



Upholding the Rule of Law by Scrutinising Judicial Independence

The Irish Court's request for a preliminary ruling on the European Arrest Warrant

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On March 23rd, the Irish High Court sent an unprecedented request for a preliminary ruling before the Court of Justice of the European Union (CJEU) in the case Minister for Justice and Equality v Artur Celmer. The request raises a far-reaching question: Should a national judge surrender a criminal suspect pursuant to a European Arrest Warrant (EAW) issued by a member state of the EU, in this specific case Poland, which is in breach of the rule of law?

The EAW has been presented as the 'cornerstone' of judicial cooperation in the EU on criminal matters. Its model of expedited cross-border extradition is firmly based on the principle of mutual recognition of judicial decisions between member states' authorities. This principle operates under the presumption of mutual trust on the basis of compliance with fundamental rights and the rule of law, both being EU founding values enshrined in Art. 2 of the Treaty on European Union (TEU). Judicial independence constitutes a key component for the effective protection of these commitments.

The independence of the judiciary in Poland has been subject to much controversy and political upheaval between the European Commission and the Polish government during the last few years. After never-ending diplomatic attempts to persuade the Polish authorities to reverse the cascade of legislative changes affecting the independence of domestic constitutional review and the ordinary judiciary, the Commission issued a [Reasoned Opinion](#) in accordance with Art. 7(1) TEU regarding the rule of law in Poland on 20 December 2017.

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Art. 7 TEU is the sole Treaty-based instrument in the hands of European institutions to act in cases where a member state poses a “clear risk” of seriously breaching Art. 2 TEU values, or when such a breach actually already exists. Art. 7 TEU envisages a preventive arm (determining a clear risk of a breach) and a corrective arm (determining a serious and persistent breach). It offers the possibility for the Council to decide to suspend certain EU membership rights of the country concerned. The activation of Art. 7 TEU on Poland represents a historic step in European integration. It is the first time that this Treaty article has actually been used in practice. The procedural requirements that are envisaged for its operationalisation are so burdensome that it has remained a rather exceptional and ad hoc affair, often described as [‘the nuclear option’](#).

In contrast to the rule of law monitoring and verification procedures designed for any country to accede to the EU, in light of the so-called [‘Copenhagen criteria’](#), nothing remotely similar exists post-accession independently of the accession process. The [Cooperation and Verification Mechanism \(CVM\) applying to Bulgaria and Romania](#) post-accession relates to their obligations enshrined in the run-up to accession. However, the CVM provides an important precedent of scrutinising not only the implementation of specific EU legislation, but also compliance more broadly with the rule of law, including the principle of judicial independence.

The lack of any other form of regular scrutiny of the rule of law post-accession has been referred to as the [‘Copenhagen dilemma’](#). Indeed, developments during recent years have shown how the trust-based presumption, according to which membership of the Union guarantees that states’ parties comply with Art. 2 TEU values, can no longer always be realistically maintained. New thinking is necessary to better operationalise and make effective democratic rule of law and fundamental rights within the EU constitutional framework.

True, in addition to Art. 7 TEU, there are other ‘softer’ instruments designed to monitor EU member states’ compliance with these values. Chiefly, the [‘EU rule of law framework’](#) provides a sort of ‘pre-Art. 7 TEU procedure’ for the Commission to engage in diplomatic tactics with any concerned member state. The case of Poland is nonetheless paradigmatic of the inefficiency affecting this EU tool. The issuing of one rule of law opinion, four rule of law recommendations and twenty-five letters to the Polish authorities within the context of the EU rule of law framework have not prevented this country from progressively backsliding into a state of ‘constitutional capture’.

Respect for the rule of law is an essential prerequisite for mutual trust in the EU’s Area of Freedom, Security and Justice (AFSJ). The open questions left unanswered by the EU rule of law dilemma have very visible practical consequences across the Union, not least for national judges. This is illustrated by the request submitted by the [Irish High Court in the *Celmer* case](#) for a preliminary ruling before the Luxembourg Court. The case has already sent some [shockwaves](#) to Poland. The Irish judge is asking the Court of Justice the following questions:

When a national court determines there is cogent evidence that conditions in the issuing Member State are incompatible with the fundamental right to a fair trial because the system of justice itself in the issuing State is no longer operating under the rule of law, is it necessary

for the executing judicial authority to make any further assessment, specific and precise, as to the exposure of the individual concerned to the risk of unfair trial where his trial will take place within a system no longer operating within the rule of law? And in the positive, which kind of guarantees as to fair trial would be required?

The request makes reference to the wealth of information demonstrating that the state of affairs of the judiciary in Poland is fundamentally flawed. The Irish court notes the evidence provided by the above-mentioned Commission Reasoned Proposal in accordance with Art. 7(1) TEU as well as the Opinions issued by the European Commission for Democracy through Law ([the Venice Commission](#)) in the Council of Europe.

These sources have clearly highlighted areas of profound concern, in brief: (i) the lack of an independent and legitimate constitutional review; and (ii) the threats to the independence of the ordinary judiciary, which have resulted from the cumulative effects of no fewer than thirty legislative reforms affecting the judiciary in Poland.

Among these, it is worth underlining the still unresolved issue of the composition of the Polish Constitutional Tribunal, the lowering of the general retirement age of Supreme Court judges and – chiefly for the case at hand – the merging of the office of the Minister of Justice with that of the Public Prosecutor General. As the Irish judge highlights in her request to the Luxembourg Court, all these developments directly expose and make the justice system highly vulnerable to political influence by the Polish government.

On these bases, the Irish court concludes that “the common value of the rule of law in Poland has been breached”. It submits that there are substantial risks that the criminal suspect would be subjected to arbitrariness in the course of his trial due to “the system’s wide and unchecked powers”. This would constitute a violation of Arts 3 and 6 of the European Convention on Human Rights and by co-relation Arts 3 and 6 of the EU Charter of Fundamental Rights.

The challenges inherent to the ‘mutual trust presumption’ in EU criminal justice cooperation are not new. The compatibility of mutual recognition based on ‘presumed trust’ with the effective protection of fundamental rights has been raised regularly in litigation before the Luxembourg Court. These cases have predominantly dealt with the extent to which the fundamental rights of criminal suspects should be taken into account by the national court executing an EAW before surrendering the suspect to the second member state issuing the extradition request.

This question was at the heart of the CJEU joined [cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*](#) of 5 April 2016. The Court determined that if the national court found ‘general and systemic deficiencies’ in the fundamental rights protections (specifically regarding prison conditions) offered by the issuing member state, it should carry out a “further assessment” consisting of a two-step approach: first, where the risk is “specific and precise”; and second, “whether there are substantial grounds to believe that the individual concerned will be exposed to that risk”.

In this way, the national judge is now expected to “seek all necessary supplementary information from the issuing state as to the protections for the individual concerned”. For the first time in CJEU case law, the Court found that surrender under the EAW can ultimately be postponed *if* the executing authority is not convinced that surrender will not lead to a breach of the fundamental rights in question.

What is new in the Irish court’s *Celmer* case is that the CJEU is now asked to broaden its fundamental rights test in the *Aranyosi* case towards a wider rule of law test – based on the flagrant denial of a fair trial in the issuing country. One can only sympathise with the Irish court’s dilemma. Is it realistic to expect a national judge to surrender a suspect to a legal system where the independence of the judiciary is blatantly at stake? Applying the *Aranyosi* test would actually require the Irish national judge to ask the partner judge in Poland whether she or he is independent.

The question of judicial independence has been examined by the CJEU implicitly in a series of rulings on the definition of the term ‘judicial authority’ for the purposes of the operation of the Framework Decision on the European Arrest Warrant. The Court treated the concept of judicial authority as an autonomous concept in EU law in cases [C-452/16 PPU, Poltorak of 10 November 2016](#), [C-477/16 PPU, Kovalkovas](#) of 10 November 2016 and [C-453/16 PPU, Özcelik](#), of 10 November 2016. The Court confirmed that the words ‘judicial authority’ are not limited to designating only the judges or courts of a member state. It may extend more broadly to the authorities required to participate in administering justice in the legal system concerned.

That notwithstanding, the Court found that national police authorities and a national executive authority such as a ministry do not fall within this definition of ‘judicial authority’. The Court justified this exclusion on the grounds of the need to respect the rule of law and the principle of separation of powers on the one hand, and the need to uphold mutual trust stemming from the judicialisation of cooperation on the other. Prior judicial approval is a prerequisite of mutual recognition in this context.

The central importance of judicial independence in the EU legal system was certainly in the background of the [case Associação Sindical dos Juizes Portugueses \(C-64/16\)](#) of 28 February 2018. While this case dealt primarily with the legality of a reduction in the remuneration of public officials and judges in Portugal due to its interference with the principle of judicial independence, the Court provided the first interpretation of Art. 47 of the EU Charter of Fundamental Rights, and specifically *the right to an effective remedy and fair trial*. In paragraph 35 of the judgment the Court held that

the principle of the effective judicial protection of individuals’ rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter.

The CJEU highlights in paragraph 36 of this ruling that “the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law”. Importantly, in paragraph 38 of the ruling the Court provides a clear set of conceptual features determining the extent to which a judicial authority is ‘independent’ for the purposes of EU law. This paragraph states that

the factors to be taken into account in assessing whether a body is a ‘court or tribunal’ include, inter alia, whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.

In this same ruling the CJEU sent a clear message regarding the role of national courts. Art. 19(1) TEU states that “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”. The Court held that this provision, “entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals”. It added in paragraph 30 that “mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premise that Member States share a set of common values on which the European Union is founded, as stated in Article 2 TEU”.

The case *Associação Sindical dos Juizes Portugueses (C-64/16)* is particularly relevant in its proclamation of *effective judicial protection* as a general principle of EU law and the definition provided of independent judicial authority in European law. The Court’s ruling may have far-reaching consequences in the current follow-up discussions on the Commission’s above-mentioned Reasoned Proposal regarding the rule of law in Poland of December 2017.

The judgment will also have significant implications in testing the legality of other EU policy discussions underway in criminal justice, such as the European Commission’s idea to create a [‘European production order’](#) (EPO). The EPO would oblige IT companies to give direct access to individuals’ electronic data to member states’ prosecutors when investigating criminal activities. Leaving access to electronic data to non-independent prosecutorial authorities without effective judicial review would amount to a violation of Arts 47 and 48 of the EU Charter of Fundamental Rights, and more generally the EU rule of law.

As [Fair Trials International](#) has rightly pointed out, the Irish court’s preliminary question provides the CJEU with the opportunity to extend the scope of application of the ‘EU general principle of effective judicial protection’ to the European Criminal Justice Area and the EAW. It could also be a timely occasion for the Luxembourg Court to send a clear message to EU co-legislators that something *more* must be done to effectively uphold the rule of law, democracy and fundamental rights protection, so that the principles of mutual trust and mutual recognition remain legitimate and optimal in the EU’s AFSJ.

The use of the preliminary reference mechanism by the Irish court is an example of bottom-up scrutiny of the rule of law across the EU. This bottom-up scrutiny can go a long way in addressing the shortcomings of law and practice in relation to the operation of Art. 7 TEU and the role and limits of EU institutions in effectively scrutinising rule of law compliance in member

states. In the *Celmer* case, it is a national court of a member state that has expressed doubts about the state of the rule of law in another EU member state, inviting the Court of Justice to undertake an assessment.

This scrutiny is central in the EAW system, involving cross-border cooperation based on mutual trust. If the example of the Irish court is followed in litigation in other member states, with courts expressing concerns about the rule of law elsewhere in the EU, the cooperative arrangements between national courts established in *Aranyosi*, and between national courts and the CJEU under the preliminary reference procedure, will establish ongoing channels of scrutiny of rule of law compliance on the ground.

In terms of rule of law scrutiny by EU institutions, a number of improvements could be made. In 2013, we recommended that the EU establish [a new rule of law mechanism](#), which would pay attention to developing more in detail the phases preceding the preventive and corrective arms enshrined in Art. 7 TEU. Existing rule of law monitoring bodies and tools in the framework of the United Nations and the Council of Europe (such as the Venice Commission) provide robust evidence and an excellent source of knowledge on how EU member states are performing or not on [the rule of law](#).

However, bodies like the Venice Commission are not formally equipped or do not have the actual legal competence to examine and deal with issues that are characteristic of or *specific* to the EU legal system, and its autonomous nature, such as the principle of mutual recognition of judicial and administrative decisions. Moreover, should the entire legitimacy and workability of the EU legal system be left exclusively in the hands of these external bodies?

In October 2016 the [European Parliament](#) adopted a legislative own-initiative report calling for the establishment of an EU mechanism on the rule of law, democracy and fundamental rights, which would cover all EU member states and therefore ensure equality of treatment among all EU governments and EU institutions. The Parliament requested the Commission to submit by September 2017, in light of Art. 295 of the Treaty on the Functioning of the European Union (TFEU), an initiative for the conclusion of a *Union Pact for democracy, the rule of law and fundamental rights* ([‘EU Pact for DRF’](#)). This would take the shape of an interinstitutional agreement.

Regrettably, the Commission did not follow up the Parliament’s call, which we qualified as a [‘missed opportunity’](#) by the Commission to ensure ‘more EU’ in rule of law monitoring. The main argument by the Commission was that existing instruments were enough to deal with current challenges. This conclusion contradicted the results of a [Comprehensive European Added Value Assessment](#) that accompanied the above-mentioned European Parliament report. This study provided evidence highlighting the gaps in existing EU rule of law-related tools and showed the added value of a new EU rule of law mechanism and the setting-up of a new EU body tasked with permanently monitoring the enforcement of Art. 2 TEU values. It is welcomed nevertheless that the European Commission has recently announced that during 2018 it will present an [“initiative to strengthen the enforcement of the Rule of Law in the European Union”](#); yet no further details are currently known about the actual shapes that it will take.

A treaty change would not be necessary for this to be addressed. Art. 70 TFEU already provides a clear legal basis. It could be an excellent starting point for the Union to better uphold the rule of law in the EU. This Treaty provision offers the possibility for the Council, based on a proposal by the European Commission, to adopt legal measures aimed at conducting an “objective and impartial evaluation” of the implementation of EU policies in order to “facilitate the full application of the principle of mutual recognition”, which applies not only in judicial cooperation in criminal areas but also in policy domains as central as the Common European Asylum System.

A mechanism based on Art. 70 TFEU would complement, with an additional arm, the phases preceding Art. 7 TEU. It would consist of a periodic evaluation of the actions of EU member states and European institutions. Based on previous experience, such as in the scope of the [Schengen Evaluation Mechanism](#), a peer-to-peer intergovernmental process would not be fit for purpose. Instead, an EU-led monitoring system should be established.

A key component to ensure its success would be to guarantee an objective, impartial and robust methodology and assessment. Such a regular assessment should not be based primarily on benchmarks and indicators, but rather on a qualitative examination taking due consideration of member states’ domestic specificities, constitutional traditions and domestic systems. It should also cover monitoring actions by EU institutions and agencies. The evaluation should be based on the best independent academic assessment, with the establishment of a network of scholars providing an annual overview of key findings and also recommendations from international, regional and EU actors, bringing them to light for EU law specificities.

This should be complemented with better tailored and direct EU financial support for civil society and nongovernmental organisations in the next Multiannual Financial Framework post-2020, particularly as regards their watchdog role over democracy, the rule of law and fundamental rights on the ground. This could be the first step towards a [regular civil-society monitoring system](#) of compliance by member states and EU institutions with existing protection standards.

The CJEU is also bound to take full ownership of the EU Charter of Fundamental Rights and truly become a fundamental rights court. The CJEU can look into increasing and diversifying its sources of information and expertise, following the model developed by the Strasbourg human rights court. As recently supported by other [rule of law experts](#), the CJEU should be equipped with a clear possibility to enforce a [‘freezing mechanism’](#), whereby contested policies and practices of EU member states would automatically be ‘frozen’ in cases of actual, suspected or imminent breaches of fundamental rights and/or freedoms of individuals, while the legality of the case is being examined in detail.



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