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**AN ELEGANT WEAPON FOR A MORE CIVILIZED AGE:  
REFUSING EUROPEAN ARREST WARRANT  
ON THE GROUNDS OF RIGHT TO A FAIR TRIAL INFRINGEMENTS**

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## TIIVISTELMÄ

**Työn nimi:** An Elegant Weapon for a More Civilized Age: Refusing European Arrest Warrant on the Grounds of Right to a Fair Trial Infringements

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**Tiivistelmä:** Entinen luovuttamisjärjestelmä EU:n jäsenmaiden korvattiin eurooppalaisella pidätysmääräyksellä vuoden 2002 puitepäätöksellä. Eurooppalaisen pidätysmääräyksen ja oikeuden oikeudenmukaiseen oikeudenkäyntiin väliltä löytyy useita ongelmakohtia.

Vuoden 2002 puitemääräys ei nimenomaisesti salli jäsenvaltion kieltäytyvän henkilön luovuttamisesta sillä perusteella, että hänen oikeutensa oikeudenmukaiseen oikeudenkäyntiin olisi kohdemaassa vaarassa. Euroopan unionin tuomioistuin on kuitenkin oikeuskäytännössään päätenyt siihen, että luovuttamisesta voidaan näissä tilanteissa kieltäytyä. Kieltäytymiselle on kuitenkin asetettu tiukat edellytykset.

EU:n tuomioistuin on ottanut vaikutteita jäsenvaltioiden yhteisistä perustuslaillisissa traditioita määrittääkseen perusoikeuksia käytännössä. Jokainen jäsenvaltio on myös Euroopan ihmisoikeussopimuksen jäsen ja siten sen sääntöjen sitoma.

Jäsenvaltioiden välinen keskinäinen luottamus vaatii (poikkeukselliset tilanteet pois lukien), että jäsenvaltiot olettavat toistensa noudattavan EU:n sääntelyä, mutta erityisesti perusoikeuksia, jotka EU-oikeus tunnustaa. Tämän hetkinen epäselvyys itse puitepäätöksen ja oikeuskäytännön sisällön välillä korjattaisiin ideaalitalanteessa täydentämällä puitepäätöstä oikeuskäytännön nykytilan mukaiseksi, mikä korostaisi oikeusvarmuutta.

**Avainsanat:** Euroopan unionin oikeus, ihmisoikeudet, oikeudenkäynti, rikoksentekijän luovutus, oikeusvaltio, Euroopan ihmisoikeussopimus

## SUMMARY

**Title:** An Elegant Weapon for a More Civilized Age: Refusing European Arrest Warrant on the Grounds of Right to a Fair Trial Infringements

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**Summary:** The formal extradition procedure was abolished among the European Union's Member States and replaced with the surrender-based European Arrest Warrant adopted under the Framework Decision of 18 June 2002. Several persistent issues concerning the EAW and the right to a fair trial exist.

The Framework Decision does not expressly provide grounds for mandatory or even optional non-execution of a requested person if that surrender would infringe a person's fundamental right to a fair trial. CJEU in its case law established that right to a fair trial can, under strict conditions, lead to a non-execution of a EAW.

The CJEU has drawn inspiration from the constitutional traditions common to the Member States for the purposes of defining fundamental rights. Each of the Member States is also a signatory to the ECHR and is therefore bound to apply its rules.

The principle of mutual trust requires, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law. The currently unclear situation concerning EAW's non-execution would ideally be achieved by inserting express provisions in the Framework Decision, which would promote certainty of law.

**Key words:** European Union law, human rights, trial, surrender, rule of law, European Convention on Human Rights

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## Abbreviations

AG	Advocate General
CJEU	Court of Justice of the European Union
CPT	European Committee for the Prevention of Torture
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EU	European Union
FTI	Fair Trials International
OJ	Official Journal
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

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### REGULATION

#### International Conventions

European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)  
ETS 5

- Protocol No. 11, ETS 155
- Protocol No. 14, CETS 194
- Protocol No. 15, CETS No. 213
- Protocol No. 16, CETS No. 214

European Convention on Extradition (1957) ETS No. 024

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- Second Additional Protocol to the European Convention on Extradition (ETS No. 098)
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- Fourth Additional Protocol to the European Convention on Extradition (CETS No. 212)

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## CASE LAW

### Court of Justice of the European Union

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C-123/08 *Wolzenburg* EU:C:2009:616

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C-216/18 *LM* EU:C:2018:517, AG Opinion

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### **European Court of Human Rights**

*The Sunday Times v. The United Kingdom*, 6538/74, 26 April 1979

*Pretto v. Italy*, 7984/77, 8 December 1983

*Soering v. United Kingdom*, 14038/88, 07 July 1989

*Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*, 45036/98, Grand Chamber, 30 June 2005

*Jalloh v. Germany*, 54810/00, Grand Chamber, 11 July 2006

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*Yefimova v. Russia*, 39786/09, 19 February 2013

*Al Nashiri v. Poland*, 28761/11, 24 July 2014

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*Minister for Justice and Equality v. Celmer* (no.4) [2018] IEHC 484

*Minister for Justice and Equality v. Celmer* (no.5) [2018] IEHC 639

## 1. Introduction

### 1.1. Let There Be Mutual Recognition

*“The European Council underlines the importance of effective judicial cooperation in the fight against cross-border crime. It recognises the need to enhance the ability of national legal systems to work closely together and asks the Council to identify the scope for greater mutual recognition of decisions of each other’s courts.”<sup>1</sup>*

The paragraph above is one of the conclusions of the meeting of the European Council in Cardiff in 1998, the genesis of the mutual recognition programme in criminal matters. The central aim is the recognition and execution of judicial decisions from one Member State to another with minimal barriers: judicial co-operation is thus achieved without harmonizing national regulation. Member State A simply recognizes Member State B’s judicial decision as equivalent to A’s own decision (even with no directly comparable national solution).<sup>2</sup>

The following year at the meeting of the European Council held in Tampere, the European Council stressed that enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate cooperation between authorities and the judicial protection of individual rights and therefore the European Council endorsed the principle of mutual recognition, which in its view *“should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union.”*<sup>3</sup> The origin of what would become the European Arrest Warrant (EAW) can be traced to the following statement:

*“[The European Council] considers that the formal extradition procedure should be abolished among the Member States as far as persons are concerned who are fleeing from justice after having been finally sentenced, and replaced by a simple transfer of such persons, in compliance with Article 6 TEU. Consideration should also be given to fast track extradition procedures, without prejudice to the principle of fair trial.”<sup>4</sup>*

Although the idea of an European arrest warrant was originally met with scepticism, as it brought into discussion the prejudice of the Member states’ sovereignty, the terrorist attacks of 11 September 2001 in the United States of America happened to convince the European Union’s (EU) Member States of the necessity of adopting a legal instrument contributing to the maintenance and the development of a common space of freedom, security and justice.<sup>5</sup> Only some days after 9/11, the European Council included the proposal for a European arrest

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<sup>1</sup> The Cardiff European Council. Presidency Conclusions, SN 150/1/98 REV 1. 15 and 16 June 1998, para. 39.

<sup>2</sup> As *Marguery* has noted, mutual recognition establishes a link between the external limits (fundamental rights) and the internal limits to punishment (the functions of punishment). *Marguery* (2018), p. 715.

<sup>3</sup> The Tampere European Council. Presidency Conclusions, 200/1/99. 16 October 1999, para. 33.

<sup>4</sup> The Tampere European Council. Presidency Conclusions, 200/1/99. 16 October 1999, para. 35.

<sup>5</sup> *Pirlac* (2011), p. 353.

warrant in a European action plan to combat terrorism.<sup>6</sup> EAW soon became reality when the Council of the European Union (the Council) adopted the Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between the EU Member States ('the Framework Decision'). The Framework Decision entered into force on 7 August 2002 with a deadline of 31 December 2003 for final implementation by Member States.

Article 1(1) of the Framework Decision defines EAW as "a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order." An important element of the EAW as a whole comprises of *surrender*, which can be defined as the official proceedings whereby one State surrenders a suspected or convicted criminal to another State.

Before the Framework Decision, extradition was regulated by multiple treaties between Member States.<sup>7</sup> In fact, extradition represents one of the oldest forms of cooperation between states in order to combat criminality, which originally appeared as a consequence of absolute monarchies' need to preserve their authority.<sup>8</sup> The EAW thus provided a more uniform regulation and streamlined process for Member States than separate treaties.

The Court of Justice of the European Union (CJEU) is, however, increasingly faced with balancing fundamental rights with the principle of mutual trust and recognition in the criminal justice area.<sup>9</sup> The balance between these two principles and the protection of fundamental rights may be severely affected.<sup>10</sup>

Even though EAW was adopted under the "impulse"<sup>11</sup> of the events of the 11<sup>th</sup> of September 2001, the scope of EAW is not (and never was) limited only to crimes related to terrorism. This has led to questions on the proportionality when applying the Framework Decision. It seems reasonable to state that the system was founded on the fear of what might happen without

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<sup>6</sup> Fennelly (2007), p. 519.

<sup>7</sup> This does not mean that there currently no other systems in place in Europe. For example, extradition between the Nordic Countries (Finland, Sweden, Denmark, Norway and Iceland) takes place in accordance with the Nordic Arrest Warrant (NAW), which was implemented after the Framework Decision.

<sup>8</sup> Pirlac (2011), p. 348.

<sup>9</sup> Gáspár-Szilágyi (2016), p. 2.

<sup>10</sup> On a general level the relationship of the EU and fundamental rights happens in three dimensions: 1) self-constraint, 2) external review, 3) promotion of human rights. See Lawson, Rick: Human Rights: The Best is Yet to Come (*European Constitutional Law Review* 2005, 1(1): p. 27-37, 2005).

<sup>11</sup> Pirlac (2011), p. 351.

tools to combat free movement of people, but also on the positive expectation that all Member States of the European Union are tied to the common European values.

## 1.2. Research Question

*Fennelly* has suggested that the EAW should be assessed according to three criteria: (1) legality; (2) effectiveness; and (3) respect for fundamental rights.<sup>12</sup> I will be focusing on the third one. With a slight simplification, the steps involved in the EAW process can be pinpointed as (i) the issue of the EAW; (ii) the transmission of the EAW; (iii) the arrest of the requested person; (iv) a hearing by the executing judicial authority, in accordance with the law of the executing member state; and (v) the decision on surrender.<sup>13</sup> My research will focus on the last step, the decision on surrender. Combining these two aspects, the topic therefore revolves around respect for fundamental rights when making the decision on surrender. I decided to formulate my research question as follows:

- *how the right to a fair trial limits the execution of a European Arrest Warrant?*

This research is important for slightly different reasons depending on the point of view of the reader. From the point of view of Finnish legal study, this research has value because it provides answers on how to interpret our national legislation.<sup>14</sup> However, from a European perspective, it can give context for larger notions of the interplay of mutual trust, fundamental rights and procedural cooperation.

## 1.3. Research Method

The main research method of this master's thesis is *legal dogmatics* (legal doctrinal method) which is described as argumentative context analysis.<sup>15</sup> According to *Aarnio*, the tasks of legal dogmatic analysis are interpretation and systematisation.<sup>16</sup> However, interpretation of EU law differs from the interpretation of national law. Several main methods exist for interpreting EU legislation.<sup>17</sup> *Literal interpretation* can be considered the starting point. *Historic interpretation*

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<sup>12</sup> *Fennelly* (2007), p. 520.

<sup>13</sup> *Fennelly* (2007), p. 526.

<sup>14</sup> See chapter 4.3.

<sup>15</sup> *Laakso* (2012), p. 178.

<sup>16</sup> *Aarnio* (1978), p. 52.

<sup>17</sup> *Joutsamo – Aalto – Kaila – Maunu* (2000), p. 299.

approach aims to find “the legislator’s meaning”. *Systematic interpretation* approach puts the norm into a larger legal context in which the norm is to function. *Comparative approach* starts with the facts that the norms and case law concerning the same case in different judicial systems have their starting point in their own national legal systems. *Teleological interpretation* aims to find the intent and meaning behind the legal order as a whole.

This thesis approaches the subject first through the right to a fair trial. Secondly, rule of law, which has become an integral part of current case law, is discussed. Thirdly, the relevant legal framework (both EU and national regulation as well as CJEU’s case law) is detailed. Fourthly, the actual criteria for refusal to surrender are examined. Fifthly, comparison between the approaches of Court of Justice of the European Union and the European Court of Human Rights (ECtHR) are examined. Finally, before concluding remarks, significance of mutual trust between Member States in relation to the research question is examined. Chapters 7.3. and 7.4. approach the topic *de lege ferenda*.

#### 1.4. Terms of “Surrender” and “Extradition”

The Framework Decision of 2002 introduced a new system of surrender, thus replacing the previous, traditional system of extradition between Member States. According to *Suominen*, “surrender” conveys the meaning of mutual recognition of a foreign-issued warrant as opposed to the centrally controlled and essentially more discretionary request for “extradition”.<sup>18</sup> The basic multilateral treaty in the field of extradition is the European Convention on Extradition<sup>19</sup>, adopted by the Council of Europe. Implemented provisions of the Framework Decision did not derogate this or any other extradition conventions, nor did they provide cancellation. In practice, however, the conventions became obsolete.<sup>20</sup> Without prejudice to their application in relations between Member States of the EU and third states, the Framework Decision and its surrender based system replaced the corresponding provisions of conventions applicable in the field of extradition in relations between Member States of the EU.

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<sup>18</sup> *Suominen* (2012), p. 594.

<sup>19</sup> European Convention on Extradition (1957) ETS No.024.

<sup>20</sup> *Klimek* (2011), p. 155.

As *Klimek*<sup>21</sup> notes, the surrender procedure is primarily judicial, which means that the political phase inherent in the extradition procedure was abolished. In extradition, the provisional arrest warrant and the extradition request are two distinct phases of the procedure. The request for extradition is made formally through diplomatic channels and the request is then examined by the courts. The final decision is taken usually by the executive, to which the national law will usually give discretion to refuse the request, subject only to obligations provided by the relevant treaty. The Framework Decision's surrender procedure, however, does not distinguish these two phases. The mechanism of the EAW is based on mutual recognition. When a judicial authority of a Member State of the EU requests the surrender of a person, its decision must be recognised and executed automatically (in principle) throughout the EU unless grounds for refusal indicated in the Framework Decision (or national laws implementing the Framework Decision) are present.

There are, however, opposing views. For example, *Žurek* did not even find the two procedures different enough to use the term "surrender" when discussing the EAW.<sup>22</sup> However, this is, in my view, confusing when the legislator uses the term "surrender". Even more so, because *Žurek* also stated the following: "Even if we tried, by using these fundamental points of difference, to compare EAW with extradition we would find out basically speaking both procedures are very alike, but surrendering is less formal. Existing differences between both legal instruments do not influence at all on the final effect, which is delivering a person to a foreign state."<sup>23</sup> Thus, highlighting the very reason these two different terms exist.

The final outcome is the same, but the process is simpler in procedure and different in principle. Surrender conveys the meaning of a system based on mutual trust, but this is not to say that the EAW is not at all influenced by political factors.<sup>24</sup>

The lowered significance of central authorities also speaks volumes. According to Article 7(1) of the Framework Decision, each Member States may designate a central authority or, when its legal system so provides, more than one central authority to assist the competent judicial authorities. The Member State may then, if it is necessary as a result of the organisation of its internal judicial system, make its central authority, or authorities, responsible for the

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<sup>21</sup> *Klimek* (2011), p. 155-156.

<sup>22</sup> *Žurek* (2012), p. 66.

<sup>23</sup> *Žurek* (2012), p. 67.

<sup>24</sup> See chapter 7.4.

administrative transmission and reception of EAWs as well as for all other official correspondence relating thereto (Article 7(2)). These central authorities have only an assisting and supporting role to the judicial authorities: the preamble (9) states “[The role of central authorities] must be limited to practical and administrative assistance.”

From a Finnish point of view, the difference might seem inconsequential due to linguistic reasons. As noted in the (albeit unofficial) translation of Finland’s Act on Extradition on the Basis of an Offence Between Finland and Other Member States of the European Union (1286/2003) provided by Finland’s Ministry of Justice, Finnish legal terminology has only one term, “*luovutus*”, to denote the process of turning an alleged fugitive or convicted offender over to another state.<sup>25</sup> It was noted during the legislative process that the process is in essence the same: surrendering a person to another state due to criminal activity.<sup>26</sup> The Finnish law didn’t, (by a very conscious decision of the legislator), adopt the same exact terminology of the Framework Decision, but the one of Finland’s existing legislation as the cohesiveness of the Finnish legislation was seen as more important.<sup>27</sup> In this research, “surrender” will refer to the EAW procedure and “extradition” to refer to the old, treaty-based act of surrendering a person to another state.

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<sup>25</sup> *Finland’s Ministry of Justice* (2006), footnote 1.

<sup>26</sup> *HE 88/2003 vp*, p. 6.

<sup>27</sup> *HE 88/2003 vp*, p. 8.

## 2. Right to a Fair Trial in EU

### 2.1. The Charter of Fundamental Rights

The rights of every individual in the EU were established at different times, in different ways and in different forms. The Charter of Fundamental Rights of the European Union<sup>28</sup> ('the Charter') enshrines the key political, social and economic rights of EU citizens and residents in EU law. By stating all fundamental rights in a clear and visible manner, the Charter actually contributes in part to the creation of a space of freedom, security and justice and improves legal safety regarding the protection of fundamental rights.

For a long time, the legal status of the Charter remained uncertain. Within the Treaty of Lisbon (entered into force on 1 December 2009)<sup>29</sup>, the provisions of the Charter became compulsory, thus gaining the same legal value of that of the EU treaties. This was a major leap forward and was made to ensure the Charter's transformation from soft law into hard law.<sup>30</sup> The Charter is also important for citizens because the system of fundamental rights is now visible and transparent, not a complicated secret for insiders.<sup>31</sup>

Akin to national catalogues of rights, the Charter is addressed to institutions and bodies belonging to all three classic branches of government (legislative, executive and judicial). That said, the judiciary is often considered to have a special responsibility for ensuring fundamental rights protection.<sup>32</sup>

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<sup>28</sup> Charter of Fundamental Rights of the European Union (consolidated version). *Official Journal (OJ) C 326, 26.10.2012, p. 391–40*. *Jääskinen* has described the process of accepting the Charter's role as follows: "In Finland, the attitude towards an EU Bill of rights was at best lukewarm. Its necessity was questioned, there were fears that it represented a first step towards a federal constitution of Europe, and many saw it as an attempt to prevent the accession of the EU to the ECHR, which was the preferred option for Finland. However, the Finnish Parliament stated in 1999 something that seems very important even today. Namely, that if an EU bill of rights were adopted, it could and should not be limited to rights protected by the ECHR, the latter being an instrument which was five decades old. Therefore, the EU catalogue of fundamental rights should be comprehensive and modern, and also protect fundamental societal rights, rights to participation in decision-making, the right to good administration and the protection of the environment, and the rights of minorities." *Jääskinen, Niilo: The Place of the EU Charter within the Tradition of Fundamental and Human Rights (Morano-Foadi, Sonia – Vickers, Lucy (eds.): Fundamental Rights in the EU – A Matter for Two Courts (Hart Publishing 2015, p. 11-20; p. 11)*

<sup>29</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (consolidated version). *OJ C 326, 26.10.2012, s. 13–390*.

<sup>30</sup> *de Visser* (2013), p. 39-40.

<sup>31</sup> *Rossi* (2008), p. 78. See also *Venables, Tony: The EU Charter – A Missed Opportunity to Respond to Citizens' Concerns (In Feus, Kim (ed.): The EU Charter of Fundamental Rights – text and commentaries. Federal Trust for Education and Research 2000, p. 189-196)*.

<sup>32</sup> *de Visser* (2013), p. 40.

The Charter has been described by *Ryland*, as “a precondition to effective judicial protection” in two ways. Firstly, through the complementary issue of accession to an external human rights regime and secondly, in instigating more liberal individual standing requirements in order to protect fundamental rights in relation to activities of institutions within the EU.<sup>33</sup> The Charter covers all the rights found in the case law of the CJEU, the rights and freedoms enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (“the ECHR”)<sup>34</sup> and other rights and principles resulting from the common constitutional traditions of EU countries and other international instruments.

## 2.2. Defining a Fair Trial

Title VI of the Charter, headed “Justice”, includes Article 47 which is titled “Right to an effective remedy and to a fair trial” and states the following:

*“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*

*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.*

*Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”*

Therefore, the basic building blocks of a fair trial are fairness, a public hearing, reasonable time and a tribunal, previously established by law, that is both independent and impartial.<sup>35</sup> The possibility of being advised, defended and represented helps individuals and enforces their rights. Available legal aid (Article 47(3)) is also central to guaranteeing a fair trial. Overall, the right to a fair trial has almost countless aspects and the CJEU case law is so vast that it is impossible to detail all of them. Key areas are examined here.

*Fairness.* The principle of *equality of arms*, a corollary of the concept of a fair hearing, implies that each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage *vis-à-vis* his

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<sup>33</sup> *Ryland* (2003), p. 162-163.

<sup>34</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) ETS 5.

<sup>35</sup> For a look at how fair trial conflicts with other human rights in the case law of ECtHR, see *Brems*, Eva: *Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms* (*Human Rights Quarterly* 2005, 27(1); p. 294-326).

opponent.<sup>36</sup> Principle of *adversarial proceedings* means the parties to a case must have the right to examine all the documents or observations submitted to the court for the purpose of influencing its decision, and to comment on them.<sup>37</sup>

*A public hearing.* A public hearing helps promote confidence in courts by rendering visible and transparent the administration of justice. This publicity protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of a fair trial.<sup>38</sup> Regarding public hearing, the right of the accused to appear in person at his trial is an important component, though that right is not absolute.<sup>39</sup>

*Reasonable time.* The reasonable time is appraised in the light of the circumstances specific to each case, such as the complexity of the case and the conduct of the parties. The list of relevant criteria is not exhaustive and that the assessment of the reasonableness of a period does not require a systematic examination of the circumstances of the case in the light of each of them, where the duration of the proceedings appears justified in the light of one of them. Thus, the complexity of the case or the dilatory conduct of the applicant may be deemed to justify a duration which is *prima facie* too long.<sup>40</sup>

*Independence.* The concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.<sup>41</sup>

*Impartiality.* Impartiality has two aspects: The first aspect, which is external, presumes that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them. That essential freedom from such external factors requires certain guarantees sufficient to protect the

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<sup>36</sup> C-199/11 *Europese Gemeenschap v. Otis NV and Others* EU:C:2012:684, para. 71.

<sup>37</sup> C-300/11 *ZZ v. Secretary of State for the Home Department* EU:C:2013:363, para. 55.

<sup>38</sup> See ECtHR's ruling *Pretto v. Italy* (8 December 1983), para. 21. Article 47 of the Charter corresponds to Article 6 of the ECHR on this point.

<sup>39</sup> C-399/11 *Stefano Melloni v. Ministero Fiscal* EU:C:2013:107, para. 49.

<sup>40</sup> C-58/12 *Groupe Gascogne SA v. European Commission* EU:C:2013:770, paras. 85–86.

<sup>41</sup> C-216/18 *LM* EU:C:2018:586, para. 44.

person of those who have the task of adjudicating in a dispute, such as guarantees against removal from office. The second aspect, which is internal, is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject-matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.<sup>42</sup>

The second paragraph of Article 47 corresponds to Article 6(1) of the ECHR, which is worded as follows:

*“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”*

The limitation to the determination of civil rights and obligations or criminal charges in ECHR does not apply as regards EU law and its implementation. That is one of the consequences of the fact that the Union is a community based on *the rule of law*.<sup>43</sup> Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way.<sup>44</sup>

### 2.3. Essence of the Right

Article 52(1) (“Scope of guaranteed rights”) of the Charter states that any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. This is also firmly established in case law.<sup>45</sup>

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<sup>42</sup> C-506/04 *Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg* EU:C:2006:587, para. 50-52.

<sup>43</sup> See chapter 3.

<sup>44</sup> Explanations relating to the Charter of Fundamental Rights. *OJ 2007 C 303*, p. 17.

<sup>45</sup> See judgments C 300/11 *ZZ v. Secretary of State for the Home Department* EU:C:2013:363, para. 51; C 562/12 *Liivimaa Lihaveis* EU:C:2014:2229, para. 72; C 362/14 *Schrems*, EU:C:2015:650, para. 95; C 439/14 and C 488/14 *Star Storage and Others* EU:C:2016:688, para. 49; C 73/16 *Puškár* EU:C:2017:725, para. 62; C 664/15 *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation* EU:C:2017:987, para. 90.

Article 47 contains in each paragraph components of the essence: access to a court, judicial independence, legal representation, and legal aid among others. *Gutman* has suggested that CJEU's case law indicates that the essence of the right to an effective remedy and to a fair trial has an autonomous function apart from proportionality in the context of the application of justified limitations to the exercise of that right under Article 52(1) of the Charter. Gutman has linked it to national procedural autonomy, equivalence, effectiveness and construction of a truly coherent system of judicial protection in the EU. The overarching principle of judicial protection<sup>46</sup> also plays an important role.<sup>47</sup>

Guidance for pinpointing the essence of fair trial can be looked for in the ECHR case law, (especially in questions that have not yet been examined by the CJEU). For example, according to the European Court of Human Rights (ECtHR) a particularly strict application of a procedural rule may sometimes impair the very essence of the right of access to a court<sup>48</sup> particularly in view of the importance of the appeal and what is at stake in the proceedings for an applicant who has been sentenced to a long term of imprisonment.<sup>49</sup> Public-interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights, including the privilege against self-incrimination.<sup>50</sup>

In ECtHR's case law, it is established that extradition or expulsion risking a flagrant denial of justice *can* violate Article 6 of the Convention. However, the "flagrant denial of justice" test of ECtHR is a stringent one and requires a breach of the principles of a fair trial guaranteed by the Convention's Article 6 that is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.<sup>51</sup>

## 2.4. Issues with EAW

Issues with EAW and right to a fair trial were already recognized as early as 2010 in legal literature with *Spencer* drawing attention to several problems: legal advice and legal representation that is poor or non-existent, incompetent interpreters and oppressive police

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<sup>46</sup> See chapter 4.1.

<sup>47</sup> *Gutman* (2019), p. 903.

<sup>48</sup> *Labergère v. France* (26 September 2006), para. 23.

<sup>49</sup> *Labergère v. France* (26 September 2006), para. 20.

<sup>50</sup> *Jalloh v. Germany* (11 July 2006), § 97.

<sup>51</sup> *Ahorugeze v. Sweden* (27 October 2011), para. 115; *Othman (Abu Qatada) v. the United Kingdom* (17 January 2012), para. 260. See chapter 6.

practices when dealing with suspects and witnesses.<sup>52</sup> European Commission (the Commission) published in 2011 a report “on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States” which highlighted several problems with the EAW, especially concerning proportionality and fundamental rights.<sup>53</sup> Disproportionate use was seen as being undermining to mutual trust and varying standards leading to human rights infringements.

Fair Trials International (FTI), a London-based human rights non-governmental organisation, in their 2011 report, “The European Arrest Warrant seven years on – the case for reform”, highlighted several problems. If one country refuses to execute an EAW, for example because it would breach a person’s right to a fair trial (perhaps due to the amount of time that has elapsed since the alleged offence), this does not automatically invalidate the EAW. The individual subject to the EAW remains a wanted person and risks re-arrest, further hearings and additional legal costs, each time he or she crosses a national border.<sup>54</sup> The absence of common standards in areas of fundamental procedural rights, bail and pre-trial detention represent a threat to the integrity and fair operation of the EAW scheme, in the light of mutual trust.<sup>55</sup>

Recently FTI completed their "Beyond Surrender" project to document what happens to people after they are surrendered. The purpose of the project was to understand the extent of concerns identified with the operation of EAW system in practice. The project found that the problems with the EAW system continue. FTI highlighted several human rights problems with the EAW including: issuing EAWs without taking proportionality into account, surrenders despite human rights concerns and persons sought under EAWs not being provided with legal representation in the issuing State as well as the executing State.<sup>56</sup>

As pre-trial detention falls under the time counted towards “a fair trial in a reasonable time”, this is another concerning area of EAW. Research conducted in the project shows that people continued to be surrendered under EAWs despite evidence that they will spend lengthy and

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<sup>52</sup> *Spencer* (2010), p. 227.

<sup>53</sup> COM(2011) 175 Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

<sup>54</sup> *Fair Trials* (2011), p. 6-7.

<sup>55</sup> *Fair Trials* (2011), p. 23.

<sup>56</sup> *Fair Trials* (2018), p. 8.

unlawful periods in pretrial detention, often because the EAW has been issued to investigate the person rather than bring them to trial.<sup>57</sup>

FTI also underlined vulnerable suspects and non-existent remedies as especially concerning areas. The lack of standards for vulnerable suspects, particularly those with limited intellectual capacity is a significant concern.<sup>58</sup> The lack of standards governing remedies for rights violations is hindering implementation. In many EU Member States, the improper denial of a lawyer will lead to no meaningful remedy, with unlawfully obtained evidence able to be used to convict the person. This can limit the incentives to comply with EU legislation that guarantees fair trial rights.<sup>59</sup>

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<sup>57</sup> *Fair Trials* (2018), p. 21.

<sup>58</sup> *Fair Trials* (2018), p. 24.

<sup>59</sup> *Fair Trials* (2018), p. 24.

### 3. Rule of Law

#### 3.1. Relationship with Right to a Fair Trial

The Treaty on European Union (TEU)<sup>60</sup> is one of the primary treaties of the European Union,<sup>61</sup> which forms the basis of EU and sets out general principles of the Union's purpose, the governance of its central institutions, as well as the rules on external, foreign and security policy. Following the Treaty of Lisbon,<sup>62</sup> the current version of the TEU entered into force in 2009.<sup>63</sup> Article 2 of TEU states that EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

Rule of law is commonly defined as *the restriction of the arbitrary exercise of power by subordinating it to well-defined and established laws*. The rule of law mainly concerns the quality of the law and the existence of adequate procedures.<sup>64</sup> Ervo has observed that in ECtHR case law, one common criteria for rule of law is the material legal protection achieved through procedural legal protection. Therefore, the meaning of requirements of right to a fair trial and procedural legal protection is easy to explain with the current principle of rule of law.<sup>65</sup>

Necessary elements (which are not only formal but also substantial or material) include (1) legality, including a transparent, accountable and democratic process for enacting law; (2) legal certainty; (3) prohibition of arbitrariness; (4) access to justice before independent and impartial courts, including judicial review of administrative acts; (5) respect for human rights; and (6) non-discrimination and equality before the law.<sup>66</sup>

There is a great deal of overlap between the rule of law and respect for human rights, but they are not necessarily synonymous.<sup>67</sup> The ECHR, the Charter and the TEU all refer to the rule of law explicitly. The rights most obviously connected to the rule of law include: (1) the right of

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<sup>60</sup> Treaty on European Union (consolidated version). *OJ C 326*, 26.10.2012, p. 13–390.

<sup>61</sup> Alongside the Treaty on the Functioning of the European Union (TFEU) (consolidated version). *OJ C 326*, 26.10.2012, p. 47–390.

<sup>62</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007). *OJ C 306*, 17.12.2007, p. 1–271.

<sup>63</sup> An older form of the same document was implemented by the Maastricht Treaty (1992) (Treaty on European Union. *OJ C 191*, 29.7.1992, p. 1–112).

<sup>64</sup> Lautenbach (2013) p. 175.

<sup>65</sup> Ervo (2005), p. 97.

<sup>66</sup> *European Commission for Democracy Through Law: Report on the Rule of Law*. CDL-AD(2011)003rev. 04.04.2011, para. 41.

<sup>67</sup> *European Commission for Democracy Through Law: Report on the Rule of Law*. CDL-AD(2011)003rev. 04.04.2011, para. 59.

access to justice; (2) the right to a legally competent judge; (3) the right to be heard; (4) inadmissibility of double jeopardy (*ne bis in idem*); (5) the legal principle that measures which impose a burden should not have retroactive effects; (6) the right to an effective remedy for any arguable claim; (7) anyone accused of a crime is presumed innocent until proven guilty; and (8) the right to a fair trial.<sup>68</sup> Most of these rights (as well as the principle of independence and impartiality of the judiciary) are enshrined in Article 6 of the ECHR.<sup>69</sup>

The right to a fair trial can be traced back to the idea of rule of law.<sup>70</sup> Article 6 of the ECHR is said to reflect the fundamental principle of the rule of law.<sup>71</sup> The trial process has also been called “a cornerstone” of the rule of law.<sup>72</sup> The connection between a minimum standard of procedural justice and the rule of law is recognized in virtually all instruments of international human rights protection.<sup>73</sup>

The relationship between right to a fair trial and rule of law works in two ways. The right to a fair trial is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded.<sup>74</sup> On the other hand, the rule of law itself requires that at least a minimum standard of the right to a fair trial is upheld.<sup>75</sup> Therefore, although rule of law guarantees a fair trial, a fair trial also works as a guarantee of rule of law. Breaches to one or the other give a strong indication that the other one is not respected either.

An example of how damage to a fair trial also damages rule of law can be observed in the ECtHR case law. For example, the ECtHR stated in *Othman (Abu Qatada) v. The United Kingdom* that “Fundamentally, no legal system based upon the rule of law can countenance the admission of evidence which has been obtained by torture. Torture evidence damages

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<sup>68</sup> *European Commission for Democracy Through Law: Report on the Rule of Law*. CDL-AD(2011)003rev. 04.04.2011, para. 60.

<sup>69</sup> Other rights may also have rule of law connotations, such as the right to expression, which permits criticism of the government of the day (Article 10 ECHR) and even rights such as the prohibition on torture or inhuman or degrading treatment or punishment (Article 3), which may be linked to the notion of a fair trial. *European Commission for Democracy Through Law: Report on the Rule of Law*. CDL-AD(2011)003rev. 04.04.2011, para. 61.

<sup>70</sup> *Ervo* (2005) p. 92.

<sup>71</sup> *The Sunday Times v. The United Kingdom* (26 April 1979), para. 55.

<sup>72</sup> *Othman (Abu Qatada) v. the United Kingdom* (17 January 2012), para. 264.

<sup>73</sup> *Zurn – Nollkaemper - Peerenboom* (2012), p. 63.

<sup>74</sup> C-64/16 *Associação Sindical dos Juizes Portugueses* EU:C:2018:117, para. 48.

<sup>75</sup> *Lautenbach* (2013), p. 177.

irreparably the trial process; it substitutes force for the rule of law and taints the reputation of any court that admits it. Torture evidence is excluded to protect the integrity of the trial process and, ultimately, the rule of law itself.”<sup>76</sup>

### 3.2. Rule of Law Framework

Article 7 TEU provides the following:

*“1 On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.*

*The Council shall regularly verify that the grounds on which such a determination was made continue to apply.*

*2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.*

*3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.*

*The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.”*

This provision, which was first introduced into the EU Treaties by the Amsterdam Treaty,<sup>77</sup> gives the Council of the EU the power to sanction any member state found “guilty” of a *serious* and *persistent* breach of the EU values laid down in Article 2 TEU.<sup>78</sup> For instance, the Council could deprive the relevant member state of certain of the rights it derives from the EU Treaties, including the right to vote on EU legal acts submitted to the Council for adoption.

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<sup>76</sup> *Othman (Abu Qatada) v. The United Kingdom* (17 January 2012), para. 264.

<sup>77</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (1997). *OJ C 340, 10.11.1997, p. 1–144.*

<sup>78</sup> For a comprehensive, yet critical, paper tracing the history of discussions and decisions leading to the incorporation of the Article 7 mechanism, see *Sadurski, Wojciech: Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement, and Jörg Haider* (The University of Sydney, Sydney Law School, Legal Studies Research Paper no. 10/01 January 2010 available at [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1531393](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1531393))

With the Nice Treaty,<sup>79</sup> Article 7 TEU was revised to further enable the EU to adopt preventive sanctions in a situation where there is “a clear risk of a serious breach” of the EU values by a Member State.<sup>80</sup>

Article 7 TEU is not designed as a remedy for individual breaches in specific situations. It is solution of last-resort, a concerted action for systemic problems that raise to a certain threshold of seriousness and persistence.<sup>81</sup> Although activation can ultimately result in the suspension of membership rights, the aim of this political mechanisms is not to punish Member States but rather to neutralize threats to the rule of law.<sup>82</sup>

The enactment of such mechanism can be dually interpreted. On one hand it demonstrated a political will to strengthen fundamental rights protection in EU, since the sanction put on Member States is quite substantial. On the other hand, this worked as an alternative for the adoption of a catalogue of rights in the EU.<sup>83</sup> According to *Margaritis*, the makers of the TEU decided to work more on negative integration method by adding an obligation of the Member States to avoid serious and persistent violations of rights, rather than taking positive actions for further protection in EU level.<sup>84</sup>

A risk of serious breach must be “clear”, excluding purely contingent risks from the scope of the prevention mechanism.<sup>85</sup> The serious breach criterion is common to the prevention and the penalty mechanisms: the clear risk must be that of a “serious” breach and the breach itself when it occurs must be “serious”. To determine the seriousness of the breach, a variety of criteria will have to be considered, including the purpose and the result of the breach.<sup>86</sup>

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<sup>79</sup> Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (2001). *OJ C 80, 10.3.2001, p. 1–87.*

<sup>80</sup> *Kochenov – Pech* (2015), p. 516.

<sup>81</sup> *Larion* (2018), p. 163.

<sup>82</sup> *Uitz* (2019), p. 3.

<sup>83</sup> *Margaritis* (2013), p. 144. However, the predominantly political nature of Article TEU 7 is indicated by the fact that the Council is actually under no legal obligation to take further action even in a situation where it concludes that a member is in breach of Article TEU values. See *Kochenov – Pech* (2015). p. 516.

<sup>84</sup> *Margaritis* (2013), p. 144.

<sup>85</sup> COM(2003) 606 final Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on the European Union. Respect for and promotion of the values on which the Union is based, p. 7.

<sup>86</sup> COM(2003) 606 final Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on the European Union. Respect for and promotion of the values on which the Union is based, p. 8.

### 3.3. Rule of Law Backsliding

The rule of law is essential for the functioning of the EU as a whole, but especially concerning cooperation in the area of Justice and Home Affairs. “Rule of law backsliding” has been described as the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party.<sup>87</sup>

From the perspective of EU institutions, the most problematic aspect of rule of law backsliding concerns current attacks by populist governments on the judiciary. These governments take measures dismantling the system of checks and balances that safeguard the independence of courts and judges. This threaten the rule of law in two ways: I) They endanger the independence and impartiality of courts; and II) they put at risk the realisation of the right to a fair trial. The consequence of such an attack is twofold for EU law: 1) The removal of certain institutional or procedural guarantees of the independence of courts and judges undermines the effective enforcement of EU law; 2) it undermines the effective protection of fundamental rights in the Member States to the extent that they hinge on judicial protection (specifically on access to a fair trial by an independent court).<sup>88</sup>

Rule of law backsliding has unfortunately been observed in Poland and Hungary. Through the years, this process finally lead to the TEU 7 dialogue mechanism for safeguarding the rule of law being activated for the first time, in respect of Poland, in January 2016.<sup>89</sup> European Parliament on 12 September 2018 gave their resolution on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded.<sup>90</sup>

Similar concerns have also been raised in relation to Romania and Bulgaria. On 10 May 2019, *Frans Timmermans*, then Vice-president of the Commission, sent a letter to the Romanian government, in which he discussed the rule of law developments in Romania. Within it, he

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<sup>87</sup> *Pech – Scheppele* (2017), p. 10.

<sup>88</sup> *Bárd - Śledzińska-Simon* (2019), p. 4.

<sup>89</sup> COM(2017) 835 final Proposal for a COUNCIL DECISION on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law.

<sup>90</sup> P8\_TA(2018)0340 European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)).

warned that if the Romanian government does not withdraw the recent legislative amendments undermining the effective fight against corruption in the country, the Commission would initiate procedures under the rule of law framework.<sup>91</sup>

Bulgaria's situation has not caused the EU to take action yet, but significant concerns have been raised regarding government interference in the justice system and legislative arbitrariness.<sup>92</sup> These developments in multiple Member States raise major concerns about the issue of surrendering suspects to Member States where rule of law and right to fair trial are compromised.<sup>93</sup>

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<sup>91</sup> *Timmermans* (2019).

<sup>92</sup> *Vassileva* (2019).

<sup>93</sup> *Katalin Miklóssy* examined the situation in her article "Oikeusvaltion ahdinko vai yhteen sopimattomat käsitteet? Tarkastelussa itäiset EU-maat" (Lakimies 7-8/2018, p. 1066-1072) mentioning Hungary, Poland, Romania, Bulgaria and even Czech and Slovakia as troubling examples. Miklóssy argued that countries in Eastern Europe are creating an exceptionally stable system that can't be changed with conventional democratic methods.

## 4. Relevant Legal Context

### 4.1. Judicial protection, a Meta-Norm

The principle of the effective *judicial protection* of individuals' rights under EU law is a general principle stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of ECHR, and which is now reaffirmed by Article 47 of the Charter.<sup>94</sup> *Roeben* has argued that judicial protection also serves as the meta-norm for governing the EU judicial architecture resting on two pillars; the EU judicature and the Member States judicatures.<sup>95</sup> This meta-norm then becomes further institutionalised, through the TEU, the Charter, and the related doctrine of the CJEU.

According to *Roeben*, Article 47 of the Charter formalises a fundamental right of judicial protection at the core of judicial protection and then also is the individual right.<sup>96</sup> By balancing the principle of effective rights protection with any countervailing general objectives of an orderly procedure, CJEU is then responsible for concretising this fundamental right into requirements. These requirements then become standards for the procedure legislatures of the EU and the Member States.

*Roeben* continues stating that institutional judicial protection becomes a hard or formal meta-norm within the primary law and therefore, the Treaties (and even less secondary law) must not include rules incompatible with an effective protection of individual rights.<sup>97</sup> In *Roeben's* view, judicial protection overrides *all conflicting principles* that aim to preserve non-justiciable decision-making of the EU's political institutions, the procedural autonomy of the Member States, or even their mutual trust. This elevated, constitutional status of judicial protection can be justified, as a matter of positive law and normatively; judicial protection aims to make human dignity actual rather than simply aspirational. This protection includes all rights-holders in the process of European integration.

*Conway* has provided a differing view:<sup>98</sup>

*“Along with the rule of law and democracy, the other principle of political morality articulated as part of the self-identity of the EU polity is human rights, which have been treated in some literature as modifying or qualifying an untrammelled democratic*

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<sup>94</sup> C-619/18 *European Commission v. Republic of Poland* EU:C:2019:531, para. 49.

<sup>95</sup> *Roeben* (2019), p. 32.

<sup>96</sup> *Roeben* (2019), p. 32.

<sup>97</sup> *Roeben* (2019), p. 33.

<sup>98</sup> *Conway* (2012) p. 278.

*principle. This counter-majoritarian character of human rights does not have to and should not amount to reconfiguring the judicial branch as having an autonomous law-creating and polity-building counter-majoritarian role. The counter-majoritarian implications of fundamental human rights are best understood in the context of a constitutional moment of entrenchment, which is itself democratically legitimated at the adoption of a constitution: the policy commits itself, at a moment of special deliberation, to human rights applicable to all, which may not be undermined by temporary legislative majorities. In this way, human rights protection in the context of constitutional review should not be equated with a simple counter-majoritarian principle, as if a counter-majoritarian writ large was thus somehow inevitably a feature of constitutional review.”*

Even though mutual trust and mutual recognition between Member States form the foundation of the EAW system, judicial protection should override even them when effective judicial protection is at stake. This principle has not always been fulfilled.<sup>99</sup> Judicial protection serves as the principle which guides the interpretation of EAW’s legal context.

#### 4.2. Framework Decision

The Framework Decision<sup>100</sup> was drafted by the Council, which consists of State Ministers for particular area – in this case, the Ministers of the Interior. The establishment of the EAW replaced the extradition institution in the relations of cooperation in criminal matters between Member States of the EU.

The Framework Decision was adopted on the basis of the former third pillar of the EU, in particular, under TEU’s (as amended by the Maastricht Treaty) Article 34(2)(b).<sup>101</sup> According to Article 34(2)(b), the Council “shall take measures and promote cooperation, using the appropriate form and procedures as set out in this title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect.”

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<sup>99</sup> See chapters 4.4.1. and 4.4.2.

<sup>100</sup> 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 Decision. OJ L 190, 18.7.2002, p. 1–20.

<sup>101</sup> Framework decisions were available as legislative instruments to the Union from 1 May 1999 (Treaty of Amsterdam entered into force) until 1 December 2009 (Treaty of Lisbon entered into force).

The main advantage of framework decisions was the speed with which they could land themselves onto national systems and they also had all the flexibility of directives with the same discretion left to national systems to choose the format and means to arrive at the prescribed goals. However, was this kind of flexibility out of place in a of criminal law which is traditionally governed by the strict application of the principle of legality?<sup>102</sup>

When assessing the research question, the Framework Decision's recitals are important for providing information on the meaning of the aims of the EAW system. Recital 5 provides that the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences made it possible to remove the complexity and potential for delay inherent in the extradition procedures.

EAW is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the "cornerstone" of judicial cooperation (the Framework Decision's Recital 6). Since the aim of replacing the system of multilateral extradition cannot be sufficiently achieved by the Member States acting unilaterally and can therefore, by reason of its scale and effects, be better achieved at Union level, the Council may adopt measures in accordance with the *principle of subsidiarity*, but in accordance with the principle of proportionality, the Framework Decision does not go beyond what is necessary in order to achieve that objective (the Framework Decision's Recital 7).

Decisions on the execution of the EAW must be subject to sufficient controls, which means that a judicial authority of the Member State where the requested person has been arrested will have to take the decision on his or her surrender (the Framework Decision's Recital 8). As stated in the Framework Decision's Recital 10, the mechanism of the EAW is based on a high level of confidence between Member States and its implementation may be suspended only in "the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) [now, after amendment, Article 2 TEU], determined by the [European] Council pursuant to Article 7(1) [now, after amendment, Article 7(2) TEU,] with the consequences set out in Article 7(2) thereof [now, after amendment, Article 7(3) TEU]."

#### *Human rights provisions*

According to *Pérignon – Daucé*, the EAW contributes to the protection of the fundamental rights of the requested person in two main aspects. First, the EAW was drafted and adopted

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<sup>102</sup> *Impala* (2005) p. 59-60.

with careful regard to compliance with the fundamental rights of the requested person. Secondly, the Framework Decision contains specific provisions designed to restate and, in some cases, strengthen specific rights of the requested persons guaranteed by national law.<sup>103</sup>

The Framework Decision respects fundamental rights and observes the principles recognised by Article 6 TEU and reflected in the Charter, in particular Chapter VI thereof. Nothing in the Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a EAW has been issued when there are reasons to believe, on the basis of objective elements, that the EAW has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons (the Framework Decision's Recital 12). No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment (the Framework Decision's Recital 13).

According to Article 1(2) of the Framework Decision, Member States shall execute any EAW on the basis of the principle of mutual recognition and in accordance with the provisions of the Framework Decision. Article 1(3) guarantees that the Framework Decision does not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [EU]. Respect for fundamental rights is routinely proclaimed in other EU legal instruments governing criminal justice cooperation.<sup>104</sup>

It follows that the provisions of the Framework Decision themselves provide for a procedure that complies with the requirements of Article 47 of the Charter, regardless of the methods of implementing the Framework Decision chosen by the Member States.<sup>105</sup>

### *Supplying information*

Article 7(1) of the Framework Decision, titled "Recourse to the central authority", provides that each Member State may designate a central authority or, when its legal system so provides, more than one central authority to assist the competent judicial authorities. Article 7(2) states that a Member State may, if it is necessary as a result of the organisation of its internal judicial system, make its central authority (or authorities) responsible for the

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<sup>103</sup> *Pérignon - Daucé* (2007), p. 212.

<sup>104</sup> *Anagnostopoulos* (2014), p. 16.

<sup>105</sup> C-168/13 *Jeremy F* EU:C:2013:358, para. 47.

administrative transmission and reception of EAWs as well as for all other official correspondence relating thereto. Member State wishing to make use of the possibilities referred to in Article 7 shall communicate to the General Secretariat of the Council information relating to the designated central authority or central authorities. These indications are binding upon all the authorities of the issuing Member State.

Article 15(1) of Framework Decision (titled “Surrender decision”) guarantees that the executing judicial authority shall decide, within the time limits and under the conditions defined in the Framework Decision, whether the person is to be surrendered. Article 15(2) states that if the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the *necessary supplementary information*, in particular with respect to Articles 3 to 5 and Article 8, be furnished as a matter of urgency and may fix a time limit for the receipt thereof, taking into account the need to observe the time limits set in Article 17.<sup>106</sup>

### 4.3. National Legislation

The Framework Decision had to be first transposed into national legislation before coming into force, because as legislative instruments framework decisions were not directly applicable in Member States. However, the Member States were free to choose the form and method to achieve the objectives set out in the Framework Decision.

It is also settled case law that although framework decisions may not entail direct effect, as laid down in Article 34(2)(b) EU, their binding character nevertheless places on national authorities, and in particular on national courts, an obligation to interpret national law in conformity with EU law.<sup>107</sup>

When national courts apply domestic law, they are bound to interpret it, so far as possible, in the light of the wording and the purpose of the Framework Decision in order to achieve the result sought by it. This obligation to interpret national law in conformity with EU law is inherent in the system of the TFEU, since it permits national courts, for the matters within

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<sup>106</sup> See chapter 5.2.1.

<sup>107</sup> C-554/14 *Ognyanov* EU:C:2016:835, para. 58. See also C-42/11 *Da Silva Jorge* EU:C:2012:517, para. 53 and the case law cited.

their jurisdiction, to ensure the full effectiveness of EU law when they rule on the disputes before them.<sup>108</sup>

Finland's Act on Extradition on the Basis of an Offence Between Finland and Other Member States of the European Union (1286/2003) was implemented to adopt the Framework Decision. The main procedural change was that the deciding institution was changed from Ministry of Justice to the District Court of Helsinki as the Framework Decision intended for the judicial officials to make the surrender decisions.<sup>109</sup> A major change on the substance of the legislation was that Finnish citizens can be surrendered to other Member States on the same grounds as other persons.<sup>110</sup>

Provided that the application of the Framework Decision is not frustrated, it does not prevent a Member State from applying its constitutional rules relating *inter alia* to respect for the right to a fair trial.<sup>111</sup> Finland emphasized its commitment to human rights and to a fair trial when drafting the national legislation. Finnish law states in Chapter 2 Section 5 ("Grounds for mandatory refusal") that extradition shall be refused if:

6) there is justifiable ground to suspect that the requested person is threatened by capital punishment, torture or other degrading treatment or that he or she would be subjected, on the basis of origin, membership in a certain social group, religion, belief or political opinion, to persecution that threatens his or her life or liberty or to other persecution, or there is justifiable cause to assume that he or she would be subjected to a violation of his or her human rights or *constitutionally protected due process* [emphasized here], freedom of speech or freedom of association.

The Framework Decision's surrender refusal grounds Articles 3 and 4 don't explicitly include this kind of rule. Finnish legislator derived the rule from other parts of the Framework Decision as well as Finland's human rights commitments in force in surrender procedures under the Framework Decision.<sup>112</sup>

The above rule should be used in very rare occasions and with caution when applying. There should be a justifiable and objective suspicion of threatening persecution towards life or freedom or other type of persecution or then a breach of the persons constitutional or human

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<sup>108</sup> C-554/14 *Ognyanov* EU:C:2016:835, para. 59. See also C-42/11 *Da Silva Jorge* EU:C:2012:517, para. 54 and the case law cited.

<sup>109</sup> HE 88/2003 vp, p. 9.

<sup>110</sup> HE 88/2003 vp, p. 10.

<sup>111</sup> C-168/13 *Jeremy F* EU:C:2013:358, para. 53.

<sup>112</sup> HE 88/2003 vp, p. 22.

rights. The starting point is that the Member State requesting surrender is obliged to follow human rights and is, in the end, responsible of possible violations to the ECtHR.<sup>113</sup>

This rule can be based on Framework Decision Article 1(3) which guarantees that the Framework Decision does not have the effect of modifying the obligation to respect the enshrined fundamental rights and fundamental legal principles.<sup>114</sup> It is only natural that also the case law of ECtHR has to be accounted for when interpreting the meaning of human rights.<sup>115</sup> The rule can also be traced back to Recitals 12 and 13 of the Framework Decision.<sup>116</sup> The refusal on the basis of due process should only be used in very rare cases considering that it concerns surrendering persons inside the EU.<sup>117</sup>

The Commission has called the introduction of grounds not provided for in the Framework Decision “disturbing”. According to the Commission, the explicit grounds of refusal for violation of fundamental rights (Article 1(3)) or discrimination (Recitals 12 and 13), which two thirds of the Member States have chosen to introduce expressly in various forms, is not an issue. However legitimate they may be, apart from where they exceed the Framework Decision, these grounds should be invoked only in exceptional circumstances within the EU.<sup>118</sup>

#### 4.4. Evolution of CJEU’s Case Law

##### 4.4.1. *Radu* – 29 January 2013

For a long time, CJEU held on to the principle of mutual recognition, which underpins the Framework Decision and to the view that in accordance with Article 1(2) of the Framework Decision, the Member States are in principle obliged to act upon a EAW. They must or may refuse to execute a EAW only in the cases listed in Articles 3 and 4.<sup>119</sup> *Radu* judgment was a

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<sup>113</sup> *HE 88/2003 vp*, p. 22.

<sup>114</sup> See chapter 4.4.2.

<sup>115</sup> *HE 88/2003 vp*, p. 22.

<sup>116</sup> *HE 88/2003 vp*, p. 22.

<sup>117</sup> *HE 88/2003 vp*, p. 23.

<sup>118</sup> The Commission notes that more noticeable is the introduction of other reasons for refusal, which are contrary to the Framework Decision, such as political reasons, reasons of national security or those involving examination of the merits of a case. COM(2005) 63 final Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, p. 5.

<sup>119</sup> See C-388/08 *Leymann ja Pustovarov* EU:C:2008:669, para. 51; C-123/08 *Wolzenburg* EU:C:2009:616, para. 57; C-261/09 *Mantello* EU:C:2010:683, para. 37; C-192/12 *West* EU:C:2012:404, para. 55.

late example of this, but the Advocate General's (AG) opinion already expressed a different view.<sup>120</sup>

*Radu*, a Romanian national, was subject to four EAWs, issued by the German judicial authority for the purpose of conducting criminal prosecutions for acts of robbery. Radu did not consent to his surrender and claimed that the EAWs were issued without him having been summoned or having had a possibility of hiring a lawyer or presenting his defence, in breach of Articles 47 and 48 of the Charter and Article 6 of the ECHR.

The Constanța Court of Appeal in Romania, the referring court, essentially asked the CJEU, whether the referring court is entitled to examine whether the issue of a EAW complies with fundamental rights with a view, if that is not the case, to refusing its execution, even if that ground for non-execution is provided for neither in the Framework Decision nor in the national legislation which transposed that decision.<sup>121</sup> The ECJ then ruled that the Framework Decision must be interpreted as meaning that the executing judicial authorities cannot refuse to execute a EAW issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard in the issuing Member State before that EAW was issued.

The judgment differs significantly from the opinion of Advocate General *Sharpston* in which she wrote that “The competent judicial authority of the Member State executing a European arrest warrant can refuse the request for surrender without being in breach of the obligations authorised by the founding Treaties and the other provisions of European Union law, where it is shown that the human rights of the person whose surrender is requested have been infringed, or will be infringed, as part of or following the surrender process. However, such a refusal will be competent only in exceptional circumstances.”<sup>122</sup>

*Sharpston's* opinion is more in line with the later case law than the actual ECJ's judgment in *Radu* which emphasized mutual trust over fundamental rights: “Framework Decision 2002/584 thus seeks, by the establishment of a new simplified and more effective system for the surrender of persons convicted or suspected of having infringed criminal law, to facilitate and accelerate judicial cooperation with a view to contributing to the objective set for the

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<sup>120</sup> C-396/11 *Radu* EU:C:2012:648, AG Opinion.

<sup>121</sup> C-396/11 *Radu* EU:C:2013:39, para. 23.

<sup>122</sup> C-396/11 *Radu* EU:C:2012:648, AG Opinion, para. 108(3).

European Union to become an area of freedom, security and justice by basing itself on the high degree of confidence which should exist between the Member States.”<sup>123</sup>

#### 4.4.2. Melloni – 26 February 2013

The request for a preliminary ruling was made in proceedings between *Stefano Melloni*, and the Ministerio Fiscal concerning the execution of a EAW issued by the Italian authorities for the execution of a prison sentence handed down by judgment *in absentia* against Melloni. The referring court decided to stay the proceedings and to refer three questions to the European Court of Justice (ECJ) for a preliminary ruling. The ECJ reformulated the questions as follows:

“(i). Must Article 4a(1) of the Framework Decision be interpreted as precluding national judicial authorities, in the circumstances specified in that provision, from making the execution of a EAW conditional upon the conviction in question being open to review, in order to guarantee the rights of defence of the person requested under the warrant?

(ii). In the event of the first question being answered in the affirmative, is Article 4a(1) of the Framework Decision compatible with the requirements deriving from the right to an effective judicial remedy and to a fair trial, provided for in Article 47 of the Charter and from the rights of defence guaranteed under Article 48(2) of the Charter?

(iii). In the event of the second question being answered in the affirmative, does Article 53 of the Charter, interpreted schematically in conjunction with the rights recognised under Articles 47 and 48 of the Charter, allow a Member State 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 European Union law, in order to avoid an interpretation which restricts or adversely affects a fundamental right recognised by the constitution of the first-mentioned Member State?”

The ECJ ruled that Article 4a(1) of the Framework Decision must be interpreted as precluding the executing judicial authorities, in the circumstances specified in that provision, from making the execution of a EAW issued for the purposes of executing a sentence conditional upon the conviction rendered *in absentia* being open to review in the issuing Member State. The Court also ruled that Article 4a(1) of the Framework Decision is compatible with the requirements under Articles 47 and 48(2) of the Charter and that Article 53 of the Charter must be interpreted as not allowing a Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State,

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<sup>123</sup> C-396/11 *Radu*, EU:C:2013:39, para. 34. See, to that effect, C-192/12 *West* EU:C:2012:404, para. 53 and the case law cited.

in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution.

The judgment clearly (as did *Radu*) emphasized mutual trust over fundamental rights and differing from the non-execution grounds listed in the Framework Decision with the ECJ stating:

“Consequently, allowing a Member State to avail itself of Article 53 of the Charter 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 provided for under Framework Decision 2009/299, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision.”<sup>124</sup>

#### 4.4.3. *Aranyosi and Căldăraru* – 5 April 2016

A major turning point in CJEU’s case law occurred in 2016 when the Court gave their ruling in joined cases *Aranyosi and Căldăraru*.<sup>125</sup> *Aranyosi*, a Hungarian national, was requested for two counts of burglary. *Aranyosi*’s counsel requested to refuse the surrender of *Aranyosi* because the Public Prosecutor didn’t specify a correctional facility and that, for this reason, it would have been impossible to verify the detention conditions to which *Aranyosi* would have been subjected. In *Căldăraru*, just as in *Aranyosi*, the Higher Regional Court Bremen was convinced that, given the information available to the court, there were strong indications that surrender of *Căldăraru*, a Romanian national, would expose him to detention conditions in violation of Article 3 ECHR, the fundamental rights, and general principles enshrined in Article 6 TEU.

In both of these cases the court was unable to decide whether surrender was permissible, based on Article 1(3) of the Framework Decision. For this reason, the Higher Regional Court Bremen decided to stay the proceedings and refer the CJEU. The ECJ joined the two cases together for the purposes of judgment. The ECJ stated that the referring court sought, in essence, to ascertain whether Article 1(3) of the Framework Decision must be interpreted as meaning that, where there is solid evidence that detention conditions in the issuing Member State are incompatible with fundamental rights, in particular with Article 4 of the Charter, the

<sup>124</sup> C-399/11 *Stefano Melloni v. Ministerio Fiscal* EU:C:2013:107, para. 63.

<sup>125</sup> C-404/15 and C-659/15 *Aranyosi and Căldăraru* EU:C:2016:198.

executing judicial authority may or must refuse to execute a EAW issued in respect of a person for the purposes of conducting a criminal prosecution or executing a custodial sentence, or whether it may or must make the surrender of that person conditional on there being obtained from the issuing Member State information enabling it to be satisfied that those detention conditions are compatible with fundamental rights. Further, the referring court sought to ascertain whether Articles 5 and 6(1) of the Framework Decision must be interpreted as meaning that such information may be supplied by the judicial authority of the issuing Member State or whether the supply of that information is governed by the domestic rules of competence in that Member State.

ECJ ruled that:

“-- Article 1(3), Article 5 and Article 6(1) of the Framework Decision must be interpreted as meaning that where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of his surrender to that Member State. To that end, the executing judicial authority must request that supplementary information be provided by the issuing judicial authority, which, after seeking, if necessary, the assistance of the central authority or one of the central authorities of the issuing Member State, under Article 7 of the Framework Decision, must send that information within the time limit specified in the request. The executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end.”<sup>126</sup>

ECJ ruled that the execution of that warrant must be postponed but it cannot be abandoned.<sup>127</sup> The ruling, therefore, did not set an absolute prohibition on surrender. It also left open the possibility that Member States provide information that is not fully accurate to one-another, resulting in surrender despite valid concerns. FTI has demanded the Framework Decision needs to be amended to fully guarantee this right.<sup>128</sup>

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<sup>126</sup> C-404/15 and C-659/15 *Aranyosi and Căldăraru* EU:C:2016:198, para. 104.

<sup>127</sup> C-404/15 and C-659/15 *Aranyosi and Căldăraru* EU:C:2016:198, para. 98. See, by analogy, judgment in C-237/15 *Lanigan* EU:C:2015:474, paragraph 38.

<sup>128</sup> *Fair Trials* (2018), p. 18.

*Aranyosi* marked, according to *Hong*, a remarkable change in tone and posture compared to *Melloni*: whereas *Melloni* was all about the Framework Decision being conclusive and excluding any individualised review, *Aranyosi* is all about the need to secure fundamental rights in an individual case.<sup>129</sup> *Caeiro – Finaldo – Prata Rodrigues* stress that the judgment was, in many respects, a one-of-a-kind decision, but it brought up important aspects:<sup>130</sup> (i) The protection of individual rights can be an actual obstacle to surrender pursuant to a EAW; (ii) The presumption underlying mutual trust (and hence mutual recognition) can be rebutted.

The judgment was a landmark decision as it established for the first time that fundamental rights can work as grounds for non-execution of a EAW even though not listed as such in the Framework Decision. However, the judgment left a number of uncertainties. Most importantly, could other fundamental rights than non-derogable ones offer the same possibility and if so, what is the threshold? Before the ECJ got to answer these questions, it had to provide an important judgment on rule of law and the independence of judiciary.<sup>131</sup>

#### 4.4.4. *Associação Sindical dos Juizes Portugueses – 27 February 2018*

In *Associação Sindical dos Juizes Portugueses*,<sup>132</sup> the request was made in proceedings between the Associação Sindical dos Juizes Portugueses (Trade Union of Portuguese Judges) and Portugal’s Court of Auditors, concerning the temporary reduction in the amount of remuneration paid to that court’s members, in the context of the Portugal’s budgetary policy guidelines. The Supreme Administrative Court referred the following question to the CJEU for a preliminary ruling:

“In view of the mandatory requirements of eliminating the excessive budget deficit and of financial assistance regulated by ... rules [of EU law], must the principle of judicial independence, enshrined in the second subparagraph of Article 19(1) TEU, in Article 47 of the [Charter] and in the case-law of the Court of Justice, be interpreted as meaning that it precludes the measures to reduce remuneration that are applied to the judiciary in Portugal, where they are imposed unilaterally and on an ongoing basis by other constitutional authorities and bodies, as is the consequence of Article 2 of Law [No 75/2014]?”

By its question, the referring court sought, in essence, to ascertain whether the second subparagraph of Article 19(1) TEU (“Member States shall provide remedies sufficient to

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<sup>129</sup> *Hong* (2016), p. 562.

<sup>130</sup> *Caeiro – Finaldo – Prata Rodrigues* (2018), p. 701.

<sup>131</sup> ECJ’s ruling C-220/18 *ML* EU:C:2018:589 later supplemented *Aranyosi and Căldăraru* in many aspects.

<sup>132</sup> C-64/16 *Associação Sindical dos Juizes Portugueses* EU:C:2018:117.

ensure effective legal protection in the fields covered by Union law.”) must be interpreted as meaning that the principle of judicial independence precludes general salary-reduction measures linked to requirements to eliminate an excessive budget deficit and to an EU financial assistance programme, from being applied to the members of a Member State’s judiciary.

ECJ ruled that the second subparagraph of Article 19(1) TEU must be interpreted as meaning that the principle of judicial independence does not preclude general salary-reduction measures, such as those at issue in the main proceedings, linked to requirements to eliminate an excessive budget deficit and to an EU financial assistance programme, from being applied to the members of the Court of Auditors.

Importance of the judgment, in relation to the research question, is based on several key points. Firstly, the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law.<sup>133</sup> Secondly, it follows that every Member State must ensure that the bodies which, as “courts or tribunals” within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection.<sup>134</sup> Finally, in order for that protection to be ensured, maintaining such a court or tribunal’s independence is essential, as confirmed by the second subparagraph of Article 47 of the Charter, which refers to the access to an “independent” tribunal as one of the requirements linked to the fundamental right to an effective remedy.<sup>135</sup>

#### 4.4.5. *LM – 25 July 2018*

*LM* ruling brought the case law detailed in previous chapters to its current conclusion.<sup>136</sup> In 2013, Polish courts issued three EAWs against the person concerned and on 5 May 2017 the person concerned was arrested in Ireland on the basis of those EAWs and brought before the referring court, the High Court of Ireland. He informed that court that he did not consent to his surrender to the Polish judicial authorities and was placed in custody pending a decision on his surrender.<sup>137</sup>

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<sup>133</sup> C-64/16 *Associação Sindical dos Juizes Portugueses* EU:C:2018:117, para. 36.

<sup>134</sup> C-64/16 *Associação Sindical dos Juizes Portugueses* EU:C:2018:117, para. 37.

<sup>135</sup> C-64/16 *Associação Sindical dos Juizes Portugueses* EU:C:2018:117, para. 41.

<sup>136</sup> C-216/18 *LM* EU:C:2018:586

<sup>137</sup> C-216/18 *LM* EU:C:2018:586, para. 15.

In support of his opposition to being surrendered, the person concerned submitted, *inter alia*, that his surrender would expose him to a real risk of a flagrant denial of justice in contravention of Article 6 of the ECHR (right to a fair trial). In this connection, he contended, in particular, that the recent legislative reforms of the system of justice in Poland denied him his right to a fair trial. In his submission, those changes fundamentally undermine the basis of the mutual trust between the authority issuing the EAW and the executing authority, calling the operation of the EAW mechanism into question.<sup>138</sup> The person concerned relied on a reasoned proposal adopted by the Commission pursuant to Article 7(1) TEU in order for the Council to determine that there is a clear risk of a serious breach by that Member State of the values referred to in Article 2 TEU, such as that of the rule of law, on account, in particular, of actions impairing the independence of the national courts.<sup>139</sup>

The High Court of Ireland referred two questions to the ECJ for a preliminary ruling. The ECJ then, after consideration, ruled that Article 1(3) of the Framework Decision must be interpreted as meaning that, where the executing judicial authority, called upon to decide whether a person in respect of whom a EAW has been issued for the purposes of conducting a criminal prosecution is to be surrendered, has material, such as that set out in a reasoned proposal of the European Commission adopted pursuant to Article 7(1) TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, that authority must 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 EAW, and in the light of the information 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 such a risk if he is surrendered to that State.

If the executing judicial authority cannot discount the existence of a real risk that the individual concerned will suffer in the issuing Member State a breach of the essence of his fundamental right to a fair trial, the executing judicial authority must refrain from giving effect to the EAW relating to the person.<sup>140</sup>

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<sup>138</sup> C-216/18 LM EU:C:2018:586, para. 16.

<sup>139</sup> C-216/18 LM EU:C:2018:586, para. 17.

<sup>140</sup> C-216/18 LM EU:C:2018:586, para. 78.

As Advocate General in *LM* expressed that the executing judicial authority can be required to postpone the execution of a EAW only if there is a real risk of breach not of the right to a fair trial but of the *essence* of that right.<sup>141</sup> An important part of justification in *LM* was based on the *Associação Sindical dos Juizes Portugueses* in which the ECJ directly pointed out that a Member State's judicial structure must be seen as an important part of guaranteeing the fundamental right to a fair trial regardless of whether such a structure is under the scope or direct protection of EU secondary law or not.<sup>142</sup>

The *LM* judgment identified some structural aspects of the control of judiciary that may be considered, according to *Sadurski*, as “symptoms of defects” in guaranteeing the independence of judges that read like direct reference to what has in Poland.<sup>143</sup> The *LM* judgment may be seen as a judicial legitimization of the Commission's actions under the rule of law framework. It may also be recognized as grounds for a future ruling in the cases submitted by the Commission or initiated by the Polish Supreme Court's preliminary references concerning the “reform” of the judiciary in Poland. The ECJ's repeated references to the case of *Associação Sindical dos Juizes Portugueses* might suggest such a future line of case law.<sup>144</sup>

After ECJ's *LM* ruling, the Irish High Court concluded that the systemic and generalised deficiencies in the independence of the judiciary in Poland of themselves did not reach the threshold of amounting to a real risk that there would have been a flagrant denial of the requested individual's right to a fair trial. The Irish Court also concluded that, despite adverse comments on his presumption of innocence made by the Deputy Minister of Justice, the real risk had not been established. On that basis, the Irish High Court ordered his surrender on each of the three EAWs.<sup>145</sup>

While the *LM* judgment might not be a major change on a EU level as it sets very stringent conditions on the non-execution, however, when compared to *Radu*, the difference is clear as day. In just five years, CJEU went from giving mutual trust and cooperation seemingly unbeatable precedence to admitting that derogable human rights can, under strict conditions,

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<sup>141</sup> C-216/18 *LM* EU:C:2018:517, AG Opinion, para. 76

<sup>142</sup> *Sadurski* (2019), p. 207.

<sup>143</sup> *Sadurski* (2019), p. 207.

<sup>144</sup> *Sadurski* (2019), p. 207.

<sup>145</sup> *Minister for Justice and Equality v. Celmer* (no.5) [2018] IEHC 639, para. 123.

lead to a non-execution of a EAW, a judicial tool based on mutual trust. However, “a ripple effect” may be expected.<sup>146</sup>

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<sup>146</sup> *Sadurski* (2019), p. 208.

## 5. Assessing the Surrender

### 5.1. Two-Step Approach

An important practical tool for judicial authorities to start making the legal assessment (along the legal sources mentioned in the previous chapter) is the European Commission’s “Handbook on how to issue and execute a European arrest warrant”, which was last updated in the fall of 2017.<sup>147</sup> According to the preface, it takes into account the experience gained over the years of application of the EAW in the Union. The purpose of the handbook’s revisions is to update the handbook and make it more comprehensive and more user-friendly. The Commission consulted various stakeholders and experts, including Eurojust, the Secretariat of the European Judicial Network, and Member States’ government experts and judicial authorities.

The Council and the Commission may believe that they can do maintenance on the EAW by amending the Handbook related to the EAW.<sup>148</sup> However, as the handbook’s disclaimer states, it is neither legally binding nor exhaustive and without prejudice to existing EU law and its future development. It is also without prejudice to the authoritative interpretation of EU law which may be given by the CJEU. Nevertheless, it can be viewed as guiding.

The executing judicial authority shall decide, within the time-limits and under the conditions defined in the Framework Decision, whether the person is to be surrendered (Article 15(1) “Surrender decision”). The Framework Decision’s Article 3 (“Grounds for mandatory non-execution of the European arrest warrant”), Article 4 (“Grounds for optional non-execution of the European arrest warrant”) and Article 4a (“Decisions rendered following a trial at which the person did not appear in person”) set out the grounds for non-execution of a EAW.

The Framework Decision doesn’t therefore contain any provisions on non-execution on the basis of a breach of the requested person’s fundamental rights in the issuing Member State as detailed in the previous chapter. The mechanism is derived from case law and the larger legal framework and its meaning. The possibility to non-execute a EAW on this basis was nevertheless recognized in legal literature before case law existed on the matter.<sup>149</sup> As established in the case law detailed in previous chapters, specifically *Aranyosi* and *Căldăraru*

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<sup>147</sup> C(2017) 6389 final Commission Notice — Handbook on how to issue and execute a European arrest warrant. *OJ C 335, 6.10.2017, p. 1–83.*

<sup>148</sup> *Marin* (2014), p. 347.

<sup>149</sup> See *Fennelly* (2007), p. 525-526.

and *LM*, the assessment on whether to refuse or allow the surrender of a person on the basis of risk to the right to the fair trial, should be examined as a two-step process.

As a first step, the executing judicial authority 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>150</sup>

Then, if, having regard to the requirements noted, the executing judicial authority finds that there is, in the issuing Member State, a real risk of breach of the essence of the fundamental right to a fair trial on account of systemic or generalised deficiencies concerning the judiciary of that Member State, such as to compromise the independence of that State's courts, that authority must, as a second step, 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>151</sup>

This two-step test was first formulated in the judgment *Aranyosi and Căldăraru*, in the context of a surrender liable to result in a breach of Article 3 of the ECHR. The Court left a number of issues open, not least because the facts and circumstances of the case made it, according to *Bárd - van Ballegooij*, relatively easy one: a non-derogable right was at stake and its violation was established beyond doubt by ECtHR judgments. However, the ECJ left the question unanswered as to how national judicial authorities should proceed, where derogable rights are at stake and the pieces of evidence are less strong or persuasive. Neither did the ECJ address the issue of whether the newly adopted judicial test was applicable to rule of law violations beyond fundamental rights infringements and whether and under what conditions it should be up to the judicial branch to ensure proper rule of law and fundamental rights safeguards in judicial cooperation.<sup>152</sup>

The same two-step test was then found applicable in *LM* in relation to Article 47 of the Charter, at least as far as the independence of the judiciary is concerned.<sup>153</sup> In *LM*, the person concerned relied on a reasoned proposal adopted by the Commission pursuant to Article 7(1)

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<sup>150</sup> C-216/18 *LM* EU:C:2018:586, para. 61.

<sup>151</sup> C-216/18 *LM* EU:C:2018:586, para. 68

<sup>152</sup> *Bárd – van Ballegooij* (2018), p. 355-356

<sup>153</sup> C-216/18 *LM* EU:C:2018:586, para. 23.

TEU in order for the Council to determine that there is a clear risk of a serious breach by that Member State of the values referred to in Article 2 TEU, such as that of the rule of law, on account, in particular, of actions impairing the independence of the national courts. The Commission was led to adopt its reasoned proposal stemming from concerns relating to the independence of judges to the separation of powers and therefore to the right to a fair trial. But can then the same two-step test in question be applied to right to a fair trial as a whole? The only reasonable answer is yes. Any other answer would be against the principles stated in the Framework Decision and judicial protection as a meta-norm. If the same test was not applicable to, for instance, situations where the overall fairness of the procedure was at danger, this could lead to severe infringements. Advocate General *Tanchev* also noted in his *LM* opinion that “a risk of breach of the right to a fair trial may exist in the issuing Member State even if it is not in breach of the rule of law”.<sup>154</sup> Regrettably, *Tanchev* did not state his reasoning in detail for this opinion. CJEU has yet to give its irrefutable judgment on the matter, but any other answer would be illogical.

On this basis, the test could be reformulated to apply to right to a fair trial as a whole. Advocate General *Tanchev* also provided his own two-step test in his opinion, excluding the mention of independence, but referring to “a flagrant denial of justice”.<sup>155</sup> Removing the mention of independence from ECJ’s two-step test, to take the whole Article 47 of the Charter into consideration, would be worded as follows:

(i) As a first step, the executing judicial authority 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, on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached.

(ii) Then as a second step, if, having regard to the requirements noted, the executing judicial authority finds that there is, in the issuing Member State, a real risk of breach of the essence of the fundamental right to a fair trial, that authority must, as a second step, 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.

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<sup>154</sup> C-216/18 *LM* EU:C:2018:517, AG Opinion, para. 40. See COM(2017) 835 final Proposal for a COUNCIL DECISION on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, paras. 171-186 of the explanatory memorandum to the Commission’s reasoned proposal. The Advocate General also underlined the fact that the two assessments conducted, respectively, by the Council and by the executing judicial authority, do not have the same objective.

<sup>155</sup> C-216/18 *LM* EU:C:2018:517, AG Opinion, para. 133. See also chapter 4.4.2.

Although *LM* can be seen as a landmark decision as it expressly allowed the use of breach of the right to a fair trial as a reason for EAW's non-execution, some still view it as "*a missed opportunity*" and not as a breakthrough as it requires case-by-case approach rather than offering a systemic answer.<sup>156</sup> It has even been argued that the whole question should be examined purely as a rule of law issue rather than a fair trial or human rights issue.<sup>157</sup> However, *Konstadinides* has argued that compartmentalizing the problems in Poland and addressing specific EU law breaches through the lenses of fundamental rights, adds to the existing arsenal available to the EU Institutions under Article 258 TFEU and Article 7 TEU to enforce the rule of law in backsliding Member States.<sup>158</sup> Further, by elevating effective judicial protection of individuals' rights under EU law, referred to in Article 19(1) TEU and Article 47 of the Charter, the ECJ is effectively claiming ownership of the Charter. This solidifies its reputation as a fundamental rights court and further empowers individuals to defend common values which are gradually becoming uncommon in some Member States.

Although the two-step test was introduced in *Aranyosi* and *Căldăraru* and then later found applicable in *LM*, these cases are different enough. As noted by *Dorociak* and *Lewandowski*, in *LM* the violation had not been yet stated by the CJEU or the ECtHR and therefore, the High Court in Ireland was not in an analogous situation to the Court in Germany in *Aranyosi*.<sup>159</sup> Difference between these two situations, refusal under Article 4 or Article 47, is also derived from the fundamentally different nature of these two rights. As noted also by Advocate General *Bot*, while the prohibition of inhuman or degrading treatment is absolute,<sup>160</sup> the right to a fair trial set out in Article 47 may be subject to limitations.<sup>161</sup> So even though the same test is applicable, the two situations are fundamentally different in this aspect.

One important weakness of the *LM* judgments lies in the fact that the ECJ didn't conduct the test itself, only ruling it applicable to the situation. The ECJ did not directly make a judgment on whether the systemic risk described would justify a refusal to surrender in this EAW case. According to *Sadurski*, this signals that the ECJ "strongly emphasized the huge obligations of the national court submitting the preliminary question."<sup>162</sup> Clearly, the ECJ didn't want to

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<sup>156</sup> *Pech — Wachowiec* (2019).

<sup>157</sup> see *Bárd — van Ballegooij* (2018).

<sup>158</sup> *Konstadinides* (2019), p. 768-769.

<sup>159</sup> *Dorociak — Lewandowski* (2018), p. 869-871.

<sup>160</sup> C-404/15 and C-659/15 *Aranyosi and Căldăraru* EU:C:2016:198, para. 85; C-182/15 *Petruhhin* EU:C:2016:630, para. 56; C-578/16 *C. K. and Others* EU:C:2017:127, para. 59; C-353/16 *MP* EU:C:2018:276, para. 36.

<sup>161</sup> C-216/18 *LM* EU:C:2018:517, AG Opinion, para. 57

<sup>162</sup> *Sadurski* (2019), p. 207.

depart from *Aranyosi* and *Căldăraru*, but this might have made the *LM* judgment too general to find much practical use while at the same time being too specific to guarantee other fundamental rights.

A landmark or not, one must surely agree, after reading the *LM* judgment and analyzing the prerequisites, that *LM* set strict contingencies for refusal to surrender on the basis of a risk to right to fair trial. These prerequisites can be divided into six categories: (1) a real risk of breach of the fundamental right to a fair trial; (2) systemic or generalised deficiencies; (3) the requested person's personal situation; (4) nature of the offence for which the person is being prosecuted and the factual context that form the basis of the EAW; (5) information provided by the issuing Member State; and (6) substantial grounds for believing that that person will run such a risk if he is surrendered to that State.

## 5.2. The First Step

### 5.2.1. Objective, Reliable, Specific and Properly Updated Material

Article 19 of the Framework Decision ("Hearing the person pending the decision") explicitly states that the requested person shall be heard by a judicial authority, which is also an integral part of a fair judicial process. In addition, the executing judicial authority must make the surrender decision in question on the basis of material, such as that set out in a reasoned proposal of the European Commission adopted pursuant to Article 7(1) TEU. This can be considered to be the starting point for the executing judicial authority to compare its material to.

According to ECJ, information in the reasoned proposal was particularly relevant for the purposes the assessment in *LM*, but the ECJ also spells out the need for the material to be "*objective, reliable, specific and properly updated concerning the operation of the system of justice in the issuing Member State.*"<sup>163</sup> Therefore, a reasoned proposal, such as the one referred to in *LM*, is not the only option as long as the material can meet the mentioned criteria. It does not mean, however, that such material will necessarily meet the *Aranyosi* test, as noted by *Sadurski*.<sup>164</sup>

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<sup>163</sup> C-216/18 *LM* EU:C:2018:586. para. 61. See, to that effect, C-404/15 and C-659/15 *Aranyosi and Căldăraru* EU:C:2016:198, para. 89.

<sup>164</sup> *Sadurski* (2019), p. 207.

In *Aranyosi and Căldăraru*, ECJ identified the material as, *inter alia*, judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN.<sup>165</sup> The same standard was repeated in ECJ's *Generalstaatsanwaltschaft* judgment (published the same year as *LM*).<sup>166</sup> This demonstrates, according to *Konstadinides*, "synergy between different rule of law stakeholders, at all levels, and provides substantial resources for national judges called to conduct an individual assessment and a concrete inquiry prior to blocking the execution of an EAW."<sup>167</sup>

In *Aranyosi*, several ECtHR cases and a report of the European Committee for the Prevention of Torture (CPT) were submitted as evidence. The national court referred specially to *Varga and others v. Hungary*<sup>168</sup> in which the ECtHR held that Hungary had placed the applicants in overcrowded prisons with living spaces that were too small. As to the report of the CPT, the national court referred to the CPT's findings, based on visits between 2009 and 2013, that there are concrete indications that the detention conditions in Hungary didn't meet the minimum norms laid down in international law. In *Căldăraru*, the national court based their assessment on several cases before the ECtHR in which that court held that Romania had placed the applicants in overcrowded correctional facilities, without providing sufficient heating or warm water for showers. In addition, the national court referred to the CPT's conclusion, based on visits in June 2014, that correctional facilities in Romania are overcrowded.

The specific assessment of the second step is also necessary where the issuing Member State has been the subject of a reasoned proposal adopted by the Commission pursuant to Article 7(1) TEU.<sup>169</sup> *Dorociak - Lewandowski* made the statement regarding the reasoned proposal that that the justified opinion of the Commission is still nothing more than "an opinion".<sup>170</sup> They held that only Member States, acting through the Council or the European Council, could suspend the mutual trust in relation to another Member State and declare the violation of one of the values of the European Union. ECJ's *LM* judgment, however, valued the

<sup>165</sup> C-404/15 and C-659/15 *Aranyosi and Căldăraru* EU:C:2016:198, para. 89.

<sup>166</sup> C-220/18 *ML*, EU:C:2018:589, para. 45. The CJEU continues in paras. 47-48: "That was the view taken, first, by the ECtHR, which held that the new measures are not a dead letter and that instead they furnish an effective guarantee of the right not to be subjected to inhuman or degrading treatment. Second, the Committee of Ministers of the Council of Europe, in its decision of June 2017, welcomed the Hungarian authorities' commitment to resolve the problem of prison overcrowding and noted that the measures already taken appeared to have produced their first results and that it was to be hoped that those measures, and others that might be adopted in the future, might help the Hungarian authorities in taking, on a case-by-case basis, concrete and effective actions to further tackle that problem."

<sup>167</sup> *Konstadinides* (2019), p. 752. Although incorrectly referred by *Konstadinides* as an "addition" to the first limb of the *Aranyosi and Căldăraru* test. The same wording was used in *Aranyosa and Căldăraru*.

<sup>168</sup> *Varga and others v. Hungary* (10 March 2015).

<sup>169</sup> C-216/18 *LM* EU:C:2018:586, para. 69.

<sup>170</sup> *Dorociak — Lewandowski* (2018) p. 869-871. It is to be noted that *Dorociak — Lewandowski* made their assessment before *LM* judgment's publication.

reasoned proposal as “particularly relevant”. As the ECJ stated that such a document is to be viewed as particularly relevant, it must, before further review, be so.

According to the ECJ, it is only if the European Council were to adopt a decision determining, as provided for in Article 7(2) TEU, that there is a serious and persistent breach in the issuing Member State of the principles set out in Article 2 TEU, such as those inherent in the rule of law, and the Council were then to suspend the Framework Decision in respect of that Member State that the executing judicial authority would be required to refuse automatically to execute any EAW issued by it.<sup>171</sup> This would then, according to ECJ, happen without having to carry out any specific assessment of whether the individual concerned runs a real risk that the essence of his fundamental right to a fair trial will be affected. ECJ thus left the national courts the possibility to assess the significance of a reasoned proposal, while still leaving room for future developments.

Regarding previous case law, Advocate General *Sharpston* in her *Radu* opinion noted that while the record of the Member States in complying with their human rights obligations may be commendable, it is also not pristine (as evidenced by the Commission’s 2011 report on EAW).<sup>172</sup> According to *Sharpston*, there can therefore be no assumption that, simply because the surrender is requested by another Member State, that the 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.<sup>173</sup> This view expresses the principle of mutual trust setting a high standard of proof.<sup>174</sup>

ECJ practically expanded the catalogue of sources of information to be considered by a judge in making determinations about an EAW by allowing any material that meets the standard set. However, there is always a need for a national court to assess the impact of such risk for individuals subject to an EAW.<sup>175</sup> In this way, according to *Sadurski*, the ECJ simply evaded the issue of the systemic nature of threats to the rule of law signalled by the initiation of the Article

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<sup>171</sup> C-216/18 *LM* EU:C:2018:586, para. 72.

<sup>172</sup> COM(2011) 175 Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

<sup>173</sup> C-396/11 *Radu* EU:C:2012:648, AG Opinion, para. 41.

<sup>174</sup> See chapter 7.

<sup>175</sup> See chapter 5.2.2.

7 procedure, which may render “time-consuming and convoluted” judicial tests unnecessary.<sup>176</sup>

### 5.2.2. *Real Risk of a Breach*

The existence of a real risk that the person in respect of whom a EAW has been issued will, if surrendered to the issuing judicial authority, suffer a breach of the essence of the person’s fundamental right to a fair trial,<sup>177</sup> is capable of permitting the executing judicial authority to refrain, by way of exception, from giving effect to that EAW, on the basis of Article 1(3) of the Framework Decision.<sup>178</sup>

The submitted material needs to go beyond than proving just a “risk”. “Real risk” carries the connotation of high probability. If the risk *may* occur, it should be considered as real. On other hand, if the risk just *might* occur, it can’t be considered real. So, for a risk to be considered real, the probability at which it may occur, should be at least over 50 percent. “Real risk” can be read as setting very strict criteria, but it shouldn’t be considering too restricting. If the risk to the essence of the fundamental right of fair trial may occur with over 50 percent probability, this should be enough. Due weight should be given to ensuring judicial protection.

This requirement could otherwise put the individual at a significant disadvantage as the burden of proof is already set quite high. Regarding the burden of proof, Advocate General *Tanchev’s LM* opinion stated that the individual concerned should be the one required to establish that there are substantial grounds for believing that there is a real risk of suffering a flagrant denial of justice in the issuing Member State.<sup>179</sup> Such a position corresponds to the position of the ECtHR, which holds, in addition, that, once such evidence has been adduced, it is for the State in question to dispel any doubts in that regard.<sup>180</sup>

The *LM* judgment was in line with the Advocate General’s opinion in *Radu*, where the Advocate General was of the opinion that “something more than mere suggestions of

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<sup>176</sup> *Sadurski* (2019), p. 207.

<sup>177</sup> See chapter 2.3.

<sup>178</sup> C-216/18 *LM* EU:C:2018:586, para. 59.

<sup>179</sup> C-216/18 *LM* EU:C:2018:517, AG Opinion, para. 115. See *Ahorugeze v. Sweden* (27 October 2011), para. 116; *Othman (Abu Qatada) v. the United Kingdom* (17 January 2012), para. 261; and *Yefimova v. Russia* (19 February 2013), para. 220.

<sup>180</sup> See chapter 5.3.2.

potential impropriety will be needed”.<sup>181</sup> If the executing court is not to implement a EAW on the basis that there is a real risk that the requested person’s rights will be infringed, it will not be sufficient that rudimentary doubts are raised. The Advocate General suggested that the appropriate test is that the requested person must persuade the decision-maker that his objections to the transfer are substantially well founded.

Even if requesting Member State’s courts were to provide safe-guards in a single case, actual use of these in practice by a compromised judiciary, is perhaps not that likely. *Konstadinides* has expressed the need to consider that although essence of fundamental right to a fair trial may be compromised in a Member State, the judiciary is not a monolithic sector.<sup>182</sup> Meaning that despite Member State’s systemic reforms, that Member State may still have courts that are able to provide a fair trial. Executing judges need to be careful in their assessment not to be prejudiced against an individual Member State in all situations and to remember the importance of mutual trust<sup>183</sup> or “high level of confidence between Member States” as expressed by Recital 10 of the Framework Decision (“...implementation of the [EAW] mechanism may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 2 TEU, determined by the European Council pursuant to Article 7(2) TEU, with the consequences set out in Article 7(3) TEU...”).

As noted by Advocate General *Tanchev* in his *LM*, determination by the Council that there is a clear risk of a serious breach of the values referred to in Article 2 TEU does not have the same consequences as the executing judicial authority finding that there is a real risk of breach of a fundamental right.<sup>184</sup> A suggested proposal therefore leaves the rule of law situation in a sort of a limbo: Article 7(1) TEU does not prescribe the period within which the Council, when it has a reasoned proposal before it, must adopt a decision determining that there is a clear risk of a serious breach of the values referred to in Article 2 TEU, but it also does not provide that, if the Council considers that there is no such risk, it is to adopt a decision to that effect.<sup>185</sup>

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<sup>181</sup> C-396/11 *Radu* EU:C:2012:648, AG Opinion, para. 85.

<sup>182</sup> *Konstadinides* (2019), p. 754-755.

<sup>183</sup> See chapter 7.

<sup>184</sup> C-216/18 *LM* EU:C:2018:517, AG Opinion, para. 41.

<sup>185</sup> C-216/18 *LM* EU:C:2018:517, AG Opinion, para. 45.

### 5.2.3. Systemic or Generalised Deficiencies

The decision to non-execute a EAW must be made on account of systemic or generalised deficiencies (“systemic or, at all events, generalised deficiencies”<sup>186</sup>). The importance of systemic or generalized deficiencies should be analyzed in relation to the effect they would have on the surrendered person’s trial. The executing judicial authority must, in particular, examine to what extent the systemic or generalised deficiencies are liable to have an impact at the level of that State’s courts with jurisdiction over the proceedings to which the requested person will be subject.<sup>187</sup> This connects the deficiencies to the real risk criteria described in the previous chapter. If the deficiencies do not have an effect on the trial process of the person concerned, ECJ’s criteria is not met.

Judicial independence is an important aspect of the judiciary system as a whole which, when compromised, can prove to be a deficiency described. In *Associação Sindical dos Juizes Portugueses*, ECJ ruled that principle of judicial independence doesn’t preclude general salary-reduction measures, linked to requirements to eliminate an excessive budget deficit and to an EU financial assistance programme, from being applied to the members of the Court of Auditors of Portugal.<sup>188</sup>

*Konstadinides* has expressed that *LM* indicates ECJ’s acute awareness of its boundaries in finding systemic or generalized deficiencies in the Member States.<sup>189</sup> *Konstadinides* suspected that ECJ knows that the *LM* case raised primarily a problem of rule of law in Poland, but ECJ still understands that it has been asked a different question by the referring court.

What then is the relationship between systemic or generalized deficiencies and Article 7 TEU? Although “systemic or generalized deficiencies” are different from “a clear and serious breach”, at least some overlap between the two concepts exists. Article 7 TEU is not, however, by design a remedy for individual breaches in specific situations, *Larion* has described it as a solution of last-resort, a concerted action that exists for “systemic problems, that raise to a certain threshold of seriousness and persistence.”<sup>190</sup> They still examine similar situations, although their aims are different.

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<sup>186</sup> C-216/18 *LM* EU:C:2018:586, para. 60.

<sup>187</sup> C-216/18 *LM* EU:C:2018:586, para. 74.

<sup>188</sup> C-64/16 *Associação Sindical dos Juizes Portugueses* EU:C:2018:117.

<sup>189</sup> *Konstadinides* (2019), p. 764-765.

<sup>190</sup> *Larion* (2018), p. 163.

Commission of the European Communities expressed in their communication on Article 7 TEU to the Council and the European Parliament that a risk of serious breach must be “clear”, excluding purely contingent risks from the scope of the prevention mechanism.<sup>191</sup> The serious breach criterion is common to the prevention and the penalty mechanisms: the clear risk must be that of a “serious” breach and the breach itself when it occurs must be “serious”. To determine the seriousness of the breach, a variety of criteria will have to be considered, *inter alia*, the purpose and the result of the breach.<sup>192</sup> Persistent breach applies only to the activation of the penalty mechanism in respect of a breach which has already taken place. For breach to be persistent, it must last some time, but persistence can be expressed in a variety of manners.<sup>193</sup>

Examining these criteria is tightly connected to the real risk of a breach. Article 7 TEU is considered through clear risk (excluding purely contingent risks) + serious breach (eg. purpose and the result of the breach) and the systemic or generalized deficiencies of *Aranyosi* test in *LM* through the effect they would have on the surrendered person’s trial (in particular, to what extent the systemic or generalised deficiencies are liable to have an impact at the level of that State’s courts with jurisdiction over the proceedings to which the requested person will be subject).

Even if a 1:1 correlation between the two concepts doesn’t exist, at least a strong correlation does. Systemic or generalised deficiencies can exist even if a serious and persistent breach to rule of law does not. The threshold for systemic or generalised deficiencies should not be interpreted as too limiting, but rather from the perspective of judicial protection.

The systemic or generalized deficiencies mentioned could also be expressed as “deficiencies affecting a majority of the requesting Member State’s operation of the system of justice”. If the examination shows that the deficiencies are liable to affect national courts, the executing judicial authority must also conduct the second step of the described test.

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<sup>191</sup> COM(2003) 606 final Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on the European Union. Respect for and promotion of the values on which the Union is based, p. 7.

<sup>192</sup> COM(2003) 606 final Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on the European Union. Respect for and promotion of the values on which the Union is based, p. 8

<sup>193</sup> COM(2003) 606 final Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on the European Union. Respect for and promotion of the values on which the Union is based, p. 8

### 5.3. The Second Step

#### 5.3.1. Proportionality

The assessment must be made, having regard to the requested person's 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 EAW.<sup>194</sup> These three (the requested person's personal situation, the nature of the offence and the factual context) form the "proportionality" aspect of the two-step assessment. Although ECH did not use the term in their ruling, in practice, it holds the same meaning. The case law, *LM* or others indirectly related, do not give much information on how to judge the personal situation of the persons concerned.

ECJ's general vagueness concerning this aspect leaves much room for future developments. It seems reasonable, however, to make an overall assessment and to balance all three in order to achieve a reasonable outcome. In *LM*, the person requested provided the Irish Court evidence as to comments made by the the Deputy Minister of Justice which raised certain concerns. Those comments, in particular by "virtue of their repetitive nature, their reference to the respondent as a criminal, and most importantly, the statement that he is wanted for punishment, would all appear to have considerable implications for his presumption of innocence."<sup>195</sup> The Irish Court did find these comments, even when taken in the context of the deficiencies relating to the independence of the judiciary in Poland, to give rise to a real risk that the respondent would face a flagrant denial of his right to a fair trial on his surrender to Poland.<sup>196</sup>

Regarding Article 6(1) of the ECHR, the Advocate General in *LM* provided the example of *Ahorugeze v. Sweden*, in which the ECtHR held that the extradition of the applicant, a Rwandan national of Hutu ethnicity, to Rwanda, where he was to stand trial on charges of genocide and crimes against humanity, would not expose him to a real risk of flagrant denial of justice.<sup>197</sup> Among other factors, the ECtHR examined the applicant's personal situation. It found that neither the fact that the applicant had given testimony for the defence before the

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<sup>194</sup> C-216/18 *LM* EU:C:2018:586, para. 75. In *LM*, the three EAWs' against the person concerned were, inter alia, for trafficking in narcotic drugs and psychotropic substances (C-216/18 *LM* EU:C:2018:586, para. 14).

<sup>195</sup> *Minister for Justice and Equality v. Celmer* (no.4) [2018] IEHC 484, para. 36.

<sup>196</sup> *Minister for Justice and Equality v. Celmer* (no.5) [2018] IEHC 639, para 117.

<sup>197</sup> *Ahorugeze v. Sweden* (27 October 2011).

International Criminal Tribunal for Rwanda, nor the fact that he had been head of the Rwandan Civil Aviation Authority, nor his conviction for destroying other people's property during the 1994 genocide exposed him to a flagrant denial of justice.

Disproportionate use of the EAW is currently problematic on a systematic level as the current absence of any parallel system for enabling less serious trans-border crime to be dealt with by less drastic tools means that prosecutors are tempted to use EAWs heavy-handedly.<sup>198</sup> For example, the UK and the Netherlands have allegedly been overloaded by cases of chicken and bicycle thefts and other petty crimes by the Polish authorities: the overuse of EAW is confirmed to be a general issue, a serious enough to affect the enforcement of the EAW in many countries.<sup>199</sup> Proportionality principle is also important for maintaining mutual trust between Member States.<sup>200</sup>

What allows proportionality to be considered, is the nature of the right to fair trial as derogable. ECJ's *LM* wording expresses the idea put forth in Advocate General's *Aranyosi* opinion that it is necessary to "weigh up the rights of the surrendered person against the requirements of the protection of the rights and freedoms of others."<sup>201</sup> Article 6 of the Charter states that everyone has the right not only to liberty but also to security of person. That right, as the right guaranteed in Article 4 of the Charter is an absolute, non-derogable right. Where the person, with respect to whom the EAW is issued, is sought for acts of terrorism or rape of a child, the non-execution of the EAW raises the question of the need to "safeguard national security and public order."<sup>202</sup> It is necessary to bear in mind that the interests of the victims of crimes in seeing their perpetrators brought to justice are also at stake.<sup>203</sup>

The Framework Decision provides no binding proportionality test for EAWs. However, Commission's EAW Handbook gives its soft law version. According to the Handbook, particularly the following factors could be taken into account: (a) the seriousness of the

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<sup>198</sup> *Spencer* (2013), p. 253.

<sup>199</sup> See *Marin* (2014), p. 335.

<sup>200</sup> See chapter 7.

<sup>201</sup> C-404/15 and C-659/15 *Aranyosi and Căldăraru* EU:C:2016:140, AG Opinion, para. 135.

<sup>202</sup> C-404/15 and C-659/15 *Aranyosi and Căldăraru* EU:C:2016:140, AG Opinion, para. 135. However, *Mancano* has firmly rejected the argument put forward by the Advocate General in *Căldăraru*, where the principle of proportionality was considered. When breach of absolute rights are at stake, no room for proportionality can possibly be made: the balance inherent in the use of proportionality is incompatible with *absolute* prohibition. See *Mancano* (2018), p. 728.

<sup>203</sup> C-396/11 *Radu* EU:C:2012:648, AG Opinion, para. 81.

offence; (b) the likely penalty imposed if the person is found guilty of the alleged offence; (c) the likelihood of detention of the person in the issuing Member State after surrender; (d) the interests of the victims of the offence. Issuing judicial authorities should also consider whether other judicial cooperation measures could be used instead of issuing a EAW.<sup>204</sup>

The proportionality test of Article 52(1) (“Scope of guaranteed right”) of the Charter is a threefold one and implies an assessment of the measure in terms of its suitability, necessity and proportionality *stricto sensu*. The suitability test evaluates appropriateness of the means (the restriction) in relation to the achievement of the objective pursued. According to *Mancano*, the necessity test implies that the measure chosen is the least intrusive measure for the right or freedom restricted, on condition of being equally effective to meet that objective: proportionality will be complied with if the means adopted does not impose “an excessive burden on the right.”<sup>205</sup>

### 5.3.2. Dialogue Between National Courts

The executing authority must, after finding general or systemic deficiencies in the protections provided in the issuing Member State, seek all necessary supplementary information from the issuing Member State’s judicial authority as to the protections for the individual concerned.<sup>206</sup> In the course of such a “dialogue” between the executing judicial authority and the issuing judicial authority, the latter may, where appropriate, provide the executing judicial authority with any objective material on any changes concerning the conditions for protecting the guarantee of judicial independence in the issuing Member State.<sup>207</sup>

This emphasis on “dialogue” can be viewed as the ECJ’s way of furthering mutual trust when it’s at risk. However, as *Bárd & van Ballegooij* note, ECJ’s insistence that the executing authority acquire supplementary information from the issuing judicial authority and that the two courts should engage in a dialogue requires that a court will admit its own shortcomings (in *LM*, presumed lack of independence), but such a self-criticism is unlikely, because the

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<sup>204</sup> C(2017) 6389 final Commission Notice — Handbook on how to issue and execute a European arrest warrant, p. 19.

<sup>205</sup> *Mancano* (2018), p. 720-721. Margin of appreciation that Member States hold can also play a role in the assessment. See *Kühling* (2006), p. 535-541.

<sup>206</sup> C-216/18 *LM* EU:C:2018:586, para. 23.

<sup>207</sup> C-216/18 *LM* EU:C:2018:586, para. 77.

issuing court would destroy its own reputation.<sup>208</sup> In the case of lack of independence, the issuing court would also then be criticizing the issuing state's executive, the very branch of government upon which it is dependent.

*Sadurski* has observed some practical problems with ECJ's current policy.<sup>209</sup> For one, when reliable information is needed fast from one Member State, how is a national in another Member State supposed manage this, especially when the supplementary information should also be objective, reliable, specific and properly updated. Secondly, as *Sadurski* noted, in this kind of a situation the requesting Member State's judicial needs to enjoy significant independence. The requirement for such action is self-defeating otherwise.

The material provided is considered only supplementary. In accordance with Article 15(2) of the Framework Decision, the executing judicial authority may fix a time limit for the receipt of the information requested. That time limit must be adjusted to the particular case, so as to allow to that authority the time required to collect the information, if necessary by seeking assistance to that end from the central authority or one of the central authorities of the issuing Member State, under Article 7 of the Framework Decision.

There appears to be stricter conditions set in *LM* ruling than the Framework Decisions Article 15(3). In accordance with Article 15(3) of Framework Decision 2002/584 the issuing judicial authority *may* at any time forward any additional useful information to the executing judicial authority.<sup>210</sup> However, according to *LM* ruling, the issuing judicial authority is *obliged* to provide that information to the executing judicial authority.<sup>211</sup> Considering ECJ's wording, it seems that the executing judicial authority is required the material if it wants to have the EAW executed.

### 5.3.3. Substantial Grounds

The refusal to surrender a person requires that there are *substantial grounds* for believing that that person will run the risk described if he is surrendered to the requesting Member

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<sup>208</sup> *Bárd — van Ballegooij* (2018), p. 361.

<sup>209</sup> *Sadurski* (2019), p. 208.

<sup>210</sup> This cannot be interpreted as *requiring* the issuing judicial authority to inform the executing judicial authority, after that authority has acceded to the request for surrender, of the existence of an additional sentence so that executing judicial authority may adopt a decision regarding the possibility of enforcing that sentence in the issuing Member State. C-551/18 *IK* EU:C:2018:991, para. 68.

<sup>211</sup> C-404/15 and C-659/15 *Aranyosi and Căldăraru* EU:C:2016:198, para. 97.

State. “Substantial grounds” can be regarded as an overall assessment of all the previous criteria. If objective, reliable, specific and properly updated material, a real of risk of a breach, systemic or generalized deficiencies, proportionality and dialogue between national courts all show substantial reasons that the person requested should not be surrendered, then the executing judicial authority should refuse the EAW.

However, a decision by the Council completely removes the need for the two-step test. According to the ECJ, “as long as a decision, described in Article 7 TEU, has not been adopted by the Council, the executing judicial authority may refrain--”.<sup>212</sup> The Council’s decision therefore overrides the need for any individualized review and serves as substantial grounds by itself.

The repeated emphases on “exceptional” circumstances as to when such a suspension of trust allowed raises a very high bar before a national judge who is concerned about the state of a system of justice. This practically guarantees that suspension in individual situations will be extremely rare, if they occur at all.<sup>213</sup>

As regards the standard of proof, the Advocate General in *Radu* noted that it should not be required to prove a potential breach be established “beyond reasonable doubt”. Such a standard may be appropriate, and is used in certain jurisdictions, in determining the obligation to be imposed on the prosecution services in criminal trials but the Advocate General did not find it appropriate here. Furthermore, there is a risk that the obligation it imposes on the person concerned, who may be in need of legal aid, will be impossible in practice to satisfy.<sup>214</sup>

Advocate General in *Radu* also expressed that in cases involving Articles 5 and 6 of the Convention and/or Articles 6, 47 and 48 of the Charter that the infringement must be such as fundamentally to destroy the fairness of the process. The person alleging infringement must persuade the decision-maker that his objections are *substantially well founded*. Past infringements that are capable of remedy will not found such an objection.<sup>215</sup> In the context of a past infringement, it must be demonstrated either that their effect, if spent, will of itself

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<sup>212</sup> C-216/18 *LM* EU:C:2018:586, para. 73.

<sup>213</sup> *Sadurski* (2019), p. 208.

<sup>214</sup> C-396/11 *Radu* EU:C:2012:648, AG Opinion, para. 84.

<sup>215</sup> C-396/11 *Radu* EU:C:2012:648, AG Opinion, para. 97.

be such that no fair trial can be possible or that their past effects, if continuing will be such that they will have the same result.<sup>216</sup>

Overall, observance of the rights of the person whose surrender is requested falls primarily within the responsibility of the issuing Member State, which must be presumed to be compliant with EU law, in particular the fundamental rights conferred by that law.<sup>217</sup> However, because of the lack a global legal framework for guaranteeing the right to a fair trial, it is up to all the courts, national and international, to be alert to this risk. According to *Gless*, the right to a fair trial must be established as a general principle with implications for the understanding of criminal investigations and prosecutions not limited to national criminal justice systems.<sup>218</sup> Looking at the two-step assessment through the individual's need for judicial protection is therefore useful for not setting the standard of proof too high a standard. Rather, emphasizing fundamental rights, such as Article 47, as the most important underlying principle when substantial grounds exist, allows the two-step to remain reasonable.

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<sup>216</sup> C-396/11 *Radu* EU:C:2012:648, AG Opinion, para. 89.

<sup>217</sup> See C-367/16 *Piotrowski* EU:C:2018:27, para. 50 and C-551/18 *IK* EU:C:2018:991, para. 66.

<sup>218</sup> *Gless* (2013), p. 108.

## 6. Strasbourg Court's Interpretation

### 6.1. ECtHR's Relationship with the CJEU

What then is the difference between the CJEU's interpretation of the Charter's Article 47 and the ECtHR's interpretation of Article 6 in EAW cases? CJEU has acknowledged ECtHR's judgments among legal sources for national courts to consider when conducting the two-step test. However, for some time, the CJEU wanted to take a very narrow view and had not taken the opportunity to clarify the relationship between the EAW, the ECHR and the Charter. ECJ gives great weight to the need to have an efficient surrender mechanism between Member States when examining EAW cases and this has led some to question whether sufficient prominence is given to the role of the ECtHR in providing enough protection against ECHR violations.<sup>219</sup>

Advocate General *Sharpston* tried pinpoint the distinction between the two systems in her *French Republic v People's Mojahedin Organization of Iran* opinion. As *Sharpston* noted, the TEU represents a self-standing set of rules, that has been termed an "autonomous legal system". In interpreting that legal order, the CJEU has, it is true, drawn "inspiration from the constitutional traditions common to the Member States" for the purposes of defining the fundamental rights which form an integral part of the general principles of the legal order of the EU. All the Member States are also signatory to the ECHR and is therefore bound to apply its rules. But to conclude that national systems for the protection of fundamental rights and the EU equivalent *are, therefore, one and the same thing* seems simply misconceived.<sup>220</sup>

CJEU seems to heavily rely on ECtHR's ruling in open questions as exemplified by *Dumitru-Tudor Dorobantu* in which the ECJ ruled that: "As regards, in particular, the personal space available to each detainee, the executing judicial authority must, in the absence, currently, of minimum standards in that respect under EU law, take account of the minimum requirements under Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, as interpreted by the European Court of Human Rights."<sup>221</sup>

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<sup>219</sup> *Doobay* (2013), p. 262.

<sup>220</sup> C-27/09 *French Republic v People's Mojahedin Organization of Iran* EU:C:2011:482, AG Opinion, para. 249.

<sup>221</sup> C-128/18 *Dumitru-Tudor Dorobantu* EU:C:2019:857.

The CJEU seems to have embarked on the path to becoming a human rights court. However, *Weiß* noted that the CJEU, at the same time, still might be tempted, based on the autonomy of EU law and the continuity side of the EU post-Lisbon human rights regime, to continue traditional interpretive approaches, which counter effective human rights protection with structural characteristics of the EU in order to limit the enjoyment of EU human rights.<sup>222</sup>

Considering the case law of the CJEU, it is necessary to bear in mind that Article 52(3) of the Charter provides that it is open to EU law to provide more extensive protection than that laid down by the ECHR.<sup>223</sup> The executing Member State should only exceptionally refuse to transfer a requested person under the Framework Decision. The whole objective of the Framework Decision would be undermined if it were possible to raise what might be described as “routine” challenges based on “notional breaches of human rights.”<sup>224</sup>

## 6.2. Essential Case Law

### 6.2.1. *Soering v. United Kingdom*

*Soering v. United Kingdom* (07 July 1989) is a landmark judgment of the ECtHR which established that extradition of a young German national to the United States to face charges of capital murder violated Article 3 of the ECHR guaranteeing the right against inhuman and degrading treatment. It enlarged the scope of a state's responsibility for breaches of the ECHR. A signatory State must consider consequences of returning an individual to a third country where that individual might face treatment that breaches the ECHR. This is notwithstanding that the ill-treatment may be beyond its control<sup>225</sup>, or even that general assurances have been provided that no ill-treatment will take place.<sup>226</sup>

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<sup>222</sup> *Weiß* (2015), p. 89. See chapter 7.

<sup>223</sup> C-396/11 *Radu* EU:C:2012:648, AG Opinion, para. 80.

<sup>224</sup> C-396/11 *Radu* EU:C:2012:648, AG Opinion, para. 81.

<sup>225</sup> *Soering v. United Kingdom* (07 July 1989), para. 86.

<sup>226</sup> *Soering v. United Kingdom* (07 July 1989), para. 93-99.

The ECtHR concluded in the judgment that having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3 of the ECHR. A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration.<sup>227</sup>

Importantly, the ECtHR did not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country. However, the facts of the *Soering* case did not disclose such a risk.<sup>228</sup>

### 6.2.2. *Pirozzi v. Belgium*

*Pirozzi v. Belgium* (17 April 2018)<sup>229</sup> concerned Mr. Pirozzi's detention by the Belgian authorities and his surrender to the Italian authorities under a EAW with a view to enforcing a criminal conviction imposing 14 years' imprisonment for drug trafficking. With regard to the lawfulness and propriety of the EAW, in line with the system established by the Framework Decision, it was for the judicial authority which had issued the EAW and to which Pirozzi ought to be handed over to assess the lawfulness and validity of the EAW. The Belgian public prosecutor's office did not therefore have discretion to assess the appropriateness of the arrest, and the Belgian courts could have refused to execute it only on the grounds set out in the Belgian legislation. In this connection, the ECtHR considered that the review carried out by the Belgian authorities, thus limited, did not in itself give rise to any problem in relation to the ECHR, provided that the Belgian courts examined the merits of the complaints raised under the ECHR. In the case, they had verified that the enforcement of the EAW in Pirozzi's case did not give rise to manifestly deficient protection of the rights guaranteed by the ECHR.

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<sup>227</sup> *Soering v. United Kingdom* (07 July 1989), para. 111.

<sup>228</sup> *Soering v. United Kingdom* (07 July 1989), para. 113.

<sup>229</sup> The original judgment is only available in French. The press release (legally non-binding) is available at: [hudoc.echr.coe.int/eng#{%22itemid%22:\[%22003-6061117-7798896%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22003-6061117-7798896%22]}).

With regard to Pirozzi's conviction *in absentia*, Pirozzi had been officially informed of the date and place of the hearing and he had been assisted and defended by a lawyer whom he had himself appointed. In addition, that defence had been effective, in that it had obtained a reduction in his sentence.

The ECtHR noted that the implementation of the EAW by the Belgian courts had not been manifestly deficient such that it rebutted *the presumption of equivalent protection* afforded both by the EAW system – as defined by the Framework Decision and clarified by the case law of the CJEU – and by its application in Belgian law. The ECtHR also concluded that Pirozzi's surrender to the Italian authorities could not be considered as having been based on a trial amounting to a flagrant denial of justice. The ECtHR considered that Pirozzi's surrender to the Italian authorities had not been in breach of Article 6 § 1 of the ECHR.

### 6.3. Flagrant Denial of Justice

As demonstrated above, according to the ECtHR's case law, an issue might exceptionally arise under Article 6 by an extradition decision in circumstances where the individual would risk suffering *a flagrant denial of a fair trial* in the requesting country. The principle was first set out in *Soering*<sup>230</sup> and has been subsequently confirmed by the ECtHR in a number of cases.<sup>231</sup> The term "flagrant denial of justice" has been considered synonymous with a trial which is manifestly contrary to the ECHR's Article 6 or the principles embodied therein.<sup>232</sup>

According to the ECtHR, a flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 of the ECHR if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 of the ECHR which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.<sup>233</sup>

*Doobasy* has noted that the ECtHR continues to consider the different criminal justice systems of the parties to the ECHR trying to ensure that the ECHR is applied and differences in national systems are respected. While many claimants raise detailed allegations about specific

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<sup>230</sup> *Soering v. United Kingdom* (07 July 1989), para. 113.

<sup>231</sup> See *Mamatkulov and Askarov v. Turkey* (04 February 2015), paras. 90-91.

<sup>232</sup> See *Sejdovic v. Italy* [GC], no. 56581/00, § 84, ECHR 2006-II.

<sup>233</sup> *Othman (Abu Qatada) v. the United Kingdom* (17 January 2012), § 260; *Al Nashiri v. Poland* (24 July 2014), § 563).

provisions of ECHR's Article 6, the ECtHR tends to take a more holistic view and to consider the overall fairness of the proceedings taking into account the interests of other parties to the process.<sup>234</sup>

It is clear that the test for a refusal in surrender cases must be a rigorous one. In *Radu*, the Advocate General took issue, with the case law of the ECtHR in two aspects. Firstly, the term "flagrant" which appears to be too nebulous to be interpreted consistently throughout the Member States. The breach must be so fundamental as to amount to a complete denial or nullification of the right to a fair trial.<sup>235</sup> Secondly, the Advocate General viewed the test as "unduly stringent". It would require that every aspect of the trial process be unfair. However, a trial that is only partly fair cannot be guaranteed to ensure that justice is done. The appropriate criterion should rather be that the deficiency or deficiencies in the trial process should be such as fundamentally to destroy its fairness.<sup>236</sup>

The first aspect seems a common problem in practically all legal interpretation conducted by multiple parties. The second aspect, however, seems based on a slight misinterpretation by the Advocate General: the requires a breach of the principles of fair trial which is so fundamental as to amount to a nullification, or destruction of *the very essence, of the right*.<sup>237</sup> Destruction of the right's essence does not require the whole process (meaning every step) to be unfair.<sup>238</sup> The two criteria currently utilized are then not so different. *Gáspár-Szilágyi* even questioned whether the CJEU decided in *Aranyosi* to end "the frosty relationship" between it and the ECtHR by moulding its own standard of fundamental rights protection to better fit the standards used by the ECtHR.<sup>239</sup>

The Advocate General in *Radu* also found non-remediable and remediable breaches to hold different weight. Breaches that are remediable will not, in the Advocate General's view, justify a refusal to transfer the requested person to the "offending" Member State. Such breaches cannot prevail over the objectives of the swift and efficient administration of justice which the Framework Decision seeks to promote. The ECtHR has repeatedly held that, when considering whether a breach of Article 6 of the ECHR has been established, it is necessary to ascertain

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<sup>234</sup> *Doobay* (2013), p. 261-262.

<sup>235</sup> C-396/11 *Radu* EU:C:2012:648, AG Opinion, para. 82.

<sup>236</sup> C-396/11 *Radu* EU:C:2012:648, AG Opinion, para. 83.

<sup>237</sup> *Othman (Abu Qatada) v. the United Kingdom* (17 January 2012), § 260; *Al Nashiri v. Poland* (24 July 2014), § 563).

<sup>238</sup> See chapter 2.3.

<sup>239</sup> *Gáspár-Szilágyi* (2016), p. 2.

whether the proceedings, considered as a whole were fair. Naturally, nothing would prevent the person in question from seeking to recover damages in respect of the infringement, under the relevant principles of EU or national law or, if appropriate, Article 41 of the ECHR (“Just satisfaction”).<sup>240</sup>

One of the key differences the two interpretations is the existence of mutual trust.<sup>241</sup> CJEU has to consider it while ECtHR does not. As *Mitsilegas* puts it, mutual trust “represents a fundamental philosophical and substantive difference in the protection of fundamental rights between the Luxembourg and Strasbourg Courts.”<sup>242</sup> However, ECtHR has moulded something similar: the *Bosphorus* doctrine.<sup>243</sup>

Also known as *the presumption of equivalent protection*, the *Bosphorus* principle applies when the mutual recognition mechanisms require a national court to presume that the observance of fundamental rights by another Member State has been sufficient. The national court is thus deprived of its discretion in the matter, leading to automatic application of the *Bosphorus* presumption of equivalence. The ECtHR has emphasized that this results, paradoxically, in a twofold limitation of the national court’s review of the observance of fundamental rights, due to the combined effect of the presumption on which mutual recognition is founded and the *Bosphorus* presumption of equivalent protection.<sup>244</sup>

The ruling in *Bosphorus* then ensures that the protection provided by the ECHR remains in place even when the contested act can be ascribed to the EU rather than to its Member State; however, *Spaventa* has rather wisely drawn attention to the fact that *Bosphorus* only provides protection against noteworthy deficiencies in the protection, since: 1) it establishes a presumption of equivalent protection of EU law with the ECHR, 2) it is for the claimant to prove that such equivalent protection is not only lacking but manifestly deficient.<sup>245</sup>

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<sup>240</sup> C-396/11 *Radu* EU:C:2012:648, AG Opinion, para. 88.

<sup>241</sup> See chapter 7.

<sup>242</sup> *Mitsilegas* (2016), p. 31.

<sup>243</sup> *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland* (30 June 2005), paras. 160-165.

<sup>244</sup> *Avotiņš v. Latvia* (23 May 2016), para. 115.

<sup>245</sup> *Spaventa* (2014), p. 249.

## 7. Mutual Trust and the Surrender Decision

### 7.1. Mutual Trust as a Principle

#### 7.1.1. *Mutual Trust...*

Defining mutual trust has taken place largely in CJEU's case law. Two general principles have become clear. Firstly, both the principle of mutual trust between the Member States and the principle of mutual recognition, which is itself based on the mutual trust between the latter, are of fundamental importance in EU law given that they allow an area without internal borders to be created and maintained. Secondly and more specifically, the principle of mutual trust requires, particularly as regards the area of freedom, security and justice, each of those Member States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law.<sup>246</sup>

The fundamental assumption is that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU (among those rule of law). That assumption implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.<sup>247</sup> However, ECJ has also stated that the observance of the rights of the person whose surrender is requested falls primarily within the responsibility of the issuing Member State, because of mutual trust.<sup>248</sup> These two seem paradoxical on a surface level.

CJEU has previously given mutual trust importance even over fundamental rights. Concerning the Union's accession to the ECHR, the CJEU stated: "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, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the

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<sup>246</sup> C-216/18 *LM* EU:C:2018:586, para. 36.

<sup>247</sup> See Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014 EU:C:2014:2454, para. 168

<sup>248</sup> See C-367/16 *Piotrowski* EU:C:2018:27, para. 50 and C-551/18 *IK* EU:C:2018:991, para. 66)

EU.”<sup>249</sup> This approach seems to have evolved from a natural assumption that rule of law is followed across the EU and is consistent with the most recent case law, but it certainly poses practical problems resulting from blind spots in the EAW process.<sup>250</sup>

### 7.1.2. ...but Verify

Mutual trust is founded on the premise that the criminal courts of the other Member States meet the requirements of effective judicial protection because, following execution of a EAW, the courts will have to conduct the criminal procedure for the purpose of prosecution, or of enforcement of a custodial sentence or detention order, and the substantive criminal proceedings.<sup>251</sup> As *Roeben* has argued, judicial protection<sup>252</sup> can override even mutual trust.<sup>253</sup> The relationship of mutual trust and judicial protection is, therefore, a strained one.<sup>254</sup>

One of the most important consequences arising from *Aranyosi* is, according to *Caeiro – Finaldo – Prata Rodrigues*, the pressure that is now put on Member States to make their prison system comply, in the actual practice, with human rights standards.<sup>255</sup> Not complying, the Member States face the risk of having their requests for judicial cooperation systematically denied across the whole EU. In *Caeiro – Finaldo – Prata Rodrigues’s* view, eventually nothing reinforces mutual trust more than ruling that mutual trust is not a mere normative assumption: it must be earned and deserved (although seemingly paradoxical). This same logic is easily applied to fair trial threats. If rule of law and fair trial erode, Member States can risk losing the advantages that mutual trust provides: low-effort judicial cooperation in criminal matters.

Additionally, Member States have to make sure that they offer remedies to redress possible breaches of fundamental rights that are equivalent to remedies available when implementing national law: EU law must be interpreted as meaning that a national court is bound to take into consideration the whole body of rules of national law and to interpret them, so far as

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<sup>249</sup> See Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014 EU:C:2014:2454, para. 192.

<sup>250</sup> See chapter 2.4.

<sup>251</sup> C-216/18 LM EU:C:2018:586, para. 58.

<sup>252</sup> See chapter 4.1.

<sup>253</sup> *Roeben* (2019), p. 33.

<sup>254</sup> Disproportionality contributes to this strain as it interferes with the rights of the affected individuals and endangers mutual trust (along with mutual recognition). See *Haggenmüller* (2013), p. 103.

<sup>255</sup> *Caeiro – Finaldo – Prata Rodrigues* (2018), p. 701.

possible, in accordance with the Framework Decision, in order to achieve the result sought by the Framework Decision, and if necessary to disapply, on its own authority, the interpretation adopted by the national court of last resort, if that interpretation is not compatible with EU law.<sup>256</sup>

Within the EAW system, the existing legal framework prevents the need to verify, in every single surrender case, the level of protection and the respect of fundamental rights. The area of freedom, security and justice can only function efficiently if it is not *necessary* to verify, in every concrete case, whether values, in particular fundamental rights, are actually guaranteed. However, in a concrete case, in *Prechal's* words: “the delicate balance, -- between preserving the system, on the one hand, and offering sufficient protection to fundamental rights, on the other, must be kept in mind.”<sup>257</sup> The protection of fundamental rights should not therefore be *examined* in every case, but still kept in mind in case suspicions of breaches arise.

## 7.2. Suspending Mutual Trust

In practice, mutual trust is not always guaranteed between EU judicial authorities, despite the existence of EU fundamental rights and of mechanisms to remedy a possible violation. *Marguery* has asked, does any failure generate a loss of mutual trust?<sup>258</sup> The answer is, considering everything already said, of course not. However, an accumulation of small failures can lead to a failed system. Even ECJ implied as much in their *LM* ruling when referring to “systemic or, at all events, generalised deficiencies”<sup>259</sup>. When can a judicial authority then set aside its obligation of mutual recognition and mutual trust?

According to *Arnull*, the general principle of respect for fundamental rights enjoys the same formal status as other general principles (in theory).<sup>260</sup> As early as 2012, *Billing* drew attention to mutual trust as a rebuttable principle. A conclusive presumption, that the issuing Member State will respect a requested person’s fundamental and human rights, should be prohibited. The presumption of mutual trust must be viewed as derogable. It is necessary to ensure from

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<sup>256</sup> See C-554/14 *Ognyanov* EU:C:2016:835, paras 54-71.

<sup>257</sup> *Prechal* (2017), p. 90

<sup>258</sup> *Marguery* (2016), p. 949.

<sup>259</sup> C-216/18 *LM* EU:C:2018:586, para. 60.

<sup>260</sup> *Arnull* (2006), p. 364.

a legal point of view that national implementing legislation promotes both the issuing and the executing Member States' duties to interpret and apply the Framework Decision in a manner which is consistent with the Charter, the ECHR and general principles of EU law.<sup>261</sup>

A surprisingly large emphasis has been given to mutual trust in CJEU's case law and legal literature considering that fundamental rights are at the other end of the scale. *Melloni* judgment exemplifies this.<sup>262</sup> ECJ stated in that judgment that allowing a Member State to avail itself of Article 53 of the Charter 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 provided for under Framework Decision, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision.<sup>263</sup> A slightly alarming aspect of CJEU's reasoning is that efficiency of the Framework Decision could even be considered against fundamental rights, but this clearly shows the importance given to mutual trust.

In legal literature, *Dorociak - Lewandowski* emphasized the role of mutual trust discussing the *LM* case, stating that only Member States, acting through the Council or the European Council, could suspend the mutual trust in relation to another Member State and declare the violation of one of the values of the EU.<sup>264</sup> *Dorociak - Lewandowski* also saw that the potential suspension of mutual trust towards Poland would also mean suspension of mutual trust towards the whole EU in general. In practice, however, this would create an unnecessarily high threshold considering the need for judicial protection of individuals.

It seems that CJEU's case law aims to make a clear difference between Article 4 and other fundamental rights. In Article 4 cases, a finding, by the executing judicial authority, that there are substantial grounds for believing that, following the surrender to the issuing Member State of the person concerned by a EAW, that person will run a real risk of being subjected to such treatment, because of the conditions of detention prevailing in the prison in which it is actually

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<sup>261</sup> *Billing* (2012), p. 90.

<sup>262</sup> See chapter 4.4.2.

<sup>263</sup> C-399/11 *Stefano Melloni v. Ministerio Fiscal* EU:C:2013:107, para. 63.

<sup>264</sup> *Dorociak — Lewandowski* (2018), p. 869-871.

intended that he will be detained, *cannot be weighed*, for the purposes of deciding on that surrender, against considerations relating to the efficacy of judicial cooperation in criminal matters and to the principles of mutual trust and recognition.<sup>265</sup> The fact that the prohibition of inhuman or degrading treatment within the meaning of Article 4 of the Charter is absolute, justifies, exceptionally, a limitation of the principles of mutual trust and recognition.<sup>266</sup>

The decision of the executing judicial authority is without prejudice to the person in question's opportunity, after surrender, to have recourse, within the legal system of the issuing Member State, to legal remedies granted. That person may, at that time, rely, *inter alia*, on respect for the rights to an effective remedy, to a fair trial and of the defence which is derived from Article 47 and Article 48(2) of the Charter.<sup>267</sup>

The dividing factor then is the nature of the right: absolute or non-absolute. A risk to an absolute right allows non-execution more freely than Article 47 breaches. Whilst the prohibition of inhuman or degrading treatment, laid down in Article 4 of the Charter, is absolute,<sup>268</sup> the same is not true of the right to a fair trial set out in Article 47 thereof. That right may be subject to limitations.<sup>269</sup>

However, CJEU's case law's emphasis of mutual trust in Article 47 cases, but not in Article 4 cases, creates a problem. By underlining the right of an effective remedy and fair trial, CJEU is implying that these rights safeguard other fundamental rights, but they are not themselves worth the same scrutiny. Safeguarding Article 47 is not supposed to happen at the Member State making the surrender decision, but if right to a fair trial and rule of law are compromised at the requesting Member State, who provides the safeguard there? This relates the question back to Article 7 TEU and seems rather contradictory to CJEU's own reasoning, because the CJEU has also emphasized that in the surrender procedure established by the Framework Decision the right to an effective remedy, set out in Article 13 of the ECHR and Article 47 of the Charter is of special importance.<sup>270</sup>

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<sup>265</sup> C-128/18 *Dorobantu* EU:C:2019:857, para. 84.

<sup>266</sup> C-128/18 *Dorobantu* EU:C:2019:857, para. 82-83.

<sup>267</sup> C-551/18 *IK* EU:C:2018:991, para. 67.

<sup>268</sup> C-404/15 and C-659/15 *Aranyosi and Căldăraru* EU:C:2016:198, para. 85; C-182/15 *Petruhhin* EU:C:2016:630, para. 56; C-578/16 *C. K. and Others* EU:C:2017:127, para. 59; C-353/16 *MP* EU:C:2018:276, para. 36.

<sup>269</sup> C-216/18 *LM* EU:C:2018:517, AG Opinion, para. 57.

<sup>270</sup> C-168/13 *Jeremy F* EU:C:2013:358, para. 42.

## 7.3. Building Trust

### 7.3.1. *Maintenance and Soft Law*

How to remedy the problematic issues described above? The answer to the question, when to suspend mutual trust in favour of Article 47, seems unclear at the moment. A solution must be found if rebuttable presumptions against execution of an EAW are acceptable in CJEU's case law.

According to *Billing*, the answer would ideally be achieved by inserting express provisions in the Framework Decision.<sup>271</sup> This would promote certainty of law. *Billing* suggests that the Framework Decision should explicitly require national implementing legislation to establish the opportunity for substantial rebuttal evidence to be raised by the defence, or on the national executing judge's own motion, if appropriate, against the execution of an EAW on human rights grounds, where there is a real risk that the requested person's fundamental and international human rights will be violated due to systemic flaws, if the person requested is surrender to the issuing Member State.

However, the Council and the Commission seem to believe that they can do maintenance through soft law by amending the EAW Handbook. *Marin* has said that this sounds like 'a farewell to the rule of law' and seems to exclude the European Parliament from the discussion of important legal and political questions, compromising the prerogatives attributed to it by the treaties.<sup>272</sup>

*Marguery* has, unlike *Billing*, held soft law as a viable option in the absence of an amendment to the current legislation, stating that certain improvements concerning mutual trust between judicial authorities that are confronted with a fundamental right deficit may be enhanced through soft law.<sup>273</sup> Regardless, at least national implementing the Framework Decision should clearly establish a rebuttable presumption, that the issuing Member State will guarantee the fundamental and human rights of those being surrendered, in compliance with the requirements of the Charter, the ECHR and general principles of EU law.<sup>274</sup>

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<sup>271</sup> *Billing* (2012), p. 90.

<sup>272</sup> *Marin* (2014), p. 347.

<sup>273</sup> *Marguery* (2018), p. 717.

<sup>274</sup> *Billing* (2012), p. 90-91.

*Billing* has highlighted Article 4(6) of the Framework Decision as a remedy in specific situations. Article 4(6) allows for the executing judge to refuse to execute the EAW on the basis that the executing Member State will “...undertake to execute the sentence or detention order in accordance with its domestic law”. This provision provides a reasonable alternative to surrendering a person to a state where the criminal justice system is a crisis.<sup>275</sup> *Billing* drew attention to the fact that even this poses problems. In the case of a requested person who, is a suspect of a serious offence committed solely against the domestic law of the issuing Member State and who is able to present clear risk that their fundamental rights will be violated if surrendered, the options are limited: either, the EAW is executed in a manner that is not in compliance with the current Framework Decision or human rights obligations; or risk leaving open the possibility of forum shopping by non-resident criminals by refusing the EAW, at least until the situation in the issuing Member State has improved.<sup>276</sup>

### 7.3.2. Strengthening Judicial Cooperation

Recital 6 of the Framework Decision clearly states that the EAW was the *first* concrete measure implementing the principle of mutual recognition in the field of criminal law. The European Council referred to mutual recognition as “the cornerstone” of judicial cooperation according to the same recital. In 2009, the Framework Decision of 2002 was amended enhancing the procedural rights of persons and fostering the application of the principle of Mutual Recognition to decisions rendered in the absence of the person concerned at the trial.<sup>277</sup>

Rather than creating an integrated single criminal justice system, enhancing cooperation remains the common rationale of legislative measures in the EU’s criminal justice field. Achieving progress in the cross-border reach of criminal justice (without subjecting national systems to the controversies and costs entailed in an extensive harmonization of national legislation and structures) has been successful through the strong emphasis on mutual recognition.<sup>278</sup>

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<sup>275</sup> *Billing* (2012), p. 91.

<sup>276</sup> *Billing* (2012), p. 91.

<sup>277</sup> Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial. *OJ L 81, 27.3.2009, p. 24–36.*

<sup>278</sup> *Monar* (2013), p. 188-189.

Actual harmonization, however, has been kept to the absolute minimum necessary. To facilitate communication and interaction between the national systems without putting them under central control or forcing them to change their respective systems a range of measures have been adopted. Member States have transferred no actual executive judicial powers in the criminal justice field to the EU level which has ensured a continuing high degree of autonomy of national criminal justice systems.<sup>279</sup>

In the area of criminal law and enforcement, *Conway* holds the view that it might be better, from a legal point of view, to discuss “cooperation” rather than the more loaded term of “integration”. “Cooperation”, though more modest in its ambition, will allow for incremental change in a way that will not undermine the legitimacy of reforms through sidelining national constitutional traditions.<sup>280</sup>

Rather significant progress has been achieved since the adoption of the Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (the Roadmap).<sup>281</sup> Six directives have been adopted following the Roadmap:

1. the Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings,<sup>282</sup> strengthening the right to interpretation and translation in surrender procedure;
2. the Directive 2012/13/EU on the right to information in criminal proceedings<sup>283</sup>, which strengthened the right to information and introduced a Letter of Rights in EAW proceedings;
3. Directive 2013/48 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,<sup>284</sup>

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<sup>279</sup> *Monar* (2013), p. 188-189.

<sup>280</sup> *Conway* (2018), p. 155.

<sup>281</sup> Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. *OJ C 295*, 4.12.2009, p. 1–3.

<sup>282</sup> Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings. *OJ L 280*, 26.10.2010, p. 1–7.

<sup>283</sup> Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings. *OJ L 142*, 1.6.2012, p. 1–10.

<sup>284</sup> 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. *OJ L 294*, 6.11.2013, p. 1–12.

4. Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings;<sup>285</sup>
5. Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings;<sup>286</sup> and
6. Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.<sup>287</sup>

These directives have without a doubt been important steps toward building a European area of justice, freedom and security. For example, a very positive aspect of the Directive 2013/48 on the right of access to a lawyer is the possibility for the requested person in EAW proceedings to also appoint a lawyer in the issuing Member State. Though the lawyer's role in the issuing Member State is limited unreasonably in the Directive's text to simply "assisting" his colleague in the executing state while the competent authorities of the executing Member State are under no obligation to actively pursue such appointment of second counsel in the issuing jurisdiction, the official recognition of dual defence in the EAW proceedings is an important step towards effective protection of the individuals concerned. Furthermore, such dual defence facilitates the smooth functioning of the EAW mechanism and saves court time and costs.<sup>288</sup>

Another procedural tool similar to the EAW was adopted when the European Investigation Order was adopted.<sup>289</sup> Its purpose being that of facilitating and speeding up the obtaining and transfer of evidences between Member States, but also offering harmonized procedures for obtaining these.

The 2009 amendment and the directives have contributed to strengthening the procedural rights of surrendered persons. Naturally they are small steps in the right direction and contribute towards strengthening mutual trust. However, they do nothing to fill the potential cracks between EAW, mutual trust, rule of law and fair trial on a larger level. If rule of law

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<sup>285</sup> Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. *OJ L 65, 11.3.2016, p. 1–11.*

<sup>286</sup> Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings. *OJ L 132, 21.5.2016, p. 1–20.*

<sup>287</sup> Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings. *OJ L 297, 4.11.2016, p. 1–8.*

<sup>288</sup> *Anagnostopoulos (2014)*, p. 16.

<sup>289</sup> Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters. *OJ L 130, 1.5.2014, p. 1–36.*

backsliding continues, the situation is not amended by adding layers to an unstable foundation. Stronger incentives may be needed.<sup>290</sup>

## 7.4. In the End, It's Politics

### 7.4.1. *Inherently Political*

The path towards more cooperation in the field of European judicial cooperation since the EAW has not been all together unproblematic. Issues surrounding the EAW can, at least in part, be attributed to *political unwillingness* as exemplified by the fate of the European Commission's Proposal for a Framework Decision on certain procedural rights in criminal proceedings, which did not reach unanimity.<sup>291</sup> *Anagnostopoulos* has called it a "troubling" example of political unwillingness to promote and enhance individual rights in criminal proceedings under the guise of lacking legal basis and need for such an instrument.<sup>292</sup> Sadly, this is an example of how political the system is inherently.

Although one of the aims of the EAW system was to replace largely political extradition treaties with strictly judicial control, this evolution might have contributed to the political unwillingness described above. According to *Marin*, this shift of powers triggered by mutual recognition within national legal orders from legislative to the judicial authorities should be balanced by the possibility for political actors to control the process again.<sup>293</sup> This would unlikely turn out to be a positive change.

As Articles 2 and 7 of TEU have become integral to the current legal situation, as demonstrated by *LM*, it's political nature must be underlined. ECJ has determined that it follows from the wording of Recital 10 of the Framework Decision that it is for the European Council to determine a breach in the issuing Member State of the principles set out in Article 2 TEU, including the principle of the rule of law, with a view to application of the EAW mechanism being suspended in respect of that Member State.<sup>294</sup> This gives up a large portion of power in the process back to political powers.

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<sup>290</sup> See chapter 7.4.2.

<sup>291</sup> COM(2004) 328 final Proposal for a COUNCIL FRAMEWORK DECISION on certain procedural rights in criminal proceedings throughout the European Union.

<sup>292</sup> *Anagnostopoulos* (2014), p. 12.

<sup>293</sup> *Marin* (2008), p. 273.

<sup>294</sup> C-216/18 *LM* EU:C:2018:586, para. 71.

However, ECJ has also underlined the independence of judiciary as it guarantees the non-involvement of political powers. The ECJ stated in *LM* that the requirement of independence means that the disciplinary regime governing those who have the task of adjudicating in a dispute must display the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions.<sup>295</sup>

Although activation of Article 7 TEU can ultimately result in the suspension of membership rights, the aim of this political mechanisms is not to punish member states but rather to neutralize threats to the rule of law.<sup>296</sup> *Kochenov - Pech* have held it highly unlikely that the Council would ever adopt sanctions under Article TEU 7. This is in part because, the Council is under no legal obligation to do so even in a situation where it concludes that a member state is in breach of Article 2 TEU values: this clearly shows the predominantly political nature of Article TEU 7.<sup>297</sup>

Sadly, the EU's Justice Programme budget has also not grown. As *Fair Trials* has noted, a limited budget and consistent pressure to create new instruments granting prosecutors ever more powerful tools, is limiting the ability of the Commission to enforce EU law in this area.<sup>298</sup>

#### 7.4.2. Developing Financial Incentives

There have been attempts, on EU level, to link rule of law obligations to financial incentives. In 2018, the Commission put forward a proposal for a regulation on the protection of the Union's budget in the event of generalised deficiencies as regards the rule of law in a Member State.<sup>299</sup> The proposal addressed, from a budgetary perspective, generalised deficiencies as regards the rule of law: threats to the independence of the judiciary, arbitrary or unlawful decisions by public authorities, limited availability and effectiveness of legal remedies, failure to implement judgments, or limitations on the effective investigation, prosecution or sanctions for breaches of law. The Commission proposed the possibility for the Commission

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<sup>295</sup> C-216/18 *LM*, EU:C:2018:586, para. 67.

<sup>296</sup> *Uitz* (2019), p. 3.

<sup>297</sup> *Kochenov – Pech* (2015), p. 516. In order to clarify: The ECtHR is also to an extent influenced by political factors. See *Christoffersen, Jonas – Rask Maden, Mikael*: The European Court of Human Rights between Law and Politics (Oxford University Press 2011).

<sup>298</sup> *Fair Trials* (2018), p. 24.

<sup>299</sup> COM(2018) 324 final Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States.

to make proposals to the Council in such cases on sanctions measures with regard to EU funding: suspension of payments, suspension, reduction or even termination of legal commitments (to pay), suspension of programmes, and the transfer of money to other programmes. The European Parliament did not agree with the Commission's initial proposal and made several proposals for amendments.<sup>300</sup>

Finland's current presidency of the Council of the European Union aims to find better and more efficient ways to ensure respect for the EU's common values in the member states and to forestall potential problems and pursue the negotiations on making the receipt of EU funds conditional on respect for the rule of law.<sup>301</sup> These aims recently brought Finland's and Hungary's political actors into an open disagreement as Hungary strictly opposes them. Hungarian government's spokesman Zoltan Kovacs said in September 2019: "Trying to link rule-of-law conditions to the EU budget is pure political blackmail," and that "If member states insist on it, then there simply won't be an EU budget because Hungary will veto it."<sup>302</sup> In the beginning, there was mutual recognition, but in the end, politics.

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<sup>300</sup> COM(2018)0324) legislative resolution of 4 April 2019 on the proposal for a regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States.

<sup>301</sup> *Council of the European Union (2019)*.

<sup>302</sup> *Simon – Pohjanpalo (2019)*.

## 8. Conclusions

Principle of mutual recognition has become the cornerstone of judicial cooperation in both civil and criminal matters within the Union. The formal and political extradition procedure was abolished among the Member States and replaced with the simpler, surrender-based European Arrest Warrant adopted under the Framework Decision of 18 June 2002. “Surrender”, as a term, conveys the meaning of mutual recognition of a foreign-issued warrant as opposed to the centrally controlled and essentially more discretionary request for “extradition”.

The Charter of Fundamental Rights of the European Union, by stating all fundamental rights in a clear and visible manner, contributes in part to the creation of a space of freedom, security and justice and improves legal safety regarding the protection of fundamental rights. Article 47 of the Charter (titled “Right to an effective remedy and to a fair trial”) states the fundamental building blocks of a fair trial: fairness, a public hearing, reasonable time and a tribunal, previously established by law, that is both independent and impartial.

Any limitation on the exercise of the right must be provided for by law and respect the essence of the right to a fair trial. Article 47 contains in each paragraph components of the essence: access to a court, judicial independence, legal representation, and legal aid among others. Several persistent issues concerning the EAW and right to a fair trial exist: issuing EAWs without taking proportionality into account, surrenders despite human rights concerns and persons sought under EAWs not being provided with legal representation.

One of the values the EU is founded on is rule of law. The meaning of requirements of right to a fair trial and procedural legal protection is easy to explain with the current principle of rule of law. Activation of Article 7 TEU aims to neutralize threats to the rule of law in a situation where a serious and persistent breach exists. “Rule of law backsliding” has been described as the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party. In recent years, this phenomenon has been observed especially in two Member States; Poland and Hungary.

The principle of the effective *judicial protection* of individuals’ rights under EU law is a general principle of EU law, enshrined in Articles 6 and 13 of ECHR and reaffirmed by Article 47 of the

Charter. Judicial protection can override all conflicting principles that aim to preserve non-justiciable decision-making of the EU's political institutions, the procedural autonomy of the Member States, or even their mutual trust. The Framework Decision does not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles, but also does not expressly provide grounds for mandatory or even optional non-execution of a requested person if that surrender would infringe a person's fundamental right to a fair trial. However, Member States have in their national legislation introduced grounds not provided for in the Framework Decision. For example, Finland's Act on Extradition on the Basis of an Offence Between Finland and Other Member States of the European Union, implemented to adopt the Framework Decision, provides that the EAW shall be refused if there is justifiable cause to assume that the person requested would be subjected to a violation of the person's human rights or constitutionally protected due process.

CJEU in its case law rather stubbornly held on to the principle of mutual recognition and to the view that the Member States are in principle obliged to act upon a EAW and must or may refuse to execute a EAW only in the cases listed in the Framework Decision. This view was upheld in order to not cast doubt on the uniformity of the standard of protection of fundamental rights as defined in the Framework Decision. That doubt would undermine the principles of mutual trust and recognition and compromise the efficacy of the EAW as a whole.

*Aranyosi and Căldăraru* marked a change in tone: the need to secure fundamental rights over mutual recognition was established. Moving further, the *LM* judgment established that even right to a fair trial (a derogable human right) can, under strict conditions, lead to a non-execution of a EAW.

As a first step, the executing judicial authority 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, on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached.

Then as a second step, if, having regard to the requirements noted, the executing judicial authority finds that there is, in the issuing Member State, a real risk of breach of the essence of the fundamental right to a fair trial, that authority must, as a second step, 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.

The CJEU has drawn inspiration from the constitutional traditions common to the Member States for the purposes of defining the fundamental rights. Each of the Member States is a signatory to the ECHR and is therefore bound to apply its rules. The ECtHR does not exclude that an issue might exceptionally be raised under Article 6 of the ECHR by an extradition decision in circumstances where the person has suffered or risks suffering a flagrant denial of a fair trial in the requesting country. The presumption of equivalent protection applies when the mutual recognition mechanisms require the court to presume that the observance of fundamental rights by another Member State has been sufficient.

The principle of mutual trust requires, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law. Not complying, the Member States face the risk of having their requests for cooperation systematically denied across the whole EU. Mutual trust must be earned and deserved.

A risk to an absolute right allows non-execution more freely than Article 47 breaches. Whilst Article 4 of the Charter, is absolute, the same is not true of the right to a fair trial set out in Article 47 thereof. That right may be subject to limitations. The dividing factor then is the nature of the right: derogable or non-derogable.

The currently unclear situation would ideally be achieved by inserting express provisions in the Framework Decision, which would promote certainty of law. However, at the moment, maintenance of the Framework Decision is realized only through soft law and supplemented by further cooperative measures.

Many of the issues surrounding the EAW can be attributed to political unwillingness and the inherent political nature of the system. Thus far, attempts to link rule of law obligations to financial incentives have been unsuccessful. These aims have even brought political actors into an open disagreement. The objective to create a less formal extradition procedure without political factors has thus been hindered by political players.