EUROPEAN ARREST WARRANT – MUTUAL TRUST AND MISTRUST AMONG EU MEMBER STATES

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Abstract: *The Europeanisation process for criminal law still faces many challenges today. The first of them is the concept of state sovereignty in the matter of criminal jurisdiction. The European arrest warrant (EAW) exemplifies the successful Europeanisation of criminal legal procedure. The EAW has introduced a new principle of so – called, surrendering, to another Member State of the European Union, for criminal prosecution. Unlike extradition proceedings, the whole process of surrendering a citizen pursuant to an EAW rests solely with the courts. No review by an executive body is required, as it is presumed that, if surrendered to another Member State, the surrendered person's rights – in particular, their right to a fair trial will not be jeopardised. The EAW, with its attending surrender mechanism, is thus a signifier of mutual trust between Member States.*

Keywords: *European law, protection of fundamental rights and freedoms, European arrest warrant, surrender procedure, dual – criminality test*

I. INTRODUCTION

The European arrest warrant (EAW) exemplifies the successful Europeanisation of criminal legal procedure. The relevant EU standard was developed in 2002, before our EU membership. In the context of EU accession, we were obliged to implement Code of Criminal procedure decision on the EAW and incorporate it into our law – namely into our penal procedural – which ultimately occurred, although the process was not a smooth one. (The Czech Republic should have fulfilled its commitment to adopt and implement the EAW by its date of accession. Instead, it did so only in January 2005; and, as such, only in part, because its validity was limited in time to acts committed after 1 November 2004.)

The capability to surrender one's own citizens to another Member State for prosecution for certain criminal offences "only" on the basis of a court decision (and without further review by an executive body) appeared too revolutionary not only to us but also to Belgium, Germany and Poland. In those countries, as was also the case here, the question of adopting and implementing the EAW was put before their respective constitutional courts. In all of these countries, however, it was eventually found to be constitutionally conforming under certain conditions. The essence of the proceedings before our Constitutional Court was the question whether the surrendering of Czech citizens to other EU Member States for prosecution is not contrary to the provisions of the Charter of Fundamental Rights and Freedoms, which provides that a citizen must not be forced to abandon their homeland. The application to the Constitutional Court even contained an emotional note

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regarding practices of the pre – November 1989 governments where political opponents were forcibly ejected from their homes or even escorted from their towns. Nevertheless, the application to cancel implementing provisions of Czech law was rejected by the Constitutional Court in May 2006.[1]

The EAW has introduced a new principle of so – called, surrendering, to another Member State of the European Union, for criminal prosecution. Unlike extradition proceedings, the whole process of surrendering a citizen pursuant to an EAW rests solely with the courts. No review by an executive body is required, as it is presumed that, if surrendered to another Member State, the surrendered person's rights – in particular, their right to a fair trial – will not be jeopardised. The EAW, with its attending surrender mechanism, is thus a signifier of mutual trust between Member States. As mentioned in Opinion 2/13 of the European Court of Justice (ECJ):

It should be noted that the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. 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.[2]

II. BASIS FOR MUTUAL TRUST

The principle of mutual trust between Member States is based on a broad array of guarantees for the protection of fundamental rights and freedoms afforded primarily under the Charter of Fundamental Rights of the EU, but also issuing from the EU Court of Justice's rich case law. As a European citizen spends time in other Member States, that citizen may encounter a number of situations, unforeseen by European law; for example, matters that fall within the purview of the laws protecting human rights, but also those to which criminal law would apply. The development of primary EU law responded, in part, to this reality. Also, since the late 1990s, case law has increasingly upheld the principle that human rights are to be upheld in balance with economic rights. For example, in *Omega Spielhallen und Automatenauftsellungs GmbH*,[3] the ECJ held that human rights shall take precedence over economic rights. Accordingly, EU framework decisions, including the Framework Decision on EAW, must also be interpreted in such a way that fundamental rights, including the right to a fair trial, must be respected. The application of the right to fair trial is linked to the second and third paragraphs of Article 48 of the EU Charter

[1] Judgment of the Constitutional Court Pl. ÚS 66/04 regarding the application to repeal section 21 (2) of Act 140/1961 Sb., the Criminal Code, as amended, and to repeal section 403 (2), section 411 (6) (e), section 411 (7) and 412 (2) 141/1961 Sb., on the Code of Criminal Procedure (implementation of the European Arrest Warrant) submitted by a group of members of Parliament and senators.

[2] Opinion of the Court (Full Court) of 18 December 2014. Opinion pursuant to Article 218(11) TFEU. Opinion pursuant to Article 218(11) TFEU – Draft international agreement – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the draft agreement with the EU and FEU Treaties. Point 191.

[3] Judgment of the Court (First Chamber) of 14 October 2004. Omega Spielhallen-und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn. Case C-36/02. Reports of Cases 2004 I-09609.

of Fundamental Rights, under which a citizen must be afforded the right to a duly assigned judge, the right of defence and the right to free legal aid, if necessary.

Fundamental rights and freedoms provide a framework within which the coercive state power to prosecute criminal offences must operate – and beyond the bounds of which it must not go. Some rights cannot be restricted at all, however urgent the interest in prosecuting a criminal offence, as this would have a completely fatal effect on a person's autonomy (e. g., prohibitions against torture, inhuman treatment, humiliation). Other of these rights and freedoms may be restricted in the context of criminal proceedings; however, only subject to the conditions, and within the limits, set by the Constitution or the EU Charter of Fundamental Rights or by international treaty. In fact, such principles that are, in essence, general procedural principles manifest the right to a fair trial in a democratic state governed by the rule of law.

Also linked to Article 48 of the Charter of Fundamental Rights of the EU is the protection of the rights of victims of crime. Here it is worth recalling, in particular, the 2005 *Pupino* decision.[4] The court in *Pupino* held that, in the case where victims are particularly vulnerable, the national court must be afforded the capability to adopt special procedural rules, such as that of requiring a preliminary evidentiary hearing outside of the main trial proceedings in the manner stipulated by the law of the Member State, or of stipulating special conditions for deposition. Where a special procedure is better suited to a victim's situation, such stipulations may be made and should be applied, for reasons such as preventing the loss of evidence, reducing the number of interviews to a minimum, or avoiding consequences that would be harmful to a victim if the victim were made to testify in open court. Article 48 of the Charter of Fundamental Rights of the EU guarantees that any accused person shall be presumed innocent until lawfully proven guilty and also guarantees respect for the accused's right to a defence.

Prior case law of the ECJ has already confirmed in this context a number of fundamental rights relevant to criminal proceedings, such as the right not to self incriminate or the rights of the parties to have an opportunity to comment on all evidence. As regards the right not to self incriminate, the ECJ issued decisions on point in the *Orkem*[5] and *Solvay*[6] cases. The facts of the *Orkem* case involved an investigation, based on suspicion, that the company had colluded with others in illicit agreements and concerted practices, thereby infringing competition laws. The European Commission ordered that the matters giving rise to suspicion be investigated. The investigation was to involve obtaining information from the company's employees. Subsequently, the question of law that came before the ECJ was whether a company's employees could be compelled to disclose information to the investigating authorities. The ECJ ruled on this issue that the investigating authorities of the European Commission may not compel a company's employees to disclose potentially inculpatory information. As regards the parties'

[4] Judgment of the Court (Grand Chamber) of 16 June 2005. Criminal proceedings against Maria Pupino. Case C-105/03. Reports of Cases 2005 I-05285.

[5] Judgment of the Court of 18 October 1989. Orkem v Commission of the European Communities. Case 374/87. Reports of Cases 1989 03283.

[6] Judgment of the Court of 18 October 1989. Solvay & Cie v Commission of the European Communities. Case 27/88. Reports of Cases 1989 03355.

inalienable right to comment on evidence presented, this was first and foremost articulated by the ECJ in its decision on the *Emesa Sugar*[7] case, where the Court invoked this fundamental procedural principle.

Another pivotal issue in the surrender process for mutual trust between the Member States is that which concerns the dual – criminality principle. The Framework Decision on EAW lists 32 types of crime for which a dual – criminality test will not be required when surrendering on the basis of an issued EAW, provided that the maximum term of imprisonment for the crime in question is not less than three years under the law of the Member State where the EAW was issued. The dual – criminality test requirement may be abandoned as a safeguard within the context of EU Member States' relations because the Member States are considered to have a sufficient level of mutual trust and shared values; they are democracies adhering to the "rule of law" principle; and they are bound by an obligation to uphold this principle. This represents another pivotal issue because the level of mutual trust between EU Member States has reached such a level that they no longer feel the need to fully adhere to the dual – criminality test requirement. The Framework Decision gives rise to such problems that are inherent in the EAW. These are specific problems of application of the principle of dual criminality. Listing the types of crime for which a dual – criminality test is not required in the context of an EAW constitutes a change in the safeguards if compared to the procedure for extradition. For other types of crime, surrender may be conditioned upon a determination that the conduct for which the EAW has been issued is a criminal offence under the laws of the executing Member State. It appears that some offences are defined too broadly (e.g., "cyber crime") or that, when implemented into national legal codes, there is a different descriptive definition of the conduct which could necessitate a dual – criminality test.

On the question of the dual – criminality test, it should be added that there is a method *in abstracto* and *in concreto*. As the ECJ pointed out in the *Grundz* case, their details may vary from one Member State to another.[8] The Czech Constitutional Court stated its opinion that *"the assessment of dual criminality in abstracto considers making only a general consideration of whether a certain typical (abstract) conduct would be a criminal offence under a given legal order and disregards the specific conditions under which criminal liability would attach in a particular case…. It is only examined whether the described offence, for which criminal proceedings are being conducted in a foreign state, would generally constitute a criminal offence."*[9] If, therefore, the Czech Constitutional Court considers the method of assessing dual criminality *in abstracto* rather as a theoretical construction, then in the case of the in *concreto* method it holds the view that *"it is not a requirement that a similarly titled or labelled offence for which the foreign state is requesting legal aid exists within the Czech legal system. It is sufficient if the conduct, as defined by the requesting state, fulfils any of the essential elements of a criminal offence under the laws of the Czech*

[7] Judgment of the Court of 8 February 2000. Emesa Sugar (Free Zone) NV v Aruba. Case C-17/98. Reports of Cases 2000 I-00675.

[8] Judgment of the Court (Fifth Chamber) of 11 January 2017 Criminal proceedings against Jozef Grundza. Case C-289/15.

[9] Judgment sp. II. ÚS 2597/18, dated 9. 4. 2020, Non-assessment of all legal conditions (dual criminality) for ordering a house search within the framework of legal aid to a foreign authority by a general court.

Republic, which would include generally recognized essential elements, negative elements or negative conditions pointing to criminality."[10]

III. POLITICAL DIMENSION OF SURRENDER

The academic literature on the EAW generally viewed it as a depoliticised instrument of EU law, in the sense that there should be no political reasons when deciding on surrender, but also that surrender would not be appropriate for politically motivated crimes.[11] The EAW passed a "politicisation test" of use for the first time, and most notably, in the context of Spain's requests for the surrender of Catalan politicians who were seeking their region's autonomy from Spain.

In October 2017, Catalonia held a referendum on establishing independence from Spain. On the basis of its results from this referendum, a unilateral declaration of an independent Catalan state in the form of a Republic was made. The Madrid government declared the referendum unconstitutional and accused the Catalan politicians who organised the referendum, led by Prime Minister Carles Puigdemont, of the crime of rebellion (*rebelión*) under Article 472 of the Spanish Criminal Code, but also of the crime of misuse of public funds (*malversación*) pursuant to Article 432 of that Code.[12] The respective politicians were arrested and placed in pre – trial detention; however, Prime Minister Carles Puidgemont and a member of his government, Lluís Puig, managed to flee to Belgium. Spanish judge Pablo Llarena issued an EAW for both politicians, seeking Belgium's surrender of them to Spain, for the aforementioned offences. While the offence of embezzlement is covered by the EAW, the offence of rebellion is not listed amongst the 32 offences exempted from the dual – criminality test. The Belgian, or rather Flemish, court (*Raadkamera van de Nederlandstalige rechtbank van eerste aanleg Brussel*) rejected the Spanish EAW on formal grounds. The Spanish EAW had been based on an indictment issued by the supreme court for wilful obstruction of an official's tasks or of the execution of an official's decision and for misuse of public funds.[13]

According to the Belgian court, information about an enforceable national judgment, warrant or other enforceable judicial decision having the same effect is a mandatory part of the EAW, which must precede its being issued. However, the Spanish court did not take such a decision required for the Belgian court, so a "mere" indictment could not be considered sufficient for an EAW to be issued in this case. The Flemish court argued for the need to ensure that the two – stage protection of the procedural and fundamental rights of the requested person, within the meaning of the ECJ decision in the *Bob Dogi* case:

[10] Ibidem.

[11] HAMUĽÁK, O. *Eurozatykač, tři ústavní soudy a dominance práva Evropské unie: srovnávací ohlédnutí se za rozhodnutími ústavních soudů Polska, Německa České republiky* [The European arrest warrant, three constitutional courts and the dominance of European Union law: a comparative look back at the decisions of the constitutional courts of Poland, Germany and the Czech Republic]. Olomouc: Univerzita Palackého, Právnická fakulta, 2011.

[12] Ley Orgánica 10/1995, de 23 de noviembre 1995, del Código Penal. Boletín Oficial del Estado, 24. 11. 1995, núm. 281 / Organic Law 10/1995, of November 23, 1995, of the [Spanish] Penal Code. Official State Gazette, 24. 11. 1995, no. 281.

[13] Auto de procesamiento del Tribunal Supremo, Nº 20907/2017, del 21. 3. 2018. / Indictment of the Supreme Court, no. 20907/2017, dated 21. 3. 2018.

"The European arrest warrant system therefore entails …a dual level of protection for procedural rights and fundamental rights which must be enjoyed by the requested person, since, in addition to the judicial protection provided at the first level, at which a national judicial decision, such as a national arrest warrant, is adopted, is the protection that must be afforded at the second level, at which a European arrest warrant is issued, which may occur, depending on the circumstances, shortly after the adoption of the national judicial decision. That dual level of judicial protection is lacking, in principle, in a situation such as that in the main proceedings, in which a 'simplified' European arrest warrant procedure is applied, since, under that procedure, no decision, such as a decision to issue a national arrest warrant on which the European arrest warrant will be based, has been taken by a national judicial authority before the European arrest warrant is issued."[14]

The Belgian court took the view that the Spanish indictment could not be regarded as a national arrest warrant; and, therefore, it requested additional information from the Spanish Supreme Court. The latter confirmed that the Spanish EAW was indeed based on an indictment of March 2018, which stated, among other things, that a national warrant against L. Puig was issued as early as November 2017, although the circumstances and reasons for which the requested person was charged had changed during the course of the ongoing investigation. The Belgian court, however, was not satisfied with this answer and, therefore, refused to execute the EAW.[15] And, meanwhile, one can only speculate about the political atmosphere of the court proceedings in the Flemish part of Belgium, where separatist tendencies are very strong.

Just for the record, it should be added that an appeal was filed against the decision of the Flemish court, and the case at the Belgian level was definitively closed in January 2021, when the Brussels Court of Appeal (*Cour d'appel de Bruxelles*) confirmed the first instance decision of the lower court; and the public prosecutor's office did not use its opportunity to appeal that decision. Ultimately, the Belgian courts did not address the issue of dual criminality whatsoever, instead justifying its determination of unenforceability of the Spanish EAW as being due to the Spanish Supreme Court's lack of jurisdiction. According to the Belgian courts, the competent courts should have been those in Catalonia. According to Article 6 of the Framework Decision on the European arrest warrant, *"[t]he issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State."*[16] It is clear from this provision that each Member State is free to determine for itself who will be its issuing judicial authority. Under the Spanish law on implementing the EAW, the judge or court hearing the case in Spain is the competent issuing judicial authority, the continuation of which authority will be ensured by the surrender of the requested person.[17] This is so in the case

[14] Judgment of the Court (Second Chamber) of 1 June 2016 Niculaie Aurel Bob-Dogi, Case C-241/15.

[15] KHINOVÁ, G. Test oboustranné trestnosti podle evropského zatýkacího rozkazu v kontextu stíhání katalánských politiků a europoslanecká imunita [The dual criminality test under the European Arrest Warrant in the context of the prosecution of Catalan politicians and parliamentary immunity]. *Právník*. 2020, Vol. 159, No. 8, pp. 601–617.

[16] 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. Official Journal L 190, 18/07/2002 P. 0001–0020.

[17] Ley 3/2003, de 14 de marzo, sobre la orden europea de detención y entrega. / [Spanish] Law 3/2003, of March 14, on the European arrest warrant and surrender order.

of the Spanish Supreme Court also because Art. 123 of the Spanish Constitution clearly states that its Supreme Court is the highest – ranking judicial authority in the country with nationwide jurisdiction. The Belgian courts' argument that the Spanish Supreme Court lacked jurisdiction to issue the EAW thus appears dubious. According to the Belgian courts, concern about respect for fundamental rights conferred in Spain, namely the principle of the presumption of innocence in the context of the right to a fair trial, constituted other grounds for the Belgian holding. This human rights aspect of assessing dual criminality will be discussed below.

While the Belgian courts did not get around to considering dual criminality for purposes of the possible surrender of the Catalan politicians, it was later dealt with by the German courts. Carles Puidgemont was detained at the request of Spain in the State of Schleswig – Holstein, where he faced a Spanish arrest warrant for his surrender for the offences of rebellion and misuse of public funds.[18] As regards the offence of misuse of public funds, the Higher Regional Court of Schleswig – Holstein (*Oberlandesgericht Schleswig – Holstein*) recognised its dual criminality and accepted the possibility of surrendering Puidgemont to Spain, but only for that offence. The German court rejected the dual criminalisation of the crime of rebellion. First, it considered whether the provisions of section 81 of the German Criminal Code, which governs the offence of high treason against the Bundestag (*Hochverrat gegen den Bund*), could be applied to the conduct.[19] Under section 81, the offence of high treason is committed by a person who: *"…undertakes, by force or threat of force, to undermine the continued existence of the Federal Republic of Germany or to change the constitutional order based on the Basic Law for the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland)."* However, according to the *Schleswig – Holstein* court, it is doubtful whether Puigdemont committed a comparable crime by force. This is primarily because the material elements of the German crime include the element of force or the threat of force. On the contrary, Puidgemont tried to achieve the separation of Catalonia from Spain by democratic means, by organising a referendum. Although violence occurred during some demonstrations, its occurrence cannot be attributed to the requested person and claimed that he wanted to achieve independence by such means. The court compared Puigdemont's actions with the case decided by the German Federal Court of Justice (*Bundesgerichtshof*) in the *Startbahn – West* case of 1983.[20] In this case, the defendant environmental activist wanted to force the Parliament of the State of Hesse to permit a referendum on a planned airport expansion. As in Catalonia, violence occurred in connection with the referendum. According to the relevant decision of the Federal Court of Justice, criminal violence that forces the state to capitulate is an attempt to carry out a revolution that will bring sacrifices and leave the state in a state of chaos.[21] At first glance, this was identical to the deeds of the Catalan politicians; but the

[18] TOMÁŠEK, M. *Bilanční zpráva 60* [Interim evaluation report 60]. Memorabilia iuridica č. 10. Praha: Vodnář, 2023.
[19] Strafgesetzbuch. In der Fassung der Bekanntmachung vom 13.11.1998 (BGBl. I S. 3322). / [German] Criminal code. In the version published on November 13, 1998 (Federal Law Gazette I p. 3322).
[20] Bundesgerichtshof, 23. 11. 1983 – 3 StR 256/83 (S), Startbahn West. / [German] Federal Court of Justice, November 23, 1983 – 3 StR 256/83 (S), Startbahn West.
[21] KÖNIG, J., MEICHELBECK, P., PUCHTA, M. The Curious Case of Carles Puigdemont-The European Arrest Warrant as an Inadequate Means with Regard to Political Offenses. *German law journal*. 2021, Vol. 22, No. 2, pp. 256–275.

German court did not permit surrender primarily because the Catalan referendum was declared unconstitutional by the Constitutional Court only *after* the referendum vote. It rejected the prosecution's argument that the unconstitutionality could have been foreseen by the organisers, given the circumstances.

The German court also compared Puigdemont's conduct with the elements of the offence of violating public order (*Landfriedensbruch*) under Article 125 of the German Criminal Code. This would be deemed committed by *"Whoever participates as an offender or a participant in acts of violence against persons or property or threatening acts of violence against persons which are committed by a crowd of people who have joined forces in a manner which endangers public safety, or whoever encourages a crowd of people to commit such acts."*[22] Under German criminal law, like under Spanish law, it is not required that the organiser of the criminal act was present at the place where the criminal act was committed.

However, according to German case law, it is important whether the event related to the violent was permitted or prohibited. The court again distinguishes the *Startbahn West* decision, in which instance Puigdemont would not have committed the German crime of violating public order. If someone lawfully announces a peaceful demonstration in order to achieve a goal permitted by law, and this demonstration is subsequently joined by groups that use violence, the organiser of this event cannot be charged with such a crime, even if he already knew about this risk when announcing it. According to the *Schleswig – Holstein* court, Puigdemont's intention was only to make the polling stations available to the Catalan population. It was not evident from the issued EAW that he had planned any violence. Based on the information provided in the EAW and in the indictment, Puigdemont could not be considered a person who planned, organised or otherwise assisted in the commission of violent acts that occurred during the assembly of the population. As already mentioned, for the criminal offence of misuse of public funds, Germany was ready to surrender Puigdemont on the condition that he would not be prosecuted for other crimes in Spain. However, the Spanish court did not accept this, so the surrender did not take place.

IV. HUMAN RIGHTS DIMENSION OF SURRENDER

As already pointed out, the surrender mechanism under the EAW is based on mutual trust between Member States. This is based on the premise that all Member States respect all fundamental rights and freedoms within the meaning of Article 6 of the EU Treaty (TEU). However, in connection with the Spanish request that Belgium surrender the Catalan politicians, the Belgian courts questioned whether their right to a fair trial would be respected in Spain. And this was not for the first time: already in 2013, the Belgian courts had refused to surrender to Spain requested persons associated with the activities of the Basque organisation ETA, which is known for its struggle for the Basque Country's inde-

[22] Strafgesetzbuch. In der Fassung der Bekanntmachung vom 13. 11. 1998 (BGBl. I S. 3322) /[German] Criminal Code. In the version of the notice of 13.11.1998 (BGBl. I S. 3322).

pendence from the Spanish Crown.[23] The Belgian Court of Cassation in Ghent (*Hof van Cassatie*), as the court of last instance, held *verbatim* that *"the surrender to Spain of Spanish citizen, affiliated to the Basque resistance and separatist movement ETA, would entail a risk of fundamental rights infringement as guaranteed in article 6 of the Treaty on the European Union."*[24]

Refusing to surrender a criminally prosecuted person to another Member State because of doubts as to whether they may be deprived of their fundamental rights there would jeopardise the whole mechanism of the EAW and, more broadly, the principle of mutual trust between Member States. Insofar as the ECJ is responsible for addressing a crisis of interpretation of any EU norm, it was only a matter of time that the Court would also begin to consider arguments as to why a requested person could not be surrendered to another Member State due to doubts about its compliance with human rights standards. The ruling of the ECJ in the joined cases of *Aranyosi* and *Căldăraru* has become crucial case law for further considering such doubts.[25] The meritorious basis was the doubt of the German High Regional Court in Bremen (*Hanseatisches Oberlandesgericht in Bremen*) as to whether requested persons could be handed over to Hungary and Romania for fear of their being subjected to inhuman and degrading treatment in prisons. The ECJ relied on judgments of the European Court of Human Rights where the Strasbourg Court found Romania to be in violation by reason of the overcrowding in its prisons.[26]

The European Court for Human Rights particularly held it to be established that Romania was in violation of Article 3 European Charter of Human Rights by imprisoning the applicants in cells that were too small and overcrowded, that lacked adequate heating, that were dirty and lacking in hot water for showers. The extradition court made the argument that surrendering Pál Aranyosi and Robert Căldăraru to the Romanian authorities does not satisfy the minimum standards required by international law which is also supported by a report issued by the European Committee for the Prevention of Torture and Inhuman or Degrading Punishment. Referencing that report, the court observed that *"[t]he findings in that report refer in particular to the significant prison overcrowding identified in visits made between 5 and 17 June 2014."*[27]

The ECJ has recognised that limitations of the principles of mutual recognition and mutual trust between Member States can be made "in exceptional circumstances". The Court built upon the preamble to the Framework Decision on the European Arrest Warrant, paragraph 10, which states that *"[t]he mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be sus-*

[23] MEYSMAN, M. Belgium and the European arrest warrant: is European criminal cooperation under pressure? Refusal of European arrest warrant surrender in the case Jauregui Espina as proof of failing mutual trust. *European Criminal Law Review*. 2016, Vol. 6, No. 2, pp. 186–210.

[24] Hof van Cassatie, 19 november 2013, AR P.13.1765.N.

[25] Judgment of the Court (Grand Chamber) of 5 April 2016 Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen Joined Cases C-404/15 and C-659/15 PPU.

[26] In a number of judgments issued on 10 June 2014, the (ECtHR, Voicu v. Romania, No 22015/10; Bujorean v. Romania, No 13054/12; Mihai Laurențiu Marin v. Romania, No 79857/12, and Constantin Aurelian Burlacu v. Romania, No 51318/12).

[27] Judgment of the Court (Grand Chamber) of 5 April 2016 Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen Joined Cases C-404/15 and C-659/15 PPU.

pended 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."[28] Such were the evaluations *in abstracto*. The assessment *in concreto* was made by the ECJ in the case of *Aranyosi* and *Căldăraru* as follows:

Nonetheless, a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of detention in the issuing Member State cannot lead, in itself, to the refusal to execute a European arrest warrant. It follows that, where the judicial authority of the executing Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State, having regard to the standard of protection of fundamental rights guaranteed by EU law that judicial authority is bound to assess the existence of that risk when it is called upon to decide on the surrender to the authorities of the issuing Member State of the individual sought by a European arrest warrant. The consequence of the execution of such a warrant must not be that that individual suffers inhuman or degrading treatment.[29]

The ECJ inferred from the court's opinion in the *Aranyosi* and *Căldăraru* joined case the theory of the so – called *Aranyosi* test. The test is a two – stage test, where the situation is assessed *in abstracto* under the first stage. The executing judicial authority must then assess, on the basis of objective, reliable, accurate and duly updated data, whether there is, in general, a real risk, in the issuing Member State, to the requested persons in terms of a violation of their fundamental rights – such as the right to a fair trial. This is an assessment of the system, whereby the level of protection, as provided by the legal order of the Member State under scrutiny, is assessed.[30] If the issuing court finds that, in general, such a risk is present, it must then undertake the second stage of the *Aranyosi* test. In reviewing this stage, the court will assess the impact of the relevant risks on the particular person.[31]

The relationship of the first stage of the *Aranyosi* test to Article 7 TEU was clarified by the ECJ in its ruling in *High Court of Ireland v. LM*.[32] In that case, the requested person claimed that his surrender to Poland would deny him the right to a fair trial because the principle of the rule of law is being violated in that country and there are no guarantees of independence and impartiality of the Polish courts. The ECJ accepted here as objective evidence the information contained in the Commission's reasoned proposal requesting the activation of the mechanism under Art. 7, par. 1 TEU, but requested again that the Irish judicial authorities not be satisfied with a demonstration

[28] 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. Official Journal L 190, 18/07/2002 P. 0001–0020.

[29] Judgment of the Court (Grand Chamber) of 5 April 2016 Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen Joined Cases C-404/15 and C-659/15 PPU.

[30] FRACKOWIAK-ADAMSKA, A. Court of Justice Trust until it is too late! Mutual recognition of judgments and limitations of judicial independence in a Member State. *Common Market Law Review*. 2022, No. 1, pp. 113–150.

[31] LEVÁ, K. *Evropský zatýkací rozkaz a vzájemná důvěra ve světle případu katalánských politiků – jak by měl Soudní dvůr nyní zareagovat?* [The European Arrest Warrant and mutual trust in the light of the case of Catalan politicians – how should the Court of Justice react now?]. Praha: Právnická fakulta Univerzity Karlovy, 2022.

[32] Judgment of the Court (Grand Chamber) of 25 July 2018 High Court (Ireland) v. LM Case C-216/18 PPU.

of a "real risk" due to systemic or general deficiencies concerning the judiciary in Poland.

The ECJ held:

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 generalised deficiencies concerning the judiciary of that Member State, such as to compromise the independence of that State's courts, that authority must, as a second step, assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run that risk.[33]

As the Irish judicial authorities were unable to find evidence demonstrating the specific risk to which the requested person would have been exposed by the surrender to Poland, he was surrendered.[34]

According to point 10 of the preamble to the EU Framework Decision on the European Arrest Warrant, the implementation of the EAW mechanism can be suspended only after the Council of the EU has found a given Member State guilty of violating fundamental Union values pursuant to the so – called preventive procedure within the meaning of Art. 7, par. 1 TEU, and the so – called sanctioning procedure according to Art. 7, par. 2 TEU. However, practice has shown that the mechanism of Art. 7 TEU has never been performed in full since its inception 30 years ago and can therefore be described as non – functional. For example, No.7 TEU was invoked against Poland in December 2017 and against Hungary in September 2018. However, since then, the actual preventive procedure has not finished, and the sanctioning procedure has still not commenced. That is why, in the abovementioned cases and elsewhere, the ECJ has repeatedly admitted that, for the first stage of the *Aranyosi* test, it is sufficient 'only' to initiate a preventive procedure, or even to make a mere objection of suspicion of non – observance of certain fundamental rights and freedoms. However, neither of those situations relieves the courts of their obligation to carry out, as well, the second stage of the *Aranyosi* test.

V. CONCLUSIONS

The examples provided here illustrate a still imperfect functioning of the EAW, where courts of the Member States hesitate, or refuse altogether, to surrender requested persons. The path to resolving this situation is to refer to the ECJ for a preliminary ruling on a question that will take "pro – EU positions" on the matter. Advocate General Michal Bobek commented very aptly in his Opinion in the *Grundza* case[35] that, in any event, that case did not concern the EAW directly but rather the Framework Decision on the application of the principle of mutual recognition of judgments in criminal matters.[36] According to

[33] Ibid.

[34] FRACKOWIAK-ADAMSKA, A. *Court of Justice Trust until it is too late! Mutual recognition of judgments and limitations of judicial independence in a Member State.* pp. 113–150.

[35] Judgment of the Court (Fifth Chamber) of 11 January 2017 Criminal proceedings against Jozef Grundza. Case C-289/15.

Advocate General Bobek's Opinion, it is clear that, on the basis of the principles of mutual trust and mutual recognition, the legal systems of the individual Member States are much more open to each other, as demonstrated by the replacement of the classic extradition procedure with a more simplified process of surrendering. However, if this mechanism is to be utilised to maximum effect within the meaning of the *l'effet utile* doctrine, it must be accepted that an assessment of the condition of dual criminality will require a considerable degree of abstraction. Bobek states in point 52 of his Opinion:

In other words, the questions to be asked by the judicial authority of the executing State in the process of such a 'conversion' are: can the act(s) that have led to the judgment in the issuing State be subsumed under any criminal offence provided for by the criminal law of the executing State? Would such an act be considered criminally punishable per se if committed on the territory of the executing State?[37]

The Europeanisation process for criminal law still faces many challenges today. The first of them is the concept of state sovereignty in the matter of criminal jurisdiction. Any decision by the European Union's judicial authorities to Europeanise any aspect of criminal law will immediately be subject to scrutiny with respect to any limiting effect on the national sovereignty of the Member States. European lawmakers must therefore constantly hide behind unquestionable values in relation to criminal law, such as the rule of law, the democratic decision – making process or the protection of fundamental rights and freedoms. Only through principles thus formulated has it been possible in recent years to achieve difficult – to – enforce objectives in the area of Europeanisation of criminal law, one example being the EAW towards minimally harmonising the articulation of criminal offences. The path to a "European criminal law" is forged through the case law of the ECJ. In particular, its interpretation of the proper use of the EAW may be considered essential. If we succeed in promoting the pro – EU application of this instrument, we will once again be one step further along the path described.

[36] Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ 2008, L 327, p. 27), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24).

[37] Opinion of Advocate General Bobek delivered on 28 July 2016, Case Grundza, C-289/15, EU:C:2016:622.