Universitat Pompeu Fabra Barcelona

Balancing Judicial Independence and Mutual Recognition:

The CJEU's case – law on the European Arrest Warrant and Fundamental Rights Protection

MASTER'S THESIS

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ABSTRACT

Faced with attacks in certain EU states against the rule of law and which affect judicial independence, the Court of Justice of the European Union has been swamped by a series of preliminary questions where Member States receiving EAWs from those countries where such attacks are taking place are faced with the dilemma of whether should they execute the warrants, fearing that, if executed, they will be sending the individuals concerned to courts where their fundamental right to effective judicial protection will not be upheld.

Against this background, the CJEU applied a mechanism consisting of a "double" test to determine whether the EAW should be executed, given the circumstances of each case. However, after being used on numerous occasions, this system has presented several problems. The aim of this Master Thesis is to highlight these problems and propose certain reformulations that allow for a better approach to this type of scenario.

Key words: Judicial independence, fundamental rights, mutual recognition, LM case, EAW.

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ABBREVIATIONS

CJEU	Court of Justice of the European Union
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights
EU	European Union
FDEAW	Framework Decision on the European Arrest Warrant
TEU	Treaty of the European Union

1. INTRODUCTION

The genesis of the European Union lies in the aftermath of the II World War, when there was a great desire for cohesion between the European countries. In such a dire climate, an aspiration for European integration, though mainly in the economic field at the very beginning, seemed more desirable than what the current populists' movements make it out to be.

Those first three European Communities have come a long way since then, making up nowadays the European Union (hereinafter, "EU") and aspiring for objectives that are far from just economic. The EU has moved from, inter alia, the ambition to reach an interior market without borders to the construction of the Area of Freedom, Security, and Justice.

However, why is it that in the moment of greater integration, there is such a high resistance to push for the European values and to stay in the Union?

While there is a tendency all over the globe to move towards these more authoritarian regimes[1], for the purpose of this research the focus will be mainly set on Hungary and Poland, since they are both the most critical cases within the European Union at the moment.

In 2010, Alliance of Young Democrats–Hungarian Civic Union (Fidesz) came to power in Hungary with a constitutional majority in Parliament and with Viktor Orbán as its leader. Since then, a series of severe attacks to the rule of law have been carried out, being one of the most relevant of those attacks the capturing of the judiciary by the executive, as well as the amendments to the Constitution[2].

In a speech in 2014, Viktor Orbán stated that "we must break with liberal principles and methods of social organisation, and in general with the liberal understanding of society"[3]. Hungary has since then reached such a dreadful state that it

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[1] Marina Nord et al., *Democracy Report 2024: Democracy Winning and Losing at the Ballot* (University of Gothenburg: V-Dem Institute, 2024), 11, 19.

[2] For a more thorough explanation of what is the current situation in Hungary and all the attacks that have been carried out to destroy the Rule of Law in this state, we recommend the readings of Kumush Suyunova, 'The Conflict between the Principles of the National Identity of Member States and Values of European Union Such as Rule of Law, Respect for Human Rights and Liberal Democracy – Case Study of Hungary', *International and Comparative Law Review* 20, no. 2 (1 December 2020): 159–73, https://doi.org/10.2478/iclr-2020-0022.;

[3] Viktor Orbán, "Speech at the 25th Bálványos Summer Free University and Student Camp," transcript of speech delivered at Tusnádfürdő (Băile Tuşnad), Romania, July 26, 2014, https://2015-

has been disregarded as a democracy by many[4], being categorised by Freedom House as a transnational or hybrid regime, located in the grey zone between democracy and autocracy[5].

On the other hand, after the elections of 2015, Law and Justice (*Prawo i Sprawiedliwość*, in Polish; hereinafter "PiS") became the ruling party in Poland and started to carry out a capture of the judiciary and to informally modify the Constitution[6].

During its mandate, the PiS also undermined the Rule of Law through several measures: faulty appointments to the Constitutional Tribunal and failure to publish key rulings, along with changes to the National Council of the Judiciary (hereinafter, "NCJ") that compromised judicial independence[7]; merging the roles of Public Prosecutor and Minister for Justice, granting the latter authority to intervene in prosecutions and discipline court presidents, potentially intimidating them and affecting justice administration; lowering the retirement age for judges to create vacancies filled by political appointees via the restructured NCJ; and compromising the Constitutional Court's efficacy and integrity by failing to ensure laws adhered to the Constitution, thereby impacting the entire criminal justice system[8].

Taking into consideration all these events, that are not only taking place in Poland and Hungary, though they are the paramount examples, it seems sensible to consider that there is a Rule of Law backsliding problem in some European Union Member States.

2019.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp (accessed June 4, 2024).

[4] European Parliament, *Resolution of 15 September 2022 on the Proposal for a Council Decision Determining, Pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on Which the Union Is Founded (2018/0902R(NLE))*, p. Y.

[5] Freedom House, "Hungary," *Nations in Transit 2023* (2023), https://freedomhouse.org/country/hungary/nations-transit/2023

[6] For further readings into the situation of Poland: Laurent Pech, Patryk Wachowiec, and Dariusz Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action', *Hague Journal on the Rule of Law* 13, no. 1 (April 2021): 1–43, https://doi.org/10.1007/s40803-021-00151-9.; Tímea Drinóczi and Agnieszka Bień-Kacała, 'Illiberal Constitutionalism: The Case of Hungary and Poland', *German Law Journal* 20, no. 8 (December 2019): 1140–66, https://doi.org/10.1017/glj.2019.83.

[7] The capture of the Constitutional Court can be seen in some of the few published resolutions of the Tribunal, inter alia: Constitutional Court of Poland. Case no. U 2/20, 20 April 2020.

[8] Despite all of this, there have been recent changes in the Polish government after the last elections held in the fall of 2023. This event gives hope to the future, since the new ruling coalition has shown a more Pro – EU spirit and is trying to reverse all the attacks carried out to the rule of law by the previous government, though it might take some time given the gravity of the measures carried out by the previous government. For more information on the new ruling coalition: Wojciech Kość, "Poland's Donald Tusk, Civic Coalition, Opposition Parties Reach Agreement," *Politico*, November 10th, 2023, https://www.politico.eu/article/poland-donald-tusk-civic-coalition-opposition-parties-reach-agreement/. (Accessed on June 11th 2024)

In order not to go too deep into a theoretical question as to what Rule of Law backsliding means and entails, for the purposes of this research we refer to it as a process carried out in a State through which the Rule of Law in that place is put at stake via several attacks to its democratic principles[9]. A process like this can lead to the consolidation of electoral autocracies, as well as it not only affects the citizens of one of these EU Member States but the whole EU itself, given that there's an increasing reliance between the Member States[10].

In the following master's thesis, we will be discussing how these issues with regards to the Rule of Law and judicial independence might interfere with balancing mutual recognition systems under European Union law and the protection of fundamental rights, specifically focusing on the double – step test developed by the Court of Justice of the European Union (hereinafter, "CJEU").

The first section consists of an explanation on what the rule of law and judicial independence entail, what are the main characteristics of these two concepts, how they are interconnected and what is their relevance within the European Union law framework.

In the second section, the concepts of mutual trust and mutual recognition are explained as well as the role they play in upholding the European Union's integration and the consolidation of the Area of Freedom, Security, and Justice. In this part of the thesis there is also a brief explanation of the Framework Decision 2002/548/EC and its most relevant concepts, given the importance it holds for the purpose of this research.

The third section explores the mechanism developed by the CJEU to balance the principle of mutual recognition and the protection of fundamental rights, going from the original test to the one used for cases of lack of judicial independence. This section also analyses the multiple issues that arise while implementing the system developed by the CJEU.

[9] "The process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long – term rule of the dominant party" Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU', *Cambridge Yearbook of European Legal Studies* 19 (December 2017): 10, https://doi.org/10.1017/cel.2017.9.

[10] This is shown, inter alia, by the judicial interdependence consolidated by the Area of Freedom, Security, and Justice.

The fourth section recapitulates the explored possible ways in which the CJEU could improve the mechanism proposed to balance mutual recognition and fundamental rights protection, mainly with regards to scenarios where there is a lack of judicial independence, and with a special focus on what could be done to the individual assessment.

2. THE RULE OF LAW AND JUDICIAL INDEPENDENCE

The second paragraph of article 19 (1) of the Treaty of the European Union (hereinafter, "TEU") states that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union Law". The CJEU considers that this article gives "concrete expression to the value of the rule of law stated in Article 2 TEU"[11].

But what is the Rule of Law? Despite being a foundational principle of many of our legal system since centuries ago, there is still great discussion and contestation about what the Rule of Law entails and what should be done to protect it and to promote it. In very simple terms, the Rule of Law could be described as one of the core principles that governs any democratic society where both the State authorities and individuals are bound by the Law and can challenge the effects stemming from it before an independent judiciary[12].

Though it is true that there is no unanimous theoretical consensus when it comes to defining what the Rule of Law is, the CJEU has stated that the European Union "is a union based on the rule of law in which individual parties have the right to challenge before the courts the legality of any action or other national measure relating to the application to them of an EU act".

Keeping in mind that there is no exact definition, one of the key elements that is commonly agreed on is the need for an independent judiciary in order to have Rule of Law, and to protect it. For the CJEU, in general terms, judicial independence presupposes

[11] Court of Justice of the European Union. Case C – 64/16, Associaçao Sindicial dos Juízes Portugueses, ECLI:EU:C:2018:117, 27 February 2018, p. 32

[12] In very general terms, the definition provided by Lord Bingham : "The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts" Lord Bingham, 'THE RULE OF LAW', *The Cambridge Law Journal* 66, no. 1 (March 2007): 69, https://doi.org/10.1017/S0008197307000037.

that "the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions"[13].

In this light, judicial independence is understood from a double perspective. On the one hand, there is an independence external in nature, related to the judges' autonomy or independence in a strict sense. By referring to the Court exercising its functions "wholly autonomously", the CJEU implies the need for the courts and tribunals to be protected against any external interventions or pressures liable to impair the independent judgment of the members and to influence their decisions. On the other hand, there is an independence internal in nature, which is linked to impartiality. This side of the coin requires an equal distance from the parties to the proceedings and their respective interests with regards to the subject matter of those proceedings. Impartially needs objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the law.

In order to have functioning judicial systems in the way they are understood within the European Union, protecting these two fundamental values is of great relevance, since, without them, the system does not properly work. It is for this reason that, given the measures taken in Poland and Hungary, some Member States have started to refer questions to the CJEU regarding how these attacks affect not only these two fundamental values, but also the principles of mutual trust and mutual recognition.

3. MUTUAL RECOGNITION, MUTUAL TRUST, AND THE FRAMEWORK DECISION ON THE EUROPEAN ARREST WARRANT

As we have already mentioned, the European Union has come a long way since its original purpose, which was, regarding the economic field, to create an interior and borderless market. Since the entry into force of the Amsterdam Treaty, the consolidation

[13] Court of Justice of the European Union, Associaçao Sindicial dos Juízes Portugueses, op. cit., p. 44

of the Area of Freedom, Security, and Justice[14] became one of the main objectives for the European Union to achieve. For this purpose, several principles became paramount in order for the EU to accomplish its goal, inter alia, the principles of mutual recognition and mutual trust, upon which the former is based.

a. Mutual recognition

In general, and practical terms, the European Commission described the principle of mutual recognition as implying that "a decision taken by a judge in exercising his or her official powers in one Member State, has been taken, that measure – in so far as it has extranational implications – would automatically be accepted in all other Member States, and have the same or at least similar effects there"[15].

In this light, judicial resolutions issued by one Member State will be *quasi*[16] automatically enforced in another Member State, as if they had been issued by their own judicial authorities[17]. This leads to a system of almost blind trust, since hosting States are left with very limited options to oppose the enforcement of the resolution, creating a "one size fits all and no questions asked"[18] kind of system.

This principle was introduced by the European Council in 1999 in the Tampere Conclusions as the "cornerstone"[19] of judicial cooperation contributing to the Union

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[14] For more information on the Area of Freedom, Security, and Justice: Hartmut Marhold, 'The European "Area of Freedom, Security and Justice" : Its Evolution and Three Fundamental Dilemmas:', *L'Europe En Formation* n° 381, no. 3 (21 November 2017): 9–24, https://doi.org/10.3917/eufor.381.0009.

[15] European Commission, *cation from the Commission to the Council and the European Parliament - Mutual Recognition of Final Decisions in Criminal Matters, COM (2000) 0495 final*, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:52000DC0495., p. 2.

[16] The requisites usually are the filling of a standardised form, i.e. https://www.ejn-crimjust.europa.eu/ejn2021/EAW_Certificate/EN/4/true for the EAW or https://www.ejn-crimjust.europa.eu/ejn2021/EIO_Certificate/EN/6/true for the EIO.

[17] "No se hace alusión, por tanto, a que se cursen peticiones o solicitudes de asistencia entre los distintos responsables del proceso penal, sino que se equipara la colaboración que se prestan las autoridades europeas a través de los instrumentos de reconocimiento mutuo a las que se prestarían las autoridades de un mismo Estado miembro cuando internamente se cursan exhortos." Ángeles Sebastián Montesinos and Carmen Rodríguez-Medel Nieto, Manual práctico de reconocimiento mutuo penal en la Unión Europea (Tirant Lo Blanch, 2015), 19, https://biblioteca-tirant-com.eu1.proxy.openathens.net/cloudLibrary/ebook/info/9788490866900.

[18] Valsamis Mitsilegas, 'Conceptualising Mutual Trust in European Criminal Law. The Evolving Relationship Between Legal Pluralism and Rights-Based Justice in the European Union', in *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law*, ed. Evelien Brouwer and Damien Gerard (European University Institute, n.d.).

[19] This feature has also been stated by the CJEU in several judgments (i.e., Case C – 303/05, Advocaten voor de Wereld, ECLI:EU:C:2007:261, 3 May 2007 or Case C – 452/16 PPU, Krzystof Marek Poltorak, ECLI:EU:C:2016:858, 10 November 2016) and by EU legislation, being the following a relevant example to this project: "The 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." (Recital (6) of European Union. *Council*

becoming an Area of Freedom, Security and Justice. In these conclusions, the Council went as far as to state that "enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgments and to other decisions of judicial authorities."

That said, for this principle to exist, there needs to be high trust between the Member States, and that is why it is considered that the principle of mutual recognition is built on the principle of mutual trust.

b. Mutual trust

Trust makes the world go round, it allows people to wander around the social environment, making it possible for humans to connect with each other. Trust is needed to set society in motion despite the existence of areas out of our control. It is because we trust others that we can take on even the most basic tasks in life. Trust represents the leap of faith we need for our systems and relations to function[20].

Given the relevance that trust has in our everyday lives, it becomes even more logical, for the purposes of the European Union to be accomplished, the need to develop mechanisms that allow for trust between the Member States to flourish and to consolidate. The integration process of the European Union is one of trust, trust in that the rest of the Member States are committed to the respect of the same core values and to the consecution of the same objectives.

Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Official Journal of the European Communities, L 190/1, July 18, 2002. https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A32002F0584)

[20] However, trust is understood in many different ways in the philosophical field. According to Anthony Giddens, trust is "the vesting of confidence in persons or in abstract systems, made on the basis of a "leap of faith" which brackets ignorance or a lack of information". According to Georg Simmel, it is the "hypothesis of future conduct, which is sure enough to become the basis of practical action, (and), as a hypothesis, a mediate condition between knowing and not knowing another person". According to Niklas Luhmann, trust is "a mechanism to reduce social complexity as resulting from our choice to act in spite of the (ever remaining) contingency of the inaccessible or unknown".

Though contested in the beginning given the path taken to elaborate the principle, mutual trust has become an axis to the EU's structure and is fundamental for the principle of mutual recognition to properly function.

The principle of mutual trust was established as a constitutional principle of the European Union by the CJEU in its Opinion 2/13 on the draft agreement to the accession of the EU to the ECHR[21], where it was established that "each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU".

Nevertheless, it had already being established as a core principle of the European Union by the Court in previous cases. In this light, in the N.S. case, the CJEU argued that "At issue here is the *raison d'être* of the European Union and the creation of an area of freedom, security and justice (…), based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights"[22].

According to the CJEU, mutual trust exists and is justified by the commitment made by the Member States to take part in the European Union, which is characterised by a set of specific features and where there is a network of principles, rules and mutually interdependent legal relations between the EU and the Member States, as well as between the Members with each other[23]. Accession to the European Union includes the commitment to the protection of fundamental rights[24], at least to the standards provided by EU Law, so, following the principle of mutual trust, each Member State should trust that the rest is also committed to this objective[25]. One of the key functions of the principle

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[21] Court of Justice of the European Union. Opinion 2/13, Accession of the EU to the ECHR, ECLI:EU:C:2014:2454, 18 December 2014

[22] Court of Jutice of the European Union. Cases C – 411/10 and C – 493/10, N.S. and others, ECLI:EU:C:2011:865, 21 December 2011, p. 83

[23] "These essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a 'process of creating an ever closer union among the peoples of Europe'." And "That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected." Court of Justice of the European Union, Opinion 2/13, op. cit., p. 167 and 168

[24] In this regard, article 49 TEU established that "Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union".

[25] "That principle requires, particularly with regard to the Area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law" Court of Justice of the European Union, Opinion 2/13, op. cit., p. 191

of mutual trust for the CJEU is that "it allows an area without internal borders to be created and maintained"[26].

c. Framework Decision 2002/584/JHA

The Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (hereinafter, "FDEAW") represents one of the main steps of the European Union in the construction and consolidation of the Area of Freedom, Security and Justice. It reflects the principles of mutual trust, mutual recognition and equivalence.

After its entering into force, extradition between the Member States was abolished and superseded by a judicial resolution dictated by an issuing authority for the executing one to arrest and surrender the concerned person, either to prosecute them or to imprison them[27].

According to the CJEU, "it is apparent from recital 6 of the FDEAW that the European arrest warrant provided for in that Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition"[28]. The Court has also stated that the Framework decision "seeks, by the establishment of a new simplified and more effective system for the surrender of persons convicted or suspected of having infringed criminal law, to facilitate and accelerate judicial cooperation with a view to contributing to the objective set for the European Union to become an area of freedom, security and justice, founded on the high level of confidence which should exist between the Member States"[29].

One of the main issues surrounding the Framework Decision concerns the protection of fundamental rights, or, more specifically, the possible lack of it. Scholars have criticised the few existing grounds to refuse the execution of the European Arrest

[26] Court of Justice of the European Union, Opinion 2/13, op. cit., p. 191

[27] According Advocate General Jarabo – Colomer, the EAW's goal is to "confined to creating a mechanism for assistance between the courts of different States during the course of proceedings to establish who is guilty of committing an offence or to execute a sentence" Jarabo-Colomer, Case C – 303/05, Opinion of Advocate General on Advocaten voor de Wereld, ECLI:EU:C:2006:552, 12 September 2006, p. 103

[28] Court of Justice of the European Union. Case C – 216/18, LM (Minister for Justice and Equality), ECLI:EU:C:2018:586, 25 July 2018, p. 38

[29] Joined Cases C – 404/15 and C – 659/15 PPU, Aranyosi and Căldăraru, ECLI:EU:C:2016:198, 5 April 2016, p. 76

Warrant (hereinafter, "EAW")[30], as well as the fact that, in such a short list, the non – compliance with fundamental rights standards cannot be found. The low relevance given to the protection of fundamental rights can also be seen in cases like, i.e., Melloni or Radu[31], where the safeguarding of the mutual recognition system prevailed over fundamental rights standards.

The absence of an exception based on the non – compliance with fundamental rights could be explained by the fact that, at the time of the drafting of the Framework Decision, there was an expectation of high trust that Member States were complying with fundamental rights protection (recent times, unfortunately, have proven such presumption wrong), as well as by the fact that, at the moment of the entering into force of the Framework Decision, the Charter of Fundamental Rights was not part of the binding and primary EU law.

Despite there not being any explicit mention on the protection of fundamental rights as a ground for refusing to execute a EAW, the Court has stated that, on the basis of Article 1(3) of there is a need of compliance with the Charter of Fundamental Rights[32].

The only case in which it is explicitly mentioned that the execution of the FDEAW can be suspended is foreseen in Recital 10, which establishes that "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".

Recent CJEU case – law and scholars have set the focus on the issues that arise due to this lack of an explicit protection of fundamental rights within the EAW regulation

[30] *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, op. cit, arts. 3 and 4

[31] Radu was the first case in which it was referred to the CJEU whether mutual recognition could be halted on the grounds of fundamental rights protection to which the CJEU responded that the execution could not be hampered *solely* on the grounds of fundamental rights protection (Court of Justice of the European Union. Case C-396/11, Ciprian Vasile Radu, ECLI:EU:C:2013:39, 29 January 2013). In Melloni, the CJEU did not accept that the Spanish authorities could not execute an EAW on the basis that they gave a higher protection to the fundamental right concerned than Italy did, since, in this case, it would contravene the primacy of EU law principle, according to the Court (Court of Justice of the European Union. Case C-399/11, Stefano Melloni v. Ministerio Fiscal, ECLI:EU:C:2013:107, 26 February 2013).

[32] Court of Justice of the European Union, Aranyosi and Căldăraru, op. cit., p. 83; Court of Justice of the European Union, LM (Minister for Justice and Equality), op. cit., p. 45.

and what happens when this protection clashes with the principles of mutual recognition and mutual trust.

d. Why are these principles so important?

Since the establishment of the Area of Freedom, Security, and Justice, it has become of greater importance to nurture and to enhance trust between the Member States. No area trying to accomplish a space where, among other objectives, judicial resolutions of one state should be directly applicable in another State (as promoted by the principle of mutual recognition) can work without that trust nor without mechanisms to promote it.

For the past years, the EU has developed several mechanisms to achieve a European judicial space where resolutions are automatically recognised. Examples of these are, inter alia, the Directive 2014/41/EU on the European Investigation Order[33] and the Framework Decision 2002/584 on the European Arrest Warrant[34], this latter one being of special relevance for the purpose of this project.

One of the main objectives of the application in the criminal justice realm of the principle of mutual recognition is for judicial authorities to recognise other member states' judicial decisions as their own[35]. For this goal to be achieved and given what both mutual trust and mutual recognition entail, these principles appear as fundamental.

However, the aforementioned factual context that is currently taking place in the European Union has made these principles tremble and as time goes by it seems more complicated to keep on claiming their use on the same basis as two decades ago. How can we expect Member States to trust each other's systems when one of the EU members has been declared as not a democracy any longer?

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[33] European Union. *Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 Regarding the European Investigation Order in Criminal Matters*. Official Journal of the European Union, L 130/1, May 1, 2014. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0041.

[34] European Union. *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, Official Journal of the European Communities, L 190/1, July 18, 2002. https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A32002F0584

[35] "Each of them should recognise the criminal law in force in the other Member States even in the event of a different outcome if its own national law were to be applied" Court of Justice of the European Union. Joined Cases C-187/01 and C-385/01 Gözütok and Brügge, ECLI:EU:C:2003:87, 11 February 2003, p. 33.

4. THE EUROPEAN ARREST WARRANT AND THE PROTECTION OF FUNDAMENTAL RIGHTS: THE CASE – LAW

a. The double-step test: Aranyosi and Căldăraru

Joined case by the European Court of Justice, Aranyosi and Căldăraru rose to the hall of fame of the CJEU's judgments as the first time that a limit to the execution of EAWs based on fundamental rights protection was recognised[36].

Having both Mr. Aranyosi and Mr. Căldăraru declined their consent to the surrenders on the basis of eventual inhuman treatments due to the poor conditions of the prisons in both Hungary and Romania, the German courts found themselves in the position of deciding whether to execute the issued warrants or not, so they referred a preliminary ruling to the CJEU.

When facing this dilemma, the Court of Justice of the European Union first explained the relevance of mutual trust and mutual recognition, and then continued to elaborate on how the Framework Decision cannot modify the obligation to respect fundamental rights as enshrined in, inter alia, the Charter[37] (this was very relevant regarding this case, since they were dealing with the prohibition of torture and inhuman or degrading treatment or punishment, recognised in Article 4 of the Charter and which holds an absolute nature).

Finally, to tie it all together, the CJEU developed a double – step test that Courts must carry out when facing situations where the execution of the EAW clashes with the respect of fundamental rights: The first step to take is the general assessment of all the conditions of the case to determine whether there are systemic or generalised deficiencies, or insufficiencies that may affect certain groups of people or certain places of detention. Afterwards, if the executing authority finds that such kind of deficiencies exist, those are still not enough grounds to refrain from carrying out the surrender. In case of considering

[36] Court of Justice of the European Union, Aranyosi and Căldăraru, op. cit.

[37] Article 1 (3) *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, op. cit., as well as Court of Justice of the European Union, Aranyosi and Căldăraru, op. cit., p. 83.

the existence of the aforementioned problems, then the executing authority must analyse whether those insufficiencies will affect the concerned person of the case[38].

b. Application of the test to the lack of judicial independence in a Member State

The Aranyosi and Căldăraru test was then applied to cases of denial of the consent to the surrender based on the lack of independence of the judiciary in the issuing Member State. This is the factual context of the Minister for Justice and Equality case, or the "LM case".

For the purpose of conducting criminal proceedings regarding, inter alia, trafficking in narcotic drugs and psychotropic substances, the Polish authorities issued several EAWs asking for the surrender of the person concerned. To such request, the person declined his consent to the simplified surrender on the basis of the lack of judicial independence of the Polish judiciary, arguing that his surrender would imply a real risk of a flagrant denial of justice in contravention of Article 6 European Convention on Human Rights (hereinafter, "ECHR") on the right to a fair trial.

After hearing this and finding out about the situation in Poland, through exhaustive and objective evidentiary material, the High Court of Ireland found that the rule of law had, in fact, been breached in Poland.

When facing this situation, the High Court of Ireland referred to the CJEU a set of questions, concerning whether when in front of cogent evidence that conditions in the issuing Member State are incompatible with the fundamental right to a fair trial because the system of justice itself in the issuing Member State is no longer operating under the rule of Law, is it necessary for the executing judicial authority to make any further assessment, specific and precise, as to the exposure of the individual concerned to the risk of unfair trial where their trial will take place within a system no longer operating within the rule of Law[39].

[38] Court of Justice of the European Union, Aranyosi and Căldăraru, op. cit., p. 92 ("Whenever 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.")

[39] Court of Justice of the European Union, LM (Minister for Justice and Equality), op. cit.

In view of this question, the CJEU considered that, in spite of generalised or systemic deficiencies regarding the independence of the concerned Member State's judiciary, the individual prong of the test still needs to be carried out so as to determine whether in the particular circumstances of the case, there are substantial grounds to believe that, following their surrender to the issuing Member State, the requested person will run that risk.

However, the transposition of the elaborated mechanism was not made in strict terms, since the Court, acknowledging there were some differences between the cases, included what some authors called a third step or a division of the second prong into two sub – steps.

For the purpose of this research project, we will be discussing about two sub – steps of the individual assessment stage, since they both required a specific evaluation of both the courts and the person involved in the case and different issues arise in the implementation of both of them.

First prong. General assessment

First, there needs to be a general assessment regarding the alleged systemic or generalised deficiencies regarding the issuing Member Sate's judiciary[40], based on objective, reliable, specific, and properly updated material. This must be carried out having regards to the standard of protection of the fundamental right that's guaranteed by the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, which establishes that "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Second prong. Individual assessments.

Sub – step one. Individual assessment of the concerned court.

[40] "The executing judicial authority must, as a **first** step, assess, on the basis of material that is objective, reliable, specific and properly updated concerning the operation of the system of justice in the issuing Member State (see, to that effect, judgment of 5 April 2016, Aranyosi and Căldăraru, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 89), "whether there is a real risk, connected with a lack of independence of the courts of that Member State on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached." Court of Justice of the European Union, LM (Minister for Justice and Equality), op. cit., p.61.

To carry out this step, the executing authority must carry out an assessment concerning the specific court which decides on the matter[41], to determine whether those general or systemic deficiencies will affect the proceedings of the concrete case.

The line of argument which justifies this intermediate step is that a general or systematic deficiency does not imply that every tribunal or court in the Member State must be affected by it[42].

Sub – step two. Specific assessment regarding the situation of the individual[43]

After having established both the existence of general or systemic deficiencies and the possibility for the issuing authority to be affected by them, the executing authority cannot stop on its tracks and determine the non-execution of the EAW. After such discoveries, the executing authority must carry out one last step and determine whether those "general" circumstances will affect the concerned individual in the event of their surrender.

For this, the Court might take into consideration: the specific concerns expressed by the person prosecuted as well as their personal situation, the nature of the offence, the circumstances in which it was committed as well as the context in which the arrest warrant was issued, etc[44].

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[41] "In the course of such an assessment (the individual one), the executing judicial authority must, in particular, examine to what extent the systemic or generalised deficiencies, as regards the independence of the issuing Member State's courts, to which the material available to it attests 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." Court of Justice of the European Union, LM (Minister for Justice and Equality), op. cit., p. 74

[42] "A prevailing majority of the total of more than 10,000 judges maintain their independence in difficult conditions, both legal and psychological, which they face in their daily work" Stanisław Biernat, 'How to Assess the Independence of Member State Courts?', *Verfassungsblog: On Matters Constitutional*, 28 July 2018, 5, https://doi.org/10.17176/20180730-100627-0.

[43] "If (…) the executing judicial authority finds that there is, in the issuing Member State, a real risk of breach of the essence of the fundamental right to a fair trial on account of systemic or generalized deficiencies concerning the judiciary of that Member State, such as to compromise the independence of that State's courts, that authority must, as a **second** step, assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run that risk." Court of Justice of the European Union, LM (Minister for Justice and Equality), op. cit., p. 68

[44] "If that examination shows that those deficiencies are liable to affect those courts, the executing judicial authority must also assess, in the light of the specific concerns expressed by the individual concerned and any information provided by him, whether there are substantial grounds for believing that he will 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, 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." Court of Justice of the European Union, LM (Minister for Justice and Equality), op. cit., p. 75

c. Implementation problems

When discussing whether the LM test is an effective way to tackle down the problems arising from the execution of EAWs issued by certain Member States when judicial independence is at stake, there are many issues that surface regarding a wide variety of different concerns.

i. Impunity

This high risk of impunity that would entail a less stringent test is one of the main arguments that the CJEU uses in order to sustain the need for a double – step test that includes an individual assessment as a second prong. For the CJEU, if the individual test is not carried out, there would be an increase of impunity issues stemming from non – executed EAWs, which would be contrary to the spirit of the EAW system as a whole[45].

In accordance with that article, the CJEU considers that "the aim of the mechanism of the European arrest warrant is to enable the arrest and surrender of a requested person in the light of the objective pursued by the framework decision, so that the crime committed does not go unpunished and that that person is prosecuted or serves the custodial sentence ordered against him"[46].

It is because of this view that, when discussing the issues that surround this new procedure, it is important to bring to the table that it is sensible to argue that not executing these warrants might possibly lead to an impunity problem: if the warrants issued under the EAW mechanism are not executed, then the issuing Member States might run out of options to arrest the person concerned, since extradition no longer exists between Member States.

But does this "prevention-of-impunity" argument have a sound basis?

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[45] In this light, the Court adds that "That objective precludes an interpretation of Article 1(3) of Framework Decision 2002/584 according to which the existence of or increase in systemic or generalised deficiencies so far as concerns the independence of the judiciary in a Member State is sufficient, in itself, to justify a refusal to execute a European arrest warrant issued by a judicial authority of that Member State", since such an interpretation "would entail a high risk of impunity for persons who attempt to flee from justice after having been convicted of, or after they have been suspected of committing, an offence, even if there is no evidence, relating to the personal situation of those individuals, to suggest that they would run a real risk of breach of their fundamental right to a fair trial if they were surrendered to the Member State which issued the European arrest warrant concerned." Court of Justice of the European Union, Joined Cases C – 354/20 and C – 412/20 PPU, L and P, ECLI:EU:C:2020:1033, 17 December 2020, pp. 63 and 64.

[46] Court of Justice of the European Union. Case C-551/18 PPU, IK (Enforcement of an Additional Sentence), ECLI:EU:C:2018:991, 6 December 2018, p. 39

Considering the establishment of the borderless Area of Freedom, Security, and Justice, which allows for people to move freely and without restrictions from one Member State to another, very laxed and vague criteria for the denial of a surrender on the basis of an EAW could lead to the depicted impunity scenario.

While it is important to keep in mind an impunity rationale, so as to ascertain that justice is served, it should be borne in mind the need for finding balance between law enforcement and fundamental rights protection. Notwithstanding some of the cases where the CJEU has mentioned other mechanisms, this insist on the fight against impunity narrative does not precisely comprehensively convey the EU law framework and makes it seems as if the EAW were an isolated mechanism[47].

With regards to this situation, some authors have proposed the need for a broader approach to all the instruments at hand when dealing with criminal justice cooperation inside EU Law. Some scholars have pointed out to the possibility of pushing for different mechanisms to the EAW when concerns regarding fundamental rights protection arise. Examples of these different procedures are the transfer of proceedings or the transfer of sentences[48]. This more holistic view of the EU Law on criminal proceedings might open new routes to follow once generalised or systematic deficiencies have been proved.

If things keep on functioning the way they have been up until now, there is a risk that the protection of the principle of mutual recognition will overshadow the protection of fundamental rights, as well as a risk of legitimising Rule of Law backsliding, consolidating it as something acceptable in our democracies.

Maybe it is not so much about suspending the principle of mutual recognition with those states that are putting the Rule of Law at stake within their territories[49] or completely disregarding the test proposed by the CJEU, but to look elsewhere for formulas that make

[47] Jannemieke Ouwerkerk, 'Are Alternatives to the European Arrest Warrant Underused? The Case for an Integrative Approach to Judicial Cooperation Mechanisms in the EU Criminal Justice Area', *European Journal of Crime, Criminal Law and Criminal Justice* 29, no. 2 (13 September 2021): 87–101, https://doi.org/10.1163/15718174-29020002.

[48] Ouwerkerk, 'Are Alternatives to the European Arrest Warrant Underused?', op. cit.

[49] Which is a standing that is being pushed by some scholars. In this light, Iris Canor, 'Suspending Horizontal Solange: A Decentralized Instrument for Protecting Mutual Trust and the European Rule of Law', in *Defending Checks and Balances in EU Member States*, ed. Armin Von Bogdandy et al., vol. 298, Beiträge Zum Ausländischen Öffentlichen Recht Und Völkerrecht (Berlin, Heidelberg: Springer Berlin Heidelberg, 2021), 183–206, https://doi.org/10.1007/978-3-662-62317-6_8.

fundamental rights protection and a borderless Area of Freedom, Security and Justice work together[50].

ii. Reframing the issue: From Fundamental Rights protection to Rule of Law concerns

Another major problem arising from an almost unaffected transposition of the double step, as designed for torture or degrading treatment to the cases of lack of judicial independence, is the failure to understand the distinction at the heart of the scenarios.

In the first case, we are talking about a possible attack on an absolute fundamental right from a rather individual point of view[51]; while in the second one, we are talking about an issue that affects the very organisation of the State's judicial system.

With this in mind, one of the advances to be made should begin by reframing the issue from a collective perspective such as the rule of law as a democratic principle linked to deficiencies in state structures and not from the potential risk of infringement of the fundamental right to effective judicial protection[52].

In cases where the problem is not as drastic as in Poland or Hungary, there may be room for a healthy judicial dialogue and a development of the two (or three) steps of the test, because if it is not a problem concerning the democratic heart of the State, then it would be necessary to look at the more concrete particularities of the specific case. However, in critical situations such as those occurring in the aforementioned states, the problem is not that of an individual or of a specific targeted group, but one that rather affects the very foundations of the State, so that an individualised test seems to become ineffective.

iii. Nemo Iudex in Causa Sua

It is true that it is not so much a question of directly asking the court of the issuing state "are you independent, yes or no?" However, even if these are not the questions to

[50] R. Daniel Kelemen, 'The European Union's Failure to Address the Autocracy Crisis: MacGyver, Rube Goldberg, and Europe's Unused Tools', *Journal of European Integration* 45, no. 2 (17 February 2023): 223–38, https://doi.org/10.1080/07036337.2022.2152447.

[51] Given that there are systemic problems concerning the prison system, but they don't affect the state's structure. They imply violations directly to the individuals' fundamental right not to be tortured or subjected to inhuman treatment.

[52] Petra Bard and Wouter Ballegooji, 'The AG Opinion in the Celmer Case: Why Lack of Judicial Independence Should Have Been Framed as a Rule of Law Issue', *Verfassungsblog: On Matters Constitutional*, 2 July 2018, https://doi.org/10.17176/20180702-173606-0.

be asked, which we do not know in concrete terms since the CJEU in none of the cases delimited the questions to be asked, the central problem is not only the content of the questions (as it will be discussed later), but the addressee itself.

There is a problem that arises when applying analogically (even if some modifications are made) the test designed for the Aranyosi and Căldăraru case to other cases in which torture or inhuman treatment is not at stake, but rather problems of judicial independence, given the latent difference between one and the other: in these latter scenarios, the judge and the judged are the same subject.

This situation is in direct conflict with the legal principle of "*nemo iudex in causa sua*", which translates in English to "no one should be a judge in their own case" and it constitutes a general principle of law recognized by all the nations in the world[53].

While in the case of Aranyosi & Căldăraru the key question involved a problem concerning issues at the penitentiary institutions, so the issuing authority was alien to them; in the case of LM the problem concerned the issuing judges themselves. In this way, the judiciary was asked to determine whether *they* were or were not independent.

Thus, it is not so much the "foolishness" of asking the issuing judicial authority whether it is independent or not, but the problem of putting the judge and the judged together in the same figure.

iv. Thresholds: systemic deficiencies and individual harm

When describing the first step that the executing authorities must carry out in order to assess whether there are systemic or generalised deficiencies that might be liable to affect the independence of the judiciary of the issuing Member State, the CJEU did not give a clear definition, or any definition for that matter, of what should be considered as such kind of deficiencies. In this light, the Court only stated that executing authorities have to assess "whether there is a real risk, connected with a lack of independence of the courts of that Member State on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached"[54]. But what constitutes systemic or generalised deficiencies?

[53] Okeke, 'Rethinking the Applicability of the Nemo Judex Rule to the Decision-Making Process in the Security Council', 2022.
[54] Court of Justice of the European Union, LM (Minister for Justice and Equality), op. cit., p. 61. This problem due to a lack of definition is still present, given that, still, in one of its latest judgments, the CJEU

There are two opposing cases that illustrate the extent to which this lack of a concrete definition set by the Court can be problematic: On the one hand, the High Court of England and Wales (hereinafter, "EWHC")[55] decided to understand that a demonstration of a breach of the right to an independent tribunal precludes the need to prove the breach of any other element linked to the essence of the fundamental right to a fair trial[56]. Following this decision, the Court, examined the personal situation of the three defendants taking special consideration as to whether the Polish authorities might have any political interest on the matter; not finding any, the EWHC decided to execute all of the three arrest warrants[57].

On the other hand, at the High Court of Ireland, Justice Donnelly required the defendant to prove a flagrant denial of justice, understood as guaranteed by Article 6 ECHR[58]. In contraposition to the English decision, the Irish judgment sets quite a high threshold, which was even considered to be "unduly stringent" by Advocate General Sharpston in the *Radu* case[59].

These opposed cases also reflect another threshold problem which is what makes up an individual risk. With regards to the second prong of the test, on the step referred to the individual risk that must be proved so as to refrain from executing the EAW, the CJEU, repeating what it had already stated in the Aranyosi and Căldăraru case, established that "the executing judicial authority is required to assess whether there is a real risk that the individual concerned will suffer a breach of that fundamental right, when it is called upon to decide on his surrender to the authorities of the issuing Member State"[60]. Thus, the CJEU has not provided guidelines so as to determine what entails a

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failed to give a concrete definition on what those deficiencies might be, *vid*. Court of Justice of the European Union, L and P, op. cit., p. 54.

[55] High Court of England and Wales. Case [2018] EWHC 2848 (Admin), Lis, Lange and Chmielewski, 31 October 2018

[56] Marco Antonio Simonelli, "'…And Justice for All?' The Right to an Independent Tribunal after the Ruling of the Court of Justice in LM," *New Journal of European Criminal Law* 10, no. 4 (December 2019): 340, https://doi.org/10.1177/2032284419877099.

[57] High Court of England and Wales, Lis, Lange and Chmielewski, op. cit., pp. 67 to 70.

[58] "It is only where the breach is so fundamental as to amount to a nullification or destruction of the very essence of the right guaranteed by Article 6, that extradition must be prohibited" High Court of Ireland. Case [2018] IEHC 639, The Minister for Justice and Equality v Celmer No.5, 19 November 2018, p. 32.

[59] Sharpston. Case C – 396/11, Opinion of the Advocate General on Radu, ECLI:EU:C:2012:648, 28 October 2012, p. 83.

[60] Court of Justice of the European Union, LM (Minister for Justice and Equality), op. cit., p. 60. This was later confirmed in other judgments, inter alia, Court of Justice of the European Union, L and P, op. cit., p. 61: "substantial grounds for believing that that person will run a real risk of breach of his or her right to a fair hearing once he or she has been surrendered to the issuing Member State."

real risk for the individual concerned nor when should it be established. This is shown by the fact that the national courts develop different ways to reach a conclusion regarding such risk, as the two previous also reflect.

v. Challenges in Identifying Systemic Deficiencies through Objective Evidence

The CJEU, despite having been asked by the referring Court what would constitute objective evidence to assess the concrete prong, did not provide any guidelines to follow so as to determine what evidentiary material national courts should resort to in order to determine whether the test has been satisfied or not.

In response to the national court, the CJEU established that a Reasoned Proposal by the Commission would be "particularly relevant"[61], as well as it also mentioned the possible use of other instruments like "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"[62]. Nonetheless, these examples do not give that much clarity so as to have a clear vision of what evidence may the Courts use.

On the one hand, this leaves broad room for the national authorities to gather all the information necessary to determine whether the systemic deficiencies exist, without any limits on their activity. However, this lack of established and objective definitions to follow by the executing authorities can lead to opposing judgments, as we have mentioned, and it has been raised by many scholars as one of the most important practical issues when carrying out the LM test. Not having these criteria brings up questions regarding how to judge judicial independence[63].

One of the key issues that the executing authorities also must face when carrying out the test is the gathering of evidence. Not only can this task amount to an enormous burden even in obvious cases like the Polish or Hungarian ones[64]; but, even more so, the

[61] Court of Justice of the European Union, LM (Minister for Justice and Equality), op. cit., p. 61
[62] Court of Justice of the European Union, Aranyosi and Căldăraru, op. cit., p. 89
[63] Biernat, 'How to Assess the Independence of Member State Courts?', op. cit.
[64] For example, Rechtbank Amsterdam. Case 13/751441-18 RK 18/3804, ECLI: NL: RBAMS:2018:7032, 4 October 2018. This case was dealing with a Polish EAW. Therefore, the Court of Amsterdam had a lot of objective reports from various international institutions establishing the existence of a problem with the Rule of Law in Poland.

workload becomes astronomical in those cases where a possible problem of independence is not as apparent.

Apart from the evidence brought before the court by the individual, another mechanism to gather evidence concerning the alleged systemic or generalised deficiencies is by the executing authority doing so. This is mainly done by judicial dialogue, which has not been proven to be that effective in matters like these, as it will be explained below.

vi. Burden of proof

According to the CJEU, the individual assessment must be carried out having regards to, inter alia, "the specific concerns expressed by the individual concerned and any information provided by him"[65]. In this way, the Court places the burden of proof on the defendant.

Taking for granted, for the purposes of this section, that carrying out the double – step test is the best way to fight these deficiencies that are taking place in some of the European Union Member States, as well as the best way to protect fundamental rights and the Mutual Recognition Regimes. If this were the case, is it sensible to lie the burden of proof on top of the individual?

It is already a big hurdle for the national courts of the Member States to recompile all the necessary evidence needed to establish the (in)existence of systemic or generalised deficiencies, so how can the defence be expected to get access and be able to put together all the evidentiary materials required to determine an even more specific kind of risk, as the one *in concreto* that the CJEU requires to determine the individual risk at stake?

The difficulty that this imposes on the defence is reflected in some of the case – law. For example, in the Celmer case before the High Court of Ireland, the respondent had affidavits, and his solicitor had another one stating the meaningful efforts he had made in vain so as to seek further evidence to corroborate his respondent's position, but he stated that it had been impossible to engage an expert to submit a report. The only thing they could grasp was a response by an official Polish body (though it was not able to clearly establish wo made the response) where it was stated, in very general terms, that there were no problems concerning the independence of the Polish judiciary ("the courts

[65] Court of Justice of the European Union, LM (Minister for Justice and Equality), op. cit., p. 75

and tribunals are a separate power and shall be independent of other branches of power")[66].

Nonetheless, despite these difficulties, according to the Court, the deficiencies regarding the individual risk can be established by evidence that points to the personal situation of the individual, the nature of the offence, the factual context of the issuance of the EAW, the composition of the panel of judges, the procedure for the appointment of those judges concerned, and the availability of any legal remedies in that respect[67], not being enough the determination of one or more of the judges that participated in the proceedings was appointed by a non – independent body[68].

Moreover, this issue doe not only raise concerns regarding the strain that it poses upon the defendant[69], but it also raises doubts with regards to the principle of equality of arms and whether it is being respected or not by the CJEU's approach[70].

The equality of arms principle tries to set a level playing field between the parties during the proceedings and it constitutes one of the essential elements of the fundamental right to a fair trial[71]. However, the test developed by the CJEU raises concerns regarding equality of arms, given that imposing the burden of proof on the individual at every stage, even when gathering the needed evidence is so far out of their reach, does not seem to set both parties at the same level.

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[66] High Court of Ireland. Case [2018] IEHC 119, The Minister for Justice and Equality -v- Celmer, 12 March 2018, p. 44 and 45

[67] Court of Justice of the European Union, L and P, op. cit., p. 88

[68] Court of Justice of the European Union, L and P, op. cit., p. 87

[69] "Although the requested persons argued in numerous cases that a risk in concreto existed, thus far the CoA has not been able to find sufficient information to take step 2B and bring the procedure to an end." Adriano Martufi and Daila Gigengack, 'Exploring Mutual Trust through the Lens of an Executing Judicial Authority: The Practice of the Court of Amsterdam in EAW Proceedings', *New Journal of European Criminal Law* 11, no. 3 (September 2020): 295, https://doi.org/10.1177/2032284420946105., referring to Rechtbank Amsterdam. Case 13/751441 – 18, ECLI:NL: RBAMS:2018:5925, 16 August 2018

70 "The burden of proof sets a very high threshold for the requested person, one that is very hard to reach in practice as detailed information on the organisation of the judiciary may be challenging to collect for the defence" Martufi and Gigengack, op. cit., p. 295.

[71] "The right to a fair trial entails protecting the "equality of arms" principle, an inherent element of the due process of law in both civil and criminal proceedings. Strict compliance with this principle is required at all stages of the proceedings in order to afford both parties (especially the weaker litigant) a reasonable opportunity to present their case under conditions of equality." Elisa Toma, "The Principle of Equality of Arms - Part of the Right to a Fair Trial," Union of Jurists of Romania. Law Review I, no. 3 (Jul/Sep 2011), 1, https://www.proquest.com/scholarly-journals/principle-equality-arms-part-right-fair-trial/docview/1013785718/se-2.

vii. Horizontal dialogue

According to the CJEU, and with regards to Article 15 FDEAW, when carrying out the test, if the executing authorities consider that they need additional information concerning any matter at stake regarding the deficiencies, they must enter into dialogue with the issuing judicial authorities[72].

Nevertheless, practice shows that when it comes to using judicial dialogue as a tool in order to assess the individual risk of the requested person's fundamental right to a fair trial, national courts, given that there are no standards set by the CJEU, tend to go for more general questions not really diving deep into concerns with regards to the personal situation of the individual concerned[73].

In some cases, these answers only convey a brief summary of the general laws governing the judiciary: "As indicated above, the hierarchically highest legal norms in Poland exclude threats to the independence of judges of a systemic nature."[74]; in other instances, they tend to be more evasive or cryptic[75]; other times the issuing authorities to which the questions are referred do not have the formal authority to respond in the required material scope[76]; in other situations, the questions are left unanswered forcing the executing authority to engage again in a dialogue with the issuing authorities.

In establishing this dialogue other issues arise, which do not directly concern the substance of the questions, but the setting up of the dialogue itself. A very clarifying example of this is the Puig Jordi case, where the Spanish and the Belgian authorities had

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[72] Court of Justice of the European Union, LM (Minister for Justice and Equality), op. cit., p. 76

[73] Examples of this are, inter alia, the Court of Amsterdam's judgments when faced by EAWs issued by Poland: Rechtbank Amsterdam. Case 13/751752-18, ECLI:NL:RBAMS:2019:42, 4 January 2019; Rechtbank Amsterdam. Case 13/751441-18, ECLI:NL:RBAMS:2019:43, 4 January 2019; Rechtbank Amsterdam. Case 13/737645-13, ECLI:NL:RBAMS:2019:44, 4 January 2019;Rechtbank Amsterdam. Case 13/751031-18, ECLI:NL:RBAMS:2019:48, 4 January 2019. In all these cases, the CoA encountered several problems in order to engage in a fruitful dialogue with the Polish authorities.

[74] "Jak wskazano wyżej, hierarchicznie najwyższe w Polsce normy prawne wykluczają zagrożenia dla niezawisłości sędziów o charakterze systemowym." District Court of Warsaw. Case on the European Arrest Warrant Act of 2003, 26 September 2018, http://bip.warszawa.so.gov.pl/attachments/download/7511, p.9 *in fine*.

[75] "I have also considered the two pieces of additional evidence from the Regional Court in Poznan and the single additional evidence issued by the Regional (in translation described as the Circuit) Court in Wloclawek. These add very little to the understanding of the general situation in Poland. More particularly, the information does nor indicate that the legislative changes which were of concern to this Court, based primarily upon the facts contained in the Reasoned Proposal, have been altered in any meaningful manner" High Court of Ireland, The Minister for Justice and Equality v Celmer No.5, op. cit., p. 90

[76] "Regarding question A4: 1. The court requests that this question be forwarded to a body that is competent and in the power to answer this question." Rechtbank Amsterdam. Case 13/751721-18, ECLI:NL:RBAMS:2019:33, 4 January 2019

to dialogue with each other in order to come up with a conclusion regarding Mr. Puig Jordi's surrender. When discussing about this case, Mr. José Manuel Sánchez Siscart, judge at the High Court of Justice of Navarra, explained that the Belgian Court had wrongly interpreted the Spanish legislation and decided on that faulty basis without requiring any additional information, and he also added that there was no direct contact between authorities to get such finding[77]; however, Mr. Peter Hartoch, judge at the Appeal Court of Brussels, added that they had asked for information to the Spanish Courts up to three times[78] and on the basis of the information that was given to them they concluded that there was a possible risk of a breach of the right to a judge pre – established by the Law. This is very insightful regarding the miscommunications that arise during these dialogues. The Belgian judge also considered that the information that was brought before them was very poor (only 1 or 2 pages long), that it did not attach any Law and that there was a need for more clear information. He described the dialogue as that of a "broken phone".

An interesting proposal that was brought up at that round table and that it might lessen some of the difficulties that surface when horizontal dialogue between the authorities is carried out is that of allowing the issuing Member State to be heard during the proceedings carried out to execute (or not) the EAW[79]. This might diminish the "broken phone" like dialogue.

Another issue that arises regarding judicial dialogue in these scenarios is related to the first step of the individual prong of the test. According to the CJEU, the executing authority, having established the existence of general or systemic deficiencies with regards to the independence of the judiciary of the issuing Member State, needs to also assess whether those deficiencies affect the court or tribunal with authority over the proceedings to which the concerned person will be subject as a part of the second prong of the test[80].

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[77] Universitat Pompeu Fabra, "Roundtable discussion on Puig Gordi and Others" *YouTube*, 2 April 2024, 40:40 https://youtu.be/a4LEBth7IRk?si=civ8FeO4UPKRiDiL&t=2440
[78] Universitat Pompeu Fabra, "Roundtable discussion on Puig Gordi and Others", op. cit., 1:10:37 https://youtu.be/a4LEBth7IRk?si=LFLam_kVr30VfEhE&t=4234
[79] Universitat Pompeu Fabra, "Roundtable discussion on Puig Gordi and Others", op. cit., 1:11:40 https://youtu.be/a4LEBth7IRk?si=VmhsN8m_6Y47mMP-
[80] Court of Justice of the European Union, L and P, op. cit., p. 55

The problem that arises when trying to carry out this step is that sometimes it is not possible to know which one is the authority that will oversee the proceedings once the person is surrendered. It is also important to take into consideration that "The risk of the potential change of jurisdiction after the surrender of the person prosecuted creates the danger that the assessment made by the executing authority will not be correct"[81], impeding a high degree of certainty in the executing authority's considerations and voiding of significance the results of the assessment.

This not only creates a high risk of legal uncertainty, but it might also hinder the possibility of dialogue between authorities, given that they might not be equipped enough to establish it and, even if they do so, the final authority that will take over the proceedings at the issuing Member State might change eventually.

All things considered, though judicial dialogue is a key instrument for European integration, and it nurtures mutual trust[82], in these scenarios it might not have as many beneficial outcomes as it might have been thought by the CJEU. It is because of this, that there is a need to rethink the way this dialogue takes place or even whether it is the appropriate mechanism to tackle these concerns.

5. WHERE TO NEXT?

The LM case shows the push forward carried out by the CJEU when it comes to the upholding of the principles of mutual trust and mutual recognition in detriment of the protection of fundamental rights. In this light, the system's effectiveness ranks higher than ensuring that fundamental rights are fully protected. However, it does not seem proportional[83] for a system like EU Law, where fundamental rights have a foundational rank since 2009, to develop a mechanism under which, as it has been shown, most of the times mutual trust and mutual recognition trump those rights.

[81] Stanisław Biernat and Paweł Filipek, 'The Assessment of Judicial Independence Following the CJEU Ruling in C-216/18 LM', in *Defending Checks and Balances in EU Member States*, ed. Armin Von Bogdandy et al., vol. 298, Beiträge Zum Ausländischen Öffentlichen Recht Und Völkerrecht (Berlin, Heidelberg: Springer Berlin Heidelberg, 2021), 416, https://doi.org/10.1007/978-3-662-62317-6_16.

[82] For further information: Aida Torres Pérez, 'Judicial Dialogue and Fundamental Rights in the European Union: A Quest for Legitimacy', in *Comparative Constitutional Theory*, ed. Gary Jacobsohn and Miguel Schor (Edward Elgar Publishing, 2018), https://doi.org/10.4337/9781784719135.00011.

[83] For more information on how to apply a proportionality test when balancing these interests: Ermioni Xanthopoulou, 'The Quest for Proportionality for the European Arrest Warrant: Fundamental Rights Protection in a Mutual Recognition Environment', *New Journal of European Criminal Law* 6, no. 1 (March 2015): 32–52, https://doi.org/10.1177/203228441500600104.

It also seems counter effective for mutual trust protection to keep on promoting a mechanism in which the executing authorities carry out such a detailed assessment of the functioning of the issuing Member State's system. Some authors have pointed out that this test does not imply such a protection, but rather the complete opposite effect[84]. Such an examination conveys more distrust than trust between the Member States concerned. If they trusted each other, they would not be carrying out these thorough assessments.

The foregoing problems shown by judicial praxis illustrate that the axis in which the CJEU bases the assessments, horizontal judicial dialogue mainly, might not be as efficient as the Court would like. Practice shows that it might be possible that national EU courts are not properly equipped to carry out such a dialogue so as to address such specific concerns.

Most of the times even though the general deficiencies are established, as well as the fact that those deficiencies are probably affecting the court in charge of the proceedings, the executing authorities have no other choice but to surrender the person, since the individual assessment threshold is set up so high up[85].

This leaves doubts as to whether the test elaborated by the CJEU really is efficient when it comes to protect fundamental rights within the framework of mutual recognition instruments, especially regarding the individual assessment. Considering all the issues that arise in the implementation of the test, it could seem sensible to state that there is still wide room to improve the approach.

Some scholars have argued that the path that must be taken when addressing all these issues is that one of suspending mutual recognition entirely with those Member States that manifest these kinds of systemic or generalised deficiencies with regards to the Rule of Law[86]. Despite being an option that should be further explored, it still needs some shaping and, as for now, given the resistance shown by some Member States to stay

[84] Agnieszka Frąckowiak-Adamska, 'Drawing Red Lines with No (Significant) Bites: Why an Individual Test Is Not Appropriate in the LM Case', in *Defending Checks and Balances in EU Member States*, ed. Armin Von Bogdandy et al., vol. 298, Beiträge Zum Ausländischen Öffentlichen Recht Und Völkerrecht (Berlin, Heidelberg: Springer Berlin Heidelberg, 2021), 447, https://doi.org/10.1007/978-3-662-62317-6_18.

[85] Rechtbank Amsterdam. Case 13/751346-17 (EAB III), ECLI:NL:RBAMS:2019:2722, 16 April 2019, para.5.4.2; Rechtbank Amsterdam. Case 13/751752-18, ECLI:NL:RBAMS:2019:2751, 16 April 2019, para.5.4.2; Rechtbank Amsterdam. Case 13/752170-18, ECLI:NL:RBAMS:2019:2794, 16 April 2019 para.6.4.3; Rechtbank Amsterdam. Case 13/751031-18, ECLI:NL:RBAMS:2019:2795, 16 April 2019, para.4.4.2.

[86] Canor, 'Suspending Horizontal Solange'., op. cit.

as part of the Union, it might not be the safest way out. It is because of this, and understanding the shortcomings that are present nowadays in the European Union Law, that some ideas appear more appealing, at least in the short run.

It is of great relevance the need for the CJEU to approach issues regarding the execution of the EAWs in a more comprehensive manner, since, as it has been explained, an isolated explanation misses the opportunity to convey a more balanced approach with regards to these clashes between the principle of mutual recognition and fundamental rights. The European Arrest Warrant is not the only mechanism available for the Member States.

Moreover, it seems like another technique to tackle at least some of the evidentiary problems that arise during the implementation of the LM test could be the shift on the burden of proof. In this way, it would rely on the defendant to prove the systematic or generalised deficiencies that they claim to exist on the concerned Member State. However, if proven, with regards to the next step, due to the hurdle it imposes on individuals because of how difficult it is to acquire the materials needed to prove the specific risk, the burden of proof should rely on the Member State.

Most importantly, the CJEU really needs to start framing[87] these issues as part of Rule of Law backsliding concerns and not just as attacks to the fundamental rights of individuals.

Notwithstanding the wide range of options available within the system to tackle down the aforementioned problems, one that truly stands out amidst all of them is the proposal to overstep the individual prong if generalised or systemic deficiencies regarding judicial independence in the issuing Member States have been established[88].

One of the main arguments that keeps been brought up in order to uphold the individual test is that generalised or systemic deficiencies do not necessarily impact every judge on the issuing Member State[89]. However, as it has been established in the previous

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[87]Bard and Ballegooji, 'The AG Opinion in the Celmer Case'., op. cit.

[88] It is important to note here that this is not to say that every time there are these kinds of deficiencies the individual test should not be carried out, but only when they concerned issues that attack the core organisation of the state like the independence of the judiciary does. If these deficiencies are related to individual fundamental rights, then it seems logical to carry out an individual assessment like the CJEU established.

[89] In Anna Podolska, Olga Śniadach, and Krystyna Warylewska-Kamuś, 'The Rule of Law "on the Ground". The Polish Courts' Perspective', *Przegląd Prawniczy Uniwersytetu Im. Adam Mickiewicza* 15

sections, executing judicial authorities can never be completely certain with regards to which judicial authority will take over the proceedings in the event of surrendering the individual concerned, and since the lack of judicial independence affects the core organisation of the Member State, there will always be a risk that the case at hand might end up being judged by a non – independent court or tribunal.

Moreover, it should be borne in mind that for the individual assessment to be carried out, first the executing authority must have already assessed whether there are systemic or generalised deficiencies concerning judicial independence in the issuing Member State and whether is it possible for the issuing authority to be affected by them. In this light, requiring the individual assessment not only poses a great risk to the individual, but it might appear as if the CJEU *de facto* acknowledged the existence of dangers to the judicial independence, and still did not consider them of enough relevance so as not to "over" protect mutual trust and mutual recognition[90].

As Justice Donnelly stated in her preliminary reference to the CJEU concerning the Celmer case: "where there are such egregious defects in the system of justice, it appears unrealistic to require a requested person to go further and demonstrate how, in their individual case, these defects will affect their specific trial"[91].

Given these events, it only seems sensible that, once established that there is a lack of judicial independence at a Member State, due to the gravity this implies for any democratic society, the individual should not be required to prove that there is a potential individual harm or, at least, if the CJEU is not ready to take such a step, the individual should not be forced to bear the burden of proof and this should be shifted towards the issuing Member State.

6. CONCLUSIONS

Well beyond focusing primarily on the creation of a single internal market, and with its sights set on much more ambitious goals such as the consolidation of an Area of

(30 December 2023): 59–92, https://doi.org/10.14746/ppuam.2023.15.03., they consider the common courts, those closest to the citizens, as a last hope for judicial independence in Poland. Defending the independence of more common courts, also vid. Biernat, 'How to Assess the Independence of Member State Courts?', 5.

[90]Biernat, 'How to Assess the Independence of Member State Courts?', op. cit.

[91] High Court of Ireland. Case [2018] IEHC 153, The Minister for Justice and Equality -v- Celmer, 23 March 2018, p. 51

Freedom, Security, and Justice, the European Union today faces one of the greatest challenges in its history.

In the midst of populist discourses against remaining within the Union and with governments that are almost autocratic in some cases and that threaten the very essence of our democracies (the rule of law), the European Union, and the CJEU as one of the greatest defenders of its integrity, find themselves "between a rock and a hard place".

It is not a matter of imposing decisions that extend the powers granted by the Treaties to the Court, but of striving to find a formula in which the various attacks being carried out against the foundations of the rule of law are curbed and, above all, prevented from endangering the fundamental rights of citizens.

While well-intentioned and capable of providing good solutions in some cases, the second step of the test developed by the CJEU becomes meaningless when the problem to be solved arises from lack of judicial independence. That is why this thesis has tried to explain how the cases that have come before the CJEU are different and why in those cases where judicial independence problems are involved the individual test should not apply, or at least not in the terms required by the Court. While the reasons why the CJEU developed this test in the first place are understandable, and fundamental rights are not always absolute, the balancing of fundamental rights against other values can never devoid them of content, and that is, as has been shown, what the test developed by the Court leads to.

It is time to change the focus and to rethink, by giving due importance to the foundations of our democracies and to citizens' rights, how to develop a way of balancing these with the principles on which the Union is based.

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