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après Aranyosi and Căldăraru**

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THE SKY IS NOT THE LIMIT: MUTUAL TRUST AND MUTUAL RECOGNITION APRÈS ARANYOSI AND CĂLDĂRARU

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Summary: In the present article, judgments of the European Court of Justice, together with the case of Aranyosi and Căldăraru, are put under the academic microscope. The analysis is conducted through the lenses of domestic judges. It starts by drawing a broader picture of the challenges that the domestic judiciary faces when it comes to EU criminal law, in particular the mutual recognition instruments. It argues that judges are faced not only with the legal framework of sometimes questionable quality but also with potential conflicts of loyalty resulting from the multiplicity and occasional inconsistency of applicable legal regimes. In turn, the analysis moves to the exegesis of the Aranyosi and Căldăraru line of jurisprudence, in particular to the already mentioned security vs justice conundrum, which domestic judges sometimes face. The article ends with conclusions looking into the current state of affairs, and suggestions are made regarding the way forward.

1 Introduction

As Ernest Hemingway wrote: ‘the way to make people trust-worthy is to trust them’.¹ This, however, is easier said than done. Unless one deals with a case of blind trust, it is well known that for trust to develop several preconditions have to be met. And then, in equal measure, trust may be gained, put to the test and eventually lost. The first frequently takes a long time, the second and the third may happen in a split second and, once the damage is done, it is rather difficult to recover. When it comes to EU law, trust, or more precisely the principle of mutual trust, has from the start been a cornerstone of the Area of Freedom, Security and Justice and, at the same time, a precondition for mutual recognition in criminal matters.² However, from the early days questions have

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¹ C Baker (ed), *Ernest Hemingway Selected Letters 1917-1961* (Letter to Dorothy Connable (17 February 1953) Charles Scribner’s Sons 1981) 805.

² For an academic appraisal see, inter alia, A Suominen, *The Principle of Mutual Recognition in Cooperation in Criminal Matters* (Intersentia 2011); Ch Janssens, *The Principle of Mutual Recognition in EU Law* (OUP 2013); L Klimek, *Mutual Recognition of Judicial Decisions in European Criminal Law* (Springer 2017); W van Ballegooij, *The Nature of Mutual Recognition in European Law* (Intersentia 2015); E Xanthopoulou, ‘Mutual Trust and Rights in EU Crim-

been raised about whether the sky is the limit or, alternatively, where the limits to mutual trust and mutual recognition lie.³ These questions have arisen not only in academic discourse but also among national judges.⁴ A reminder is fitting that according to the well-established and rehearsed jurisprudence of the Court of Justice, national courts are in charge of the enforcement of EU law and, by the same token, are entrusted to secure its effectiveness.⁵ Furthermore, the European Union is based on the rule of law and, following the recent jurisprudence of the Court of Justice, it can be upheld only if national courts are independent. So, the role of domestic courts in the development of the EU legal order is paramount; national judges are also EU judges. This applies to all areas of EU law, starting with the free movement of goods and ending with judicial cooperation in criminal matters. The latter is, however, a relatively new phenomenon. While the foundations were laid in the early 1990s *qua* the Treaty on European Union, the area in question only started to develop more robustly at the turn of the century and, at the time of writing, it was still in its formational years.⁶ As legislative activity has steadily continued, the enforcement of the adopted rules, in particular the controversial litmus test for mutual recognition – the European arrest warrant – has been heading for troubled waters. Mutual trust, and consequently also mutual recognition, has been cracking, as respect for human rights in several Member States, for instance in relation to detention conditions, has become questionable.⁷ The foundations of mutual recognition have also started to

inal and Asylum Law: Three Phases of Evolution and the Uncharted Territory Beyond Blind Trust (2018) 55 CML Rev 489. For doubts about whether this was the right way forward, see, for instance, S Peers, 'Mutual Recognition and Criminal Law in the European Union. Has the Council Got It Wrong? (2004) 41 CML Rev 5

³ See, eg, V Mitsilegas, 'The Limits of Mutual Trust on Europe's Freedom, Security and Justice. From Automatic Inter-State Cooperation to the Slow Emergence of the Individual' (2012) 31 YEL 319.

⁴ See, for instance, the reference for a preliminary ruling submitted by the Finnish Korkein oikeus in Case C-105/10 *Public prosecutor v Malik Gataev, Khadizhat Gataeva* [2010] OJ C100/32. The reference, however, was subsequently withdrawn by the referring court and removed from the register of the Court of Justice.

⁵ Post Lisbon Treaty this stems from Article 19 TEU, as confirmed by the Court of Justice, *inter alia*, in Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* ECLI:EU:C:2018:117. For an academic appraisal, see, eg, M Bonelli and M Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary: ECJ 27 February 2018, Case C-64/16, *Associação Sindical dos Juizes Portugueses*' (2018) 14 EUConst 622.

⁶ See, *inter alia*, V Mitsilegas, *EU Criminal Law* (Hart Publishing 2009) 5; S Miettinen, 'The Evolution of Competence Distribution Between the European Union and the Member States in the Criminal Field' in Ch Brière and A Weyembergh (eds), *The Needed Balances in EU Criminal Law. Past, Present and Future* (Hart Publishing 2018); V Mitsilegas, *EU Criminal Law after Lisbon. Rights, Trust and the Transformation of Justice in Europe* (Hart Publishing 2016).

⁷ See, for instance, Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading

break, as Poland and Hungary have become rather economical in their compliance with Article 2 TEU.⁸

To put it differently, the questionable human rights records and the brewing rule of law crises in several Member States have forced not only the EU institutions to act but also persuaded national judges around the European Union to become more vocal about their doubts as to the limits of mutual trust and mutual recognition. The judgment in the Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*⁹ is a very good example of when such doubts are shared with the Court of Justice, which – as is well known – provides assistance to national courts when interpretation of EU law is unclear, or when the validity of secondary legislation is under scrutiny.¹⁰ This time the judges at Kirchberg were dragged into the dilemmas of their domestic counterparts as where to draw the line between the three constituent elements of the mantra: freedom, security and justice and how to answer the paraphrased Shakespearean question: to surrender or not to surrender. Although the judgment in question is, without a shadow of doubt, a groundbreaking development, it has also been – as rightly put by W Van Ballegooij and P Bárd – ‘only the start of a discussion between the CJEU and national courts on the scope and application of the fundamental rights exception’.¹¹ This has proven to be true in the most recent jurisprudence on

Treatment or Punishment (CPT 2014) from 3 to 12 April 2013 (CPT/inf 2014) available at <<https://rm.coe.int/1680696b7f>> accessed 23 December 2018.

⁸ See, inter alia, Z Szente, ‘Challenging the Basic Values: The Problems of the Rule of Law in Hungary and the Failure of the European Union to Tackle Them’ in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values* (OUP 2017); B Bugarcic and A Kuhelj, ‘Varieties of Populism in Europe: Is the Rule of Law in Danger?’ (2018) 10 *Hague Journal of Rule of Law* 21; W Rech, ‘Some Remarks on the EU’s Action on the Erosion of the Rule of Law in Poland and Hungary’ (2018) 26 *Journal of Contemporary European Studies* 334; P Filipek, ‘Challenges to the Rule of Law in the European Union: The Distressing Case of Poland (2017) 17/18 *Revista do Instituto Brasileiro de Direitos Humanos /Journal of the Brazilian Institute of Human Rights* 211.

⁹ Joined Cases C-404/15 and C-659/15PPU *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, ECLI:EU:C:2016:198. For an academic appraisal, see, inter alia, G Anagnostaras, ‘Mutual Confidence Is Not Blind Trust! Fundamental Rights Protection and the Execution of the European Arrest Warrant: *Aranyosi and Caldaru* (2016) 53 *CML Rev* 1675; Sz Gáspár-Szilágyi, ‘Joined Cases *Aranyosi and Căldăraru*: Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant (2016) 24 *European Journal of Crime, Criminal Law and Criminal Justice* 197; F Korenica and D Doli, ‘No More Unconditional “Mutual Trust” Between the Member States: An Analysis of the Landmark Decision of the CJEU in *Aranyosi and Căldăraru*’ (2016) 21 *EHRLR* 542.

¹⁰ The Court does so under the preliminary ruling procedure laid down in Article 267 TFEU. See further, inter alia, M Broberg and N Fenger, *Preliminary References to the European Court of Justice* (2nd edn, OUP 2014).

¹¹ W Van Ballegooij and P Bárd, ‘Mutual Recognition and Individual Rights. Did the Court Get it Right?’ (2016) 7 *NJEUCL* (2016) 439, 462.

the power of national courts not to entertain European arrest warrants on human rights/rule of law related grounds.¹²

2 Competing loyalties in a multifaceted legal environment

2.1 Introduction

When we look at the *Aranyosi and Căldăraru* line of jurisprudence through the lenses of national judges, the emerging picture is not even close to a nicely balanced Rembrandt but has more of the dottiness known from the works of Pollock. It is notable, however, that it may somewhat vary, depending on whether one uses the lenses of a judge sitting at a constitutional court or whether at an ordinary criminal court. For the first, the challenges emerging from the development of EU criminal law, in particular mutual recognition, are comparable to the ones faced in other areas of EU law. For decades now, constitutional courts in many of the Member States have been engaged in – depending on the perspective – judicial battles or judicial dialogue with the Court of Justice of the European Union regarding the doctrine of supremacy. For reasons which merit no explanation, EU criminal law became part of this equation shortly after the adoption of the Framework Decision on the European Arrest Warrant.¹³ Prior to that, EC/EU law had largely been *terra incognita* for national criminal courts.

The years immediately following the entry into force of the Treaty on European Union were marred by uncertainties. Firstly, until the Treaty of Lisbon, the suite of legal instruments employed by the European Union in criminal matters was very different from the traditional set of regulations and directives used in the former first pillar of the EU.¹⁴ Secondly, the rules on their enforcement at the national level were undefined. Thirdly, the jurisdiction of the Court of Justice was limited. Even after the reform introduced by the Treaty of Amsterdam, the Court had no jurisdiction to determine the compatibility of national laws with EU criminal law. Furthermore, it provided assistance to national courts

¹² Case C-216/18 PPU MLECLI:EU:C:2018:586; Case C-220/18 PPU MLECLI:EU:C:2018:589; Case C-327/18 PPU RO ECLI:EU:C:2018:733.

¹³ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1. For an academic appraisal see, inter alia, R Blekxtoon and W van Ballegooij (eds), *Handbook on the European Arrest Warrant* (Asser Press 2005); N Keizer and E van Sliedregt (eds), *The European Arrest Warrant in Practice* (Asser Press 2009).

¹⁴ See further A Łazowski and B Kurcz, 'Two Sides of the Same Coin? Framework Decisions and Directives Compared' (2006) 25 YEL 177. See also MJ Borgers, 'Implementing Framework Decisions' (2007) 44 CML Rev 1361; A Hinarejos, 'On the Legal Effects of Framework Decisions and Decisions: Directly Applicable, Directly Effective, Self-Executing, Supreme?' (2008) 14 ELJ 20.

qua the preliminary procedure only in the cases of those Member States which recognised its jurisdiction.¹⁵ The end result was that judges in domestic criminal courts were, whenever in doubt, left partly to their own devices. Still, as argued by the present author elsewhere, the Court of Justice has managed to put its firm mark on the evolving EU criminal law.¹⁶ This includes the principle of mutual recognition, in particular its flagship instrument – the European arrest warrant. Not only have its human rights credentials been challenged several times,¹⁷ but many aspects of the EAW *modus operandi* have reached the Kirchberg court-rooms.¹⁸

In this context, the *Aranyosi and Căldăraru* line of jurisprudence seems to have been inevitable, as from the early days of the Framework Decision 584/2001/JHA questions were raised concerning whether national judges may refuse to surrender on human rights grounds. The legal framework was somewhat confused, as the Framework Decision 584/2001/JHA was not the finest hour of the EU legislator and the transposition effort by the national parliaments has been of questionable quality. The situation was exacerbated by the already mentioned lack of infringement proceedings in criminal matters, which – arguably – was partly to blame for the incomplete transposition of EU criminal law to domestic legal orders.¹⁹

2.2 *Thou shalt be my master: who art thou?*

In order to appreciate the complexities of the *Aranyosi and Căldăraru* line of jurisprudence, it is worth exploring further the competing loyalties that national criminal courts face in the highly multifaceted legal environment they are operating in. It is a well-known treatise that national judges in the EU Member States serve at least two masters: the domestic and EU legal orders. On the one hand, as per national laws, the task of national judges is to enforce domestic law. On the other hand, the

¹⁵ For a comprehensive overview, see, inter alia, A Hinarejos, *Judicial Control in the European Union. Reforming Jurisdiction in the Intergovernmental Pillars* (OUP 2009).

¹⁶ A. Łazowski, 'Stepping into Uncharted Waters No More: The Court of Justice and EU Criminal Law' in Brière and Weyembergh (n 6).

¹⁷ Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* ECLI:EU:C:2007:261; Case C-396/11 *Ciprian Vasile Radu* ECLI:EU:C:2013:39.

¹⁸ See, eg, Case C-66/08 *Proceedings concerning the execution of a European arrest warrant issued against Szymon Kozłowski* ECLI:EU:C:2008:437; Case C-123/08 *Dominic Wolzenburg* ECLI:EU:C:2009:616; Case C-306/09 *IB* ECLI:EU:C:2010:626; Case C-237/15 *PPU Minister for Justice and Equality v Francis Lanigan* ECLI:EU:C:2015:474.

¹⁹ In relation to pre-Lisbon EU legal acts that had been adopted under the Third Pillar of the European Union, the infringement proceedings envisaged in Articles 258-260 TFEU apply only as of 1 December 2014. See further Łazowski (n 16) 114-118.

same judges have been mandated by the Court of Justice to guarantee the effectiveness of EU law and, by this token, to make sure it is enforced at the domestic level. In accordance with the doctrine of primacy, as developed by the judges at Kirchberg, in cases of conflict between domestic and EU law a national judge is governed by the *Simmenthal* mandate.²⁰ Thus, in a given case, it has to set aside the domestic law and give EU law priority. This, in itself, is a challenge for the national judiciaries, in particular when countries join the European Union. Over the years its membership (and that of its predecessor the European Community) has grown from the six founding countries to the current twenty-eight.²¹ This has brought under the same umbrella a very diverse group of European States with different legal traditions and cultures, as well as different attitudes to non-domestic sources of law.²² But the legal environment in which national judges operate goes beyond the EU and national legal orders. As is well known, all Member States of the European Union are also members of the Council of Europe and, by the same token, parties to the European Convention on Human Rights and Fundamental Freedoms, as well as subject to scrutiny by the European Court of Human Rights.

Navigating such a multifaceted, and not always consistent, web of rules is at times an unenviable task. In an average European arrest warrant case, a domestic court, which deals with its execution, will face, on the one hand, the domestic Constitution and national rules giving effect to the Framework Decision 584/2001/JHA and, on the other hand, the Framework Decision 584/2001/JHA itself, as well as the Charter of Fundamental Rights and the ECHR. In this respect, the case of *Melloni*²³ and Opinion 2/13 on accession to the ECHR²⁴ demonstrate the potential complexities rather well. In *Melloni*, the Court of Justice was asked by the Spanish Constitutional Court whether the domestic constitutional

²⁰ See, inter alia, B de Witte, 'Direct Effect, Primacy, and the Nature of the Legal Order', in P Craig and G de Búrca, *The Evolution of EU Law* (2nd edn, OUP 2011); D Leczykiewicz, 'Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability' in A Arnulf and D Chalmers, *The Oxford Handbook of European Union Law* (OUP 2015); A Capik, 'Five Decades since Van Gend en Loos and Costa Came to Town: Primacy, Direct and Indirect Effect Revisited' in A Łazowski and S Blockmans (eds), *Research Handbook on EU Institutional Law* (Edward Elgar Publishing 2016).

²¹ It is notable that the European Union is expected to experience the first reduction of its membership when the United Kingdom leaves on 29 March 2019.

²² See, inter alia, A Łazowski (ed), *The Application of EU Law in the New Member States. Brave New World* (Asser Press 2010); M Bobek (ed), *Central European Judges Under the European Influence. The Transformative Power of the EU Revisited* (Hart Publishing 2015).

²³ Case C-399/11 *Stefano Melloni v Ministerio Fiscal* ECLI:EU:C:2013:107.

²⁴ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms ECLI:EU:C:2014:2454.

standard of human rights protection should prevail over the Framework Decision on the European Arrest Warrant. The answer of the Court of Justice was controversial, to say the least.²⁵ The Court held that while the Framework Decision 584/2001/JHA complied with the Charter of Fundamental Rights, the Spanish courts could not apply a higher standard of human rights protection developed on the basis of the Spanish Constitution. Arguably, the Court of Justice seems to have sacrificed justice on the altar of security, but that must have been for a reason: the judges at Kirchberg feared that to rule otherwise would undermine the effectiveness of mutual recognition or, more broadly, EU law. This was confirmed a few years later in Opinion 2/13, in which the Court of Justice rejected the possibility of accession to the ECHR under the terms of the negotiated Accession Agreement.²⁶ One of the main reasons behind the Court's decision was protection of mutual recognition in criminal matters.

For criminal courts, the jurisprudence on the enforcement of framework decisions was of equal importance. It was clear from the start that they cannot produce direct effect as the former Article 34 TEU was unequivocal in this respect. However, the subsequent jurisprudence of the Court extended the application of the doctrine of indirect effect to framework decisions. The starting point was Case C-105/03 *Pupino*,²⁷ while the

²⁵ It obviously attracted a flurry of academic commentary. See, inter alia, A Tinsley, 'Note on the Reference in Case C-399/11 Melloni' (2012) 3 NJECL 19; N De Boer, 'Addressing Rights Divergence under the Charter: Melloni' (2013) 50 CML Rev. 1083; M. De Visser, 'Dealing with Divergences in Fundamental Rights Standards' (2013) MJECL 576; A Pliakos and G Anagnostaras, 'Fundamental Rights and the New Battle over Legal and Judicial Supremacy: Lessons from Melloni' (2015) 34 YEL 97; G Cavallone, 'European Arrest Warrant and Fundamental Rights in Decisions Rendered in Absentia: The Extent of Union Law in the Case C-399/11 Melloni v Ministerio Fiscal' (2014) ECLR 19; LFM Besselink, 'The Parameters of Constitutional Conflict after Melloni' (2014) EL Rev 531; J Vervaele, 'The European Arrest Warrant and Applicable Standards of Fundamental Rights in the EU' (2013) Review of European Administrative Law 37.

²⁶ For an academic appraisal see, inter alia, D Halberstam, "'It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) 16 GLJ 105; C Krenn, 'Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession after Opinion 2/13' (2015) 16 GLJ 147; S Øby Johansen, 'The Reinterpretation of TFEU Article 344 in Opinion 2/13 and its Potential Consequences' (2015) 16 GLJ 169; A Łazowski and RA Wessel, 'When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR' (2015) 16 GLJ 179; S Peers, 'The EU's Accession to the ECHR: The Dream Becomes a Nightmare' (2015) 16 GLJ 213; P Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky' (2015) 38 Fordham Intl LJ (2015) 955; B de Witte and Š Imamović, 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court' (2015) 40 EL Rev 683; BH Pirker and S Reitemeyer, 'Between Discursive and Exclusive Autonomy: Opinion 2/13, the Protection of Fundamental Rights and the Autonomy of EU Law' (2015) 17 CYELS 168.

²⁷ Case C-105/03 *Criminal proceedings against Maria Pupino* ECLI:EU:C:2005:386. For an academic appraisal see, inter alia, M Fletcher, 'Extending "indirect effect" to the Third

judgments in Cases C-42/11 *Da Silva Jorge*²⁸ and C-579/15 *Popławski*²⁹ provided further guidance to national judges. But the question is whether the answers of the Court of Justice have made the tasks of national judges clearer or, on the contrary, if they have led to confusion. For instance, in Case C-579/15 *Popławski* the Court of Justice held:

the fact remains that the principle that national law must be interpreted in conformity with EU law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, with a view to ensuring that the framework decision in question is fully effective and to achieving an outcome consistent with the objective pursued by it.³⁰

In theoretical terms such a conclusion is plausible but for many domestic judges it might be difficult to square the circle in a courtroom. In the case of the Framework Decision on the European Arrest Warrant, the challenges are exacerbated by the fact that, as already mentioned above, the domestic provisions of many Member States do not faithfully mirror the EU legislation in question. For instance, the national legislators were quite economical with the transposition of the grounds for refusal to surrender laid down in Article 4 of the Framework Decision.³¹ Furthermore, some Member States have included the human rights grounds even though they are neither mentioned on the list of obligatory grounds or optional grounds for refusal to surrender. Yet, at the same time, as per Article 1(3) EAW FD, the legislation in question does not modify the obligation to respect the fundamental rights and principles outlined in Article 6 TEU. Does it mean that this is yet another ground for refusal to surrender and, if so, to which category does it belong (compulsory or discretionary)? Furthermore, recitals 12 and 13 of the Preamble give an indication that domestic courts should not surrender individ-

Pillar: The Significance of Pupino?' (2005) 30 EL Rev 862; E Spaventa, 'Opening Pandora's Box: Some Reflections on the Constitutional Effects of the Decision in Pupino' (2007) 3 EuConst 5.

²⁸ Case C-42/11 *Proceedings concerning the execution of a European arrest warrant issued against João Pedro Lopes Da Silva Jorge* ECLI:EU:C:2012:517. For an academic appraisal see, inter alia, Ch Janssens, 'Differentiation on the Basis of Nationality in Surrender Cases: The Court of Justice Clarifies in Case C-42/11 *Lopes Da Silva Jorge* the Member States' Margin of Discretion' (2013) 19 CJEL (2013) 553.

²⁹ Case C-579/15 *Openbaar Ministerie against Daniel Adam Popławski* ECLI:EU:C:2017:116.

³⁰ *ibid.*, para 34.

³¹ See Commission, 'Report based on Article 34 of the Council Framework Decision of 13 June 2002 on the European Arrest warrant and the surrender procedures between Member States' COM (2005) 63 final; 'Report based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (revised version)' COM (2006) 8 final.

uals on several human rights related grounds. This is an example of a legal cacophony, which demonstrates a number of important phenomena mentioned earlier in the present contribution. Firstly, it proves that the Framework Decision in question was not the finest hour of the EU legislator. It was rushed in the post-9/11 political climate and subject to unanimous approval of the Council. Big compromises usually come at a price, and the Framework Decision in question is fitting evidence of this. Secondly, it also exemplifies the quagmires of competing loyalties that domestic judges are exposed to. On the one hand, they have the domestic Constitutions and legislation on the EAW to apply. On the other hand, as per the jurisprudence of the Court of Justice, the interpretation of the latter should take into account the Framework Decision 584/2001/JHA, the jurisprudence of the Court of Justice, as well as the Charter of Fundamental Rights. Last but not least, the domestic courts also have to comply with the ECHR and, for instance, the right to a fair trial laid down therein. It is against this background that one should look at the *Aranyosi and Căldăraru* line of cases.

3 *Aranyosi and Căldăraru* and follow-up

3.1 Introduction

The *Aranyosi and Căldăraru* case was no doubt a turning point. Prior to the judgment of the Court of Justice, several national courts refused to surrender individuals on human rights grounds. Furthermore, the German Constitutional Court conducted its Constitutional identity review, whereby it sent strong signals into the legal stratosphere.³² Inevitably, the matter in question eventually reached the Court of Justice *qua* the preliminary ruling procedure.³³ As is frequently the case with landmark and groundbreaking judgments of the Court, further references from national courts followed. Cases C-216/18PPU *LM*,³⁴ C-220/18PPU *ML*,³⁵ and C-327/18PPU *RO*³⁶ are presented in turn.

³² Order of 15 December 2015, 2 BvR 2735/14. For an academic appraisal see, inter alia, F Meyer, "From Solange II to Forever I": The German Federal Constitutional Court and the European Arrest Warrant (and How the CJEU Responded)' (2016) 7 NJECL 277; M Hong, 'Human Dignity, Identity Review of the European Arrest Warrant and the Court of Justice as a Listener in the Dialogue of Courts: Solange-III and Aranyosi: BVerfG 15 December 2015, 2 BvR 2735/14, Solange III, and ECJ (Grand Chamber) 5 April 2016, joined cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*' (2016) 12 EUConst 549.

³³ In the early case law, see Case C-396/11 *Ciprian Vasile Radu* ECLI:EU:C:2013:39 and, especially, Case C-396/11 *Ministerul Public – Parchetul de pe lângă Curtea de Apel Constanța v Ciprian Vasile Radu* ECLI:EU:C:2012:648, Opinion of AG Sharpston.

³⁴ Case C-216/18PPU *LM* ECLI:EU:C:2018:586.

³⁵ Case C-220/18PPU *ML* ECLI:EU:C:2018:589.

³⁶ Case C-327/18PPU *RO* ECLI:EU:C:2018:733.

3.2 Aranyosi and Căldăraru: *can we trust your detention conditions?*

3.2.1 Introduction

For the domestic courts, the judgment in Joined Cases *Aranyosi and Căldăraru* offers a very much overdue clarification of how national judges should proceed when faced with argumentation and evidence proving that at the receiving end the person being subject to an EAW may be exposed to inhuman treatment at a detention facility or facilities.³⁷ The Court has ruled that even though the system is based on the presumption of mutual trust and mutual recognition, in extraordinary circumstances, and subject to a number of preliminary procedural steps, a domestic court may decide to bring the surrender procedure to an end.³⁸ This is not, however, by any stretch of the imagination, a straightforward affair. From the point of view of national judges, at least three aspects of this decision are problematic and merit attention in this article.

To begin with, the already mentioned legal quagmire of the relationship between Articles 3-4a (grounds for refusal to surrender), Article 1(3) (fundamental rights) of the EAW Framework Decision, and Article 4 of the Charter of Fundamental Rights comes to the fore. The key question is: do we now have an additional ground for refusal to surrender? If so, why were fundamental rights not included either in the catalogue of mandatory grounds or in the list of discretionary grounds, as good law-making principles would dictate? It is very instructive to look how the Court of Justice framed this issue and what it means for national authorities in charge of executing European arrest warrants. Secondly, the procedural *modus operandi* developed by the Court of Justice is plausible at first sight. When in doubt, the national court should first make a general determination of the situation on receipt of the request and, should it be necessary, also seek a clarification from its counterpart in the requesting country. The key questions, however, are what kind of information may be used in the first instance, and, in turn, what sort of clarification may be requested from a counterpart in another Member State and how comprehensive should it be? Thirdly, under what circumstances can the national court refuse to surrender, or, as euphemistically put by the Court of Justice, under what circumstances may it bring the surrender procedure to an end?

³⁷ See, inter alia, A Łazowski and S Nash, 'Detention' in N Keijzer and E van Sliedregt (eds), *The European Arrest Warrant in Practice* (TMC Asser Press/CUP 2009).

³⁸ *Aranyosi and Căldăraru* (n 9) para 104.

3.2.2. Aranyosi and Căldăraru: a new ground for the non-execution of a European arrest warrant?

The substantive part of the judgment starts, as one would expect, with a truncated exposé covering the foundations of mutual recognition in criminal matters. The picture drawn by the judges at Kirchberg seems to be clear: the system is based on mutual trust, and benefits from the presumption that the Member States provide 'equivalent and effective protection of the fundamental right recognized at EU level, particularly in the Charter'.³⁹ The trouble starts if one reads paragraph 80 of the judgment literally. The Court emphasises that an authority which executes a European arrest warrant may refuse to do so on the grounds 'exhaustively listed' in Articles 3 and 4-4a of Framework Decision 584/2002/JHA. The choice of words employed by the Court of Justice makes it perfectly clear that the list of grounds is exhaustive. To put it differently, it is the limit. If such a reading were to be correct, it would mean that national authorities may not, at least as per the EAW Framework Decision, refuse to surrender on human rights grounds. Then, however, the Court of Justice veers away from the Framework Decision itself and continues its analysis by putting the centre of gravity on Article 4 of the Charter of Fundamental Rights.⁴⁰ In this respect, Article 1(3) of the Framework Decision serves as the bridge between these legal acts. It provides that the EAW Framework Decision does not modify the obligation to respect fundamental rights enshrined in Article 6 TEU. This, as clarified by the Court of Justice in the commented case, also comprises the Charter of Fundamental Rights. The judges confirm, in turn, that the Charter applies to the case at hand, as the application of national provisions transposing the EAW Framework Decision constitutes implementation of EU law, which – as per Article 51(1) – is a *conditio sine qua non* for the application of the Charter.⁴¹ For a national judge, confusion may arise from a comparative analysis of the interpretation of Article 1(3) of the EAW Framework Decision by Advocate General Bot and the conclusions of the Court.⁴² Arguably, it is one of those examples where it would have served national judges if the Court of Justice openly agreed or disagreed with its own advocate general.⁴³ While Advocate General Bot claimed

³⁹ *ibid*, para 77.

⁴⁰ For an academic appraisal of Art 4 of the Charter see, *inter alia*, M Nowak and A Charbord, 'Article 4' in S Peers and others (eds), *The EU Charter of Fundamental Rights. A Commentary* (Hart/Beck 2014).

⁴¹ See further, *inter alia*, A Ward, 'Article 51' in Peers (n 40).

⁴² See also Case C-396/11 *Ministerul Public – Parchetul de pe lângă Curtea de Apel Constanța v Ciprian Vasile Radu*, ECLI:EU:C:2012:648, Opinion of AG Sharpston.

⁴³ For an academic appraisal of advocates general and their role at the Court of Justice see, eg, N Burrows and R Graves, *The Advocate General and EC Law* (OUP 2007).

that the provision in question may not serve as a ground for refusal to surrender, the Court of Justice used it as a vehicle to a conclusion, which offers a mixed bag of legal bases. The judges' final conclusion is based on Articles 1(3), 5 and 6(1) of the EAW Framework Decision. It is notable that Articles 3, 4 and 4a covering grounds for the non-execution of the European arrest warrant are nowhere to be seen. This, as argued later, may have been the reason behind the very cautious wording employed by the Court of Justice to describe options available to a national court should its doubts not be discounted after clarifications from the requesting country.

3.2.3 *Towards a creative interpretation of the EAW Framework Decision*

Voltaire acutely observed that 'doubt is an uncomfortable condition'.⁴⁴ It is particularly so when a national judge doubts the respect for fundamental rights in the requesting country and considers whether or not to surrender an individual. Arguably, the references in the Joint Case *Aranyosi and Căldăraru* also put the Court of Justice in an uncomfortable position as it forced the judges to engage in the balancing act of reconciling mutual trust and mutual recognition with the risks to respecting fundamental rights. At this stage of the analysis, it is fitting to focus on how the Court of Justice interpreted the Charter of Fundamental Rights and the way it designed a procedure for national judges to follow when they find themselves in the same predicament as *Hanseatisches Oberlandesgericht* in Bremen (from which both references originated).

To begin with, the Court of Justice emphasised that when national authorities deal with the execution of a European arrest warrant, they need to take into account Article 4 of the Charter, which prohibits inhuman and degrading treatment or punishment.⁴⁵ Since it is modelled on Article 3 ECHR, it has to be interpreted accordingly, that is, taking into account the jurisprudence of the European Court of Human Rights.⁴⁶ The question that emerged in *Aranyosi and Căldăraru* is how to square the circle, taking into account the Framework Decision 584/2002/JHA and Article 4 of the Charter of Fundamental Rights. To put it differently, how a national judge should proceed when, on the one hand, Articles 3-4/4a of the Framework Decision provide for an exhaustive catalogue of grounds for refusal to surrender and yet, on the other hand, such a surrender may not expose the person concerned to inhuman and degrading treatment. In this respect the Court of Justice has proven to be

⁴⁴ Voltaire, *The Complete Works of Voltaire* (Voltaire Foundation, online edition, nd).

⁴⁵ For an academic appraisal see, inter alia, M Nowak and A Charbord, 'Article 4' in Peers (n 40).

⁴⁶ As per Article 52 of the Charter.

quite creative, developing a two-tier test that should be followed. As will be argued below, this provides some clarity as a matter of principle, but, at the same time, a fair degree of uncertainty when it comes to national courtrooms.

As a first step, the executing judicial authority must establish whether there is a risk of degrading treatment in the detention conditions in the receiving country. Such argumentation with evidence is likely to be submitted by defence lawyers aiming at the non-surrender of their clients. The question is what kind of evidence must be submitted to prove the point. In this respect, paragraph 89 of the judgment is very instrumental. The Court of Justice ruled that:

the executing judicial authority must, initially, rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention.⁴⁷

The test is not only about the categories and quality of information that will be employed to make the assessment but also about the substantive criteria to be used to determine what is specific enough. In this respect the following paragraph of the judgment is crucial as the Court of Justice elaborates further on the detention standards developed in its jurisprudence by the European Court of Human Rights. It held:

it follows from the case-law of the ECtHR that Article 3 ECHR imposes, on the authorities of the State on whose territory an individual is detained, a positive obligation to ensure that any prisoner is detained in conditions which guarantee respect for human dignity, that the way in which detention is enforced does not cause the individual concerned distress or hardship of an intensity exceeding the unavoidable level of suffering that is inherent in detention and that, having regard to the practical requirements of imprisonment, the health and well-being of the prisoner are adequately protected (see judgment of the ECtHR in *Torregiani and Others v. Italy* [...]).⁴⁸

All the above is plausible as far as the principles are concerned. Yet, when one looks at it through the lenses of national judges several questions emerge. While it is true that it gives the domestic courts discretion and flexibility, at the same time it merely provides vague indications and puts the uniform application of EU law at risk. Firstly, the test laid down in paragraph 89 of the judgment is characterised by rather vague

⁴⁷ *Aranyosi and Căldăraru* (n 9) para 89.

⁴⁸ *ibid.*, para 90.

wording. The adjectives employed by the Court of Justice are quite open ended. The test requires a national judge to base the assessment on data, which is: 'objective, reliable, specific and properly updated'. The first three notions are largely linked to the source and quality of information, where the assessment of a national judge will be rather subjective. The fourth criterion requires a more objective evaluation and, thus, remains the easiest in this set. In practical terms, the key dilemma that domestic judges face is whom to trust. To put it differently, which sources may be treated as trustworthy, so as to guarantee that the information meets the discussed requirements? The Court of Justice, seemingly aware of the matter in question, indicated that judgments of international courts as well as national courts may be taken into account. This, obviously, includes the judgments of the European Court of Human Rights. Furthermore, documents produced by the Council of Europe or UN related authorities will also serve the purpose. The reports of the Committee for the Prevention of Torture, operating within the Council of Europe, can surely be of use. It should be noted, however, that the list laid down in para 89 of the judgment is non-exhaustive. Hence, it is for national judges to make a selection of sources of information when acting *ex officio* and to decide what kind of material submitted by defence lawyers should be treated as credible. It leaves it open whether sources coming from NGOs, local or international, should be considered by national judges as 'objective' and 'reliable'.

From the academic point of view, one may conclude that the Court of Justice struck a balance between providing assistance to national courts and leaving them a solid margin of discretion. In reality, however, the conclusions of the Court are based on a rather optimistic presumption that national judges are *au courant*, for instance with the jurisprudence of the European Court of Human Rights or the outputs of such outlets as already mentioned, including the Committee for the Prevention of Torture. It is also based on the presumption that national judges and their clerks are fluent in foreign languages. This is particularly relevant for the matter at hand, as the language regime of the Council of Europe is rather modest when compared to that of the European Union. To put it differently, judgments or reports are not – as a rule – translated *en masse* into the languages of all members of Council of Europe. A reminder is fitting that the EAW proceedings are subject to a very tight time regime, leaving very little space for translation.

As already mentioned, the Court of Justice requires the information to be 'specific', which – again – may be considered as problematic. A simple question emerges as to what is specific enough to satisfy the test. Would the level of detail required by a national judge depend on a particular requesting country? For instance, should the level of detail cor-

respond to the level of trust in the judiciary, law enforcement apparatus and detention conditions in the requesting country? To put it differently, should less trust translate into a higher level of detail required to meet the test? It has been left to national practice to decide.

Once the 'objective, reliable, specific and properly updated [information] on detention conditions' is collected, the executing authority needs to determine whether there is 'a real risk of inhuman or degrading treatment by virtue of general conditions of detention in the issuing Member State'. If there is no such risk, then the domestic authority has to proceed with the execution of the European arrest warrant (providing there are no other grounds for refusal to surrender). If, however, systemic or generalised deficiencies exist, their existence is not *per se* an indication that a person, whose is the subject of a European arrest warrant, will be exposed to treatment that would be in breach of Article 4 of the Charter of Fundamental Rights. This needs to be determined by the executing authority separately by liaising with its counterparts in the requesting country. For this purpose, the procedural mechanism laid down in Article 15(2) of the EAW Framework Decision should be employed. The Court of Justice clarified, in a very general fashion, that the evidence obtained must, again, be 'objective, reliable, specific and properly updated' in order to verify if there are 'substantial grounds' to believe that the person in question 'will run a real risk' of being subject to inhuman or degrading treatment.⁴⁹ It may include information about the *modi operandi* for monitoring the detention conditions. However, all other details are left to the decision of national judges, which – in itself – opens a host of problems and challenges. For instance, how detailed should such a request for supplementary information be and should the national court of the requesting country be trusted blindly? Not surprisingly, the matters in question have returned to the Court of Justice like a boomerang in the cases discussed later in the present article.

Once all necessary general and individualised information is in place, it is for the national executing authority to decide whether to surrender the person in question or not. In this respect, the Court of Justice has provided general guidance on how the domestic judges should proceed. Should the conclusion be that there is a 'real risk of inhuman or degrading treatment' the execution of the European arrest warrant must be postponed. However, as the Court of Justice phrased it, the execution 'cannot be abandoned'.⁵⁰ On the one hand, the postponement of surrender gives the executing authority a chance to seek further clarification from the requesting court, and, for the latter, one more opportunity to

⁴⁹ *ibid.*, para 94.

⁵⁰ *ibid.*, para 98.

discount the doubts as to the existence of risk of inhuman or degrading treatment of the person subject to the European arrest warrant. On the other hand, the solution preferred by the Court of Justice triggers numerous challenges for the national courts related to, for instance, detention of the person concerned during the period of suspension. Furthermore, it is entirely unclear how long such a suspension should last. The Court of Justice has only provided an indication that the time period should be 'reasonable'.⁵¹ This is a blessing and a curse. On the one hand, it affords national judges discretion but, on the other hand, it painfully lacks detail and offers limited guidance, especially given that in the next step a national court may take its final decision to refuse to surrender.

As already mentioned, the Court of Justice has confirmed its earlier jurisprudence in the Joined Cases *Aranyosi and Căldăraru* that limitations of the principles of mutual recognition and mutual trust are on the menu, although only in exceptional circumstances. As the commented judgment clarifies, such exceptional circumstances may occur when the national court in charge of the execution of a European arrest warrant cannot discount doubts as to the risk of inhuman or degrading treatment that a person subject to an EAW may face. Should that be the case, the domestic judges may bring the procedure to an end. The already mentioned euphemistic language employed by the Court is a departure from the statutory vocabulary used by the EU legislator in the EAW Framework Decision. The reasons behind the decision not to call a spade a spade will remain locked behind the doors of the deliberation room at Kirchberg. It is, however, worth emphasising that the Court of Justice deliberately talks about bringing the procedure to an end, instead of refusal to surrender. Perhaps this is related to the fact that neither Article 3 nor Articles 4-4a of the EAW Framework Decision (which deal with the grounds for the non-execution of the surrender requests) are mentioned in the final conclusions of the Court. Does this mean that the Court has developed a parallel *modus operandi* on top of the existing grounds for non-execution? Alas, this is not clear from the judgment at hand.

3.2.4. Conclusions

Overall, the judgment in the Joined Cases *Aranyosi and Căldăraru* prompts – not surprisingly – mixed emotions. On the one hand, it offers a long overdue clarification, and, in a way, it brings the EU *acquis* into synchronisation with domestic practice in some of the Member States. Furthermore, it eases the mentioned loyalty conflicts which face the national judges in such cases. As argued earlier, while providing a clarifica-

⁵¹ *ibid*, para 104.

tion, this judgment also triggers a host of new challenges and questions for national judges. Not surprisingly, some of them have found their way to the Court of Justice *qua* subsequent references for a preliminary ruling, which are analysed below in turn.

3.3 Case C-220/18PPU *ML*: can we really trust your detention conditions?

3.3.1 Introduction

Case C-220/18PPU *ML* is surely a follow-up to Joined Cases C-404/15 and C-659/15PPU *Aranyosi and Căldăraru* and proves the point made by W Van Ballegooij and P Bárd that the latter case was just the beginning of the dialogue between national courts and the Court of Justice.⁵² The judgment in case *ML* also fits into a more general trend that whenever the Court of Justice delivers a ground-breaking judgment setting a principle, it frequently shies away from giving it a satisfactory level of detail.⁵³ Consequently, domestic courts follow with further references, seeking a clarification of the earlier jurisprudential output.⁵⁴ The *ML* case is ideal to demonstrate the phenomenon in question and, no doubt, further references are due to follow. For the purposes of the analysis that follows, it is enough to provide a reminder that the gist of the reference was centred on two main issues.⁵⁵ Firstly, whether the *Aranyosi and Căldăraru* test requires verification of information regarding all detention conditions in the receiving countries or, alternatively, only those detention centres where the person covered by the European arrest warrant is likely to be transferred. Secondly, the question was how detailed the request for information should be. As explained earlier in the present article, on the one hand the judgment in *Aranyosi and Căldăraru* gives the national authorities discretion to determine what kind of information is specific enough to meet the test. On the other hand, a question emerges regarding whether there are limits to the discretion. Arguably, the latter may

⁵² van Ballegooij and Bárd (n 11) 462.

⁵³ Many a time it is a consequence of the way in which the Court of Justice operates. As frequently discussed in the academic literature, the rules governing the functioning of the Court of Justice do not permit for dissenting opinions; therefore, the judgments, as well as opinions or orders of the Court, are products of compromises between judges forming a particular chamber. Allegedly, this may have an impact on the quality of judicial discourse and, by the same token, the judgments of the Court. See further, *inter alia*, M Adams and others (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013).

⁵⁴ In this respect, a good example is the judgment in Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* ECLI:EU:C:2011:124.

⁵⁵ It is notable that the referring court submitted over a page of questions to the Court of Justice. See para 40 of the judgment.

be inextricably linked to the level of trust in the judicial system at the receiving end. To put it differently, the less trust, the more information may be required and information that is considered to be desirably specific. It could, of course, also work the other way around: the more trust, the less information is required.

3.3.2 *How deep is your trust?*

In Case C-220/18PPU *ML*, the levels of trust in the Hungarian detention centres were, perhaps, not particularly impressive. This was hardly surprising bearing in mind the evidence available to the referring court, comprising, inter alia, judgments of the European Court of Human Rights.⁵⁶ Yet, when looking at the requests for clarification submitted to the Hungarian authorities, it may well be that the case was handled by overzealous judges, who wished to know as much as possible about the Hungarian detention facilities. Either way, the Court of Justice was asked for clarification of the judgment in *Aranyosi and Căldăraru*. The preliminary observations made by the judges at Kirchberg offer the domestic judges, including the referring court, nothing new. The Court of Justice has provided a systemic background of the principles of mutual trust and mutual recognition, which is well known from its previous jurisprudence.⁵⁷ However, the parts of the reasoning that follow are undoubtedly very useful from the perspective of national judges.

To begin with, the Court of Justice attended to the relevance of a new legal remedy available as per Hungarian law to challenge the legality of detention conditions. The judges clarified that the existence of such a remedy may not, *per se*, rule out the risk of inhuman and degrading treatment at detention centres. By the same token, it does not free the executing judicial authority from the obligation to conduct the general assessment required by the *Aranyosi and Căldăraru* test. The Court in turn proceeded to clarify how much information may be required as supplementary clarification by the executing authority. It is notable that in the case at hand the German authorities sent a total of 78 questions to their Hungarian counterparts. This, as argued earlier, may be evidence of limited trust combined, perhaps, with a pinch of overzealousness. Nevertheless, it allowed the Court of Justice to provide a necessary clarification of its earlier ruling in *Aranyosi and Căldăraru*. Firstly, the

⁵⁶ For instance, the judgment of the ECtHR of 10 March 2015, *Varga and Others v Hungary* ECLI:CE:ECHR:2015:0310JUD001409712, paras 79-92.

⁵⁷ The only exception is paras 68-71 where the Court of Justice reacts to submissions of the Hungarian government, disputing the existence of deficiencies in Hungarian detention centres. The Court of Justice, and rightly so, concludes that the existence of such deficiencies is not the subject of the reference for a preliminary ruling, and neither is a determination of their existence a task for the Court of Justice.

executing judicial authority should make enquiries only related to the detention conditions in prisons where the person subject to a European arrest warrant may be detained. This includes units where the surrendered person will be detained on a temporary or transitional basis. This precludes general requests covering all national prisons. Secondly, only conditions of detention which are relevant for the determination of a real risk of inhuman or degrading treatment should be enquired about and used for the assessment. In this respect, the Court of Justice has relied – as indicators – on relevant standards developed by the European Court of Human Rights.⁵⁸ Bearing in mind the lack of relevant EU standards, this is the most obvious choice, which – among others – provides domestic judges with a useful clarification of interaction between EU law and ECHR standards. By the same token, it helps them to navigate the multifaceted legal environment they are exposed to.

3.4 Case C-216/18PPU LM: *errrm... are you independent enough for us to trust you?*

3.4.1 Introduction

Case C-216/18PPU LM was delivered against the very precarious political background of a Member State which had downgraded its rule of law standards in a staggering anti-democratic blitz. Ever since the elections in 2015 the Polish Government, the Parliament and the President, driven by the right-wing nationalist *Prawo i Sprawiedliwość* (Law and Justice, *sic!*), have implemented a series of reforms which largely de-activated the country's Constitutional Tribunal and heavily undermined the independence of the entire judiciary, including most recently the Supreme Court.⁵⁹ In other words, the reforms have considerably blurred the boundaries between the executive and the judiciary, raising the fundamental question of whether Poland was still meeting the standard laid down in Article 2 TEU. Not surprisingly, this attracted the attention of several international actors⁶⁰ and sounded the alarm bells around the

⁵⁸ See *ML* (n 35) paras 90-100.

⁵⁹ For an overview see, inter alia, Filipek (n 8).

⁶⁰ For instance, the Commission for Democracy through Law of the Council of Europe (usually referred to as the Venice Commission) issued several critical reports about the reforms in Poland. See, inter alia, Poland: Opinion on the Act on the Constitutional Tribunal, adopted by the Venice Commission at its 108th Plenary Session (Venice, 14-15 October 2016) <[www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)026-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)026-e)> accessed 23 December 2018; Poland: Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, adopted by the Commission at its 113th Plenary Session (Venice, 8-9 December 2017) available at <[www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)031-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)031-e)> accessed 23 December 2018.

European Union. Alas, it has also raised questions whether the existing *modi operandi* employed by the European Union to remedy breaches of EU law by the Member States are fit for purpose and whether they can be utilised when the rule of law is at stake.⁶¹

When this article was completed, the European Commission was at the stage of testing the waters on whether the standard infringement proceedings based on Article 258 TFEU could be invoked. It has already submitted two infractions to the Court of Justice where it openly challenged the compatibility of the changes in the Polish law with, among others, Article 19 TEU.⁶² At the same time, it has triggered the *par excellence* political procedure based on Article 7 TEU.⁶³ In so doing, the European Commission identified several threats to respect for the EU values laid down in Article 2 TEU and, as for the procedural requirements laid down in Article 7(1) TEU, it issued a reasoned proposal.⁶⁴ Furthermore, several Polish courts, including the Supreme Court, have proceeded with references for a preliminary ruling aiming for a clarification on whether the alleged reforms, which led to a purge in the judiciary, were compatible with EU law.⁶⁵ Not surprisingly, questions were also raised in national courts across the European Union whether the Polish judicial system should continue to benefit from the principles of mutual trust and mutual recognition. This matter, too, reached the Kirchberg courtroom in Case C-216/18PPU *LM*.

3.4.2 *The quagmires of the High Court of Ireland*

The reference in case C-216/18PPU *LM* was submitted by the High Court of Ireland, which received a number of European arrest warrants issued by the Polish authorities with a view to conducting the criminal prosecution of a Polish national who was accused of drug trafficking. It

⁶¹ See, inter alia, D Kochenov and L Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2012) 11 *EUConst* 512; D Kochenov, 'On Policing Article 2 TEU Compliance - Reverse Solange and Systemic Infringements Analyzed' (2013) 33 *PolYBIL* 145; A Von Bogdandy and others, 'Reverse Solange: Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49 *CML Rev* 489; M Schmidt and P Bogdanowicz, 'The Infringement Procedure in the Rule of Law Crisis: How to Make Effective Use of Article 258 TFEU' (2018) 55 *CML Rev* 1061.

⁶² For instance, pending case C-619/18 *Commission v Poland*. See Order of the Vice-president of the Court of Justice Case C-619/18P *Commission v Poland* ECLI:EU:C:2018:852.

⁶³ For an appraisal of Article 7 TEU and its progeny, see, eg, W Sadurski, 'Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider' (2010) 16 *CJEL* 385.

⁶⁴ Commission, 'Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law' COM (2017) 835 final.

⁶⁵ See, inter alia, pending references for a preliminary ruling submitted by the Polish Supreme Court: Case C-522/18 *DŚ v Zakładowi Ubezpieczeń Społecznych Oddział w Jaśle*; Case C-537/18 *Krajowa Rada Sądownictwa*; Case C-585/18 *Krajowa Rada Sądownictwa*.

should be noted that at the material time the already mentioned Article 7 TEU procedure had already been triggered by the European Commission and its recommendations made available to the public. Bearing this in mind, the referring court faced the dilemma whether to clear the surrender of the person in question to Poland or, alternatively, whether to refuse to do so, taking into account the fact that Polish courts were no longer independent. The latter, potentially, could expose the person surrendered to an unfair trial. Not surprisingly, the High Court of Ireland proceeded with a reference for a preliminary ruling to the Court of Justice. The referring court not only analysed *in extenso* the situation in Poland but also questioned whether the *Aranyosi and Căldăraru modus operandi* was fit for purpose in the case at hand. According to the High Court of Ireland, it was questionable whether any clarification received from the requesting judicial authority should be treated as acceptable. To put it differently, would assurances of independence issued by a national court that is not independent, discount the doubts of a court asked to entertain a request for surrender?⁶⁶ Not surprisingly, the Court of Justice decided to employ the urgent preliminary ruling procedure and, bearing in mind the gravity of the situation and importance of the legal issues raised, the case was assigned to the Grand Chamber.

3.4.3 Aranyosi and Căldăraru revisited

The judgment rendered by the Court of Justice raises a plethora of legal issues, and merits a comprehensive analysis. This, no doubt, is likely to follow in the academic literature.⁶⁷ The present article, as outlined above, aims to look at the *Aranyosi and Căldăraru* line of jurisprudence through the lenses of national judges. Hence, the analysis that follows focuses only on selected legal issues raised by the judges at Kirchberg.

To begin with, the Court of Justice made an attempt to draw a line between the Article 7 TEU proceedings and the EAW Framework Decision. A reminder is fitting that the latter provides, albeit only in the preamble, that the European Council may suspend the application of the European arrest warrant machinery only in cases of serious and

⁶⁶ *The Irish High Court, Minister for Justice and Equality v Celmer* (No 1) judgment of 12 March 2018 [2018] IEHC 119. For an academic appraisal, see inter alia, M Dorociak and W Lewandowski, 'A Check Move for the Principle of Mutual Trust from Dublin: The Celmer Case' (2018) 3 European Papers 857; S Carrera and V Mitsilegas, 'Upholding the Rule of Law by Scrutinising Judicial Independence: The Irish Court's Request for a Preliminary Ruling on the European Arrest Warrant' (2018) CEPS Commentary 2018, available at <www.ceps.eu/system/files/SCandVM_ROL.pdf> accessed 23 December 2018.

⁶⁷ For an early appraisal see, inter alia, P Bárd and W van Ballegooij, 'Judicial Independence as a Precondition for Mutual Trust? The CJEU in *Minister for Justice and Equality v LM*' (2018) 9 NJECL 353.

persistent breach of principles laid down in Article 6(1) TEU. For that to happen, a unanimous decision of the European Council is required as per Article 7(2) TEU. The Court of Justice clarified that in such an event, the executing judicial authority would be required to automatically refuse the execution of a European arrest warrant. In the current political constellation, this scenario is merely a theoretical proposition that is very unlikely to materialise. The political character of the Article 7 TEU proceedings, combined with the dominant role prescribed to the Member States (acting either as the European Council or the Council) and the unanimity requirement for a key decision as well as the fact that the two allied Member States are currently subject to the procedure, makes any determination of a serious and persistent breach of EU values a highly illusory exercise. This, in a nutshell, means that the suspension of the EAW mechanism *vis-à-vis* Poland or Hungary is not on the cards. It does not, however, change the fact that in the course of EAW proceedings national courts face dilemmas similar to those expressed by the referring court in Case C-216/18PPU *LM*. In this respect, the Court of Justice has offered a solution along the lines of the *Aranyosi and Căldăraru* ruling.

To begin with, the Court of Justice made it clear that until the European Council freezes the EAW mechanism in relation to a particular Member State, the national executing authorities may refuse to give effect to European arrest warrants in exceptional circumstances after a thorough individual assessment of whether in a particular case the person surrendered could be exposed to an unfair trial resulting from a lack of independence of the domestic court. The Court of Justice ruled that such a decision may be made on the basis of Article 1(3) of the EAW Framework Decision. This, as compared to the *Aranyosi and Căldăraru* ruling and its constructive ambiguity discussed above, is a welcome clarification. Once again, it shows an inventive side of the Court of Justice and the way in which it interprets EU law. It is notable, however, that the judges at Kirchberg again opted for phraseology departing from the language of the EAW Framework Decision. As the Court of Justice put it, the executing authority ‘may refrain [...] to give effect to a European arrest warrant’.⁶⁸ In practical terms there is, if any, very little difference between ‘refraining’ and ‘non-executing’ a request for surrender. It seems now confirmed that the Court of Justice has opted to turn Article 1(3) of the EAW Framework Decision into an additional ground for refusal to surrender. The picture emerging from the judgment in question is that such a decision should be neither automatic nor taken lightly. Hence, the bulk of the Court’s reply to the Irish High Court comprises a detailed account of what amounts to judicial independence and what factors should

⁶⁸ *LM* (n 34) para 73.

be taken into account by national courts when applying the *Aranyosi and Căldăraru* test.

There are two central elements in the Courts' reasoning. Firstly, the Court of Justice found it fitting to elaborate *in extenso* on the importance of the rule of law and, in more general terms, the meaning and the scope of Articles 2 and 19 TEU. Secondly, the judges at Kirchberg addressed the impact of the rule of law breaches on the European arrest warrant mechanism. It is not surprising that the Court of Justice has put so much emphasis on rule of law matters. In many respects, judges operate in a legal lacuna and face competence dilemmas. On the one hand, respect for EU values is a pre-condition of EU membership and it is at the heart of EU integration. On the other hand, the EU operates under the principle of conferral, which – in general terms – precludes interventions in areas not falling within its competences.⁶⁹ One of the problems currently faced by the EU and its institutions is that the very generous wording of Article 2 TEU is not matched by extensive competences in rule-of-law matters. Nevertheless, it is rather obvious that respect for the rule of law and the existence of independent national judiciaries are essential conditions for the application as well as the effectiveness of EU law. This link has been extensively dealt with by the Court of Justice in Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*,⁷⁰ and the discussed judgment in Case C-216/18PPU *LM* cements this emerging line of jurisprudence and equips the Court of Justice with legal ammunition to deal with the already mentioned rule of law infringement proceedings against Poland and references from the Polish Courts. One has to agree with Matteo Bonelli and Monica Claes that Case C-64/16 *Associação Sindical dos Juizes Portugueses* arrived at a perfect time and amounted to judicial serendipity.⁷¹ It allowed the Court of Justice to develop key principles in a case of lesser political gravity. By the same token, it paved the way for highly politicised cases regarding respect for the rule of law in Poland and Hungary. As already noted, Case C-216/18PPU *LM* was the first in line. The Court of Justice has emphasised that judicial independence is

⁶⁹ For an academic appraisal of the principle of conferral after the entry into force of the Treaty of Lisbon, see, inter alia, G Davies, 'The Post-Laeken Division of Competences' (2003) 28 *EL Rev* 686; M Dougan, 'The Convention's Draft Constitutional Treaty: Bringing Europe Closer to Its Lawyers?' (2003) 28 *EL Rev* 763; P Craig, 'Competence: Clarity, Conferral, Containment and Consideration' (2004) 29 *EL Rev* 323; T Tridimas, 'Competence after Lisbon. The Elusive Search for Bright Lines' in D Ashiagbor, N Countouris and I Lianos (eds), *The European Union after the Treaty of Lisbon* (CUP 2012); M Dougan, 'The Treaty of Lisbon 2007: Winning Minds Not Hearts' (2008) 45 *CML Rev* 617; M Claes and B de Witte, 'Competences: Codification and Contestation' in Lazowski and Blockmans (n 20).

⁷⁰ Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* ECLI:EU:C:2018:117.

⁷¹ Bonelli and Claes (n 5).

at the heart of the fundamental right to a fair trial, which is guaranteed by Article 47 of the Charter of Fundamental Rights.⁷²

The Court of Justice has also brought to the fore Article 19 TEU, which 'gives concrete expression to the value of the rule of law affirmed in Article 2 TEU'.⁷³ It creates an obligation for national courts to guarantee full application of EU law in the Member States and protect the rights of individuals. This is a well-known treatise, which, with the entry into force of the Treaty of Lisbon, found a proper legal basis in the EU Founding Treaties (Article 19 TEU). In this context the independence of national courts is a core requirement, also for the effective functioning of the EAW, based on mutual trust and mutual recognition. The Court of Justice has clarified in turn that the decisions on issuing and on execution of European arrest warrants need to be taken by independent courts. Furthermore, in paragraph 57 the judges have rather boldly emphasised the obvious that even in areas not covered by EU law the Member States have to observe the ECHR, in particular the right to a fair trial. The Court has in turn provided guidance to national courts as to the factors which should be taken into account by the executing judicial authority when conducting an assessment of the state of affairs in the requesting country. For instance, the Court of Justice delved into the external and internal aspects of judicial independence.⁷⁴ This led to the exact *modus operandi* the national courts should follow. The Court of Justice has followed in this respect the test laid down in the judgment in *Aranyosi and Căldăraru*, requiring national judges to start with a general assessment, and then, should doubts arise, follow-up with an individual analysis based on the clarifications received from the requesting judicial authority. The latter is required even when, as in the case at hand, the European Commission publishes a reasoned proposal and, by the same token, triggers Article 7 TEU proceedings. The two-step process has been summarised by the Court of Justice in the following fashion:

If, having regard to the requirements noted in paragraphs 62 to 67 of the present judgment, 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

⁷² See further, *inter alia*, A Ward, 'Article 47' in Peers (n 40).

⁷³ *LM* (n 34) para 50.

⁷⁴ *ibid*, paras 63-65.

believing that, following his surrender to the issuing Member State, the requested person will run that risk.⁷⁵

This amounts to *Aranyosi and Căldăraru* revisited and does not follow the suggestions made by Advocate General Tanchev in his opinion.⁷⁶ Furthermore, it fails to address the concerns raised by the Irish High Court in its reference for a preliminary ruling about the second step, which for reasons explained further below may prove not to be fit for purpose. When it comes to the general assessment, which constitutes the first step, the Court of Justice has followed the test laid down in *Aranyosi and Căldăraru*. In a nutshell, the executing judicial authority must make its assessment based on information that is ‘objective, reliable, specific and properly updated’.⁷⁷ The Court of Justice has indicated that the material provided by the European Commission in its reasoned proposal is based on Article 7(1) TEU. Although this is not mentioned by the Court, one should assume that reports of other bodies could be taken into account as well. This would include, for instance, reports of the Venice Commission, which operates under the auspices of the Council of Europe. *Prima facie*, the Courts’ conclusion is sound, yet it does not take into account the ‘whom to trust’ dilemma. Not surprisingly, the reports of the Venice Commission as well as the reasoned proposal of the European Commission have been discredited by the Polish authorities, which prefer and promote an alternative understanding of independence of the judiciary and the rule of law. The question is whether this in itself may lead to confusion among the national courts of other Member States. Should they trust at face value the assessments made by international institutions or the national authorities of the Member State concerned? The first phase, however, seems to be a relatively easy step to take when one looks further at the second procedural step required by the Court of Justice. Indeed, particular challenges may arise when the national executing authority proceeds to engage in dialogue with the authorities of the requesting country. This boils down to a fundamental question whether one can trust an assessment and evidence provided by a national court, which – allegedly – is not independent. In the case at hand, the doubts expressed by the Irish High Court were exacerbated by a rather blunt statement courtesy of the Polish Deputy Minister of Justice, who acted in breach of the presumption of innocence by alluding that the person subject to the European arrest warrant was a criminal.⁷⁸ This

⁷⁵ *ibid*, para 68.

⁷⁶ Case C-216/18PPU *Minister for Justice and Equality v LM (Deficiencies in the system of justice)* ECLI:EU:C:2018:517, Opinion of AG Tanchev.

⁷⁷ *LM* (n 34) para 61.

⁷⁸ See *Irish High Court, Minister for Justice and Equality v Celmer (No 4)* judgment of 1 August 2018 [2018] IEHC 484.

has surely undermined the already cracking trust in the Polish judiciary and its independence.

In Case C-216/18PPU *LM* the Court of Justice concluded that if the doubts of the requested court cannot be discounted it may refuse to surrender a person requested under the European arrest warrant. This has to happen when the executing judicial authority concludes that there is 'a real risk that the individual concerned will suffer in the issuing Member State a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial'.⁷⁹ In this respect it is interesting to note the two differences between the discussed judgment and the decision of the Court of Justice in *Aranyosi and Căldăraru*. Firstly, Article 1(3) of the EAW Framework Decision is employed unequivocally as the legal basis for such a decision. Secondly, the Court uses a different language to describe the actions of executing authorities. While in *Aranyosi and Căldăraru* the Court talks about bringing the EAW procedure to an end, in the present case the judges at Kirchberg have instructed their domestic counterparts to 'refrain from giving effect to the European Arrest Warrant'.⁸⁰ Irrespective of the phraseology, the end result is, however, just the same.

3.4.4 Conclusions

Case C-216/18PPU *LM* arrived at a crucial time and, not surprisingly, it has triggered a deal of commotion. From the point of view of principles of mutual trust and mutual recognition, it encapsulates well the evolving legal landscape, which no longer features blind and unconditional trust in the judicial systems of other Member States. For many national judges, it is a welcome development, even though, as academic commentators put it, the case-by-case *modus operandi* laid down therein requires the passing of 'Herculean hurdles'.⁸¹ The High Court of Ireland, which submitted the reference in the present case, eventually ruled on 19 November 2018 that the surrender to Poland should be ordered since, despite the systemic and generalised deficiencies in the independence of the Polish judiciary, there was no real risk that the requested person would be exposed to a flagrant denial of the right to a fair trial.⁸² This, arguably, is one of the first cases, and many will follow. The key question is how domestic courts will proceed in the months to come. Since the general suspension of the European arrest warrant system is neither

⁷⁹ *LM* (n 34) para 77.

⁸⁰ *ibid.*, para 77.

⁸¹ Bárd and van Ballegooij (n 67).

⁸² Irish High Court, *The Minister for Justice and Equality v Celmer* No 5, 19 November 2018 [2018] IEHC 639, para 123.

politically possible nor desired, the burden to assess how much trust there is left in the Polish judicial system will remain on the shoulders of national judges.

3.5 Mutual trust and mutual recognition at the time of Brexit

3.5.1 Introduction

The final judgment of this saga deals with the operation of the principles of mutual trust and mutual recognition at the time of Brexit. As is well known and documented in the academic literature, the UK's withdrawal from the European Union will have profound legal implications for both the departing country and the remaining twenty-seven Member States of the European Union. This, of course, extends to the Area of Freedom, Security and Justice, even though the United Kingdom has for years benefited from a variety of opt-outs.⁸³ Not surprisingly, the uncertainties surrounding the withdrawal itself, as well as the shape of post-Brexit relations between the EU and the UK, have raised doubts in national judges dealing with European arrest warrants and other mutual recognition instruments. This eventually led to a reference for a preliminary ruling from the Irish High Court and, consequently, to the judgment of the Court of Justice in Case C-327/18PPU *RO*.

3.5.2 Does Brexit undermine mutual trust?

As the title of the present section suggests, the key question that the Court of Justice has been asked is whether the period pending the withdrawal of the United Kingdom from the European Union undermines the principle of mutual trust and, as a result, also the mutual recognition underpinning judicial cooperation in criminal matters. In a nutshell, the judges at Kirchberg answered in the negative. To put it differently, as long as a Member State remains in the European Union – even having triggered the withdrawal procedure – it is business as usual. As the Court put it:

it must be observed that such a notification does not have the effect of suspending the application of EU law in the Member State that has given notice of its intention to withdraw from the European Union and, consequently, EU law, which encompasses the provisions of the Framework Decision and the principles of mutual trust and mutual recognition inherent in that decision, continues in full force and effect in that State until the time of its actual withdrawal from the European Union.⁸⁴

⁸³ See, inter alia, V Mitsilegas, 'Cross-Border Criminal Cooperation after Brexit' in M Dougan (ed), *The UK after Brexit. Legal and Policy Challenges* (Intersentia 2017); A Weyembergh, *Consequences of Brexit for European Union Criminal Law* (2017) 8 NJECL 284.

⁸⁴ *RO* (n 36) para 45.

The judges agreed with Advocate General Szpunar that to rule to the contrary would amount to the unilateral suspension of the EAW Framework Decision and, at the same time, it would be in breach of its recital 10, which permits only for suspension taken in the context of the Article 7 TEU proceedings. So, to cut a long story short, the notification of intention to withdraw from the European Union does not *per se* constitute a circumstance justifying refusal to surrender under the EAW procedural apparatus. Yet, as the Court of Justice made clear, it does not de-activate the obligations resting on the shoulders of national judges as per the *Aranyosi and Căldăraru* ruling. In order to discount the doubts of the referring court and, presumably, also other executing authorities, even when Article 4 of the Charter ceases to apply to the United Kingdom on the date of withdrawal, it will still be bound by the ECHR, in particular its Article 3, which also prohibits inhuman and degrading treatment. In equal measure, the Court of Justice attempted to discount the trepidation of the referring court as regards the continuous application of the principle of specialty.

3.5.3 Conclusions

The judgment in Case C-327/18PPU *RO* arrived at a crucial time, when many legal aspects of Brexit remain unknown. It makes it clear that notification of the intention to withdraw in itself does not undermine mutual trust and mutual recognition. Yet, it gives national executing authorities room for manoeuvre when they handle requests for surrender closer to the date of Brexit. This is achieved by extending the application of the *Aranyosi and Căldăraru* test. When this article was completed all bets were off. In a scenario guaranteeing legal certainty at a time of political chaos, the United Kingdom would leave the EU in accordance with the Withdrawal Agreement. If that were the case, it would be subject to a transitional period during which the mutual recognition instruments would continuously apply. At the same time, a chaotic unilateral withdrawal should not be dismissed. Leaving political speculation aside, if it were to materialise, it would mean that EU law, including the EAW Framework Decision, would apply to the United Kingdom until 2020 (or even longer). Would that remain business as usual? Time will tell, although more references for preliminary rulings to the Court of Justice seem inevitable.⁸⁵

⁸⁵ See the reference in Case C-191/18 *KN v The Minister for Justice and Equality*, which was withdrawn by the referring court in the wake of the judgment in the discussed Case C-327/18PPU *RO*.

4 Conclusions

What does the judgment in the Joined Cases *Aranyosi and Căldăraru* and the follow-up decisions leave us with? To begin with, it has been a breaking point for mutual recognition and mutual trust in criminal matters. Although carefully worded, and setting the *modus operandi* that should be followed in the event of doubts about respect for fundamental rights at the receiving end, the Court in fact opened the door to national judges to refuse execution of European arrest warrants. It should be noted that everyday practice will determine whether the door has been left merely ajar or wide open. On the one hand, the discussed judgments are the answers to dilemmas faced in the multifaceted legal environment. On the other hand, they are a challenge to the principle of mutual trust. EU law now allows domestic judges to openly question trust in their counterparts and the legal systems of other Member States. At the same time, this eases the tensions between the obligations on the shoulders of domestic judges, courtesy of national law combined with the ECHR and Framework Decision 584/2001/JHA on the European Arrest Warrant (and some other mutual recognition instruments). In more general terms, as argued by L Mancano, the shift in the jurisprudence of the Court of Justice 'restores the balance between fundamental rights protection and enforcement demands in the European arrest warrant system'.⁸⁶ By the same token, the Court of Justice has moved the centre of gravity from security closer to justice. The question is whether the conclusions reached in the Joined Cases *Aranyosi and Căldăraru* should now also be addressed by the EU legislator. To put it differently, if a revision of the EAW Framework Decision were to materialise, should Articles 3-4a be amended in order to codify the jurisprudence coming from Kirchberg? It should be noted that a precedent has been set in Directive 2014/41/EU on the European Investigation Order, which envisages fundamental rights as a non-recognition ground.⁸⁷ Yet, for now, any formal revision of the EAW Framework Decision remains merely a theoretical proposition as there is clearly no appetite to proceed with any revision of the legal act in question. This, in turn means that the question whether to surrender or not, when in doubt about respect for fundamental rights, will remain to be answered solely by national courts (assisted by the Court of

⁸⁶ L Mancano, 'A New Hope? The Court of Justice Restores the Balance between Fundamental Rights Protection and Enforcement Demands in the European Arrest Warrant System' in Brière and Weyembergh (n 6).

⁸⁷ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters [2014] OJ L130/1. See further A Erbežnik, 'Mutual Recognition in EU Criminal Law and Fundamental Rights: The Necessity for a Sensitive Approach' in Brière and Weyembergh (n 6) 197-199.

Justice). And this will boil down to the fundamental question of whether their counterparts in the other Member States can be trusted. Trust has not yet been lost, but, as the cases discussed in this article demonstrate, it has been put to the test.