

## Judicial independence as a precondition for mutual trust? The CJEU in *Minister for Justice and Equality v. LM*

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[njecl.sagepub.com](http://njecl.sagepub.com)**Petra Bárd**

Eötvös Loránd University, Hungary

**Wouter van Ballegooij**

European Parliamentary Research Service, European Parliament, Belgium

### Abstract

This article discusses the relationship between judicial independence and intra-European Union (EU) cooperation in criminal matters based on the principle of mutual recognition. It focuses on the recent judgment by the Court of Justice of the EU in Case C-216/18 PPU *Minister for Justice and Equality v. LM*. In our view, a lack of judicial independence needs to be addressed primarily as a rule of law problem. This implies that executing judicial authorities should freeze judicial cooperation in the event should doubts arise as to respect for the rule of law in the issuing Member State. Such a measure should stay in place until the matter is resolved in accordance with the procedure provided for in Article 7 TEU or a permanent mechanism for monitoring and addressing Member State compliance with democracy, the rule of law and fundamental rights. The Court, however, constructed the case as a possible violation of the right to a fair trial, the essence of which includes the requirement that tribunals are independent and impartial. This latter aspect could be seen as a positive step forward in the sense that the judicial test developed in the *Aranyosi* case now includes rule of law considerations with regard to judicial independence. However, the practical hurdles imposed by the Court on the defence in terms of proving such violations and on judicial authorities to accept them in individual cases might amount to two steps back in upholding the rule of law within the EU.

### Keywords

European Arrest Warrant, democracy, rule of law, fundamental rights, judicial independence, mutual recognition, mutual trust, primacy of EU law

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### Corresponding author:

Petra Bárd, Eötvös Loránd University, Faculty of Law, Egyetem tér 1-3., Budapest 1053, Hungary.

E-mail: [petra.bard@ajk.elte.hu](mailto:petra.bard@ajk.elte.hu)

## Introduction

On 25 July 2018, the Court of Justice delivered its judgment in Case C-216/18 PPU *Minister for Justice and Equality v. LM*.<sup>1</sup> The issue was whether Mr Artur Celmer referenced by the Court as LM, a crime suspect, should be surrendered from Ireland to Poland when the executing judicial authority had serious doubts as to whether the suspect would receive a fair trial in the issuing state, due to the lack of independence of the judiciary resulting from changes to the Polish judicial system.<sup>2</sup>

The case raises questions regarding the validity of the presumption of mutual trust between Member States.<sup>3</sup> Thereby it also casts doubts on the extent to which cooperation based on the principle of mutual recognition,<sup>4</sup> as implemented by European Union (EU) rules regarding surrender between Member States – the Framework Decision on the European Arrest Warrant (FD EAW)<sup>5</sup> – may continue. It also raises the question which role executing judicial authorities should play in upholding the rule of law within the Union.

In accordance with the principle of mutual trust, one Member State may not take unilateral action that overrides mutual recognition in order to address shortcomings in the implementation of EU law by another Member State. Instead, an executing state should presume<sup>6</sup> the adherence of the issuing state to the values enshrined in Article 2 of the Treaty on European Union (TEU), the Charter of Fundamental Rights and the safeguards found in secondary pieces of EU legislation.<sup>7</sup> Proper implementation should be ensured in accordance with the tools provided for in the Treaties: the infringement procedure, to be initiated by either the European Commission<sup>8</sup> or a Member State<sup>9</sup>; or the procedure foreseen in Article 7 TEU.

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1. Judgment of the Court (Grand Chamber) of 25 July 2018, *Minister for Justice and Equality v. LM*, Requests for a preliminary ruling from the High Court (Ireland), Case C 216/18 PPU, not yet published.
  2. High Court of Ireland decision of 12 March 2018, *Minister for Justice and Equality v. Celmer* [2018] IEHC 119. For the final version of the preliminary reference, see High Court of Ireland decision of 23 March 2018, *Minister for Justice and Equality v. Celmer* [2018] IEHC 119.
  3. For an early criticism of Court of Justice case law on this point, see V. Hatzopoulos, 'With or Without You Judging Politically in the Field of Area of Freedom, Security and Justice', *European Law Review* 33(1) (2008), pp. 44–65.
  4. For a more general discussion of mutual recognition in European Law, see W. van Ballegooij, *The Nature of Mutual Recognition in European Law: Re-examining the Notion From an Individual Rights Perspective With a View to Its Further Development in the Criminal Justice Area* (Antwerp: Intersentia, 2015).
  5. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, OJ L 190, 18 July 2002, pp. 1–20.
  6. FD EAW, recital (10): 'The mechanism of the European Arrest Warrant is based on a high level of confidence between Member States. 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) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof'; Article 1(2) FD EAW.
  7. Mutual trust requires, particularly as regards the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognized by EU law (C-452/16 PPU Poltorak, Judgment of 10 November 2016, EU: C:2016:858)
  8. On 2 July 2018, the European Commission launched an infringement procedure by sending a Letter of Formal Notice to Poland regarding the Polish law on the Supreme Court, European Commission Press Release IP/18/4341. Available at: [http://europa.eu/rapid/press-release\\_IP-18-4341\\_en.htm](http://europa.eu/rapid/press-release_IP-18-4341_en.htm) (accessed 15 August 2018).
  9. Cases C-5/94, *The Queen v. Ministry of Agriculture Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd*, para 20: 'A Member State cannot under any circumstances unilaterally adopt, on its own authority, corrective measures or measures to protect trade designed to prevent any failure on the part of another Member State to comply with the rules laid down by the Treaty'.

Article 7 TEU allows the relevant EU institutions to act in situations where there is ‘a clear risk of a serious breach’ by a Member State of EU values laid down in Article 2 TEU (Article 7 (1)), or where there is a ‘serious and persistent breach’ of these values (Article 7(2)). Ultimately, the Member State concerned can be sanctioned through the suspension of membership rights. However, since its introduction in the Treaties, this procedure has never been used due to reasons ranging from its institutional design – which bars individuals from bringing actions, excludes substantive judicial review by the Court of Justice, and contains high thresholds for decision-making – to the general lack of political willingness among Member States to use it. Still, in 2014, the Commission launched an ‘EU framework to strengthen the Rule of Law’.<sup>10</sup> The framework comprises an ‘early warning tool’ leading to a ‘structured dialogue’ with the Member State concerned aimed at addressing emerging threats to the rule of law before they escalate. The Commission commenced a ‘structured dialogue’ with Poland, which failed to achieve the desired result. Consequently, in December 2017, the Commission decided to adopt a Reasoned Proposal inviting for a Council Decision on the determination of a clear risk of a serious breach by Poland in accordance with Article 7(1) TEU.<sup>11</sup>

Acknowledging the limits of mutual trust, the EU law on surrender foresees the limits of automatic recognition and execution of judicial decisions. Article 1(3) FD EAW stipulates that it ‘shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [EU]’. In *Aranyosi and Căldăraru*, commented by us in a previous edition of this journal,<sup>12</sup> the Court of Justice established a two-prong test for checking the general fundamental rights situation in a country and the potential risks of human rights violations in the individual case. It held, in the context of a surrender liable to result in a breach of Article 4 of the EU Charter,<sup>13</sup> that if a finding of general or systemic deficiencies in the protections in the issuing Member State is made by the executing judicial authority, that authority must make an assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to a real risk of being subject in that Member State to inhuman or degrading treatment. In that judgment, the Court also established a two-step procedure to be applied by an executing judicial authority in such circumstances. That authority must, first of all, make a finding of general or systemic deficiencies in the protections provided in the issuing Member State and, then, seek all necessary supplementary information from the issuing Member State’s judicial authority as to the protections for the individual concerned.<sup>14</sup>

The Court left a number of issues open, not least because the facts and circumstances of the case made it a relatively easy one. In *Aranyosi*, an absolute right was at stake and its violation was

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10. Communication from the Commission to the European Parliament and the Council, A new EU framework to strengthen the rule of law, COM (2014) 158 of 19 March 2014.

11. Commission’s Reasoned Proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland, 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, COM(2017) 835 final, para 180 (2–3).

12. Judgment of the Court (Grand Chamber) of 5 April 2016, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*, Requests for a preliminary ruling from the Hanseatisches Oberlandesgericht in Bremen, Joined Cases C-404/15 and C-659/15 PPU, ECLI: EU: C:2016:198; W. van Ballegooij and P. Bárd, ‘Mutual Recognition and Individual Rights, Did the Court get it Right?’, *New Journal of European Criminal Law* 7(4) (2016), pp. 439–464.

13. Article 4 EU Charter: ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’.

14. Case C-216/18 PPU, para 23.

established beyond doubt by solid evidence, among others judgments and pilot judgments delivered by the European Court of Human Rights (ECtHR) against the issuing states.<sup>15</sup> Therefore, the Court 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. Most importantly, the Court did not 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 in the first place to ensure proper rule of law and fundamental rights safeguards in judicial cooperation.

## Questions raised by the Irish High Court

Between 2012 and 2013, Polish courts issued three European Arrest Warrants (EAWs) against Mr Celmer for him to be arrested and surrendered for the purpose of conducting criminal prosecutions, *inter alia* for trafficking in narcotic drugs and psychotropic substances. In May 2017, he was arrested in Ireland and brought before the High Court. As he did not consent, he was placed in custody pending a decision on his surrender. In support of his opposition to being surrendered, Mr Celmer submits that his surrender would expose him to a real risk of a flagrant denial of justice in contravention of Article 6 of the European Convention on Human Rights (ECHR). In this connection, he contends, in particular, that the recent legislative changes to the system of justice in the Republic of Poland deny him his right to a fair trial. He relies, in particular, on the Commission's Reasoned Proposal.<sup>16</sup>

The Irish High Court considered that the 'wide and unchecked powers' of the system of justice in the Republic of Poland were inconsistent with those granted in a democratic State subject to the rule of law. Thus, surrender of a suspect would result in breach of his rights laid down in Article 6 of the ECHR and should, accordingly, be refused.<sup>17</sup>

The High Court was uncertain whether it had to follow earlier jurisprudence of the Court of Justice of the European Union (CJEU) developed in *Aranyosi and Căldăraru* when deciding on whether to postpone the execution of an EAW. If yes, a further issue was whether it had to engage in a two-stage examination, as suggested in *Aranyosi*, or whether the *LM* case should be distinguished and thus the applicable judicial test accordingly modified.<sup>18</sup> In those circumstances, the High Court decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Notwithstanding the conclusions of the Court of Justice in *Aranyosi* and *Căldăraru*, where a national court determines there is cogent evidence that conditions in the issuing Member State are incompatible with the fundamental right to a fair trial because the system of justice itself in the issuing Member State is no longer operating under the rule of law, is it necessary for the executing judicial authority to make any further assessment, specific and precise, as to the exposure of the individual

15. ECtHR of 10 March 2015 in Case Nrs. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, *Varga and others v. Hungary*; ECtHR of 10 June 2014, in Case Nr. 22015/10 *Voicu v. Romania*, Case Nr. 13054/12 *Bujorean v. Romania*, Case Nr. 79857/12 *Mihai Laurențiu Marin v. Romania*, and Case Nr. 51318/12 *Constantin Aurelian Burlacu v. Romania*. Judgment in *Aranyosi*, para 60.

16. Case C-216/18 PPU, paras 14–17.

17. Op. cit., para 22.

18. Op. cit., para 24.

concerned to the risk of unfair trial where his trial will take place within a system no longer operating within the rule of law?

(2) If the test to be applied requires a specific assessment of the requested person's real risk of a flagrant denial of justice and where the national court has concluded that there is a systemic breach of the rule of law, is the national court as executing judicial authority obliged to revert to the issuing judicial authority for any further necessary information that could enable the national court discount the existence of the risk to an unfair trial and if so, what guarantees as to fair trial would be required?<sup>19</sup>

### *Opinion of Advocate General Tanchev*

On 28 June 2018, Advocate General Evgeni Tanchev delivered his Opinion.<sup>20</sup> AG Tanchev's Opinion distinguishes the present case from the procedure conducted according to Article 7 TEU, like the one triggered against Poland on 20 December 2017.<sup>21</sup>

He argued that the two procedures do not have the same objectives. Under Article 7(1) TEU, the Council assesses whether there is a clear risk of a serious breach of the values referred to in Article 2 TEU, whereas a decision on surrender concerned 'the examination by the executing judicial authority [of] the existence of a real risk of breach not of a value common to the Member States but of a fundamental right'.<sup>22</sup>

The AG also contended that the application of the Framework Decision on the EAW may only be suspended in line with Recital (10), read in conjunction with Article 1(3), if the sanctioning prong of Article 7 TEU is made use of and the Council determines a breach, and not just a mere *risk* of a breach of values listed in Article 2 TEU. In contrast, he recalls the *Aranyosi* doctrine, where a real risk of a breach of a fundamental right was permitted to potentially lead to the suspension of actual surrender cases.<sup>23</sup> Differentiating between the two procedures leads the AG to conclude that the national court has to decide whether to execute an EAW even if an Article 7 procedure is pending. Once the obligation for the executing judicial authority to employ the *Aranyosi* test was established, the question arose to what extent this jurisprudence was applicable, when a derogable right was at stake, such as the right to a fair trial, rather than a non-derogable right such as the prohibition of inhuman or degrading treatment. In the AG's view, a derogable right may still be capable of giving rise to an obligation to postpone the execution of EAWs, if certain conditions are met.<sup>24</sup> The Opinion stressed that the right to a fair trial may be subject to limitations, unless these limitations are so severe that the *essence* of that right is violated. Therefore, with regard to the first prong of the *Aranyosi* test on general deficiencies, in the AG's view, in order for the executing authority to postpone surrender, there must be a real risk not of a breach of the right to a fair trial but of a 'flagrant denial of justice'.<sup>25</sup>

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19. Op. cit., para 25.

20. Opinion of Advocate General Tanchev, delivered on 28 June 2018 in *Minister for Justice and Equality v. LM*, Requests for a preliminary ruling from the High Court (Ireland), Case C 216/18 PPU.

21. Op. cit., para 35.

22. Op. cit., para 38.

23. Op. cit., paras 41–44.

24. Op. cit., paras 57–58.

25. Op. cit., paras 72–77.

For an example for a successful determination of a flagrant denial of justice, the AG recalls rather extreme ECtHR cases<sup>26</sup> involving Member States' complicity in torture.<sup>27</sup> The AG admits that these judgments are, to date, the only ones where the ECtHR has found a breach of the Convention on account of the lack of independence and impartiality of the courts.<sup>28</sup>

As to the second prong of the test, several legal issues arose. One of the most fundamental issues was whether this part of the test is even applicable. The Irish High Court's suggestion was that it would be unrealistic to require a suspect to establish that deficiencies in a legal system have an effect on the proceedings to which he is subject. In contrast, the AG Opinion required to be proved that the individual concerned was exposed to a risk of flagrant denial of justice.

As to pieces of evidence to point at deficiencies at the national level, the referring court, the High Court of Ireland, emphasized the political nature of Article 7 TEU and it concluded that the *outcome* of an Article 7 procedure was less relevant for a national court deciding on issues of surrender. Instead, it reasoned that documents produced during the *process* may serve as persuasive evidence to be taken into account when deciding whether the EAW should be executed.<sup>29</sup> However, in the AG's view, the triggering of an Article 7(1) TEU procedure alone does not prove that suspects automatically have a real risk of breach of their right to a fair trial.<sup>30</sup> Inspired by the Commission's arguments, the Opinion concludes that even if the first prong of the *Aranyosi* test is satisfied, 'this cannot be taken to mean that *no* Polish court is capable of hearing *any case whatever* in compliance with the second paragraph of Article 47 of the Charter'.<sup>31</sup> The AG references *Mo.M. v. France*, where the examination of the Applicant's personal situation has shown that his sending back to Chad, which he had fled after being arrested and tortured by the Chadian authorities, would have breached the ECHR.<sup>32</sup>

According to the AG's Opinion, the burden of proof is on the individual concerned to establish that there are substantial grounds to believe that there is a real risk of a flagrant denial of justice in the issuing state in his or her case. When deciding this issue, the executing authority has to consider objective, reliable, specific and properly updated information. The Commission's Reasoned Proposal to have Article 7 TEU triggered can be taken into account, if that document is read in conjunction with any legislative changes passed after the Reasoned Proposal had been adopted. The AG's Opinion requires that the executing authority acquire from the issuing judicial authority all the necessary supplementary information.<sup>33</sup>

### *Judgment of the court (Grand Chamber) of 25 July 2018*

In its judgment of 25 July 2018,<sup>34</sup> the CJEU followed AG Tanchev's suggestion to construct the case as a possible violation of the right to a fair trial, the essence of which includes the requirement

26. Judgment of European Court of Human Rights of 24 July 2014, *Al Nashiri v. Poland*, Application no. 28761/11  
Judgment of European Court of Human Rights of 31 May 2018, *Al Nashiri v. Romania*, Application no. 33234/12.

27. *Minister for Justice and Equality v. LM*, Case C 216/18 PPU, para 92.

28. *Op. cit.*, para 94.

29. High Court of Ireland, *Celmer*, 12 March 2018, *op. cit.*, paras 115–116.

30. *Minister for Justice and Equality v. LM*, Case C 216/18 PPU, para 103.

31. *Op. cit.*, para 108.

32. *Op. cit.*, para 110.

33. *Op. cit.*, paras 122–128.

34. Judgment of the Court (Grand Chamber), *Minister for Justice and Equality v. LM*, Case C 216/18 PPU.

that tribunals are independent and impartial.<sup>35</sup> The judgment does not consider the question of whether and under what circumstances derogable rights, such as the right to a fair trial, could lead to suspending mutual trust in individual cases. It takes for granted that the potential breach of any fundamental right can trigger the *Aranyosi* test.<sup>36</sup> Nor does the Court apply the ‘flagrant denial of justice’ test proposed by the AG.

The CJEU, however, does follow the AG in not accepting ‘a clear risk of a serious breach’ of EU values (Article 7(1)) as a benchmark.<sup>37</sup> It reserves the task of suspending mutual trust exclusively to the European Council<sup>38</sup> and only if the sanctioning prong of Article 7 TEU was executed. Courts in contrast may only suspend individual surrenders on a case-by-case basis.<sup>39</sup> The Court interpreted Article 1(3) of the FD EAW such that the national court is allocated the responsibility to decide whether or not to execute an EAW in the light of a possible violation of the right to a fair trial even where an Article 7 TEU procedure is pending. The Court also ruled that the two-step test in *Aranyosi* needs to be followed by the executing judicial authority when making this decision.

First, on the basis of objectivity, the executing court must assess reliable, specific, and properly updated material concerning the operation of the justice system in the issuing Member State and determine whether there is a real risk of a breach of the fair trial rights of the person concerned, also with regard to a potential lack of independence of the courts.<sup>40</sup> When discussing judicial independence, the Court heavily relied on the case *Associação Sindical dos Juizes Portugueses*<sup>41</sup> and emphasized that both judicial independence and impartiality are crucial for the right to fair trial to be respected.<sup>42</sup>

Second, if the first element of the test is satisfied, the executing judiciary must specifically and precisely assess whether, in the case at hand, there are substantial grounds for believing that the requested suspect will run the real risk of being subject to a breach of the essence of the right to a fair trial.<sup>43</sup>

The CJEU insists that this includes the requirement that the executing authority acquire supplementary information from the issuing judicial authority and that the two courts should engage in a ‘dialogue’.<sup>44</sup> If this dialogue does not lead the executing judicial authority to discount the existence of a real risk that the individual concerned will suffer in the issuing Member State a breach of his fundamental right to an independent tribunal and, therefore, 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 him.<sup>45</sup>

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35. Op. cit., paras 47, 48.

36. Op. cit., para 47.

37. Op. cit., paras 7, 70.

38. Op. cit., paras 71, 72.

39. Op. cit., para 73.

40. Op. cit., para 61.

41. Judgment of the Court (Grand Chamber) of 27 February 2018, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, Request for a preliminary ruling from the Supremo Tribunal Administrativo, Case C-64/16, not yet published.

42. Judgment of the Court (Grand Chamber), *Minister for Justice and Equality v. LM*, Case C 216/18 PPU, paras 64–67.

43. Op. cit., para 68.

44. Op. cit., paras 76–77.

45. Op. cit., para 78.

## Assessment

As we discuss in more detail below, in our view a lack of judicial independence needs to be addressed primarily as a problem of the rule of law. This implies that executing judicial authorities should freeze judicial cooperation should doubts arise as to respect for the rule of law in the issuing Member State.

The Court, however, constructed the case as a possible violation of the right to a fair trial, the essence of which incorporates the requirement that tribunals are independent and impartial. This latter aspect could be seen as a positive step forward in the sense that the *Aranyosi* case law now includes rule of law considerations with regard to judicial independence. However, the practical hurdles imposed by the Court on the defence in terms of proving such violations and on judicial authorities to accept them in individual cases might amount to two steps back in upholding the rule of law within the EU.

### *Suspending mutual trust at the political level rendered practically impossible*

As indicated above, the Court reserves the task of suspending mutual trust exclusively to the political level, and only if the sanctioning prong of Article 7 TEU is successfully invoked.

The Lisbon Treaty prescribes different voting majorities to the different prongs. Reaching consensus on even a risk of a serious breach is difficult, as it requires a four-fifths majority in the Council. But the process under the second prong, that is, Article 7(2), is even more unlikely to be carried out, since the procedure can be vetoed by any Member State to save the one concerned. Therefore, the Court in effect precluded the possibility of having the EAW regime suspended vis-à-vis a State that violates Article 2 TEU values.

But making suspension of mutual trust dependent on the sanctioning prong of Article 7 TEU is a reading of the FD EAW that can easily be contested. It disregards the historical evolution of Article 7 TEU. The reason Recital (10) to the FD EAW is silent about current Article 7(1) TEU is that it did not exist at the time this framework decision had been drafted. Since a preventive arm has been added in the meantime, one could argue that the drafters of the FD EAW intended to refer to Article 7 as such and the preventive arm should also be read into Recital (10). Such an interpretation would have been preferable in the light of the inherent asymmetry between the individual and the state, especially in the area of criminal law.

### *Halting surrenders on a case-by-case basis: Herculean hurdles*

The AG's Opinion by proposing the European Court of Human Rights' 'flagrant denial of justice' test would have rendered both a general suspension of mutual trust and a case-by-case suspension of surrenders virtually impossible. AG Tanev did not heed the warning of AG Sharpston in *Radu* that 'such a test [...] seems to me unduly stringent. [...] a trial that is only partly fair cannot be guaranteed to ensure that justice is done'.<sup>46</sup> Additionally, recent CJEU case law suggests that the standard of proof shall be lower than a real risk of a flagrant denial of justice.<sup>47</sup> Following the AG's Opinion would have also led to the rather absurd conclusion that if there is a risk of a human rights violation due to inhumane prison conditions (like in *Aranyosi*), surrender may be postponed, but at

46. Opinion of Advocate General Sharpston delivered on 18 October 2012 in Case C-396/11, *Ministerul Public – Parchetul de pe lângă Curtea de Apel Constanța v. Ciprian Vasile Radu*, ECLI: EU: C:2012:648, para 83.

47. Judgment of the Court (Fourth Chamber) of 24 May 2016 in Case C-108/16 PPU, *Openbaar Ministerie v. Pawel Dworzecki*, EC LI: EU: C:2016:346.



the same time, the bar for establishing a violation of fair trial rights due to systemic rule of law problems should be put so high that there is virtually no way for it to be met except in situations in which Member States are complicit in the torture of individuals.

The Court's judgment enables a case-by-case suspicion of mutual trust. But it does give rise to Herculean hurdles in which the Court echoes its position in Opinion 2/13 that limitations to mutual trust are to be reserved for 'exceptional cases'.<sup>48</sup>

We disagree with the Court's assertion that the only alternative to an Article 7(2)–(3) TEU procedure resulting in the suspension of instruments based on mutual trust is the executing national authority proceeding along the *Aranyosi* doctrine. Instead, it could have more closely followed its prior case law in *Associação Sindical dos Juizes Portugueses*,<sup>49</sup> where the CJEU emphasized the importance of the national judiciary in the enforcement of EU law, and could have acknowledged that a lack of judicial independence jeopardizes all fundamental rights in potentially all legal disputes, not just in a small segment of cases and only with regard to the right to an independent tribunal as an element of the right to a fair trial.

We also disagree with the imposition of the second step of the test where a real risk of a breach of the rule of law is established. The Court's requirement mixes up the responsibilities of the Commission as guardian of the rule of law, of the European Council – which is now given the sole power to suspend mutual trust –, and of individuals who do not possess an apparatus demonstrating risks to their fundamental rights. Once the first step of the test is satisfied, the onus should shift<sup>50</sup> to the stronger party, that is, the state accused of rule of law violations, in the light of the bedrock of the principle of a fair trial embedded in all constitutions of the democratic world and international human rights documents: the equality of arms.

The Court's insistence that the executing authority acquire supplementary information from the issuing judicial authority and that the two courts should engage in a 'dialogue' presupposes that a captured court will admit its lack of independence. Such a self-criticism is highly unlikely, not only because the issuing court would destroy its own reputation but also because it would thereby criticize the issuing state's executive, that is, the branch of government upon which it is dependent.

### Need for a freezing mechanism

The main legal issue in *LM* was whether and to what extent the joined cases of *Aranyosi and Căldăraru*,<sup>51</sup> which carved out exceptions for surrender on human rights grounds, should be

48. Court of Justice of the European Union, Opinion 2/13 of 18 December 2014, not yet published. Opinion pursuant to Article 218(11) TFEU – draft international agreement – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the draft agreement with the EU and FEU Treaties, para 192.

49. K.L. Scheppele, Rule of Law Retail and Rule of Law Wholesale: The ECJ's (Alarming) 'Celmer' Decision, *Verfassungsblog*, 28 July 2018. Available at: <https://verfassungsblog.de/rule-of-law-retail-and-rule-of-law-wholesale-the-ecjs-alarming-celmer-decision/> (accessed 15 August 2018).

50. P. Bárd, S. Carrera, E. Guild and D. Kochenov, with a thematic contribution by W. Marneffe, 'An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights', CEPS Paper on Liberty and Security No. 91, CEPS, Brussels (2016). Available at: <https://www.ceps.eu/publications/eu-mechanism-democracy-rule-law-and-fundamental-rights> (accessed 15 August 2018).

51. Judgment of the Court (Grand Chamber), *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*, Joined Cases C-404/15 and C-659/15 PPU; W. van Ballegooij and P. Bárd, 'Mutual recognition and individual rights, Did the Court Get It Right?', *New Journal of European Criminal Law* 7(4) (2016), pp. 439–464.

followed. We have previously argued<sup>52</sup> that, following the case of *Associação Sindical dos Juizes Portugueses*,<sup>53</sup> the CJEU needs to go beyond its earlier jurisprudence and frame the case primarily as a rule of law problem.

While acknowledging that judicial authorities have an independent responsibility to put a halt to surrender if it would result in the violation of the wanted person's fair trial rights due to a general lack of judicial independence in the issuing state, we also insisted that political responsibility for balancing diverse EU constitutional principles needed to be borne by democratically elected institutions. Therefore, we proposed that executing judicial authorities should freeze judicial cooperation in the event should doubts arise as to respect for the rule of law in the issuing Member State. Such an approach has also been advocated by Professors Carrera and Mitsilegas.<sup>54</sup> This measure should stay in place until the matter is resolved in accordance with the procedure provided for in Article 7 TEU or the mechanism proposed by the European Parliament,<sup>55</sup> designed to monitor and enforce democracy, the rule of law, and fundamental rights (DRF) in the Member States. Through the DRF mechanism, the EU could be in a position to act without having to wait for rule of law backsliding or gross human rights infringements to occur in order to determine – via its respective legal procedures – violations of EU values. Instead, it could warn the respective Member State in due time and request a return to these values. Also, if a Member State has already breached these values, the EU would not have to wait for external players, like the UN, the Council of Europe (including the ECtHR), or the European Committee for the Prevention of Torture to indicate generic problems but could rely on its own monitoring system.

Such a mechanism should be based on objective standards, be developed along scientific rigour, sound methodology, and equal treatment of Member States, which, if necessary, shall lead to a

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52. P. Bárd and W. van Ballegooij, 'Judicial Independence as a Precondition for Mutual Trust', *Verfassungsblog*, 10 April 2018. Available at: <https://verfassungsblog.de/judicial-independence-as-a-precondition-for-mutual-trust/>; P. Bárd and W. van Ballegooij, 'The AG Opinion in the Celmer Case: Why Lack of Judicial Independence Should Have Been Framed as a Rule of Law Issue', *Verfassungsblog*, 2 July 2018. Available at: <https://verfassungsblog.de/the-ag-opinion-in-the-celmer-case-why-lack-of-judicial-independence-should-have-been-framed-as-a-rule-of-law-issue/>; W. van Ballegooij and P. Bárd, 'The CJEU in the Celmer case: One Step Forward, Two Steps Back for Upholding the Rule of Law Within the EU', *Verfassungsblog*, 29 July 2018. Available at: <https://verfassungsblog.de/the-cjeu-in-the-celmer-case-one-step-forward-two-steps-back-for-upholding-the-rule-of-law-within-the-eu/> (accessed 15 August 2018).
53. Judgment of the Court (Grand Chamber) of 27 February 2018, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, Request for a preliminary ruling from the Supremo Tribunal Administrativo, Case C-64/16, ECLI: EU: C:2018:117.
54. S. Carrera and V. Mitsilegas, 'Upholding the Rule of Law by Scrutinising Judicial Independence: The Irish Court's request for a preliminary ruling on the European Arrest Warrant', CEPS commentary, 11 April 2018. Available at: <http://www.ceps.eu/publications/upholding-rule-law-scrutinising-judicial-independence-irish-courts-request-preliminary> (accessed 15 August 2018).
55. European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), P8\_TA-PROV(2016)0409; W. van Ballegooij and T. Evas, *An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights, Interim European Added Value Assessment accompanying the Legislative initiative report (Rapporteur Sophie in 't Veld)* (European Parliamentary Research Service, 2016), PE.579.328; Annex I, L. Pech, E. Wennerström, V. Leigh, A. Markowska, L. De Keyser, A. Gómez Rojo and H. Spanikova, 'Assessing the need and possibilities for the establishment of an EU scoreboard on democracy, the rule of law and fundamental rights'; Annex II, P. Bárd, S. Carrera, E. Guild and D. Kochenov, with a thematic contribution by W. Marneffe, 'Assessing the need and possibilities for the establishment of an EU Scoreboard on democracy, the rule of law and fundamental rights' (Brussels: European Union, 2016).

warning when autonomous legal concepts such as mutual trust need to be suspended or reinstated. An overall suspension of all forms of cooperation between Member States based on mutual trust would apply until such a quarantine is lifted by the same mechanism, but without the heavy political and practical burdens of an Article 7 TEU procedure. The mechanism could cover procedural rights and detention conditions and have a special emphasis on judicial independence.<sup>56</sup> If a Member State falls short in adhering to the values referred to in Article 2 TEU, or if a country-specific assessment shows that there is either a clear risk of a serious breach or a serious and persistent breach of these values, mutual trust should be suspended until the next periodic review shows that the situation has sufficiently improved.

## Final comments

Without judicial independence and other elements of the rule of law concept, EU law will cease to be operational, whether in the context of the single market or outside of it.<sup>57</sup> Controversies involving a criminal law element are ideal test cases proving this, because consequences of EU inaction are more apparent and immediate due to the nature of that branch of law, which by definition includes limitations of individual rights. In particular, surrender cases are litmus tests for the EU's approach towards the enforcement of the rule of law in the Member States. *Aranyosi* and *LM* are the beginning of a long journey. These cases demonstrate that ultimately – as in all incomplete constitutional systems – it is the courts which play a crucial role in carving out and applying rule of law and fundamental rights exceptions. But as the *LM* judgment proves, it is difficult to come up with tests that, on the one hand, respect the duty of loyal cooperation and the presumption of mutual trust vested in the protection offered by the issuing Member States and, on the other hand, make the Court act as a constitutional court.

The Court's acknowledgement that a lack of judicial independence may ultimately lead to a refusal to execute an EAW is to be welcomed as a step forward in upholding the rule of law within the Union. In the case at hand, Justice Donnelly diligently follows the test developed in *LM* by the Court. For the time being, she determined that the first prong of the test was satisfied,<sup>58</sup> whereas as to the second prong, she is considering various aspects<sup>59</sup> and invites counsel for both parties to submit draft questions. If other national *fora* do the same, the judgment could have a deterrent effect on Member States undermining the rule of law, thereby reinforcing other currently existing and employed mechanisms designed to enforce EU values. Not only may other courts follow suit, but they may extend diffidence to other areas. Judicial independence is equally important for the functioning of the single market and the Eurozone – this explains why the assessment of judicial independence plays a central role in the European semester. Lack of judicial independence may jeopardize autonomous EU law concepts. Direct effect and the supremacy or primacy of EU law were also developed by the Luxembourg court at a time when EU integration had not yet reached a

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56. W. van Ballegooij, *The Cost of Non-Europe in the Area of Procedural Rights and Detention Conditions* (European Parliamentary Research Service, 2017), PE.611.008, (Brussels: European Union, 2017), pp. 38–40.

57. 'Mutual trust cannot survive when one national system ceases to be governed by the rule of law'. K.L. Scheppele, L. Pech, 'Should the EU Care About the Rule of Law at Member State Level?', *Verfassungsblog*, 3 March 2018. Available at: <https://verfassungsblog.de/should-the-eu-care-about-the-rule-of-law-at-member-state-level> (accessed 15 August 2018).

58. High Court of Ireland, *Minister for Justice and Equality v. Celmer* (No.4), [2018] IEHC 484, 1 August 2018, para 25.

59. *Op. Cit.*, paras 37 and 40.

stage where black letter law could have been agreed on these principles.<sup>60</sup> Now it is these very principles of EU constitutional law that are at stake. For how could direct effect<sup>61</sup> allow individuals to invoke European law before national courts if these Member State *fora* do not satisfy the very basic tenets of the rule of law and are not independent? The tenets of the EU's constitutional system are at risk if national judges, who are also responsible for the application and interpretation of European law, no longer enforce EU law, including laws protecting EU citizens against their own Member State. Thus, the controversy may have far-reaching consequences.

However, the Court also takes us two steps back in upholding the rule of law. First, the Court's suggestion that EAW procedures in general may only be suspended once the Article 7 (2)–(3) procedures have been completed vis-à-vis the issuing Member State will effectively result in shifting too much of a burden on national courts. If these courts do not or are unable to take up that responsibility, it will result in both impunity for Member States violating the rule of law and the proliferation of violations of individual rights. Second, with its large hurdles the modified two-step *Aranyosi* test is likely to be applied by some executing judicial authorities, but not by others. This will lead to the fragmentation of EU law, discriminatory treatment among EU citizens and residents, and jeopardize the primacy, unity and effectiveness of EU law, in this case the FD EAW, which is exactly what the CJEU has been so meticulously trying to avoid in its case law.

As stated before, limiting the discretion of executing judicial authorities, claiming it is beneficial for mutual recognition, fails to understand the difference between the need to recognize judicial decisions as opposed to enforcing them directly based on compliance with the standards of the home state.<sup>62</sup> This is based on the questionable assumption that there is a conflict between mutual recognition and the safeguarding of individual rights. It should be understood that mutual recognition is a *process* of recognizing and giving effect to factual and legal situations established in other Member States. That process contributes to free movement but does not guarantee it. The reason for that is that certain exceptions to free movement also find their direct origins in the aims of the EU.

The EU needs to be serious about the claim that the Union constitutes an entity with distinct constitutional characteristics and accordingly it must provide centralized guidance to national judicial authorities on the application of the above referenced rule of law exceptions.<sup>63</sup> Limitations could entail the establishment of a permanent and regular monitoring mechanism for democracy, the rule of law and fundamental rights, as suggested in the 'Need for a freezing mechanism' section. Should the EU shy away from creating a working tool supervising Article 2 TEU values – which would guide national courts when assessing whether mutual trust is still to be presumed – it will uphold neither the autonomy of EU law nor the values behind EU integration. And vice versa: reinforcing the EU's distinct constitutional features via strong rule of law supervision would reinforce mutual trust.

60. P. Craig and G. De Búrca, eds., *The Evolution of EU Law* (Oxford: Oxford University Press, 1999), 209 et seq; P. Craig and G. De Búrca, eds., *The Evolution of EU Law* (Oxford: Oxford University Press, 2011), 324; M.P. Maduro and L. Azoulay, eds., *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishing, 2010).

61. Case C-26/62, *Van Gend en Loos*, Judgment of 5 February 1963, ECLI: EU: C:1963:1.

62. van Ballegooij, *The Nature of Mutual Recognition*, p. 356.

63. J.V. van Rossem, *The Autonomy of EU Law: More Is Less?*, in R.A. Wessel and, S. Blockmans, eds., *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (The Hague: Asser Press/Springer, 2013), pp. 39–40.

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