

Erosion of the Principle of Mutual Recognition. European Arrest Warrant and the Principle of Mutual Recognition in the Light of the Recent CJEU Rulings

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Keywords:

EU criminal law,
mutual recognition,
mutual trust,
European Arrest
Warrant,
fundamental rights,
EU law,
the Court of Justice of
the European Union

Abstract: Effective implementation of mutual recognition in the Area of Freedom, Security, and Justice requires mutual trust between the Member States. Mutual trust has been eroded in some Member States due to the rule of law crisis. However, it is not only the rule of law crisis, but also the abandonment of the shared values of respect for fundamental rights as well as the differences in the prosecutorial systems of respective Member States, which have caused changes in the perception of the principle of mutual recognition. This paper will examine the evolving approach to the principle of mutual recognition based on the recent Court of Justice of the European Union rulings on the European arrest warrant. The analysis concludes that the CJEU attaches more importance to the protection of the principle of mutual recognition, the prosecution of perpetrators of crime, and the unwavering presumption of respect for fundamental rights by the Member States than to the effective protection of fundamental rights.

1. Introduction

It has been 25 years since the meeting of the European Council in Cardiff (15–16 June 1998) and its expression of its position on the need to start the process to improve mutual recognition and execution of judgements in criminal cases. The Cardiff meeting indicated that mutual recognition of criminal judgements was intended to strengthen the effective cooperation

in criminal matters for the purpose of preventing cross-border crime, while, according to some researchers, also providing an alternative to the process of harmonisation of criminal law.¹ In essence, it was “the recognition by each Member State of decisions of courts from other Member States with a minimum of procedure and formality.” In the following years, the European Council held a summit in Tampere (15–16 October 1999), which resulted in a declaration that mutual recognition of court decisions and judgments was to become a “milestone” of the cooperation in criminal as well as civil cases.² The Communication from the Commission to the Council and the European Parliament³ was adopted on 26 July 2000. It concerned

¹ See: Hans Nilsson, “Mutual Trust or Mutual Mistrust?,” in *La Confiance Mutuelle Dans l’Espace Pénal Européen/Mutual Trust in the European Criminal Area*, eds. Gilles de Kerchove and Anne Weyembergh (Brussels: de l’Université de Bruxelles, 2005), 29; Valsamis Mitsilegas, “The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU,” *Common Market Law Review* 43, no. 5 (2006): 1278; Valsamis Mitsilegas, *EU Criminal Law* (Oxford: Hard Publishing, 2009), 116; Steve Peers, “Mutual Recognition and Criminal Law in the European Union: Has the Council Got It Wrong?,” *Common Market Law Review* 41, no. 5 (2004): 5–36; Susie Alegre and Marisa Leaf, “Mutual Recognition in European Judicial Cooperation: A step Too Far Too Soon? Case Study – the European Arrest Warrant,” *European Law Journal* 10, no. 2 (2004): 200–217; Andrzej Sakowicz, “Some Reflections on the Mutual Recognition as a Mode of Governance in EU Justice and Home Affairs,” in *Current Problems of the Penal Law and the Criminology. Aktuelle Probleme des Strafrechts und der Kriminologie*, ed. Emil W. Pływaczewski (Białystok: Temida 2, 2009), 493–507.

² “Presidency Conclusions, Tampere European Council, 15–16 October 1999,” Council of the European Union, October 16, 1999, accessed March 21, 2023, <https://www.refworld.org/docid/3ef2d2264.html>. In point 33 we read that “Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities.” See: Maria Fletcher, Robin Löf, and Bill Gilmore, *EU Criminal Law and Justice* (Cheltenham: Edward Elgar Publishing, 2008), 105; Guy Stressens, “The Principle of Mutual Confidence between Judicial Authorities in the Area of Freedom, Justice and Security,” in *L’espace pénal européen: enjeux et perspectives*, eds. Gilles de Kerchove and Anne Weyembergh (Bruxelles: Editions de l’Université de Bruxelles, 2002), 93.

³ Communication from the Commission to the Council and the European Parliament. Mutual Recognition of Final Decisions in Criminal Matters, COM(2000) 495.

the issue of mutual recognition of judgements ending criminal proceedings,⁴ and the European Council promulgated the Hague Programme,⁵ that reaffirmed the importance of the principle of mutual recognition in the formation of a single judicial area.⁶

The above documents indicate that recognition of judgements generally implies their automatic acceptance and enforcement. It seems that the “automatism” of performance is a peculiar specificity of mutual recognition. It may lead to the situation where a judgement is recognised and enforced even in the case where the authorities of a particular Member State would not have issued such a judgement in their own legal system. This has been dictated not only by the growing need for a uniform judicial area within the EU, but by an insufficient process of harmonisation of criminal law. The rulings of the Court of Justice of the European Union (hereinafter the Court or the CJEU) concerning the *ne bis in idem* principle issued in the pre-Lisbon period excellently exemplify those facts. The joined cases *Hüseyin Gözütok* (C-187/01) and *Klaus Brügge* (C-385/01),⁷ seeing

⁴ The Communication indicated that judicial cooperation could be based on the concept of mutual recognition “which, simply stated, means that once a certain measure, such as a decision taken by a judge in exercising his or her official powers in one Member State, has been taken, that measure in so far as it has extranational implications – would automatically be accepted in all other Member States, and have the same or at least similar effects there.”

⁵ The Hague Programme: strengthening freedom, security and justice in the European Union, OJ C 53, 3.3.2005, pp. 1–14; Anne Weyembergh, “Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme,” *Common Market Law Review* 42, no. 6 (2005): 1574–1577.

⁶ Mitsilegas, *EU Criminal Law*, 116.

⁷ CJEU Judgement of 11 February 2003, *Hüseyin Gözütok and Klaus Brügge*, Case C-187/01 et C-385/01, ECLI:EU:C:2003:87, para. 33; Nadine Thwaites, “Mutual Trust in Criminal Matters: The ECJ Gives a First Interpretation of a Provision of the Convention Implementing the Schengen Agreement. The Judgement of 11 February 2003 in Joined Cases C-187/01 and C-385/01, Hüseyin Gözütok and Klaus Brügge,” *German Law Journal* 4, no. 3 (2003): 252–262; Gerard Conway, “Judicial Interpretation and the Third Pillar. Ireland’s Acceptance of the European Arrest Warrant and the Gözütok and Brügge Case,” *European Journal of Crime, Criminal Law and Criminal Justice* 13, no. 2 (2005): 280–281; John A.E. Vervaele, “Case Law. Joined Cases C-187/01 and C-385/01, Criminal Proceedings against Hüseyin Gözütok and Klaus Brügge, Judgement of the Court of Justice of 11 February 2003,” *Common Market Law Review* 41, no. 3 (2004): 795–812; Anne Weyembergh, “Comment on CJEU, 11 February 2003, Joined Cases C-187/01 and C-385/01 Criminal Proceedings v Hüseyin Gözütok and Klaus Brügge,” in *The Court of Justice and European Criminal Law: Leading*

the differences in the operation of the judicial authorities of the Member States and noting the differences in their criminal policies, the Court stated that the *ne bis in idem* principle expressed in Article 54 of the Convention implementing the Schengen Agreement implied that “there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied.” The CJEU came to a similar conclusion in the *van Esbroeck* case, where it recognised that the existence of different legal classifications of the same act in two countries cannot prevent the application of the *ne bis in idem* principle, precisely because of the mutual trust between the Member States, the identity of legal classification of such approach or the protected legal interest that does not necessarily requires specific conduct to be regarded as “the same act”. The decisive criterion is the identity of the material acts understood as “the existence of a set of concrete circumstances which are inextricably linked together.”⁸ This statement is self-evident. In view of the diverse ways of expressing the statutory characteristics of criminal offences in the Member States, it is impossible to ensure the implementation of the guarantees provided by the *ne bis in idem* principle without accepting the existing differences in this regard.⁹ More broadly, the trust that each Member State and its citizens should have in the administration of justice of other Member States is a logical consequence of the establishment of an area of freedom, security, and justice without internal borders, and the resistance of Member States

Cases in a Contextual Analysis, eds. Valsamis Mitsilegas, Alberto di Martino, and Leandro Mancano (Chicago: Hart Publishing, 2019), 199–211; Sibyl Stein, “Ein Meilenstein für das europäische ‚ne bis in idem,‘” *Neue Juristische Wochenschrift*, no. 16 (2003): 1162–1164; Daniel Thym, “Strafklageverbrauch bei Einstellung durch die StA,” *Neue Zeitschrift für Strafrecht*, no. 6 (2003): 334–335.

⁸ CJEU Judgement of 9 March 2006, *van Esbroeck*, Case C-436/04, ECLI:EU:C:2006:165, point 36.

⁹ V. Mitsilegas demonstrates by examining the evolution of the *ne bis in idem* principle based on the Court’s jurisprudence that the protection of fundamental rights can be the result of mutual trust; see Valsamis Mitsilegas, “The Symbiotic Relationship between Mutual Trust and Fundamental Rights in Europe’s Area of Criminal Justice,” *New Journal of European Criminal Law* 6, no. 4 (2015): 458–465.

to the concept of harmonisation of substantive and procedural criminal law by the EU legislature.

With the entry into force of the Treaty of Lisbon, the principle of mutual recognition found its way into the EU primary law. *De lege lata*, it is explicitly mentioned in Articles 67 (4), 70, 81 (1), and 82 of the TFEU. This allows for the assumption that the principle of mutual recognition is a constitutional principle that constitutes the basis of the Area of Freedom, Security and Justice. Although the adopted model of cooperation in criminal matters has been based on the respect for the differences and systemic autonomy in respective Member States, it is easier to trust and accept the decision of another country's court if the equivalence of national laws can be expected to be achieved at some point in the future. The original desire to use the mutual recognition mechanism as an alternative to harmonisation, which was dictated by the preservation of the *status quo* of national legal systems and the wrongly understood State's sovereign monopoly of power, could not be effective.¹⁰ One must agree with P. Asp that it is unrealistic to effectively build the cooperation in criminal matters on the basis of the principle of mutual recognition while abandoning the process of harmonisation of criminal law.¹¹ Therefore, in Article 82 of the TFEU, it is rightly assumed that the cooperation in criminal matters within the EU is based on two methods: the principle of mutual recognition of judgements

¹⁰ On the relationship between national sovereignty and the principle of mutual recognition, see Suzanne Andrea Bloks and Ton van den Brink, "The Impact on National Sovereignty of Mutual Recognition in the AFSJ. Case-Study of the European Arrest Warrant," *German Law Journal* 22, no. 1 (2021): 45–64; Massimo Fichera, "The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?," *European Law Journal* 15, no. 1 (2009): 70; Jan Komárek, "European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contrapunctual Principles," *Common Market Law Review* 44, no. 1 (2007): 9–40; Oresto Pollicino, "European Arrest Warrant and Constitutional Principles of the Member States: A Case Law-Based Outline in the Attempt to Strike the Right Balance Between Interacting Legal Systems," *German Law Journal* 9, no. 10 (2013): 1313–1355; Andrzej Sakowicz, *Zasada ne bis in idem w ujęciu paneuropejskim [The "ne bis in idem" Principle in Criminal Law in a Pan-European Perspective]* (Białystok: Temida 2, 2011), 145–166.

¹¹ Petter Asp, "Mutual Recognition and the Development of Criminal Law Cooperation within the EU," in *Harmonisation of criminal law in Europe*, eds. Erling Johannes Husabø and Asbjørn Strandbakken (Antwerpen–Oxford: Intersentia, 2005), 29.

and judicial decisions, and the approximation of laws and regulations of the Member States. Leaving aside the relationship between those mechanisms, the statement that harmonisation of criminal law contributes to a better implementation of mutual recognition should raise no objections. This condition is necessary, but not sufficient.¹²

Effective implementation of mutual recognition in the Area of Freedom, Security, and Justice requires mutual trust between the Member States.¹³ The Member States must mutually accept the fact that their legal systems are based on this “foundation”. There must be strong belief, including among both representatives of law enforcement authorities and judges of respective Member States, that the internal regulations of respective Member States are adopted by their legislatures with genuine and unquestionable democratic legitimacy derived from universal and free elections, and that they are based on the universal principles and values of the European legal culture. Those bodies must be aware that the legal systems of

¹² Valsamis Mitsilegas, “Autonomous Concepts, Diversity Management and Mutual Trust in Europe’s Area of Criminal Justice,” *Common Market Law Review* 57, no. 1 (2020): 47.

¹³ Also Andrea Miglionico and Francesco Maiani, “One Principle to Rule Them All? Anatomy of Mutual Trust in the Law of the Area of Freedom, Security and Justice,” *Common Market Law Review* 57, no. 1 (2020): 13. The concept of mutual trust has been extensively elaborated by Auke Willems, see “Mutual Trust as a Term of Art in EU Criminal Law: Revealing Its Hybrid Character,” *European Journal of Legal Studies* 9, no. 1 (2016): 211–249. A. Willems aptly notes that “Mutual recognition functions on a presumption of mutual trust. The logic is that the ‘extraterritoriality of judicial decisions,’ created by mutual recognition, will only be accepted if there is sufficient mutual trust between Member States,” see Auke Willems, “The Court of Justice of the European Union’s Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal,” *German Law Journal* 20, no. 4 (2019): 469. The CJEU also recognises mutual trust as a normative principle underlying cooperative regulatory instrument. In the Opinion 2/13 on the Accession of the EU to the European Convention on Human Rights (ECHR), the CJEU emphasised that “the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained,” The CJEU Opinion 2/13 of 18 December 2014, point 191; Sacha Prechal, “Mutual Trust Before the Court of Justice of the European Union,” *European Papers* 2, no. 1 (2017): 76. It should be noted that the relationship between mutual recognition and mutual trust is the subject of debate, see Christine Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford: University Press, 2013); Jannemieke Ouwerkerk, *Quid Pro Quo?: A comparative law perspective on the mutual recognition of judicial decisions in criminal matters* (Larcier: Intersentia, 2011).

other countries, including in the area of criminal law, are characterised by a common standard of respect for the fundamental rights and freedoms of individuals. The standard does not have to be identical but must be convergent. Only then is it possible to move closer to effective and full implementation of the principle of mutual recognition. In this context, one must agree with the CJEU ruling, issued in respect of the *Puig Gordi and Others* case, that the high level of trust between Member States, on which the mutual recognition mechanism is based, is founded on the assumption that national courts issuing a European arrest warrant meet the requirements inherent in the fundamental right to a fair trial enshrined in the second paragraph of Article 47 of the Charter of Fundamental Rights. That fundamental right is of cardinal importance as it guarantees that all the rights which individuals derive from the EU law will be protected and that the values common to the Member States set out in Article 2 of the TEU, in particular the value of the rule of law, will be safeguarded.¹⁴

It would seem that with the creation of the single Area of Freedom, Security, and Justice, the integration process in the European criminal justice area would be strengthened. However, the opposite has happened, as illustrated by the recent case law of the CJEU concerning the European arrest warrant. Mutual trust has been eroded in some Member States (especially Poland and Hungary) due to the rule of law crisis. However, it is not only the rule of law crisis, but also the abandonment of the shared values of respect for fundamental rights by the Member States, as well as the differences in the prosecutorial systems of respective Member States, that have caused changes in the perception of the principle of mutual recognition. The purpose of this paper is to critically present those developments by means of the example of the case law of the CJEU on the “flagship” of mutual recognition, which undoubtedly is the European arrest warrant, and to point out the risks in the context of both the operation of the European Arrest Warrant and the very model of cooperation in criminal matters based on the principle of mutual recognition.

¹⁴ CJEU Judgement of 31 January 2023, *Puig Gordi and Others*, Case C-158/21, ECLI:EU:C:2023:57; CJEU Judgement of 22 February 2022, *Openbaar Ministerie*, Case C562/21 PPU et C563/21 PPU, EU:C:2022:100, point 45.

2. Violation of the Fundamental Rights Imposing Limitation on the Principle of Mutual Recognition

The issue of protection of the fundamental rights in the area of freedom, security, and justice is complex. On the one hand, it can be seen that the legal framework based on the principle of mutual recognition has contributed to an enhanced protection of the fundamental rights. The supranational approach to the *ne bis in idem* principle in Article 54 of the Convention implementing the Schengen Agreement (Article 50 of the Charter of Fundamental Rights) is a good example. The fact that the *ne bis in idem* principle has received “supranational” application under Article 54 of the Schengen Convention is an expression of mutual trust in the legal systems of the Member States. It is thanks to mutual trust and the related mutual recognition of judgements in criminal cases, based on such trust, that it has become possible to protect individuals from being prosecuted again for the kindred offence, and that free movement of persons has become the reality as well as legal certainty has been guaranteed by respecting court judgements that have become finally enforceable despite the lack of harmonisation of the criminal legal regulations in the Member States.¹⁵

On the other hand, a normative possibility has provided for the refusal to execute mutual recognition instruments due to suspected violations of fundamental rights or basic principles of law. It is exemplified by Article 20(3) of the Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties¹⁶ and Article 11(1)(f) of Directive 2014/41/EU regarding the European Investigation Order in criminal matters. There are few examples of this nature. The EU legislature has rarely pointed to the construction of fundamental rights as the basis for the refusal to implement a legal instrument. Usually, however, do mutual recognition instruments contain a general clause stating the need to respect the fundamental rights and the fundamental principles of law contained in Article 6 of the Treaty on European Union.¹⁷

¹⁵ See broadly Mitsilegas, “The Symbiotic Relationship,” 459.

¹⁶ The Preamble to the same Directive 2014/41/EU affirms that the presumption of compliance by Member States with fundamental rights is rebuttable.

¹⁷ For example, Article 1(3) of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework

This is based on the assumption that membership in the European Union presumes the full respect of fundamental rights by all Member States, which, as emphasised by V. Mitsilegas, “creates mutual trust which in turn forms the basis of automaticity in inter-state cooperation in Europe’s area of criminal justice.”¹⁸ However, there can be no automaticity in the application of the principle of mutual recognition in the enforcement of judgements. Although the cooperation needs to take place within a limited timeframe, under strict deadlines, and on the basis of a pro-forma form annexed to the Framework Decisions and directives, there is still a limited but exhaustive list of obligatory or optional grounds to refuse the recognition and execution of a judicial decision.¹⁹ In addition, for the guarantee-related reasons, the list of obligatory grounds for any refusal to execute mutual recognition instruments cannot be reduced. The situation is different for optional grounds for any refusal. In this case, as the CJEU has stated in the *Wolzenburg* case,²⁰ a national legislature that chooses to limit the situations in which its executing judicial authority may refuse to surrender a requested person merely reinforces the system of surrender introduced by that Framework Decision to the advantage of the area of freedom, security, and justice.

As time has shown, the assumption based on a high level of mutual trust in the justice systems of the Member States has turned out to be an illusion. Quickly after the entry into force of the Treaty of Lisbon, which had

Decision, The Official Journal of the EU L 190, 18.7.2002, pp. 1–20. A similar approach regarding the protection of fundamental rights has been adopted in Article 3(4) of the Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, The Official Journal of the EU L 327, 5.12.2008, pp. 27–46.

¹⁸ Mitsilegas, “The Symbiotic Relationship,” 466; Valsamis Mitsilegas, “The Limits of Mutual Trust in Europe’s Area of Freedom, Security and Justice. From Automatic Inter-state Cooperation to the Slow Emergence of the Individual,” *Yearbook of European Law* 31, no. 1 (2012): 319–372.

¹⁹ A different view is expressed by V. Mitsilegas, see Valsamis Mitsilegas, “The European Model of Judicial Cooperation in Criminal Matters: Towards Effectiveness based on Earned Trust,” *Revista Brasileira de Direito Processual Penal* 5, no. 2 (2019): 571–572.

²⁰ CJEU Judgement of 6 October 2009, *Wolzenburg*, Case C-123/08, ECLI:EU:C:2009:616, point 58.

introduced a single legal regime within the European Union, there were symptoms in the case law of the Court indicating the possibility of limitation of the principle of mutual recognition by invoking the need to protect the fundamental rights. The CJEU was faced for the first time with the task of determining the normative position of fundamental rights in the European arrest warrant procedure under the case C-396/11, where Ciprian V. Radu claimed that the provisions of the Framework Decision on the EAW did not allow the executing authorities to check whether his right to a fair trial, the principle of presumption of innocence, and the right to liberty, which he derived from the Charter of Fundamental Rights and the European Convention on Human Rights (hereafter: the ECHR), were respected when the European arrest warrant was issued without his prior hearing. However, as C.V. Radu added, in accordance with Article 6 of the TEU, the provisions both of the Charter and the ECHR had become the provisions of the primary European Union law and, therefore, the Framework Decision 2002/584/JHA should have henceforth been interpreted and applied in accordance with the Charter and the ECHR. This view has been shared by Advocate General E. Sharpston in his Opinion of the Advocate General to the *Radu* case. The opinion states that:

while the record of the Member States in complying with their human rights obligations may be commendable, it is also not pristine. There can be no assumption that, simply because the transfer of the requested person is requested by another Member State, that person's human rights will automatically be guaranteed on his arrival there. There can, however, be a presumption of compliance which is rebuttable only on the clearest possible evidence. Such evidence must be specific; propositions of a general nature, however well supported, will not suffice.²¹

²¹ CJEU Judgement of 29 January 2013, *Radu*, Case C-396/11, ECLI:EU:C:2012:648. It seems that the position of AG E. Sharpston was inspired by the CJEU judgement in the *N.S. and Others* case (CJEU Judgement of 21 December 2011, Case C-411/10 et C-493/10, ECLI:EU:C:2011:865). In that case, the Court stated that the transfer of a person applying for an asylum under the Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1) would not have been possible if there were substantial grounds for believing that there were systemic flaws in the asylum procedure and reception

That view is not shared by the CJEU in its judgement of 29 January 2013.²² According to the Court, the Framework Decision 2002/584 – by establishing a new simplified and more effective system for the surrender of persons convicted or suspected of having violated criminal law – contributes to the establishment of the area of freedom, security, and justice based on the high degree of trust that should exist between the Member States.²³ Considering that the provisions of the Framework Decision 2002/584 precisely define the cases of mandatory and optional refusal to execute a warrant, the judicial authorities of the Member States – outside those cases – are obliged to act upon a European arrest warrant.²⁴ A concurring position was expressed in the *Melloni* Case.²⁵ In that case, the Court examined whether Article 4a(1) of the Framework Decision 2002/584/JHA should have been interpreted as precluding national judicial authorities, in the circumstances specified in that provision, from making the execution of a European arrest warrant conditional upon the conviction in question being open to review, in order to guarantee the rights of the defense of the person requested under the warrant. The case concerned a convict who was sentenced in Italy in absentia (*in absentia*) but was represented by a counsel. Meanwhile, the Spanish Constitution guaranteed the possibility of challenging a sentence *in absentia* in such a case, and therefore provided for a higher standard than that set

conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State (para. 86). See also Matilde Ventrella, “European Integration or Democracy Disintegration in Measures Concerning Police and Judicial Cooperation?,” *New Journal of European Criminal Law* 4, no. 3 (2013): 299–309. In *N.S. and Others* Case, the Court put an end to the boundless trust, stating that: at issue here is the *raison d'être* of the European Union and the creation of an area of freedom, security and justice (...) based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights” (point 83). See also Willems, “The Court of Justice,” 480.

²² CJEU Judgement of 29 January 2013, Radu, Case C-396/11, ECLI:EU:C:2012:648.

²³ CJEU Judgement of 29 January 2013 Radu, Case C-396/11, ECLI:EU:C:2012:648, point 34; See also the Court's similar reasoning in the CJEU Judgement of 28 June 2012, West Case, Case C-192/12 PPU, ECLI:EU:C:2012:404, point 53.

²⁴ CJEU Judgement of 29 January 2013, Radu, Case C-396/11, ECLI:EU:C:2012:648, point 35–36.

²⁵ CJEU Judgement of 26 February 2013, Melloni, Case C-399/11, ECLI:EU:C:2013:107.

by the Framework Decision 2009/299/JHA, which specifically normalised the grounds for the refusal to execute an EAW in the event of a conviction *in absentia*.

Focusing on the effectiveness of the European arrest warrant, the Court stated that the harmonisation of the conditions for execution of the warrant in the event of conviction *in absentia* reflected “the consensus reached by all the Member States regarding the scope to be given under EU law to the procedural rights enjoyed by persons convicted in absentia who are the subject of a European arrest warrant.”²⁶ It would be violated if Member States were allowed to invoke Article 53 of the Charter of Fundamental Rights to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State, a possibility not being provided for under the Framework Decision 2009/299, in order to avoid an adverse impact on the right to a fair trial and the rights of the defense guaranteed by the constitution of the executing Member State.²⁷ In the opinion of the CJEU, such a situation, by undermining the uniformity of the standard of protection of fundamental rights set forth in the Framework Decision 2009/299, would lead to a violation of the principles of mutual trust and mutual recognition, which the above-mentioned Framework Decision seeks to strengthen, and consequently would jeopardise its effectiveness.²⁸ Consequently, in that case,

²⁶ CJEU Judgement of 26 February 2013, Melloni, Case C-399/11, ECLI:EU:C:2013:107, point 62.

²⁷ CJEU Judgement of 26 February 2013, Melloni, Case C-399/11, ECLI:EU:C:2013:107, point 63. It should be added that, Article 53 of the Charter of Fundamental Rights is not an isolated article, but has to be read in the light of Articles 51 and 52 Charter, which refer to the existence of the plurality of sources of protection for fundamental rights binding the Member States; John Vervaele, “The European Arrest Warrant and Applicable of Fundamental Rights in the EU,” *Review of European Administrative Law* 6, no. 2 (2013): 52.

²⁸ In the *Melloni* case, the Court noted that “although the right of the accused to appear in person at his trial is an essential component of the right to a fair trial, that right is not absolute,” para. 49. Some scholar considers that in the case of the EAW, the European legislature has determined the applicable conditions and standards of the mutual recognition procedure, its scope of application, the procedural requirements, and the optional and obligatory grounds for refusal. Thus, the voluntary and obligatory refusal grounds are pre-determined by the EU and may not be changed or supplemented at the national level; see Bloks and van den Brink, “The Impact on National Sovereignty,” 58.

the Court has given priority to the effectiveness of mutual recognition based on presumed mutual trust.²⁹

The presumption that national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at the EU level was called into question in the joined Cases *Aranyosi* and *Căldăraru*.³⁰ The issue in those cases was that the conditions of detention to which P. Aranyosi and R. Căldăraru would have been subjected in Hungarian and Romanian prisons, respectively, violated fundamental rights, in particular Article 4 of the Charter of Fundamental Rights prohibiting inhuman or degrading treatment or punishment. This was particularly evidenced by the judgements of the ECtHRs, which found that Romania and Hungary had violated Article 3 of the ECHR.

At the outset of its argument, the Court pointed out that the prohibition of inhuman or degrading treatment or punishment provided for in Article 4 of the Charter of Fundamental Rights was absolute. Moreover, it is also closely linked to the respect for human dignity referred to in Article 1 of the Charter.³¹ Considering that the above provisions and Article 3 of the ECHR enshrine one of the fundamental values of the Union and its Member States, that all Member States must respect, the CJEU has presented a two-tier test for assessing the risk of inhuman or degrading treatment or punishment resulting from the execution of a European arrest warrant. First, a general assessment of the threat of inhuman or degrading

²⁹ See Mitsilegas, “The Symbiotic Relationship,” 469.

³⁰ CJEU Judgement of 5 April 2016, *Aranyosi* and *Căldăraru*, Case C-404/15 et C-659 PPU, ECLI:EU:C:2016:198. See also an interesting analysis of this judgement: Georgios Anagnostaras, “Mutual confidence is not blind trust! Fundamental rights protection and the execution of the European arrest warrant: *Aranyosi* and *Caldararu*,” *Common Market Law Review* 53, no. 6 (2016): 1675–1704; Adam Łazowski, “*Aranyosi* and *Caldararu* through the Eyes of National Judges,” in *The Court of Justice and European criminal law: leading cases in a contextual analysis*, eds. Valsamis Mitsilegas, Alberto di Martino, and Leandro Mancano (Chicago: Hart Publishing, 2019), 438–454. For the need to accept different legal rules of another Member State in criminal law, see, for instance, Sacha Prechal, “Mutual Trust,” 84–86. S. Prechal is right in saying that “Finally, ‘equivalent’ does not necessarily mean ‘identical’. Mutual trust implies respect for a degree of difference, as long as an equivalent level of protection is assured,” p. 84.

³¹ A similar judgement was issued in the judgement of the CJEU of 12 June 2003, *Schmidberger*, Case C-112/00, ECLI:EU:C:2003:333, point 80.

treatment should be carried out due to the general conditions of detention prevailing in the issuing Member State. Such an assessment has to take place where the judicial authority of the executing Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State, having regard to the standard of protection of fundamental rights guaranteed by the EU law.³² To this end, the executing judicial authority should rely on objective, reliable, accurate, and duly updated data on the conditions of imprisonment prevailing in the issuing Member State, which prove the existence of irregularities, whether systemic or general, or concerning certain groups of persons or certain penitentiary units. This information may come, in particular, from international court judgements, such as judgements of the ECtHR, court judgements of the issuing Member State, and decisions, reports, and other documents drafted by the Council of Europe bodies or originating from the United Nations system.³³

A finding in the first stage of the test that there is a real threat of inhuman or degrading treatment in a Member State due to the general conditions of detention prevailing in the issuing Member State may lead to the refusal to execute the arrest warrant. A finding that there is an actual risk of a violation of Articles 1 and 4 of the Charter and Article 3 of the ECHR in a Member State obliges the judicial authority executing the Member State warrant to determine “whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State.”³⁴ To this end, the executing authority should, on the basis of Article 15(2) of the Framework Decision 2002/584/JHA, request the judicial authority of the issuing Member State to immediately provide the necessary supplementary information with regard to the conditions under which the person covered by the European arrest warrant is to be detained in the indicated

³² CJEU Judgement of 5 April 2016, Aranyosi and Căldăraru, Cases C-404/15 et C-659 PPU, ECLI:EU:C:2016:198, point 88.

³³ CJEU Judgement of 5 April 2016, Aranyosi and Căldăraru, Cases C-404/15 et C-659 PPU, ECLI:EU:C:2016:198, point 89.

³⁴ CJEU Judgement of 5 April 2016, Aranyosi and Căldăraru, Cases C-404/15 et C-659 PPU, ECLI:EU:C:2016:198, point 92 and 94.

Member State.³⁵ If the executing judicial authority determines that there is a real risk of inhuman or degrading treatment in the specific case, the executing judicial authority must decide whether the surrender procedure should be brought to an end.³⁶

The judgement of the CJEU under the joined Cases *Aranyosi* and *Căldăraru* is groundbreaking. As V. Mitsilegas rightly points out, it confirms “a shift from automatic mutual recognition based on uncritical mutual trust (...) to earned trust on the basis of an individualised assessment of the fundamental rights consequences of surrender on the ground.”³⁷ The trust in the legal system of a Member State, including in the protection of fundamental rights, that is expressed at the stage of admission to the European Union, is not permanent. It may be diminished when legal changes occur in the legal system of such a state, that lead to violations of the values

³⁵ CJEU Judgement of 5 April 2016, *Aranyosi* and *Căldăraru*, Case C-404/15 et C-659 PPU, ECLI:EU:C:2016:198, point 95.

³⁶ CJEU Judgement of 5 April 2016, *Aranyosi* and *Căldăraru*, Case C-404/15 et C-659 PPU, ECLI:EU:C:2016:198, point 104; see Szilárd Gáspár Szilágyi, “Joined Cases *Aranyosi* and *Căldăraru*. Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant,” *European Journal of Crime, Criminal Law and Criminal Justice* 24, no. 2–3 (2016): 197–219.

³⁷ Valsamis Mitsilegas, “The European Model,” 582. It is suggested that, under the joined cases *Aranyosi* and *Căldăraru* cases, the mutual trust presumption gave way to the protection of human dignity in the form of the prohibition of torture and inhuman and degrading treatment, governed under Article 1 and Article 4 EU Charter, and under Article 4 EU Charter; see Catherine Dupré, “The Rule of Law, Fair Trial and Human Dignity: The Protection of EU Values After *LM*,” in *Defending Checks and Balances in the EU Member State*, eds. Armin von Bogdandy, et al. (Berlin: Springer, 2021), 437. An interesting evolution of the principle of mutual recognition is presented by E. Xanthopoulou, see Ermioni Xanthopoulou, “Mutual Trust and Rights in the EU Criminal and Asylum Law: Three Phases of Revolution and the Unchartered Territory Beyond Blind Trust,” *Common Market Law Review* 55, no. 2 (2018): 489–509; Małgorzata Wąsek-Wiaderek, “Ryzyko naruszenia praw człowieka jako przesłanka odmowy wykonania europejskiego nakazu aresztowania (uwagi na tle najnowszego orzecznictwa trybunału sprawiedliwości unii europejskiej) [Risk if Human Rights Violations as a Premise for Refusal to Execute A European Arrest Warrant (Remarks Against the Background of Recent Jurisprudence of the Court of Justice of the European Union)],” in *Verba volant, scripta manent. Proces karny, prawo karne skarbowe i prawo wykroczeń po zmianach z lat 2015–2016. Księga pamiątkowa poświęcona Profesor Monice Zbrojewskiej*, eds. Tomasz Grzegorzczak and Radosław Olszewski (Warsaw: Wolters Kluwer, 2017), 486–498.

on which the European Union is founded (Article 2), particularly including fundamental rights. The mutual trust may also be weakened by changing practices of judicial authorities (e.g. in the execution of imprisonment sentences). The occurrence of such situations cannot be accepted through indiscriminate mutual trust.³⁸ Blind trust in the correctness of a Member State's legal system and the pursuit of effective prosecution in the space of freedom, security, and justice without internal borders cannot lead to a violation of dignity and compliance with the prohibition of inhuman or degrading treatment or punishment. What is important is not only the goal of achieving material justice, but also the path leading to it. The need to preserve a balance between substantive justice and formal justice is obvious, and the fundamental rights guaranteed by the Framework Decision 2002/584/JHA must not be illusory.

The formal approach to the joined Cases *Aranyosi* and *Căldăraru* was presented by Advocate General Y. Bot. Although the Advocate General acknowledged that the conditions in Hungarian and Romanian prisons demonstrated a persistent violation of the statutory principles set forth in Article 6(1) of the TEU,³⁹ he nevertheless concluded that a real risk of violation in the issuing Member State of the fundamental rights of the person to

³⁸ As noted by some researchers, however, “blind mutual recognition of foreign decisions is not feasible due to the lack of trust that is caused by the differences in member states’ criminal justice systems”; see Gert Vermeulen, Wendy de Bondt, and Peter Verbeke eds., *Rethinking International Cooperation in Criminal Matters in The EU* (Antwerpen, Apeldoorn, Portland: Maku, 2012), 337. On the essence of mutual trust in Europe’s area of freedom, security and justice, see Ester Herlin-Karnell, “From Mutual Trust to the Full Effectiveness of EU Law: 10 Years of the European Arrest Warrant,” *European Law Review* 38, no. 1 (2013): 79; Damien Gerard, “Mutual Trust as Constitutionalism?,” in *Mapping Mutual Trust Understanding and Framing the Role of Mutual Trust in EU law*, eds. Evelien Brouwer and Damien Gerard (European University Institute: EUI WORKING PAPERS, 2016), 75; Thomas Wischmeyer, “Generating Trust Through Law? Judicial Cooperation in the European Union and the “Principle of Mutual Trust,” *German Law Journal* 17, no. 3 (2016): 339; Willems, “The Court of Justice,” 469–470.

³⁹ Opinion of Advocate General Yves’a Bot delivered on 3 May 2016 under the Joined Cases C-404/15 and C-659 PPU, *Aranyosi and Căldăraru* Case, ECLI:EU:C:2016:140, point 85, 86–88. As a result Advocate General Bot concluded that “I can only say that, by laying down the principle stated in Article 1(3) of the Framework Decision, the Union legislature did not intend to allow the executing judicial authorities to refuse to surrender the requested person in circumstances such as those at issue in the present cases” (point 93).

be surrendered should not have constituted the grounds for the refusal to execute a European arrest warrant. According to Advocate General Y. Bot, adoption of a different position would have resulted in the introduction of the ground for the refusal to execute an arrest warrant that was not envisaged by the EU legislature and would have contradicted the principle of certainty of law. According to the Advocate General, the only “lifeline” in a situation of serious and persistent violation of fundamental rights by a Member State should be the use of the mechanism provided for in Article 7 (2 and 3) of the TEU, which leads to the suspension of the European arrest warrant mechanism. In the case of this conceptual framework, the Advocate General sees a strong involvement of political factors. The tardiness of the Member States in their recognition of a serious and persistent violation of fundamental rights by one of them, and the subsequent suspension of some mechanism for the cooperation with that state, will be more like the proverbial “*Waiting for Godot*” than a way to ensure an effective protection of fundamental rights.

However, it is impossible to approach the CJEU judgement under the joined Cases *Aranyosi* and *Căldăraru* in an uncritical manner. First, the Court did not answer whether the adopted approach applied only to cases involving violations of the fundamental rights set forth in Article 4 of the Charter, or perhaps to any fundamental right. However, it seems that such a possibility should only exist for fundamental rights that are non-derogable. It should therefore be reserved only to exceptional circumstances in which the execution of a European arrest warrant would violate human dignity.⁴⁰ Second, the Court did not clarify whether the Member State executing an EAW could request the issuing state to provide information on

⁴⁰ While it is sometimes necessary to lower the level of protection of fundamental rights in order to achieve effectiveness in the cross-border fight against crime and to promote the mutual trust inherent in the international cooperation in criminal matters, violations of the absolute rights set forth in Article 4 of the Charter are excluded; see a similar view expressed by: T. Wahl, “Refusal of European Arrest Warrants Due to Fair Trial Infringements,” *Eucrime*, no. 4 (2020): 321. There are also opinions that advocate the full application of the protection of fundamental rights in the international cooperation in criminal matters; see, for example, Otto Lagodny, *Die Rechtsstellung des Auszuliefernden in der Bundesrepublik Deutschland* (Freiburg im Breisgau: Max-Planck-Institut für Ausländisches und Internationales Strafrecht, 1987), 256.

the conditions of detention on its own initiative, either, or whether it did so only at the request of the prosecuted person or his or her defense counsel. It seems that the judgement did not exclude the former possibility.⁴¹ Third, with its clear emphasis on the need for mutual trust as a pillar of creating and maintaining a space without internal borders and the unique nature of the permissible exceptions to the surrender of the subject of a warrant, the CJEU marginalised the effects of “bringing to an end” of a European arrest warrant when there was a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter. In such an exceptional situation, the person subject to a European arrest warrant cannot count on impunity. In a situation where a European arrest warrant has been issued for the purpose of conducting criminal proceedings, the executing state should, in accordance with the *aut dedere aut iudicare* principle, proceed to the takeover of the prosecution, provided that it has its own jurisdiction in the specific case. On the other hand, when a European arrest warrant has been issued in the execution of a sentence of imprisonment, the executing state or the subject of the warrant may implement the procedure for the execution of the judgement in the territory of the executing state (pursuant to Article 4(5) under the Framework Decision 2008/909).

The essential statements of the judgement under the joined Cases *Aranyosi* and *Căldăraru* have been reiterated in the subsequent judgements of the Court. In its judgement under the Case C-220/18 PPU,⁴² the Court indicated that the judicial authority of the executing state, when it had data proving the existence of systemic or general irregularities concerning the conditions of detention in the prisons of the issuing Member State, could not exclude the existence of a real risk that a person subject to a European arrest warrant would be subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter. The Court further assumed

⁴¹ Tomasz Ostropolski, “Naruszenie praw podstawowych jako przesłanka odmowy wykonania ENA – uwagi do wyroku Trybunału Sprawiedliwości z 5.04.2016 r. w sprawach połączonych C-404/15 *Aranyosi* i C-659/15 PPU *Căldăraru* [Infringement of Fundamental Rights as a Ground for Refusal to Execute an EAW: Remarks on the Judgement of the CJEU of April 5, 2016 in Jointed Cases C-404/15 *Aranyosi* and C-695/15 PPU *Căldăraru*],” *Europejski Przegląd Sądowy*, no. 11 (2016): 25.

⁴² CJEU Judgement of 25 July 2018, Generalstaatsanwaltschaft, Case C-220/18 PPU, ECLI:EU:C:2018:589.

that the executing judicial authority was required to assess only the conditions of detention in the prisons in which, according to the information available to it, it was likely that that person would be detained, including on a temporary or transitional basis. Moreover, the executing judicial authority must assess, to that end, solely the actual and precise conditions of detention of the person concerned that are relevant for determining whether that person will be exposed to a real risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights. Finally, the executing judicial authority may take into account information provided by the authorities of the issuing Member State other than the issuing judicial authority that “would indicate that the person subject to the warrant will not be subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights.”⁴³

Under the *Dorobantu* Case, on the other hand, the Court went into unnecessary casuistry. Wanting to “have its cake and eat it”, the CJEU based protection against inhuman or degrading treatment on an individual assessment of the situation of each person concerned by a European arrest warrant. This is a flawed assumption, as it merely amounts to an assessment of only the conditions of detention in the prisons in which, according to the information available to it, it is likely that that person will be detained, including on a temporary or transitional basis. What if the person subject to a warrant is surrendered after two months to another prison, where he or she will be exposed to an actual risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter? This is something the Court is no longer interested in. As stated by the Court under the *Dorobantu* Case (C-128/18):

When implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but also, save in exceptional cases, they may not check

⁴³ CJEU Judgement of 25 July 2018, Generalstaatsanwaltschaft, Case C-220/18 PPU, ECLI:EU:C:2018:589, point 47.

whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the European Union.⁴⁴

This leads to a simple conclusion. If you want positive execution of an arrest warrant, present information testifying that a few weeks after the surrender, the person covered by the warrant will be treated well, and “after that you can do as you please.”⁴⁵ Besides, the Court itself pointed out that information on where a person was likely to be incarcerated “on a temporary or transitional basis” was sufficient for positive execution of a warrant. This position is wrong. Absolute rights do not apply either only at the time of the surrender or a few weeks later. Those legal regulations are in force at all times and all the Member States have pledged to uphold them. Therefore, I believe that if there is a real risk of inhuman or degrading treatment of the person subject to an arrest warrant in the issuing Member State, the executing judicial authority should refuse to surrender the person unless the authorities of the issuing state ensure that the person will not be subjected to inhuman or degrading treatment in penitentiary facilities throughout the period of the imprisonment sentence.

A slight clarification of the case law of the CJEU on the conditions under which the surrender of a person sought by a EAW can be refused because standards of detention in the issuing state infringe the prohibition of inhuman or degrading treatment was provided under the *Dorobantu* Case. The Court added that in assessing the actual risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter in view of the conditions prevailing in prisons, the executing judicial authority was obliged to take account of all the relevant physical aspects of the conditions of detention in the prison in which the person was actually intended to be detained, such as the personal space available to each detainee in a cell in that prison, sanitary conditions and the extent of the detainee’s freedom of movement within the prison.⁴⁶ In the Court’s opinion, indicating only

⁴⁴ CJEU Judgement of 15 October 2019, *Dorobantu*, Case C-128/18 PPU, ECLI:EU:C:2018:589, point 47.

⁴⁵ André Klip, “Eroding Mutual Trust in an European Criminal Justice Area without Added Value,” *European Journal of Crime, Criminal Law and Criminal Justice* 28, no. 2 (2020): 112.

⁴⁶ CJEU Judgement of 15 October 2019, *Dorobantu*, Case C-128/18 PPU, ECLI:EU:C:2018:589, point 85. The CJEU stresses that the detainee must have the possibility to move around normally within the cell. The Court also refers to its previous case law in which it indicated

“general deficiencies” would not allow the executing judicial authority to determine whether the surrender of a person might actually involve his or her inhuman or degrading treatment.⁴⁷

The position that a refusal to execute an arrest warrant may only be allowed as an exception was upheld in the CJEU judgement of January 31, 2023 (under the Case C-158/21, *Lluís Puig Gordi and Others* Case).⁴⁸ The Court stated that a refusal to execute a warrant on the grounds of a violation of fundamental rights was not allowed if only an assessment of the individual situation of the persons concerned (an assessment *in concreto*) could lead to a finding of a real risk of a violation of fundamental rights in the issuing Member State. Thus, the Court correctly concluded that the Framework Decision 2002/584/JHA could not be interpreted in such a way as to call into question the effectiveness of the system of the judicial cooperation between the Member States.⁴⁹ Therefore, the examination, by the executing judicial authority, of the observance, by the courts of the issuing Member State, of the right laid down in the second Paragraph

that “a strong presumption of a violation of Article 3 of the ECHR arises when the personal space available to a detainee is below 3 m² in multi-occupancy accommodation a presumption that is capable of being rebutted if the reductions in the required minimum personal space of 3 m² are short, occasional and minor, if they are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities, if the general conditions of detention at the facility in which the detainee is confined are appropriate and there are no other aggravating aspects of the conditions of the individual concerned’s detention.”

⁴⁷ CJEU Judgement of 15 October 2019, *Dorobantu*, Case C-128/18 PPU, ECLI:EU:C:2018:589. As the Court held in its judgement, “[i]n any event, the mere existence of evidence that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people or certain places of detention, with respect to detention conditions in the issuing Member State does not necessarily imply that, in a specific case, the individual concerned will be subjected to inhuman or degrading treatment in the event that he is surrendered to the authorities of that Member State” (point 54). Similarly, CJEU Judgement of 5 April 2016, *Aranyosi and Căldăraru*, Case C-404/15 et C-659 PPU, ECLI:EU:C:2016:198, point 91 and 93; CJEU Judgement of 25 July 2018, *Generalstaatsanwaltschaft*, Case C-220/18 PPU, ECLI:EU:C:2018:589, point 61; see Ágoston Mohy, “The *Dorobantu* Case and the Applicability of the ECHR in the EU Legal Order,” *Pécs Journal of International and European Law*, no. 1 (2020): 85–90.

⁴⁸ CJEU Judgement of 31 January 2023, *Lluís Puig Gordi and Others*, Case C-158/21, ECLI:EU:C:2023:57.

⁴⁹ CJEU Judgement of 31 January 2023, *Lluís Puig Gordi and Others*, Case C-158/21, ECLI:EU:C:2023:57, point 116.

of Article 47 of the Charter, can take place only in exceptional circumstances.⁵⁰

3. Systemic Differences as a Barrier to an Effective System for the Surrender of Persons Convicted or Suspected of Having Infringed Criminal Law

The crisis in mutual recognition has been caused not only by the weakening of mutual trust between the Member States, but also by the lack of equivalence of institutional arrangements. This lack of equivalence is one of the obstacles to the implementation of mutual recognition, which is well illustrated by the case law of the CJEU concerning the interpretation of the term “judicial authority” within the meaning of Article 6(1) of the Framework Decision 2002/584/JHA.

Any comments in this regard should note that 13 Member States have designated the public prosecutor’s office as the competent authority for issuing arrest warrants.⁵¹ The Member States have adopted diverse practices in the designation of the authorities accountable for issuing European arrest warrants. Designating the public prosecutor’s office for this role could have been considered unobjectionable in light of the tacit position of the EU’s institutions.⁵² The turning point turned out to be the judgement of the CJEU of 1 June 2016 under the *Bob-Dogi* Case.⁵³ In respect of that case, the Court pointed out that:

where the European arrest warrant has been 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 should 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

⁵⁰ CJEU Judgement of 31 January 2023, Lluís Puig Gordi and Others, Case C-158/21, ECLI:EU:C:2023:57, point 117.

⁵¹ This information results from an analysis of the list of notifications posted on the website of the European Judicial Network, <https://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=14>, accessed February 2, 2023.

⁵² Tomasz Ostropolski, „Pojęcie organu sądowego w ramach współpracy wymiarów sprawiedliwości w sprawach karnych [The Notion of ‘Judicial Authority’ in Judicial Cooperation in Criminal Matters],” *Europejski Przegląd Sądowy*, no. 9 (2019): 25.

⁵³ CJEU Judgement of 1 June 2016, *Bob-Dogi*, Case C-241/15, ECLI:EU:C:2016:385.

authority 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.⁵⁴ The CJEU went on to note that a dual level of protection for procedural rights and fundamental rights which must be enjoyed by the requested person is built into the European arrest warrant system, since, in addition to the judicial protection provided at the first level, at which a national judicial decision, such as a national arrest warrant, is adopted, 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.⁵⁵

A decision that meets the requirements related to an effective judicial protection of a prosecuted person should be implemented at least at one of the two levels of that protection. Where the law of the issuing Member State grants the power to issue a European arrest warrant to an authority that is neither a judge nor a court, then the national judicial decision, such as a national arrest warrant, on which the European arrest warrant is based, should satisfy the requirement of effective judicial protection of the right to liberty of the requested person.⁵⁶ Such a requirement is self-evident. The execution of a European arrest warrant may violate the freedom of the prosecuted person, as it leads to the detention of the requested person in order to hand him or her over to the issuing judicial authority for the purpose of criminal proceedings or the execution of a sentence of imprisonment.

In its subsequent judgements, the CJEU stated that the concept of judicial authority (Article 6(1) of the Framework Decision 2002/584/JHA) was an autonomous concept of the European Union's law that did not include non-judicial authorities, such as: (a) the police, as it did not give the executing authority confidence that the order was subject to judicial review⁵⁷; (b) the Ministry of Justice (the case involved the Lithuanian Ministry of Justice designated as the issuing authority), which was an executive body⁵⁸; and (c)

⁵⁴ CJEU Judgement of 1 June 2016, *Bob-Dogi*, Case C-241/15, ECLI:EU:C:2016:385, point 55.

⁵⁵ CJEU Judgement of 1 June 2016, *Bob-Dogi*, Case C-241/15, ECLI:EU:C:2016:385, point 56.

⁵⁶ CJEU Judgement of 27 May 2019, *PF*, Case C-509/18, ECLI:EU:C:2019:457, point 47.

⁵⁷ CJEU Judgement of 10 November 2016, *Poltorak*, Case C-452/16 PPU, EU:C:2016:858, point 45.

⁵⁸ CJEU Judgement of 10 November 2016, *Kovalkovas*, Case C-477/16 PPU, EU:C:2016:861, point 39–47.

the public prosecutor's office of a Member State, which was at risk of being subject, directly or indirectly, to respective orders or instructions from an executive authority, such as the Minister of Justice, in deciding whether to issue a European arrest warrant (the case involved the status of a public prosecutor in Germany).⁵⁹ Last but not least, according to the judgement of the CJEU of November 24, 2020, in light of Article 6(2) as well as Article 27(3)(g) and 27(4) of the Framework Decision 2002/584/JHA, a public prosecutor of a Member State who may, in the exercise of his or her decision-making powers, receive individual instructions from the executing authority does not constitute an "executing judicial authority" within the meaning of those provisions.⁶⁰ The latter judgement concerned the status of a Dutch prosecutor who agreed to prosecute a requested person for crimes other than those that formed the basis of the surrender.

At the same time, the CJEU has recognised the public prosecutor of a Member State as a judicial authority, if his or her status provides a guarantee of independence, in particular in relation to the executing authority. The CJEU has had no doubt that such a status is enjoyed by prosecutors in France,⁶¹ Sweden,⁶² Belgium,⁶³ and Austria,⁶⁴ and by the Prosecutor General of Lithuania, who is independent of both the judiciary and the executing authority, including the Ministry of Justice.⁶⁵

⁵⁹ CJEU Judgement of 27 May 2019, OG and PI, Case C-508/18 et C-82/19 PPU, EU:C:2019:456, point 85–88.

⁶⁰ CJEU Judgement of 24 November 2020, AZ, Case C-510/19, ECLI:EU:C:2020:953, point 70.

⁶¹ CJEU Judgement of 12 December 2019, JR and YC, Case C-566/19 PPU et C-626/19 PPU, EU:C:2019:1077, point 54–58.

⁶² CJEU Judgement of 12 December 2019, XD, Case C-625/19 PPU, ECLI:EU:C:2019:1078, point 46–56.

⁶³ CJEU Judgement of 12 December 2019, ZB, Case C627/19 PPU, ECLI:EU:C:2019:1079, point 31–39.

⁶⁴ CJEU Judgement of 9 October 2019, CJ, Case C-489/19 PPU, ECLI:EU:C:2019:849, point 40–49. It should be added that Austrian prosecutors' offices do not issue European arrest warrants on their own, as Article 29(1) of the Law on judicial cooperation in criminal matters with the Member States of the European Union provides for court endorsement of the warrants. The endorsement procedure includes an examination of the legality and proportionality of the European arrest warrant concerned and is subject to judicial review.

⁶⁵ CJEU Judgement of 27 May 2019, PF, Case C-509/18, ECLI:EU:C:2019:457, point 51–52.

The series of judgements discussed herein show that the Court is paying more and more attention to the equivalence of legal systems in the context of the European arrest warrant. While the acceptance of dissimilarities between different legal systems is an essential element of mutual recognition of judgements, this does not mean that it is unlimited. Although the concept of judicial authority is conventional in the European Union and its actual scope depends on the instrument of the cooperation in criminal matters, it has a special nature in the European arrest warrant procedure. It should not be overlooked that the European arrest warrant procedure has an impact on the freedom of the person being prosecuted. No specific requirements arise from the case law of the CJEU presented herein for the form of the judicial authority other than the requirement that the judicial authority of the issuing Member State or the judicial authority of the executing state “should not receive individual instructions from the executive branch that would affect its decision-making powers.” This is a minimum standard that is genetically embedded in the system for the protection of human rights established by the ECHR and the Charter of Fundamental Rights. One could also add – following the opinion of Advocate General M. Campos Sánchez-Bordona – the requirement that the entity issuing an EAW must not be subject to directions or instructions, which stems from the de-politicisation of the EAW procedure as compared to the classic extradition procedure.⁶⁶ Certainly, cases such as *Kovalkovasi*, *Özçelik*, *Poltorak*, as well as judgements in which the CJEU examined the public prosecution’s position in Austria, Belgium, Germany, Lithuania, France and Sweden, have had harmonising effects on the criminal procedure.⁶⁷

4. The Rule of Law Crisis (Apparent) Imposing Limitation on the European Arrest Warrant

Formal membership of countries in the EU is not sufficient to secure the proper implementation of the EU’s instruments for the cooperation in criminal matters. The Member States must respect the common values set

⁶⁶ The Opinion of Advocate General Campos Sánchez-Bordona delivered on 30 April 2019 under the Joined Cases C 508/18 and C 82/19 PPU, ECLI:EU:C:2019:337, *Minister for Justice and Equality v O.G. and P.I.*, point 89.

⁶⁷ Similarly, *Bloks and van den Brink*, “The Impact on National Sovereignty,” 60.

forth in Article 2 of the TEU both at the stage of accession to the EU and while participating in the “project” called the European Union. The respect for those values serves the basis for mutual trust, which, as indicated earlier, is a prerequisite for the effective mutual recognition.⁶⁸ This is aptly emphasised by N. Cambien who stated that “it would not make sense to require a Member State to systematically recognise the decisions and rules of another Member State if it did not have trust in the adequacy of the legal system of that other Member State.”⁶⁹ The CJEU also reached a similar conclusion under the joined Cases *Aranyosi* and *Căldăraru* indicating that:

[T]he principle of mutual recognition on which the European arrest warrant system is based is itself founded on the mutual confidence between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at EU level, particularly in the Charter.⁷⁰

It is impossible to ensure “equivalent and effective levels of protection of fundamental rights” when the rule of law has not been respected. The rule of law is a *sine qua non* condition of the respect for procedural guarantees, the implementation of the principle of equality, the effectiveness of the EU law, and mutual trust and recognition of judgements. Any adverse impact on the rule of law, in particular a violation of judicial independence, causes the mutual trust between the Member States to be

⁶⁸ Others have argued that mutual trust is rather a consequence of mutual recognition. For example, Advocate General Bot stated: „The intention of the EU legislature, in adopting the principle of mutual recognition, was to overcome the almost insurmountable difficulties which had been encountered, due in particular to the failure of efforts to approximate national laws in advance. (...) The phrase used must therefore be understood as meaning that mutual trust is not a prerequisite for the operation of mutual recognition, but a consequence which is imposed on Member States by the application of that principle. (14) In other words, the application of the principle of mutual recognition requires the Member States to place trust in each other regardless of the differences in their respective national laws”, the Opinion of Advocate General Yves’a Bota delivered on 15 December 2015 under the Case C- 486/14, ECLI:EU:C:2015:812, Kossowski Case, point 89.

⁶⁹ Nathan Cambien, “Mutual Recognition and Mutual Trust in the Internal Market,” *European Papers* 2, no. 1 (2017): 9.

⁷⁰ A similar opinion was expressed in the CJEU Judgement of 30 May 2013, *Jeremy F. v. Prime Minister*, Case C-168/13 PPU, EU:C:2013:358.

diminished and threatens all fundamental rights.⁷¹ A conservative position in this regard was adopted by the Court under the *LM* Case (also referred to as the *Celmer* Case),⁷² despite serious allegations by the referring court pointing to profound legislative reforms in the Polish system of justice, as a result of which the rule of law had been breached.⁷³ The CJEU, despite its initial assumption that: (a) the Member States are required to presume that fundamental rights have been observed by the other Member States,

⁷¹ The Court aptly pointed out in the *Associação Sindical dos Juizes Portugueses* Case that: The very existence of effective judicial review designed to ensure compliance with the EU law is of the essence of the rule of law (CJEU Judgement of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, Case C64/16, EU:C:2018:117, point 36 and the case-law cited).

⁷² CJEU Judgement of 25 July 2018, *LM*, Case C-216/18 PPU, ECLI:EU:C:2018:586. It must be noted that in respect of the *LM* case, the CJEU delegated its assessment of the Polish system to the national courts implementing the EAW. In the case of the ASJP, on the contrary, the Court reaffirmed its mandate under Article 19(1)(2) of the TEU to autonomously review national measures affecting judicial independence, even if those measures did not implement the specific EU rules, see Michał Krajewski, “Who Is Afraid of the European Council? The Court of Justice’s Cautious Approach to the Independence of Domestic Judges,” *European Constitutional Law Review* 14, no. 4 (2018): 794; Agnieszka Grzelak, „Wzajemne zaufanie jako podstawa współpracy sądów państw członkowskich UE w sprawach karnych (uwagi na marginesie odesłania prejudycjalnego w sprawie C-216/18 PPU *Celmer*) [Mutual trust as the basis for judicial cooperation in criminal matters in the EU (reference for a preliminary ruling in case C-216/18 PPU *Celmer*)], *Państwo i Prawo* 10, (2018): 50–66.

⁷³ The referring court based the above statement on the basis of the changes that were considered particularly significant, such as: the changes to the constitutional role of the National Council for the Judiciary in safeguarding independence of the judiciary, in combination with the Polish Government’s invalid appointments to the Constitutional Tribunal and its refusal to publish certain judgements; the fact that the Minister for Justice is now the Public Prosecutor, that he is entitled to play an active role in prosecutions and that he has a disciplinary role in respect of presidents of courts, which has the potential for a chilling effect on those presidents, with consequential impact on the administration of justice; the fact that the Supreme Court is affected by compulsory retirement and future appointments, and that the new composition of the National Council for the Judiciary will be largely dominated by political appointees; and [the fact that the integrity and effectiveness of the Constitutional Court have been greatly interfered with in that there is no guarantee that laws in Poland will comply with the Polish Constitution, which is sufficient in itself to have effects throughout the criminal justice system; CJEU Judgement of 25 July 2018, *LM*, Case C-216/18 PPU, ECLI:EU:C:2018:586, point 21.

(b) the possibility of checking whether the other Member State has actually observed the fundamental rights guaranteed by the European Union is excluded in principle,⁷⁴ and (c) emphasising the precise grounds for mandatory non-execution (Article 3) and optional non-execution (Articles 4 and 4a) of a European arrest warrant as well as the guarantees to be given by the issuing Member State in particular cases (Article 5), stated that limitations could be imposed on the principles of mutual recognition and mutual trust between Member States only in “in exceptional circumstances”.⁷⁵ Thus, the Court accepted for the first time the exceptional possibility of the executing judicial authority to bring the surrender procedure established by the Framework Decision 2002/584 to an end where the person to be surrendered was exposed to the real risks of violations of the fundamental right to a fair trial connected with a lack of independence of the courts of that Member State.

The Court, referring to the *Aranyosi and Căldăraru* Case, reconstructed a two-tiered test without which it was not possible to bring the surrender procedure established by the Framework Decision 2002/584 to an end. The first stage of the assessment involves determining whether,

on the basis of material that is objective, reliable, specific and properly updated concerning the operation of the system of justice in the issuing Member State, whether there is a real risk, connected with a lack of independence of the courts of that Member State on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached.⁷⁶

Performing a positive verification in this regard, i.e. establishing that there is a threat to the fundamental rights of the individual *in abstracto* guaranteed by the second Paragraph of Article 47 of the Charter, allows to proceed to the second stage of the assessment. At that stage, the executing judicial authority is obliged to determine, specifically and precisely,

whether, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant, and in the light of the information

⁷⁴ CJEU Judgement of 25 July 2018, LM, Case C-216/18 PPU, ECLI:EU:C:2018:586, point 37.

⁷⁵ CJEU Judgement of 25 July 2018, LM, Case C-216/18 PPU, ECLI:EU:C:2018:586, point 43.

⁷⁶ CJEU Judgement of 25 July 2018, LM, Case C-216/18 PPU, ECLI:EU:C:2018:586, point 61.

provided by the issuing Member State pursuant to Article 15 (2) of the framework decision, there are substantial grounds for believing that that person will run a risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter if he is surrendered to that State.⁷⁷

The adoption of a two-stage, interrelated assessment of violations of the right to a fair trial, due to systemic inadequacies in the independence of the judiciary of the issuing Member State, calls into question what the CJEU has really wanted to protect. It is clear from the reasoning of the judgement under the *LM* case that the Court's concern for the effective prosecution of the perpetrators of the crime and the unwavering presumption that fundamental rights had been observed by the other Member States were more important to the CJEU than ensuring the right of a prosecuted person to a fair trial in a situation of systemic violations of the rule of law in one of the Member States. This is evidenced by the Court's reference to recital 10 of the Framework Decision 2002/584 that implementation of the European arrest warrant mechanism may be suspended only in the event of a serious and persistent breach of the principles set out in Article 2 of the TEU by one of the Member States, as determined by the European Council pursuant to Article 7(2) of the TEU, with the consequences set out in Article 7(3) of the TEU).⁷⁸ Referring to the political procedure, as that is what is specified in Article 7 of the TEU, the CJEU actually closed the possibility to refuse to surrender a prosecuted person to a Member State where there are systemic or general deficiencies in the independence of the judiciary. Meanwhile, the political procedure set forth in Article 7 of the TEU aims to generally suspend the application of a legal instrument such as the mechanism of the European arrest warrant and is applied to a state, while the refusal to execute a European arrest warrant undertaken by a judicial authority of a Member State concerns a specific warrant and is a manifestation of the cooperation between the judicial authorities of the Member States. Every executing court is obliged not only to take into account the optional and mandatory grounds for the refusal to execute a European arrest warrant, but also to respect fundamental

⁷⁷ CJEU Judgement of 25 July 2018, *LM*, Case C-216/18 PPU, ECLI:EU:C:2018:586, point 79.

⁷⁸ CJEU Judgement of 25 July 2018, *LM*, Case C-216/18 PPU, ECLI:EU:C:2018:586, point 70.

rights and fundamental legal principles as enshrined in Articles 2 and 6 of the TEU. The obligation in this regard in relation to the cooperating judicial authorities derives from Article 1 (3) of the Framework Decision 2002/584 and the above provisions of the TEU.

In respect of the *LM* case, the CJEU allowed for the refusal to execute a warrant only in exceptional circumstances, where a real risk of violation of the fundamental right to a fair trial (*in abstracto*) was demonstrated and it was established that the person subject to the European arrest warrant would be exposed, upon surrender to the issuing judicial authority, to a real risk of violation of his or her fundamental right to an independent tribunal. While the first stage of the assessment is provable in a straightforward manner, the second stage of the assessment, which involves translating the systemic deficiencies to the future situation of the requested person, is difficult to implement.⁷⁹ The CJEU indicates that the executing authority should take into account, among other things, the personal situation as well as the nature of the offence for which he or she is being prosecuted and the factual context that serves the basis for the European arrest warrant.⁸⁰ In addition, it is the duty of the court executing the warrant to turn to the issuing authority for additional information to determine whether there is a risk to a due process. The question is: What is the point of starting a dialogue between the executing judicial authorities and the issuing judicial authorities each time?

Doubts are also raised about the dialogue itself and the content of the answers given, e.g.

⁷⁹ As T. Wahl points out, using the example of the analysis of the case law of the European courts on the European arrest warrant, the refusal to execute the warrant is not justified if only: “a) the requested persons referred to changes at the ordinary courts, which were brought about by the judicial reforms, and to disciplinary power of the Polish Minister of Justice over the Presidents of the Courts as well as the chilling effect it has had on the administration of justice; b) the requested persons referred to statements made by Polish justice officials in the media against them, thus leaving doubts as to the presumption of innocence; c) evidence given by witnesses (even by Polish judges) was in the defendants’ favor in voicing serious concerns over the independence of Polish judges, because the statements at the same time pointed out that judges try to perform their obligations to the best of their abilities to administer justice impartially and free from pressure”; see: Thomas Wahl, “Refusal of European Arrest Warrants Due to Fair Trial Infringements,” *Eu crim*, vol. 4 (2020): 325.

⁸⁰ CJEU Judgement of 25 July 2018, *LM*, C-216/18 PPU, ECLI:EU:C:2018:586, point 75.

will such information meet the standard set by the Court of Justice? Will such information be objective and adequate? Will the assessment be fully reliable? Does a judge (court) who does not recognise any threats to the independence of the judiciary, contrary to the widely expressed and well-documented concerns, remain fully independent? How about a judge whose answers comply with the expectations of political decision-makers, bearing in mind that their voice could have an impact on the judge's career? Would a judge admit receiving explicit or implicit instructions, suggestions or perhaps 'friendly advice' from the executive or other political actors? Answers to these questions can be challenging. On the other hand, how about a judge who provides critical comments on fair trial guarantees?⁸¹

In this context, it should be recognised that it is difficult to assess the independence of specific courts competent to conduct criminal proceedings against a requested person. The executing judicial authority is not able to predict the further development of the case after the surrender of the requested person and cannot, for example, exclude a personnel change in the composition of the court or a transfer of the case to another court. Therefore, one-step assessment should be advocated, since the lack of judicial independence always leads to a real risk of violation of fundamental rights, including the right to a fair trial.⁸²

⁸¹ Stanisław Biernat and Paweł Filipek, "The Assessment of Judicial Independence Following the CJEU Ruling in C-216/18 LM," in *Defending Checks and Balances in EU Member State*, eds. by Armin von Bogdandy, et al. (Berlin: Springer, 2021), 424.

⁸² See also: Petra Bárd and Wouter van Ballegooij, "The AG Opinion in the Celmer Case: Why Lack of Judicial Independence Should Have Been Framed as a Rule of Law Issue," *Verfassungsblog*, July 7, 2018, <https://verfassungsblog.de/the-ag-opinion-in-the-celmer-case-why-lack-of-judicial-independence-should-have-been-framed-as-a-rule-of-law-issue>, accessed February 23, 2023; Petra Bárd and Wouter van Ballegooij, "Judicial Independence as a Precondition for Mutual Trust," *Verfassungsblog*, April 10, <https://verfassungsblog.de/judicial-independence-as-a-precondition-for-mutual-trust/>, accessed February 23, 2023. See also Biernat and Filipek, "The Assessment of Judicial Independence," 805. Some even argue that a breach of the obligation to ensure independence of the courts should result in suspending the participation of a given Member State in the EU policy area at stake; Agnieszka Frąckowiak-Adamska, "Drawing Red Lines with No (Significant) Bites: Why an Individual Test Is Not Appropriate in the LM Case," in *Defending Checks and Balances in EU Member State*, eds. Armin von Bogdandy, et al. (Berlin: Springer, 2021), 443–454.

The above concerns are not eliminated by the most recent judgement of the CJEU issued under the joined Cases C-562/21 PPU and C-563/21 PPU.⁸³ On the contrary, the judgement narrowed the scope of the “exceptional circumstances”, the occurrence of which gives grounds for the refusal to execute a warrant. In a situation where the issuance of a warrant concerns the surrender of a person for the purpose of executing a sentence of imprisonment, it is the duty of the person whose surrender is sought to rely on specific factors on the basis of which he or she considers that the systemic or generalised deficiencies of the judicial system in the issuing Member State have had a tangible influence on the criminal proceedings in his or her respect, in particular on the composition of the panel of judges who had been called upon to hear the criminal case in question, with the result that one or more judges in that panel had not offered the guarantees of independence and impartiality required under the EU law).⁸⁴ If the warrant is issued for the purpose of conducting criminal proceedings, it is the duty of the requested person to present his or her personal situation, the nature of the offence in respect of which criminal proceedings are pending against him or her, the factual context in which the European arrest warrant fits or any other circumstances relevant to the assessment of the independence and impartiality of the adjudicating panel. At the same time, the CJEU also stipulated that “information concerning the fact that one or more of the judges who participated in the proceedings that led to the conviction of the person whose surrender is sought were appointed on application of a body made up, for the most part, of members representing or chosen by the legislature or the executive” was not sufficient for the refusal to surrender the requested person.⁸⁵ The main arguments for the position of the CJEU included the need to avoid the risk of impunity for persons who attempted to flee from justice after having been convicted of or suspected of committing a crime, the protection of the rights of the victims of the offences, and non-interference in the political procedure under Article 7 of

⁸³ Judgement of 22 February 2022, X and Y, Case C-562/21 PPU et C-563/21 PPU, EC LI:EU:C:2022:100.

⁸⁴ CJEU Judgement of 22 February 2022, X and Y, Case C-562/21 PPU et C-563/21 PPU, EC LI:EU:C:2022:100, point 86.

⁸⁵ CJEU Judgement of 22 February 2022, X and Y, Case C-562/21 PPU et C-563/21 PPU, EC LI:EU:C:2022:100, point 87.

the TEU. That judgement ignores the fact that a lack of independence of the courts precludes the possibility of achieving justice for the accused and the victim.⁸⁶

5. Conclusion

The analysis presented herein has proven that the case law of the CJEU that concerns the European arrest warrant has changed the approach to mutual trust and the operation of the principle of mutual recognition in criminal matters. The fact that the new grounds for the refusal to execute a European arrest warrant are now based on fundamental rights supports the argument that the relative automaticity of this mechanism for the cooperation in criminal matters has been reduced. The doctrine established in the *Aran-yosi* and *Căldăraru* case, which consists in assessing the risk of inhuman or degrading treatment or punishment, and later – in the *Celmer* case – reconstructed for the purpose of assessing the demonstration of a real risk of violation of the right to a fair trial when there are systemic deficiencies in the independence of the judiciary, has introduced a narrow mechanism for monitoring the observance of fundamental rights. The refusal to execute a European arrest warrant on the basis of the indicated rights has become possible only in exceptional circumstances. The cases *Aranyosi* and *Căldăraru* as well as *Celmer* indicate that the Court attaches more importance to the protection of the principle of mutual recognition, the prosecution of perpetrators of crime, and the unwavering presumption of respect for fundamental rights by the Member states than to the effective protection of fundamental rights. Such a distribution of emphasis means the subordination of the European Union's standard for the protection of fundamental rights to the effective cooperation in criminal matters. However, it should be noted that each Member State is obliged to guarantee the respect for the fundamental rights set forth in Article 6 of the TEU and the respect for the values set forth in Article 2 of the TEU. This obligation results not only from

⁸⁶ As aptly pointed out by Advocate General Sharpston, "(...) a trial that is only partly fair cannot be guaranteed to ensure that justice is done," the Opinion of Advocate General Sharpston delivered on 18 October 2012 under the Case C-396/11, *Ministerul Public – Parchetul de pe lângă Curtea de Apel Constanța/Ministerul v. Ciprian Vasile Radu*, ECLI:EU:C:2012:648, point 83.

mutual trust, but also from the principle of the loyal cooperation. There must be a balance in this regard, as the judicial authorities of the Member States are more inclined to recognise and execute judgements issued in other Member States if the fundamental rights of the requested persons are adequately protected throughout the EU. This thought is perfectly reflected in recital 8 of the Directive 2013/28, which states that: “common minimum rules should lead to increased confidence in the criminal justice systems of all Member States, which, in turn, should lead to more efficient judicial cooperation in a climate of mutual trust and to the promotion of a fundamental rights culture in the Union.”⁸⁷

The view of the CJEU that the lack of judicial independence can ultimately lead to the refusal to execute a European arrest warrant should be received with satisfaction. However, in respect of the *LM* Case, the Court allowed for the possibility to refuse to execute an arrest warrant only in exceptional circumstances, after a two-step test and after the executing judicial authority had obtained additional information from the issuing judicial authority. The second stage of the test, which involves the assessment whether a person subject to a European arrest warrant will be exposed to a real risk of violation of his or her fundamental right to an independent tribunal after his or her surrender, is based on the narrow criteria that are difficult for an individual to demonstrate in the executing state. Many a time will it be simply unrealistic. That calls into question the real intention of the CJEU regarding the respect for fundamental rights. All the more so because any deficit in judicial independence leads to a real risk of violation of fundamental rights, including the right to a fair trial and the guarantees deriving from it.

In conclusion, one must agree with the statement that the procedure for the execution of a European arrest warrant cannot effectively account for harmonising the level of protection against inhuman treatment in

⁸⁷ The Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty; The Official Journal of the EU L 294, 6.11.2013, pp. 1–12.

penitentiary units in the EU countries,⁸⁸ cannot serve the purpose of accurately assessing the shape of “the judicial authority”, and cannot lead to the elimination of violations of the rule of law and deficiencies in judicial independence in the Member States. Nevertheless, the very fact that the judicial authorities of another country are examining the indicated elements may provide an impetus for normative changes in the state issuing the European arrest warrant.

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⁸⁸ André Klip, *European Criminal Law. An Integrative Approach* (Cambridge–Antwerp–Chicago: Intersentia, 2021), 651–653.

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