Judicial Independence and the Rule of Law in the context of non-execution of a European Arrest Warrant

Case 216/18 *Minister for Justice and Equality v LM* [2018] ECLI:EU:C:2018:586.

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1. Introduction

The formal reference to the rule of law in the Treaty (Article 2 TEU) applies to all EU areas of action and is applicable to both Member States and their citizens. Such attachment to the rule of law reinforces the axiom established in the early case law of the CJEU that EU law imposes obligations on individuals and confers upon them substantive rights which constitute an essential part of their legal heritage.[2] As such, upholding the rule of law via rigorous monitoring of the general principles of EU law constitutes a central tenet of the jurisprudence of the CJEU.[3] More recently, the CJEU has employed the general principles of EU law in order to uphold concepts such as judicial independence which is protected, inter alia, through freedom of judges from interference and influence or pressure from the State, including restrictions on removal from office. The CJEU has established a firm link between judicial independence and the fundamental right to effective judicial review to ensure compliance with EU law in the Member States as one of the cornerstones of the rule of law.[4]

This contribution will provide an analysis of the much anticipated judgment in *Minister for Justice and Equality v LM* (*LM* hereafter),[5] a preliminary ruling which

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[2] Case 6/64 *Costa v ENEL* [1964] ECR 1141

[3] See K Ziegler, P Neuvonen and V Moreno-Lax (eds.) *Research Handbook on General Principles of EU Law* (Cheltenham, Edward Elgar Publishing, 2019).

[4] See recent analysis by S Carrera and V Mitsilegas, 'Upholding the Rule of Law by Scrutinising Judicial Independence', CEPS Commentary, 11 April 2018. https://www.ceps.eu/system/files/SCandVM_ROL.pdf

[5] Case 216/18 *Minister for Justice and Equality v LM* [2018] ECLI:EU:C:2018:586. See Guest editorial, (2018) 55 *Common Market Law Review* 983, at 984. The *LM* case is known as *Celmer* in Ireland. The difference in name is due to the CJEU's decision to increase the protection of the data of natural persons in publications concerning requests for preliminary rulings. This decision took effect on

confirms the above commitments in the context of non-execution of a European Arrest Warrant (EAW) – the well-known but still somewhat controversial cross-border judicial surrender procedure.[6] The question referred to the CJEU was whether an Irish judge shall refrain from surrendering a criminal suspect detained in Ireland under a EAW issued against him by Poland when the latter State is undermining the principle of judicial independence upon which the rule of law depends.[7] In the case at hand, it was contended that Poland jeopardised the principle of judicial independence through its recent reforms of the judiciary system that gave the government greater powers over the country's judiciary. It was also alleged that such reforms would have a detrimental effect to the kind of judicial review afforded to a person surrendered to Poland.

Although the Irish reference relates only to the execution of the EAW, the case raised a number of broader legal questions regarding the linkage between the right to a fair trial under Article 47 of the EU Charter of Fundamental rights; the requirement in Article 19(1) TEU for an independent judiciary as the provider of effective remedies, and the protection of the overarching principle of the rule of law enshrined in Article 2 TEU. The reasoning of the CJEU in *LM* was key in linking the above provisions. Inter alia the CJEU elucidated the test that can be applied by national courts to assess systemic deficiencies that may put individuals at risk in one of the Member States and therefore refrain from giving effect to a EAW beyond the listed cases of non-execution provided by the Framework Decision. The 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.[8]

2. Factual and legal background to the dispute

LM concerns a preliminary reference made to the CJEU by the Irish High Court. The question addressed to the CJEU concerned the enforcement of a European Arrest

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1 July 2018. See CJEU Press Release No 96/18, 29 June 2018. Available from: https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-06/cp180096en.pdf

[6] See M Fichera, *The Implementation of the European Arrest Warrant in the European Union: Law, policy and practice* (Antwerp, Intersentia, 2011).

[7] Minister for Justice and Equality v Artur Celmer (No 3) [2018] IEHC 153.

[8] See also Case C-64/16 *Associação Sindical dos Juízes Portugueses* [2018] EU:C:2018:117. See case annotation in (2018) 55 *Common Market Law Review* 1–28.

Warrant (EAW) against Artur Celmer, a 31-year-old Polish national, accused in Poland for drug trafficking offences. Celmer, who was detained in Ireland, refused to surrender to the Polish authorities because of the potential breach of his right to a fair trial (within the meaning of Article 6 ECHR and Article 47 EU Charter of Fundamental Rights). He claimed, in particular, that recent legislative reforms in Poland of the justice system posed a grave risk of denial of justice and the rule of law.

Henceforth, Ms Justice Donnelly of the Irish High Court asked the CJEU to clarify the test required to be applied by a national judge in order to assess an individual's objection to surrender to another Member State when there is strong evidence that the justice system in that issuing Member State is no longer operating under the rule of law. Specifically, the Irish judge queried whether the CJEU's *Aranyosi* and *Căldăraru* two-stage test (regarding non-execution of a EAW on account of cruel detention conditions in Hungary and Romania respectively) is applicable in the Polish context. [9]

The *Aranyosi* and *Căldăraru* test - often described as a step to soften the relationship between the CJEU and the ECtHR, following *Opinion 2/13* [10] - provided that postponement of a EAW is possible where fundamental rights are at stake, especially when the executing judicial authority finds:

i) that there is a real risk of inhuman or degrading treatment in the issuing Member State on account, inter alia, of systemic deficiencies.

and

ii) that there are substantial grounds for believing that the individual concerned by the EAW will be exposed to such a risk.

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[9] Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* [2016] EU:C:2016:198.
It is worth mentioning that this was the first (joint) case where the CJEU accepted exceptions to the principle of mutual recognition on fundamental rights grounds in the context of the execution of a EAW. The CJEU held that if the executing judicial authority finds that there is a real risk of fundamental rights [ECHR (Article 3) and EU Charter of Fundamental Rights (Articles 1-4)] violation for the requested person once surrendered, the execution of the EAW must be deferred (until additional information is gathered) and, where such a risk cannot be discounted, the executing court must decide whether or not to terminate the surrender procedure.

[10] *Opinion 2/13 Accession of the EU to the ECHR* (2014) ECLI:EU:C:2014:2454. See for commentary of the CJEU's Opinion: D Halberstam, 'It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) 16 *German Law Journal* 105; P Gragl, 'The Reasonableness of Jealousy: Opinion 2/13 and EU Accession to the ECHR in W Benedek et al (eds.) *European Yearbook on Human Rights* (Vienna, Neuer Wissenschaftlicher Verlag, 2015).

It follows that if the CJEU required that the above test is applicable in *LM* it would have been possible for the Irish High Court to make an individual assessment of the specific situation of the concerned individual. What is more, allowing the Irish High Court to make an individual assessment and subsequent finding of incompatibility of the surrender of an individual on the above grounds would have been compatible with section 37(1) of the Irish European Arrest Warrant Act 2003 according to which Ireland can refuse to execute a EAW if it breaches Ireland's obligations under the ECHR.[11]

The *LM* reference for a preliminary ruling was very well-timed in that beyond its immediate aim in seeking guarantees from the CJEU that the rights of the accused will be protected, it also confronted the attempts of the Polish government to place the judicial system under the control of the executive and legislative branches. As it is well known, the independence of the judiciary in Poland has been subject to considerable political controversy and tension between the Commission and the Polish authorities since 2016. This is, inter alia, due to the adoption of legislation in Poland pertaining to the reform of the Supreme Court and the National Council of the Judiciary.[12] For instance, the lowering of the Supreme Court retirement age from seventy to sixty-five had the effect of terminating the mandate of approximately 40 percent of Supreme Court judges before the end of their legal terms. As such, it jeopardised the principles of irremovability of judges and of judicial independence and infringed Poland's obligation to ensure effective legal protection in the areas covered by EU law.

Despite repeated efforts to engage the Polish authorities in a constructive dialogue, including in the context of its 2014 'Rule of Law Framework' (Article 7 TEU), the Commission concluded in 2016 that there was a clear risk of a serious breach of the rule of law in Poland.[13] In 2017, the Polish authorities were served with a 'Reasoned

[11] See *The Minister for Justice and Equality v Artur Celmer (No 3)* [2018] IEHC 153.
[12] Other reforms concerned judges on the National Council of Judges no longer being elected by their peers; the Minister for Justice retaining powers as head prosecutor in the disciplining of judges who could be asked to account for the content of their decisions. See for more detail: Guest editorial, (2018) 55 *Common Market Law Review* 983.
[13] See European Commission Press Release, Commission adopts Rule of Law Opinion on the situation in Poland, 1 June 2016. Available from: http://europa.eu/rapid/press-release_IP-16-2015_en.htm

proposal in accordance with Article 7(1) of the TEU regarding the rule of law in Poland' which supported the case of existing systemic deficiencies in Poland and highlighted the clear risk of a serious breach of the values referred to in Article 2 TEU.[14] Subsequently, outside the contours of the Article 7 TEU process, in September 2018, the Commission referred Poland to the CJEU contending that Polish legislation on the Supreme Court was in breach of the principle of judicial independence.[15] The Commission also asked the CJEU to order interim measures until it had issued a judgment on the case. Indeed, by order of the Court on 17 December 2018, Poland was requested to immediately suspend the application of the provisions of national legislation relating to the lowering of the retirement age for Supreme Court judges.[16] As a result, the Polish Parliament passed legislation on the same day to reinstate Supreme Court judges who were forced to retire.[17]

Against this factual and legal background (but for the recent order of the CJEU regarding judges' retirement), it can be contended that the accused in *LM* had substantial evidence at his disposal to challenge his extradition from Ireland to Poland. Beyond the European Commission's reasoned proposal, the Opinion of the Venice Commission also constituted further ammunition to highlight the lack of independent and legitimate constitutional review and the existing threats to the independence of the ordinary judiciary in Poland.[18] The latter claims made by an impartial body outside the EU framework underlined further the risk to an individual finding him/herself entangled in the Polish justice system.

3. Opinion of the Advocate General

Advocate General Tanchev opined that the maintenance of independence of courts, including their composition, is the foundation of the right to a fair trial. He stressed

[14] COM (2017) 835 final

[15] Case C-619/18 R *Commission v. Poland* (2018) ECLI:EU:C:2018:910
The Commission contended that Poland failed to fulfill its obligations under Article 19(1) TEU read in connection with Article 47 of the Charter of Fundamental Rights of the European Union.

[16] Order of the Court in Case C-619/18 R *Commission v Poland* ECLI:EU:C:2018:910

[17] See Press Release from the President's Office: 'President signs bill amending law on Supreme Court', 17 December 2018. Available from: http://www.president.pl/en/news/art,926,president-signs-bill-amending-law-on-supreme-court.html

[18] Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, adopted by the Commission at its 113th Plenary Session (Venice, 8-9 December 2017) CDL-AD(2017)031-e

that independence and impartiality require rules in place in relation to the composition of the body and the appointment and dismissal of its members. Accordingly, he echoed the Commission's reasoned proposal to the Council to adopt a decision against Poland under Article 7(1) TEU which established that the independence of the judiciary is a key component of the rule of law.[19] The Advocate General underlined that:

> It cannot, to my mind, be ruled out that lack of independence of the courts of the issuing Member State may, *in principle*, constitute a flagrant denial of justice.[20]

The Advocate General agreed that the fact that there is a problem pertaining to judicial independence in a Member State is indeed concerning vis-à-vis the (mutual recognition) presumption of equivalent protection of fundamental rights in all Member States. However, he claimed that such a problem at the heart of a Member State is not sufficient in its own to establish that surrendering a criminal suspect pursuant to a EAW issued by that Member State would expose her/him to a 'risk of flagrant denial of justice'. [21] Instead, the Advocate General submitted that the lack of independence and impartiality of a tribunal equals to a flagrant denial of justice only when it is so serious that it destroys the fairness of the trial enshrined in Article 47 (2) of the EU Charter of Fundamental Rights.[22] He confirmed, in accordance with the *Aranyosi* and *Căldăraru* test, that the non-execution of EAWs is also based on an individual assessment.

Accordingly, the Irish High Court needed to determine that the seriousness of the alleged lack of independence of the Polish courts amounted to destruction of the fairness of the trial. To the assistance of the Irish judge, the Advocate General highlighted that in building her case about whether Celmer could get a fair trial in

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[19] Reasoned Proposal in accordance with Article 7(1) TEU regarding the rule of law in Poland, 20.12.2017. COM (2017) 835 final, p.36

[20] Opinion of Advocate General in Case C-216/18 PPU *Minister for Justice and Equality v LM* (2018) ECLI:EU:C:2018:517, para 90.

[21] Ibid, paras 72, 80-85, 119 of the Opinion

[22] Ibid, para 93. See also Advocate General Sharpston in Case 396/11 *Radu* ECLI:EU:C:2012:648, para 83 (also paras 97, 108). Sharpston argues in para 83 that 'a trial that is only partly fair cannot be guaranteed to ensure that justice is done. I suggest that the appropriate criterion should rather be that the deficiency or deficiencies in the trial process should be such as fundamentally to destroy its fairness.

Poland, Ms Justice Donnelly needed to rely upon objective, reliable, specific and properly updated information. Such information included the Commission's reasoned proposal about Poland and any progress made by the Polish authorities thereafter.

4. Judgment of the Court

The case was given expedited status by the CJEU (since Mr Celmer was in custody) and was heard on 1 June 2018 by the Grand Chamber, which demonstrates the importance to ensuring effectiveness of judicial cooperation and the protection of fundamental rights as well as the necessity for addressing systemic rule of law problems in Poland. The CJEU's judgment was unequivocal and clearly mandated that maintaining the independence of judicial authorities is essential in order to ensure the effective judicial protection of individuals, including in the context of the EAW mechanism.[23] The CJEU also confirmed the centrality of adherence to fundamental EU values by Member States, such as respect to the rule of law and mutual trust.

The CJEU tackled the issue of judicial independence from the point of view of the protection of the criminal suspect. It treated the principle of judicial independence as a determining aspect of Mr Clemer's right to a fair trial protected by Article 47 of the Charter and also linked to Article 1(3) of the EAW Framework Decision. The latter provides that the EAW Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Articles 2 and 6 TEU.[24]

In line with the *Aranyosi* and *Căldăraru* test, the CJEU stressed that in the event the executing court possessed information that there is a real risk of breach of the right to fair trial because of systemic or generalised deficiencies vis-à-vis the independence of the issuing State's judiciary, it shall assess whether the accused incurs such a risk if she is surrendered to that State. Like the Advocate General's Opinion, the CJEU judgment placed the onus on national courts: It confirmed that the violation of fundamental rights protected by EU law can trigger an individual assessment by an executing judicial authority of the situation in their counterpart.

[23] LM judgment, paras 48, 63, 65.
[24] *LM* judgment, para 45.

When it came to the provision of guidance to a national court making an individual assessment about the execution of a EAW, the CJEU did not refer to the Advocate General's 'real risk of flagrant denial of justice' benchmark (although the same term was also used by the Irish High Court in its preliminary reference) which was broad and would have perhaps set the bar higher for the national judge. Instead the CJEU used the more familiar term 'real risk of breach of fundamental rights' as an aid to a national court making an individual assessment.[25] Despite such semantics, the threshold set by the CJEU in *LM* on the prevention of surrender is very high. The CJEU established that the executing court needed to have regard of the requirements of independence and impartiality in the issuing state (e.g. rules pertaining to the courts' composition; length of service; grounds of abstention, rejection and disciplinary procedures in place as well as dismissal of judges) in order to assess whether in the circumstances of the case at hand there are substantial grounds to believe that there is a real risk of breach of fundamental rights and that the accused will be exposed to that risk.

The CJEU noted that in its individual assessment, the Irish High Court could rely on the Commission's rule-of-law probe against Poland vis-à-vis the latter's breach of the values inherent in Article 2 TEU. The deficiencies concerning the independence of the issuing Polish courts included the lack of an independent constitutional review

[25] Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* [2016] EU:C:2016:198, paras 91, 94, 98. As already mentioned the *Aranyosi* and *Căldăraru* test confirms that postponement of the execution of a EAW can only take place where the requested person can demonstrate that i) there is a real risk of flagrant denial of justice on account of deficiencies affecting the system of justice of the issuing Member State and ii) that s/he will be exposed to that risk. Adopting the 'flagrant denial of justice' terminology used by the Irish High Court in its preliminary reference (see *LM judgment*, para 25), the Advocate General stressed (in para 72) that 'in order for the execution of a European arrest warrant to have to be postponed, it is not sufficient that there is a real risk of breach of the second paragraph of Article 47 of the Charter in the issuing Member State. There must be a real risk of flagrant denial of justice.' There is a lot of emphasis on the ECtHR case law in the Opinion using the 'flagrant denial' test as applied in relation to Article 6 ECHR (see paras 80-83 of the AG Opinion). Conversely, the CJEU stayed loyal to its *Aranyosi* and *Căldăraru* terminology highlighting that what matters is that 'the existence of 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, a right guaranteed by the second paragraph of Article 47 of the Charter…' Following the CJEU's preliminary ruling, the Irish judge attempted to clarify these two interpretations by pointing that: 'The case law emanating from the ECtHR as to the test being one of a flagrant denial of justice is well settled and it must be understood on the basis that the CJEU took that that aspect of the law as settled. Therefore, the essence of the right and the flagrant denial of the right are to be understood as one and the same.' See *Minister for Justice and Equality v Celmer No 5* [2018] IEHC 639, para 24.

and the absence of independence of the ordinary judiciary deriving from recent reform legislation. Ireland could, therefore, temporarily refrain (by way of exception) from executing the EAW in this case.[26] While this is true, the CJEU clarified that systemic and generalised deficiencies in the independence of the judiciary in Poland are not sufficient of themselves to amount to a real risk of Mr Celmer's right to a fair trial. The conclusion is that an individual risk test is always required to be undertaken by executing courts

5. Four important aspects of the *LM* judgment

The focus here is on four aspects where the ruling in *LM* makes a particular contribution: (A) the application of the *Aranyosi* and *Căldăraru* test in *LM*. The test relies upon principles of mutual trust and mutual recognition, and was designed to guide the control exercised by national courts on the execution of EAWs; (B) striking the balance between effectiveness of mutual recognition (a structural principle) and fundamental rights protection (a substantive principle); (C) establishing rules regarding the protection afforded to individuals in accordance with the principles of judicial independence and impartiality as general principles of EU law; and (D) protecting the rule of law in the EU as a foundational and overarching principle that encompasses general principles of EU law.

A. The *Aranyosi and Căldăraru* test

A distinction shall be drawn between a national court making an individual assessment (asking whether the particular suspect is at risk) to a national court making a general assessment (asking if everyone extradited to a defaulting Member State would face risks). It is clear that in *LM* only the first question was asked (and answered) – i.e. whether Mr Celmer is at risk. *LM* is, therefore, more of a fair trial case than one that concerns rule of law deficiencies in Poland and whether Member States shall generally refuse to extradite suspects as a result of those deficiencies. As such, the CJEU was right to apply its *Aranyosi and Căldăraru* test (thus acting more as a fundamental rights court) while abstaining from providing general guidance or a

[26] Having said that, we shall remind the reader that the CJEU maintains the position that refusal to execute a EAW is an exception to the principle of mutual recognition underlying the EAW mechanism and that exception must accordingly be interpreted strictly.

free pass to external rule-of-law scrutiny of the Polish government's backsliding by fellow national courts or otherwise (thus acting less as a constitutional court). In doing so, however, the CJEU made the standard for not granting an extradition request very high indeed.

In striking a balance between effectiveness of judicial cooperation and the protection of fundamental rights, the CJEU emphasised that Member States may only 'in exceptional cases' check whether another Member State has actually, in a specific case, observed the fundamental rights guaranteed by EU law.[27] The CJEU did not conduct a general assessment on Poland's breach of the obligation to ensure independence of the courts. Neither did it propose a drastic solution about the execution of all pending EAWs issued by Polish courts. This is because, as has been noted elsewhere, 'there is a substantial difference between fundamental rights and the independence of judiciary. Infringements of the latter require other legal mechanisms of protection' namely Article 7 TEU.[28] Instead, the CJEU proposed a case-by-case assessment requiring all executing courts to apply the two-tier *Aranyosi* and *Căldăraru* test for blocking the execution of EAWs. In this respect, the CJEU contributed to the precedential value attributed by the Court itself to its previous judgments and their binding effect on national courts.[29] It also avoided confrontation between the political process of Article 7 TEU and the role of the CJEU. While emphasising the close connection between fundamental rights and judicial independence, the CJEU decided to focus on the individual situation in *LM*. Let us now turn to the *Aranyosi and Căldăraru* test for not granting an extradition request and articulate the key ideas in the two limbs studied, as well as their limitations.

i) existence of systemic or generalised deficiencies

With regard to the existence of systemic or generalised deficiencies, the CJEU held that the executing court must build its case on a basis of material that is objective,

[27] *LM judgment*, para 43.

[28] A Frąckowiak-Adamska, 'Drawing Red Lines With No (Significant) Bite – Why an Individual Test Is Not Appropriate in the LM Case', VerfBlog,2018/7/30, https://verfassungsblog.de/drawing-red-lines-with-no-significant-bite-why-an-individual-test-is-not-appropriate-in-the-lm-case/

[29] See T Tridimas, 'Precedent and the Court of Justice: A Jurisprudence of Doubt' in J Dickson and P Eleftheriadis, Philosophical Foundations of EU Law (Oxford University Press, 2012), p.307.

reliable, specific and properly updated. The Court noted that beyond the Commission's reasoned proposal in accordance with Article 7(1) TEU, an important factor for the executing court in assessing the deficiency in question is the extent to which there is evidence of new national legislation that includes a remedy mechanism with regard to guaranteeing the right(s) in question. Although it was claimed by the CJEU that such legislation shall be effective (as opposed to merely symbolic) considering an extradition against the background of such evidence may not be always possible. This is the case when, for instance, evidence of new legislation can only be drawn from the information provided to the executing court by the national authorities of the defaulting Member State.

The CJEU's judgment in *Generalstaatsanwaltschaft* (decided in the same year as *LM*) in relation to conditions of detention in Hungary is helpful in this regard. It provides that information which is 'objective, reliable, specific and properly updated' may also be obtained from 'judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN.' [30] This addition to the first limb of the *Aranyosi and Căldăraru* test demonstrates synergy between different rule-of-law stakeholders at all levels. It also provides substantial resources for national judges called to conducting an individual assessment and a concrete inquiry prior to blocking the execution of a EAW.

On the downside, the CJEU's instructions in *Generalstaatsanwaltschaft* about the pool of evidence available regarding systemic or generalised deficiencies imply that whoever is in risk of being extradited must rely heavily on the availability of external resources as evidence that can be used in court. It may be relatively easy to find such material now as everyone's attention is on rule of law deficiencies in Poland and Hungary. But will this rule-of-law monitoring continue for as long as these

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

deficiencies are in place or will the focus of EU institutions, bodies of the Council of Europe, and the UN, turn somewhere else tomorrow leaving behind only outdated material?

It has been argued that the possible impact of the *LM* ruling is 'colossal' and could potentially exceed that of the *Aranyosi and Căldăraru* decision.[31] Indeed, handling national judges the keys to conduct a review of the jurisdiction of their European counterparts where a comprehensive violation of the rule of law is at issue is not a trivial matter. It provides national courts with a means of unilaterally enforcing justiciable rights within the permissible limits determined by EU law. While doing so, however, we cannot ignore the fact that this new competence carries the danger of reducing horizontal judicial cooperation based on mutual recognition. On the one hand, some issuing courts may be less likely than others to engage in a constructive dialogue with their counterparts. On the other hand, some executing courts may find it difficult to make sense of the CJEU's guidance in *LM* and take too narrow an approach to establishing systemic or generalised deficiencies.

ii) A risk of fundamental rights breach

The CJEU established that the executing judicial authority must assess whether, having regard to Mr Celmer's personal situation, as well as to the nature of the offence for which he was prosecuted and the factual context that formed the basis of the EAW, there were substantial grounds for believing that following his surrender he would run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial. This individual assessment, which is always required to be performed in order to ascertain whether the threshold for refusal of surrender has been reached, was more recently revisited in *Generalstaatsanwaltschaft*.[32] It was held that the executing judicial authority must assess solely the actual and precise conditions of detention of the person concerned that are relevant for determining whether that person concerned will be exposed to a

[31] Guest Editorial, (2018) CMLR, p993. The author also mentions that *LM* goes also beyond the *N.S.* decision (mentioned later in the annotation).
[32] Case C-220/18 PPU *Generalstaatsanwaltschaft* (2018) ECLI:EU:C:2018:589.

real risk of inhuman or degrading treatment within the meaning of Article 4 of the EU Charter of Fundamental Rights.

The CJEU established that an individual assessment was also necessary even where the issuing Member State has been the subject of a reasoned proposal of the Commission seeking a determination by the Council that there is a clear risk of a serious breach by that Member State of the values referred to in Article 2 TEU. The above assessment may seem time-consuming, yet it is compatible with the Treaty which (as mentioned above) does not confer competence to the Commission to make a finding about a clear breach of the rule of law. To suggest that the Commission's rule of law probe sufficed to automatically authorise a halt to a EAW request from Poland could be perceived as encroachment on the competences of the European Council.[33] Additionally, the CJEU confirmed that executing courts are bound to undertake an individual assessment of the situation of each person concerned even in the event the competent authority of the issuing Member State provides assurances by means of which a commitment is given that the person sought will not have her rights violated.[34]

The above guidance will need to be supplemented by giving specific consideration to the nature of the case in hand vis-à-vis what exactly it takes for the threshold of the *Aranyosi* and *Căldăra* test to be met. For instance, a case concerning threats to judicial independence in a Member State is very different to one regarding a specific fundamental right violation occurring by an agent of a Member State (as was the case in *Aranyosi* and *Căldăraru* with regard to Article 4 of the Charter). Hence, although *LM* is not concerned with the breadth and scale of the Polish problem, it cannot ignore it either. One cannot help, for instance, but notice the practical challenges regarding the application of the *Aranyosi* and *Căldăraru* test to the facts of *LM*. What appears particularly difficult with utilising the test in the context of *LM* is the shifting of the burden of proof on the requested person. This equals to asking the individual

[33] *LM* judgment, para 71.

[34] The CJEU mentioned that the issuing judicial authority shall produce upon request supplementary information and any objective material on any changes to the conditions for protecting the guarantee of judicial independence which may rule out the existence of that risk for the individual concerned. See also Case C-220/18 PPU *Generalstaatsanwaltschaft* (2018) ECLI:EU:C:2018:589 with regard to information about the conditions in which the accused person would be incarcerated.

concerned to demonstrate that the judicial reforms in question have affected the independence of the judge who will conduct her/his own hearing whilst being ignorant about the identity of that judge.

The CJEU was correct to tread carefully in the manner it confronted the Polish rule-of-law drawback. In doing so, however, it placed a hard burden on national judges. Take for instance the process of an executing judge receiving assurances from an issuing court about the extent to which a systematic erosion of the rule of law in the Member State requesting the transfer was such as to mean that there was a strong risk the accused would not receive a fair trial. Such issuing court could in most cases either be corrupt or under political pressure from the backsliding government in question and therefore not in a position to provide any form of assurances (either present or future) as to its independence. Even if Polish courts were to provide assurances in the present case, one could argue that these were more likely to be smoke and mirrors than fact.

At the same time, however, we need to consider that although judicial independence may be currently compromised in Poland, the judiciary is not a monolithic sector. Despite recent reforms, there may still be Polish courts that are independent. As such, executing judges need to be careful in their individual assessment not to be prejudiced against Poland in all situations. As the Advocate General rightly stressed in *LM*: 'it cannot be ruled out that, in certain situations, the courts of that Member State are capable of hearing a case with the independence required by the second paragraph of Article 47 of the Charter.'[35]

Beyond the above practical hurdles for national judges, the CJEU was successful in providing in *LM* an avenue by which national courts can protect the principle of judicial independence in light of evidence before them of another Member State's systemic or generalised deficiencies. Having said that, certain details are yet to be clarified regarding the second limb of the *Aranyosi* and *Căldăraru* test. These include, for instance, the extent to which the transfer of a criminal suspect to the issuing Member State can be refused if there is a risk of the individual concerned suffering

[35] See AG Opinion, para 103.

inhuman or degrading treatment even if there is no proof of systemic or generalised deficiencies.[36] Furthermore, while the CJEU has now established that the violation of a suspect's right to fair trial can limit the execution of a EAW it did not establish that the same is true with reference to other rights protected by the EU Charter of Fundamental Rights.

A different point concerns the extent to which EU law can require Member States positively or proactively to facilitate further claims made by a criminal suspect which are linked to her original case. To use a current example, the compatibility with fundamental rights of the way systemic or generalised deficiencies manifest themselves in other prisons or courts in which the suspect may possibly be held after surrender or be sentenced at a later stage following her extradition fall exclusively within the jurisdiction of the prisons and courts of the issuing Member State.[37] Even if a national court therefore decides against the execution of a EAW based on an individual assessment, this may only partially protect a suspect's fundamental rights. More issues will no doubt emerge in the course of future litigation and subsequent refinement of the individual test by the CJEU will be inevitable if not essential.

B. Mutual recognition and fundamental rights protection

While the execution of a EAW constitutes the default rule, refusal to execute such a warrant is intended to be an exception which must, on that basis, be interpreted strictly. The *LM* judgment clarifies the law pertaining to EU extradition procedure with regard to two issues: i) the interpretation of Article 1(3) of Framework Decision 2002/584 on the EAW (Member States must respect fundamental rights as enshrined in Article 6 TEU as well as the principle of legality)[38] and ii) the extent to which fundamental rights concerns can be taken into account and form a ground of non-execution of a EAW.

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[36] In Case C-578/16 PPU *C.K.* [2017] ECLI:EU:C:2017:127 the CJEU held in the context of the transfer of asylum seekers to another Member State that 'even where there are no substantial grounds for believing that there are systemic flaws in the Member State responsible for examining the application for asylum, the transfer of an asylum seeker within the framework of Regulation No 604/2013 can take place only in conditions which exclude the possibility that that transfer might result in a real and proven risk of the person concerned suffering inhuman or degrading treatment, within the meaning of that article' (para 98)

[37] See Case C-220/18 PPU *Generalstaatsanwaltschaft* (2018) ECLI:EU:C:2018:589

[38] Council Framework Decision 2002/584/JHA of June 2002 on the European arrest warrant and surrender procedures between Member States (OJ 2002 L190/1).

The CJEU confirmed in *LM* that executing judicial authorities are entitled to refrain from giving effect to a EAW on account of blatant risks of breach of the fundamental right to a fair trial by the issuing state. The *LM* outcome is, therefore, decisive for the 'constitution' of EU criminal law which is based on mutual recognition, the least contentious method for integration but one which nonetheless covers a wide range of judicial decisions in all stages of the criminal justice process.[39] We shall note that Framework Decision 2002/584 was the first instrument in EU criminal law to be adopted following the principle of mutual recognition (as opposed to harmonisation). Simultaneously, it is an instrument which although augments judicial cooperation it touches upon a number of fundamental rights – vis-à-vis the rights of the accused subject to criminal proceedings and surrender within this framework.

Indeed, the CJEU has historically restricted the avenues available for national courts to refuse to execute a EAW. Instead, it has given priority to the effectiveness of mutual recognition based on presumed mutual trust. The *LM* reasoning is therefore important because although the legality of the mutual recognition system established by the Framework Decision remains undisputed (as is its compatibility with fundamental rights)[40] the judgment sees the CJEU setting the boundaries pertaining to the extent to which the EU can sustain an automatic system of recognition based solely on presumed trust.

The literature on the principle of mutual recognition in EU criminal law is extensive and hence we are not going to delve into an analysis of its premises.[41] Suffice to say

[39] See for a list of mutual recognition instruments compiled in 2017: https://www.consilium.europa.eu/media/29668/eu-instruments-in-the-field-of-criminal-law.pdf

[40] See Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633. Also in *Melloni*, the CJEU pronounced the primacy of EU law (i.e. the EAW Framework Decision as amended by Framework Decision 2009/299/JHA) vis-à-vis *in absentia* judgments and held that Article 4a(1) of the Framework Decision was compatible with Articles 47 and 48(2) of the EU Charter of Fundamental Rights.

[41] L Klimek, Mutual Recognition of Judicial Decisions in European Criminal Law (Springer Verlag, 2017); 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' (Intersentia, 2015); C Janssens, The Principle of Mutual Recognition in the EU (Oxford University Press, 2013); K Lenaerts, 'The principle of Mutual Recogntion in the Area of Freedom, Security and Justice', University of Oxford, 30.01.2015. available from: https://www.law.ox.ac.uk/sites/files/oxlaw/the_principle_of_mutual_recognition_in_the_area_of_freedom_judge_lenaerts.pdf

for the purpose of this annotation that, against the logic of establishing common substantive rules, mutual recognition generally depends upon the Member States' tolerance of the diversity characterising national legal systems. It encourages cooperation between them through mutual trust and recognition of each other's practices. Accordingly, the CJEU's reference to the principles of mutual trust and mutual recognition in *LM* serves to highlight this fundamental premise based on Member States' sharing of a set of common values on which the EU is founded (Article 2 TEU).[42] In this context, the CJEU explains that national implementation of EU law in a Member State is based on the presumption that all other twenty-seven Member States comply with EU law (fundamental rights in particular). It implicitly recognises, however, that such a presumption is difficult to always sustain, especially in relation to maintaining a high level of mutual trust between the different actors which partake in the system.[43]

While we mentioned earlier the role of precedent in the case law and its constraining force of the CJEU, the approach of the Court in *LM* sets new precedent vis-a-vis the limits that EU imposes to the EAW system. At first glance, *LM* can be read as a decision that contests the CJEU's earlier findings starting with *Radu* (which concerned deprivation of liberty and forcible surrender of the suspect against Articles 5 and 6 ECHR), where the Court appeared unconvinced that mutual recognition could be refused on fair trial grounds.[44] The *LM* ruling also seems to be challenging the mutual recognition status quo of previous decisions such as *Melloni* (refusal to execute of a EAW request on fundamental rights grounds) and *Jeremy F* (possible right to an appeal suspending decisions which relate to the EAW) where the discretion left to Member States to protect fundamental rights was rather limited.[45] While these cases are important points of reference with regard to the evolution of fundamental rights as a ground of non-execution of a EAW, we shall emphasise that they dealt with purported national law limits to the EAW; whereas the CJEU in *LM* is imposing

[42] *LM* judgment, Para 35-37.

[43] See Joined Cases C-411/10 and C-493/10 *NS and ME* [2011] ECR I-13905 and the ECtHR's decision in *MSS* v. *Belgium and Greece*, Application no. 30696/09, Judgment of 21 January 2011.

[44] Case C-396/11 *Radu* (2011) ECLI:EU:C:2013:39. See for comment: E Xanthopoulou, '*Radu* judgment: a lost opportunity and a story of how mutual trust obsession shelved human rights' KSLR EU law blog, 27.03.2013. Available from: https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=416#.XBt68i2cais

[45] Case C-168/13 PPU *Jeremy F* (2013) ECLI:EU:C:2013:358

EU law limits to the EAW. This is perhaps one of the most important aspects of the decision which will no doubt be of particular interest to criminal lawyers.

As such, it can be argued that despite the shortcomings surrounding the specification of the application of the *Aranyosi* and *Căldăraru* test, the CJEU's formal recognition of fundamental rights as an EU law ground for non-execution of a EAW in *LM* is a welcome development. It both takes into account the post-Lisbon binding character of the Charter and relaxes the requirements of the EAW Framework Decision in producing a simplified and more effective system of surrender based on mutual recognition at all costs.[46] National courts are invited to partake in monitoring the observance of the rights enshrined in the EU Charter of Fundamental Rights in their counterparts in specific cases.[47] Such a bottom-up scrutiny, often leading to a preliminary reference, may also require national judges to temporarily refuse the execution of a EAW and flee from the obligation to extradite both for the purpose of prosecution as well as for the execution of a custodial sentence by taking full account of the application of Lisbon's human rights framework on the interpretation of the EAW.

Having said that, while the CJEU explicitly recognised in *LM* that the violation of the right to a fair trial under Article 47 of the EU Charter of Fundamental Rights constitutes a ground of non-execution of a EAW, this is subject to two caveats. First, such an exception can only be used in exceptional circumstances. Second, only once such circumstances (e.g. a high threshold of systemic deficiency[48]) have been established, limitations can be placed on the application of mutual recognition principles between Member States. As such, the *LM* ruling provides considerable

[46] We shall note that the discussion about the 'uneasiness in the actual implementation of the mutual recognition scheme' (see Fichera above, p. 168) vis-à-vis the grounds for refusal available in national law and the procedural divergence in the execution of the EAW between the European legal systems is hardly new and has been central in the relevant literature. See also T Konstadinides, 'The Europeanisation of Extradition: How Many Light Years Away to Mutual Confidence?' in C Eckes and T Konstadinides (eds.) *Crime within the Area of Freedom Security and Justice: A European Public Order* (Cambridge, Cambridge University Press, 2011), Chapter 7, pp.192-223.

[47] This adds to the post-Lisbon Directive on the European Investigation Order has introduced an optional ground for non-recognition or non-execution: where there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing state's obligations under Art. 6 TEU and the Charter (Art. 11(1)(f)). Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters [2014] OJ L130/1 (1 May 2014).

[48] See Joined Cases C-411/10 and C-493/10 *N.S.* (2011) ECLI:EU:C:2011:865.

opportunities for national courts but without going too far in allowing national judges to intervene on behalf of individual claimants suffering from a Member State's systemic deficiencies.

Interpreted in this manner, the CJEU avoided taking constitutional risks in *LM* while it indirectly contributed to addressing the problem caused by backsliding Member States. The decision does not seem to undermine the EU's aspirations to forge a 'European criminal justice area' based on mutual recognition. It compensates, however, for the lack of an EU specific legal basis / ground for refusal for fundamental rights breaches by issuing authorities, which for years left little choice to executing courts but to surrender criminal suspects. National judges had little choice to block the execution of a EAW even where the rights of the accused were not observed by the issuing state or where there was a high risk that they will be violated due to rule-of-law backsliding or other problems.[49] In this respect, the *LM* outcome pays homage to another precedent, namely the *N.S.* ruling which concerned asylum law and fundamental rights violations in the operation of mutual recognition.[50] Last, the CJEU's approach in *LM* is somewhat sympathetic to the view taken in a number of Member States where non-compliance of surrender with fundamental rights constitutes an express ground of refusal in their national law implementing the EAW Framework Decision.[51]

We shall not fail to mention that the principles emanating from the *LM* judgment are complementary to the existing grounds for non-execution of a EAW and guarantees

[49] Mitsilegas claims that 'Non-compliance with fundamental rights is not, however, included as a ground to refuse to execute a European Arrest Warrant. Rather, the general provision of article 1(3) includes the general statement that 'this 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 TEU' See V Mitsilegas, 'The principle of mutual recognition in EU criminal law in V Mitsilegas, M Bergstrom and T Konstadinides (eds.) *Research Handbook on EU Criminal Law* (Cheltenham, Edward Elgar, 2016)

[50] Joined Cases C-411/10 and C-493/10 *N.S.* (2011) ECLI:EU:C:2011:865. See Case Report by S Lieven (2011) 14 (2) *European Journal of Migration Law* 223.

[51] On the implementation of the EAW Framework Decision, see Gisèle van Tiggelen, Anne Weyembergh and Laura Surano (eds), *The Future of Mutual Recognition in Criminal Matters* (Brussels, Éditions de l'Université de Bruxelles, 2009); and Valsamis Mitsilegas, 'The Area of Freedom, Security and Justice from Amsterdam to Lisbon: Challenges of Implementation, Constitutionality and Fundamental Rights' in Julia Laffranque (ed.), *The Area of Freedom, Security and Justice, including Information Society Issues*, *Reports of the XXV FIDE Congress* (Tallinn, 2012), vol. 3, pp. 21–142, and national Reports included therein.

inherent in Articles 3-5 and recitals 12, 13 of the Framework Decision which have been present since the inception of the EAW. It remains to see how the CJEU will balance the full effectiveness of mutual recognition mechanisms and the protection of the rights of the person concerned in an individualised case-by-case assessment of fundamental rights implications of the execution of a EAW, giving *LM* the power of precedent.

C. The protection afforded to individuals in accordance with the principles of judicial independence and impartiality

The CJEU confirmed that the fundamental right to a fair trial before an independent tribunal, is enshrined in Article 6(1) of the ECHR, a provision which corresponds to the second paragraph of Article 47 of the Charter.[52] The CJEU interpreted judicial independence narrowly as the right of the accused to an independent court pertaining to the right to a fair trial (as opposed to the ability of a judge to decide a case free from government pressure). Likewise, the CJEU provided an analogous account of the rules it considered to be inalienable to the guarantees of independence and impartiality.[53]

In this respect, *LM* can be added to the line of case law inaugurated by *Associação Sindical* vis-à-vis the protection afforded to individuals in accordance with the principles of independence and impartiality.[54] Having said that, we need to note that the reference in *LM* was framed differently to *Associação Sindical* which was a special case altogether dealing with the remuneration of judges in Portugal and its connection with judicial independence. While, therefore, in *Associação Sindical* the CJEU established that judicial independence derives from Articles 2, 4(3) and 19

[52] *LM* judgment, para 33

[53] Ibid, paras 60-70 are particularly significant. The CJEU stressed that the requirement that courts be independent and impartial has two aspects: i) They need to exercise their functions wholly autonomously, shielded from external interventions or pressure, and ii) they need to be impartial, which entails maintaining an equal distance from the parties to the proceedings and their respective interests. We shall also note that the CJEU has held that the concept of judicial authority is an autonomous concept and not limited to courts but includes authorities charged with the administration of justice. See Case C-452/16 PPU *Poltorak* (2016) ECLI:EU:C:2016:858; Case C-477/16 PPU *Kovalkovas* (2016) ECLI:EU:C:2016:861.

[54] Case C-64/16 *Associação Sindical dos Juízes Portugueses* [2018] EU:C:2018:117. See for a detailed analysis: L Pech and S Platon, 'Judicial independence under threat: The Court of Justice to the rescue *Associação Sindical dos Juízes Portugueses*' (2018) 55 *Common Market Law Review* 1.

TEU, in *LM* the CJEU focused primarily on Article 47 of the EU Charter of Fundamental Rights as the source of judicial independence. It stressed that:

> The principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter. The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law.[55]

The CJEU, therefore, connected judicial independence with effective judicial review and the right to an effective remedy before a court. The CJEU's extension of the scope of application of the general principle of effective judicial protection to EU criminal law highlights further that this is a shared value between Member States also protected by Article 2 TEU. Mutual trust between Member States and their courts is based on this fundamental premise. The CJEU's *LM* decision is therefore a reminder to Member States to take positive steps to maintain the high level of fundamental rights protection which will in turn help maintain a functioning system of mutual recognition.

Apart from the adoption of legislation to protect fundamental rights, positive steps include national courts being forward about expressing concerns in future litigation concerning rule of law compliance in other Member States and opening channels of communication with their counterparts vis-à-vis the provision of supplementary information. Any further information provided by the issuing courts is important for executing judges in order to determine the foreseeability of breach of the fundamental right in question in relation to the concerned individual. As mentioned, this is perhaps easier done where the execution of a EAW relates to the conditions in which the criminal suspect is detained (i.e. that s/he will not suffer inhuman or degrading

[55] Case C-64/16 *Associação Sindical dos Juízes Portugueses* [2018] EU:C:2018:117, paras 35, 36.

treatment) as opposed to a situation where the quality and independence of a Member State's justice system as a whole is put into question.[56]

What is more, the legacy of the *LM* decision is somewhat limited insofar as national courts still need to act in pursuance of recital 10 of the EAW Framework Decision and may by means of exception suspend a warrant in very limited circumstances.[57] More guidance is needed, for instance, by the CJEU on the length of postponement of a EAW execution or the extent to which a national judge may express her dissatisfaction with another State's assurances about rectifying the situation.[58] To draw from the situation in *LM,* if Ireland chose to systematically refuse to extradite Mr Celmer (as opposed to postponing his extradition until the Polish authorities provided assurances that they rectified the situation[59]) this would amount to a breach of recital 10 of the Framework Decision[60]; the constitutional principle of mutual trust; and the principle of equality between Member States as laid down in Article 4 TEU.[61] In other words, Ireland would be the defaulting Member State.

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[56] This was flagged up in Case C-220/18 PPU *Generalstaatsanwaltschaft* (2018) ECLI:EU:C:2018:589. Para 64: 'Since the issue in the main proceedings is the execution of a specific EAW and not the quality of the issuing Member State's prison system as a whole, I believe that, if the issuing Member State's authorities make a commitment that the particular conditions in which the person sought will be detained do not entail a real risk that that person will suffer inhuman or degrading treatment, the executing judicial authority must attach to that commitment the significance which it deserves. As the expression of an obligation which has been formally assumed, if that commitment is breached, it may be relied on by the person sought before the judicial authority of the issuing Member State.'

[57] See paras 70-72 of the CJEU's decision in *LM* which provided that the implementation of the EAW may only be suspended where a breach of Article 2 TEU has occurred – the determination of which falls to the European Council alone acting in accordance with Article 7 TEU.

[58] As the CJEU stressed in Case C-220/18 PPU *Generalstaatsanwaltschaft* (2018) ECLI:EU:C:2018:589, para 81 'I say *postpone* and not *refuse* because the case-law established in *Aranyosi* does not mean inevitably that, if a risk of infringement of Article 4 of the Charter is identified which is not general and abstract but rather specific and personal, the executing judicial authority must refuse to allow the surrender of the person sought.'

[59] It, therefore, suffices in the post-*LM* world that the Polish government recently decided to retreat on forcing Supreme Court judges into early retirement.

[60] Recital 10 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant. OJ L190 18.7.2002: The mechanism of the EAW 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.

[61] Opinion of the Advocate General, para 99. The Advocate General also emphasised the importance of the executing court asking its counterpart issuing court for any supplementary information that can assist it in its decision to postpone.

D. Rule of Law Protection in the European Union

The CJEU's *LM* judgment can be characterised as a balancing act. One the one hand, there is evidence of self-restraint from the part of the CJEU acting within its sphere of competence. The CJEU abstains from taking the situation in its hands and acting as a rule of law enforcer by suspending all EAW requests from Poland in response to the Council's Article 7 TEU ennui. One the other hand, the CJEU recognises its aptness to address a constitutional epidemic via legal means (as opposed to political) and tackle the wide and unchecked powers of the justice system in Poland – emphasising their inconsistency with those granted in a democratic state subject to the rule of law.[62]

Certain commentators agreed prior to the *LM* judgment that 'the Court might want to take the opportunity to send another signal to the Polish government that further attempts to undermine the independence of the judiciary would be subject to the scrutiny of Luxembourg.'[63] This is what the CJEU did to a certain extent in *LM* by enabling executing judicial authorities and individual litigants to rely upon the European Commission's Article 7 TEU rule of law probe in light of the serious deterioration of EU values in Poland. The CJEU did not undermine the Commission's investigation. Far from it, it 'added bite to Article 7 TEU' by attributing to the Commission's reasoned proposal (not a source of law in its own right) constitutional effects.[64]

The *LM* case, as well as the separate legal cases opened pertaining to Polish reforms of the judiciary (including *Commission v Poland*[65] and a preliminary reference made

[62] See *LM* judgment, para 22.

[63] M Bonelli and M Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary' (2018) 14 (3) *European Constitutional Law Review* 622.

[64] A von Bogdandy et al, 'Drawing Red Lines and Giving (Some) Bite – the CJEU's Deficiencies Judgment on the European Rule of Law', VerfBlog, 2018/8/03, https://verfassungsblog.de/drawing-red-lines-and-giving-some-bite-the-cjeus-deficiencies-judgment-on-the-european-rule-of-law/

[65] Case C-619/18 R *Commission v Poland (independence of Polish Supreme Court)* (2018) ECLI:EU:C:2018:910. The Advocate General Opinion will come out on 11 April 2019. See also Joined cases C-585/18 C-624/18 C-625/18 (independence of Polish Supreme Court's disciplinary chamber) on 19 March 2019.

by the Polish Supreme Court itself[66]) provide the CJEU with new possibilities for rule-of-law intervention. The fact that rule of law related cases increasingly find their way in the courtroom provides important ammunition for judges because neither a referring court nor the CJEU has competence to find a breach of the rule of law under the procedure provided for in Article 7 TEU. Beyond the limited competence of the CJEU under Article 7 TEU to review procedure (but not substance) there are noticeable difficulties in operationalising the political mechanism that Article 7 TEU establishes.[67] As such, *LM* is significant as it initiates a process whereby the CJEU becomes actively involved in conserving the values and sustainability of Article 2 TEU. As a result, rule of law enforcement gradually becomes a shared domain between the political and judicial institutions.

Of course, it would be misleading to claim that the CJEU has had a spectator role in relation to the rule of law in Poland. So far it has been able to impliedly address rule of law related breaches in Poland in direct actions launched by the Commission for failure to fulfil its obligations under Article 258 TFEU. For instance, in the *Białowieża Forest* case, the CJEU justified the imposition of a fine on Poland in interim proceedings as a means to guarantee the effective application of EU law (the Habitats Directive 2013/17/EU and the Birds Directive 2009/147/EC), describing such application as 'an essential component of the rule of law, a value enshrined in Article 2 TEU and on which the European Union is founded'.[68] Here the rule of law terminology was used to reinforce Polish compliance with EU secondary legislation.

LM is the next milestone in this process compensating for the slow political rule-of-law enforcement pace. The CJEU connected the dots between political and juridical rule-of-law monitoring by supporting the Commission's rule-of-law monitoring and warning against Poland. It confirmed that maintaining the independence of judicial

[66] See A Sikora, 'The CJEU and the rule of law in Poland: Note on the Polish Supreme Court preliminary ruling request of 2 August 2018, EU Law Analysis, 04.08.2018, Available from: http://eulawanalysis.blogspot.com/2018/08/the-cjeu-and-rule-of-law-in-poland-note.html

[67] See C Closa and D Kochenov, *Reinforcing rule of law oversight in the EU* (Cambridge University Press, 2018).

[68] Case C-441/17, *Commission v Poland* [2018] ECLI:EU:C:2018:255, See Order of the Vice-President of the Court of 27 July 2017, ECLI:EU:C:2017:877, para 102. It was held that the Polish logging in the forest breached the EU Habitats and Wild Birds Directives. The CJEU granted an order ex parte (without hearing Poland) to stop. Poland ignored the CJEU and the Court issued a second order imposing a €100,000 fine per day for failure to comply.

authorities (an issue which has been at the epicentre of the Article 7 TEU proceedings against Poland) is essential in order to ensure the effective judicial protection of individuals, including in the context of the execution of the EAW for the purpose of their prosecution or execution of a custodial sentence or detention order against them.

The CJEU has therefore confirmed or, to put differently, constitutionalised the findings of the Commission and other international bodies with regard to Polish defiant attitude towards EU fundamental values. Not only did the CJEU abstained from calling the shots in *LM,* it also allowed sufficient space for national courts to determine whether the measures adopted by a counterpart Member State breach the rule of law. Commentators have not unanimously welcomed the CJEU's approach. One annotation on the *LM* judgment noted that the CJEU could 'go beyond its case law and frame the case primarily as a problem of rule of law' ordering the overall suspension of EAW surrenders to Poland until it is satisfied that the problem is remedied.[69] I disagree with this position, as it is obvious that such a solution would have not been compatible with the principle of conferral. Observance of the rule of law also includes the principle of conferral laid out in Article 5 (1) and (2) TEU which governs the competences of EU Institutions. The principle of loyalty in Article 4 (3) TEU is also applicable to EU action, ensuring that EU Institutions are under a duty to show respect to the Member States when they exercise their powers under the Treaty.[70]

We shall remind the reader that neither the Court nor the Commission have the competence in the Treaty to make a finding of a clear breach of the rule of law. Such competence lies in the political realm with the European Council having the last word – which as it known it is yet to take action.[71] The *LM* ruling, therefore, indicates that the CJEU is acutely aware of its boundaries in finding systemic or generalised deficiencies in the Member States. It knows that the case raises primarily a problem of

[69] 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', VerfBlog,2018/7/29, https://verfassungsblog.de/the-cjeu-in-the-celmer-case-one-step-forward-two-steps-back-for-upholding-the-rule-of-law-within-the-eu

[70] See T Konstadinides. *The Rule of Law in the EU: The Internal Dimension* (Hart Publishing, 2017), p.87; See also C Hillion, 'Mixity and coherence: The significance of the duty of cooperation' In: C Hillion and P Koutrakos (eds.) *Mixed Agreements Revisited.* (Hart Publishing, 2010)

[71] Opinion of the Advocate General, para 102.

rule of law deficit in Poland. Yet, the CJEU appreciates that it has been asked a different question by the Irish High Court, the resolution of which would add a stone to fill the empty space leading up to the Polish problem.

Whether or not *LM* will be remembered as a masterful manoeuvre from the CJEU to avoid criticism of centralisation or an act of good will to include domestic courts (or even shifting the burden on them) in rule-of-law enforcement remains to be seen. What is certain is that *LM* creates a tall order for some national judges who will be handed the task to discover systemic or generalised deficiencies in other Member States in order to protect individuals from unfair prosecution. As such, the CJEU's guidance on the proper interpretation of EU law will be central in the course of infringement proceedings brought by the Commission against backsliding Member States or in preliminary ruling requests regarding concerns expressed by national courts because of a systemic deficiency in the rule of law in one of their counterparts.

6. Conclusion

Additional to the efforts of the EU political institutions to add substance to European values, the CJEU's contribution is valuable in establishing that judicial independence is constitutionally protected as an essential component of the rule of law. The CJEU has gone beyond interpreting judicial independence as the ability of a judge to decide a case free from government pressure. It has confirmed in *LM* that judicial independence is imperative for the protection of fundamental rights within the EU legal order. At the same time, however, *LM* poses questions about the appropriateness of the test to assess systemic deficiencies in the Member States, the risks inflicted upon the principle of mutual recognition caused by the review of jurisdiction of another Member State as well as the CJEU's mandate to protect the rule of law.

With reference to the test to assess systemic deficiencies in the Member States, the CJEU confronted some of the challenges inherent in the mutual recognition presumption that dominates EU criminal justice. In balancing the compatibility of mutual recognition and fundamental rights protection, the CJEU ensured that mutual trust is not applied automatically and blindly. At the same time the question stands as to whether executing courts will progressively discontinue surrendering criminal

suspects to the issuing authorities of other Member States as a result of the 'real risk' and 'substantive grounds' test applied by the CJEU.

Indeed the CJEU placed the onus on national courts to determine the modalities of horizontal judicial cooperation in case of systemic or generalised deficiencies in the issuing state. Yet, the application of the *Aranyosi and Căldăraru* test may prove problematic in practice where, as in the *LM* case, the executing authorities of a Member State aspire to protect a suspect because of a rule of law crisis that has been taking place in the issuing state but are not entirely convinced with the results of their investigation regarding the substantial issues of a case. Following the *LM* preliminary ruling, Ms Justice Donnelly of the Irish High Court ordered that the extradition of Mr Celmer takes place. She concluded that there was no real risk that Mr Celmer would face a 'flagrant denial of his right to a fair trial' on surrender to Poland.[72] It is worth noting that the Irish High Court emphasised that the case was being made by reference to the test of 'flagrant denial' and remarked that any diversion from that standard would have been highlighted in the CJEU's judgment.[73] Following the judgment of the Irish High Court, Mr Celmer sought leave to appeal the order for his extradition to Poland. He was granted leave to appeal before the Supreme Court of Ireland in December 2018 and his case is pending judgment.[74]

Perhaps more often than anticipated by the CJEU we are going to see executing courts' decisions appealed by individuals in higher national courts which may in turn seek a preliminary ruling from the Court. National judges will be asking the CJEU about the permissible level of deviation allowed from the principle of mutual recognition in light of the evidence of deficiencies they have in front of them. They will then apply the CJEU's preliminary ruling to the facts of the case which will confirm the extent to which a criminal suspect's fundamental rights can be protected vis-à-vis the authority to which she is subjected.

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[72] See *Minister for Justice and Equality v Celmer (No 5)* [2018] IEHC 639, paras 11onwards. See for case analysis: C Bracken, 'Episode 5 of the Celmer Saga – The Irish High Court Holds Back', *VerfBlog,* 2018/11/28, Available from https://verfassungsblog.de/episode-5-of-the-celmer-saga-the-irish-high-court-holds-back/, DOI: https://doi.org/10.17176/20181128-140802-0.

[73] *Celmer (No 5)*, para 24

[74] Irish Times, 'Supreme Court to hear further extradition appeal by Artur Celmer', 4 March 2019.

Given the above, can we be certain that the *Aranyosi and Căldăraru* test brings national judges closer to the EU law enforcement landscape? As a commentator puts it: 'at least some questions arising after the *Aranyosi* decision have been answered' with regard to the use of the Charter's provisions to refrain from executing a EAW. Yet, in their quest for supplementary information from their counterparts in another Member State about the state of fundamental rights protection as well as any guarantees for the individual national judges will be confronted with embarrassing situations. Inter alia, they will sometimes find themselves asking their European counterparts whether they are 'independent'. Furthermore, the newly acquired power of supervision offered to national judges cannot preclude cases in which the 'non-independent' Polish judges may decide to temporarily block the execution of a EAW where the suspect in question is refusing to be extradited from Poland to another Member State in which laws are not equally enforced and independently adjudicated.

Surely, one can think of numerous worst-case scenarios where the CJEU may come to regret the contribution of the *LM* decision on the existence of additional grounds for non-execution of a EAW. Indeed, the fine details of conducting an individual and specific assessment of the concrete risks in each case can be refined. As explained, what constitutes a 'blatant risk' can be easy to ascertain for the executing judge when the EU political institutions have conducted a rule-of-law investigation against the requesting state, as it was the case in *LM* in relation to Poland. But is the CJEU ready to draw parallels with the ECtHR's findings in *Tarakhel* (regarding the importance of ensuring fundamental rights in the Dublin system) in a case where generalised systemic deficiencies in the issuing state have not been first ascertained by the EU Institutions?[75] Like the *LM* ruling, more cases will be returned to Member States for

[75] *Tarakhel v Switzerland* (2014) 29217/12. In this case concerning the transfer of asylum seekers from Switzerland to Italy, there were no allegations relating to flaws in Italy's asylum procedures including detention. The applicants' Article 3 ECHR argument was based on living conditions in Italian detention centres. Similar to the CJEU, the ECtHR required the Swiss authorities to obtain specific assurances as to the treatment of vulnerable individuals upon their return to Italy. It also stressed that the presumption of compliance with fundamental rights is rebuttable. By contrast to the CJEU's approach, however, the ECtHR took into account the applicants' vulnerability (family with children) and decided that individuals could be protected even where the problems they encounter in the responsible Member State are not per se 'systematic'. This finding goes against the CJEU's decision in Case C-394/12 *Abdullahi* where the Court highlighted 'systematic deficiencies' in the asylum procedure or 'system deficiencies' in reception conditions as the only ways to challenge transfer under the Dublin system. See also *MSS v Belgium* (2011) 53 EHRR 2 and commentary by S Motz, '*Tarakhel v Switzerland*' (2015) *Journal of Immigration, Asylum and National Law* 59.

an assessment of the merits, and there are going to be more extradition proceedings in the Member States where similar issues will emerge.

Some of these cases will eventually find their way to the ECtHR when all appeals before national courts have been exhausted. Like in *Tarakhel*, the ECtHR would be able to assess whether the practice and interpretation of the EAW by a Contracting party is in line with the ECHR. Despite future applicants presenting a strong case, the ECtHR may adopt a stricter stance where contrary to *Tarakhel* the applicants' special vulnerability threshold is low. We shall highlight that although the ECtHR confirmed that a softer obligation lays on Member States in cases in which the risk of fundamental rights breaches is not proven by the general situation in the concerned Member State, it paid particular attention on the applicants' individual circumstances and efficacy of assurances applying in the context of removals to Member States. Hence, the ECtHR's interpretation ensures compliance with the principle of mutual recognition (as it does with the principle of non-refoulement). Last, the ECtHR's attitude of deference to national decision-makers, which often comes at the expense of the rights at issue, has hardly changed as a result of *Tarakhel*.[76] Hence, one might wonder whether Member States will comply and fulfil their human rights obligations in the context of asylum or extradition as a result of the case law of the ECtHR.

Moving on to consider the risks inflicted upon the principle of mutual recognition caused by the review of jurisdiction of another Member State, even though the divergent practice regarding trial and detention in different Member States undermine the CJEU's mutual recognition principle, it is doubted that the CJEU will in future deny its significance as the cornerstone of EU criminal law. Since its constitutionalisation by the Lisbon Treaty, mutual recognition is here to stay and define the conduct of Member States in the majority of criminal cases given that certain preconditions are met. Mrs Justice Donnely's post-*LM* judgment confirms this position although it was doubtful that Poland was fulfilling its human rights obligations. She stressed that the facts of *Celmer* did not reach the 'high threshold' necessary to prevent his surrender to Poland in accordance with the principles laid

[76] See A Spalding, '*Tarakhel v Switzerland*: The ECtHR Finally Cracks Down on Italy? (2015) *Border Criiminologies*. Available at: http://bordercriminologies.law.ox.ac.uk/tarakhel-v-switzerland/

down by the CJEU.[77] This was notwithstanding the earlier finding of the Irish High Court of the existence of generalised and systemic violations to the independence of Poland's judiciary.[78]

Last, as regards the CJEU's mandate to protect the rule of law, the *LM* judgment is symbolic that the development of the EU rule of law's application in practice has been led not merely by legislative development but also by the CJEU in its jurisprudence beginning with *Les Verts* and developed thereafter, most recently in cases like *Associação Sindical.* Enabling the CJEU to offer its own perspective on the matter, however reticently, carries considerable practical significance. Compartmentalising the problems in Poland and addressing specific EU law breaches through the lenses of fundamental rights adds to the existing arsenal available to the EU Institutions under Article 258 TFEU and Article 7 TEU to enforce the rule of law in backsliding Member States. Moreover, by elevating effective judicial protection of individuals' rights under EU law referred to in Article 19(1) TEU and Article 47 of the Charter, the CJEU is taking ownership of the EU Charter of Fundamental Rights. Not only does it solidify its reputation as a fundamental rights court but it also empowers individuals to defend common values which are gradually becoming uncommon in some Member States. The *LM* decision is a small victory, but a victory nonetheless especially in raising awareness about systemic fair trial issues in the Member States and placing weight on diplomatic assurances which guarantee fair trial rights.

[77] See *The Minister for Justice and Equality v Artur Celmer Celmer (No 5)* [2018] IEHC 639, paras 68, 123.

[78] See *Minister for Justice and Equality v Artur Celmer (No 1)* [2018] IEHC 119; *The Minister for Justice and Equality v Artur Celmer (No 3)* [2018] IEHC 153; *The Minister for Justice and Equality v Artur Celmer Celmer (No 5)* [2018] IEHC 639, para 93