

Gloss on the Judgment of the Court of Justice of the European Union of November 9, 2023, *Staatsanwaltschaft Aachen, C-819/21*

Marek Ryszard Smarzewski

PhD, Assistant Professor, Department of Criminal Procedure, Faculty of Law, Canon Law and Administration, The John Paul II Catholic University of Lublin; correspondence address: Al. Raclawickie 14, 20-950 Lublin, Poland; e-mail: marek.smarzewski@kul.pl

 <https://orcid.org/0000-0003-0910-9128>

Keywords:

transfer of the penalty of imprisonment, two-step test, refusal to recognize and execute the judgment, Framework Decision 2008/909/JHA, mutual recognition

Abstract: The subject of the considerations undertaken in the paper is the judgment of the CJEU of 9 November 2023, *Staatsanwaltschaft Aachen, C-819/21*. The judgment under comment was issued in response to preliminary questions submitted by the Landgericht Aachen (Aachen Regional Court). It primarily addresses the possibility of recognizing and enforcing a custodial sentence by a court of the executing State if there are grounds to believe that the conditions in the issuing State – at the time of the judgment to be enforced or subsequent judgments concerning it – are inconsistent with the fundamental right to a fair trial, in particular because the judicial system in the Member State in question has been found to be incompatible with the rule of law and has a specific, adverse effect on the convicted person in the proceedings. The CJEU ruled that the application of an exceptional ground for refusal not expressly regulated in FD 2008/909 is possible after conducting the two-stage test developed in the CJEU’s case law in relation to the procedure for enforcing an EAW. This position of the CJEU does not deserve uncritical approval, although it is broadly consistent with the Court’s approach to the significance of abstract and concrete deficiencies relating to fundamental rights, including those affecting the right to a fair trial, in relation to the principle of mutual recognition of judgments and

the exceptional possibility of derogation from that principle. The solution developed in the judgment of 9 November 2023 fails to take into account the fundamental differences between the EAW procedure and that set out in FD 2008/909 and raises doubts as to its functionality.

1. Thesis

Article 3(4) and Article 8 of Council Framework Decision 2008/909/JHA of 27 November on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009,¹ must be interpreted as meaning that the competent authority of the executing Member State may refuse to recognize and enforce a judgment imposing a criminal sentence delivered by a court of another Member State where it has evidence of systemic or generalized deficiencies in that Member State regarding the right to a fair trial, in particular in so far as concerns the independence of the courts, and where there are substantial grounds for believing that those deficiencies may have had a tangible influence on the criminal proceedings brought against the person concerned. It is for the competent authority of the executing Member State to assess the situation existing in the issuing Member State up until the date of the criminal conviction in respect of which recognition and enforcement are requested and, if necessary, up until the date of the new conviction which resulted in the revocation of the suspension initially attached to the sentence in respect of which enforcement is requested.

2. Selected Factual and Legal Grounds

The CJEU's ruling, which constitutes the sentence of the judgment of 9 November 2023, in case C-819/21,² was issued in response to preliminary

¹ Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition in judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ L327, 5 December 2008); thereafter referred to as "FD 2008/909."

² CJEU Judgment of 9 November 2023, *Staatsanwaltschaft Aachen*, Case C-819/21, ECLI:EU:C:2023:841.

questions submitted by the Aachen Regional Court (Landgericht Aachen). It resolves the issue of the possibility of refusing to execute a penalty of imprisonment within the system of mutual recognition standardized in FD 2008/909, irrespective of the negative grounds provided for in the aforementioned legal act, after conducting a two-stage test, the findings of which lead to the conclusion that executing the judgment would result in a real risk of violating the right to a fair trial within the meaning of the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union (CFR).³ According to the ruling cited, the court of the executing State has the authority to conduct the test and, consequently, refuse to recognize the judgment and enforce the prison sentence. The examination of potential irregularities should refer to the situation existing prior to the issuance of the convicting judgment, which is to be executed under FD 2008/909, as well as to the issuance of a new conviction, which resulted in the order of a previously conditionally suspended prison sentence.

The problem outlined above arose in relation to M.D., a Polish citizen residing in Germany, in connection with a Polish court's application for recognition and enforcement of the remaining six-month prison sentence, initially imposed with a conditional suspension of its execution. It should be noted that, in the present case, after ordering the execution of the conditionally suspended prison sentence, a European Arrest Warrant (EAW) was issued first.⁴ However, the German authorities refused to execute it, finding a negative ground under Article 4(6) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States,⁵ owing to the requested person's habitual residence in Germany and his objection to being transferred to Poland. Subsequently, given the failure to take into account the Polish EAW and seeking an alternative to the ineffective cooperation measure, the Regional Court in Szczecin requested the execution of M.D.'s prison sentence in Germany using the legal instrument provided for in FD 2008/909. During the examination, M.D. claimed that he had not received a summons

³ OJ C326, 26 October 2012, p. 391–407; thereafter referred to as “CFR.” Opinion of Advocate General Emiliou delivered on 4 May 2023, ECLI:EU:C:2023:386, para I.3.

⁴ European Arrest Warrant – thereafter referred to as “EAW.”

⁵ OJ L190, 18 July 2002, p. 34–51; thereafter referred to as “FD 2002/584.”

to the trial in Poland, following which the judgment sought to be recognized and enforced was issued. He also stated that the charges against him were unfounded. However, the Aachen Public Prosecutor's Office (Staatsanwaltschaft Aachen), considering that all the conditions for executing the sentence of imprisonment in Germany against M.D. had been met, requested that the Landgericht Aachen enforce the judgment.

In considering the recognition and enforcement of a custodial sentence, the Landgericht Aachen noted the existence of systemic or generalized deficiencies in the Polish judicial system, both at the time of the judgment imposing a conditionally suspended custodial sentence and at the time the Polish Court (Szczecin-Prawobrzeże District Court) issued the decision to order the enforcement of the previously conditionally suspended sentence. The Landgericht Aachen considered whether it was for the court of the executing State – in considering a takeover of a penalty of imprisonment under FD 2008/909 – to determine general, systemic judicial deficiencies and a violation of the individual's fundamental right to a fair trial, or whether the CJEU should make relevant findings in this regard. Furthermore, the German court was unsure how to proceed in a situation where the rule of law in the issuing state was satisfactory at the time the judgments for which enforcement was sought were issued, but subsequently changed unfavorably and existed at the time the executing State ruled on the recognition and enforcement of the judgment.

Taking into account the issues raised above, the Landgericht Aachen submitted four specific questions to the CJEU.

First, it requested a ruling on whether a court of the executing state may, on the basis of Article 3(4) FD 2008/909, in conjunction with the second paragraph of Article 47 CFR, refuse to recognize a judgment and thus enforce the prison sentence imposed therein in accordance with Article 8 FD 2008/909, if there are grounds for believing that conditions prevailing in the issuing State – at the time of the adoption of the judgment to be enforced or subsequent decisions relating to it – are incompatible with the fundamental right to a fair trial on the grounds that the judicial system in the issuing state is not consistent with the rule of law as defined in Article 2 of the Treaty on European Union.⁶

⁶ OJ C202, 7 June 2016, p. 1–388; thereafter referred to as “TEU.”

Secondly, the German court asked whether a court of the executing Member State to which a request for the transfer of a prison sentence has been made may refuse, on the basis of Article 3(4) FD 2008/909, in conjunction with the principle of the rule of law enshrined in Article 2 TEU, to recognize and enforce the judgment of another Member State, in accordance with Article 8 FD 2008/909, if there are indications that the judicial system of the issuing State is not consistent with the rule of law set out in Article 2 TEU.

The third question was formulated by the Landgericht Aachen, depending on an affirmative response of the CJEU to the first question. It addressed the issue of whether, before refusing to recognize and execute a judgment under Article 3(4) FD 2008/909, in conjunction with the second paragraph of Article 47 CFR, due to general deficiencies found in the issuing state, resulting in the incompatibility of the judicial system in that state with the rule of law, it is necessary to examine whether these consequences, contrary to the fundamental right to a fair trial, had an adverse effect on the convicted person in the proceedings concerned.

The final and fourth question concerned a situation in which the CJEU would answer negatively regarding the competence of a court of the executing State to determine the compatibility of the relations in the issuing State with the fundamental right to a fair trial, given the incompatibility of the judicial system in that State with the rule of law, and acknowledged that the CJEU had the authority in this regard. It referred to a potential decision by the CJEU on whether, on the date of the conviction of a suspended custodial sentence and that of the decision ordering the execution of the suspended sentence, the judicial system in the issuing State was and is currently compliant with the rule of law.

As emphasized in the reasoning of the judgment of 9 November 2023, the CJEU – in accordance with recital 5 FD 2008/909 – stated that FD 2008/909 constitutes an expression of closer judicial cooperation in criminal matters regarding the recognition and enforcement of judgments imposing custodial sentences, and the purpose of the cooperation measure standardized therein is to facilitate the social reintegration of the convicted person. According to Article 8 FD 2008/909, mutual recognition of such judgments is therefore the principle, and their recognition and enforcement may be refused if the grounds for refusal set out in Article 9 FD 2008/909 are

met. However, it remained problematic whether, in the field of cooperation under FD 2008/909, the additional limitations established before the CJEU, in particular in the judgment of 5 April 2016,⁷ 25 July 2018,⁸ and 22 February 2022⁹ with regard to EAW, could be applied by means of the two-stage test established in CJEU case law. The CJEU answered this issue in the affirmative, deriving from Article 3(4) FD 2008/909, read in conjunction with recital 13 FD 2008/909 that a transfer request may be refused if it is established that there have been systemic or generalized violations of the right to a fair trial in the issuing state and that, in the specific case, the deficiencies identified at the first stage could have affected the functioning of the courts in the issuing state competent to prosecute the person concerned, taking into account the situation of that person, the nature of the offence for which he or she was convicted and the factual circumstances in which the conviction was handed down, the enforcement of which is sought, as well as any additional information provided by the Member State. It is therefore necessary to find that, with respect to a specific person in a given proceeding, there are substantial grounds for believing that there was an actual risk of a breach of the right to a fair trial within the meaning of the second paragraph of Article 47 CFR.

Against this background, the CJEU argues that the assessment of systemic and generalized deficiencies in the judicial system in the issuing State should be made in relation to the situation in that State on the date of the conviction sought for recognition and enforcement under FD 2008/909, taking into account the development of that situation up to that day. In this context, the authority of the executing state should analyze the specific impact of the generalized deficiencies on the criminal proceedings pending against the individual. An appropriate individualized assessment is to be conducted in relation to the evidence presented by the person for whom the transfer of the custodial sentence is sought.

However, the CJEU stated that the two-stage test does not apply to the situation in the issuing state at the time the executing authority rules on

⁷ CJEU Judgment of 5 April 2016, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*, Joined Cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198.

⁸ CJEU Judgment of 25 July 2018, *LM*, Case C-216/18 PPU, ECLI:EU:C:2018:586.

⁹ CJEU Judgment of 22 February 2022, *X and Y v. Openbaar Ministerie*, Case C-562/21 PPU and C-563/21 PPU, ECLI:EU:C:2022:100.

a request for recognition of a judgment and enforcement of a custodial sentence. Likewise, it found that there is no need to examine any potential irregularities at the time of the decision by the authority of the issuing State to order the execution of a conditionally suspended penalty of imprisonment, where the basis for the decision to execute the sentence was the issuance of a new conviction. In such a case, the authority of the executing state assesses the situation in the issuing state up to the date of the new conviction, as a factor resulting in the ordering of a suspended custodial sentence, allowing the application for recognition and enforcement of that sentence.¹⁰

3. Commentary on the CJEU Judgment

As can be seen from the background outlined above, the most important issue was that of resolving doubts as to the possibility of refusing to recognize and execute a judgment due to deficiencies in the sphere of fundamental rights, including the right to a fair trial, in particular in the context of judicial independence, which – given the existence of serious reasons for doing so – may influence the determination of their specific impact on the proceedings pending against the person concerned.¹¹ The approach that allows for the application of an exceptional ground for refusing to recognize and execute a custodial sentence requested to be taken over by the issuing State, not only within the procedure for reviewing an EAW by the authorities of the executing state, but also within the scope of the measure regulated in FD 2008/909, derogating from the general principle of mutual recognition, should be approved. Thus, although the rule is that a refusal may occur only in the event of circumstances falling within the grounds of Article 9 FD 2008/909, this does not exclude the possibility of a refusal decision as an exception dictated by the risk of violating fundamental rights, in particular the right to a fair trial.

¹⁰ Cf. CJEU Judgment of 23 March 2023, *Minister for Justice and Equality (Levée du sursis)*, Joined Cases C-514/21 LU and C-515/21 PH, ECLI:EU:C:2023:235.

¹¹ Cf. Barbara Augustyniak, “Komentarz do art. 611(tk) Kodeksu postępowania karnego,” in *Kodeks postępowania karnego. Komentarz aktualizowany*, vol. 2, ed. Dariusz Świecki (LEX/el., 2025), thesis 3; Tomasz Partyk, “Systemowe problemy sądownictwa to nie konkretne wyroki. Omówienie wyroku TS z dnia 9 listopada 2023 r., C-819/21 (Staatsanwaltschaft Aachen)” (LEX/el., 2023).

The argumentation for the position presented can be found in Article 3(4) FD 2008/909, since that provision contains for a general clause on the protection of human rights, stating that FD 2008/909 does not infringe the obligation to respect fundamental rights and fundamental legal principles set out in Article 6 TEU. In accordance with recital 13 of FD 2008/909, which is a development in this respect, cooperation using the measure serving to transfer a penalty of imprisonment for execution in another Member State must be carried out in compliance with the principles set out in the CFR.¹² Incidentally, it is worth noting that the premise of a violation of fundamental rights finds *expressis verbis* expression in Article 611tk § 1 point 5 of the Polish Code of Criminal Procedure (CCP).¹³ Within the framework of mandatory grounds for refusal to take over a prison sentence for execution, despite the lack of an appropriate prototype in the grounds under Article 9(1) FD 2008/909, the one relating to the violation of human and citizen's rights and freedoms was taken into account. This premise is defined in a manner analogous to that resulting in the refusal to execute an EAW, regulated in Article 607p § 1 point 5 of the CCP. It is rightly highlighted in the doctrine of Polish criminal procedural law that the possibility of violating rights and freedoms must be assessed in terms of the effects of taking over the sentence to be executed in Poland, and in this context the problem of compliance of the conditions of serving a prison sentence with fundamental rights is perceived as a potential obstacle, linking this issue, in particular, with the overcrowding of prisons.¹⁴

¹² Stefano Montaldo, "Framework Decision 2008/909/JHA and Fundamental Rights Concerns: In Search of Appropriate Remedies," in *The Transfer of Prisoners in the European Union. Challenges and Prospects in the Implementation of Framework Decision 2008/909/JHA*, ed. Stefano Montaldo (Hague: Eleven International Publishing; G. Giappichelli Editore, 2000), 47.

¹³ Act of 6 June 1997, consolidated text: Journal of Laws 2025, item 46, as amended; thereafter referred to as "CCP"

¹⁴ See in this context: Augustyniak, "Komentarz do art. 611(tk) Kodeksu postępowania karnego," thesis 8; Adam Górski, "Komentarz do art. 611tk Kodeksu postępowania karnego," in *Kodeks postępowania karnego. Komentarz*, ed. Andrzej Sakowicz (Warsaw: C.H. Beck; Legalis, 2025), thesis 3; Marek Smarzewski, "Przejęcie i przekazanie kary pozbawienia wolności do wykonania na podstawie decyzji ramowej Rady 2008/909/WSiSW," in *System Prawa Karnego Procesowego*, vol. 18, *Współpraca międzynarodowa w sprawach karnych*, ed. Małgorzata Wąsek-Wiaderek (Warsaw: Wolters Kluwer Polska, 2025), 1116–17.

Against this background, the main objection to the judgment under comment can be raised: the CJEU's incorrectly and imprecisely applied the mechanism for refusing to execute an EAW based on a violation of the fundamental right to a fair trial, following the two-stage test established in case law, to the level of cooperation in the recognition and enforcement of a custodial sentence. It should be noted that when deciding whether to accept a transfer of a penalty of imprisonment for enforcement, the assessment by the authority of the executing State refers to its taking over, not its transfer. Therefore, the subject of the assessment is the existence of grounds for refusal on the part of the executing State, not the issuing State.

Even before the CJEU delivered its judgment of 9 November 2023, the doctrine highlighted the issue, correctly noting the problem with applying the two-stage test formulated in *Aranyosi and Căldăraru* due to the fundamental difference between the EAW procedure and that laid down in FD 2008/909. A comparison of the two cooperation measures reveals a reversal of the roles of the issuing and executing authorities. In the case of a transfer of a prison sentence, the authority of the issuing State, requesting recognition and enforcement of the judgment, often also materially transfers the person concerned.¹⁵ However, with regard to EAW, the transfer remains the responsibility of the executing authority. In turn, in the context of the transfer of sentenced persons under FD 2008/909, the concept of the executing authority is linked to the enforcement of the sentence of imprisonment in the Member State to which the transfer was made.¹⁶ From the perspective of FD 2008/909, the subject of the assessment is therefore whether the exceptional ground for refusal exists in the executing Member

¹⁵ In many cases, the person subject to the transfer of a custodial sentence under FD 2008/909 may also reside in the executing Member State where the issuing authority seeks recognition and enforcement of the judgment. It should be recalled that this is precisely the configuration that occurred in the factual circumstances of the case under analysis.

¹⁶ Stefano Montaldo, "Intersection Among EU Judicial Cooperation Instruments and the Quest for an Advanced and Consistent European Judicial Space: The Case of the Transfer and Surrender of Convicts in the EU," *New Journal of European Criminal Law* 13, no. 3 (2022): 264–65.

State, and whether the fundamental rights of the person concerned will be violated in that State and not in the issuing Member State.¹⁷

Of course, it can be argued that the potential refusal adopted in the judgment under comment concerns the execution of a sentence of imprisonment and thus refers to a conviction that was handed down in the issuing State. Its creation based on the application of FD 2008/909 is a response to the doubts raised by the Landgericht Aachen as to whether the Polish judicial system guarantees the right to a fair trial within the meaning of Article 47 CFR.¹⁸ In this context – given the subject of reference – one should in particular seek a general pattern in the CJEU judgment of 22 February 2022,¹⁹ which states that a judicial authority executing an EAW that has evidence confirming the existence of systemic or general irregularities concerning the independence of the judiciary of the state issuing the EAW, especially with regard to the procedure for appointing judges, may refuse to execute an EAW issued, among others, for the purposes of executing a custodial sentence when it finds that, in the circumstances of a given case, there are serious and verified grounds for believing – taking into account, in particular, the information provided by the requested person concerning the composition of the panel of judges who heard his or her criminal case or relating to any other circumstance relevant to the assessment of the independence or impartiality of that panel – that the person’s fundamental right to a fair trial before an independent and impartial tribunal previously established by law, as set out in second paragraph of Article 47 CFR, has been violated. Assessing the judgment of 9 November 2023, from this perspective, it appears that the CJEU formulates the exceptional ground for refusal based on a violation of the right to a fair trial – interpreted on the basis of FD 2008/909 and the case law concerning the EAW – in an overly general manner. The CJEU failed to take into account that the EAW and the instrument for transferring a prison sentence differ fundamentally in

¹⁷ Alessandro Rosanò, “*Staatsanwaltschaft Aachen*, ovvero la tutela dei diritti fondamentali sulla base del test *LM* nelle procedure di trasferimento interstatale di detenuti,” *European Papers* 8, no. 3 (2023): 1117–18.

¹⁸ Ruairi O’Neill, “Defending Judicial Independence in Court: A Subjective Right to Independence in EU Law,” *Liverpool Law Review* 46 (2025): 71.

¹⁹ CJEU Judgment of 22 February 2022, *X and Y v. Openbaar Ministerie*, Case C-562/21 PPU and C-563/21 PPU, ECLI:EU:C:2022:100.

their impact on the individual in a situation where the executing authority refuses to recognize and enforce a judgment. In the case of the EAW the situation is rather clear as the requested person is residing in the territory of the executing Member State. However, the situation may be different when applying for the transfer of a prison sentence. The person concerned by the cooperation measure may reside in the State where enforcement is requested. Nevertheless, it is often the case that such a person is still in the territory of the issuing State. This means that refusing to take over a custodial sentence based on the exceptional ground for refusal conceived by the CJEU could, paradoxically, have a negative impact on the individual, who would then, by definition, ultimately serve a penalty of imprisonment in the issuing state, where systemic and specific deficiencies in the protection of fundamental rights have been identified. Therefore, it cannot be ruled out that applying the solution proposed by the CJEU in the commented judgment may result in failure to achieve the primary objective of FD 2008/909, which is to facilitate the rehabilitation and social reintegration of the convicted person. In a situation similar to the one in the case under review, where the execution of an EAW was refused and then the possibility of refusal arose under FD 2008/909, there is a risk of impunity for the individual concerned.²⁰

Regardless of the polemical comments raised, it is true that, by its judgment of 9 November 2023, the CJEU established a two-stage test applicable to the decision of an authority of the executing State regarding the transfer of a custodial sentence. Thus, it is necessary to establish a reference point for examining general, systemic, and specific deficiencies. The FD 2008/909 mechanism concerns the recognition and enforcement of a custodial sentence. With this in mind, in the context of this cooperation measure and assuming the possibility of applying a two-stage test, the consequence was that the assessment of the existence of general, systemic, and specific deficiencies in the issuing State should occur, in particular, at the time of the conviction imposing the custodial sentence to be

²⁰ See: Jannemieke Ouwerkerk, “The Missing Link in CJEU *Staatsanwaltschaft Aachen* (C-891/21) and the Argument for Humanitarian Considerations in Prison Transfer Proceedings,” *European Journal of Crime, Criminal Law and Criminal Justice* 32 (2024): 186–90, <https://doi.org/10.1163/15718174-32030001>.

transferred. It seems fair to conclude that this is a universal approach that can generally be applied to transfers under FD 2008/909, even in cases where an absolute custodial sentence is imposed. However, it should be recalled that in the factual circumstances of the case under analysis, in the proceedings in the issuing state, the prison sentence was imposed with conditional suspension and only then was its execution ordered owing to the fact that the person concerned had committed a similar intentional offence during the probation period.

In such a situation, according to Article 75 § 1 of the Polish Criminal Code,²¹ there was a mandatory requirement to order the execution of the sentence. Therefore, considering the possibility of taking over a sentence of imprisonment (previously conditionally suspended), the CJEU found that the special ground for refusing to recognize a judgment and enforce the sentence may also apply if general and specific irregularities are identified in a given case until the day of the new conviction, the issuance of which resulted in the existence of a mandatory basis for ordering the execution of the previously suspended custodial sentence. In such a situation, the executing authority does not examine the situation in the requesting State at the time of deciding on the order for the sentence to be carried out. The mandatory nature of managing the execution of a sentence in the event of a new conviction for a similar intentional offence leaves no choice to the competent authority of the issuing state deciding on the enforcement of the penalty of imprisonment. In fact, it is obliged to order the enforcement of the suspended sentence.²² The subject of the assessment, in the context of the possible application of the exceptional ground for refusal of recognition and enforcement, is the situation prevailing in the issuing State until the date of the new conviction, the issuance of which resulted in the mandatory order for the execution of the custodial sentence to be taken over in the executing State. However, the point of reference for conducting

²¹ Act of 6 June 1997, consolidated text: Journal of Laws 2025, item 383; thereafter referred to as “CC.”

²² As a side note, it is worth noting that the application of the special ground of refusal of recognition and enforcement could apply to situations in which general, systemic, and specific deficiencies in the right to a fair trial occurred in the context of a decision based on the finding of the existence of optional grounds for ordering the execution of a suspended custodial sentence, as defined in Article 75 § 2 and § 3 CC.

the two-step test is not the moment when the authority of the issuing state decides to request the recognition and enforcement of the custodial sentence in another Member State. Similarly, it is not justified to carry out a two-step test of the existence of a risk of violation of fundamental rights in the issuing state at the time when the authority of the executing State takes a decision on the request for recognition and enforcement of a custodial sentence imposed in that issuing State.

In summary, it seems reasonable to conclude that the judgment under comment recognized the possibility of applying an exceptional ground for refusal, which, in its form – developed for the purposes of the procedure for deciding on the execution of an EAW – does not fit the specific nature of the cooperation measure used to transfer the execution of a prison sentence. The reason for creating a special ground for refusal unregulated in FD 2008/909 is the finding of systemic and generalized irregularities concerning the right to a fair trial, particularly those relating to the functioning of the judicial system and respect for the rule of law, which may have a specific impact on the convicted person. In fact, the existence of a specific ground for refusal can be considered primarily in the event of participation in the issuance of a judgment imposing a prison sentence or a judgment resulting in the ordering of the execution of a suspended prison sentence in the issuing State by a person appointed to the office of judge at the request of the National Council of the Judiciary, established pursuant to the provisions of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts.²³ Identifying and applying this ground when the person sentenced to imprisonment is in the executing State will most likely lead to impunity. In turn, if the person concerned remains in the issuing State, refusal can paradoxically lead to the execution of the prison sentence in a State where general, systemic and specific violations of the fundamental right to a fair trial have been identified.

²³ Journal of Laws 2018, item 3, as amended.

References

- Augustyniak, Barbara. "Komentarz do art. 611(tk) Kodeksu postępowania karnego." In *Kodeks postępowania karnego. Komentarz aktualizowany*, vol. 2, edited by Dariusz Świecki. LEX/el., 2025.
- Górski, Adam. "Komentarz do art. 611tk Kodeksu postępowania karnego." In *Kodeks postępowania karnego. Komentarz*, edited by Andrzej Sakowicz. Warsaw: C.H. Beck; Legalis, 2025.
- Montaldo, Stefano. "Framework Decision 2008/909/JHA and Fundamental Rights Concerns: In Search of Appropriate Remedies." In *The Transfer of Prisoners in the European Union. Challenges and Prospects in the Implementation of Framework Decision 2008/909/JHA*, edited by Stefano Montaldo, 37–60. Hague: Eleven International Publishing; G. Giappichelli Editore, 2020.
- Montaldo, Stefano. "Intersection Among EU Judicial Cooperation Instruments and the Quest for an Advanced and Consistent European Judicial Space: The Case of the Transfer and Surrender of Convicts in the EU." *New Journal of European Criminal Law* 13, no. 3 (2022): 252–69.
- O'Neill, Ruairi. "Defending Judicial Independence in Court: A Subjective Right to Independence in EU Law." *Liverpool Law Review* 46 (2025): 65–84.
- Ouwerkerk, Jannemieke. "The Missing Link in CJEU *Staatsanwaltschaft Aachen* (C-891/21) and the Argument for Humanitarian Considerations in Prison Transfer Proceedings." *European Journal of Crime, Criminal Law and Criminal Justice* 32 (2024): 181–95. <https://doi.org/10.1163/15718174-32030001>.
- Partyk, Tomasz. "Systemowe problemy sądownictwa to nie konkretne wyroki. Omówienie wyroku TS z dnia 9 listopada 2023 r., C-819/21 (*Staatsanwaltschaft Aachen*)." LEX/el., 2023.
- Rosanò, Alessandro. "*Staatsanwaltschaft Aachen*, ovvero la tutela dei diritti fondamentali sulla base del test LM nelle procedure di trasferimento interstatale di detenuti." *European Papers* 8, no. 3 (2023): 1105–20.
- Smarzewski, Marek. "Przejęcie i przekazanie kary pozbawienia wolności do wykonania na podstawie decyzji ramowej Rady 2008/909/WSiSW." In *System Prawa Karnego Procesowego*. Vol. 18, *Współpraca międzynarodowa w sprawach karnych*, edited by Małgorzata Wąsek-Wiaderek, 1102–61. Warsaw: Wolters Kluwer Polska, 2025.