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Review article

THE PRINCIPLE OF MUTUAL TRUST IN JUDICIAL COOPERATION: A REALITY OR AN UNATTAINABLE IDEAL IN CRIMINAL MATTERS BETWEEN EU MEMBER STATES?

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ABSTRACT

The principle of mutual recognition of judicial decisions among Member States was proclaimed as the cornerstone of judicial cooperation in criminal matters at the Tampere meeting in 1999. The implementation of this substantial and legally binding principle of EU primary law, since the entry of the Lisbon Treaty, is unattainable without a high level of mutual trust among Member States. The concept of mutual trust, crucial for enacting the principle of mutual recognition in criminal matters between Member States, lacks precision, yet the jurisprudence of the CJEU to some extent clarifies its boundaries. Starting with the logical presumption that all Member States, as outlined in the TEU, share common values of the European Union, including the rule of law and respect for human rights, a high level of mutual trust between Member States should be unquestionable. Consequently, judicial cooperation in criminal matters should operate seamlessly. However, CJEU decisions regarding the implementation of legal instruments of secondary EU law, based on principle of mutual recognition, such as the European Arrest Warrant (EAW) and the European Investigation Order (EIO), challenge this presumption. In the paper, the author scrutinizes CJEU jurisprudence, investigating shifts in stance on whether the principle of mutual trust constitutes an irrebuttable or rebuttable presumption in EU law. Special consideration is given to questions that arise in both cases. The author examines into pro and contra arguments of mutual trust as irrebuttable or rebuttable presumption in EU law, and its effects. Firstly, from the aspect that mutual trust between Member States, as irrebuttable presumption, reaffirms supremacy of secondary EU law and consequently primacy of EU law over national laws of Member States. Secondly, if the mutual trust between Member States in criminal matters is a rebuttable presumption, the decisions of CJEU show weak points of EU law in this area and they should be used as corrective measure to achieve overall aim of European Union: shared common values. In the paper, author emphasizes that all actions undertaken by EU are not strictly legal nature, but rather they are influenced by political decisions.

Keywords*: CJEU, EAW, EIO, judicial cooperation in criminal matters in EU, principle of mutual trust*

1. MUTUAL TRUST: ESSENTIAL FOR IMPLEMENTING THE PRINCIPLE OF MUTUAL RECOGNITION IN EU CRIMINAL MATTERS

October 2024 will mark 25 years since the Tampere meeting in 1999, where mutual recognition was declared the cornerstone of EU criminal justice cooperation.[1] Over the course of years, this principle has been fortified through strategic political documents issued by the European Council, with a focus on further developing the area of freedom, security, and justice within the European Union (AFSJ). With this objective in mind and building upon the Tampere Conclusions, the European Council adopted multiannual agendas: the Hague[2] and Stockholm[3] Programme. Both programmes emphasize the need for strengthening the implementation of the principle of mutual recognition of judgments and judicial decisions among Member States throughout all stages of criminal proceedings or in areas pertinent to such proceedings, as an appropriate strategy to address cross-border crimes within the EU. While the Tampere Conclusions do not address mutual trust, the Hague and Stockholm Programs explicitly highlight mutual trust among Member States as prerequisite for efficient judicial cooperation in criminal matters based on principle of mutual recognition.[4] Since the entry into force of the Lisbon Treaty in December 2009, the principle of mutual recognition of judgments and judicial decisions has become a legally binding principle of judicial cooperation in criminal matters (Article 82(1) of the TFEU) and one of the fundamental principles through which the EU ensures AFSJ (Article 67(3) of the TFEU).[5]

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1 Tampere European Council 15 and 16 october 1999, Presidency conclusions. It is important to emphasize that the principle of mutual recognition is not new to EU law, originating in the CJEU's internal market jurisprudence, specifically in the landmark *Cassis de Dijon* case. In this case, the CJEU established that goods lawfully produced and marketed in one Member State should be allowed to enter the market of any other Member State, and that such products may not be subjected to legal prohibitions based on national rules, such as those concerning alcohol content in beverages. This foundational judgment has profoundly influenced the evolution of mutual recognition within EU law, extending its application to judicial cooperation in criminal matters. For more on mutual recognition in the internal market, see C120/78 *Rewe-Zentrale v Bundesverwaltung fur Branntwein (Cassis de Dijon)* [1979] ECLI:EU:C:1979:42, par. 14; Auke, W., *The Principle of Mutual Trust in EU Criminal Law*, Hart Publishing, Oxford, 2021, pp. 42-43; Xanthopoulou, E., *Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice: A Role for Proportionality?*, 1st ed., Hart Publishing, Oxford, 2020, pp. 12-15.

2 The Hague Programme: strengthening freedom, security and justice in the European Union [2005] OJ C53 (The Hague Programme).

3 The Stockholm Programme — An open and secure Europe serving and protecting citizens [2010] OJ C115 (The Stockholm Programme).

4 The Hague Programme, *op. cit.,* note 2, pp. 11-12; The Stockholm Programme, *op. cit.,* note 3, pp. 11-12.

5 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C326/1.

The definition of the principle of mutual recognition, as leading principle of judicial cooperation in criminal matters within the EU, predates Lisbon Treaty. In its Communication on mutual recognition of final decisions in criminal matters, Commission defines mutual recognition "as a principle that is widely understood as being based on the thought that while another state may not deal with a certain matter in the same or even a similar way as one's own state, the results will be such that they are accepted as equivalent to decisions by one's own state."[6] Mutal trust among Member States is crucial element of cited definition and has two aspects: 1) trust in the adequacy of each other's rules and 2) trust that they will be correctly applied.[7] Nevertheless, the concept of mutual trust, crucial for enacting the principle of mutual recognition in criminal matters between Member States, lacks precision. How can mutual trust be defined? Does mutual trust imply blind faith, where one believes in the actions of others without any reservations and expects the same in return, or mutual trust can be subject to questioning? If so, what serves as a reference point for such questioning? In the realm of judicial cooperation in criminal matters, primary EU law, notably the shared values enshrined in Article 2 TEU and the Charter of Fundamental Rights of the European Union (the Charter), can act as a reference point for evaluating mutual trust between Member States. It is reasonable to presume that upon joining the EU, all Member States are committed to embracing, respecting, and promoting a shared set of common values outlined in Article 2 of the Treaty on European Union (TEU), upon which the EU is founded. This presumption equally applies to the Charter, which, since the entry into force of the Lisbon Treaty, holds the same legal status as the Founding Treaties (Article 6(1) TEU). Consequently, there should be no dispute among Member States when implementing secondary EU law (e.g. directives or regulations), as it must be adopted and aligned with primary EU law. Put simply, if all Member States fully comply with primary EU law, any doubts about mutual trust issues would vanish. Naturally, this compliance also extends to the application of secondary EU law based on mutual recognition. In the criminal justice area of the EU, this is a challenging endeavor, as Member States have not embraced the unification of law.[8] Hence, the presumption of mutual trust among Member States exists to create a legal fiction that all Member States act in accordance with primary EU law. By doing so, this legal fiction supports the implementation of secondary EU law, which

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6 Communication from the Commission to the Council and the European Parliament - Mutual recognition of Final Decisions in criminal matters, COM/2000/0495 final, p. 4.

7 *Ibid*.

8 Mitsilegas, V., *EU Criminal Law after Lisbon*: *Rights, Trust and the Transformation of Justice in Europe*, 1st ed., Hart Publishing, Oxford, 2016, pp. 125-126; Mitsilegas, V., *The European Model of Judicial Cooperation in Criminal Matters: Towards Effectiveness Based on Earned Trust*, Revista Brasileira de Direito Processual Penal, Vol. 5, No. 2, 2019, p. 568; Armada, I.;Weyembergh, A., *The mutual recognition principle and EU criminal law*, in: Fletcher, M.; Herlin-Karnell, E.; Matera, C. (eds.), The European Union as an Area of Freedom, Security and Justice, Abingdon, Routledge, 2017, 116-117.

is based on the principle of mutual recognition, ensuring its uniform application and reaffirming its supremacy over the national legislation of Member States. The key question in this legal construct is whether presumed mutual trust is an irrebuttable or a rebuttable presumption. The answer can be found via review of jurisprudence of the CJEU in cases involving the implementation of secondary EU law instruments based on the principle of mutual recognition, such as the European Arrest Warrant (EAW) and the European Investigation Order (EIO).

Before examining the CJEU's judgments in relevant cases concerning the implementation of the EAW and the EIO, this paper provides a brief review of the CJEU's initial approach to mutual trust in a *ne bis in idem* cases, demonstrating the importance of mutual trust principle for judicial cooperation in criminal matters among Member States in the EU.

2. BLIND MUTUAL TRUST AMONG MEMBER STATES IN CRIMINAL MATTERS AS THE GUARDIAN OF EU LAW SUPREMACY

The CJEU established itself as a strong proponent of the principle of mutual trust, a fundamental element for mutual recognition of judgments, even before it was formally codified in the Lisbon Treaty. Despite its limited jurisdiction under the Amsterdam Treaty, as well as during the five-year transitional period after the Lisbon Treaty came into force, the CJEU effectively promoted the principle of mutual trust as a crucial one for cooperation in this field. In its landmark ruling in the joined cases *Hüseyin Gözütok and Klaus Brügge*[9], the CJEU justified broad interpretation of the Article 54 of the CISA[10] (*ne bis in idem* principle) particularly on the mutual trust among Member States. The main question in these joined cases revolved around identifying whether the *ne bis in idem* principle applies when the prosecuting authority opts to terminate criminal proceedings after the accused fulfills specific obligations, such as the payment of a predetermined sum by the prosecuting authority, without any court involvement in the process. Following, in a detailed explanation of why the lack of court involvement and consequently absence of a judicial decision is not contrary to the Article 54 of the CISA, the CJEU underlines the necessity of Member States to have "mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own

[9] C-187/01 and C-385/01 *Gözütok and Brügge* [2003] ECLI:EU:C:2003:87.

[10] Under Protocol 2 of the Amsterdam Treaty, the Schengen *acquis* was integrated into the legal framework of the European Union. See Protocol 2 integrating the Schengen acquis into the framework of the European Union, Treaty of Amsterdam, OJ C 340/1/, pp. 93-96.

national law were applied."[11] Therefore, the CJEU ruled that the *ne bis in idem* principle, as outlined in Article 54 of the CISA, also applies in the aforementioned situation. It seemed that the CJEU left this position in *Spasic*[12] case, in which it confirmed the compatibility of Article 50 Charter with Article 54 of the CISA, without making a reference to the mutual trust principle among Member States. Nevertheless, subsequent rulings indicate an expansion of the mutual trust principle. In the judgment in the *M.* case[13], delivered just a few days after the *Spasic* judgment, the CJEU reaffirmed its position from the *Hüseyin Gözütok and Klaus Brügge* cases and concluded that mutual trust extends not only to final judgments disposing of a case against a person but also to decisions made by authorities not to proceed with a case to trial, known as 'non-lieu' decisions. The CJEU reiterated its settled case law in recent judgments, but it also provided further guidelines for interpretation of the Article 54 of the CISA read in in the light of Article 50 of the Charter regarding the assessment of the "*idem*" requirement of the principle *ne bis in idem* (C-726/21)[14], as well as conditions under which this principle can be triggered due to the lack of sufficient evidence (C-147/22)[15].

The CJEU extended the presumption of mutual trust established in *Gözütok and Brügge* cases to the context of the new legal instrument - Framework Decision 2002/584/JHA (FD EAW)[16]. FD EAW adopted in 2002, entered into force in 2004, established the EAW as the first legal instrument to operationalize the principle of mutual recognition in EU's criminal matters.[17] The EAW was established with the purpose to replace the traditional extradition system reliant on the principle of mu-

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11 C-187/01 and C-385/01 *Gözütok and Brügge* [2003] ECLI:EU:C:2003:87, par. 33.

12 Article 50 of the Charter guarantees that individuals who have been finally acquitted or convicted cannot be tried or punished again for the same offense. However, under Article 54 of the CISA, this right is conditional upon the penalty having been enforced, being in the process of enforcement, or no longer being enforceable under the laws of the sentencing Contracting Party. In the Spasic case, the European Court of Justice was asked to determine whether this enforcement condition is compatible with the Charter. See C-129/14 PPU *Spasic* [2014] ECLI:EU:C:2014:586.

13 Case C-398/12 *M.* [2003] ECLI:EU:C:2014:1057.

14 C-726/21 *Inter Consulting* [2023] ECLI:EU:C:2023:764. See Wahl, T., *ECJ Clarifies Assessment of "idem" Requirement, 2023,* [https://eucrim.eu/news/ecj-clarifies-assessment-of-idem-requirement/], Accessed 2 April 2024.

15 C-147/22 *Terhelt5 v Központi Nyomozó Főügyészség* [2023] ECLI:EU:C:2023:790. See Wahl, T., *ECJ: Public Prosecutor's Order to Discontinue Proceedings due to Lack of Evidence Triggers ne bis in idem Rule, 2024,* [https://eucrim.eu/news/ecj-public-prosecutors-order-to-discontinue-proceedings-due-to-lack-of-evidence-triggers-ne-bis-in-idem-rule/], Accessed 2 April 2024.

16 Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190 (FD EAW).

17 Klimek, L., *Mutual Recognition of Judicial Decisions in European Criminal Law*, Springer, Cham, 2017, pp. 61-63; Auke, W., *The Principle of Mutual Trust in EU Criminal Law*, Hart Publishing, Oxford, 2021, pp. 53, 57.

tual legal assistance and based on numerous multilateral conventions, by introducing a new simplified extradition system at EU level. By creating a new mechanism, which functions directly between judicial authorities of Member States, the EAW simplifies and facilitates the process of surrender of criminals within EU. The intention of the EU's legislator is evident from Recital 5 of the Preamble of FD EAW: it aims to replace all cumbersome and outdated traditional extradition cooperation instruments with a system that enables the free movement of both pre-trial and final judicial decisions in criminal matters within the AFSJ. This is aligned with the broader objective for establishing an the AFSJ within the EU. Unlike the Hague and Stockholm Programs, which view ensuring mutual trust as an ongoing process requiring further strengthening, the FD EAW asserts it as an already existing, established, fact: "The mechanism of the European arrest warrant is based on a high level of confidence between Member States."[18] While it should be self-evident that a high level of confidence among Member States originates from their adherence to primary EU law, the FD EAW emphasizes this as one of the obligations. Specifically, Recitals 10 and 12 of the Preamble and Article 1(3) of the FD EAW stress the requirement for Member States to respect fundamental rights and legal principles enshrined in Article 6 TEU. The focus on human rights protection within the FD EAW suggests that the EU legislator may have anticipated that potential challenges in its implementation would revolve around the extent and scope of safeguarding human rights and fundamental freedoms. This assertion is supported by rulings from the CJEU in cases such as *Advocaten voor de Wereld*[19], *Radu*[20], *Melloni*[21], and *Aranyosi and Căldăraru*[22]. However, it's worth noting that the CJEU ruling in the latter case (*Aranyosi and Căldăraru*) significantly differs from those in the three preceding cases. In all four rulings in the aforementioned cases, the CJEU made a reference to the mutual trust among Member States, affirming it as the underlying concept for the implementation of the principle of mutual recognition. In its judgment in the case *Advocaten voor de Wereld*, which addressed the exclusion of the verification of double criminality for 32 categories of offenses, the CJEU stated that the selection of the categories of offenses listed in Article 2(2) of the FD EAW was made "on the basis of the principle of mutual recognition and in the light of the high degree of trust and solidarity between the Member States" considering nature of the criminal offences.[23] Hence, the CJEU ruled that Article 2(2) does not contravene Article 6(2) TEU, or,

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18 Recital 5 of the Preamble of FD EAW. On this topic see: Auke, W., *op. cit.,* note 17, p. 119.

19 C-303/05 *Advocaten voor de Wereld v Leden van de Ministerraad* [2007] ECLI:EU:C:2007:261.

20 C-396/11 *Radu* [2013] ECLI: ECLI:EU:C:2013:39.

21 C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] ECLI:EU:C:2013:107.

22 C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECLI:EU:C:2016:198.

23 C-303/05 *Advocaten voor de Wereld v Leden van de Ministerraad* [2007] ECLI:EU:C:2007:261, par. 57.

more specifically, the principle of legality of criminal offenses and penalties or the principle of equality and non-discrimination. The importance of mutual confidence[24] among Member States as a prerequisite for implementing the principle of mutual recognition, and consequently, upholding the supremacy of EU law, was once again underscored in the *Radu* case. Notably, this case marked the first instance where the CJEU, after the Charter became primary EU law, considered whether EAW could be refused on fundamental rights grounds. In particular, referring court referred the question to the CJEU: whether FD EAW, interpreted in light of relevant articles of the Charter (Articles 47 and 48) and the ECHR (Article 6), must be interpreted as allowing the executing judicial authorities to refuse the execution of an EAW issued for the purpose of conducting a criminal prosecution if the requested person was not heard by the issuing judicial authorities before its issuance. The CJEU answered negatively and in its ruling took a firm stance that the execution of the EAW can only be refused on the grounds specified in Article 3 (mandatory grounds for non-execution of the EAW) and Articles 4 and 4a of the FD EAW (optional grounds for non-execution of the EAW).[25] The right of the requested person to be heard prior to arrest is neither listed as one of the mandatory nor optional grounds upon which executing judicial authorities can refuse to execute an issued EAW. Moreover, contrary to Mr. Radu's arguments that this right is guaranteed under provisions Articles 47 and 48 of the Charter (primary EU law), the CJEU argues that enforcing such an obligation "would inevitably lead to the failure of the very system of surrender provided for by" the FD EAW and, "consequently, prevent the achievement" of the AFSJ.[26] Therefore, the EAW must maintain an element of surprise to effectively prevent the requested person from fleeing.[27] The CJEU's prioritization of effectiveness of judicial cooperation, based on mutual trust and recognition, in the *Radu* case drew disappointment from scholars, who saw it as overshadowing the protection of fundamental rights.[28] The mutual trust as an irrebuttable presumption was reaffirmed in the subsequent judgment in the *Melloni* case. The CJEU held that Article 53 of the Charter does not allow Member States to prioritize their national constitutions over EU law regarding fundamental rights.[29] This applies even in cases where the national constitution

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[24] It's worth noting the difference in wording between the FD EAW and the CJEU's judgment in the *Radu* case. Whereas recital 10 of the FD EAW declares a high level of confidence between Member States as an established fact, paragraph 34 of the CJEU's judgment in the *Radu* case emphasizes that a high degree of confidence "should exist between the Member States."

[25] C-396/11 *Radu* [2013] ECLI: ECLI:EU:C:2013:39, par. 36.

[26] C-396/11 *Radu* [2013] ECLI: ECLI:EU:C:2013:39, par. 40.

[27] *Ibid.*

[28] See: Auke, W., *op. cit.,* note 17, pp. 91-92 ; Peers, S., *EU Justice and Home Affairs Law: Volume II: EU Criminal Law, Policing, and Civil Law*, 4th ed., Oxford University Press, Oxford, 2016, pp. 100-101; Satzger, H., *International and European Criminal Law*, 2nd ed., C.H. Beck/Hart/Nomos, Munchen, 2018, p. 56.

[29] C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] ECLI:EU:C:2013:107, par. 56.

provides a higher standard of protection regarding guarantees for EAWs issued after trials conducted *in absentia*. Otherwise, interpreting Article 53 of the Charter differently would undermine the supremacy of EU law.[30] This is because it would allow Member States to disregard secondary EU law (FD EAW), which is fully in line with the primary EU law (the Charter), in instances where its provisions conflict with the constitutional guarantees of Member States. As a result, this would prompt scrutiny into the uniformity of the standard of fundamental rights protection as defined in the FD EAW, undermining the principles of mutual trust and recognition that the FD EAW aims to reinforce, and consequently, diminishing its effectiveness.[31]

The CJEU remained a strong defender of mutual trust as an irrebuttable presumption. In its *Opinion 2/13*[32] regarding the Draft agreement on the accession of the European Union to the European Convention of Human Rights, the CJEU once again reiterated that the mutual trust is of fundamental importance in EU law for creating and maintaining the AFSJ.

In line with its prior rulings, including the ruling in the *Melloni* case, the CJEU reaffirmed that the principle of mutual trust requires from each Member State, save in exceptional circumstances, to uphold EU law, particularly regarding fundamental rights enshrined within it. This obligation to adhere to EU law presupposes a reciprocal presumption among Member States that they all comply with EU law.[33] Therefore, when implementing EU law, each Member State must generally assume that all other Member States respect fundamental rights according to EU law. Consequently, it cannot request a higher national protection standard from others than what EU law sets forth. Additionally, save in exceptional circumstances, Member States cannot verify whether the other Member State has indeed respected the fundamental rights guaranteed by the EU law in a specific case.[34] From Opinion 2/13, it follows that the concept of mutual trust stems from the premise that all Member States share and recognize a set of common values delineated in Article 2 TEU. Taking this premise as true, the mutual trust is justified and unquestionable, as well as primacy of EU law envisaged for its implementation.[35] Therefore, the CJEU concluded that Draft agreement on the accession of the EU to the ECHR, *inter alia*, is incompatible with Article 6(2) TEU or with Protocol No 8 EU because it could negatively affect on "the specific characteristics and the autonomy of EU law in so far it does not ensure coordination between Article 53 of the ECHR and Article

30 C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] ECLI:EU:C:2013:107, par. 58.

31 C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] ECLI:EU:C:2013:107, par. 60.

32 Opinion 2/13 of the Court (Full Court) [2014] ECLI:EU:C:2014:2454.

33 Opinion 2/13 of the Court (Full Court) [2014] ECLI:EU:C:2014:2454, par. 191.

34 Opinion 2/13 of the Court (Full Court) [2014] ECLI:EU:C:2014:2454, par. 192.

35 Opinion 2/13 of the Court (Full Court) [2014] ECLI:EU:C:2014:2454, par. 166-168.

53 of the Charter".[36] More importantly, the Draft "does not avert the risk that the principle of Member States' mutual trust under EU law may be undermined". [37]

From the perspective of the CJEU, as evidenced by its case law and *Opinion 2/13*, mutual trust among Member States is regarded as an irrebuttable presumption.[38] This presumption comes from the voluntary decision of each Member State to join the EU and acknowledge and uphold the common values upon which it is founded (Article 2 TEU). For this reason, a high level of mutual trust among Member States is inherent, as well as a consistent application of primary and secondary EU law. However, the challenge with this standpoint of the CJEU lies in its failure to accurately observe the actual situation concerning the extent and effectiveness of the protection of fundamental rights within Member States under EU law. The CJEU's efforts to uphold the supremacy of primary EU law and system of judicial cooperation in criminal matter developed through secondary EU law, such as EAW, appears missing this issue. Additionally, it is important to note that while Member States can establish higher national standards of fundamental rights, this is only permissible in areas not fully regulated by EU law, such as the FD EAW, where Member States have limited ability to establish higher national standards. The CJEU's approach, while prioritizing the unity and effectiveness of EU law, risks undermining the equitable application of fundamental rights across the Union. Simply put, in areas where the EU legislator has imposed a uniform level of fundamental rights protection in line with the Charter, the *Melloni* case makes it clear that Member States are precluded from applying higher standards under their national laws. In any case, the fundamental rights protection cannot be lower than provided by the Charter. [39]

It took a great deal of time before the CJEU finally allowed Member States to challenge blind mutual trust due to concerns about the serious risk of fundamental rights violations. However, the landmark judgment in the joint cases of *Aranyosi*

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36 Opinion 2/13 of the Court (Full Court) [2014] ECLI:EU:C:2014:2454, par. 258.

37 *Ibid.*

38 Since Opinion 2/13, the CJEU has aligned its standards with those of the ECtHR in some cases, particularly those related to non-derogable rights enshrined in Article 3 ECHR and Article 4 of the Charter. In cases concerning other rights, "mutual trust remains a quasi-automatic requirement". See Di Franco, E.; Correia de Carvalho, M., *Mutual Trust and EU Accession to the ECHR: Are We Over the Opinion 2/13 Hurdle?*, European Papers, Vol. 8, No 3, 2023, pp. 1221-1233.

39 See: Lenaerts, K., *Making the EU Charter of Fundamental Rights a Reality for All: 10th Anniversary of the Charter Becoming Legally Binding* (keynote speech), 2019, pp. 11-15, [https://commission.europa.eu/system/files/2019-11/charter_lenaerts12.11.19.pdf] Accessed 30 March 2024; Franssen, V., *Melloni as a Wake-up Call – Setting Limits to Higher National Standards of Fundamental Rights' Protection*, 2014, [https://europeanlawblog.eu/2014/03/10/melloni-as-a-wake-up-call-setting-limits-to-higher-national-standards-of-fundamental-rights-protection/] Accessed 30 March 2024; Materljan, G.; Materljan, I. *Predmet Taricco II i pitanja na vagi: ustavno načelo zakonitosti u kaznenom pravu i djelotvornost prava Europske unije*, Hrvatski ljetopis za kaznene znanosti i praksu, Vol. 26, No. 2, 2019, pp. 521-522.

and Căldăraru marked this shift, transitioning the presumption of mutual trust from an irrebuttable to a rebuttable. The subsequent sections of this paper examine this change in perspective. The focus will not only be on the *Aranyosi and Căldăraru* case, but also on the rulings that followed concerning the implementation of the FD EAW. Additionally, particular attention will be given to the cases of *Ivan Gavanozov I*[40] and *Ivan Gavanozov II*[41], which were among the first cases to invite the CJEU to interpret relevant provisions of the EIO Directive.

3. FROM BLIND MUTUAL TRUST TO DOUBTFUL MUTUAL TRUST

In the landmark judgment in joint cases of *Aranyosi and Căldăraru*, the CJEU took a stance that the presumption of mutual trust among Member States can be called into question when there is a serious risk of violating fundamental rights, such as those protected under Article 4 of the Charter (prohibition of torture, inhuman or degrading treatment, or punishment). The background of the joined cases can be outlined as follows: Germany received two requests for surrender – one concerning the prosecution of Mr. Aranyosi (a Hungarian national residing in Germany), and the other request for the enforcement of a prison sentence for Mr. Căldăraru (a Romanian national). Both Mr. Aranyosi and Mr. Căldăraru refused the simplified surrender procedure under the FD EAW. The Higher Regional Court of Bremen (Germany) confronted with a crucial question: would their surrender to Hungary and Romania be in compliance with Article 1(3) of the FD EAW? This question was prompted by both countries' documented history of repeated violations of Article 3 of the ECHR due to their failure to uphold the minimum standards of detention conditions as guaranteed by international law. Therefore, the Higher Regional Court of Bremen (Germany) decided to stay the proceedings and seek clarifications from the CJEU, by way of preliminary ruling request, whether the execution of an EAW may or must be refused when there is compelling evidence that detention conditions in the issuing Member State violate fundamental rights of requested person. Alternatively, under such circumstances, is the executing Member State's decision to surrender requested person conditional upon receiving assurances that detention conditions in the issuing state will be sufficiently safeguarded.[42]

Contrary to its previous legal stance, which required the automatic execution of EAW unless none of the mandatory or optional grounds for non-execution ap-

[40] C-324/17 *Gavanozov* [2019] ECLI:EU:C:2019:892.

[41] C-852/19 *Gavanozov II* [2021] ECLI:EU:C:2021:902.

[42] C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECLI:EU:C:2016:198, par. 46, 63.

plied, the CJEU attempted to strike a balance in the *Aranyosi and Căldăraru* ruling. This balancing act involved navigating between the strict application of the principle of mutual recognition, based on mutual trust among Member States, and the concrete realization of guaranteed minimum fundamental rights of requested person as enshrined in EU law across every Member State. To this end, the CJEU established a two-step test that the executing Member State must conduct before making a final decision to refuse the execution of the EAW.[43] First step entails the obligation of the executing Member State to ascertain a real risk of infringement of the right guaranteed under Article 4 of the Charter.

This determination should be based on "objective, reliable, specific, and properly updated" information that reveals any systemic or widespread deficiencies affecting certain groups of individuals or specific detention facilities.[44] However, a determination that there are indeed general or widespread deficiencies in the detention conditions of the issuing Member State cannot automatically result in the refusal of the EAW. The executing Member State is required to proceed to the second step, correlating the findings from the first step with specific and precise circumstances of the individual facing surrender under the EAW. Conducting the second step requires the executing Member State to urgently request all additional information from the issuing Member State regarding the conditions under which the requested person will be detained.[45] Only after conducting a comprehensive assessment of the real risk through two-step test and if the risk cannot be ruled out within a reasonable period by the issuing Member State, the executing Member State can decide to bring the surrender process to an end.

Nevertheless, the CJEU ruling in judgment *Aranyosi and Căldăraru* raises doubts about the potential outcomes of conducting a two-step test given the circumstances of the case. It is unrealistic to expect that the Member States, Hungary and Romania, can promptly address, or more precisely, rectify the systemic deficiencies identified in judgments of the ECtHR and reports of the CPT concerning the conditions of deprivation of liberty within their territories.[46] Therefore, the guidelines of the CJEU, which require requesting additional information from the

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43 C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECLI:EU:C:2016:198, par. 92-94.

44 Such information may be sourced from international court rulings, including those of the European Court of Human Rights (ECtHR), domestic court decisions, as well as resolutions, reports, and documents generated by Council of Europe entities or under the oversight of the United Nations. See:C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECLI:EU:C:2016:198, par.89.

45 C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECLI:EU:C:2016:198, par. 95-97.

46 Auke, W., *op. cit.,* note 17, p. 101.

issuing Member State of the EAW in order to conduct thorough assessment of the serious risk of the requested person's rights being violated in the event of execution of the EAW, may be perceived as redundant or as a means of prolonging the procedure or delaying a final decision. Nonetheless, these guidelines must be viewed in the context of mutual trust among Member States. Given that mutual trust, particularly between Germany and Hungary and between Germany and Romania, as EU Member States, appears to be compromised, the guidelines advocate a collaborative process between the judicial authorities of the issuing state (Hungary and Romania) and the executing state (Germany) to enhance or reestablish it. Only if this proves unfeasible, the issuing Member State of the EAW will be refused execution, irrespective of the fact that unsatisfactory conditions of deprivation of liberty are not explicitly cited as grounds for non-recognition.

In the *LM*[47] case, the CJEU reaffirmed its departure from the presumption of mutual trust as irrebuttable one, once again prioritizing the protection of fundamental rights over the supremacy of EU law. By applying the two-part test established in the *Aranyosi and Căldăraru* case, the CJEU ruled that the executing Member State may refrain from executing the EAW if, upon receiving additional information from the issuing Member State, it is likely that the requested person's right to a fair trial before an independent court will be violated. A notable contrast to the CJEU's decision in the *Aranyosi and Căldăraru* case lies in the very nature of the right in question. Unlike the absolute prohibition of torture and inhuman or degrading treatment or punishment, the right to an effective remedy and to a fair trial can be subject to derogation in certain circumstances.[48] In its judgment, the CJEU emphasized that judicial independence is integral to the fundamental right to a fair trial, a right essential for safeguarding all the rights derived from EU law and upholding the common values of Member States outlined in Article 2 TEU, particularly the value of the rule of law. Furthermore, the CJEU reiterated that it falls upon national courts and tribunals, as well as the CJEU itself, to ensure the comprehensive application of EU law in all Member States and to protect individuals' rights under EU law, thus preserving the rule of law. Effective judicial review, aimed at guaranteeing compliance with EU law, is the core of the rule of law itself.[49] It is crucial to highlight specific aspects of the *LM* case: the High Court (Ireland) sought a preliminary ruling from the CJEU, referenced, *inter alia*, the European Commission's reasoned proposal to initiate proceedings against Poland (the issuing Member State of three EAWs), under the provisions of the TEU, to evaluate the evident risk of significant breaches of the rule of law resulting from implemented

47 C-216/18 PPU *Minister for Justice and Equality* [2018] ECLI:EU:C:2018:586.

48 Šarin, D. *Pravo na pristup sudu u praksi Europskog suda za ljudska prava*, Pravni vjesnik, Vol. 31, No. 3-4, p. 283.

49 C-216/18 PPU *Minister for Justice and Equality* [2018] ECLI:EU:C:2018:586, par. 50-51.

judicial reforms.[50] Given the circumstances, the referring court was in a quandary regarding the necessity to proceed to the second step of the test established in the *Aranyosi and Căldăraru* judgment, as deficiencies in the Polish justice system were apparent from its perspective. The nature of these deficiencies, according to the High Court (Ireland), made it impractical to conduct the second step of the test, as it would be unrealistic to expect from the person whose surrender is requested by EAW to demonstrate the impact of those deficiencies on the proceedings to which he is subject.[51] The CJEU rejected this argument and stated that the suspension of implementation of the FD EAW, and consequently of mutual trust, rests with the European Council as outlined in Article 7(2), along with consequences set out in Article 7(3) TEU.[52] Therefore, while the European Commission invoked Article 7(1) TEU in order to address the clear risk of a serious breach of the rule of law in Poland as Member State, it does not exempt the executing Member State of the EAW from the obligation to carry out the second step of the test established in the *Aranyosi and Căldăraru* judgment. In judgments that followed in joined cases *Openbaar Ministerie I*[53] (concerning the right to fair trial) and joined cases *Openbaar Ministerie II*[54] (pertaining to the right to a tribunal previously established by law), the CJEU upheld its ruling in the *LM* case. This encompassed reaffirming the obligation of the executing Member State to conduct a two-step test and to request supplementary information from the issuing Member State, as stipulated in Article 15(2) of the FD EAW, before refraining from execution of the EAW. Despite the well-documented deterioration of the rule of law in Poland, particularly concerning the independence of the judiciary, this did not sway the CJEU to abandon the second step of the established test in the *Aranyosi and Căldăraru* judgment. In conclusion, executing Member States cannot solely rely on first-step findings of general deficiencies, as mentioned above, in the issuing Member State to refuse the execution of an EAW, particularly when such deficiencies are known to be increasing.

Nonetheless, it could be argued that the CJEU shifted the burden of proof onto the individual requested by the EAW to demonstrate that, if surrendered, he would indeed face a real risk of his right to a fair trial before an independent and impartial tribunal being violated. In its ruling on the *Openbaar Ministerie II* case, the CJEU outlined specific requirements: "It is for the person in respect of whom a European arrest warrant has been issued to adduce specific evidence to suggest, in the case of a surrender procedure for the purposes of executing a custodial sentence or detention order, that systemic or generalised deficiencies in the judicial system of the issuing Member State had a tangible influence on the handling of his or her criminal case

50 C-216/18 PPU *Minister for Justice and Equality* [2018] ECLI:EU:C:2018:586, par. 21.

51 C-216/18 PPU *Minister for Justice and Equality* [2018] ECLI:EU:C:2018:586, par. 21-22.

52 C-216/18 PPU *Minister for Justice and Equality* [2018] ECLI:EU:C:2018:586, par. 70-73.

53 C-354/20 PPU and C-412/20 PPU *Openbaar Ministerie* [2020] ECLI:EU:C:2020:1033.

54 C-562/21 PPU and C-563/21 PPU *Openbaar Ministerie II* [2022] ECLI:EU:C:2022:100.

and, in the case of a surrender procedure for the purposes of conducting a criminal prosecution, that such deficiencies are liable to have such an influence. The production of such specific evidence relating to the influence, in his or her particular case, of the abovementioned systemic or generalised deficiencies is without prejudice to the possibility for that person to rely on any *ad hoc* factor specific to the case in question capable of establishing that the proceedings for the purposes of which his or her surrender is requested by the issuing judicial authority will tangibly undermine his or her fundamental right to a fair trial."[55] In this context, the CJEU established specific criteria regarding the information required, which vary depending on the purpose of the EAW - whether it pertains to the execution of a custodial sentence or detention order, or the conducting a criminal prosecution. However, the scholars did not welcome the persistence of CJEU on applying the second step of the established two-step test (an individual assessment of the impact resulting from findings from the first step), especially considering that despite its rulings in previous cases, the rule of law in the issuing Member State of the EAW is progressively deteriorating.[56] Scholars view the current the two-step test, particularly the evidence requirements for the second step, as setting an unreasonably high standard, making it practically impossible for the executing Member State to refuse an EAW on the grounds of fundamental rights infringement in the issuing Member State.

By alluding to the proverbial "elephant in the room" Inghelbrecht succinctly summarized the entire issue.[57] While the CJEU was focused on setting criteria for conducting the second step of the test, which are nearly impossible to meet, the elephant — the "unprecedented lack of respect for the rule of law" in the Member State (Poland) — remains unaddressed. Additionally, Holmøyvik's statement that "It would only be consistent, in surrender cases, to find that the general risk for a breach of fair trial is so high that few if any specific grounds should be required to refuse surrender." resonates with this perspective.[58]

The recent ruling in the case of *Luis Puig Gordi and Others*[59], involving Catalan separatists, unequivocally confirms that the CJEU remains resolute in upholding the two-step test, regardless of objections regarding potential infringements of fundamental rights by issuing Member States. This case involved a request for preliminary ruling from Spanish Supreme Court, which issued EAWs that were refused by Bel-

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55 C-562/21 PPU and C-563/21 PPU *Openbaar Ministerie II* [2022] ECLI:EU:C:2022:100, par. 83.

56 See: Wahl, T., *CJEU: No Carte Blanche to Refuse EAWs from Poland*, eurcim, No. 1, 2022, pp. 33-34; Inghelbrecht, F., *Avoiding the Elephant in the Room Once Again*, 2022, [https://verfassungsblog.de/avoiding-the-elephant-in-the-room-once-again/] Accessed 2 April 2024.

57 Inghelbrecht, *op. cit.*, note 56.

58 Holmøyvik, E., *No Surrender to Poland*, [https://verfassungsblog.de/no-surrender-to-poland/] Accessed 2 April 2024.

59 Case C-158/21 *Puig Gordi and Others* [2023] ECLI:EU:C:2023:57.

gian courts. The Belgian courts based the refusal of the EAWs on the grounds that the requested persons would be tried by a court lacking jurisdiction for that purpose (Spanish Supreme Court). The CJEU ruled out this argument as valid, since the legal system of Spain, as issuing Member State of EAWs, provides for legal remedies enabling a review of the jurisdiction of the court called upon to try a person surrendered under FD EAW.[60] Furthermore, the CJEU reiterated that opinions from the Working Group on Arbitrary Detention and relevant judgments from the European Court of Human Rights (ECtHR) can be regarded as the first step of the examination in the two-step test. This step is focused on identifying systemic or generalized deficiencies within the judicial system of the issuing Member State. However, these external sources alone cannot serve as sufficient reason for an executing Member State to refuse the execution of an EAW. They must be directly relevant to the specific personal circumstances of the individual requested under the EAW and evaluated in the second step.[61] Finally, the CJEU addressed a question from the Spanish Supreme Court regarding the possibility of issuing multiple successive EAWs against an individual after the refusal of a prior EAW. The CJEU confirmed that successive EAWs can be issued, provided that their execution does not violate the fundamental rights of the requested individual in accordance with Article 1(3) of the FD EAW, and that the issuance of each new EAW is proportionate to the circumstances.[62]

In summary, an analysis of CJEU case law regarding the implementation of the FD EAW reveals that there is a tremendous challenge in contesting the presumption of mutual trust among Member States. While the presumption of mutual trust may be challenged contested if fundamental rights are at risk of being violated, the CJEU's established guidelines make successful contests highly improbable, bordering impossible.

3.1. The EIO: A New Legal Instrument, Yet Old Issues with Mutual Trust

In May 2017, Directive 2014/41/EU regarding the European Investigation Order in criminal matters came into force.[63] This directive established a comprehensive and unique legal instrument known as the EIO for obtaining evidence in cross-border criminal cases among Member States. Like the EAW, the EIO operates on the principle of mutual recognition, with mutual trust among Member States serving as a crucial prerequisite for its implementation. Both legal instruments include

60 Case C-158/21 *Puig Gordi and Others* [2023] ECLI:EU:C:2023:57, par. 112-114.

61 Case C-158/21 *Puig Gordi and Others* [2023] ECLI:EU:C:2023:57, par. 123-125.

62 Case C-158/21 *Puig Gordi and Others* [2023] ECLI:EU:C:2023:57, par. 146.

63 Directive 2014/41/EU of the European Parliament and of the Council regarding the European Investigation Order in criminal matters [2014] OJ L130 (EIO Directive).

the same provision stipulating that their implementation will not adversely affect the obligation of Member State to respect fundamental rights and legal principles as enshrined in Article 6 of the TEU.[64]Considering this, along with established case law from EAW cases, it was reasonable to anticipate a swift ruling from the CJEU in the first EIO case, where CJEU was called to interpret the right to legal remedies outlined in Article 14 of Directive 2014/41 in conjunction with Article 47 of the Charter. Unfortunately, despite the CJEU delivering its first ruling in the case of *Ivan Gavanozov I*, the question prompted in the request for preliminary ruling from the referring court (Specialised Criminal Court, Bulgaria) remained unanswered. The Specialised Criminal Court, among all other questions, explicitly sought the answer on whether Bulgaria could be precluded from issuing an EIO due to the lack of any legal remedies in its national legislation against the issuance of an EIO for the purpose of conducting searches and seizures, as well as hearing a witness via videoconference. Instead of addressing this specific question, the CJEU, reformulated all questions and reduce them to a mere formal question: How to fill the Section J of the form set out in Annex A to Directive 2014/41?.[65] The CJEU ruled that the issuing Member State is not required to include in Section J a description of any legal remedies, if available, provided by its national law against the issuance of an EIO. This CJEU judgment was criticized by scholars as disappointing and inadequate for two reasons. Firstly, it upholds Bulgarian legislation, which lacks any legal remedy against the issuance of the EIO, to the detriment of the rights of the accused person.[66] Secondly, by doing so, it supports the *non-inquiry principle* of mutual trust among Member States.[67] Fortunately, the Specialised Criminal Court persisted in its quest for more comprehensive answers regarding the interpretation of provisions of Directive 2014/41 on the conditions for issuing an EIO (Article 6) and the legal remedies that should be ensured against its issuance (Article 14). Only few weeks after the first CJEU ruling (*Ivan Gavanozov I*), the Specialised Criminal Court submitted a new request for preliminary ruling in the same criminal case. In new request, now referred as the case of *Ivan Gavanozov II*, it restricted itself to the following two questions:

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64 See: Article 1(3) FD EAW and Article 1(4) EIO.

65 C-852/19 *Gavanozov II* [2021] ECLI:EU:C:2021:902, par. 23 -24. Section J of the EIO in point 1 requests information whether a legal remedy has already been sought against the issuing of an EIO, followed by further details (description of the legal remedy, including necessary steps to take and deadlines).

66 Wahl, T., *First CJEU Judgment on European Investigation Order, 2020,* [https://eucrim.eu/news/first-cjeu-judgment-european-investigation-order/], Accessed 2 April 2024.

67 Materljan, G.; Materljan, I., *Europski istražni nalog i nacionalni sustavi pravnih lijekova: pitanje primjerene razine zaštite temeljnih prava u državi izdavanja naloga*, Hrvatski ljetopis za kaznene znanosti i praksu, Vol. 27, No. 2, 764-767.

1. Is a national legislation, which does not provide for any legal remedy against the issuing of an EIO for the search of residential and business premises, the seizure of certain items and the hearing of a witness compatible with Article 14(1) to (4), Article 1(4) and recitals 18 and 22 of Directive 2014/41 and with Articles 47 and 7 of the Charter, read in conjunction with Articles 13 and 8 of the ECHR?
2. Can an EIO be issued under those circumstances?[68]

It is surprising for the court of the Member State issuing an EIO to question whether its state can continue to be part of the EIO mechanism. This is especially true considering that Bulgaria, as a Member State, has repeatedly been held liable for breaching Article 13 of the ECHR due to the lack of legal remedies against search and seizure orders. Additionally, this fact was brought to attention by the court of the issuing Member State, the Specialised Criminal Court, which submitted the request for a preliminary ruling to the CJEU. In the judgment *Ivan Gavanozov II*, the CJEU ruled that the provisions of Article 6 and Article 14 of Directive 2014/41, read in conjunction with Article 47 of the Charter, must be interpreted as precluding the issuing of a EIO for the purpose of conducting investigative actions such as searches, temporary confiscation of items, and witness hearings via videoconference by a Member State that lacks any legal remedy against its issuance. As a result, Bulgaria, as a Member State, was precluded from the issuing EIOs due to the lack of legal remedies.[69]The CJEU adhered to the opinion of Advocate General Bobek presented in this case[70]. In his opinion, an EIO issued by Member State that is aware it does not adhere to the prescribed minimum guarantees of fundamental rights, fundamentally contradicts the principle of mutual trust and undermines the entire system built upon this principle. According to Bobek, if a Member State were permitted to issue an EIO while knowingly violating the prescribed rules, it would transform the safeguarding of fundamental human rights into a game of Russian roulette. In this scenario, the issuing state is aware that the issued EIO violates fundamental rights, yet it entrusts the executing state with recognizing this violation. If the executing state fails to identify or prevent the violation, there is a risk of it becoming complicit in those infringements and bearing international responsibility.[71] It is noteworthy that in the case of *Ivan Gavanozov II*, the CJEU did not apply of the two-step test. This is because the EIO Directive, unlike the FD EAW, specifically outlines in Article 11(f) substantial reasons when conducting the investigative measure specified in

68 C-852/19 Gavanozov II [2021] ECLI:EU:C:2021:902, par. 23.

69 C-852/19 Gavanozov II [2021] ECLI:EU:C:2021:902, par. 63.2.

70 C-852/19 Opinion of Advocate General Bobek [2021] ECLI:EU:C:2021:346.

71 C-852/19 Opinion of Advocate General Bobek [2021] ECLI:EU:C:2021:346, par. 85-86.

the EIO would violate the executing State's obligations under Article 6 of the TEU and the Charter, thereby allowing for non-execution of an EIO.[72]

4. FINAL REMARKS

The CJEU has had and continues to have a crucial role in both shaping and upholding the concept of mutual trust among Member States through its case law, as well as through the Opinion 2/13. This role is inherently complex and delicate, as it requires navigating the intricate legal framework of EU. On one hand, the CJEU aims to uphold the supremacy of EU law and enhance judicial cooperation in criminal matters based on the principle of mutual recognition. On the other hand, it must balance this objective with the imperative of protecting fundamental rights, especially in cases where there are indications that Member States do not fully adhere to primary EU law (Article 2 TEU and the Charter). Before its ruling in the case of *Aranyosi and Căldăraru,* the CJEU strongly favored the effective functioning of cooperation in criminal matters over protection of fundamental rights. This was achieved by establishing the presumption of mutual trust as *irrebuttable*, to the extent that the executing Member State was not allowed, save in exceptional circumstances, to verify whether the other Member State had indeed respected the fundamental rights guaranteed by the EU law in a particular case (Melloni case). By taking this position, the CJEU ensured both uniformed application of the EU law and its supremacy over national legislations of Member States. This is particularly clear in the CJEU's ruling in the *Melloni* case, where the CJEU interpreted Article 53 of the Charter to mean that Member States cannot provide higher standards of fundamental rights protection through their national laws when implementing secondary EU law provisions (such as the FD EAW). This is due to the fact that secondary EU law, such as FD EAW, is fully in compliance with the Charter. Allowing a different interpretation of Article 53 would undermine the effectiveness of EU law. However, the ruling in the case of *Aranyosi and Căldăraru* marked a significant shift, as the CJEU devised the two-step test for assessing the possibility of non-execution of EAW requests based on a real risk of fundamental rights violations. This move opened the door to contesting the presumption of mutual trust among Member States. The CJEU decided that established two step test is appropriate not only for non-derogable rights, such as prohibition of torture, inhuman or degrading treatment, or punishment (Article 4 of the Charter), but also for right to fair trial or to the right to a tribunal previously established by law (Article 47 (2) of the Charter), which can be subject to derogation in certain circumstances. However, despite its initial positive response, the two-step test eventually lost its intended purpose – enabling the refusal of EAW execution due to a real risk of fundamental rights

[72] Hernandez Weiss, A., *Effective protection of rights as a precondition to mutual recognition: Some thoughts on the CJEU's Gavanozov II decision*, New Journal of European Criminal Law, Vol.13, No. 2, pp. 190-191.

violations in the issuing Member State. The rationale behind this deviation stems from the fact that several Member States (such as Poland, Hungary, Romania, and Spain) have well-documented systemic or generalised deficiencies in their judicial systems. The requirement in the second step of the two-step test to demonstrate how these deficiencies affect the personal situation of the individual requested under the EAW, appears excessively demanding or potentially redundant, resulting in limited success. However, it's important to note that the suspension of the implementation of the FD EAW due to a serious and persistent breach of the principles set out in Article 2 of the TEU by a Member States, and consequently of mutual trust, rests with the European Council as outlined in Article 7(2), along with the consequences set out in Article 7(3) TEU. Therefore, it could be argued that it would be unreasonable to expect the CJEU to jeopardize the entire EAW mechanism, based on mutual trust, by abolishing the second step of the two-step test and allowing the non-execution of the EAW solely based on findings from the first step. The solution to existing problems should be sought through decisive and synergistic action by all relevant EU institutions. Although it took the CJEU more than four years to address the question from the request for a preliminary ruling, the ruling in the case of *Gavanozov II* demonstrates both the pathways for protecting fundamental rights and contesting mutual trust. At this point it is necessary to point out that EIO Directive explicitly contains a provision by which executing Member State may refuse the execution of EIO if there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter. The introduction of this provision in the EIO Directive represents an improvement in EU legal instruments with regard to protecting fundamental rights, while simultaneously preserving the supremacy of EU law. Overall, while challenges continue to persist in relation to contesting the presumption of mutual trust among Member States, the CJEU's jurisprudence reflects a nuanced approach aimed at balancing the interests of cooperation in criminal matters with the protection of fundamental rights. These two tendencies, one for efficient criminal cooperation and another for protection of fundamental rights will always be in conflict.

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