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THE EXECUTION OF EUROPEAN ARREST WARRANTS ISSUED BY POLISH COURTS IN THE CONTEXT OF THE CJEU RULE OF LAW CASE LAW

Abstract: *The case law of the CJEU dealing with the rule of law touches upon the question of execution of European Arrest Warrants (EAWs) issued by Polish courts. The year 2020 witnessed the second important judgment of the CJEU in this respect (the Dutch case). As in its 2018 predecessor (the Irish case), the CJEU excluded the possibility of overt denial of all EAWs issued by Polish courts. Instead it insists on a two-step examination, comprising not only a general evaluation but also the examination of the individual situation of a requested person. It remains to be seen whether this is a promise of armistice in the CJEU's approach to Poland, although this is not believed by the author of the text.*

Keywords: Court of Justice of the European Union, European Arrest Warrant, EAW, Poland, rule of law

INTRODUCTION

On 17 December 2020 the Court of Justice of the European Union (CJEU) issued a preliminary ruling in joined cases C-354/20 PPU and C-412/20 PPU.[1] It thereby responded to requests from the District Court from Amsterdam relating to the execution of European Arrest Warrants (EAWs) issued by the Polish courts with respect to two Polish nationals, designated as L and P. The Dutch court, taking into account the doubts as to the independence of the Polish judiciary, asked for an interpretation of the EAW Framework Decision as to the influence of alleged systemic deficiencies in the Polish judicial system on the automatic execution of EAWs issued by Polish courts, including even a blanket denial of their execution. This gave the CJEU the second opportunity within the last three years to express itself on the legal effect of

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[1] Joined cases C-354/20 PPU and C-412/20 PPU *Openbaar Ministerie* [2020], ECLI:EU:C:2020:1033.

EAWs issued by Polish courts. The first one was the CJEU judgment in case C-216/18 PPU LM.[2] In that case the CJEU responded to questions asked by the Irish High Court concerning the possible surrender of Mr. A. Celmer on the basis of an EAW issued by a Polish court.[3] In fact the two judgments (referred to as the Irish one and the Dutch one) could be looked at as an element of a wider set of events following the emergence in 2015 of the Polish government headed by the Law and Justice (PiS) party.[4] This wider context deserves to be mentioned. In chronological legal terms, the Irish judgment was the first and the Dutch judgment the fifth one in the "Polish rule of law" cases of the CJEU. This case law is perhaps the greatest challenge for the national and constitutional identity of the EU Member States. Some persons may see in it a safety valve, while others may see in the judgments an intrusion into matters of constitutional law of every Member State and a great step towards a European *de facto* federal state.

Although some persons probably could have expected in this context an overt blanket denial of EAWs issued by Polish courts, this did not happen in either the 2018 or 2020 cases. In both judgments the CJEU was at the same time cautious and conservative. It made the denial of execution of an EAW dependent upon the so-called two-step analysis. In practice this means the necessity of proving an individual danger to the requested person as a result of his or her surrender to Poland. The aim of the present text is to look at these two cases not only from the perspective of the case law connected with EAWs as such, but also as a new and dynamic approach in the CJEU case law on the rule of law in Poland. This article examines, *inter alia*, whether or not there is a gap between the rulings on EAWs and other "Polish" rule of law cases. The stance of the CJEU could be seen as mild in the former instance, and tough in the latter. This article argues that this mildness – even if proved – is meant rather to help the EU than the Polish government, and it does not offer great promise for the latter. It will be also shown that from the perspective of the CJEU case law on EAWs the Polish cases are not revolutionary, but rather are important elements of an evolution toward extending the *possibilities* of denial of execution of an EAW.

The volume constraints of the present text make it impossible to refer to each and every element of the complicated set of events which have taken place over the last five years, as well as each and every element of the few in number but voluminous CJEU judgments. This is why some abbreviated presentations are inevitable.

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[2] Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* [2018], ECLI:EU:C:2018:586.

[3] M.A. Simonelli, *How Flagrant is Flagrant? The latest judgment in the Celmer Saga*, Leidenlawblog, 21 October 2018, available at: https://leidenlawblog.nl/articles/how-flagrant-is-flagrant-the-latest-judgment-in-the-celmer-saga (accessed 30 May 2021).

[4] A. von Bogdandy, *Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States*, 57(3) Common Market Law Review 705 (2020), p. 706.

1. THE DISPUTE(S) RELATING TO THE POLISH JUDICIARY

To a great extent the wider context mentioned above could be perceived as a dispute between the Polish government on the one hand and a great number of influential actors (even if not most of the rest of the world) on the other. The latter group would encompass, among others, the Polish opposition, the Polish courts, the Polish mainstream media, several influential Polish and foreign legal experts, some other EU Members, and some EU organs. This dispute has concerned first of all the Polish judiciary.[5] In fact however, there were three autonomous albeit rather interrelated disputes. The first of them was connected with the Constitutional Court.[6] The second dispute related to the National Council of the Judiciary (NCJ). The third one had to do with the changes introduced to the Supreme Court. In fact only the two latter elements are of direct importance for the present text.[7]

It should be recalled that the introduction of the NCJ was one of the achievements of the 1989 Polish transition from socialism to democracy. Art. 187(1) of the 1997 Constitution provides that the NCJ will consist of 25 members.[8] In fact the only object of dispute was the election of 15 members who are to be chosen from amongst the judges of the Supreme Court, common courts, administrative courts, and military courts. The law adopted in December 2017[9] provided that they were to be elected by the Sejm (the lower house of the Polish Parliament), while earlier they had been elected by the judges themselves. This solution was much criticized.[10] The NCJ is of great importance as it not only is charged with safeguarding the independence of the judiciary, but also has the exclusive competence to present candidates for judgeships, who only on the basis of such a proposal could be nominated by the President of the Republic.

[5] Although not exclusively. The dispute also related to such matters as the media law, the term of office of the Ombudsman and many others. They are however of minor importance for the present text.

[6] In more detail: it was connected with the election of judges of the Constitutional Court and publication of two judgments of that court. For more on this dispute, see: *Commission Opinion on the Rule of Law in Poland and the Rule of Law Framework: Question & Answers*, Brussels, 1 June 2016, available at: https://bit.ly/3hBWutq (accessed 30 May 2021). *See also* Commission Recommendation (EU) 2017/146 of 21 December 2016 regarding the rule of law in Poland complementary to Commission Recommendation (EU) 2016/1374, OJ EU 2017 22/65.

[7] M. Krajewski, M. Ziólkowski, *Court of Justice EU Judicial Independence Decentralized: A.K.*, 57(4) Common Market Law Review 1107 (2020), pp. 1108 et seq.

[8] Besides 15 judges, it includes: the First President of the Supreme Court; the Minister of Justice; the President of the Supreme Administrative Court and a person appointed by the President of the Republic; four members chosen by the Sejm (the lower house of the Parliament) from amongst its Deputies; and two members chosen by the Senate (the upper house of the Parliament) from amongst its Senators.

[9] Ustawa z dnia 8 grudnia 2017 r. o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw [Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts], Journal of Laws of 2018, item 3.

[10] Mainly with respect to the provision providing for the presence of four members of Sejm in the Council. The case was not that easy, taking into consideration the blanket provision of Art. 187(4) of the 1997 Constitution, according to which, *inter alia*, the manner of choosing the members of the NCJ shall be specified by statute.

Another element was connected with the numerous changes introduced in the structure of the Supreme Court. One should start with an attempt by PiS to introduce an act providing for the end of the term of office of all judges of the Supreme Court.[11] In the face of massive protests[12] this draft, while having been accepted by the Parliament, was effectively vetoed by the President of the Republic (Mr. A. Duda) and never entered into force. What was introduced in its stead was a much more modest reform. Suffice to refer here to two elements. The first one was connected with the introduction of two additional chambers of the Supreme Court. They were the so-called the Disciplinary Chamber and the Chamber of Extraordinary Control. The Disciplinary Chamber was perceived by the government as a promise to end the alleged impunity of some dishonest judges, advocates and notaries, the earlier disciplinary proceedings allegedly being a pure fiction. On the other hand, the judges perceived this chamber as a danger to their independence and a tool of political, or even party-policy pressure. In fact the legal provisions provided for a high level of structural autonomy of this new chamber. It needs to be stressed that the new judges of the new chambers needed nominations on the basis of proposals of the new NCJ. Another element was connected with law which lowered from 70 to 65 years the age of compulsory retirement for the then-sitting judges of the Supreme Court, which was perceived as a means of getting rid of "old" judges.

2. THE RULE OF LAW CASE LAW

The Polish reforms gave rise to several critical opinions as well as informal pressure. On 20 December 2017 the European Commission presented the Reasoned Proposal in Accordance with Art. 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland,[13] thereby starting the so-called Art. 7 Procedure (based on Art. 7 of the Treaty on the European Union (TEU)). As of the present time, this procedure has not yet come to an end.

It took a few years for the first cases connected with this crisis to appear on the agenda of the CJEU. There are many commentators who suspect that this crisis had some influence on another important judgment not connected with Poland as such,[14] i.e. the

[11] Ustawa z dnia 20 lipca 2017 r. o Sądzie Najwyższym [Law of 20 July 2017 on the Supreme Court], available at: http://orka.sejm.gov.pl/proc8.nsf/ustawy/1727_u.htm (accessed 30 May 2021).

[12] Demonstracje przeciwko ustawie o Sądzie Najwyższym [Demonstrations against the Law on the Supreme Court], available at: https://wiadomosci.onet.pl/kraj/protesty-w-polsce-przeciwko-ustawie-o-sadzie-najwyzszym/5ctwjny (accessed 30 May 2021).

[13] COM (2017) 835 final.

[14] P. Filipek, *Nieusuwalność sędziów i granice kompetencji państwa członkowskiego do regulowania krajowego wymiaru sprawiedliwości – uwagi w świetle wyroku Trybunału Sprawiedliwości z 24.06.2019 r., C-619/18, Komisja Europejska przeciwko Rzeczypospolitej Polskiej* [Irremovability of judges and the limits of a Member State's competence to regulate its domestic judiciary: Remarks in the light of Court of Justice judgment of 24 June 2019, C-619/18, European Commission v. Poland],12 Europejski Przegląd Sądowy 4 (2019); T. von Danwitz, *Values and the Rule of Law: Foundations of the European Union – An Inside*

judgment in case C64/16 *Associação Sindical dos Juízes Portugueses*[15] (the Portuguese judges, or ASJP case). Though it is not a "Polish case" *per se*, no reasoned attempt to speak about rule of law jurisprudence without referring to it seems possible. The case concerned the limitation by Portugal of the salaries of the judges of the Portuguese Court of Auditors. The CJEU ruling pointed out the legality of such a reduction, as it was applied to all public offices and all public companies. All the same the importance of the judgment lies in not that much in this conclusion, but in the justification and reasoning adopted by the CJEU to arrive at it.

The Court took as the point of departure Art. 2 TEU, and stressed that "mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premise that Member States share a set of common values on which the European Union is founded, as stated in Article 2 TEU" (para. 30). However, the CJEU was careful not to treat Art. 2 TEU as an ordinary provision on the obligations of Member States, but preferred to do this using Art. 19(1) TEU. Its second sentence reads that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law." The Court described the latter as a provision giving "concrete expression to the value of the rule of law stated in Article 2 TEU," and at the same time entrusting "the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals" (para. 32). The Court referred to the obligation of Member States to ensure the application of and respect for EU law (para. 34). It stressed in particular the importance of the "effective judicial protection of individuals' rights under EU law as a general principle of EU law stemming from the constitutional traditions common to the Member States" (para. 35) and as the "essence of the rule of law" (para. 36). The conclusion which followed was 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" (para. 37). The Court had no problem with finding in its case law the criteria for the presence of a court or tribunal. It had also no doubt that "[i]n order for that protection to be ensured, maintaining such a court or tribunal's independence is essential" (para. 41). In its direct answer to the question of the Portuguese court the CJEU even spoke about "the principle of judicial independence."

The preconditions of this independence of judges were developed in the abovementioned Irish case (C-216/18 PPU *LM*). The CJEU differentiated between external and the internal independence, although acknowledging that both are necessary and equally important. In this context the CJEU referred to such matters as: guarantees against

Perspective from the ECJ, 21(1) PER: Potchefstroom Electronic Law Journal 1 (2018), p. 7; M. Bonelli, M. Claes, *Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary, ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses*, 14(3) European Constitutional Law Review 622 (2018), p. 630.

[15] Case C-64/16 *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas* [2018], ECLI:EU:C:2018:117.

removal from office; appropriate level of remuneration; "objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law"; as well as the rules concerning "the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members"; guarantees "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" (paras. 64-67). It is not difficult to find here hints to some of the Polish solutions, although the CJEU did not refer to them directly – neither as such nor in the context of the case.

These elements were referred to in another important "Polish" judgment of the Court, namely the judgment in case C-619/18 *European Commission v. Republic of Poland.*[16] The Commission contested the Polish provisions lowering the compulsory retirement age of the judges of the Supreme Court, invoking Art. 47 of the Charter of Fundamental Rights of the European Union (EU Charter) and Art. 19 TEU. The CJEU ruled that the Polish provisions concerning the retirement age were contrary to Art. 19 TEU. It did the same with respect to the provision allowing the President of the Republic to authorise retiring judges to continue to carry out their duties. What deserves mention was the list of arguments by Poland which were dismissed by the CJEU. They related to: the lack of connection of the contested Polish legal solutions with the EU competences; Protocol 30 excluding the examination of the Polish law as to its conformity with the EU Charter; and references to the national and constitutional identity. The control of the CJEU was extended to the core of the power of sovereign states to regulate the initial and the final moments of the term of office of their judges. The CJEU did not hesitate to look behind the mere letter of the provisions.[17] It looked at the Polish provisions on retirement as an instrument of getting rid of unwelcome judges and replacing them with new ones. At the same time, it perceived the powers of the President as an instrument of pressure on judges.

A kind of extreme was reached in another "Polish" case in the judgment in joined cases C-585/18, C-624/18 and C-625/18, *A.K. v. Krajowa Rada Sądownictwa* (the KRS case).[18] It resulted from three cases brought by the hitherto judges of the Supreme Court affected by the lowered retirement age. The main point of contention was that

[16] Case C-619/18 *Commission v. Poland (Independence of the Supreme Court)* [2019], ECLI:EU:C:2019:531.

[17] Filipek, *supra* note 14, pp. 5 et seq. An interesting interdisciplinary perspective is supplied by: M. Szwed, *Orzekanie przez wadliwie powołanych sędziów jako naruszenie prawa do sądu w świetle wyroku Europejskiego Trybunału Praw Człowieka z 12.03.2019 r., 26374/18, Guðmundur Andri Ástráðsson przeciwko Islandii* [Adjudication by unlawfully appointed judges as a violation of the right to a fair trial in the light of the judgment of the European Court of Human Rights of 12 March 2019, 26374/18, *Guðmundur Andri Ástráðsson v. Iceland*], 7 Europejski Przegląd Sądowy 42 (2019).

[18] Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. v. Krajowa Rada Sądownictwa*, *C.P i D.O. v. Sąd Najwyższy (Independence of the Disciplinary Chamber of the Supreme Court)* [2019], ECLI:EU:C:2019:982. On this judgment *see* Krajewski, Ziółkowski, *supra* note 7, pp. 1107 et seq.

their cases were to be heard by the newly created Disciplinary Chamber. Inasmuch as up until the moment of its creation one of the "old" chambers of the Supreme Court was sitting in the case (the Labour and Social Insurance Chamber), the questions before the CJEU related to whether the newly-created chamber was or was not a court in the light of Art. 47 of the EU Charter. The CJEU left this evaluation to the referring court. All the same it hinted at the possibility of putting this status into doubt. It pointed to the timing coincidence of the far-reaching changes concerning the age of judges, the changes in the NCJ, and the creation of the Disciplinary Chamber. In the event that the referring court would come to the conclusion that the Disciplinary Chamber was not a court, the CJEU expressed itself in favour of applying the hitherto provisions on the jurisdiction of the old chambers of the Supreme Court which was presented by the CJEU as an application of the principle of the primacy of the EU law. It should be stressed that Art. 47 of the EU Charter was invoked expressly in the CJEU's response given to the Polish court. Another provision was Art. 9(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

An attempt was apparently made to get a similar "interpretation" putting aside the entire new disciplinary procedures. Two Polish courts made requests for preliminary rulings within criminal proceedings. They wondered whether the new Polish disciplinary procedures were in conformity with EU law. The reasoning was that the judges deciding the cases could be concerned about being punished for possible future sentences that might not be welcomed by the Government. The judgment of the CJEU[19] pointed to the inadmissibility of the questions. This judgment is however important in terms of how much it says about the expectations of some Polish judges, the attitude of the CJEU, as well as some commentators. Platon went as far as to see timidity on the part of the CJEU in its preliminary ruling procedure, and boldness in the infringement proceedings.[20] The case is also important due to an *obiter dictum* stating that any attempt to initiate any disciplinary proceedings to judges because of the fact of their requests for a preliminary ruling would be contrary to the principle of judicial independence.

This rule of law jurisprudence is as young as it is bold. It is a very strong intrusion into matters which could have been perceived as a domain reserved to states. An exhaustive presentation of this jurisprudence is, however, not the task of the present text. It is rather expected to form a point of reference for the two "Polish" EAW cases.

It seems necessary to start their presentation with a few remarks on the EAW as such.

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[19] Joined Cases C-558/18 and C-563/18 *Miasto Łowicz v. Skarb Państwa – Wojewoda Łódzki*, *Prokurator Generalny, v. VX, WW, XV (Régime disciplinaire concernant les magistrats)* [2020], ECLI:EU:C:2020:234.

[20] S. Platon, *Preliminary references and rule of law: Another case of mixed signals from the Court of Justice regarding the independence of national courts: Miasto Lowicz*, 57(6) Common Market Law Review 1843 (2020), p. 1866.

3. AN EAW

An EAW is perhaps the greatest achievement of the judicial cooperation in criminal matters between the EU Member States. It is regulated in the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.[21] Art.1(1) of that Framework Decision defines an 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. It is a judicial authority of the requesting state which issues an EAW, and one from the executing state which makes the decision on its execution. The replacement of administrative organs (which hitherto made decisions on extradition) by judicial bodies (one requesting the surrender and the other granting (or not) such surrender of a given person) is presented as one of the main differences of the system resulting from the Framework Decision as compared to the previous system of extradition.[22]

Art. 1(2) of the Framework Decision stipulates that the Member States shall execute any EAW on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision. As a rule, this means an automatic application.[23]As sub-paragraph 6 of the preamble to the Framework Decision puts it: "[t]he European arrest warrant provided for in this Framework Decision 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."

However, the "automatic" application of such a procedure allows for some exceptions, i.e. grounds for a refusal of execution of an EAW. Such grounds may be mandatory or facultative. Art. 3 of the Framework Decision lists three grounds for the mandatory non-execution of a European arrest warrant.[24] Arts. 4 and 4a of the Framework Decision provide a much longer list of grounds for an optional non-execution of an EAW.[25] Last but not least, Art. 5 of the Framework Decision stipulates two conditions upon which the execution of an EAW may be made dependent. It should be noted

[21] *OJ 2002 L 190, p. 1.* It was amended only once by the means of 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 2009 L 81, p. 24).* Framework decisions were adopted in the so-called Third Pillar of the EU since the entry into force of the Treaty of Amsterdam (1 May 1999), and before the entry into force of the Lisbon Treaty (1 December 2009).

[22] L. Mancano, *You'll never work alone: A systemic assessment of the European Arrest Warrant and judicial independence*, 58(3) Common Market Law Review 683 (2021), p. 685.

[23] M. Böse, *The European arrest warrant and the independence of public prosecutors: OG & PI, PF, JR &YC*, 57(4) Common Market Law Review 1259 (2020).

[24] They are, namely, amnesty in the executing state, res judicata in the executing state, and the age of a sought person barring his/her criminal responsibility in the law of the executing state.

[25] There is no need to cite them here at full length. Suffice it here to mention a few examples, such as *lis pendens* in the executing state, res judicata in a third state; by the way of exception with respect to some

that none of those grounds refers to the danger of a breach of fundamental rights of the requested person.[26] As Mancano underlines, "[t]hey do not originate from the fear that the issuing State might be caught in systemic violations, or might be affected by structural problems capable of undermining the EAW mechanism. In this sense, these exceptions are in line with and reinforce the presumptive nature of mutual trust."[27]

Paragraph 10 of the preamble to the Framework Decision reads as follows:

> 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.

At the same time, paragraph 12 provides that:

> This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant 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.

This element is regulated in Art. 1(3) of the Framework Decision, which states that "[t]his Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union."

4. THE BASIC JUDICIAL DOCTRINES CONNECTED WITH EAWS

While it is impossible to refer here to all the important CJEU statements connected with EAWs, it seems useful to cite the most important ones dealing with mutual recognition and mutual trust, as well as their influence on possible refusals to execute EAWs.

Given that the principle of mutual recognition in the field of EAWs was mentioned directly in the Framework Decision, the CJEU has many times used it as a starting point in its analyses of EAWs. This line of citations was initiated in the judgment in case

crimes – the lack of double criminality (that is of an act being a crime both in the issuing as well as the executing state).

[26] P. Filipek, *Rozproszona europejska kontrola przestrzegania prawa do rzetelnego procesu sądowego w świetle zasady wzajemnego zaufania i wyroku C-216/18 PPU* [Decentralized European judicial review of the right to a fair trial in the light of the principle of mutual trust and the judgment C-216/18 PPU LM], 2 Europejski Przegląd Sądowy14 (2019), p. 16; Mancano, *supra* note 22, p. 685.

[27] Mancano, *supra* note 22, p. 693.

C-303/05 *Advocaten voor de Wereld*[28] and continued in many others.[29] In its judgment in Case C-388/08 PPU *Leymann and Pustovarov*[30] the CJEU called this principle as the "cornerstone" of judicial cooperation. In the same judgment[31] the CJEU noted that the implementation of the mechanism of the EAW requires a high degree of confidence between the Member States.[32]

The consequences of both mutual recognition and mutual trust are very far-reaching. In its judgment in Case C-388/08 PPU *Leymann and Pustovarov*[33] the CJEU noted that the principle of mutual recognition also means that "the Member States are in principle obliged to act upon a European arrest warrant. They must or may refuse to execute a warrant only in the cases listed in Articles 3 and 4." This thesis was also repeated in several other judgments.[34] However, a part of such judgments hints at exceptional situations.[35]

In case C-168/13 PPU *Jeremy F*[36] the Court expressly pointed to Art. 7 TEU as the exclusive grounds for a general denial to execute EAWs. In fact when confronted with requests to postpone or abandon the execution of an EAW in the face of the alleged breaches of human rights in individual cases, the CJEU did not deny such a possibility.[37] What was visible however was a lack of will to frustrate the aims of the Framework Decision.[38] A good example of conciliating between human rights and the aims of the

[28] Case C-303/05 *Advocaten voor de Wereld VZW v. Leden van de Ministerraad* [2007], ECLI:EU:C:2007:261, para. 28.

[29] Case C-66/08 *Szymon Kozłowski* [2008], ECLI:EU:C:2008:437, para. 31; C-261/09 *Gaetano Mantello* [2010], ECLI:EU:C:2010:683, para. 35; C-396/11 *Ciprian Vasile Radu* [2013], ECLI:EU:C:2013:39, para. 33; C-192/12 PPU *Melvin West* [2012],ECLI:EU:C:2012:404, para. 54; Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru* [2016], ECLI:EU:C:2016:198, para. 75.

[30] Case C-388/08 PPU *Artur Leymann, Aleksei Pustovarov* [2008], ECLI:EU:C:2008:669, para. 49. *See also Melvin West*, para. 55; Case C-237/15 PPU *Minister for Justice and Equality v. Francis Lanigan*, ECLI:EU:C:2015:474, para. 36. As is visible it also did not add much to the very wording of the Framework Decision itself.

[31] *Artur Leymann, Aleksei Pustovarov*, para. 50. *See also Ciprian Vasile Radu***,** para. 33.

[32] For very interesting and stimulating analyses of mutual trust reference should be made to K. Lenaerts, *La vie après l'avis: Exploring the principle of mutual (yet not blind) trust*, 54(3) Common Market Law Review 805 (2017), p. 806 and F. Maiani, A. Miglionico, *One principle to rule them all? Anatomy of mutual trust in the law of the Area of Freedom, Security and Justice*, 57(1) Common Market Law Review 7 (2020), p. 9.

[33] *Artur Leymann, Aleksei Pustovarov*, para. 51.

[34] *Gaetano Mantello*, paras. 36-37; *Ciprian Vasile Radu***,** para. 36. In this passage the Court referred to conditions from Art. 5 as well; *Melvin West*, para. 64; *Minister for Justice and Equality v. Francis Lanigan*, para. 36.

[35] Case C-579/15 *Daniel Adam Popławski* [2017], ECLI:EU:C:2017:503, para. 19; Case C-367/16 *Dawid Piotrowski* [2018], ECLI:EU:C:2018:27, paras. 46-48; Case C-452/16 PPU *Krzysztof Marek Półtorak* [2016] ECLI:EU:C:2016:858, paras. 24-27; Case C-453/16 PPU *Halil Ibrahim Özçelik* [2016], ECLI:EU:C:2016:860, paras. 23-26; Case C-477/16PPU *Ruslanas Kovalkovas* [2016], ECLI:EU:C:2016:861, paras. 25-28; Case C-220/18 PPU *ML* [2018], ECLI:EU:C:2018:589, paras. 48-54; Joined Cases C-508/18 and C-82/19 PPU *OG and PI* [2019], ECLI:EU:C:2019:456, paras. 43-45.

[36] Case C-168/13PPU *Jeremy F. v. Premier ministre* [2013], ECLI:EU:C:2013:358, para. 49.

[37] Case C-399/11 *Stefano Melloni v. Ministerio Fiscal* [2013], ECLI:EU:C:2013:107, para. 45.

[38] Which is "to facilitate and accelerate surrenders between the judicial authorities of the Member States in the light of the mutual confidence which must exist between them." As to the interpretation of Arts. 28-29 of the Framework Decision, *see Melvin West*, para. 77.

FD is supplied by the judgment in the case *Jeremy F.*[39] The CJEU confirmed the right of the requested person to bring an appeal with suspensive effect against a decision to execute a EAW (despite the lack of any mention of such in the FD). It stressed however that the time limits provided for in the Framework Decision were to be observed. In its judgment in case C-399/11*Melloni*[40] the Court ruled out the possibility of invoking the state constitution as a basis to justify a refusal to execute an EAW.

The last line of case law which deserves mention here has to do with the validity of EAWs. Its origin lies in the judgment in case C-241/15 *Bob-Dogi*. The CJEU ruled that "those principles are based on the premise that the European arrest warrant concerned has been issued in conformity with the minimum requirements necessary for it to be valid (...)."[41] Though this remark related to an EAW in a simplified form, there are no reasons to doubt that all EAWs should be valid. Case C-452/16 PPU *Półtorak*[42] opens another important line of judgments connected with the validity of EAWs.[43] The case concerned an EAW issued by the National Police Board. The status of this requesting body was the main object of doubt. The CJEU ruled that the term "judicial authority" "cannot be left to the assessment of each Member State" (para. 31). While accepting that the notion "judicial authority" is not limited to judges or courts only, and that it may extend to "the authorities required to participate in administering justice in the legal system concerned," it excluded the possibility that such a notion covers the police services of a Member State (paras. 33-34). In case C-477/16 PPU *Kovalkovas*[44] the Court also excluded the possibility of granting a qualification of "judicial authority" to an organ of the executive of a Member State, such as a ministry (para. 35). In the judgment in joined cases C-508/18 and C-82/19 PPU *OG (Parquet de Lübeck)* the CJEU made the same conclusion with respect to the prosecutor.[45]

5. THE IMPORTANCE OF THE CJEU JUDGMENT IN JOINED CASES *ARANYOSI AND CĂLDĂRARU*

The CJEU judgment in joined cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*[46] turned out to be the main point of reference with respect to the two Polish EAW cases.[47] The Higher Regional Court of Bremen lodged preliminary questions

[39] *Jeremy F. v. Premier minister*, paras. 37-38.
[40] *Stefano Melloni v. Ministerio Fiscal*, para. 63.
[41] Case C-241/15, *Niculaie Aurel Bob-Dogi* [2016], ECLI:EU:C:2016:385, para. 53. *See also* para. 63.
[42] *Krzysztof Marek Półtorak*, paras. 24-27.
[43] *Ruslanas Kovalkovas*, paras. 31-34; Joined Cases *OG* and *PI*, paras. 46-49.
[44] *Ruslanas Kovalkovas*, paras. 25-28.
[45] Joined Cases *OG and PI*. On the latter case see: Böse, *supra* note 23, pp. 1259 et seq.
[46] Joined Cases *Pál Aranyosi and Robert Căldăraru*.
[47] For more on this importance of this judgment, *see* A. Grzelak, *Wzajemne zaufanie jako podstawa współpracy sądów państw członkowskich UE w sprawach karnych (uwagi na marginesie odesłania prejudycjalnego w sprawie C-216/18 PPU Celmer)* [Mutual trust as the basis for judicial cooperation in criminal matters

concerning the possible denial of execution of the EAWs in issue in the face of strong indications that the detention conditions in the issuing Member States[48] infringed fundamental human rights.

The CJEU took as the point of reference the cited case law on mutual trust/recognition and on the limited grounds for non-execution or the placement of conditions on execution, while at the same time recognizing and explaining an exception to them. The CJEU referred to Opinion 2/13[49] and Art. 1(3) of the Framework Decision in order to justify limitations on the principles of mutual recognition and mutual trust between Member States "in exceptional circumstances" (paras. 82-83). The CJEU had no doubt as to the necessity to comply with Art. 4 of the EU Charter concerning the prohibition of inhuman or degrading treatment or punishment. It stressed that this provision was binding on the Member States and, consequently, on their courts when they are implementing EU law (para. 84). The CJEU emphasized that the prohibition of inhuman or degrading treatment or punishment was absolute, closely linked to respect for human dignity (paras. 85-86).

Turning directly to the execution of the EAWs in question, the CJEU ruled that "where the judicial authority of the executing Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State," that "judicial authority is bound to assess the existence of that risk when it is called upon to decide on the surrender to the authorities of the issuing Member State of the individual sought by a European arrest warrant" (para. 88). In any case "the consequence of the execution of such a warrant must not be that that an individual suffers inhuman or degrading treatment" (para. 88).

The CJEU ruled that "a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of detention in the issuing Member State cannot lead, in itself, to the refusal to execute a European arrest warrant" (para. 91). In the next passage the CJEU extended this statement to all deficiencies which may be systemic or generalised, or which may affect certain groups of people, or certain places of detention. As the Court ruled, "[w]henever the existence of such a risk is identified, it is then necessary that the executing judicial authority make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State" (para. 92). In this way the CJEU established the so-called two-step test.

The CJEU recognized a duty on the part of the executing judicial authority to verify the risks facing the requested person following his/her possible surrender, and to request from the issuing judicial authority all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained in that

in the EU (reference for a preliminary ruling in case C-216/18 PPU Celmer)], 10 Państwo i Prawo 50 (2018), p. 62.

[48] Hungary with respect to Mr. Aranyosi, and Romania with respect to Mr. Căldăraru.

[49] *See* to that effect Opinion 2/13, EU:C:2014:2454, para. 191.

Member State (para. 94). The CJEU thus found a duty on the part of the issuing judicial authority to provide that information to the executing judicial authority (para. 97).

The CJEU also delineated the result of a negative evaluation of the conditions in the issuing Member State (in the sense that the execution of the EAW might lead to a violation of the human rights of the individual concerned). It is to take form of a postponement, but not abandonment, of the execution of the warrant (para. 98), and must be accompanied by informing Eurojust of the matter (para. 99). The CJEU also referred to the influence of this postponement on the term of deprivation of freedom of the requested person (paras. 100-103).

6. THE IMPORTANCE OF THE IRISH CASE

The judgment in the *LM* case (the Irish case) was the result of doubts expressed by an Irish court as to whether it could execute three EAWs issued by Polish courts in the face of Poland's alleged generalized deficiencies as regards human rights. These deficiencies were identified as a real risk of breach of the right to a fair trial and the lack of independence of the Polish judiciary[50] (para. 34). The CJEU was expressly asked whether the two-step analysis was still required. In fact the referring court wanted to know whether there is, or is not, any possibility of getting rid of the second step, namely the examination of the real dangers facing the person(s) to whom a given EAW refers.

The Irish judgment could be labelled, albeit with some hesitation, as a joint product of "the rule of law" case law as well as the case law on exceptional denials to execute EAWs in light of a lack of respect for fundamental rights in the issuing Member State. The above-mentioned hesitation arises from the fact that the Irish case is just the second in two lines of cases – one starting with the *Portuguese judges* judgment; and the other one starting with the *Aranyosi and Căldăraru* case. In fact the explanatory part of the Irish judgment (paras. 33-79) refers nine times to the *Aranyosi and Căldăraru* case, and eight times to the judgment in the Portuguese judges case.

The CJEU took as a point of departure the principle of mutual trust. In this sense the Irish case is more a "mutual trust-oriented" than a "mutual recognition-oriented" EAW judgment. What's more, the reference to mutual trust was preceded by a symptomatic introduction that:

> [I]t should be recalled that EU law is based on the fundamental premise 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 European Union is founded, as stated in Article 2 TEU. That premise implies and justifies the existence of mutual trust between the

[50] The referring Irish court invoked: the changes introduced in the Constitutional Court; the changes to the constitutional role of the NCJ; the fact that the Minister of Justice had become the Public Prosecutor, as well as his disciplinary role in respect of the presidents of courts; the changes to the Supreme Court (compulsory retirement and future appointments) (para. 21). The Irish court did not explain which of those elements was of decisive importance.

Member States that those values will be recognised, and therefore that the EU law that implements them will be respected (para. 35).

This statement is taken from the Portuguese judges case. In fact however, other EAW cases contained similar references to mutual trust and mutual recognition. In the further part of the judgment the CJEU paraphrased this statement concerning the mutual trust by saying that the high level of trust between Member States on which the EAW mechanism is based is thus founded on "the premise that the criminal courts of the other Member States (...) meet the requirements of effective judicial protection, which include, in particular, the independence and impartiality of those courts" (para. 58).[51]

A slight change of accent is also traceable in the reference to the "principle of mutual recognition, which is itself based on the mutual trust" between the Member States (para. 36). In fact the references to the aims of the system of EAWs (paras. 36-39) and the consequences of the principle of mutual trust[52] are similar to the traditional case law referred to in subchapter 5. This relates also to statements on mutual recognition as the "cornerstone" of judicial cooperation in criminal matters; on the limited grounds of non-execution; and on the fact that "while execution of the European arrest warrant constitutes the rule, refusal to execute is intended to be an exception which must be interpreted strictly" (para. 41).

What could be seen as a challenge was the fact that the protected value in the *Aranyosi and Căldăraru* case was a human right of an absolute nature, that is the prohibition of degrading treatment and punishment. While the right to a fair trial is not absolute in this sense, the CJEU nevertheless underlined the fundamental character of that right.[53] It stressed that the judicial independence forms part of its essence. This gave the CJEU the chance to recapitulate the basic statements on judicial independence from the *Portuguese judges* case (paras. 49-54)[54] and stress its importance for cooperation in criminal matters in general and in EAW matters in particular (paras. 56-58).

All these arguments led to the conclusion on "permitting the executing judicial authority to refrain, by way of exception, from giving effect" to that EAW on the basis of

[51] On the importance of mutual trust, *see* Grzelak, *supra* note 47, pp. 57 et seq.

[52] With the possibility of the Member States being "required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but also, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the European Union" (para. 37).

[53] By calling it "a right which 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 Art. 2 TEU, in particular the value of the rule of law, will be safeguarded" (para. 48).

[54] They are more or less the same that were presented in section 3. Suffice to say that they referred to such values as rule of law, the right of individuals to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act, effective judicial review and effective judicial protection, and the independence of courts. The CJEU underlined the importance of that independence for the preliminary ruling mechanism under Art. 267 TFEU, and by analogy to the system of EAWs (paras. 54-55).

Art.1(3) of the Framework Decision (para. 59). It should be underlined that the CJEU spoke about the *possibility* to deny the execution of an EAW rather than an *obligation* to do so. Secondly, it did not refer to the differentiation between postponement and abandonment of the execution of the EAW from the *Aranyosi and Căldăraru* judgment. Thirdly, the reason for the negative decision was presented as "a real risk that the person in respect of whom a European arrest warrant has been issued will, if surrendered to the issuing judicial authority, suffer a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial" (para. 59). This "real risk" is the result of the two step-test, and does not result just from one of them.

The reference to the first test (that is examination of the alleged systemic or generalised deficiencies) was very similar to the one from *Aranyosi and Căldăraru*.[55] In fact the Irish High Court never put into question the necessity of the first test. The CJEU went so far as to point out information in a reasoned proposal addressed by the Commission to the Council on the basis of Art. 7(1) TEU as being "particularly relevant for the purposes of that assessment" (para. 61). What's more, the CJEU referred to the *Aranyosi and Căldăraru* judgment to support the thesis that "such an assessment must be carried out having regard to the standard of protection of the fundamental right that is guaranteed by the second paragraph of Article 47 of the Charter" (para. 62). However, the cited paragraph 88 does not use the very term "standard." In fact the applicable standard was that of the independence of judges and was looked for rather in the Portuguese judges case. This fragment gave the CJEU the chance to refer to the latter and to develop the idea of independence. In this regard reference can be made to subchapter 3.

What was especially emphasized by the CJEU was the necessity of effecting the second step of the analysis. It was taken verbatim from the *Aranyosi and Căldăraru* judgment, by referring to the necessity to "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" the risk recognized by the first step of the analysis (para. 68).[56]

The CJEU found it useful to refer to the above-cited recital 10 of the Framework Decision, which provided that only the use of the Art. 7 TEU procedure may lead to the suspension of the implementation of the EAW mechanism with respect to a Member State (paras. 70-72).

The CJEU described in more detail the tasks of the executing judicial authority following the confirmation of systemic or generalised deficiencies. It ruled that the executing judicial authority "must," in particular, examine to what extent the systemic

[55] A verbatim reference to the *Aranyosi and Căldăraru* judgment concerned the material examined as being "objective, reliable, specific and properly updated" (para. 61).

[56] The CJEU found it useful to repeat this conclusion, by stating that it is applicable notwithstanding firstly the "reasoned proposal adopted by the Commission pursuant to Art. 7(1) TEU." Secondly, it is applicable despite the fact that "the executing judicial authority considers that it possesses, on the basis, in particular, of such a proposal, material showing that there are systemic deficiencies, in the light of those values, at the level of that Member State's judiciary."

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" (para. 74). Secondly it must assess, "in the light of the specific concerns expressed by the individual concerned, whether there are substantial grounds for believing that he will run a real risk of breach of his fundamental right to an independent tribunal (...) having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant" (para. 75).

The last element of the judgment concerned the exchange of information between the issuing and executing judicial authority. The CJEU, like in the case of *Aranyosi and Căldăraru*, spoke in favour of a duty of the latter (using the term "must") to request from the issuing judicial authority any supplementary information necessary for assessing whether there is such a risk (para. 76). Strangely enough, the CJEU was not so ready to speak about such a duty on the part of the issuing judicial authority. It used the term "may" in this context, while on the contrary the CJEU ruled that if the information of the issuing judicial authority is not satisfactory the executing judicial authority "must" refrain from giving effect to the EAW (para. 78).

7. THE DUTCH CASE

The judgment in the Dutch case is in reality very similar to its Irish predecessor. The underlying question was once again whether the presence of systemic or generalised deficiencies was sufficient to justify the automatic denial of execution of all EAWs, irrespective of the analysis of the personal situation of the person to be surrendered (para. 33). As in the Irish case, the answer of the CJEU was negative in this respect.

What was completely new as compared to the Irish case was the supplementary analysis whether the systemic or generalised deficiencies concerning the independence of the judiciary may lead to denial of the status of an "issuing judicial authority" to all Polish courts (para. 34). One can wonder about the sense of making this element the cornerstone of the analysis. In fact none of four questions the Dutch court asked concerned whether the Polish courts are no longer judicial authorities. On the other hand, these questions adopted a presumption of non-execution of EAWs issued by Polish courts (in complete opposition to the conclusion of Irish judgment). It is also true that references were made to the above-mentioned judgment in joined cases C-508/18 and C-82/19 PPU *OG and PI* (Public Prosecutor's Offices in Lübeck and Zwickau) and the CJEU decided to start by assessing them, despite the *prima facie* lack of similarity of the Polish courts to the German prosecutors or policemen.

The CJEU concluded that an executing judicial authority, even given evidence of systemic or generalised deficiencies concerning the independence of the judiciary of the issuing Member State, "cannot deny the status of 'issuing judicial authority' (...) to all judges or all courts of that Member State acting by their nature entirely independently of

the executive" (para. 41) The CJEU pointed out that "the existence of such deficiencies does not necessarily affect every decision that the courts of that Member State may be led to adopt in each particular case" (para. 42) and "an interpretation to the contrary would amount to extending the limitations that may be placed on the principles of mutual trust and mutual recognition beyond exceptional circumstances (...) by leading to a general exclusion of the application of those principles in the context of European arrest warrants issued by the courts of the Member State concerned by those deficiencies" (para. 43). The CJEU noted that such a conclusion would "mean that no court of that Member State could any longer be regarded as a 'court or tribunal' for the purposes of the application of other provisions of EU law, in particular Art. 267 TFEU" (para. 44).

The remaining part of the judgment referred to Art. 1(3) of the Framework Decision and strictly followed the Irish judgment. The main point of reference was the possibility of denial of execution on the basis of the general situation in the issuing state. The CJEU opened this section of the judgment by citing verbatim the entire answer given to the Irish High Court three years earlier (para. 52). It itself used the notion of a "two-step examination" (para. 53). The first step was to "determine whether there is objective, reliable, specific and properly updated material indicating that there is a real risk of breach of the fundamental right to a fair trial (...) on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary" (para. 54). This definition is the same as in the two preceding cases. As regards the second step, it must firstly "determine, specifically and precisely, to what extent those deficiencies are liable to have an impact at the level of the courts of that Member State which have jurisdiction over the proceedings to which the requested person will be subject." Secondly, it must take into consideration the personal situation, the nature of the alleged offence, and the factual context in which the EAW was issued (para. 55). An additional element to be taken into consideration was "statements by public authorities which are liable to interfere with the way in which an individual case is handled" (para. 61). Interestingly enough, the CJEU stressed that "those steps cannot overlap with one another" (para. 56).

Like in the Irish case, the CJEU referred to the Art. 7 procedure and warned that a general denial to execute EAWs would be "a *de facto* suspension" of the implementation of the EAW mechanism in relation to that Member State, without respecting the requirements of Art. 7 TEU (paras. 57-59).

A negative result of the two-step analysis was described in the same way as in the Irish case, by pointing that the executing judicial authority "must" refrain from giving effect to the EAW concerned (para. 61). What was new was an unequivocal statement that "otherwise, it must execute that warrant, in accordance with the obligation of principle laid down in Article 1(2) of that framework decision" (para. 61).

It is worthwhile to note the reference of the CJEU to combating the impunity of a requested person as the objective of the mechanism of the EAW (para. 6). One can read this statement as a very delicate signal to domestic courts referring preliminary questions with the visible will of denying the execution of all Polish EAWs.

The last element concerned intertemporal aspects and their interplay with two kinds of EAWs. It revolved around the question whether the executing judicial authority must take account of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State which may have occurred after the issuance of the EAW in question. The CJEU had no doubt that it is necessary to conduct the entire examination if an EAW is issued for the purposes of conducting a criminal prosecution (para. 66). As regards EAWs issued for the purposes of executing a custodial sentence or detention order, the CJEU was more liberal. It spoke of the necessity of such an examination when, following his or her possible surrender the requested person "will be subject to new court proceedings, on account of the bringing of an action relating to the execution of that custodial sentence or that detention order or of an appeal against the judicial decision the execution of which is the subject of that European arrest warrant, as the case may be" (para. 67).

8. AN ATTEMPT OF EVALUATION

The two Polish EAW judgments must be analysed on two basic levels. The first of them obliges us to look at the Irish and Dutch cases as elements of the case law dealing with EAWs as such. The second level of analysis would look at the Polish EAW judgments as elements of the case law dealing with the rule of law.

The fact of the two judgments belonging to a wider list of EAW cases is a tautology. In fact what is interesting here is a much shorter list of EAW cases dealing with a possible denial of execution in the light of deficiencies in the issuing state. The references to the *Aranyosi and Căldăraru* case are obvious.[57]

There is no doubt as to the great importance of the Irish case. Firstly, it was the second case in which states were given a message that deficiencies in their legal systems may give rise to a denial of execution of EAWs issued by their courts. Secondly, it was the first case concerning a human right which was not absolute in nature. As Filipek notes, in this sense the Irish case was a leading ruling.[58] The Dutch case would be rather in the nature of its confirmation and a promise of a new jurisdictional doctrine. All the same it is the first indication that the automatic denial of the status of "judicial authority" to all courts of a given state is not a proper way of interpretation of the Framework Decision. If the Irish case has influenced and/or was expected to influence all future cases dealing with doubts as to the nature of the issuing authority,[59] this is all the more true with respect to the Dutch case.

[57] W. Lewandowski, *Pomiędzy Scyllą zawieszenia wzajemnego zaufania i Charybdą fragmentaryzacji standardu ochrony prawa podstawowego – dylematy Trybunału Sprawiedliwości w wyroku C-216/18 PPU, LM* [Between the Scylla of suspending mutual trust and Charybdis of fragmenting the standard of protection of a fundamental right – dilemmas of the Court of Justice in judgment C-216/18 PPU, LM] 2 Europejski Przegląd Sądowy 4 (2019), p. 6; Filipek, *supra* note 26, p. 14.

[58] Filipek, *supra* note 26, p. 23.

[59] Böse, *supra* note 23, p. 1264.

The three cases pointing out the necessity of carrying out a two-step test in order to deny the execution of an EAW make it possible speak about a judicial doctrine or line of cases. Interestingly enough, Filipek presents the Irish case in this context not only as a mere confirmation of the *Aranyosi and Căldăraru* judgment, but also as a next step in the evolution of the relevant case law. In this sense while the *Aranyosi and Căldăraru* judgment adopted a two-element test, Filipek posits that the *LM* judgment (the Irish case) would apply a three-element test. This would refer to: the generalized situation in the issuing state (test 1); the situation of the courts hearing the cases of the persons in question (test 2); and the situation of the individual case (test 3).[60] In this sense test 2 would refer to all criminal courts in the issuing state, and test 3 to the court making decisions on the EAW and on the criminal responsibility of the requested person. There is no unanimity in this respect. For Konstadinides what is at stake is simply a two-tier *Aranyosi and Căldăraru* test.[61] As is visible, this is the description of the CJEU in the Dutch case as well. All the same, step two comprises what Filipek identifies as tests 2 and 3.

There is no doubt that the Irish case was seen as one of the leading cases in the rule of law saga.[62] Lewandowski gives it third place after the *Portuguese judges (ASJP)* case and the *Achmea* case.[63] It is not only an important repetition but to a large extent also a new step – both as regards developing some notions used in the case of the Portuguese judges and as a warning of the possible denial of execution of the EAWs issued by the Polish courts. That is why it is impossible to describe the rule of law case law without referring to the Irish case. What is at the core of all these judgments is the central position of the independence of the judiciary and the possible negative consequences for a state introducing restrictions on it. As Konstadinides states, "[t]he judgment also reaffirmed the interrelation between the right to effective judicial protection, judicial independence and the rule of law and allowed the CJEU to draw red lines regarding the protection of European values."[64] Also Mancano notes that:

> [T]he definition of the EAW system as a form of judicial cooperation has significant legal implications. Since it constitutes a mechanism of inter-State surrender of (alleged or "certified") offenders, certain specific safeguards play a particularly prominent role (such as, most obviously, those related to the treatment of detainees). The purely judicial nature of the cooperation places judicial independence right at the centre of the stage as an essential precondition for the healthy functioning of the EAW.[65]

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[60] Filipek, *supra* note 26, p. 20.

[61] T. Konstadinides, *Judicial independence and the Rule of Law in the context of non-execution of a European Arrest Warrant: LM,* 56(3) Common Market Law Review 743 (2019), p. 751.

[62] A. von Bogdandy, *Tyrania wartości? Problemy i drogi europejskiej ochrony praworządności krajowej* [Tyranny of Values? Problems and Paths of European Defence of National Rule of Law], 4 Europejski Przegląd Sądowy 4 (2019), p. 6.

[63] Lewandowski, *supra* note 57, pp. 5-6.

[64] Konstadinides, *supra* note 61, p. 744.

[65] Mancano, *supra* note 22, pp. 688-689.

This importance of the independence of the judiciary may be seen as an incentive for a stronger reply. In any case an attempt to evaluate the stance of the CJEU gives rise to the "half full – half empty" dilemma. The CJEU indeed gave a warning, but did not act as a terminator of the right of the Polish courts to issue EAWs. It is difficult not to see that in this respect the attitude of the CJEU may be seen as much softer than the one resulting from other rule of law "Polish" judgments. They may be considered as very strong (i.e. the case on the retirement age in the Polish Supreme Court), or even more than very strong and actually problematic (the KRS case). If we assume that the thesis that the CJEU gave a soft answer is true, or at least plausible, another question seems inevitable, i.e. whether the self-restraint the CJEU apparently expressed in the two Polish EAW cases is a real, and not only apparent, self-restraint, and if the former is true, whether it could be looked at as a promise of some armistice with the Polish government. In fact the chronology is not very promising in that respect. The Irish case predates all other "Polish cases." It makes much more probable the suggestion that the EAWs are treated as a separate topic, with no special promise with respect to the other aspects of the dispute on the rule of law in Poland. As Konstadinides puts it, "LM is, therefore, more of a fair trial case than one that concerns rule of law deficiencies in Poland and whether Member States should generally refuse to extradite suspects as a result of those deficiencies."[66]

There may be many reasons for the CJEU's stance. The EAW cases apparently confirm the above-cited thesis of Platon on the "timidity" of the CJEU, although the *Portuguese judges* case and KRS case are everything but timid. Von Bogdandy expressed the view according to which a denial of judicial cooperation "might resuscitate old spectres of bilateral conflict."[67] It can be counterproductive as well. The mutual nature of the EAW may turn out to act against the courts trying to impose sanctions on their own. It seems that the functioning of the EAW is more valuable for the CJEU than Art. 4(2) TEU, which means that the EAW cases are not necessarily the end of the crusade with respect to Poland. Mancano identifies three reasons underlying the CJEU's self-restraint, as follows:

> First, an interpretation to the contrary would amount to a de facto suspension of the EAW, while the preamble of the EAWFD empowers only the European Council to do so. Second, accepting that the judges or courts of a Member State can no longer be considered independent *en masse* would deprive those courts and judges of the possibility to make use of the preliminary ruling mechanism, while precisely that mechanism has played a key role in relation to resisting the "reforms" of the Polish government. Third, it would entail a high risk of impunity of requested persons present in a territory other than that in which they allegedly committed an offence, thereby undermining a fundamental objective of the EAW and the EU more broadly.[68]

[66] Konstadinides, *supra* note 61, p. 751.
[67] von Bogdandy, *supra* note 4, p. 711.
[68] Mancano, *supra* note 22, p. 701.

It goes without saying that the Dutch case clearly confirms the latter two conclusions, the first one being an element of a long line of cases.

Interestingly enough, Lewandowski gave the title to his text on the Irish judgment "Between the Scylla of suspending mutual trust and Charybdis of fragmenting the standard of protection of a fundamental right." It seems that the CJEU managed to avoid both Scylla and Charybdis.

What deserves special mention is that the CJEU in both Polish EAW cases avoided any hints with respect to its own evaluation of the alleged systemic deficiencies. There is no doubt as to the critical stance of the referring courts however. There is nothing in the case law that forbids them from doing so, but in any case they must supplement this analysis with one on the individual situation of the requested person.

CONCLUDING REMARKS

The 2018 and 2020 preliminary rulings speak against the automatic denial of all EAWs coming from Polish courts. However, they are far from a guarantee that each and every such EAW will be executed, even in the absence of any of the grounds for denial of execution listed in the Framework Decision. What is underlined is the observance of a two-step test for the possible denial of execution. Even if some persons may look at it as a "mild" response, what was protected by it was more a "precious" instrument of EU cooperation than the Polish government. In any case it is difficult to see any kind of armistice in them.