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The European Arrest Warrant and Human Rights Implications: A Jurisprudential Analysis of Refusal Grounds before the Court of Justice of the European Union

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ABSTRACT

The European Arrest Warrant (EAW) institutes a fundamental mechanism in judicial cooperation in criminal matters within the European Union. At the core of its legal architecture lies the principle of mutual recognition of criminal judgments. According to the Framework Decision and the jurisprudence of the Court of Justice of the European Union (CJEU), the executing Member State may refuse to surrender the requested person only on the grounds expressly provided for in Articles 3, 4, 4a, and 5 of the Framework Decision, and not on the basis of its national law. However, the CJEU has been confronted with a growing number of cases requiring examination of whether an EAW may be refused due to violations of fundamental rights by the issuing Member State's authorities. This study focuses specifically on human rights concerns related to two key aspects: (i) detention conditions, and (ii) the right to be tried by an independent and impartial tribunal established by law. These two grounds are examined through the CJEU's jurisprudence, with the aim of exploring the delicate balance between the protection of fundamental rights and the principle of mutual recognition. This study argues that the judicial jurisprudence is backing a step-by-step shift from the absolute application of mutual trust towards its redefinition as a conditional principle, aiming to ensure that fundamental rights are guaranteed and safeguarded during the execution of the European Arrest Warrant.

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Introduction

The adoption of Council Framework Decision 2002/584/JHA of 13 June 2002[1] on the European arrest warrant and the surrender procedures between Member States (*hereinafter referred to as the "EAW FD"),* subsequently amended by Council Framework Decision 2009/299/JHA of 26 February 2009[2], laid the foundations for the implementation of the principle of mutual recognition of judicial decisions within the territorial area of the European Union *(hereinafter referred to as the "EU")*. The implementation of this new legal mechanism for the surrender of persons sought by criminal justice followed a legal practice that now relied solely on the decision-making of judicial authorities, excluding the political assessment of the administrative authorities of the application of the 1957 European Convention on Extradition[3].

However, even though the procedures for surrendering requested persons have now become faster, almost automatic, as we have discussed in previous papers[4], the EAW FD provides for an exhaustive list of cases in which the executing court has the right to refuse the execution of the EAW, provided for in Articles 3, 4, 4a, and 5 of the EAW FD. This list provides for mandatory grounds, optional grounds, and certain guarantees, which, according to the case law of the Court of Justice of the European Union (*hereinafter referred to as the "CJEU"*), are the only grounds on which the executing court may rely to refuse the surrender of the requested person.

On the other hand, from the very beginning, Article 1 (3) of the EAW FD has stipulated that the implementation of the Framework Decision is not intended to modify the obligation of the Member States to respect fundamental rights and freedoms as provided for in Article 6 of the EU Treaty. This provision seems to create the possibility of "adding" new grounds for non-execution, in addition to those provided for in Articles 3, 4, 4a, and 5 of the EAW FD. The debate regarding the creation of new legal spaces to enable the assessment of cases where human rights violations are alleged by the authorities of the issuing State has become part of a series of decisions of the European Court of Human Rights *(hereinafter referred to as the "ECtHR"*) and the CJEU.

The starting point of this debate is related to the fact that this mechanism now operates within an area of freedom, security, and justice as embodied by the Treaty of Amsterdam[5]. This premise is further strengthened by the fact that the European Arrest Warrant Framework Decision was founded on the principle of mutual recognition of criminal decisions; however, respect for human rights constitutes a fundamental and absolute standard that cannot be compromised under any circumstances.[6] This has also been emphasized by the President of the CJEU, who states that it is necessary that the principle of mutual recognition should be implemented by ensuring a level of protection of fundamental rights which, while preserving the independence of the EU legal system, is based on the constitutional traditions common to the Member States and on the European Convention on Human Rights *(hereinafter referred to as the "ECHR").*[7]

It is worth noting that the development of claims regarding the responsibility of member states for alleged violations of the ECHR led to the formation of the so-called "*presumption of equivalent protection of human rights by all member states of the European Union*", or in other words, the "*Bosphorus*" doctrine[8], which allows the ECtHR to exercise its power alongside the CJEU, only if the protection offered by EU law proves to be clearly insufficient.[9]

[1] 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.

[2]Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial [2009] OJ L81/24.

[3]European Convention on Extradition (adopted 13 December 1957, entered into force 18 April 1960) ETS No 024.

[4]Lulezim Barjamemaj, 'Safeguards and Guarantees in European Arrest Warrant Procedures: Legal and Comparative Analysis' (2024) 1(1) *Balkans Legal, Economic and Social Studies* 85p.

[5]Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C340/1.

[6] Masha Fedorova and Goran Sluiter, 'Human rights as minimum standards in international criminal proceedings' (2009) 3(1) *Human Rights and International Legal Discourse* 9.

[7]Koen Lenaerts, 'La vie après l'avis: Exploring the Principle of Mutual (Yet Not Blind) Trust' (2017) 54 *Common Market Law Review* 805-840.

[8] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* App no 45036/98 (ECtHR, 30 June 2005).

[9] Tawhida Ahmed, 'The EU's Protection of ECHR Standards: More Protective than the Bosphorus Legacy?' in James Green and Christopher Waters (eds), *Adjudicating International Human Rights: Essays in Honor of Sandy Ghandhi* (Brill Nijhoff 2014) 99–118.

As long as the member states are parties to the ECHR, and given the fact that the EU has also separately adopted the Charter of Fundamental Rights of the European Union[10], the debate regarding possible violations of human rights by the authorities of the issuing state will continue; and as analyzed by the jurisprudence of the CJEU, the "message" for the member states is clear, the authorities of the issuing and executing state must enter into a dialogue before the final decision on whether or not to surrender the requested person, and the examination of the claims must be carried out through two steps. The first step consists of the general assessment, and the second step, through which the concrete assessment of the claims on the real risk of violation of human rights is made.

The legal analysis in this study focuses on two fundamental elements of the refusal grounds under the EAW, as interpreted in the jurisprudence of CJEU. The first part examines cases involving allegations related to detention conditions, while the second part analyzes judicial decisions raising questions concerning violations of Article 6 of the European Convention on Human Rights, particularly with respect to the right to an independent, impartial, and lawfully established tribunal. Finally, the study addresses its findings in the conclusion section, mapping the legal tensions in the jurisprudence and potential loops identified.

Methodology

This study adopts a predominantly normative legal methodology, entailing a systematic and in-depth examination of legal norms enshrined in international conventions, primary and secondary legislation, as well as relevant case law. Particular emphasis is placed on the jurisprudence of the CJEU concerning detention conditions and the principle of judicial independence. In addition, the research employs a comparative and analytical approach, situating the CJEU's case law within the broader normative framework of the ECHR and the standards developed by the Council of Europe. Furthermore, the study incorporates a doctrinal dimension by critically engaging with academic scholarship and authoritative legal commentary, with a view to assessing the evolution, internal coherence, and broader implications of the legal principles in question.

Discussion

Detention Conditions as a Ground for Refusal under the EAW FD based on Article 3 of the ECHR

Article 3 of the ECHR provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.[11] This convention prohibition is absolute[12], in the sense that there is no legal circumstance in which, due to the balancing with another right, the application of the positive obligation for any State party to the ECHR can be avoided or relativized. The Convention's aims and purposes, intended to serve as a mechanism for safeguarding individual human rights, necessitate interpreting and applying its provisions that ensure practical and meaningful protection. This imperative should guide the Court's approach to understanding Article 3, emphasizing the importance of rendering its safeguards both realistic and effective.[13]

In the context of the ECHR and with reference to the ECtHR's jurisprudence in the case of Gäfgen v. Germany[14], in determining whether a particular form of ill-treatment should be classified as torture, the distinction between this notion and that of inhuman or degrading treatment

Paul Gragl, 'An Olive Branch from Strasbourg: Interpreting the European Court of Human Rights' Resurrection of Bosphorus and Reaction to Opinion 2/13 in the Avotins Case' (2017) 13(3) *European Constitutional Law Review* 551–567.

[10]Charter of Fundamental Rights of the European Union [2012] OJ C326/391. Article 51 sets the field of application, 51 (1) "The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.". And Article 52 (3) refers to the scope and interpretation of the CFR and the relationship with the ECHR: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

[11]Convention for the Protection of Human Rights and Fundamental Freedoms, art 3 (European Convention on Human Rights).

[12] *Soering v United Kingdom* App no 14038/88 (ECtHR, 7 July 1989).

N v Finland App no 38885/02 (ECtHR, 26 July 2005).

[13] Nano Vatcharadze, 'Navigating Cruelty: Examining ECHR Practice in Defining a Minimum Threshold for Torture Facilitated by State Agents' (2024) 10(29) *Law and World* 114 https://doi.org/10.36475/10.1.9

[14] *Gäfgen v Germany* App no 22978/05 (ECtHR, 6 July 2010) paras 89–91.

embodied in Article 3 of the ECHR must be assessed. By making such a distinction, it appears that the ECHR intended to give a special meaning to inhuman treatment that causes very serious and cruel suffering. In addition to the severity of the treatment, there is a distinguishing element in the subjective side of the acts that are defined as torture, where specifically as provided for in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in Article 1, "torture" is defined as the infliction of severe pain or suffering for the purpose, inter alia, of obtaining information, punishing or intimidating. The ECtHR defines that a real and imminent threat of torture may constitute at least inhuman treatment. Furthermore, the ECtHR has defined the term "inhuman treatment" as treatment for hours without interruption, by which bodily harm or severe physical and mental suffering is caused. In contrast, treatment is considered "degrading" when it is capable of arousing in the victim feelings of fear, anxiety, and inferiority, with the aim of humiliating and humiliating him and possibly breaking his physical or moral resistance, or when it is capable of inducing the victim to act against his will or conscience.

By examining the ECtHR's case law on allegations of violations of Article 3 during extradition proceedings, it is noted that in addition to allegations of a real risk of being subjected to torture through active actions in the requesting State due to the harsh penal policy of that State, other elements related to the risk of a violation of Article 3 are: i) the conditions of detention in the requesting State; ii) the health reasons of the requested person, and; iii) the inability of the requested person to be released on parole after a period of serving his sentence.

On the other hand, as we will discuss below, the CJEU has created a jurisprudence that tends to be uniform with the jurisprudence of the ECHR, but has also taken care to strengthen the principle of mutual recognition of criminal decisions within the EU area of freedom, security, and justice.

The first cases referred to the CJEU by a referring court for a preliminary ruling concerning allegations of the conditions of detention in the issuing State, which further implicate a risk of a violation of Article 3 of the ECHR, are cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*[15]. These cases were heard together in a single judgment due to the same legal circumstances and grounds.

In the Aranyosi case, a Hungarian court had issued two EAWs to prosecute Aranyosi for the criminal offences of forced entry and theft, which the latter had allegedly committed in Hungary. In the Căldăraru case, a Romanian court had issued an EAW to secure the execution in Romania of a prison sentence of 1 year and 8 months imposed for the criminal offence of driving without a driving licence. The German referring court, acting as the executing court, considered that the conditions of detention to which the two persons could respectively be subjected in Hungarian and Romanian prisons were contrary to their fundamental rights.[16] For this reason, she raised before the CJEU several questions aimed at interpreting Article 1(3) of the EAW FD, mainly regarding how the executing State should act if it finds that the conditions of detention in the issuing State are such that they may violate Article 3 of the ECHR.

To provide an exhaustive and balanced answer between the principle of mutual recognition and respect for human rights, the CJEU begins its reasoning by noting that Articles 1(1) and 1(2) of the EAW FD and points 5 and 7 of its preamble show that the EAW FD constitutes a completely new regime based on the mutual recognition of criminal decisions. It emphasizes that an EAW must, in principle, be executed unconditionally, except as provided for in Articles 3, 4, 4a, and 5 of the EAW FD.[17] Meanwhile, exceptionally, in exceptional circumstances, based on Article 1 (3) of the EAW FD which emphasizes the obligation of Member States to respect the Charter, the executing State, relying on Article 4 thereof, may refuse to surrender the requested person to the issuing State, because the prohibition of torture, inhuman or degrading punishment is an absolute prohibition closely linked to respect for human dignity which is the subject of Article 1 of the Charter and Article 3 of the ECHR.[18] Further, the CJEU goes on to clarify that if elements indicate a real risk of inhuman or degrading treatment, the executing court must conduct a two-step examination.[19]

First, it must verify whether there is a general risk in the issuing State, based on objective, reliable, and up-to-date information obtained from sources such as ECtHR decisions, Council of Europe, or UN reports. These must show systemic deficiencies or those affecting specific groups of persons or places of detention. The mere finding

[15] *Aranyosi and Căldăraru* Joined Cases C-404/15 and C-659/15 PPU (CJEU, 5 April 2016).
[16] *Aranyosi and Căldăraru* (n 14).
[17] Ibid 75-80.
[18] Ibid 82-87.
[19] Ibid 88-97.

of such a general risk is not sufficient for refusal.

Secondly, the court must assess whether there is a specific risk that the requested person, if surrendered, would face treatment contrary to Article 3 of the ECHR. At this stage, the executing court may request, under Article 15 of the EAW FD, additional information from the issuing authorities on the concrete conditions of detention and the relevant monitoring mechanisms, respecting the deadlines set out in Article 17 of the Framework Decision.

The CJEU, in its reasoning, emphasizes that in the event of a real and concrete risk to the requested person, the court must postpone the execution of the EAW. During the postponement of execution, the requested person may be detained or temporarily released, but on condition that measures are taken to prevent his escape.[20] Meanwhile, if the executing court receives additional information by which the existence of a real risk that the requested person will be subjected to inhuman and degrading treatment in the issuing Member State is excluded, it must adopt the decision to execute the EAW. Whereas, in the case of the existence of a real risk that the requested person will be subjected to inhuman and degrading treatment in the issuing Member State, and this risk cannot be averted within a reasonable time, the executing court must have a final decision on the possibility of non-execution of the EAW.[21]

Following this decision, the issues relating to the assessment of the detention conditions of the issuing State as grounds for suspecting that there may be a breach of Article 3 of the ECHR and Article 4 of the Charter, continued and became the subject of a preliminary ruling in case C-220/18 PPU, *ML* (Detention *conditions in Hungary*), Judgment of 25 July 2018.[22] In these two cases, the questions raised for consideration focused on the assessment of the possibility for an executing court to exclude the existence of a "real risk" solely because a legal remedy is provided in the issuing Member State enabling the requested person to challenge the detention conditions. Clarification was also sought as to whether the executing court must assess the detention conditions in all establishments where the person concerned may be held. The issues submitted for consideration further included the question of whether, instead of such an assessment, the executing court may rely on guarantees given by other authorities of the issuing Member State, other than the issuing court, that the requested person will not be subjected to inhuman or degrading treatment. The CJEU answers the above questions by clarifying that the availability of legal remedies enabling the requested person to challenge the conditions of detention in the issuing State does not constitute sufficient reason for the executing court to exclude a "real risk" of a violation of Article 3 of the ECHR. Regarding the possibility of assessing the conditions of detention in the issuing State, the CJEU holds that the executing court must assess only the actual conditions of detention in the prisons in which the requested person will be held, including prisons in which he will be held temporarily.

Referring to the question of which authority of the issuing State is competent to guarantee the adequacy of his detention conditions, the CJEU states that the executing court may take into account both the data and guarantees provided by the court of the issuing State, but also by other authorities of that State. The CJEU, in its decision, initially emphasized that the executing court must receive accurate and up-to-date information.

Regarding the question of the existence of a remedy to challenge the conditions of detention in the issuing State, the CJEU clarifies that these remedies alone are not sufficient to exclude a real risk. The executing court must carry out an individual assessment of the situation of each person concerned.[23] The CJEU goes on to clarify that the executing court is obliged to assess only the conditions of detention in the prisons in which, according to the information at its disposal, it is intended that the person concerned will be held, including those in which the person will be held temporarily.[24] To this end, the executing court must use the possibility of obtaining additional information under Article 15(2) of the EAW FD only as a last resort, which may be used only in exceptional cases, and it is obliged to respect the time limits laid down by that provision.[25]

The CJEU ruled that if the executing court considers that the information at its disposal is insufficient to enable a surrender decision to be made, it may request additional and necessary information in accordance with Article 15(2) of the EAW FD[26] on the actual conditions of detention. However, given that in the case at hand the executing court had sent 78 questions asking about the conditions of

[20]Ibid 98-101.
[21]*Aranyosi and Căldăraru* (n 14) 103.
[22]*Case C-220/18 PPU ML (Detention conditions in Hungary)* (CJEU, 25 July 2018).
[23]Ibid 72-76.
[24]Ibid 87-89.
[25]Ibid 79, (referring to *Piotrowski*).
[26]Ibid 101.

detention in Budapest Prison as well as in any other institution in which the person concerned may be held,[27] the CJEU held without reservation that those questions, by reason of their number, scope (*to obtain information on every prison in which the person concerned may be held*) and content (*aspects of detention which have no relevance for this assessment),* make it objectively impossible for the authorities of the issuing Member State to provide a useful answer, having regard in particular to the short time limits laid down in Article 17 of the EAW FD. The CJEU stresses that a request of this nature causes the operation of the EAW to be suspended and is not compatible with the duty of sincere cooperation under Article 4(3) of the Treaty on European Union (TEU), which encourages dialogue between the executing and issuing judicial authorities.[28]

The CJEU further reasons that, in accordance with Article 15(2) and 15(3) of the EAW FD and Article 4(3) of the TEU, the executing court and the issuing court may request information or provide assurances concerning the actual conditions in which the person concerned will be held in the issuing Member State.[29] The CJEU underlines that the assurance provided by the competent authorities of the issuing Member State is a factor that the executing court cannot disregard.[30] Where such an assurance has been provided, or at least approved by the issuing court, the executing court must base its decision on that assurance, at least in the absence of any specific indication that the conditions of detention in a given detention facility are in breach of Article 4 of the Charter.[31] Meanwhile, in the present case, since the assurance was neither provided nor approved by the issuing court itself, it must be assessed by carrying out an overall assessment of all the information available to the executing court [32]. In the present case, the guarantee provided by the Hungarian Ministry of Justice is part of the information in the possession of the German public prosecutor's office and in these circumstances, it appears that the requested person can be surrendered to the Hungarian authorities without the risk of violating Article 4 of the Charter, but in any case, as the CJEU often rules, this assessment remains a matter that must be verified by the referring court.[33]

Although the CJEU in the two above-mentioned judgments appears to have instructed the courts of the Member States to apply uniformly cases which present grounds relating to the conditions of detention, referrals from the executing courts continued to be made for preliminary rulings to the CJEU. Specifically, in case C-128/18, *Dorobantu*, Judgment of 15 October 2019[34] the referring court raised a series of questions that attempt to further detail the executing court's assessment methodology in making a decision on the execution of the EAW.

In the *Dorobantu case,* CJEU explained that the executing court must take into account all relevant physical aspects of the conditions of detention in the prison in which the requested person is intended to be held, including the personal space available to each detainee, the sanitary conditions and the freedom of movement of the detainee within the prison. This assessment is not limited to examining obvious deficiencies. For the purposes of this assessment, the executing court must request from the issuing court all the information it considers necessary and, in principle, in the absence of any specific indication that the conditions of detention infringe Article 4 of the Charter, must rely on the guarantees provided by the issuing court. As regards, in particular, the personal space available to each detainee, the executing court, in the absence of minimum standards in this regard under EU law, must take into account the minimum requirements of Article 3 of the ECHR.

The CJEU reaffirmed that the executing court cannot dismiss a real risk of inhuman or degrading treatment solely on the basis that the requested person has legal remedies or that the issuing Member State has adopted measures to improve detention conditions. Furthermore, the executing court cannot balance the finding of a “real risk” against the obligations relating to the effectiveness of judicial cooperation and to the principles of mutual trust and recognition, giving priority to the absolute obligation to prohibit torture.[35]

[27] *PPU ML (Detention conditions in Hungary)* (n 21) 102.
[28] Ibid 104.
[29] Ibid 108-110.
[30] Ibid 111.
[31] Ibid 112.
[32] Ibid 113-114.
[33] Ibid 115.
[34] *Case C-128/18 PPU Dorobantu* (CJEU, 15 October 2019).
[35] *PPU Dorobantu* (n 35) 85-86.

Independence and Impartiality of the Judiciary as Core Elements of the Right to a Fair Trial under Article 6 of the ECHR

Both Article 6 (1) ECHR and Article 47 of the EU Charter indicate the "establishment by law" as the first, most preliminary requirement for a court, and the guarantee of a fair trial. The verification should therefore begin with the question: is the court established by law? If the answer is yes, it is only then that the examination continues, i.e. whether the court is independent, and then, if it is impartial.[36]

1. Independence of the Court

The CJEU has been confronted not only with cases relating to detention conditions, but also with allegations of violations of the principle of an independent and impartial tribunal, due to deficiencies in the judicial systems of some Member States, notably Poland. The first case of this nature to be referred to the CJEU was Case C-216/18 PPU, *Minister of Justice and Equality* (*deficiencies in the justice system*), Judgment of 25 July 2018[37]. In this case, although the Court of Justice of the European Union had already consolidated its case-law in the Aranyosi and Căldăraru case, clarification was sought as to whether, in cases where the executing court finds that there is convincing evidence showing that the justice system in the issuing Member State no longer functions in accordance with the principle of the rule of law and, consequently, the conditions are incompatible with the right to a fair trial, it is still necessary to carry out a further and individual assessment of the risk that the requested person will face an unfair trial within that system.

In the *Aranyosi and Căldăraru case,* the CJEU remained faithful to the standards established by this judgment. It reiterated that mutual recognition and trust are the rule as regards the execution of EAW[38] and in principle, an EAW must be executed unless one of the grounds provided for in Articles 3, 4a, and 5 of the EAW FD applies. An exception to this rule may be made only based on Article 1(3) of the EAW FD, which constitutes an exceptional circumstance.[39] Such an exceptional circumstance may, inter alia, be the case where there is a real risk of a violation of the fundamental right to a fair trial by an independent tribunal and, consequently, of the essence of the fundamental right to a fair trial under Article 47(2) of the Charter.[40]

However, as established by the *Aranyosi and Căldăraru*, the assessment of a potential violation of the right to a fair trial must follow a two-step test, the first of which requires the referring court to determine, based on objective, reliable, specific, and up-to-date material, whether systemic or generalized deficiencies in the issuing Member State give rise to a real risk to judicial independence. Given also the claim of the requested person in the present case, the CJEU explains that the information obtained from a reasoned proposal recently addressed by the Commission based on Article 7(1) TEU serves and is particularly relevant for that assessment.[41] However, here the CJEU stops short of stressing that there is no automatic suspension of the EAW system where there is a reasoned proposal from the Commission.

This right belongs to the European Council, which may determine whether an issuing Member State has infringed the principles set out in Article 2 TEU.[42] Only if the European Council adopts a decision as provided for in Article 7(2) TEU and the Council subsequently suspends the operation of the EAW FD in respect of the issuing State should the executing court automatically refuse to execute any EAW issued by that State without having to carry out any specific assessment.[43] The CJEU therefore follows that, as long as such a decision has not been adopted by the European Council, the executing court, relying on Article 1(3) of the EAW FD, to decide on an EAW issued by a Member State which is the subject of a reasoned proposal based on Article 7(1) TEU, may decide to refuse surrender only in exceptional circumstances and after carrying out a specific and precise assessment of the individual case.[44]

That said, the executing court must assess specifically and precisely whether, in the concrete circumstances of the case, there are substantial grounds for believing that, following the surrender of the individual to the issuing Member State, the requested individual will face a real

[36] Paweł Filipek, 'Only a Court Established by Law Can Be an Independent Court: The ECJ's Independence Test as an Incomplete Tool to Assess the Lawfulness of Domestic Courts' (VerfBlog, 23 January 2020) https://verfassungsblog.de/only-a-court-established-by-law-can-be-an-independent-court/ [doi: 10.17176/20200123-181754-0]

[37] *Minister for Justice and Equality* Case C-216/18 PPU (CJEU, 25 July 2018).

[38] Ibid 36-42.

[39] Ibid 43-45.

[40] Ibid 48-58; *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* Case C-64/16 (CJEU, 27 February 2018).

[41] *Minister of Justice and Equality* (n 35) para 61.

[42] Ibid 71.

[43] Ibid 72.

[44] Ibid 73.

risk.[45] In making this assessment, the executing court must, in particular, consider to what extent systemic or general deficiencies may have an impact on the level of the courts of the issuing Member State with jurisdiction over the proceedings to which the requested individual will be subject.[46] If it is established from this examination that these shortcomings may also affect the courts having jurisdiction over the proceedings to be conducted in respect of the requested person, the executing court must also, in the light of the specific concerns expressed by the requested individual and any information provided by him, assess whether there are substantial grounds for believing that the individual would be exposed to a real risk of violation of his fundamental right to an independent tribunal and the essence of his fundamental right to a fair trial. This assessment must further be carried out, taking into account their personal situation, the nature of the criminal offence for which the individual is being prosecuted, and the factual context which constitutes the basis for the issuing of the EAW.[47] The Court concludes its reasoning by reiterating once again that the executing judicial authority, in accordance with Article 15(2) of the EAW, must request from the issuing judicial authority any additional information it considers necessary for it/her assess whether such a risk exists.[48]

Despite the above position of the CJEU, after more than 1 year, it was again faced with a judgment regarding the provision of an answer to a question almost identical to the case C-216/18 PPU, *Minister of Justice and Equality* (*Deficiencies in the justice system*), Judgment of 25 July 2018. Specifically, in Cases C-354/20 PPU and C-412/20 PPU, the *Public Prosecutor's Office*[49] was about again in the issuance of two EAWs by the Polish court in August 2015 and February 2019, respectively, for the purpose of carrying out a criminal prosecution and executing a prison sentence. After the persons were arrested in the Netherlands, the Dutch executing court had doubts as to whether it should execute these orders. More specifically, it raised the issue of the implications of the decision of *the Minister for Justice and Equality* (deficiencies in the justice system). The executing court reasons that, due to recent developments that have occurred since the issuance of the EAWs under review, it considers that the deficiencies in the Polish justice system are such that the independence of all Polish courts and consequently the right of all individuals in Poland to be tried by an independent court is at risk. However, the executing court was uncertain whether this finding was sufficient to justify a refusal to execute an EAW issued by a Polish court, without having to examine the impact of those deficiencies in the specific circumstances of the case. The court therefore referred the case to the CJEU, raising the following questions:

i. If the executing court has evidence of systemic or generalised deficiencies with regard to the independence of the judiciary in the issuing Member State, can it assume that there are substantial grounds for believing that the requested person will be exposed to a real risk of violation of his fundamental right to a fair trial guaranteed by Article 47(2) of the Charter?

ii. Can the executing court take this for granted without carrying out a specific and precise verification, which would take into account, among other things, his personal situation, the nature of the criminal offence in question, and the factual context surrounding the issuance of that order?

The CJEU assessed that articles 6(1) and 1(3) of the EAW FD must be interpreted as meaning that the executing court cannot assume that there are substantial grounds for believing that the requested person will face a real risk of a violation of his fundamental right to a fair trial without carrying out a specific and precise verification. That verification must take into account, inter alia, his personal situation, the nature of the criminal offence and the factual context in which the EAW was issued, as well as statements by public authorities which may interfere with the way in which an individual case is dealt with.

As expected, in this decision, the CJEU also emphasizes that the assessment of the case must be followed by the two steps set out in the Ministry of Justice and Equality case (*deficiencies in the justice system*). The CJEU reiterates that in the absence of a formal decision of the Council under Article 7 TEU, the executing court cannot automatically refuse the execution of a EAW, without having to carry out any specific assessment [50], as an automatic refusal would run counter to one of the main objectives of the EAW

[45]Ibid para. 68 and 78.
[46]Ibid 74.
[47]Ibid 75.
[48]Ibid 76.
[49]*Joined Cases C-354/20 PPU and C-412/20 PPU Public Prosecutor's Office (Independence of the issuing authority)* (CJEU, 17 December 2020).
[50]*PPU and CPPU Public Prosecutor's* Office (n 47) para.57 and 60.

mechanism, which is the fight against impunity.[51]

The CJEU has instructed that if an executing court has evidence indicating systematic or general deficiencies, or that there has been an increase in such deficiencies, it must be particularly vigilant. However, the executing court cannot rely solely on this finding to exclude the carrying out of the second step of the examination.[52] In terms of the second step, the executing court must assess whether there are substantial grounds for believing that the requested person will be exposed to a real risk of a violation of his right to a fair trial upon surrender to the issuing Member State. The executing court must take into account the following factors [53] also listed in the case of *the Minister for Justice and Equality* (*deficiencies in the justice system*): i. the personal situation of the requested person; ii. the nature of the criminal offence; iii. the factual context in which the arrest warrant was issued, such as statements by public authorities which may interfere with the handling of an individual case; iv. the information which the issuing court may have communicated to it in accordance with Article 15(2) of the EAW FD.

The CJEU differentiates from a temporal point of view the assessment to be made depending on the purpose of the EAW, i.e., whether the warrant is issued for criminal prosecution or for the purpose of executing a sentence. If the EAW is issued for criminal prosecution, the executing court must assess, in particular, to what extent systemic or general deficiencies may have an impact on the courts of the issuing State with jurisdiction to try the requested person. This examination, therefore, includes taking into account the impact of these deficiencies, which may have arisen after the EAW was issued[54]. Whereas if the EAW is issued for the purpose of executing a custodial sentence, the executing court must assess to what extent the systemic or general deficiencies existing in the issuing Member State at the time the EAW was issued have affected the specific circumstances of the case and the independence of the court of the issuing Member State which handed down the sentence requested[55].

2. Court Established by Law

Following the above judgments in which the CJEU responded to the dilemmas of the courts of the member states regarding claims on the independence of the issuing court, the following will address cases that remain within Article 6 of the ECHR, but this time are related to claims on the sub-principle of the "*court established by law*".

The first case to be brought by a referring executing court is Joined Cases C-562/21 PPU and C-563/21 PPU, *Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)* , Judgment of 22 February 2022[56]. In the referred case, two Polish issuing courts issued two EAW in April 2022 against two Polish nationals, respectively, for the purpose of executing a 2-year prison sentence for extortion and threats, and the other, for the purpose of conducting a criminal prosecution. The Dutch executing court examining these two orders had doubts about its obligation to execute them, as, according to it, there were systematic or general deficiencies in the issuing Member State that affected the right to a fair trial, and in particular the right to a court established by law, due, inter alia, to the fact that the Polish judges (i.e. from the issuing State) had been appointed at the request of the Polish National Council of the Judiciary (KRS). According to a resolution that the Polish Supreme Court had adopted in 2020, the KRS was no longer an independent body, therefore, according to the referring court, as long as the judges appointed at the request of the KRS may have participated in the criminal proceedings that led to the conviction of one of the requested persons, or may be assigned to examine the criminal case of the other requested person, it considered that there was a real risk that the requested persons, if surrendered to the issuing State, would suffer a violation of their right to be tried by a court established by law.

Given that the CJEU had already expressed itself in the cases discussed above regarding claims on the independence of the issuing court, the executing court raised the following question: Is the two-step review sanctioned by the CJEU in its previous case-law on the fundamental right to a fair trial (*C-216/18 PPU, Minister of Justice and Equality (deficiencies in the justice system), C-354/20 PPU and C-412/20 PPU, Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)*) also applicable when the guarantee of "*a tribunal established by law"* is at issue, which is also part of this fundamental

[51]Ibid 62-64.
[52]Ibid 60.
[53]Ibid 61.
[54]*PPU and CPPU Public Prosecutor's* Office (n 47) 66.
[55]Ibid 68.
[56]*Joined Cases C-562/21 PPU and C-563/21 PPU Public Prosecutor's Office (Tribunal established by law in the issuing Member State)* (CJEU, 22 February 2022).

right?

After its review, the CJEU assessed that articles 1(2) and 1(3) of the EAW FD must be interpreted as meaning that where the executing court has evidence of systemic or generalised deficiencies as regards the independence of the judiciary in the issuing Member State, in particular as regards the procedure for appointing members of the judiciary, that court may refuse the surrender of the requested person only if it finds that, in the specific circumstances of the case, there are substantial grounds for believing that there has been a violation of the fundamental right of the requested person to a fair trial by an independent, impartial and lawful tribunal or that the requested person would face a real risk of a violation of that fundamental right if surrendered.

The CJEU begins its reasoning by stating that, save in exceptional circumstances, Member States must consider that all other Member States comply with EU law and the fundamental rights recognised by EU law[57]; and that Member States may not require a higher level of national protection of fundamental rights from another Member State than that provided for by EU law[58]. Member States cannot control whether another Member State has respected the fundamental rights guaranteed by the EU, save in exceptional circumstances[59], but to do so, the executing Member State must use the instruments provided for in Article 8(1) and Article 15 of the EAW FD to foster mutual trust with the issuing Member State.[60]

As regards the manner of examining claims relating to the fundamental right to a fair trial before a court established by law, the referring court should follow the two-step examination as already sanctioned in the cases of *the Minister of Justice and Equality* (*deficiencies in the justice system*) and *the Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission*).

In the first step, the executing court must conduct an overall assessment based on objective, reliable, specific, and up-to-date evidence of the issuing Member State's judicial system, particularly the broader context of judicial appointments.[61] This assessment must be carried out having regard to the standard of protection of the fundamental right guaranteed by Article 47(2) of the Charter[62]. The CJEU emphasises that the right to a fair trial by a court "*established by law*" also includes the procedure for the appointment of judges; however, it continues, not every irregularity in the procedure for the appointment of judges can be considered a breach of this right[63]. As above, the CJEU underlines that the fact that a body composed for the most part of members elected by the legislature or the executive intervenes in the procedure for appointing judges in the issuing Member State is not, in itself, sufficient to justify the refusal of the executing court to surrender the requested person. However, the CJEU leaves an "open window", clarifying that the situation may be different, where the above circumstance co-exists with other relevant factors and the conditions in which these appointments were made, leading to the raising of doubts as to the independence of the appointed judges.[64] In the present case, the other relevant factors include: i. the information contained in the reasoned proposal that the European Commission addresses to the Council based on Article 7(1) TEU; ii. the above-mentioned resolution of the Polish Supreme Court; iii. the relevant decisions of the CJEU, in particular those containing data on the state of functioning of the judicial system of the issuing Member State; iv. relevant ECtHR decisions; and; v. the constitutional law of the issuing Member State which contradicts the primacy of EU law and the binding nature of the ECHR and the binding force of ECtHR decisions.[65]

Meanwhile, in the second step of the assessment, the requested person must bring specific evidence to prove that systemic or general deficiencies in the judicial system of the issuing State have had a tangible impact on the handling of his case, or in the event of surrender, will have an impact on the handling of his trial on the merits when it comes to a EAW for the purpose of criminal prosecution. As above, the executing court must assess the information regarding the composition of the trial panel that has tried the criminal case of the requested person and any other circumstances relevant to the assessment of the independence and impartiality of that trial panel. However, the CJEU emphasizes that in order to reason on the violation of the principle of a court established by law, the mere fact that one or more judges who participated in the trial of the requested person were appointed at the request of a body such as the KRS is not sufficient. The requested person must also provide information regarding the procedure for appointing the judges in question, i.e.,

[57] *PPU and CPPU Public Prosecutor's* Office (n 54) 40.
[58] Ibid 41.
[59] Ibid.
[60] Ibid 49.
[61] Ibid 67.
[62] Ibid 68.
[63] Ibid 71-72.
[64] Ibid 75-76.
[65] *PPU and CPPU Public Prosecutor's* Office (n 54) 78-80.

facts establishing that the composition of that panel was such as to affect that person's fundamental right to a fair trial. Furthermore, account must be taken of the fact that the requested person may have requested the exclusion of the members of the panel because their participation would violate his fundamental right to a fair trial and, in the event of such a request, of the outcome thereof.[66]

In the second case, that is, in the case of an EAW for criminal prosecution, the executing court must take into account information relating to the personal situation of the person concerned, the nature of the criminal offence for which he is being prosecuted, the factual context surrounding the EAW, or any other circumstances relevant to the assessment of the independence and impartiality of the panel likely to be appointed to try the requested person after surrender.[67] Otherwise, the fact that the identity of the judges to be appointed to hear the requested person's case is not known at the time of the decision on surrender, or where their identity is known, and those judges have been appointed at the request of a body such as the KRS, is still not sufficient to refuse that surrender.[68]

The CJEU concludes its reasoning by instructing that requests for additional information from the issuing court under Article 15 of the EAW FD should be made where the executing court believes that the evidence presented raises doubts, but is insufficient to prove the above-mentioned deficiencies[69] and if the issuing court demonstrates a lack of sincere cooperation, the executing court may consider this conduct as a relevant factor for the purposes of assessing whether the person subject to the request, if surrendered, would face a real risk of violation of his right to a fair trial before a court established by law.[70]

A few months later, the CJEU presented a case almost identical to the joined case C-562/21 PPU and C-563/21 PPU, *Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)*, Judgment of 22 February 2022; therefore, the CJEU this time reiterated the arguments already elaborated previously. Thus, in case C-480/21, *Minister of Justice and Equality (Tribunal établi par la loi dans l'État membre d'émission – II),* Judgment of 12 July 2022[71], it was a question of the issuance of two EAWs issued against WO and JL with a view to their surrender to the Polish judicial authorities. The Irish High Court, acting as the referring executing court, raised the issue of their surrender to the CJEU following their claims that the situation in Poland had changed since the CJEU's judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU), as a result, in particular, of the adoption of certain laws affecting the change in the organisation of the judiciary. According to them, since the adoption of those laws, there is already a risk that the Polish courts that will examine the case of the requested persons will not be constituted in accordance with the requirements of independence, as set out in the judgment of 2 March 2021 in case C-824/18, *AB and Others (Nomination des juges à la Cour suprême – Recours).* In addition, the requested persons argued that there is no legal mechanism in Poland that enables them to challenge this illegality. In the case under review, the referring court asked the following questions: Can the executing court refuse to surrender the requested person on the ground that, in the event of surrender, there is a real risk of violation of the requested person's fundamental right to a fair trial before a court established by law, enshrined in Article 47(2) of the Charter, where:

a) in the circumstances of an EAW issued for the purpose of executing a custodial sentence, the requested person has no effective remedy available to him for the violation of this fundamental right during the trial of the person's sentence, and
b) in the circumstances of an EAW issued for the purpose of carrying out a criminal prosecution, the requested person at the time of surrender, because of the way in which cases are determined by lot, cannot determine the composition of the panel before which he will be tried, and there is no effective remedy in the issuing Member State to challenge the validity of the assignment of the panel?

As noted above, the CJEU, using the same reasoning elaborated in joined cases C-562/21 PPU and C-563/21 PPU, *Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)* , Judgment of 22 February 2022, responded by stating that Articles 1(2) and 1(3) of the EAW FD must be interpreted as meaning that, where the executing court has evidence of systemic or general

[66]Ibid 88-92.
[67]Ibid 97.
[68]Ibid para. 93 and 98.
[69]Ibid 84.
[70]Ibid 85.
[71]*Case C-480/21 Minister for Justice and Equality (Tribunal established by law in the issuing Member State – II)* (CJEU, 12 July 2022).

deficiencies relating to the independence of the judiciary in the issuing Member State, in particular as regards the procedure for the appointment of judges, that court may refuse to surrender the requested person in the following circumstances: i. in the case of a EAW issued for the purpose of executing a custodial sentence, the executing court may refuse surrender only if it finds that, in the specific circumstances of the case, there are substantial grounds for believing that, having regard, inter alia, to the information provided by the requested person concerning the composition of the panel which tried his criminal case, or to any other circumstance relevant for assessing the independence and impartiality of that panel, there has been a breach of the fundamental right to a fair trial by an independent and impartial tribunal established by law, as enshrined in Article 47(2) of the Charter; Whereas in the case of a EAW warrant issued for the purpose of carrying out criminal prosecution, the executing court may refuse surrender only if it is established that, in the specific circumstances of the case, there are substantial grounds for believing that, having regard, inter alia, to the information provided by the requested person concerning his personal situation, the nature of the criminal offence for which that person is being prosecuted, the factual context surrounding the EAW, or any other circumstances relevant to the assessment of the independence and impartiality of the tribunal which may be appointed to try the requested person, if surrendered, he would face a real risk of a violation of this fundamental right.

Due to the high sensitivity of the alleged infringement of the principle of a court established by law, in the following case that we will deal with, the questions for reference to the CJEU have already been raised by a referring court. In case C-158/21, *Puig Gordi and Others*, Judgment of 31 January 2023[72] the Spanish referring court, in the context of the criminal prosecution of the former Catalan leaders following the referendum held on 1 October 2017 on the self-determination of the Autonomous Community of Catalonia in Spain, had issued several EAW for some of the defendants in this case who had already left Spain. One of the wanted persons was Lluís Puig Gordi. Following the latter's arrest in Belgium, in the context of the judgment of the request of the Spanish court, the Belgian executing courts refused to approve the surrender of Lluís Puig Gordi. The Belgian executing court considered that in the present case, in Spain, there was a risk that his right to be tried by a court established by law would be violated, given that the jurisdiction of the Spanish Supreme Court to try the requested persons had no express legal basis. Following this decision, the Spanish issuing court raised several questions to the CJEU to relativize the Belgian court's refusal. The questions raised are as follows:

i. Can an executing court refuse to execute an EAW based on a ground for non-execution not set out in the EAW FD, or because the issuing court does not have jurisdiction to issue the EAW at issue?
ii. What are the conditions under which the executing court may refuse to execute an EAW due to an alleged violation of the defendant's fundamental rights?
iii. Can the executing court assess the jurisdiction of the court designated to try the requested person in the event of his surrender to the issuing Member State?

After its review, the CJEU assessed that an executing court does not have the power to refuse the execution of an EAW based on a ground for non-execution not provided for by the EAW FD but only by the law of the executing Member State. However, the executing court may apply a national provision providing that the execution of an EAW must be refused where such execution would lead to a violation of a fundamental right enshrined in EU law, provided that the scope of that provision does not go beyond the scope of Article 1(3) of the EAW FD as interpreted by the CJEU.

Article 1(3) of the EAW FD, read in conjunction with Article 47(2) of the Charter, must be interpreted as meaning that the executing court designated to decide on the surrender of a person for whom an EAW has been issued may not refuse the surrender of the requested person on the ground that he would risk being tried by a court which does not have jurisdiction, unless the two-step test (see below) is met.

The existence of a WGAD report (Working Group on Arbitrary Detention, a United Nations group of experts) that is not directly related to the personal situation of the requested person cannot in itself be a justification for the executing court to refuse to execute the order against him, however, such a report may be taken into account by the executing court, inter alia, to assess whether there are systemic or general deficiencies in the functioning of the judicial system of that Member State or deficiencies affecting the judicial protection of an objectively identifiable group of persons to which that person belongs.

The CJEU does not change its previous positions in this case either. It adheres to the arguments and standards established by previously adjudicated cases relating to the issues of alleged violations of the principle of a court established by law. In addition to clarifying the procedural requirements for issuing an EAW, the CJEU reiterates that the executing court may refuse to execute an EAW only based on Articles 3, 4, and 4a EAW FD. However, the existence of a risk of violation of the fundamental rights set out in Articles 4 and 47 of the Charter dictates to the executing court and allows it, in exceptional circumstances, to refuse the surrender of the requested person based on Article 1(3) EAW FD. But at this point, the CJEU does not forget to repeatedly point out that allowing member states to add other grounds for non-execution would undermine the uniform application of the EAW FD and would render this mechanism ineffective[73].

In contrast to the answers given previously, the CJEU is very specific in the case at hand. It states that the Belgian court which refused to surrender the requested person based on Article 4(5) of the Belgian law on the EAW relied on the national legal provision which stipulates that the executing court must refuse to surrender the requested person if there are serious grounds for believing that surrender to the issuing State would result in a breach of fundamental rights enshrined in EU law. Such a national provision, which has the same scope as Article 1(3) EAW FD and interpreted in the light of the case-law of the CJEU, is fully compatible with EU law.

The CJEU continues to repeat itself in previous cases by instructing that, save in exceptional circumstances, Member States must consider that all other Member States are in compliance with EU law and the fundamental rights recognised by EU law [74]and that Member States may not require a higher level of national protection of fundamental rights from another Member State than that provided for by EU law[75]. In deciding whether or not to surrender the requested person, Member States, when interpreting the EAW FD, must take into account not only the guarantees flowing from Article 47(2) of the Charter, but also other interests, such as the need to respect the fundamental rights of victims of crime.[76] Its further reasoning relies again on the obligation of the executing court to conduct a two-step examination; therefore, the CJEU once again clarifies that the executing court must assess whether the requested person to be surrendered to the issuing Member State poses a real risk of violation of his fundamental right to a fair trial before a court established by law.[77]

In the first step, the executing court must assess—on the basis of objective, reliable, and up-to-date evidence—the functioning of the issuing Member State's judicial system, particularly the context of judicial appointments..[78] The executing court must carry out an overall assessment of the functioning of the judicial system of the issuing Member State and, if it finds deficiencies, must assess whether, as a result of those deficiencies in the issuing Member State, defendants are deprived of an effective remedy enabling the jurisdiction of the criminal court designated to try them to be reviewed.[79] The CJEU also clarifies that the executing court must take into account in its overall assessment the results of the judgments concerning EAW in the courts of the issuing Member State, as long as in the specific case there is evidence that in the issuing Member State, the competent court issuing the EAW is the same as the court that will judge the case on the merits.[80] The CJEU relativizes the fact that the requested person was able to challenge before the issuing court the jurisdiction of the court designated to judge the case against him, stating that this fact is not of decisive importance.[81]

What is relevant in the case at hand is the report of the UN Working Group on Arbitrary Detention (WGAD), but if the WGAD report is not directly related to the individual situation of the requested person, it cannot be sufficient to justify the refusal to execute the EAW.[82] The CJEU goes on to reason that the executing court, as has already been standardised in the case-law of the ECtHR, finds that objective, reliable, specific and up-to-date information to support the executing court in completing the first step can be obtained, inter alia, from judgments of international courts, such as judgments of the ECtHR, decisions of the courts of the issuing Member State, as well as decisions, reports and other documents produced by organs of the Council of Europe or under the auspices of the United Nations.[83] In the present case, given that the mandate of the WGAD derives from Resolutions 15/18, 20/16, and

[73]*Puig Gordi and Others* (n 70) 75-76.
[74]Ibid 93.
[75]Ibid 94.
[76]Ibid 118.
[77]Ibid 98.
[78]Ibid 102.
[79]Ibid 103.
[80]Ibid 105.
[81]Ibid 104-120.
[82]Ibid 123.
[83]*Puig Gordi and Others* (n 70) para. 124. See also *Aranyosi and Căldăraru* (n 14).

33/30 of the United Nations Human Rights Council, which itself was established by Resolution 60/251 of the United Nations General Assembly, it may be one of the factors that could be taken into account in the first step of this review. However, the executing court is not bound in its decision-making by the conclusions set out in that report.[84]

In the second step of the assessment, the executing court must determine specifically and precisely to what extent the deficiencies identified in the first step are likely to have an impact on the trial to which the requested person will be subjected. The executing court must determine whether, having regard to the personal situation of the requested person, the nature of the criminal offence for which he is being prosecuted and the factual context in which the arrest warrant against him was issued, there are substantial grounds for believing that, if he were surrendered to the issuing State, he would be exposed to a real risk of violation of the fundamental right to a fair trial guaranteed by Article 47(2) of the Charter.[85] The existence of such a risk can only be established if, by systematically interpreting the provisions on jurisdiction and judicial procedures applicable in the issuing Member State, the court likely to be designated to try the requested person clearly does not have jurisdiction[86], but the divergences regarding the manner of constitution of the court and the trial procedure in the two Member States (issuing and executing) do not constitute a reason to argue for a lack of jurisdiction and, consequently, a violation of the principle of the court designated by law.[87]

The CJEU states that if the requested person claims that he would be exposed to a risk of violation of Article 47(2) of the Charter on the grounds that he would be tried by a court of the issuing Member State which does not have jurisdiction, but on the other hand the executing court considers that the information at its disposal does not constitute objective, reliable, specific and up-to-date information to demonstrate the existence of systemic or general deficiencies in the functioning of the judicial system of the issuing Member State, or deficiencies affecting the judicial protection of an objectively identifiable group of persons to which that person belongs, that court cannot refuse to execute the EAW against him.[88]

In contrast to the above, the CJEU considers that legal remedies in the issuing Member State, which enable the review of the jurisdiction of the court designated to try the requested person after surrender, may eliminate the risk of a violation of the right to be tried by a court designated by law. However, the CJEU goes on to clarify that if the legal system of the issuing Member State provides for legal remedies to review the jurisdiction of the court, the risk that the requested person may be tried by a court of the issuing Member State which does not have jurisdiction can, in principle, be eliminated after the exercise of these legal remedies.[89] The exercise of these legal remedies, provided that they are effective, will avoid the irreparable harm resulting from a violation of the principle of a court designated by law.[90] The CJEU concludes its reasoning by emphasizing once again that if the executing court assesses and reasons that the differences in jurisdiction and judicial procedures between it and the issuing court enable it to refuse to surrender the requested person, the latter conflicts with the principle of mutual recognition.[91]

The last case to date relating to aspects of the principle of the court established by law is case C-318/24 PPU, *Breian*, Judgment of 29 July 2024[92]. In order to execute a prison sentence, the Romanian issuing court issued an EAW against the convicted person, *Breian*. The latter was arrested in France. Initially, the competent French court refused the surrender to Romania, finding that the Romanian judicial system suffers from systemic deficiencies which, in the specific case, were manifested in particular in the fact that one of the judges of the trial panel had taken the oath only as a public prosecutor and another judge of the trial panel had not taken the oath. According to the French executing court, this fact was considered a real risk that the sentence would be the result of an unfair trial. The convicted person was subsequently arrested in Malta on the basis of the same EAW. The Maltese executing court requested additional information from the Romanian court and explained that the requested person was relying on the decision of the French executing court. In these circumstances, the Romanian court, which is responsible for the execution of the prison sentence, requested a preliminary ruling to the CJEU to clarify the

[84]Ibid 125.
[85]Ibid para. 106. See also *Openbaar Ministerie (Independence of the issuing judicial courts)* and *Openbaar Ministerie* (*Tribunal established by law in the issuing Member State).*
[86]Ibid 107.
[87]Ibid 108.
[88]Ibid 111.
[89]Ibid 112.
[90]*Puig Gordi and Others* (n 70) 113.
[91]Ibid 116.
[92]*Case C-318/24 PPU Breian* (CJEU, 29 July 2024).

impact of the previous refusal decision of the French executing court. Following this request, a Maltese court of first instance refused to execute the EAW due to doubts regarding the conditions of detention in Romania.

The Romanian court therefore referred a supplementary question to the CJEU on the cooperation with the Maltese court and the standard of protection of fundamental rights. It asks the CJEU the following:

i. Can the executing court refuse an EAW when irregularities are found regarding the oath of the members of the sentencing panel?
ii. Can the executing court execute an EAW if Interpol has deleted the international alert for the wanted person from the database because the data of the wanted person does not comply with the data processing rules?
iii. Can the executing court execute an EAW based on information that was not sent to the issuing court and for which the latter has not had the opportunity to provide additional information?
iv. Can the executing court apply a higher standard than that provided for by the Charter?
v. Can the issuing court participate directly in the judicial proceedings for the execution of the European arrest warrant carried out by the executing court?

After its review, the CJEU assessed that the executing court may not refuse to execute an EAW because the record of the oath taken by one of the judges who handed down the sentence cannot be found, or because another judge of the same court has taken the oath only as a public prosecutor.

The existence of a decision of the Interpol Commission for the Control of Files (CCF) concerning the situation of the requested person cannot in itself justify a refusal by the executing court to execute an arrest warrant. However, such a decision may be taken into account by the executing court in its assessment.

When examining the conditions of detention in the issuing Member State, the executing court may not refuse to execute the arrest warrant on the basis of information it has itself obtained concerning the conditions of detention in the issuing Member State and for which it has not requested additional information from the issuing court. The executing court may not apply a higher standard of detention conditions than that guaranteed by Article 4 of the Charter. The issuing court shall not be entitled to participate as a party in the proceedings for the execution of the arrest warrant before the executing court.

The CJEU begins its reasoning by first responding to the claim on the relevance of a decision by the Interpol Commission for the Control of Files (CCF). To this end, the CJEU emphasises that the same principles apply to this claim that have already been established in the *Puig Gordi and* Others case in the part that reasons on the value of the report by the Working Group on Arbitrary Detention (WGAD). As is now standard, the CCF report is one of the factors that the executing court may take into account in the second step of the assessment, but it is worth underlining here that the conclusions of this report are not binding on the executing court.

The CJEU then responds to the claim regarding the irregularity of the oath of the members of the trial panel that imposed the sentence against the requested person, clarifying that these irregularities cannot justify the executing court to order the refusal of the arrest warrant. The CJEU reaches this conclusion by reiterating that, based on the principle of mutual trust, there is a presumption that all EU Member States respect in an equivalent manner the fundamental rights recognized by EU law.[93] On the other hand, one of the aspects of the fundamental right to a fair trial, in particular the right to be tried by an independent, impartial, and legally established court, is also the assessment of requirements that include not only the procedure for the appointment of a judge, but also the conditions under which judges take up their duties[94]. However, the ECtHR continues, not every error that occurred during the procedure for the appointment of a judge is substantial enough to cast doubt on the independence and impartiality of the judicial body[95]. Referring to the case-law of the ECtHR, it results that violations related to the fundamental rules on the procedure for the appointment of judges and their taking up their duties violate Article 6 (1) of the ECHR.

The CJEU concludes its reasoning on this aspect by stating that uncertainty as to the place where the records of oaths taken by judges of a Member State are kept, or the fact that these records cannot be found, are not sufficient in themselves to establish that the judges in question were

[93] *PPU Breian* (n 90) para. 73-74.

[94] Ibid 80.

[95] Ibid 82.

performing their duties without ever taking the oath[96]; and in any event, such uncertainty cannot be regarded as a systematic or general deficiency concerning the independence of the judiciary in that Member State, if national law provides for effective remedies[97].

Regarding the claim that the executing court may refuse surrender based on the conditions of detention, but without first requesting additional information from the issuing state, the CJEU responds by stating that a refusal decision can only be taken if the executing court requests additional information from the issuing court.[98] The executing court is then obliged to carry out a two-step examination, assessing whether there is a real risk to the requested person. If the executing court considers that there is a real risk, it must temporarily postpone the execution of the EAW, without definitively refusing it. Whereas, if the executing court considers that there is no real risk, it must adopt the decision to approve the surrender.[99]

The CJEU also addresses the possibility that the information is insufficient to conclude that there is a real risk. In this case, the executing court must urgently request the necessary additional information and, in addition, the issuing court may forward to the executing court any additional useful information. In addition to the additional information, based on Article 15 of the EAW FD, the issuing court may provide assurances as to the current and precise conditions in which the requested person will be held in the issuing Member State[100]. Here, the CJEU stops short of emphasizing that the assurance provided by the issuing court is a factor that the executing court cannot disregard[101]. Therefore, where this guarantee has been given, or at least approved by the issuing court, in view of the principle of mutual trust, the executing court must rely on this guarantee, at least in the absence of any specific evidence that the conditions of detention in a particular detention centre are in breach of Article 4 of the Charter[102]. The granting of the guarantee by the issuing court must be sufficiently clear, but does not require the use of a specific term or phrase. Therefore, the mere absence of a "*precise plan for the execution of the sentence*" or "*precise criteria for determining a particular prison regime*" does not fall within the concept of "*inhuman or degrading treatment* " within the meaning of Article 4 of the Charter [103].

Finally, the CJEU clarifies that none of the provisions of the EAW FD provides that the issuing court must participate directly in the proceedings for the execution of the arrest warrant before the executing court[104], this possibility is not excluded if it is admissible under the law of the executing Member State.[105]

Conclusion

The European Arrest Warrant mechanism remains one of the most significant instruments of judicial cooperation in criminal matters within the European Union. However, its effectiveness is inseparably conditioned by full respect for fundamental rights and the principles of the rule of law. Mutual trust, while constituting the cornerstone of this mechanism, cannot operate in an unconditional manner where systemic deficiencies exist concerning judicial independence or procedural safeguards in certain Member States. Accordingly, Article 1(3) of the Framework Decision on the EAW assumes a central function in rebalancing the relationship between the efficiency of surrender procedures and the protection of individual rights.

The evolution of the case-law of the Court of Justice of the European Union confirms that the two-step test—requiring, first, the identification of systemic or generalised deficiencies in the issuing Member State, and second, an individualised assessment of risk to the requested person—constitutes a structured and proportionate mechanism. It ensures coherence between the principle of mutual recognition and the effective protection of fundamental rights. At the same time, the case-law makes clear that general concerns, including those relating to judicial appointments or risks of political influence, are insufficient on their own to justify non-execution of an EAW; a concrete and individualised risk must be demonstrated.

With regard to Article 3 of the European Convention on Human Rights, the applicable standard is particularly stringent, requiring clear, objective, and up-to-date evidence concerning detention conditions and the treatment to which the requested person would be exposed. The jurisprudence of the European Court of Human Rights—particularly in Soering, M.S.S., Hirsi Jamaa,

[96]Ibid 86.
[97]Ibid 87.
[98]Ibid 106-107.
[99]*PPU Breian* (n 90) 109.
[100]Ibid 111.
[101]Ibid 114.
[102]Ibid 115.
[103]Ibid 118.
[104]Ibid 90.
[105]Ibid 91.

Trabelsi, and Muršić—defines the non-derogable limits of State conduct, even within frameworks of intensified judicial cooperation. These principles operate as a guiding framework for both national courts and EU institutions when assessing the existence of a real risk of inhuman or degrading treatment.

Within this legal context, Article 15 of the EAW Framework Decision plays a particularly important role. Its flexible and individualised application allows executing judicial authorities to request additional assurances, thereby enabling the execution of an EAW even in situations where legitimate concerns regarding fundamental rights arise. This mechanism contributes to preserving the effectiveness of the system while reinforcing judicial dialogue between Member States. It further enhances legal certainty and mitigates the risk of fragmentation within the European Area of Freedom, Security and Justice.

Overall, we would conclude that the EAW mechanism is not weakened by the application of robust human rights standards; rather, such standards reinforce its legitimacy and ensure its conformity with the foundational values of the European Union. On this basis, it is appropriate to advocate for the strengthening of rule of law monitoring mechanisms within Member States, the harmonisation of approaches to individual assurances, the refinement of evidentiary standards concerning real risk assessments, and the enhancement of judicial dialogue between national courts and EU judicial bodies. Only through such a coordinated approach can the EAW continue to function as an effective, fair, and rights-compliant instrument of judicial cooperation at the European level.

COMPETING INTERESTS

The author has no competing interests to declare.

REFERENCES

Ahmed T, 'The EU's Protection of ECHR Standards: More Protective than the Bosphorus Legacy?' in J Green and C Waters (eds), *Adjudicating International Human Rights: Essays in Honor of Sandy Ghandhi* (Brill Nijhoff 2014)

Aranyosi and Căldăraru Joined Cases C-404/15 and C-659/15 PPU, EU:C:2016:198

Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland App no 45036/98 (ECtHR, 30 June 2005)

Case C-216/18 PPU *Minister for Justice and Equality* EU:C:2018:586

Case C-318/24 PPU *Breian* EU:C:2024

Case C-480/21 *Minister for Justice and Equality (II)* EU:C:2022:558

Charter of Fundamental Rights of the European Union [2012] OJ C326/391

Consolidated Version of the Treaty on European Union [2012] OJ C326/13

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85

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

Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial [2009] OJ L81/24

European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221

Fedorova M and Sluiter G, 'Human rights as minimum standards in international criminal proceedings' (2009) 3(1) *Human Rights and International Legal Discourse*

Filipek Paweł, 'Only a Court Established by Law Can Be an Independent Court: The ECJ's Independence Test as an Incomplete Tool to Assess the Lawfulness of Domestic Courts' (VerfBlog, 23 January 2020) https://verfassungsblog.de/only-a-court-established-by-law-can-be-an-independent-court/ [doi: 10.17176/20200123-181754-0]

Gragl P, 'An Olive Branch from Strasbourg: Interpreting the European Court of Human Rights' Resurrection of Bosphorus and Reaction to Opinion 2/13 in the Avotins Case' (2017) 13(3) *European Constitutional Law Review*

Hirsi Jamaa and Others v Italy App no 27765/09 (ECtHR, 23 February 2012)

JMB and Others v France App nos 9671/15 and others (ECtHR, 30 January 2020)

Joined Cases C-354/20 PPU and C-412/20 PPU *Openbaar Ministerie* EU:C:2020:1033

Joined Cases C-508/18 and C-82/19 PPU *Openbaar Ministerie* EU:C:2019:456

Joined Cases C-562/21 PPU and C-563/21 PPU *Openbaar Ministerie* EU:C:2022:100

Lenaerts K, 'La vie après l'avis: Exploring the Principle of Mutual (Yet Not Blind) Trust' (2017) 54 *Common Market Law Review*

MSS v Belgium and Greece App no 30696/09 (ECtHR, 21 January 2011)

Muršić v Croatia App no 7334/13 (ECtHR, 20 October 2016) (GC)

Nano Vatcharadze, 'Navigating Cruelty: Examining ECHR Practice in Defining a Minimum Threshold for Torture Facilitated by State Agents' (2024) 10(29) *Law and World* 114 https://doi.org/10.36475/10.1.9

Selahattin Demirtaş v Turkey (No 2) App no 14305/17 (ECtHR, 22 December 2020) (GC)

Soering v United Kingdom App no 14038/88 (ECtHR, 7 July 1989)

Trabelsi v Belgium App no 140/10 (ECtHR, 4 September 2014)

UN General Assembly, 'Resolution 60/251' (3 April 2006)

UN Human Rights Council, 'Resolution 15/18' (30 September 2010)

UN Human Rights Council, 'Resolution 20/16' (18 July 2012)

UN Human Rights Council, 'Resolution 33/30' (30 September 2016)

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