

Fundamental Rights Within the European Arrest Warrant

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Abstract

The mechanism of the surrender of wanted persons on the territory of the European Union experienced a natural evolution over time with the construction of European integration and the development of the area of freedom, security and justice. Starting from the traditional difficult extradition procedures in which the political factor was decisive, it was now established a judicial procedure under the jurisdiction of independent and impartial courts, in which only legal criteria are intended to be applicable, with the total exclusion of political decision-makers. Given that the European Arrest Warrant (EAW) is based on mutual trust between the judicial authorities of the member states, it works in the vast majority of cases. However, the principle of mutual trust between member states is not an absolute one and has encountered some limitations, allowing the refusal to execute the European arrest warrant in certain situations, in which the concrete violation of the right to a fair trial or the suffering of degrading and inhumane treatments would be found.

Keywords: European arrest warrant, human rights, fair trial, conditions of detention.

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1. Introduction

After 20 years of continuous application, the European Arrest Warrant (hereinafter, EAW) has come to a time of reckoning.

However, being a coercive measure by its nature, which restricts the freedom of the requested person in order to surrender to the issuing state, the implementation of the EAW based on the principle of mutual trust comes into competition with the need to respect fundamental human rights. Human rights are intimately linked to the birth

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and evolution of society, representing minimum standards⁵ that cannot be violated.

Under these circumstances, as rightly pointed out by the President of the CJEU Koen Lenaerts, it is necessary to accommodate the principle of mutual recognition "with a level of protection of fundamental rights which, while preserving the autonomy of the EU's legal order, is inspired by the constitutional traditions common to the member states and of the ECHR". That being the case, "mutual trust should not be confused with blind trust", concludes the same author⁶. Consequently, "mutual trust, imposed in accordance with the case law of the CJEU and EU law, is not absolute, and regulates cases in which the competent authorities of the requested Member State may refuse to recognize and enforce judicial or extrajudicial decisions given in another Member State."⁷

In the following sections, we will analyze the common aspects regarding the need to respect human rights in general, then we will examine the main categories of fundamental rights that must be protected when implementing any EAW, which are invoked most often in the legal practice of the EAW (the right to a fair trial, the right to life and the prohibition of inhuman or degrading treatment). However, this study will not affect the procedural rights within the EAW judgment, such as the right to effective legal assistance or the right to translation and interpretation, for which we propose to carry out future studies in the field⁸.

2. The respect for fundamental human rights within EAW

2.1. Ensuring effective jurisdictional protection in the execution of the EAW

Regarding the application of the ECHR standard in the EAW matter, we know that, although provided as a legal obligation in Art. 6 para. 2 of the Treaty on European Union (hereinafter TEU), the European Union is not yet a party to the European Convention on Human Rights (hereinafter Convention or ECHR).⁹

⁵ Fedorova, Masha, Sluiter, Goran, "Human rights as minimum standards in international criminal proceedings", *Human Rights and International Legal Discourse*, Vol.3, Issue 1 (2009): 9-56. <https://hdl.handle.net/11245/1.333489>.

⁶ Lenaerts, Koen, "La vie après l'avis: Exploring the Principle of Mutual (Yet Not Blind) Trust", *Common Market Law Review*, Vol. 54, No. 39(2017): 805–840.

⁷ Groza, Anamaria, "The principle of mutual recognition: from the internal market to the European area of freedom, security and justice", *Juridical Tribune - Tribuna Juridica*, Vol. 12, Issue 1 (2022): 103. <https://www.tribunajuridica.eu/arhiva/An12v1/7.%20Groza%20Anamaria.pdf>.

⁸ For the analysis of such aspects, see Glerum, Vincent and Wąsek-Wiaderek, Małgorzata, "Detention Pending Execution of the European Arrest Warrant – Dutch and Polish Experience. Some Reflection from the Human Rights Perspective", *Review of European and Comparative Law*, Vol. 54, No. 3(2023): 121-122, <https://doi.org/10.31743/recl.16268>; Glerum, Vincent, "Directive 2013/48/EU and the Requested Person's Right to Appoint a Lawyer in the Issuing Member State in European Arrest Warrant Proceedings", *Review of European and Comparative Law*, Vol. XLI, Issue 2 (2020): 26, <https://doi.org/10.31743/recl.6128>.

⁹ To follow the status of accession negotiations, see the official website of the Council of Europe, accessed 8.10.2024, <https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession->

However, according to a consistent jurisprudence of the European Court of Human Rights (hereafter ECtHR), when applying Union law, member states remain bound by the provisions of the ECHR.¹⁰

Moreover, by the very Art. 52 para. 3 of the Charter, it is stipulated that the meaning and scope of the rights provided for by the Charter are the same as those provided for by the Convention, without preventing the Union law from conferring a wider protection. As stated, the Charter of Fundamental Rights of the European Union represents "the gold standard of EU human rights law"¹¹.

These conventional obligations must be taken in light of the presumption of equivalent protection of human rights in the EU vis-à-vis the ECHR conventional system, referred to as the Bosphorus presumption, after the *Bosphorus Airways v. Ireland* case of the same name¹². According to this presumption, the protection of fundamental rights by the Community legislation is equivalent to that in the Convention system¹³. In order to apply the presumption, it is necessary to comply with two conditions: on the one hand, the member state must not have any margin of appreciation in the application of Union law¹⁴, and, on the other hand, it is necessary to use the entire control mechanism provided for by EU law¹⁵. Finally, the presumption is relative, and can be overturned, but only if it is found that the jurisdictional protection at the Union level was "manifestly deficient"¹⁶.

In this context, it should be remembered that the ECtHR considers that the establishment of an area of freedom, security and justice in the Union is legitimate in principle from the point of view of the Convention¹⁷, provided, however, that the objective of effectiveness of the mutual recognition mechanism, which is at the center EAW, not to be applied "automatically and mechanically" to the detriment of fundamental rights¹⁸. From the practice of the ECtHR it follows "presumably demonstrating the lack of intention to undermine the interpretative authority of the Court of Justice of the European Union"¹⁹.

of-the-european-union-to-the-european-convention-on-human-rights.

¹⁰ ECtHR, *Avotiņš v. Latvia* [GC], no. 17502/07, 23 May 2016, point 101.

¹¹ Nagy, Csongor Istvan, "The Diagonal Application of the EU Charter of Fundamental Rights: From "Displacement" through "Agency" to "Scope" and Beyond", *German Law Journal*, no. 25(2024): 158. DOI10.1017/glj.2023.94.

¹² ECtHR, *Bosphorus Hava Yolları Turizm vs. Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI.

¹³ ECtHR, *Bosphorus*, cited above, point 165.

¹⁴ ECtHR *Povse vs. Austria*, The decision of June 18, 2013; ECtHR *Bivolaru and Moldovan vs. France*, Judgment of March 25, 2021, point 114; ECtHR *M.S.S. vs. Belgium and Greece*, Decision of the Grand Chamber of January 21, 2011, points 339 and 440; ECtHR *Ilias and Ahmed vs. Hungary*, Decision of the Grand Chamber of November, 2019, points 95-97; ECtHR *O'Sullivan McCarthy Mussel Development Ltd. vs. Ireland*, Judgement of June 7, 2018, point 112.

¹⁵ ECtHR See *Michaud vs. France*, Jugement of December 6, 2012, points 114 and 115; ECtHR *Avotiņš vs. Latvia*, cited above point 111; *Bivolaru and Moldovan vs. France*, cited above, points 115, 131.

¹⁶ ECtHR, *Bivolaru and Moldovan vs. France*, cited above, points 117-126.

¹⁷ ECtHR, *Avotiņš*, cited above, point 113.

¹⁸ ECtHR, *Avotiņš*, cited above, point 116.

¹⁹ Daminova, Nasiya, "The ECHR Preamble vs. the European Arrest Warrant: balancing Human Rights protection and the principle of mutual trust in EU Criminal Law?", *Review of European and*

The Court of Justice supported the special value that the principle of mutual trust has in the EAW matter, regarding which it ruled that it requires that, except from some exceptional circumstances, each member state considers that all other member states respect Union law and, especially, the fundamental rights recognized by Union law, as it appears from the judgments handed down in the Aranyosi and Căldăraru cases or the LM case²⁰. The principle of mutual trust "creates a presumption of compliance with EU law and particularly with the fundamental rights recognised by EU law"²¹.

As an example, in the Puig Gordi case²², the Court established that the executing judicial authority does not have the power to refuse the execution of an EAW on the basis of a reason for non-enforcement which does not derive from the Framework Decision on EAW, but only from the law of the Member State of execution.

However, "the implementation and application of the Arrest Warrant give reason to believe that there is a lack of trust between EU member states when co-operating in criminal matters"²³. "It is regrettable simply because the process has been a vital criminal justice tool in the fight against crime, be it national or transnational."²⁴

In applying the principle of effective jurisdictional protection, the Court established, in the Bob-Dogi case²⁵, that the EAW system implies a double level of protection both for the fundamental rights that the requested person must benefit from and for the procedural rights. Specifically, there is a jurisdictional protection granted at the first level, where the national judicial decision, such as a national arrest warrant, is passed, to which is added the protection that is granted at the second level, when the EAW is actually issued according to FD. For example, the first level of judicial protection is missing in the situation where a domestic judicial decision would not be issued by a national judicial authority to be the basis of an EAW before its issuance.²⁶

Under this aspect, the Court ruled that a decision which meets the requirements inherent to an effective jurisdictional protection at least at one of the two levels of the mentioned protection, should be adopted.

Thus, when the law of the issuing Member State assigns the competence to issue an EAW to an authority which, although participating in the administration of

Comparative Law, Vol. 49, No. 2(2022):100, <https://doi.org/10.31743/recl.13109>.

²⁰ CJEU, related causes C-404/15 and C-659/15 PPU Aranyosi and Căldăraru and in case C-216/18 PPU LM.

²¹ Popelier, Patricia, Gentile, Giulia and van Zimmeren, Esther, "Bridging the gap between facts and norms: mutual trust, the European Arrest Warrant and the rule of law in an interdisciplinary context", *European Law Journal*, Vol. 27 Issue 1-3(2021): 183. <https://doi.org/10.1111/eulj.12436>.

²² CJEU, C-158/21 Puig Gordi.

²³ Van Sliedregt, Elies, "The European Arrest Warrant: Between Trust, Democracy and the Rule of Law", *European Constitutional Law Review*, Vol. 3, Issue 02(2007): 244-245. <https://doi.org/doi:10.1017/S1574019607002441>.

²⁴ Davies, Gemma and Arnell, Paul, "Extradition Between the UK and Ireland After Brexit—Understanding the Past and Present to Prepare for the Future", *The Journal of Criminal Law*, Vol. 85 Issue 2(2021): 99. <https://doi.org/doi:10.1177/0022018320977531>.

²⁵ CJEU, C-241/15 Bob-Dogi.

²⁶ CJEU, C-453/16 PPU Özçelik and C-414/20 MM.

justice in this Member State, is not itself a court, the decision to issue such an arrest warrant and in particular the proportional nature of such a decision must be able to be submitted in the respective Member State to a judicial procedure that fully meets the requirements inherent in an effective jurisdictional protection.

Moreover, this must happen and the requested person must benefit from effective jurisdictional protection before being handed over to the issuing Member State, at least at one of the two levels of protection imposed by this jurisprudence, as it appears from the OG cases and PI and cause PF.²⁷

Finally, for an effective jurisdictional protection, the national authorities are required to interpret domestic law in accordance with Union law (obligation of conforming interpretation), and in the case of Union provisions with direct effect, even to leave unapplied contrary domestic provisions (obligation of priority application of Union law), context in which they can apply a higher national standard, provided it does not compromise the supremacy, unity and effectiveness of Union law.

2.2. Ensuring the requirement of proportionality in the execution of the EAW

Through its constant jurisprudence, enshrined in the OG and PI cases or in the MM case²⁸, the Court of Justice has ruled that the issuance and execution of an EAW must always be proportionate to the objective pursued, in the sense that the issuing judicial authorities must check whether, considering the specific circumstances of each case and taking into account all incriminating and exculpatory evidence, it is proportionate to issue an EAW for execution. The need to apply the principle of proportionality in the procedure for executing the European arrest warrant was argued in detail in the specialized literature²⁹.

But when the EAW is issued for the purpose of executing a sentence, it appears by hypothesis to be proportional to the issued, which must consist of a sentence or a security measure depriving freedom of at least 4 months, according to Art. 2 para. 1 of DC.³⁰

Thus, the Court determined that, given the serious consequences that the execution of an EAW has on the freedom of the requested person and the restrictions on free movement, the issuing judicial authorities should consider the assessment of a series of criteria to determine whether the issuance of an EAW is justified, in particular the following factors: (a) the seriousness of the offense (for example, the damage or danger caused); (b) the possible penalty imposed if the person is found guilty of the offense in question (for example, if it were a custodial sentence); (c) the

²⁷ CJEU, C-508/18 and C-82/19 PPU OG and PI.

²⁸ CJEU, C-508/18 and C-82/19 cited above or in case C-414/20 MM.

²⁹ Januário, Túlio Felipe Xavier, “Do princípio da proporcionalidade e sua aplicação no mandado de detenção europeu” [The principle of proportionality and its application in the European arrest warrant], *Rev. Bras. de Direito Processual Penal*, Porto Alegre, Vol. 4, No. 1(2018): 435-472. <https://doi.org/10.22197/rbdpp.v4i1.114>.

³⁰ CJEU, C-627/19 PPU ZB.

possibility of detention in the issuing Member State after surrender; (d) the interests of victims of crime.

In the same manner, the doctrine emphasized that "any test of the proportionality of a coercive measure should thus answer three questions: (1) is the objective of the measure applied sufficiently important to justify limiting a fundamental right? (2) is the measure designed to meet the legislative objective? (is it rationally connected to it?) and (3) is the measure used to restrict a right or freedom no more than is necessary to accomplish the objective? A given measure therefore must be rationally connected to the objective and may not be arbitrary, unjust, or based on irrational considerations. In other words, it should be applied in accordance with the law, and any potential infringement of rights must be proportional to the objective."³¹

In order to justify the proportionality in the EAW procedure, the Court emphasized that, at a more general level, the proportionality checked before issuing an EAW can strengthen the mutual trust between the competent authorities of the Member States, which significantly contributes to the effective functioning of the EAW throughout the entire Union.

The measure of the arrest of the person requested for surrender must also be proportional to the purpose pursued, in which context the judicial enforcement authority must decide whether the person will be kept in detention or will be released until the decision is adopted regarding the execution of EAW. Therefore, detention is not necessarily requested, and the person can be provisionally released at any time, in accordance with the domestic law of the executing Member State, in accordance with Art. 12 of the Framework Decision. However, according to the same article, if this person is not detained, the competent authority in the executing Member State has the obligation to take all the measures it considers necessary to avoid the abduction of the wanted person.

Under this aspect, in the TC case³², the Court of Justice held that the EAW Framework Decision is opposed to a national provision which provides for a general and unconditional obligation to release a wanted person who has been arrested under an EAW as soon as the 90-day period from the arrest of the person concerned has expired, when there is a very serious risk of the person's abduction and when the risk cannot be reduced to an acceptable level by the imposition of appropriate measures.

The proportional nature of the measure of arrest to surrender was reiterated in the Lanigan case³³, where the Court of Justice ruled that Union law does not preclude the detention of the requested person, even if the total duration of the detention of this person exceeds the terms of the DC, provided that this duration does not have an excessive character in relation to the characteristics of the procedure followed in the main case, an aspect whose verification rests with the referring court. Despite the fact that there is a rich jurisprudence of the Court of Justice, the judicial enforcement

³¹ Kaczmarek, Adrian, Szkudlarek, Jacek, Fraser, Aneta, "A European System of Coercive Measures: A Study in Proportionality and Effectiveness", *The Croatian Yearbook of European Law and Policy* (CYELP), Vol. 19 (2023):160. DOI: 10.3935/cyelp.19.2023.508.

³² CJEU, C-492/18 TC.

³³ CJEU, C-237/15 PPU, Lanigan.

authorities have differently assessed the proportionality of the EAW.

A particular example in this regard is the famous cases regarding the European arrest warrants issued by the Spanish courts in relation to those involved in the attempted abrogation of the Constitution in Catalonia in 2017, which represented a real test for the cooperation instrument represented by the EAW, being widely discussed in foreign doctrine³⁴.

In these cases, none of the warrants issued by the Spanish authorities were executed by the requested Member States, namely Belgium, Germany, the United Kingdom and Italy. Thus, when the arrest warrants were reactivated in October 2019 following the judgment of the Supreme Court on 14 October, the British authorities initially refused to cooperate in the surrender on the grounds that the European arrest warrant for the requested person (Clara Ponsatí) was "disproportionate". After being delayed for several months, the requested person chose to move to Belgium. In this context, the natural question arises as to what criteria the British authorities applied to reach the conclusion that the EAW - issued in the case for particularly serious crimes of "rebellion" and "embezzlement of public funds" such as the separatist action of some regional deputies - did not comply with the proportionality requirement in question?

In Romanian domestic law, there are such express legal provisions that assign, for example, for the execution phase of the criminal judgment, the judge appointed by the president of the execution court (in principle, the same as the one delegated with the execution of criminal judgments) the competence to consider whether it is "opportune to issue a European arrest warrant", taking into account "the nature of the crime committed, the age and criminal history of the requested person, as well as other circumstances of the case".³⁵

However, criticism can be heard regarding the issuing of EAWs by the Romanian authorities even for minor crimes (such as cutting down trees with damages of 300 euros), questioning the effective assessment of proportionality in such cases.³⁶ This happens, in our opinion, because in Romanian domestic judicial practice, the EAW is issued semi-automatically and without analyzing the proportionality of this provision in the event that the convicted person is not found at home in the procedure for the execution of a final criminal court decision. Such an example clearly shows the need for the courts, especially the Romanian ones, to assess with greater rigor the appropriateness criteria for the issuance and execution of an EAW and to censor the cases in which the implementation of an EAW in this manner appears disproportionate

³⁴ García, Rafael Arenas, "Orden europea de detención y entrega y defensa del orden constitucional de los Estados miembros de la UE" (European arrest warrant and the surrender procedures and defense of the constitutional order of the EU member States), Universitat Autònoma de Barcelona (Spain), publication date 26.02.2023: 360-381, accessed 8.10.2024. https://institucional.us.es/revistas/Araucaria/53/Mon_III/1_arenas.pdf.

³⁵ See art. 89 par. 1 from Law no. 302/2004 on judicial cooperation in criminal matters, republished, published in M. Of. no. 411 of May 27, 2019.

³⁶ European Union Agency for Fundamental Rights (FRA) Report: European Arrest Warrant proceedings - Room for improvement to guarantee rights in practice (2024): 39, accessed 8.10.2024 <https://fra.europa.eu/en/publication/2024/european-arrest-warrant-proceedings>.

to the objective pursued, consisting in combating the feeling of impunity of persons who are no longer in the territory of the issuing state.

3. Particular respect for fundamental rights in the execution of the EAW

3.1. Respecting the right to a fair trial in the execution of the EAW (independence of the issuing court)

Consecrated by Art. 47 of the Charter of Fundamental Rights of the European Union (hereinafter, CDFUE or the Charter) and by Art. 6 of the European Convention on Human Rights (hereinafter, the ECHR or the Convention), the right to a fair trial involves several essential aspects, as they have been developed in the jurisprudence of the European courts, some of which have also found their applicability within the EAW, such as the requirement of an "independent" and "impartial" court. This "because if the legal construction of the specified provision does not apply, then the rest of the human rights remain unprotected, which excludes the guarantee of quality and impartial justice"³⁷. Without these elements the law would cease to be itself, to be "authentic" and to present any value to its beneficiaries³⁸.

In terms of the ECHR standard for determining whether a body can be considered "independent", the Court takes into account criteria such as the way in which its members are appointed, the term of office of its members, the existence of protection against external pressure and the question of whether or not there is semblance of independence³⁹. In terms of the requirement of "impartiality" of the court, the ECtHR established two criteria for assessing impartiality by distinguishing between, on the one hand, a subjective approach that concerns the attempt to establish the personal conviction or interest of a certain judge in a certain case and, on the other hand, an objective approach in which it is verified whether the judge has provided sufficient guarantees to exclude any legitimate doubt in this regard⁴⁰.

Justice is the foundation of the judicial system and its essence, and an efficient judicial system is the foundation of a democratic society⁴¹, representing the guarantee of freedom and the rule of law. The rule of law is an umbrella concept that encompasses the legal values and principles on which modern and liberal

³⁷ Shelever, Nataliya, Rogach, Oleksandr, Antalovtsi, Olha, Voron, Diana, Pylyp, Victoria, (2024). "Justice of judicial procedure: conceptual basis and national characteristics", *Revista Brasileira de Direito*, Passo Fundo, Vol. 20, No. 1, e4987(2024). DOI: <https://doi.org/10.18256/2238-0604.2024.v20i1.4987>.

³⁸ Van Drooghenbroeck, Sébastien, Rizcallah, Cecilia, "The ECHR and the Essence of Fundamental Rights: Searching for Sugar in Hot Milk?", *German Law Journal*, Vol. 20, No. 6(2019): 904–923. doi: 10.1017/glj.2019.68.

³⁹ ECtHR, Findlay vs. United Kingdom, 1997, point 73.

⁴⁰ ECtHR, Kyprianou vs. Cyprus (MC), 2005, point 118; ECtHR, Piersack vs. Belgium, 1982, point 30; ECtHR, Grieves vs. United Kingdom (MC), 2003, point 69; ECtHR, Morice vs. France (MC), 2015, point 73.

⁴¹ Andrusyshyn, Bohdan, Bilozorov, Yevhen, Opolska, Natalia., Kupina, Liudmyla and Tokarchuk, Olha, "Right to a Fair Trial in Extraordinary Conditions", *The Age of Human Rights Journal*, 20, e7539(2023), accessed 8.10.2024. <https://doi.org/10.17561/tahrj.v20.7539>.

constitutional regimes are founded⁴². It "is one of a cluster of ideals constitutive of modern political morality"⁴³. That is why, quite rightly, with the crisis of the rule of law in Poland, some courts in other member countries such as Ireland and the Netherlands have started to ask the Court of Justice if they can refuse to execute the warrant for the reason of the lack of independence of the issuing court. The answer was positive, but strictly conditional.

Thus, by its Decision of 25 July 2018, to a preliminary question from the High Court (High Court, Ireland), the Grand Chamber applied the two-stage test established in *Aranyosi and Căldăraru*, concluding that both the (general) elements resulting from documents of the European Commission (revealing possible violations of human rights), as well as the (particular) existence of "a real risk of violation of the fundamental right to a fair trial" of the person handed over on the basis of a European arrest warrant.⁴⁴ This shows that "There are many implications arising out of the decision of the Court in *Aranyosi and Căldăraru*."⁴⁵

The binding nature of the second stage of the analysis was to be confirmed by the second reference judgment delivered on this aspect, at the request of the *Rechtbank Amsterdam* (Court of Amsterdam, Netherlands), by the Grand Chamber on 17 December 2020, which ruled that the enforcement authority cannot challenge the quality of the judicial authority that issued the European arrest warrant "without carrying out a concrete and precise check that would take into account in particular the personal situation of the person in question, the nature of the crime in question, as well as the factual of the respective issue, such as statements by some public authorities that may interfere with the treatment that must be reserved for an individual case"⁴⁶.

Therefore, the analysis of the Court of Justice does not abandon the two-stage test established in the matter of the prohibition of inhumane treatment through non-compliant conditions of detention, proceeding to its application on the occasion of assessing the risk of violation of the right to a fair trial in terms of the independence of the court, as well.

The first stage has a general nature and aims to establish, on the basis of objective, reliable, precise and properly updated elements, systemic or generalized deficiencies with regard to the independence of the judicial system in the issuing

⁴² Pech, Laurent, "A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law", *European Constitutional Law Review*, Vol. 6 No. 3(2010): 359–396. doi:10.1017/s1574019610300034.

⁴³ Waldron, Jeremy, "The Concept and the Rule of Law", *Georgia Law Review*, Forthcoming, NYU School of Law, Public Law Research Paper No. 08-50(2008), accessed 9.10.2024. <https://ssrn.com/abstract=1273005>.

⁴⁴ CJEU, C-216/18 PPU LM, cited above.

⁴⁵ Aizpurua, Eva and Rogan, Mary, "Understanding new actors in European Arrest Warrant cases concerning detention conditions: The role, powers and functions of prison inspection and monitoring bodies", *New Journal of European Criminal Law*, Vol. 11 Issue 2(2020): 224, <https://doi.org/10.1177/2032284420923410>.

⁴⁶ CJEU, related cases C-354/20 PPU and C-412/20 PPU L and P. Other cases concerning the requirement of independence of the issuing court followed, such as CJEU, the related cases C-562/21 PPU and C-563/21 PPU *Openbaar Ministerie*, CJEU, C-480/21, *W O and J L/Minister for Justice and Equality* and CJEU, C- 158/21 cited above.

Member State.

The second stage is concrete in nature and refers to the verification of whether there are substantial grounds for considering that there is such a violation of the right to a fair trial in the specific circumstances of the case for the requested person.

The two stages are not to be confused and are in a predetermined binding ratio.

Thus, the first stage regarding the retention of the generalized risk is priority and mandatory compared to the second stage regarding the particular risk for the person targeted by the EAW. In other words, the existence of a generalized risk is not enough to refuse the EAW, as it is necessary to verify the concrete situation of the requested person. In addition, the executing judicial authority cannot start the analysis directly with the second stage, so it cannot focus directly on the concrete risk before first and separately verifying the existence of systemic or generalized deficiencies in the judicial system.

Therefore, if both stages are completed and there is a risk of violation of the right to a fair trial in terms of the independence of the issuing court, the executing court cannot enforce the EAW, but must refuse to enforce it. In such a situation, the issuing and executing judicial authority could consult and examine whether there are alternative means to the EAW, such as transferring the judicial proceedings or the execution of the custodial sentence to the executing Member State.

Moreover, the two judgments regarding the independence of the judicial authority issuing the EAW come to concretize what the Court previously established through its reference judgment of 27 February 2018 regarding the rule of law in the Union in the *Associação Sindical dos Juizes Portugueses* case⁴⁷, in which the Court emphasized that "the very existence of an effective judicial control intended to ensure compliance with Union law is inherent in a rule of law".

The doctrine identifies three reasons why the European court was so restrictive in establishing the criteria for assessing the requirement of independence of the issuing court: "first, an interpretation to the contrary would amount to a de facto suspension of the EAW, while the preamble of the EAW FD empowers only the European Council to do so. Second, accepting that the judges or courts of a member state can no longer be considered independent *en masse* would deprive those courts and judges of the possibility to make use of the preliminary ruling mechanism, while precisely that mechanism has played a key role in relation to resisting the «reforms» of the polish government. Third, it would entail a high risk of impunity of requested persons present in a territory other than that in which they allegedly committed an offence, thereby undermining a fundamental objective of the EAW and the Eu more broadly."⁴⁸

In conclusion, it was shown that "even if some persons may look at it as a

⁴⁷ CJEU, Judgment of the Court (Grand Chamber) of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, ECLI:EU:C:2018:117, para. 29-37.

⁴⁸ Mancano, Leandro, "You'll never work alone: A systemic assessment of the European Arrest Warrant and judicial independence", *Common Market law review*, Vol. 58 No. 3(2021): 701, accessed 9.10.2024. <https://www.pure.ed.ac.uk/ws/portalfiles/portal/209885835/MancanoCMLR2021YoullNeverWorkAlone.pdf>.

«mild» response, what was protected by it was more a «precious» instrument of EU cooperation than the Polish government. In any case it is difficult to see any kind of armistice in them.⁴⁹ But, "the rule of law crisis encompassing systemic deficiencies in prison conditions and an erosion of judicial independence has perhaps urged the Court to consider the centrality of the rule of law and fundamental rights for the EU's identity."⁵⁰

One of the exemplary cases at the Court of Justice in terms of the Court independence requirement came from Romania itself. Thus, in the Breian case⁵¹, the Court of Justice was notified by the Braşov Court of Appeal in the context in which a French court had previously refused an EAW on the lack of independence requirement of the Romanian court that ordered the conviction of the requested person, citing the existence of systemic deficiencies regarding irregularities regarding the lack of evidence of the taking of the oath by the magistrates of the issuing Member State (first stage of analysis), which would have been found in the case of two of the three members of the panel of judges by not finding the evidence of taking the oath by them (a second stage).

In its answer to the fourth question from the preliminary reference, the CJEU followed the opinion of the referring Romanian court and established that "Article 1 paragraph (3) of Framework Decision 2002/584, as amended by Framework Decision 2009/299, must interpreted in the sense that the judicial authority executing a European arrest warrant issued for the execution of a sentence cannot refuse the execution of this arrest warrant on the grounds that the minutes of the taking the oath of a judge who imposed this sentence cannot be found or on the circumstance that another judge from the same panel would have taken the oath only upon his appointment as a prosecutor."

In our opinion, the solution of the European Court was perfectly predictable in the conditions where there was already an ECHR and CJEU standard which stated that the independence of the Court is violated only when other powers in the state impermissibly influence the method of appointing the judges of a court, and not in the hypothesis of irregularities regarding the appointment formalities, such as the failure to find evidence of taking the oath.

The Romanian court invoked in the preliminary reference both the jurisprudence of the ECHR, which emphasized that the autonomous notion of a "court established by law" has the purpose "to ensure that the organization of the judicial system in a democratic society is left to the discretion of the executive and that this matter is regulated by an Act issued by the Parliament"⁵², as well as the practice of the CJEU in the same way, by which it was held that "an irregularity committed on the

⁴⁹ Saganek, Przemysław, "The Execution of European Arrest Warrants issued by Polish Courts in the context of the CJEU Rule of Law Case Law", XI Polish Yearbook of International Law (2020): 294. DOI 10.24425/pyil.2021.138441.

⁵⁰ Xanthopoulou, Ermioni, "The European Arrest Warrant in a context of distrust: Is the Court taking rights seriously?", *European Law Journal*, Vol. 28(2022): 232, <https://doi.org/10.1111/eulj.12467>.

⁵¹ CJEU, C-318/24 PPU [Breian].

⁵² ECtHR, The judgment of November 18, 2014, Adrian Năstase vs. Romania, para. 69-73; ECtHR, Judgment of September 6, 2022, Daniela Năstase and Adrian Năstase vs. Romania, para. 114-126.

occasion of the appointment of judges within the judicial system in question causes a violation of Article 47, second paragraph, first sentence of the Charter, especially when this irregularity is of such a nature and seriousness that it creates a real risk that other branches of government, especially the executive, may exercise an unjustified discretionary power that jeopardizes the integrity of the outcome to which the appointment process leads and thus sows a legitimate doubt, in the perception of litigants, as regards the independence and impartiality of the judge or judges in question, as is the case when fundamental norms are involved that are an integral part of the establishment and functioning of this judicial system"⁵³.

3.2. The respect for the right to life in the execution of the EAW (the positive procedural obligation of the effective investigation under the loyal cooperation between the member states)

According to a consistent jurisprudence of the ECtHR, Art. 2 which protects the fundamental right to life has a positive procedural side thus obliging the state not only not to intentionally and illegally cause the death of a person, but also to take the necessary measures to protect the life of persons under its jurisdiction⁵⁴.

This positive obligation contains aspects regarding both the obligation to provide a legal framework and with reference to the obligation to take preventive operational measures (including an effective investigation).

What appears important is the practical and effective character of the procedural obligation. The state's obligation will therefore not be fulfilled if the protection provided by domestic law exists only in theory: above all, it must function effectively and in practice, which requires a prompt examination of the case, without unnecessary delays⁵⁵.

In those cases where an effective investigation of a murder that took place under the jurisdiction of a contracting state requires the involvement of several contracting states, Art. 2 of the Convention imposes an obligation on the States concerned to cooperate effectively with each other to elucidate the circumstances of the killing and to bring the perpetrators to justice. The nature and extent of these obligations, however, depend on the circumstances of each case. It is an obligation of diligence and not of result. [*Güzelyurtlu and others v. Cyprus and Turkey* (GC), §§ 232-233].

In the matter of EAW, the positive procedural obligation to protect the fundamental right to life can be transposed into the positive procedural obligation of loyal cooperation in cross-border cases.

⁵³ CJEU, Judgment of the Court, Grand Chamber, of March 26, 2020, related cases C-542/18 RX II and C-543/18 RX II, point 75, as well as the jurisprudence cited.

⁵⁴ ECtHR, *Center for legal resources on behalf of Valentin Câmpeanu vs. Romania* (MC), point 130.

⁵⁵ ECtHR, *Šilih*, point 195; ECtHR, *Calvelli and Ciglio*, point 53; ECtHR, *Lazzarini and Ghiacci vs. Italy* (dec.), nr. 53749/00, November 7, 2002; ECtHR, *Byrzykowski v. Poland*, no. 11562/05, June 27, 2006, point 117.

In *Romeo Castaño v. Belgium*⁵⁶ case, which refers to the applicants' complaint regarding Belgium's refusal to execute an EAW due to the risk of inhuman or degrading treatment regarding conditions of detention in Spain, the ECtHR held that such a risk could constitute a legitimate reason for the refusal to execute the EAW. However, the risk must have a sufficient factual basis. In the present case, the judicial enforcement authority in Belgium based its findings on international reports, without a detailed and up-to-date examination and without attempting to identify a real and individualized risk, so the refusal to execute the EAW had no sufficient factual basis. Therefore, a Member State must cooperate with another Member State within the EAW and properly consider the possibility of handing over a suspected fugitive terrorist for criminal prosecution.

For this reason, the European Court concluded that Belgium did not fulfill its obligation to cooperate arising from the procedural aspect of Art. 2 of the Convention. The ECtHR judgment in the case of *Romeo Castaño v. Belgium* is invoked in the Judgment of October 15, 2019 of the CJEU in the case of Dumitru Tudor Dorobanțu, point 57, which established the criteria that must be taken into account by the enforcement court to assess the appropriateness of the detention conditions.

On the other hand, in *Gray v. Germany*⁵⁷ case, the ECtHR found that the right to life was not procedurally violated. Thus, the refusal of the German authorities to execute an EAW issued by the English judicial authorities was based on the fact that the requested person had already been convicted of the same act in Germany (for medical malpractice). The Court was convinced that the criminal proceedings in Germany had enabled the investigative bodies to determine the cause of Mr Gray's death and to establish the responsibility of U (para. 85). In this context, the ECtHR held that the procedural aspect of Art. 2 of the ECHR does not imply a right or an obligation to obtain a certain punishment under the domestic law of a particular state, provided that the executing member state itself fulfills the procedural requirement of Art. 2 of the ECHR.

3.3. Prohibition of inhuman or degrading treatment in the execution of the EAW (refusal of surrender due to poor conditions of detention)

Starting with the *Aranyosi and Căldăraru* and *Dumitru-Tudor Dorobanțu* cases⁵⁸, the Court of Justice ruled that the principles of trust and mutual recognition know a new limitation in the event that the requested person could suffer, as a result of his surrender, inhuman or degrading treatment due to the conditions of detention

⁵⁶ ECtHR, *Romeo Castaño vs. Belgium*, no. 8351/17, July 9, 2019.

⁵⁷ ECtHR, *Gray vs. Germany*, no. 49278/09, May 22, 2014.

⁵⁸ CJEU, related cases C-404/15 and C-659/15 PPU cited above; CJEU, Judgment of 25 July 2018, *Generalstaatsanwaltschaft, C-220/18 PPU*, EU:C:2018:589; CJEU, C-128/18 *Dumitru-Tudor Dorobanțu*. In these cases, as a result of the issuance of EAWs by various judicial authorities of the member states, the wanted persons were arrested in Germany, where the executing judicial authorities, noting certain deficiencies regarding the conditions of detention in the issuing states, referred preliminary questions to the CJEU regarding the respect of human rights in this matter in the EAW procedure.

from the issuing Member State, within the meaning of Article 4 of the Charter.

To decide in this way, in *Aranyosi and Căldăraru*, the Court of Justice held as follows: "the executing judicial authority must verify, concretely and precisely, if there are serious and well-founded reasons to believe that the person subject to a European warrant of arrest issued for the purpose of criminal prosecution or the execution of a custodial sentence will face, as a result of the conditions of his detention in the respective Member State, a real risk of being subjected to inhuman or degrading treatment".

Thus, the procedure established by the Court involves two distinct and mandatory stages, in the order prescribed by the European Court.

In the first stage of analysis, the executing judicial authority verifies the existence of the risk of inhuman or degrading treatment based on objective, reliable, accurate and up-to-date information, which it is obliged to request from the issuing judicial authority. In the event that the issuing court itself offers or confirms an assurance in these respects, the executing court is obliged to rely on it, at least in the absence of any precise and specific element indicating a contrary situation. Only if the issuing court does not provide assurances or if the executing court, based on the information received from the issuing court and any other information in its possession, has precise and specific indications that the conditions of detention are contrary of Article 4 of the charter, we move to the next stage of the analysis.

In the second stage, the enforcement court has the obligation to examine only the conditions of detention existing within the penitentiary where it is likely, according to the information at its disposal, that the wanted person will be detained, including temporarily or transitory⁵⁹.

To evaluate the conditions of detention, the court will apply the assessment criteria established in the case of *Dumitru Tudor Dorobanțu*, in which the CJEU ruled that "the personal space available for each detainee, the judicial enforcement authority must, given the current lack of minimum norms in this regard in Union law, to take into account the minimum requirements arising from Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on November 4, 1950, as interpreted by the European Court of Human Rights".

In this context, the role of the bodies with powers of control and monitoring of the conditions in the penitentiary appears from the beginning and seems crucial in the evaluation of the enforcement court.

In this regard, in *Aranyosi and Căldăraru* case, the Court indicated that the presence of national or international prison monitoring mechanisms in a state is a factor that an executing judicial authority can take into account when deciding on the execution a mandate (point 96).

Later, in *Dorobanțu* case, the Court addressed the issue of the relevance of measures to improve monitoring of conditions of detention, showing that monitoring, including judicial review of conditions of detention, can be taken into account by an executing judicial authority when making an overall assessment of the conditions.

⁵⁹ CJEU, C-220/18 cited above.

However, legal remedies alone cannot avoid the risk of a person being detained in conditions that violate fundamental rights, the Court emphasized (paras. 52 and 71-79).

In this context, the excessive formalism of the terms must be removed, the Court having had the opportunity to emphasize recently in the Breian case that it is not necessary to use pre-established formulas such as when the issuing court confirms the assurances provided by the competent national institution in the matter of detention conditions, but "it is enough that from the communication addressed by the issuing judicial authority to the executing judicial authority it appears with sufficient clarity that the former has approved this assurance, whatever the concrete terms used" (point 117).

It is known that, currently, EU legislation does not provide any obligation for a member state to have a body for inspection and monitoring of penitentiaries. However, the Council of Europe's European prison rules require member states to establish internal or governmental prison inspection bodies and external or independent forms of prison monitoring. These rules have the status of a recommendation of the Committee of Ministers and are not binding. As can be seen in the *Muršić v. Croatia* case, however, the European Court of Human Rights relies heavily on these norms when ruling on cases concerning prison conditions, and the norms therefore carry considerable authority.

The doctrine also emphasized that "prison inspection and monitoring bodies are therefore key elements in the protection of fundamental rights in prisons under international human rights standards", conditions in which it was concluded that there is a need to standardize the attributions of such bodies at the level of the Union as well⁶⁰.

In conclusion, if the existence of such a real risk of inhuman or degrading treatment for the wanted person is identified, the executing judicial authority has the obligation to postpone the execution of the EAW in question, and if the risk cannot be removed within a reasonable time, the same authority has the obligation to refuse the surrender of the requested person. The requested court informs Eurojust about the refusal of enforcement, in accordance with Article 17 para. 7 of the Framework Decision on EAW.

The procedure established by the CJEU must be applied through the lens of ECtHR jurisprudence in the matter of Art. 3 of the Convention on the Prohibition of Inhuman or Degrading Treatment.

Thus, in *Bivolaru and Moldovan vs. France* case⁶¹, the ECtHR established that there is a real risk of violation of Art. 3 of the Convention because the aspects of interest regarding the conditions of detention were described only in a general way by the Romanian authorities.

In view of the above, it can be concluded that there is a rich and constant practice of the CJEU regarding the assessment of detention conditions in the EAW procedure.

⁶⁰ Aizpurua, Eva and Rogan, Mary, *op cit*: 210, 225.

⁶¹ ECtHR, *Bivolaru and Moldovan vs. France*, cited above.

However, this practice is not always followed by enforcement courts. In the previously mentioned Breian case, an execution court in Malta (Court of Magistrates as a Court of Criminal Inquiry - Malta, referred to as the Court of Committal) had refused to execute an EAW issued by a Romanian court, citing reasons related to inadequate detention conditions in the issuing state (Romania), such as the lack of an "exact sentence execution plan" or "precise criteria for establishing a certain execution regime".

Being notified in connection with this case, the CJEU ruled through the preliminary judgment delivered on July 29, 2024 that "the simple failure to establish an "exact plan for the execution of the sentence" or "precise criteria for establishing a certain execution regime", evoked by referring court in the context of the seventh question, does not fall within the scope of the notion of "inhuman or degrading treatment" (pt. 118).

However, the Maltese High Court (Court of Criminal Appeal) upheld the refusal to surrender.⁶² Such a decision of an enforcement court is fully criticizable, contravening the aforementioned principles.

4. Conclusions

The mechanism of the surrender of wanted persons on the territory of the Union experienced a natural evolution over time with the construction of European integration and the development of the area of freedom, security and justice.

Given that the EAW is based on mutual trust between the judicial authorities of the member states, it works in the vast majority of cases. But, as can be seen from the mentioned examples, in cases of high complexity the mechanism shows its weaknesses and syncopes occur in its operation. Trust is replaced by doubt, loyal cooperation by circumspect reluctance.

Perhaps it is not premature to say now that the EAW Framework Decision has reached its limits and a fundamental change in the surrender procedure is needed, with stricter rules, closer cooperation and greater transparency.

Firstly, one of our proposals is in the sense of granting the prerogative of direct participation of the judicial authorities of the issuing Member State in the proceedings before the enforcement court. In this sense, the principles that govern the institution of the European arrest warrant can be invoked, such as the principle of mutual recognition, the principles of mutual trust and loyal cooperation, combined with the need to ensure an effective jurisdictional protection of the rights of the persons involved in the procedure, all of which would require such of direct participation of the judicial authorities of the issuing Member State in the procedure before the executing judicial authority.

Moreover, within such direct procedural participation, requests, proposals of

⁶² Court of Criminal Appeal, Extradition (EAW) Proceedings No.395/2024, judgement form 12th of August 2024, accessed 9.10.2024: <https://www.google.com/search?client=safari&rls=en&q=Court+of+Criminal+Appeal%2C+EAW+Proceedings+Number%3A+paul+al+rom%C3%A2niei&ie=UTF-8&oe=UTF-8>.

evidence and take the floor in judicial debates, by the representatives of the issuing state, could be formulated. They are undoubtedly the best placed to know both the concrete situation in the main case in which the European arrest warrant was issued, as well as the relevant provisions of the domestic law of the issuing state. It is no less important that, through the direct participation of the issuing judicial authority in front of the executing judicial authority, would also be covered the psychological component of the mutual trust between the actors of the judicial authorities involved at an interpersonal level, beyond the level of organizational trust and that of system, as also emphasized in the specialized doctrine.⁶³

Thus, the principles of mutual trust and loyal cooperation in the matter of judicial cooperation within the framework of the European arrest warrant would find their rightful place in the very foundation of the architecture of the European Union, allowing the creation and maintenance of a true space without internal borders, based on mutual trust generally won, horizontally, from the level of the issuing and executing judicial authorities, and not just imposed, vertically, especially through the legal means at the level of the Union, especially through the specific interpretations from the Court of Justice. In other words, the issuing and executing judicial authorities will themselves be responsible for ensuring mutual trust, coming to first-hand awareness of the well-known characteristic of trust being as difficult to build as it is easy to lose. They will thus fully experience the meanings of the saying that "trust takes years to build, seconds to destroy and an eternity to repair"⁶⁴.

Second, the next proposal is the establishment of a body at the Union level that will analyze in detail each refusal of surrender and publicly present a neutral expert opinion and proposals for concrete measures, respecting the independence of the issuing and executing judicial authorities.

Such control would be likely to increase mutual trust and loyalty of cooperation between the judicial authorities involved, in accordance with the specialized doctrine, according to which "another trust-building mechanism that can contribute to increasing trust is control", conditions in which "control complements trust if it increases "self-determination", i.e. the internalization of rules and values to the point where the actor is motivated to follow the same "rules and values"⁶⁵.

Both proposals were presented as opinions of the referring court for the interpretation of the Framework Decision in the Breian case⁶⁶, from where we took them as such in the present material, but they were not accepted by the European court, which argued that the Framework Decision, in current form, cannot be interpreted so broadly.

So, the ball is now in the court of the European legislator who has only to play bravely and undertake a paradigm shift in the EAW procedure by adopting new rules that will increase mutual trust and judicial decision-making transparency.

Basically, this is the only way to better protect the fundamental human rights

⁶³ Popelier, Patricia, Gentile, Giulia, van Zimmeren Esther, *op. cit.*:167-184.

⁶⁴ Lenaerts, Koen, *op cit*: 838.

⁶⁵ Popelier, Patricia, Gentile, Giulia, van Zimmeren Esther, *op cit*: 181.

⁶⁶ CJEU, C-318/24 cited above, points 90-106.

before the EAW, not only of those who are the subject of the surrender procedure as requested persons, but also of those who are injured persons in the main process in which it was issued a EAW and which may be affected in the event of a refusal to surrender, as we have observed from the jurisprudence cited. Otherwise, the keystone of loyal cooperation may degrade and the edifice of the European mechanism may collapse, slowly but surely.

Of course, the proposals to improve the European legislation are part of the continuous dynamics of the European construction which, in an ideological plan, has a final objective that should not be abandoned, beyond the establishment of common minimum standards and the desired harmonization of internal legislation - the full and informal recognition of all judicial acts in the European Union.

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