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*The Human Rights Exception and the Fair Trial Exception  
in European Extradition Law*

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# *The Human Rights Exception and the Fair Trial Exception in European Extradition Law*

## **Abstract**

Since the introduction of the European Arrest Warrant (EAW) at the level of the European Union (EU) the Court of Justice of the European Union (CJEU) has dealt on several occasions with refusals to execute such warrants, in particular on the grounds of human rights violations and lack of judicial independence. The present study critically evaluates the case law of the CJEU regarding the refusal to execute EAW in its three stages of development. From mutual trust as blind trust, the CJEU moved to “real trust”, which allows the refusal to execute an EAW in cases of inhuman and degrading treatment; finally, the CJEU allowed the refusal to execute an EAW in cases where there is a violation of the right to fair trial.

## **Keywords**

*Cross-border crime, European Union, extradition, European Arrest Warrant, human rights, fair trial, judicial independence.*

## **1. Introduction**

Since the introduction of the European Arrest Warrant (EAW) at the level of the European Union (EU) the Court of Justice of the European Union (CJEU) has dealt on several occasions with the refusal to execute such warrants, in particular on the grounds of human rights violations and lack of judicial independence. In this area, the CJEU has developed extensive case law, which has gradually evolved through three main phases, which we will outline and evaluate in this study. In this endeavor, we will also take into consideration the fact that the independence of the judiciary has been undermined in some Member States.

The purpose of this study is to analyze critically the three phases of the development of the relevant CJEU case law. In the first phase of its case law development, the CJEU ruled out the refusal to execute an EAW, except on mandatory and optional grounds under Articles 3 and 4 of the Framework Decision 2002/584. In the second phase, the CJEU changed its approach and allowed a refusal to execute the EAW in case of violation of the right under Article 4 of the Charter of Fundamental Rights of the European Union ('the Charter'). In the *Aranyosi/Caldararu* decision, the CJEU elaborated the test for the refusal of execution under Article 4 of the Charter. In the third phase of its case law development, the CJEU went one-step further, applying the *Aranyosi/Caldararu* test in case of violation of the right under Article 47 of the Charter and the violation of judicial independence. Finally, we make an overall assessment of this gradual evolution of the CJEU case law with regard to the execution of an EAW.

## **2. Implementing the Principle of Mutual Trust**

There is a unifying element linking the rulings of the CJEU in this context, namely the principle of mutual trust, which is mentioned in the preamble to the Council Framework Decision 2002/584/JHA as the basis of the mechanism.<sup>1</sup> There is also a reference to the same principle in the very first decision on the EAW. Under the EAW, mutual trust is tantamount to the presumption that Member States comply with EU law, and in particular fundamental rights, except in exceptional cases. Therefore, a Member State cannot demand from another a higher level of national protection of

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<sup>1</sup> "The mechanism of the European arrest warrant is based on a high level of confidence between Member States"; point 10 of the preamble of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002, p. 1.

fundamental rights than the level provided for in EU law. Nor can a Member State check in a particular case whether another Member State has indeed respected the fundamental rights guaranteed by the EU.<sup>2</sup> In its first rulings, the CJEU, despite the hesitations of national courts, focused mainly on the respect of the “principle of mutual trust” and it appeared to be less concerned with the safeguarding of fundamental rights. Inevitably, the EAW mechanism became the object of criticism on the grounds of human rights.<sup>3</sup>

### *2.1. Execution of a European Arrest Warrant issued for the purposes of prosecution and the right to be heard*

In the Radu case,<sup>4</sup> the CJEU was asked whether the EAW must satisfy the requirements of necessity and proportionality and whether, in the event of a real or potential breach of human rights, the executing judicial authority must refuse to execute the EAW. Contrary to the Advocate General's view, the CJEU has given little consideration to the right to a fair trial. Although the CJEU acknowledged that the right to be heard is enshrined in Articles 47 and 48 of the Charter, it placed much greater emphasis on the need to implement the EAW Framework Decision<sup>5</sup> and it limited the scope of the grounds for refusal to execute an EAW.<sup>6</sup> The CJEU held that Member States may refuse to execute an EAW only in cases where one of the grounds for mandatory non-execution (Article 3 of the EAW Framework Decision) or optional non-execution (Articles 4 and 4a of the EAW Framework Decision) is met.<sup>7</sup>

Mr Radu claimed that his fundamental rights had been violated because the judicial authority issuing the EAW had not summoned him nor gave him the opportunity to be heard beforehand. The referring court raised a preliminary question that had to do more broadly with the possibility of executing the EAW in cases where there is a breach of fundamental rights. Of course, questions referred for a preliminary ruling stem from a specific case, and the violation of those rights, in Mr Radu 's case, could be challenged.<sup>8</sup>

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<sup>2</sup> Leandro Mancano , "You'll never walk alone: A systemic assessment of the European Arrest Warrant and judicial independence", *Common Market Law Review* , Volume 58, Issue 3 (2021), pp. 686-687

<sup>3</sup> Steve Peers, "Human Rights and the European Arrest Warrant: Has the ECJ turned from poacher to gamekeeper?", 12 November 2016, <http://eulawanalysis.blogspot.com/2016/11/human-rights-and-european-arrest.html> (accessed 30 May 2022)

<sup>4</sup> C – 396/11 *Ciprian Vasile Radu* ECLI: EU: C: 2013: 39

<sup>5</sup> Mancano Leandro, “The Right to Liberty in European Union Law and Mutual Recognition in Criminal” Matters, *Cambridge Yearbook of European Legal Studies* , Volume 18 (2016), pp 226

<sup>6</sup> C-396/11 *Radu* , par. 43

<sup>7</sup> *Ibid*, par. 36

<sup>8</sup> Mancano , “The right to Liberty”, *op. cit.*, pp. 226-227

At the time, the CJEU seemed to be closing the door on violations of fundamental rights as grounds for refusing to execute an EAW<sup>9</sup> and it is clear that its main concern was to ensure the effective implementation of the EAW.<sup>10</sup> The CJEU interpreted the EAW Framework Decision narrowly, missing this opportunity to take into consideration the protection of human rights. Despite the significance of the questions referred for a preliminary ruling, we note that the CJEU avoided addressing the key issue, i.e. the protection of fundamental rights, thus raising further questions. Admittedly, the decision in the Radu case was surprising and somewhat disappointing.<sup>11</sup>

### *2.2. Execution of a European Arrest Warrant issued in absentia*

The Melloni case<sup>12</sup> is a milestone in the relationship between EU and national standards of fundamental rights in the field of criminal justice.<sup>13</sup> At the same time, it is a continuation of Radu, since the CJEU has chosen to maintain the same position.<sup>14</sup> The case concerned Mr Melloni, against whom the Italian authorities issued an EAW *in absentia* for bankruptcy fraud. The Spanish judicial authorities, as executing judicial authorities, were unsure whether to surrender Mr Melloni to Italy, because the Spanish Constitution provided for a higher level of protection of the rights of a person sentenced *in absentia* than the standards laid down by EU law. Therefore, the CJEU was asked whether priority to national law should be given<sup>15</sup> and whether a Member State should be allowed to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the requesting State, thus affording those rights a greater level of protection than that deriving from EU law.<sup>16</sup>

The CJEU held that the right to a fair trial is not absolute and therefore the accused may voluntarily waive this right.<sup>17</sup> The CJEU also found that Article 4a (1) is fully compatible with the requirements under Articles 47 and

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<sup>9</sup> Ibid, pp. 226-227

<sup>10</sup> Maria Kaiafa-Gbady , "ECJ Case Law and European Arrest Warrant: Key Directions and Current Trends (PART B)", *Criminal Justice* , Issue 2 (2019).

<sup>11</sup> Ermioni Xanthopoulou , "Radu judgment: A lost opportunity and a story of how the mutual trust obsession shelved human rights", 27 March 2013, <https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=416>, (access date December 14 , 2021)

<sup>12</sup> C-399/11 *Stefano Melloni v Ministerio Fiscal* ECLI: EU: C: 2013: 107

<sup>13</sup> Vanessa Franssen, "Melloni as a wake-up call setting limits to higher national standards of fundamental rights' protection", 10 March 2014, <https://europeanlawblog.eu/2014/03/10/melloni-as-a-wake-up-call-setting-limits-to-higher-national-standards-of-fundamental-rights-protection/> (accessed 30 May 2022)

<sup>14</sup> Caiaphas -Gbady, "ECJ Case Law and European Arrest Warrant", op. cit.

<sup>15</sup> C-399/11 *Stefano Melloni* , p . 55

<sup>16</sup> Ibid, par. 35.

<sup>17</sup> Ibid, par. 49.

48(2) of the Charter.<sup>18</sup> Furthermore, the CJEU addressed the key question and made it clear that allowing the executing State to invoke Article 53 of the Charter and make the surrender of a person convicted in absentia conditional upon the conviction being open to review would undermine the effectiveness of EU law, as well as the principle of the primacy of EU law.<sup>19</sup>

In this case, as it has been correctly argued, “the ECJ placed a ceiling on the application of national human rights protection to resist execution of an EAW; but it never enforced a corresponding floor for those rights”.<sup>20</sup> The level of protection of these rights in a certain area, which is set exhaustively by the EU legislator, is considered sufficient, because a balance is struck between these rights and the effectiveness of EU law and mutual cooperation between Member States. Of course, Member States have the discretion to go beyond what is required by EU law, only to the extent that the subject matter is not fully regulated by the EU. The Melloni judgment should therefore be a wake-up call for the Member States in the field of EU criminal justice.<sup>21</sup> If we admit these hypotheses, we conclude that mutual trust means blind trust and not general trust with exceptions. It is, in fact, such a blind trust that the executing authority has to execute the EAW without any scrutiny for any reason other than the grounds referred to in Articles 3 and 4 of the EAW Framework Decision<sup>22</sup>.

### **3. Conditions of detention and violation of the fundamental right of Article 4 of the Charter**

From 2016 onwards, we observe a shift in CJEU’s interpretation of the grounds for refusing execution of EAW. The CJEU gave substance to the obligation to respect fundamental rights under the general provision of Article 1(3) of the EAW Framework Decision.<sup>23</sup> Thus, the presumption in favor of mutual trust can be rebutted, if a two-step test is met, devised by the CJEU in the *Aranyosi/Caldararu case*. The CJEU has developed an understanding of the “doctrine of exceptional circumstances” as a two-stage test for refusing to enforce the EAW in the event of a breach of fundamental rights in the issuing

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<sup>18</sup> Ibid, par. 54.

<sup>19</sup> Ibid, par. 63.

<sup>20</sup> Steve Peers, “Human Rights and the European Arrest Warrant: Has the ECJ turned from poacher to gamekeeper?”, 12 November 2016, <https://free-group.eu/2016/11/12/human-rights-and-the-european-arrest-warrant-has-the-ecj-turned-from-poacher-to-gamekeeper/> (accessed 30 May 2022)

<sup>21</sup> Franssen, “Melloni as a wake-up”, op. cit.

<sup>22</sup> Henning Bang Fuglsang Madsen Sørensen, “Mutual trust – blind trust or general trust with exceptions? The CJEU hears key cases on the European Arrest Warrant”, 18 February 2016, <http://eulawanalysis.blogspot.com/2016/02/mutual-trust-blind-trust-or-general.html> (accessed 30 May 2022)

<sup>23</sup> Caiaphas -Gbody, “ECJ Case Law and European Arrest Warrant”, op. cit.

State. Therefore, the "doctrine of exceptional circumstances" and the protection of fundamental rights can justify the refusal to execute an EAW.<sup>24</sup> The key issues in this context are the prohibition of inhuman and degrading treatment under Article 4 of the Charter and the right to a fair trial by an independent court. The shift in the case law of the CJEU was a response to the miserable detention conditions in some Member States and the regression of the rule of law in Poland.<sup>25</sup>

### *3.1. Joint cases Aranyosi and Caldaru*

In the joint cases *Aranyosi and Caldaru*<sup>26</sup>, the CJEU had to deal essentially with the same question: if there is solid evidence that detention conditions in the issuing Member State are incompatible with fundamental rights (Article 3 of the ECHR, Article 4 of the Charter and Article 6 TEU), may or must the executing judicial authority refuse to execute an EAW?

The CJEU, having first discussed the scope of the EAW Framework Decision, namely the establishment of a simpler and more efficient system of extradition,<sup>27</sup> recognized the need to respect and protect fundamental rights.<sup>28</sup> The CJEU pointed out that the prohibition of inhuman or degrading treatment or punishment, laid down in Article 4 of the Charter, is absolute in that it is closely linked to respect for human dignity, the core of Article 1 of the Charter. Article 3 ECHR, to which Article 4 of the Charter corresponds, confirms this prohibition and, as is stated in Article 15(2) ECHR, no derogation is possible.<sup>29</sup>

The CJEU devised for the first time a two-step test:

As a first step, the executing judicial authorities assess whether there is "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 EU law and, in particular, by Article 4 of the Charter"<sup>30</sup>. If such a risk is present, the executing judicial authorities do not refuse the execution of the EAW automatically.

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<sup>24</sup> Mancano, "You'll never walk", op. cit., p. 687.

<sup>25</sup> Ibid, p. 688

<sup>26</sup> Joined cases C-404/15 and C-659/15 PPU *Pal Aranyosi and Robert Caldaru* ECLI: EU: C: 2016: 198.

<sup>27</sup> Ibid, par. 76.

<sup>28</sup> Ibid, par. 83.

<sup>29</sup> Ibid, par. 85-86.

<sup>30</sup> Ibid, par. 89



As a second step, the executing judicial authority “when faced with evidence of the existence of such deficiencies that is objective, reliable, specific and properly updated, is bound to determine whether, in the particular circumstances of the case, there are substantial grounds to believe that, following the surrender of that person to the issuing Member State, he will run a real risk of being subject in that Member State to inhuman or degrading treatment, within the meaning of Article 4”.<sup>31</sup>

Therefore, the executing judicial authorities may request from the issuing judicial authorities additional information and impose specific deadlines. Until they receive such information, they postpone the decision to extradite. In the event that the executing judicial authorities cannot rule out the risk within the prescribed time, they have to decide whether to terminate the extradition procedure. Still, the CJEU considers this as a “postponement” and not as a refusal to execute the EAW, but this results in a *de facto* refusal of execution, as long as the risk remains.<sup>32</sup>

The judgment of the CJEU in *Aranyosi and Caldaru* is of paramount importance. It confirms that mutual trust is not absolute<sup>33</sup> and that it cannot apply on an abstract level. There must be a review based on specific information regarding the protection of fundamental rights in other Member States.<sup>34</sup> The CJEU states unequivocally that the requirement to prevent individual harm is absolute, “in what looks like a notable retreat from its previous insistence that only systemic deficiencies could defeat an EU obligation to transfer”<sup>35</sup>.

It is important that the CJEU moves away from what some have criticized as an attempt to ignore social reality and impose an absolute doctrine of mutual trust.<sup>36</sup> Of course, the restriction set by the CJEU is exceptional, while the CJEU clearly determines the procedure that the executing authorities have to follow if there is evidence of a “real risk of inhuman or degrading treatment”.<sup>37</sup> The CJEU began to deal with the protection of fundamental rights on its own terms and without receiving

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<sup>31</sup> Ibid, par. 94

<sup>32</sup> Caiaphas -Gbody, "ECJ Case Law and European Arrest Warrant", op. cit.

<sup>33</sup> Daniel Halberstam, "The Judicial Battle over Mutual Trust in the EU: Recent Cracks in the Façade", 9 June 2016, <https://verfassungsblog.de/the-judicial-battle-over-mutual-trust-in-the-eu-recent-cracks-in-the-facade/> (accessed 30 May 2022)

<sup>34</sup> Caiaphas -Gbody, "ECJ Case Law and European Arrest Warrant", op. cit.

<sup>35</sup> Halberstam, The Judicial Battle, op. cit.

<sup>36</sup> Ibid

<sup>37</sup> Caiaphas -Gbody, "ECJ Case Law and European Arrest Warrant", op. cit.

instructions from another court, such as the ECtHR, since it has already claimed the autonomy of EU law.<sup>38</sup>

On the other hand, the judgment of the CJEU raises further questions, in particular how the executing judicial authorities would evaluate the conditions of detention in another Member States. In addition, there is a possibility that wanted persons committing offenses may move from one Member State to another to avoid the criminal consequences of their actions.<sup>39</sup> The *Aranyosi / Caldaru* judgment has wider implications for EU law, since the CJEU moves closer to the standards applied by the ECtHR. Finally, the specific ruling of the Court can be the springboard for the improvement of the EU legal framework and the prevention of “empirically recorded abuses at the level of temporary detention”.<sup>40</sup>

### 3.2. Case *ML v Generalstaatsanwaltschaft Bremen*

In this case<sup>41</sup>, the CJEU upheld its position in the *Aranyosi/Caldaru* judgment; it further found that the referring court has the sole responsibility to take account of accurate and properly up-to-date information (p. ex. conditions of detention) and establish that there is a risk of a violation of the fundamental rights<sup>42</sup>. Interestingly, the executing judicial authorities are obliged to examine the conditions of detention in those penitentiaries “in which, according to the information available to them, it is actually intended that the person concerned will be detained, including on a temporary or transitional basis”<sup>43</sup>. The CJEU also held that the temporal or transient nature of detention is not, on its own, enough to rule out any real risk of inhuman or degrading treatment.<sup>44</sup> The judgment of the CJEU confirms that fundamental rights are protected in part, since the CJEU restricts the application of the Aranyosi test, by requiring executing authorities to assess “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” after extradition.<sup>45</sup>

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<sup>38</sup> Ermioni Xanthopoulou, “Mutual trust and rights in EU Criminal and Asylum Law: Three phases of evolution and the uncharted territory beyond blind trust”, *Common Market Law Review*, Volume 55 (2018), pp 499

<sup>39</sup> Caiaphas -Gbady, "ECJ Case Law and European Arrest Warrant", op. cit.

<sup>40</sup> Ibid.

<sup>41</sup> C-220/18 PPU) *ML v Generalstaatsanwaltschaft Bremen* ECLI: EU: C: 2018: 589

<sup>42</sup> C -220/18 PPU *ML*, par. 71.

<sup>43</sup> Ibid, par. 87.

<sup>44</sup> C -220/18 PPU *ML*, par. 100.

<sup>45</sup> Agnieszka Frąckowiak-Adamska, “Mutual trust and independence of the judiciary after the CJEU judgment in LM - new era or business as usual?”, 15 August 2018,

### 3.3. The Dorobantu case

In the Dorobantu case<sup>46</sup>, the question for preliminary ruling had to do with the minimum standards for detention conditions required under the Charter, as well with the interpretation of the concept of “real risk” used by the Court in its previous judgments. In essence, the referring court sought guidance on how to assess detention conditions in respect of each detainee's personal space.<sup>47</sup> However, EU law does not contain rules on this subject. The Court therefore became creative<sup>48</sup>, referring to the standards of the ECtHR and in particular the *Muršić v. Croatia*.<sup>49</sup> With regard to the other questions referred, the CJEU considered that the real risk of inhuman or degrading treatment could not be ruled out merely because the person concerned has, in the issuing Member State, a legal remedy enabling that person to challenge the conditions of his detention. In addition, the CJEU considered that such a real risk “cannot be weighed [...] against considerations relating to the efficacy of judicial cooperation in criminal matters and to the principles of mutual trust and recognition”.<sup>50</sup> The Court took a further step towards a more detailed explanation of the factors that are important in assessing the minimum standards of detention conditions. However, the questions raised here were also dealt with in the *Generalstaatsanwaltschaft case*.<sup>51</sup>

Several practical problems arise in the aforementioned cases. For example, “a convicted person, perhaps for very serious crimes, might have to be released from custody due to the impossibility to surrender and to extend such provisional measure any further”<sup>52</sup>. The implication is that the judicial authorities issuing an EAW will indicate a prison, according to the standards of the CJEU, in which the wanted person will be detained initially, but the person can be transferred anywhere afterwards. Therefore, the absolute right becomes a right of limited duration and the risk of inhuman or degrading treatment re-emerges in the few weeks that will elapse after extradition. In

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<http://eulawanalysis.blogspot.com/2018/08/mutual-trust-and-independence-of.html> (accessed 30 May 2022)

<sup>46</sup> C-128/18 *Dumitru -Tudor Dorobantu* ECLI: EU: C: 2019: 857

<sup>47</sup> Auguston Mohay , “Plot twist? Case -128/18 Dorobantu : detention conditions and the applicability of the ECHR in the EU legal order ”, 28 October 2019, <http://eulawanalysis.blogspot.com/search?q=dorobantu>, ( access date 16 December 2021)

<sup>48</sup> Mohay , “Plot twist?”, op. cit.

<sup>49</sup> C-128/18 *Dorobantu*, par. 71.

<sup>50</sup> C-128/18 *Dorobantu*; Mohay , “Plot twist?”, op. cit.

<sup>51</sup> Andreas Karatakis , “Case C-128/18 Dorobantu - the Aftermath of Aranyosi and Căldăraru ”, 28 October 2019, <https://europeanlawblog.eu/2019/10/28/case-c-128-18-dorobantu-the-aftermath-of-aranyosi-and-caldararu/> (accessed 30 May 2022)

<sup>52</sup> Jorge Espina, "The EAW in cases of problematic surrender: Causes, consequences and possible solutions", 3 July 2020, <https://europeanlawblog.eu/2020/07/03/the-eaw-in-cases-of-problematic-surrender-causes-consequences-and-possible-solutions/> (accessed 30 May 2022)

addition, it is paradoxical to create an *ad hoc* arrangement for persons in EAW proceedings and be indifferent to the situation of prisoners who are already in these penitentiaries and remain at risk of being ill-treated within the meaning of Article 3 of the ECHR. The EU legal framework must prevent all violations of fundamental rights in the given prison conditions, not only the rights of the fortunate ones involved in EAW proceedings.<sup>53</sup>

#### **4. Violation of Article 47 of the Charter - Infringement of judicial independence**

##### *4.1. Case Minister for Justice and Equality v LM*

The *LM case*<sup>54</sup> was the first opportunity for the CJEU to assess the consequences of the restrictions imposed on judicial independence in one Member State. Legislative reforms in Poland, which began in 2015, have been assessed by the Venice Commission as posing “a grave threat to the judicial independence as a key element of the rule of law”<sup>55</sup>. This is a problematic situation for the EU because national courts must ensure “the full application of European Union law (...) and (...) judicial protection of an individual’s rights under that law”.<sup>56</sup>

In the *LM case*, the question for preliminary ruling concerned the right to a fair trial. The CJEU, perhaps because of tight time constraints or perhaps because of its reluctance to engage in political controversy, applied the two-step test, thus taking the safest route instead of the most appropriate one. Therefore, the procedure is not left to the discretion of the executing authority, but is organized around two assessments.<sup>57</sup>

As a first step, the national court must “assess, 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”.<sup>58</sup> In this context, the CJEU

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<sup>53</sup> Andre Klip, “Eroding Mutual Trust in a European Criminal Justice Area without Added Value”, *European Journal of Criminal Law and Criminal Justice*, Volume 28 (2) (2020), pp. 109-119.

<sup>54</sup> C-216/18 PPU *Minister for Justice and Equality v LM* ECLI : EU: C: 2018: 586

<sup>55</sup> European Commission for Democracy through Law (Venice Commission), Poland: Opinion on Draft Law, Opinion No. 904 / 2017, Strasbourg, 11 December 2017.

<sup>56</sup> *Ibid.*

<sup>57</sup> C-216/18 PPU *Minister for Justice and Equality v LM* ECLI : EU: C: 2018: 586.

<sup>58</sup> *Ibid.*, par. 61.

stressed the importance of judicial independence, which is the essence of the right to a fair trial.<sup>59</sup>

As a second step, the referring court must “assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run that risk”<sup>60</sup>

To conclude with, the CJEU has allowed the presumption of mutual trust to be rebutted, if a Member State is subject to a reasoned proposal adopted by the Commission pursuant to Article 7(1) TEU. In this case, an assessment is required. The *LM* judgment constitutes as an important development in the case-law on the protection of fundamental rights in the context of mutual recognition. It is now clear that both the violation of Article 4 and the violation of Article 47 of the Charter can justify the refusal to execute an EAW.<sup>61</sup>

#### 4.2. *The joint cases L and P / Openbaar Ministerie*

In the joint cases L and P / Openbaar Ministerie<sup>62</sup>, the referring court had concerns about the right to a fair trial of two Polish citizens. Once again, the key issue was judicial independence in Poland.<sup>63</sup> The CJEU held that the refusal to execute an EAW must follow the two-step assessment set out in the *LM case*, taking into account the individual circumstances surrounding the case. The CJEU admitted that systemic or generalized deficiencies, however serious, do not affect every decision of the Polish courts automatically and necessarily. The only way to suspend the implementation of the EAW mechanism is through procedure of Article 7 TEU in case of serious and persistent violation by a Member State.<sup>64</sup> The CJEU has used a test that is essentially very difficult to satisfy. The Court's approach is explained, if not justified, by policy considerations. However, the distinction between legislative rules and systemic deficiencies may prove difficult to maintain for a

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<sup>59</sup> *Ibid.*, par. 62-67

<sup>60</sup> *Ibid.*, par. 68

<sup>61</sup> *Ibid.*

<sup>62</sup> Joined cases C-354/20 PPU and C-412/20 PPU *L and P* ECLI: EU: C: 2020: 1033

<sup>63</sup> “Court of Justice: generalized deficiencies concerning judicial independence in Poland does not justify refusal of execution of EAWs issued by Polish authorities”, 17 December 2020, <https://eulawlive.com/court-of-justice-generalised-deficiencies-concerning-judicial-independence-in-poland-does-not-justify-refusal-of-execution-of-eaws-issued-by-polish-authorities/> (accessed 30 May 2022)

<sup>64</sup> *Ibid.*

long time, especially if the undermining of judicial independence in Poland shows no signs of receding.<sup>65</sup>

## 5. Concluding Remarks

The recent case law of the CJEU seems to move away from the intended purpose of the EAW. It has raised the threshold for cooperation between the Member States, it has created more formalities, caused delays and did not strengthen the legal remedies for the affected individuals. Therefore, it has rendered cooperation less effective, by restoring borders between Member States and by undermining trust.<sup>66</sup>

In a number of cases involving EAW, citizens have temporarily benefited from individualized privileges, which may lead to unequal treatment between detainees. The effort to protect the fundamental rights of detainees in the EAW proceedings, through new questions for preliminary rulings, may lead to the adoption of ornamental measures and decorative formalities by Member States. The involvement of the CJEU for the protection of the rights of individuals in pending criminal proceedings would actually strengthen these rights in all Member States, which would render formalities in the EAW proceeding unnecessary.<sup>67</sup>

The present study critically evaluated the case law of the CJEU regarding the refusal to execute EAW in its three stages of development. From mutual trust as blind trust, the CJEU moved to “real trust” that allows the refusal to execute an EAW in cases of inhuman and degrading treatment. Finally, the CJEU allowed the refusal to execute an EAW in cases where there is a violation of the right to fair trial. Taking into account the regression of the rule of law in Poland, we explained how the CJEU distinguished legislative rules from systemic shortcomings. Moreover, we argued that there has been an erosion of mutual trust in the context of the EAW without added value for the protection of fundamental rights.<sup>68</sup> We further argued that the CJEU has to shift its focus from judicial cooperation to criminal proceedings and

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<sup>65</sup> Leandro Mancano, “Judicial Independence and the European Arrest Warrant. Systemic Challenges and Ways Forward”, 29 June 2021, <http://eulawanalysis.blogspot.com/2021/06/judicial-independence-and-european.html> (accessed 30 May 2022)

<sup>66</sup> Klip, op. cit.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

detention conditions, in order to create a single area of criminal justice and add a level of protection to the one that already exists under the ECHR.<sup>69</sup>

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<sup>69</sup> Ibid. See also Pavlidis G., “Learning from failure: cross-border confiscation in the EU”, *Journal of Financial Crime*, Vol. 26 No. 3 (2019), pp. 683-691

## Bibliography

### Journal Articles

1. Caiaphas-Gabdi Maria, " ECJ Case Law and European Arrest Warrant: Key Directions and Current Trends (PART B )", *Criminal Justice*, Issue 2 (2019)[*in Greek*]
2. Klip Andre , "Eroding Mutual Trust in a European Criminal Justice Area without Added Value", *European Journal of Criminal Law and Criminal Justice*, Volume 28 (2) (2020), pp 109-119
3. Mancano Leandro, "You'll never walk alone: A systemic assessment of the European Arrest Warrant and judicial independence", *Common Market Law Review* , Volume 58 Issue 3 (2021)
4. Mancano Leandro, "The Right to Liberty in European Union Law and Mutual Recognition in Criminal" Matters, *Cambridge Yearbook of European Legal Studies* , Volume 18 (2016)
5. Pavlidis G., "Learning from failure: cross-border confiscation in the EU", *Journal of Financial Crime*, Vol. 26 No. 3 (2019), pp. 683-691
6. Xanthopoulou Ermioni , "Mutual trust and rights in EU Criminal and Asylum Law: Three phases of evolution and the uncharted territory beyond blind trust ", *Common Market Law Review* , Volume 55 (2018)

### Online Resources

1. "Court of Justice: generalized deficiencies concerning judicial independence in Poland does not justify refusal of execution of EAWs issued by Polish authorities", 17 December 2020, [https://eulawlive.com/court-of-justice-generalised-deficiencies-concerning-judicial-independence-in-poland-does-not-justify-refusal-of-execution-of-eaws-issued-by-polish-authorities /](https://eulawlive.com/court-of-justice-generalised-deficiencies-concerning-judicial-independence-in-poland-does-not-justify-refusal-of-execution-of-eaws-issued-by-polish-authorities/), ( access date 16 December 2021)
2. Espina Jorge, "The EAW in cases of problematic surrender: Causes, consequences and possible solutions", 3 July 2020, [https://europeanlawblog.eu/2020/07/03/the-eaw-in-cases-of-problematic-surrender-causes-consequences-and-possible-solutions /](https://europeanlawblog.eu/2020/07/03/the-eaw-in-cases-of-problematic-surrender-causes-consequences-and-possible-solutions/) (accessed 30 May 2022)



3. Frąckowiak-Adamska Agnieszka, “Mutual trust and independence of the judiciary after the CJEU judgment in LM - new era or business as usual?”, 15 August 2018, <http://eulawanalysis.blogspot.com/2018/08/mutual-trust-and-independence-of.html> (accessed 30 May 2022)
4. Franssen Vanessa, “ Melloni as a wake-up call setting limits to higher national standards of fundamental rights' protection”, 10 March 2014, <https://europeanlawblog.eu/2014/03/10/melloni-as-a-wake-up-call-setting-limits-to-higher-national-standards-of-fundamental-rights-protection/> (accessed 30 May 2022)
5. Halberstam Daniel, "The Judicial Battle over Mutual Trust in the EU: Recent Cracks in the Façade", 9 June 2016, <https://verfassungsblog.de/the-judicial-battle-over-mutual-trust-in-the-eu-recent-cracks-in-the-facade/> (accessed 30 May 2022)
6. Karapatakis Andreas, “Case C-128/18 Dorobantu - the Aftermath of Aranyosi and Căldăraru ”, 28 October 2019, <https://europeanlawblog.eu/2019/10/28/case-c-128-18-dorobantu-the-aftermath-of-aranyosi-and-caldararu/> (accessed 30 May 2022)
7. Mancano Leandro, “Judicial Independence and the European Arrest Warrant. Systemic Challenges and Ways Forward ”, 29 June 2021 , <http://eulawanalysis.blogspot.com/2021/06/judicial-independence-and-european.html> (accessed 30 May 2022)
8. Mohay Auguston, “Plot twist? Case -128/18 Dorobantu : detention conditions and the applicability of the ECHR in the EU legal order ”, 28 October 2019, <http://eulawanalysis.blogspot.com/search?q=dorobantu> (accessed 30 May 2022)
9. Peers Steve, “Human Rights and the European Arrest Warrant: Has the ECJ turned from poacher to gamekeeper?”, 12 November 2016, <http://eulawanalysis.blogspot.com/2016/11/human-rights-and-european-arrest.html> (accessed 30 May 2022)
10. Sørensen Henning Bang Fuglsang Madsen, “Mutual trust - blind trust or general trust with exceptions? The CJEU hears key cases on the European Arrest Warrant ”, 18 February 2016 , <http://eulawanalysis.blogspot.com/search?q=aranyosi> (accessed 30 May 2022)
11. Xanthopoulou Ermioni , “Radu judgment: A lost opportunity and a story of how the mutual trust obsession shelved human rights”, 27 March 2013 ,

<https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=416> (accessed 30 May 2022)

### **Judgments of the CJEU**

C-396/11 *Ciprian Vasile Radu* ECLI: EU: C: 2013: 39

C-399/11 *Stefano Melloni v Ministerio Fiscal* ECLI: EU: C: 2013: 107

Joined cases C-404/15 and C-659/15 PPU *Pal Aranyosi and Robert Caldaru* ECLI: EU: C: 2016: 198

C-220/18 PPU) *ML v Generalstaatsanwaltschaft Bremen* ECLI: EU: C: 2018: 589

C-128/18 *Dumitru -Tudor Dorabantu* ECLI: EU: C: 2019: 857

C-216/18 PPU *Minister for Justice and Equality v LM* ECLI : EU: C: 2018: 586

Joined cases C-354/20 PPU and C-412/20 PPU *L and P* ECLI: EU: C: 2020: 1033