See Opinion in *Bob-Dogi* (point 52).
37 See Opinion in *Bob-Dogi* (point 54).
38 See Opinion in *Bob-Dogi* (point 55).
39 See Opinion in *Bob-Dogi* (point 56).
40 See Opinion in *Bob-Dogi* (point 57).
41 See Opinion in *Bob-Dogi* (point 62).
42 See Opinion in *Bob-Dogi* (point 66).
43 See Opinion in *Bob-Dogi* (point 73).
44 See Opinion in *Bob-Dogi* (point 75).
45 See judgment of 1 June 2016, *Bob-Dogi* (C-241/15, EU:C:2016:385, paragraph 58).

fundamental rights, the protection of which it is the task of the judicial authority of the issuing Member State to ensure, could be compromised, since the person concerned would be deprived of the first level of protection of those rights and safeguards, that is to say the purely national level of protection. [46]

81. In its judgment of 1 June 2016, *Bob-Dogi*, [47] the Court ruled that, while Articles 3, 4, 4a and 5 of Framework Decision 2002/584 leave no discretion as to the grounds for non-execution other than those set out in those articles, the fact nevertheless remains that those articles are based on the premiss that the European arrest warrant concerned satisfied the requirements as to the lawfulness of that warrant laid down in Article 8(1) of that framework decision. [48]

82. In addition, according to the Court, 'Article 8(1)(c) of the Framework Decision [2002/584] lays down *a requirement as to lawfulness which must be observed if the European arrest warrant is to be valid*'. [49] Where a European arrest warrant is not based on the prior issue of a national arrest warrant separate from the European arrest warrant, the view must be taken that that European arrest warrant *does not satisfy the requirements as to lawfulness laid down in Article 8(1) of Framework Decision 2002/584*. [50]

83. It is thus clear from the judgment of 1 June 2016, *Bob-Dogi*, [51] that a European arrest warrant is not valid if it was issued without a national arrest warrant that is separate from that European arrest warrant having been adopted beforehand.

84. In its wording of the questions referred by it for a preliminary ruling, the referring court is working on the premiss, in accordance with that case-law, that there must be a national arrest warrant that is separate from the European arrest warrant and pre-dates that European arrest warrant. However, that court observes that the Court has yet to rule on whether a European arrest warrant issued on the basis of a *national measure putting a person under investigation*, such as that contained in the order putting a person under investigation of 9 August 2019, which officially notifies the person concerned of the charges against him, is consistent with the provisions of Article 8(1)(c) of Framework Decision 2002/584.

85. In that connection, the referring court points out that, unlike the facts that gave rise to the judgment of 1 June 2016, *Bob-Dogi*, [52] there is indeed, in the case in the main proceedings, a national decision that is separate from the European arrest warrant and clearly indicated in that warrant. It does, however, note that that decision does not provide for the placement of the requested person in detention.

86. In my view, the arguments put forward by Advocate General Bot in his Opinion in *Bob-Dogi* to explain the rationale of the requirement that a European arrest warrant must have as its legal basis a national arrest warrant or any other enforceable judicial decision having the same effect support the view that such a national measure must, first, relate to the search for and arrest of an accused person in criminal proceedings and, second, be open to appeal before a court where it is adopted by an authority which, whilst participating in the administration of justice in that Member State, is not itself a court.

46 See judgment of 1 June 2016, *Bob-Dogi* (C-241/15, EU:C:2016:385, paragraph 55).

47 C-241/15, EU:C:2016:385.

48 See judgment of 1 June 2016, *Bob-Dogi* (C-241/15, EU:C:2016:385, paragraphs 62 and 63). See also judgment of 6 December 2018, *IK (Enforcement of an additional sentence)* (C-551/18 PPU, EU:C:2018:991, paragraphs 42 and 43).

49 See judgment of 1 June 2016, *Bob-Dogi* (C-241/15, EU:C:2016:385, paragraph 64). Emphasis added. See also judgment of 6 December 2018, *IK (Enforcement of an additional sentence)* (C-551/18 PPU, EU:C:2018:991, paragraph 43).

50 See judgment of 1 June 2016, *Bob-Dogi* (C-241/15, EU:C:2016:385, paragraph 66).

51 C-241/15, EU:C:2016:385.

52 C-241/15, EU:C:2016:385.

87. The question of whether the order putting a person under investigation of 9 August 2019 adopted by the public prosecutor may be equated with a '[national] arrest warrant or any other enforceable judicial decision having the same effect', within the meaning of Article 8(1)(c) of Framework Decision 2002/584, therefore necessitates a precise definition of the scope of that concept.

88. First, there must be a judicial decision. In this regard, the Court has held that, given the need to ensure consistency between the interpretations of the various provisions of Framework Decision 2002/584, the interpretation that the term 'judicial authority', within the meaning of Article 6(1) of that framework decision, must be interpreted as referring to the Member State authorities that administer criminal justice appears, in principle, transposable to Article 8(1)(c) of that framework decision. Accordingly, the latter provision must be interpreted as meaning that the term 'judicial decision' covers the decisions of the Member State authorities that administer criminal justice.[53]

89. Therefore, since it is not contested that the public prosecutor is an authority responsible for administering criminal justice in Bulgaria, the order putting a person under investigation of 9 August 2019 adopted by the public prosecutor must be regarded as a 'judicial decision' within the meaning of Article 8(1)(c) of Framework Decision 2002/584.[54]

90. Second, in order to fall within the scope of the concept of a '[national] arrest warrant or any other enforceable judicial decision having the same effect' within the meaning of Article 8(1)(c) of Framework Decision 2002/584, a national measure serving as the basis for a European arrest warrant must, even if it is not referred to as a 'national arrest warrant' in the legislation of the issuing Member State, produce equivalent legal effects. The wording of that provision argues to that effect where it refers to 'any other enforceable judicial decision *having the same effect*'.[55] Such a decision must therefore, like a national arrest warrant, produce the legal effects of an order to search for and arrest the person who is the subject of a criminal prosecution.

91. I therefore do not share the view of the Spanish Government, which considers, by contrast, further to a broad interpretation to the effect that, in essence, that concept can cover any enforceable judicial decision relating to the conduct of a criminal prosecution, that a national measure such as the order putting a person under investigation of 9 August 2019 is a sufficient legal basis on which to issue a European arrest warrant.

92. The system of judicial cooperation in criminal matters established by Framework Decision 2002/584 is an argument in favour of the view that a European arrest warrant must have as its legal basis a national measure ordering the arrest of a person on the territory of the issuing Member State. After all, the purpose of the European arrest warrant is to extend beyond the issuing Member State the legal effects of a national arrest warrant or a decision akin to such a warrant. Once the European arrest warrant is executed and the person is surrendered to the issuing judicial authority, thus exhausting its effects, it is essential that the initial national legal basis remains, pursuant to which that person can be required to appear before a court of the issuing Member State for the purpose of conducting the stages of the criminal proceedings. In that same vein, I agree with the Commission's view that the issuing judicial authority cannot use the European arrest warrant with a view to the arrest of a person in another Member State if that authority cannot order that arrest on the basis of its own national law. In other words, it is the Commission's position that the issuing judicial authority cannot request another Member State to do more than it can itself order.

53 See judgment of 10 November 2016, *Özçelik* (C-453/16 PPU, EU:C:2016:860, paragraphs 32 and 33).

54 See, by analogy, judgment of 10 November 2016, *Özçelik* (C-453/16 PPU, EU:C:2016:860, paragraph 34).

55 Emphasis added.

93. The concept of a '[national] arrest warrant or any other enforceable judicial decision having the same effect', within the meaning of Article 8(1)(c) of the Framework Decision, does not therefore cover measures which initiate the opening of criminal proceedings against a person, but rather those intended to enable, by coercive means, the arrest of that person with a view to his appearance before a court for the purpose of conducting the stages of the criminal proceedings.

94. It follows that a European arrest warrant issued on basis of a decision to put a person under investigation, such as that contained in the order of 9 August 2019, the sole legal effect of which, according to the referring court, is to notify a person of the charges against him and to give him the possibility of defending himself by furnishing explanations or presenting offers of evidence, without being an order to search for and arrest that person, is incompatible with the provisions of Article 8(1)(c) of Framework Decision 2002/584. Such failure to comply with that requirement as to lawfulness laid down in that provision affects the validity of the European arrest warrant.

95. I would add that the *order to appear* issued by the police services on 8 August 2019 pursuant to Article 71 of the NPK likewise cannot be a '[national] arrest warrant or any other enforceable judicial decision having the same effect', within the meaning of Article 8(1)(c) of Framework Decision 2002/584. Indeed, as the referring court states, that order to appear is issued merely by a police investigator, without the involvement of a public prosecutor or a judge (either beforehand or afterwards). It is therefore not a judicial decision. [56]

96. From all those factors, I infer that, in the procedural context in which the European arrest warrant at issue in the main proceedings was issued, and by analogy with the findings of the Court in its judgment of 1 June 2016, *Bob-Dogi*, [57] the dual level of judicial protection is lacking, in principle, in a situation such as that in the main proceedings, in which a European arrest warrant procedure has been applied without a decision, such as a decision to issue a national arrest warrant on which the European arrest warrant will be based, having been taken by a national judicial authority before the European arrest warrant is issued. [58]

97. The factors specific to the case in the main proceedings having been clarified, the view may be taken, in my opinion, that the requirement of a national arrest warrant would, however, have been satisfied if the national measure forming the basis of the European arrest warrant had been an order adopted by the public prosecutor under Article 64(2) of the NPK. However, the referring court states that MM has not been the subject of such a measure. I would recall that that measure is a coercive measure consisting in placing the accused person in detention for a maximum of 72 hours with a view to his appearance before the court which will rule on his possible provisional detention. In that connection, the referring court explains that that measure is the standard national basis, in Bulgaria, on which a European arrest warrant is issued during the preliminary stage; this is, in my view, likewise apparent from the information provided to the Court by the Bulgarian Government. [59]

56 See, conversely, where a national arrest warrant issued by a police service is confirmed by the public prosecutor's office, judgment of 10 November 2016, *Özçelik* (C-453/16 PPU, EU:C:2016:860).

57 C-241/15, EU:C:2016:385.

58 See, by analogy, judgment of 1 June 2016, *Bob-Dogi* (C-241/15, EU:C:2016:385, paragraph 57).

59 See also, to that effect, observations lodged by the raiyonna prokuratura Ruse, (Prosecutor of the Regional Prosecutor's Office, Ruse, Bulgaria) in the case of *Prosecutor of the regional prosecutor's office in Ruse, Bulgaria* (C-206/20), currently pending before the Court: 'When the accused person was prosecuted in this capacity in absentia and he can't be searched and brought before the court for examination of the request for placing a detention order, *the only possible basis (NAO – [National arrest order]) for the ruling of EAW* under the current legislation is the order of the public prosecutor for detention up to 72 hours on the grounds of art. 64, para 2 of the Criminal procedure code [NPK]. *Based on such type of NAO up to now there have been ruled (and implemented) hundreds of EAW [European arrest warrant] …*' (paragraph 7, emphasis added). Furthermore, in its written observations lodged in the same case, the Bulgarian Government states that, 'by definition, the public prosecutor's decision on the basis of which the person concerned is detained for a period of 72 hours in order to be brought before a court satisfies the requirement laid down in Article 8(1)(c) of Framework Decision 2002/584. It constitutes a national arrest warrant serving as the legal basis for the issuing of a European arrest warrant' (paragraph 78).

98. That said, there is scope to question whether, even in such circumstances, Bulgarian procedural law does satisfy the requirements as to effective judicial protection laid down by the Court. This prompts me to consider the other claim raised by the referring court with a view to casting doubt on the lawfulness of the procedure of issuing the European arrest warrant at issue in the main proceedings, although the finding that there is no national arrest warrant alone is sufficient to constitute infringement of the requirement as to lawfulness laid down in Article 8(1)(c) of Framework Decision 2002/584 and therefore to find that that European arrest warrant is invalid.

99. With a view to casting doubt on the validity of the European arrest warrant, the referring court points to the fact that Bulgarian procedural law does not provide for the possibility of bringing proceedings before a court against the national measures adopted by a public prosecutor as the basis for such a warrant, not even against the public prosecutor's decision to issue the European arrest warrant. Thus, it is clear from the information available to the Court that both the order to appear and the order putting a person under investigation or the order by which a person is detained for up to 72 hours so that he can appear before the court having jurisdiction in matters of provisional detention, as well as the decision to issue a European arrest warrant, are open to appeal only before the higher authority of the public prosecutor's office.

100. However, I take the view, mirroring the requirement established by the Court where a public prosecutor issues a European arrest warrant,[60] that the national measure adopted by the public prosecutor that forms the legal basis for a European arrest warrant should be capable of being the subject, in the issuing Member State, of court proceedings which meet in full the requirements inherent in effective judicial protection.

101. Furthermore, that requirement appears to me to have been laid down by the Court as early as its finding that, in a situation in which, as in the present case, 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 [the] requirements [inherent in effective judicial protection]*'.[61]

102. According to the Court, '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'.[62]

103. It thus follows from that case-law that a European arrest warrant must be based on a national arrest warrant issued in the context of a national procedure subject to review by a court.[63]

104. In the light of the foregoing considerations, I suggest that the Court answer the referring court to the effect that Article 8(1)(c) of Framework Decision 2002/584 is to be interpreted as meaning that a European arrest warrant must be regarded as invalid where it is not based on a '[national] arrest warrant or any other enforceable judicial decision having the same effect', within the meaning of that provision. That concept covers the national measures adopted by a judicial authority to search for and

60 See, inter alia, judgments in *Openbaar Ministerie (Swedish Public Prosecutor's Office)* (paragraph 41) and in *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyon and Tours)* (paragraph 62 and the case-law cited).

61 See judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)* (C-508/18 and C-82/19 PPU, EU:C:2019:456, paragraph 69). Emphasis added.

62 See judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)* (C-508/18 and C-82/19 PPU, EU:C:2019:456, paragraph 70). Emphasis added.

63 The question of whether such a review must necessarily occur before the requested person is surrendered to the issuing Member State is raised in the case of *Prosecutor of the regional prosecutor's office in Ruse, Bulgaria* (C-206/20), which is currently pending before the Court.

arrest a person who is the subject of a criminal prosecution, with a view to his appearance before a court for the purpose of conducting the stages of the criminal proceedings. It is for the referring court to determine whether a national measure putting a person under investigation, such as that upon which the European arrest warrant at issue in the main proceedings is based, produces such legal effects.

C. The jurisdiction of the referring court to review the validity of the European arrest warrant

105. In the grounds forming the basis of its decision to refer the third question to the Court for a preliminary ruling, the referring court states that Bulgarian procedural law precludes it from being able to review the validity of a European arrest warrant. It is for that reason that it asks the Court, in essence, whether EU law confers jurisdiction on it to carry out such a review.

106. The referring court notes that Bulgarian legislation does not provide for the possibility of bringing an action before a court in order for it to review the conditions under which a national or European arrest warrant was issued.

107. It observes that nor does Framework Decision 2002/584 provide for a right to an effective remedy in the event that the rights of the requested person are violated. However, consideration must be given to Article 47 of the Charter, which, as the Court has held, 'is sufficient in itself and does not need to be made more specific by provisions of EU or national law in order to confer on individuals a right which they may rely on as such'. [64]

108. The referring court asks whether, when faced with the consequences of executing a European arrest warrant in the context of proceedings for MM's provisional detention to be lifted, it is incumbent on it to grant the effective judicial protection required by Article 47 of the Charter or indeed whether, on the contrary, it should divest itself of the issue relating to the validity of the European arrest warrant by affording MM the opportunity to initiate fresh proceedings with a view to obtaining financial compensation.

109. The referring court observes that it follows from paragraph 69 of the judgment in *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyon and Tours)* [65] that a remedy that can be exercised to challenge a European arrest warrant following the surrender of the arrested person is an effective remedy. That court asks whether such an effective remedy includes the possibility of submitting arguments concerning the validity of a European arrest warrant before the court assessing the lawfulness of a provisional detention order, which is the issue before the referring court.

110. Furthermore, since the referring court is of the view that the unlawfulness of the European arrest warrant has its basis specifically in the impossibility of bringing an action before a court for a review of the lawfulness of that warrant, it might be judicious, in its view, for it to take responsibility for conducting such a review. The referring court asks whether its own finding that the European arrest warrant is unlawful is not, by definition, a remedy before a court, as required by the case-law of the Court, even though that court is not permitted to make such a finding under national law. In so far as national law prohibits the referring court from reviewing indirectly the public prosecutor's decision to issue a European arrest warrant, that court takes the view that only a judgment from the Court can form the basis of such a solution.

64 In this connection, the referring court cites the judgment of 14 May 2020, *Staatsanwaltschaft Offenburg* (C-615/18, EU:C:2020:376, paragraph 72).

65 Mention should also be made, in this regard, of paragraph 70 of the same judgment.

111. In the light of those considerations, the referring court considers that the execution of a European arrest warrant cannot justify a refusal of judicial protection, since the Court allows for the possibility of bringing proceedings against such a warrant even after the requested person has been surrendered.

112. In the Bulgarian Government's view, the function performed by the referring court when it is called upon, as in the present case, pursuant to Article 270 of the NPK, to rule on the continued provisional detention of a person who is the subject of a criminal prosecution ensures that judicial review of the conditions under which a European arrest warrant was issued and of its proportionality is guaranteed, as required by the Court.

113. In that connection, the Bulgarian Government explains that the measure adopted by the public prosecutor in accordance with Article 64(2) of the NPK is intended to ensure that the accused person appears before the court having jurisdiction as soon as possible.[66] The public prosecutor may, if necessary, decide to place that person in detention for a maximum of 72 hours so that he may be brought before the court having jurisdiction. The order adopted by the public prosecutor under that provision requires him to bring the accused person before that court as soon as possible following the latter's surrender on the basis of a European arrest warrant, for the purpose of examining the public prosecutor's application that that court make a provisional detention order.

114. According to that government, the obligation thus imposed on the public prosecutor to bring the requested person, who has been surrendered on the basis of a European arrest warrant, before the court having jurisdiction as soon as possible for the purpose of a ruling on the application to place that person in provisional detention represents a judicial review a posteriori of the conditions under which that European arrest warrant was issued and of its proportionality. In its view, that position is consistent with the case-law of the Court.[67]

115. Indeed, the Bulgarian Government explains that the court having jurisdiction to rule on whether there are grounds justifying the imposition of a provisional detention order under Article 63(1) of the NPK is inevitably led, in parallel with the assessment of the need to impose such an order, to conduct checks of the conditions required to issue the European arrest warrant, and to review the proportionality of that warrant, in the light of the criteria laid down in Article 63(1) and (2) of the NPK.[68]

116. The Bulgarian Government therefore considers that the public prosecutor's decision to issue a European arrest warrant is subject to a review by a court that satisfies the requirements of effective judicial protection, as laid down by the Court.

117. I agree with the view that, within the Bulgarian procedural system, in which the accused person must be brought as soon as possible before the court having jurisdiction to decide on his possible placement in provisional detention, the judicial review of the conditions under which a European arrest warrant was issued that can be conducted by that court does satisfy the requirement as to effective judicial protection as set out by the Court. The fact that this is not a separate remedy against

66 I would note, however, that MM was not the subject of such a measure prior to his appearance before the referring court.

67 The Bulgarian Government cites, in this regard, the judgment in *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyon and Tours)* (paragraph 74).

68 Under Article 63(2) of the NPK, where the evidence in the case does not establish the contrary, when adopting the initial provisional detention order, a genuine risk of the accused person absconding or committing an offence, within the meaning of paragraph 1 of that article, exists where the person put under investigation is a persistent reoffender or a special reoffender; where the person is put under investigation for a serious and premeditated offence and has been convicted of another serious and premeditated offence prosecuted *ex officio* by the public prosecutor's office (irrespective of the wishes of the victim) to a term of imprisonment of at least one year or to another heavier penalty, the enforcement of which is not deferred pursuant to Article 66 of the nakazatelen kodeks (Criminal Code); the person is put under investigation for an offence punishable by a penalty not less than a custodial sentence of 10 years or another more severe penalty; or that the person is put under investigation in the circumstances set out in Article 269(3) of the NPK.

the public prosecutor's decision to issue a European arrest warrant[69] but rather an indirect review as part of an action for a provisional detention order to be lifted, and the fact that such a review takes place after the surrender of the requested person,[70] do not preclude such a finding. Thus, in order to satisfy the requirement as to effective judicial protection, the review by a court of the issuing of a European arrest warrant can, in my opinion, be conducted indirectly as part of a legal remedy, the primary focus of which is not that review. This is consistent, in the present case, with the outcome sought by the referring court, namely that it examine the lawfulness of the procedure of issuing the European arrest warrant procedure at issue in the main proceedings in the context of an application for release made to it by MM.

118. However, it is important to point out that the referring court does not express the same certainty as the Bulgarian Government as regards the actual possibility of it conducting such a review under Bulgarian procedural law. That court takes the view that the fact that that law provides for an appeal against the public prosecutor's decision to issue a European arrest warrant only before the higher authority of the public prosecutor's office and not before a court constitutes an obstacle to it being able to hold that it has jurisdiction to rule on the lawfulness of such a measure adopted by the public prosecutor.

119. I would observe that the Court imposes on the issuing Member State a clear obligation as to the result to be achieved by holding that, 'where the law of the issuing Member State confers 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'.[71] The objective of such proceedings is to 'guarantee that the review by a court of [the] decision [to issue a European arrest warrant] and of the conditions necessary to issue that warrant, inter alia its proportionality, complies with the requirements inherent in effective judicial protection'.[72] According to the Court, it is for the Member States 'to ensure that their legal orders effectively safeguard the level of judicial protection required by Framework Decision 2002/584, as interpreted by the Court's case-law'.[73]

120. As the Court observed in its judgment of 30 May 2013, *F*,[74] 'the entire surrender procedure between Member States provided for by … Framework Decision [2002/584] is therefore, in accordance with that decision, carried out under judicial supervision'.[75] It follows, according to the Court, that 'the provisions of [that] [f]ramework [d]ecision themselves already provide for a procedure that complies with the requirements of Article 47 of the Charter, regardless of the methods of implementing the Framework Decision chosen by the Member States'.[76]

69 See judgments in *Openbaar Ministerie (Swedish Public Prosecutor's Office)* (paragraph 44) and in *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyon and Tours)* (paragraph 65). According to the Court, introducing a separate right of appeal against the decision to issue a European arrest warrant taken by a judicial authority other than a court is just one possible means of safeguarding effectively the level of judicial protection required by Framework Decision 2002/584.

70 See judgments in *Openbaar Ministerie (Swedish Public Prosecutor's Office)* (paragraphs 52 and 53) and in *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyon and Tours)* (paragraphs 70 and 71).

71 See, inter alia, judgments in *Openbaar Ministerie (Swedish Public Prosecutor's Office)* (paragraph 41 and the case-law cited) and in *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyon and Tours)* (paragraph 62 and the case-law cited).

72 See judgment in *Openbaar Ministerie (Swedish Public Prosecutor's Office)* (paragraph 42). See also judgment in *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyon and Tours)* (paragraph 63).

73 See judgments in *Openbaar Ministerie (Swedish Public Prosecutor's Office)* (paragraph 43) and in *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyon and Tours)* (paragraph 64).

74 C-168/13 PPU, EU:C:2013:358.

75 See judgment of 30 May 2013, *F* (C-168/13 PPU, EU:C:2013:358, paragraph 46). See also 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 56 and the case-law cited).

76 See judgment of 30 May 2013, *F* (C-168/13 PPU, EU:C:2013:358, paragraph 47).

121. Accordingly, although it is not expressly mentioned in Framework Decision 2002/584, the obligation on the issuing Member State to provide for one of more effective remedies in order to allow a review by a court of the conditions under which a European arrest warrant was issued by an authority which, whilst participating in the administration of justice in that Member State, is not itself a court stems from the system established by that framework decision in accordance with the requirements of Article 47 of the Charter.

122. The existence of such a possibility of judicial review of the conditions under which a European arrest warrant was issued in the issuing Member State is the crucial factor in maintaining mutual trust and recognition between the Member States. In this regard, I note that the Court has held that 'the high level of trust between Member States on which the European arrest warrant mechanism is based is … founded on the premiss that the criminal courts of the other Member States – which, following execution of a European arrest warrant, will have to conduct the criminal procedure for the purposes of prosecution, or of enforcement of a custodial sentence or detention order, and the substantive criminal proceedings – meet the requirements of effective judicial protection',[77] which presupposes the very existence of a possibility of judicial scrutiny.

123. It follows from the principle laid down by the Court, namely that the decision taken by a public prosecutor to issue a European arrest warrant must be capable of being the subject, in the issuing Member State, of court proceedings which meet in full the requirements inherent in effective judicial protection, that one or more effective remedies must be available to that end in that Member State.

124. I would further point out that the Court's finding that reviewing the lawfulness of a European arrest warrant falls primarily within the responsibility of the issuing Member State[78] would remain without any practical application if EU law did not require that such a review may actually take place in that Member State, it being of little consequence in that regard whether before, at the same time as or after the surrender of the requested person. Thus, the decision of the executing judicial authority is without prejudice to the opportunity of the person in question, once surrendered, to have recourse, within the legal system of the issuing Member State, to remedies that enable him to challenge the validity of the European arrest warrant on the basis of which that person was surrendered.[79]

125. Furthermore, in accordance with the procedural autonomy which they enjoy in implementing Framework Decision 2002/584, and where that framework decision is silent, the Member States have discretion as to the specific manner of implementation of review by a court of the decision to issue a European arrest warrant.[80] When adopting such rules and procedures, the Member States must however ensure that the application of Framework Decision 2002/584 is not frustrated.[81]

126. In order to achieve the outcome in which a court may review the conditions under which the European arrest warrant at issue in the main proceedings was issued, the referring court should, in my view, interpret its national procedural law in such a way that it finds that it has jurisdiction to review indirectly, in the context of the proceedings brought before it, the lawfulness of the procedure of

77 See 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 58).

78 See, inter alia, judgment of 6 December 2018, *IK (Enforcement of an additional sentence)* (C-551/18 PPU, EU:C:2018:991, paragraph 66 and the case-law cited). See also judgment of 23 January 2018, *Piotrowski* (C-367/16, EU:C:2018:27, paragraph 50).

79 See, by analogy, with regard to a European arrest warrant issued for the purpose of enforcing a custodial sentence or detention order, judgment of 6 December 2018, *IK (Enforcement of an additional sentence)* (C-551/18 PPU, EU:C:2018:991, paragraph 67 and the case-law cited).

80 See, to that effect, judgment of 30 May 2013, *F* (C-168/13 PPU, EU:C:2013:358, paragraph 52).

81 See, to that effect, judgment of 30 May 2013, *F* (C-168/13 PPU, EU:C:2013:358, paragraph 53).

issuing that warrant.[82] Viewed from that perspective, the obligation on the referring court to adopt a consistent interpretation would avoid the disadvantages for the requirement that a person who has been surrendered enjoys effective judicial protection that may arise from the procedural autonomy of the Member States.

127. Should such an approach to the interpretation of national procedural law in favour of an indirect review by a court of the European arrest warrant procedure at issue in the main proceedings prove insufficient or impossible because it runs counter to national legislation, I am of the view that the referring court could derive jurisdiction from Article 47 of the Charter.

128. It follows from the case-law of the Court that, 'in the light of the principle of primacy of EU law, where it is impossible for it to interpret national legislation in compliance with the requirements of EU law, any national court, acting in the exercise of its jurisdiction, has, as a body of a Member State, the obligation to disapply any provision of national law which is contrary to a provision of EU law with direct effect in the case before it'.[83]

129. In addition, it is clear from the Court's case-law that 'Article 47 of the Charter is sufficient in itself and does not need to be made more specific by provisions of EU or national law in order to confer on individuals a right on which they may rely as such'.[84]

130. Moreover, 'when there are no EU rules governing the matter, although it is for the domestic legal system of every Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, the Member States are, however, to ensure compliance in every case with the right to effective judicial protection of those rights as enshrined in Article 47 of the Charter'.[85]

131. The Court has also held that, 'although EU law does not, in principle, require Member States to establish before their national courts, in order to ensure the safeguarding of the rights which individuals derive from EU law, remedies other than those established by national law …, the position is otherwise if it is apparent from the overall scheme of the national legal system in question that no legal remedy exists that would make it possible to ensure, even indirectly, respect for the rights that individuals derive from EU law, or again if the sole means whereby individuals can obtain access to a court is by breaking the law'.[86]

132. It follows that, if the referring court were to take the view that it is prevented by its national procedural law, even after interpreting that law, to examine indirectly, in the context of the proceedings brought before it, the lawfulness of the procedure of issuing the European arrest warrant issued by the public prosecutor, jurisdiction to conduct such a review would be available to it under Article 47 of the Charter.[87]

82 See, in the same vein, Opinion of Advocate General Campos Sánchez-Bordona in *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyon and Tours)* (C-566/19 PPU and C-626/19 PPU, EU:C:2019:1012, point 97).

83 See, inter alia, judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 139 and the case-law cited).

84 See, inter alia, judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 140 and the case-law cited).

85 See, inter alia, judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 142 and the case-law cited).

86 See, inter alia, judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 143 and the case-law cited).

87 See, by analogy, judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 146 and the case-law cited).

133. Accordingly, where the procedural law of the issuing Member State does not provide for a remedy allowing a court to review the conditions under which such a European arrest warrant was issued and, inter alia, its proportionality, neither before nor concomitantly with its adoption nor subsequently,[88] a court which is called upon to give a ruling at a stage in the criminal proceedings subsequent to the surrender of the requested person must be able to review, indirectly, the conditions under which that warrant was issued.

134. Therefore, the referring court, before which an application for release has been brought pursuant to Article 270 of the NPK, is authorised, under Article 47 of the Charter, to review the conditions of issue of the European arrest warrant which allowed the requested person to be arrested and appear before it, as well as the subsequent adoption of a provisional detention order.

135. I therefore propose that the Court answer the referring court to the effect that, where provision is not made in the legislation of the issuing Member State for court proceedings for the purpose of reviewing the conditions under which a European arrest warrant was issued by an authority which, whilst participating in the administration of justice in that Member State, is not itself a court, the principle of primacy of EU law and the right to effective judicial protection, enshrined in Article 47 of the Charter, are to be interpreted as requiring the national court – before which an action has been brought to challenge the lawfulness of the continued provisional detention of a person who has been surrendered pursuant to a European arrest warrant issued on the basis of a national measure that cannot be regarded as a '[national] arrest warrant or any other enforceable judicial decision having the same effect', within the meaning of Article 8(1)(c) of Framework Decision 2002/584, and in the context of which a plea in law is raised alleging that that European arrest warrant is invalid in the light of EU law – to find that it has jurisdiction to conduct such a review of validity.

D. The consequences of the invalidity of the European arrest warrant for the provisional detention of the accused person

136. By its third question, the referring court also asks the Court about the conclusions that it should draw, in the context of the proceedings brought before it concerning MM's provisional detention, from the finding that the European arrest warrant at issue in the main proceedings is invalid.

137. In particular, referring, by analogy, to the rule set out in recital 44 of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings,[89] the referring court asks whether the finding that the European arrest warrant is invalid should have the effect that MM is placed in the situation in which he would have found himself if the breach of EU law had not occurred, which in the present case would mean lifting MM's provisional detention.

138. In that regard, the referring court notes that all the conditions required by national law in order to place MM in provisional detention were, and continue to be, satisfied.

88 See, conversely, judgment of 12 December 2019, *Openbaar Ministerie (Swedish Public Prosecutor's Office)* (paragraph 52).

89 OJ 2016 L 65, p. 1. Under recital 44 of that directive, 'the principle of effectiveness of Union law requires that Member States put in place adequate and effective remedies in the event of a breach of a right conferred upon individuals by Union law. An effective remedy, which is available in the event of a breach of any of the rights laid down in this Directive, should, as far as possible, have the effect of placing the suspects or accused persons in the same position in which they would have found themselves had the breach not occurred, with a view to protecting the right to a fair trial and the rights of the defence'.

139. That being said, the referring court points out that, from a purely procedural perspective, the decision to place MM in provisional detention could be taken only because MM appeared in person before the referring court; that appearance was itself the outcome of the execution of an invalid European arrest warrant. According to that court, if that warrant had not been issued, MM would not have been arrested in Spain, he would not have been handed over to the Bulgarian judicial authorities and he would therefore not have been placed in provisional detention by the referring court.

140. If that approach were adopted, the view would have to be taken, in the referring court's opinion, that, on account of MM's placement in provisional detention, there is a breach of essential procedural requirements because the European arrest warrant was issued by a body lacking the competence to do so (because the necessary participation of a court was not guaranteed), on the basis of a decision which is not a national arrest warrant. This should lead the referring court to conclude that MM's subsequent detention, following the execution of that European arrest warrant, was unlawful. MM should therefore be released. [90]

141. The referring court also takes the view that it should take into consideration the defects identified by it in the European arrest warrant and, if it finds them to be substantial in nature, that it should have the power to lift MM's provisional detention on the basis of that procedural ground.

142. I would recall, in this regard, that that provisional detention is the result of a decision taken by the referring court on 29 July 2020 further to an application made to that effect the previous day by the public prosecutor.

143. That provisional detention order was upheld by the court of appeal body.

144. A fresh application for review of the lawfulness of MM's provisional detention is now before the referring court. This reference for a preliminary ruling was thus made in the context of proceedings under Article 270 of the NPK, which were initiated by MM's defence with a view to lifting MM's provisional detention.

145. As a preliminary point, it appears to me important to note that EU law, as it currently stands, has not yet harmonised the conditions under which a person who is the subject of a criminal prosecution can be placed in provisional detention. [91] It is only in the conditions laid down in its national law that the court having jurisdiction in matters of provisional detention may decide to adopt such a measure and, where appropriate, interrupt its execution if it finds that such conditions are no longer met.

146. That being said, I would not go as far as taking the view, as the Commission seems to suggest, that the entirety of proceedings before the referring court are outside the scope of EU law, such that, in accordance with Article 51(1) of the Charter, the Charter would not apply. Since, as I have previously stated, in the case at issue in the main proceedings, judicial review of the validity of the European arrest warrant must be conducted as part of those proceedings concerning whether or not MM should be kept in provisional detention, Framework Decision 2002/584 and Article 47 of the Charter remain applicable. Since, as is apparent from the foregoing considerations, the system

90 The referring court draws a parallel to the case that gave rise to the judgment of 17 January 2019, *Dzivev and Others* (C-310/16, EU:C:2019:30), in so far as that case concerned, in the referring court's view, the consequences of a decision given by an authority which acted beyond its remit (use of evidence gathered further to the interception of telecommunications authorised by a judicial authority which had just been stripped of the power to grant such authorisation).

91 For an illustration of the limits on the applicability of Directive 2016/343 in matters of provisional detention and on the applicability of Articles 6 and 47 on the Charter in that regard, see judgment of 28 November 2019, *Spetsializirana prokuratura* (C-653/19 PPU, EU:C:2019:1024). See also Opinion of Advocate General Pitruzzella in *Spetsializirana prokuratura* (C-653/19 PPU, EU:C:2019:983, point 15 et seq.).

established by that framework decision is based on the guarantee of a review by a court of the European arrest warrant, the performance of such a review constitutes in all cases an implementation of EU law, in accordance with Article 51(1) of the Charter, regardless of the stage of the criminal proceedings at which it occurs.

147. Having made that clarification, it is my view that, given the limits inherent in the instrument of judicial cooperation in criminal matters that is the European arrest warrant, neither Framework Decision 2002/584 nor Article 47 of the Charter requires the referring court to release a person who is the subject of a provisional detention order if it finds that the European arrest warrant that led to that person's surrender is invalid.

148. In accordance with Article 1(1) of that framework decision, 'the aim of the mechanism of the European arrest warrant is to enable *the arrest and surrender* of a requested person, in the light of the objective pursued by the framework decision, so that the crime committed does not go unpunished and that that person is prosecuted or serves the custodial sentence ordered against him'.[92] It follows that, where the requested person has been arrested and then surrendered to the issuing Member State, the European arrest warrant has, in principle, exhausted its legal effects, with the exception of the effects of the surrender expressly provided for in Chapter 3 of Framework Decision 2002/584.[93]

149. In the light of those limits inherent in the European arrest warrant mechanism, it should be observed that that mechanism is not an order for the detention of that person in the issuing Member State.

150. That situation must be distinguished from the situation prevailing in the executing Member State. Although, under Article 12 of Framework Decision 2002/584, any detention of the person arrested in the executing Member State on the basis of a European arrest warrant must be decided in accordance with the national law of that Member State, that warrant represents the necessary basis for such detention. This means that, if the executing judicial authority is moved to refuse to execute a European arrest warrant, the detention order adopted pending the surrender of the person concerned loses its legal basis.

151. Following the surrender of the requested person to the issuing Member State, only a national measure adopted by a judicial authority of that Member State is capable of forming the legal basis for detention.[94] Thus, once surrendered, the person who is the subject of a criminal prosecution in that Member State can be detained only on the basis of a national provisional detention order which, depending on the specific features of the national laws, may take the form of a national arrest warrant

92 Judgment of 6 December 2018, *IK (Enforcement of an additional sentence)* (C-551/18 PPU, EU:C:2018:991, paragraph 39). Emphasis added.

93 See, in this regard, Opinion of Advocate General Sharpston in *IK (Enforcement of an additional sentence)* (C-551/18 PPU, EU:C:2018:890, points 81 and 82). She describes the process covered by Framework Decision 2002/584 as a '"loop" which begins when the European arrest warrant is issued … [and] is closed on execution of the European arrest warrant, which is effected by the surrender of the person concerned' (point 83). She infers from this that 'the effects of that process cannot extend beyond the ambit or objective of [that] [f]ramework [d]ecision, that is to say the surrender of the requested person. Any effects of that process which persist after the surrender are clearly defined in Chapter 3 of the Framework Decision' (point 84).

94 The judgment of 6 December 2018, *IK (Enforcement of an additional sentence)* (C-551/18 PPU, EU:C:2018:991, paragraph 56) contains useful guidance in this regard, even though it must be made clear, first, that it relates to a European arrest warrant issued for the purposes of enforcing a custodial sentence or detention order and, second, it concerns a situation in which the failure to mention an additional sentence in that warrant did not affect the warrant's validity. When it had to respond to the argument that, in essence, the decision of the executing judicial authority amounts to the ground for deprivation of liberty in the issuing Member State, as a result of which a sentence cannot be served which has not been the subject of a decision of the executing judicial authority and for which surrender has not been granted, the Court held that 'the decision of the executing authority is not intended to grant, in the present case, enforcement of a custodial sentence in the issuing Member State … [T]hat decision *merely grants surrender of the person requested*, in accordance with the provisions of Framework Decision 2002/584, so that the offence committed does not go unpunished. *The basis for the enforcement of the custodial sentence lies in the enforceable judgment* pronounced in the issuing Member State which must be indicted pursuant to Article 8(1)(c) of that framework decision' (paragraph 56, emphasis added).

followed, as the case may be, by a judicial decision placing that person in provisional detention if the conditions laid down in national law to that end are satisfied. It follows that provisional detention in the context of a criminal prosecution in the issuing Member State is not based on the issuing of a European arrest warrant, but rather follows from a lawfully issued national detention order.

152. It is for the national court having jurisdiction, in each case, to determine whether a national coercive detention order has been adopted against that person and whether it was adopted in a manner consistent with the national law of the issuing Member State.

153. Specifically, it is in the light of the national law of the issuing Member State that it is necessary to determine what consequences the absence of a valid national arrest warrant may have on the decision to place in provisional detention, and then whether or not to keep in such detention, a person who is the subject of a criminal prosecution. [95]

154. I would, however, point out that, in accordance with settled case-law, the Member States are required to exercise their competence in criminal matters in accordance with EU law. [96]

155. It therefore falls to the national court to take every step to preserve, in so far as possible, the effectiveness of the system of surrender established by Framework Decision 2002/584. It is for that reason that any decision to release the person concerned should be accompanied or followed by appropriate measures to prevent that person from absconding again. The absence of such measures could limit the effectiveness of the system of surrender introduced by that framework decision and, therefore, hamper the achievement of the objectives pursued by it, [97] which include preventing crime going unpunished. [98] The effectiveness of judicial cooperation in criminal matters and the mutual trust between Member States would suffer greatly if a surrender process such as that carried out in the present case were to see its effects undone, resulting in the surrendered person absconding and necessitating the issuing of a new European arrest warrant.

156. I would point out, finally, that the foregoing analysis is without prejudice to the possibility of the person who was the subject of an invalid European arrest warrant bringing, in accordance with the national law of the issuing Member State, an action for damages before the national court having jurisdiction in that regard.

157. I infer from all the foregoing considerations that Framework Decision 2002/584 and Article 47 of the Charter are to be interpreted as not requiring that the finding by the referring court that a European arrest warrant was issued unlawfully, in so far as it is not based on a '[national] arrest warrant or any other enforceable judicial decision having the same effect', within the meaning of Article 8(1)(c) of that framework decision, has the effect of releasing a person placed in provisional detention following his surrender by the executing Member State to the issuing Member State.

158. It is for the referring court to decide, in accordance with its national law, what consequences the absence of such a national measure, as the legal basis for a European arrest warrant, may have for the decision whether or not to keep the accused person in provisional detention, whilst ensuring not to undermine the effectiveness of the system of surrender established by Framework Decision 2002/584.

95 I would point out, in this regard, that MM was not the subject of an order adopted by the public prosecutor pursuant to Article 64(2) of the NPK; such a measure is seemingly the method normally used in Bulgaria to issue a European arrest warrant for a person who is the subject of a criminal prosecution.

96 See inter alia, to that effect, judgment of 24 November 1998, *Bickel and Franz* (C-274/96, EU:C:1998:563, paragraph 17). See also judgment of 2 April 2020, *Ruska Federacija* (C-897/19 PPU, EU:C:2020:262, paragraph 48 and the case-law cited).

97 See, by analogy, in the context of the expiry of the time limits laid down in Article 17 of Framework Decision 2002/584, judgment of 16 July 2015, *Lanigan* (C-237/15 PPU, EU:C:2015:474, paragraph 50).

98 See, inter alia, judgment of 6 December 2018, *IK (Enforcement of an additional sentence)* (C-551/18 PPU, EU:C:2018:991, paragraph 39).

V. Conclusion

159. In the light of all the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria) as follows:

(1) Article 8(1)(c) 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, is to be interpreted as meaning that a European arrest warrant must be regarded as invalid where it is not based on a '[national] arrest warrant or any other enforceable judicial decision having the same effect', within the meaning of that provision. That concept covers the national measures adopted by a judicial authority to search for and arrest a person who is the subject of a criminal prosecution, with a view to his appearance before a court for the purpose of conducting the stages of the criminal proceedings. It is for the referring court to determine whether a national measure putting a person under investigation, such as that upon which the European arrest warrant at issue in the main proceedings is based, produces such legal effects.

(2) Where provision is not made in the legislation of the issuing Member State for court proceedings for the purpose of reviewing the conditions under which a European arrest warrant was issued by an authority which, whilst participating in the administration of justice in that Member State, is not itself a court, the principle of primacy of EU law and the right to effective judicial protection, which is enshrined in Article 47 of the Charter, are to be interpreted as requiring the national court before which an action has been brought to challenge the lawfulness of the continued provisional detention of a person who has been surrendered pursuant to a European arrest warrant issued on the basis of a national measure that cannot be regarded as a '[national] arrest warrant or any other enforceable judicial decision having the same effect', within the meaning of Article 8(1)(c) of Framework Decision 2002/584, as amended by Framework Decision 2009/299, and in the context of which a plea in law is raised alleging that that European arrest warrant is invalid in the light of EU law, to find that it has jurisdiction to conduct such a review of validity.

(3) Framework Decision 2002/584, as amended by Framework Decision 2009/299, and Article 47 of the Charter of Fundamental Rights are to be interpreted as not requiring that the finding by the referring court that a European arrest warrant was issued unlawfully, in so far as it is not based on a '[national] arrest warrant or any other enforceable judicial decision having the same effect', within the meaning of Article 8(1)(c) of that framework decision, as amended, has the effect of releasing a person placed in provisional detention following his surrender by the executing Member State to the issuing Member State.

    It is for the referring court to decide, in accordance with its national law, what consequences the absence of such a national measure, as the legal basis for a European arrest warrant, may have for the decision whether or not to keep the accused person in provisional detention, whilst ensuring not to undermine the effectiveness of the system of surrender established by the Framework Decision, as amended.