

ARTICLES

The first four contributions to the present issue originate from expert opinions presented at the conference “The European Arrest Warrant: Current Challenges and the Way Forward”, which was organised by the German Federal Ministry of Justice in September 2020 and addressed possibilities to reform the EAW. It is comprehensible that Russia’s war against Ukraine has, for the time being, diverted Europe’s attention from even such elementary problems as the rule of law crisis, inhuman prison conditions and the obligation to surrender own nationals. But for the individuals concerned these questions with regard to the application of the EAW remain absolutely crucial and call for urgent measures by the European legislature to protect EU fundamental rights and, ultimately, to preserve the system of mutual recognition of judicial decisions in criminal matters (Frank Zimmermann).

*Frank Zimmermann**

Concerns Regarding the Rule of Law as a Ground for Non-execution of the European Arrest Warrant: Suggestions for a Reform

Abstract

The judicial reforms in Poland, which are harshly and continuously criticised as undermining the independence of Polish courts, have brought the principle of mutual recognition and the European arrest warrant (EAW) to its limits. These unprecedented challenges to the rule of law have made it necessary to create an extraordinary ground for non-execution of EAWs issued by Polish authorities. However, the pertinent jurisprudence of the Court of Justice in Luxemburg (case C-216/18 PPU and follow-up decisions) is not fully convincing, particularly in the light of two recent judgments by the Polish Constitutional Tribunal. For that reason, a more far-reaching legislative reform of the EAW is urgently needed.

* Professor of criminal law, criminal procedure, European and international criminal law as well as challenges of digitalisation for criminal law at the Westfälische Wilhelms-Universität Münster.

I. Introduction

In 2022, the European arrest warrant (EAW) celebrates its 20th anniversary. The Framework Decision¹ which introduced it was the first instrument to implement the principle of mutual recognition, upon which nowadays the entire system of cooperation in criminal matters in the European Union is based (cf. Art. 82(1) TFEU). But since the time when the EAW Framework Decision was adopted, and especially over the last decade, the parameters for its application have changed significantly. In particular, there are few topics today that attract as much attention as the crisis of the rule of law in some EU Member States. Obviously, such tendencies cannot remain without consequences for the principle of mutual recognition and the EAW as its most prominent offspring: mutual recognition presupposes that Member States have trust in the lawfulness of each other's judicial decisions. Concerns regarding the rule of law in one Member State therefore bring the EAW to its limits.

The present text analyses the circumstances under which a lack of respect for the rule of law in the issuing Member State can amount to a ground for non-execution of an EAW, and it makes suggestions for reform of this instrument. To this aim, the contribution will first briefly outline what the rule of law actually means (*infra* II.). In a second step, it will explain how the rule of law is embedded in the EAW Framework Decision (*infra* III.1.) and critically examine the respective case-law of the Court of Justice of the European Union as well as recent tendencies in Poland (*infra* III.2. and 3.). It will follow a comparison of the EAW with other mutual recognition instruments (*infra* IV.). On this basis, different possibilities to adjust the EAW to the new challenges will be discussed, amongst them several proposals for a legislative reform (*infra* V.).

II. The rule of law: self-explaining, yet not always very clear

A text that deals with the rule of law in the context of mutual recognition in general and the EAW in particular must face the challenge to explain what the rule of law actually is or means.² Its foundation in primary law lies in Art. 2 of the Treaty on European Union (TEU), and it also appears in the preamble of the European Union's Charter of Fundamental Rights (CFR). Literally, it means that state powers are bound by law and may act only within the constraints set out by law (including constitutional law). This includes the guarantee of an effective judicial review of all state actions and therefore implies the separation of powers. But the rule of law is inseparably linked with some further aspects, which cannot always be distinguished clearly:³ it is only possible to

1 Framework Decision 2002/584/JHA, OJ 2002 no. L 190 of 18 July 2002, p. 1.

2 For a detailed analysis see *Schroeder*, in: von Bogdandy et al (eds.), *Defending Checks and Balances in EU Member States*, Springer 2021, p. 105 et seqq.

3 See COM(2014) 158 final; recital no. 3 of Regulation 2020/2092, OJ 2020 no. L1 433 of 22 December 2020, p. 1.

speak of a “rule of law” when such law is the result of a democratic, accountable, transparent and pluralistic process. Furthermore, the rule of law is crucial for legal certainty, as it enables citizens to rely on what the law says and adjust their behaviour to its requirements. Thus, the rule of law also helps to prevent arbitrariness and protects the equality of all citizens before the law. All this taken together shows that the rule of law is a necessary prerequisite for the protection of citizens’ fundamental rights, which explains why Art. 2 TEU as well as the preamble of the Charter of Fundamental Rights give it such a strong emphasis. However, given the vagueness of values and principles such as democracy, equality, and legal certainty, there can be little doubt that a precise definition of when the rule of law is breached remains difficult to achieve.

III. The rule of law and the European arrest warrant

1. General setting: text analysis of the Framework Decision

In order to understand the relationship between the rule of law and the EAW, one needs to undertake a closer analysis of the respective Framework Decision. It does not mention the rule of law explicitly. But indirectly, the text ties the EAW to the rule of law in two places.

a) Recital no. 10 of the Framework Decision

The first one is recital no. 10, which reads: “[The EAW’s] implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.” However, it must be borne in mind that this reference does not mean the current version of the TEU, but the one in force when the EAW Framework Decision was adopted.⁴ This was still the text established by the Treaty of Amsterdam (the Treaty of Nice entered into force only on 1 February 2003⁵). What was then Art. 6(1) TEU is now to be found in Art. 2 TEU, although with some modifications: the former Art. 6(1) read: “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.”⁶ Apart from a slightly different wording (Art. 2 TEU speaks of “values”, not “principles”), the current version of the text appears to be somewhat more elaborate, as it includes “human dignity”, “equality” as well as “the rights of persons belonging to minorities”. It is submitted, however, that these amendments have not changed the provision in substance.

4 Cf. CJEU, case C-216/18 PPU, LM, judgment of 25 July 2018 = ECLI:EU:C:2018:586, § 7.

5 See the documentation on <https://consilium-europa.libguides.com/c.php?g=689218&cp=4933164> (last access: 22 January 2022).

6 Consolidated version 1997, OJ no. C 340 of 10 November 1997, p. 145.

When recital no. 10 of the EAW Framework Decision refers to Art. 7(1) and (2) TEU, this is probably even more misleading: in its current version,⁷ Art. 7(1) TEU deals with “a clear risk of a serious breach by a Member State of the values referred to in Article 2”, which is to be determined by the Council with a majority of four fifths of its members. But already according to the wording of recital no. 10, the mechanism to suspend the EAW does obviously not build upon a mere *risk* of a serious violation of Art. 2. A comparison with the former version of the TEU reveals that the recital refers to what today is Art. 7(2) and (3) TEU. Thus, the threshold for suspending the EAW mechanism is much higher: there must be an actual – as well as serious *and persistent* – *breach* of Art. 2 TEU, which has to be determined by a *unanimous* decision of the *European Council*.⁸

Even though it is therefore not easy to identify the precise content of recital no. 10, it can be concluded that the situation that a Member State does no longer respect the rule of law was in fact taken into account when the EAW was established.

b) The legislative part of the Framework Decision – in particular: Art. 1(3)

The second text passage is not less important, as it shows that the rule of law is also enrooted in the legislative part of the EAW Framework Decision: Art. 1(3) states that the EAW shall not affect the obligation to respect the fundamental rights and principles mentioned in Art. 6 TEU. As in recital no. 10, this reference is to be read as one to Art. 6 TEU in the Amsterdam version. Therefore, the “European *ordre public*” incorporates the content of the current Art. 2 TEU (see above), but also the fundamental rights and freedoms enshrined in the European Convention on Human Rights (ECHR) and resulting from the constitutional traditions common to the Member States (Art. 6(2) TEU-Amsterdam). On that basis, Art. 1(3) of the EAW Framework Decision furthermore contains a reference to the national identity of the Member States (Art. 6(3) TEU-Amsterdam) – a fact that does not receive a lot of attention nowadays. By contrast, Art. 1(3) of the Framework Decision did originally not incorporate the Charter of Fundamental Rights of the EU (CFR), which received its current status only with the entry into force of the Lisbon Treaty in 2009. However, it follows from the precedence of primary law (among which the CFR) over secondary law as well as from Art. 51(1) CFR that the Charter nowadays must be respected when interpreting and applying the EAW Framework Decision.

From today’s perspective, it is striking that Arts. 3, 4 and 4a of the Framework Decision, which contain mandatory and optional grounds for refusal, do not mention the rule of law or the violation of fundamental rights at all. As is well-known, the Court of Justice has first accepted the interpretation that instead Art. 1(3) may constitute an ad-

⁷ The provision of Art. 7(1) TEU was introduced by Art. 1 of the Treaty of Nice (OJ no. C 80 of 10 March 2001).

⁸ This is criticised by *Bárd/van Ballegooij*, NJECL 2018, 353 (360), who suggest that the recital should nowadays be read as requiring only a reasoned proposal pursuant to Art. 7(1) TEU.

ditional ground for refusal – beyond the catalogue of Arts. 3 to 4a – in its Aranyosi and Căldăraru judgment.⁹ Then, the judges in Luxemburg were concerned with inhuman prison conditions in Hungary and Romania. It was foreseeable that, once the CJEU had opened the door, an extraordinary ground for refusal might be raised in many other cases, including such involving deficiencies with a view to the rule of law. But before going more into detail, it is worth emphasising that an additional basis for refusing the execution of an EAW was first seen in the violation of a fundamental right (the prohibition of inhuman or degrading treatment, Art. 4 CFR¹⁰) and not in a lack of respect for the rule of law in general. Given the opaque nature of the latter concept, it is submitted that tying mutual trust to the much more elaborated content of the different fundamental rights is indeed the wiser decision,¹¹ also with a view to the practical application of such an extraordinary ground for non-execution.¹² Moreover, this choice rightly puts the focus on the interests of the individual to be surrendered, whereas concerns regarding abstract values like the rule of law and democracy easily tend to have a predominant political dimension.

2. Leading case: C-216/18 PPU (LM / Minister of Justice and Equality)

On 25 July 2018, the CJEU issued its so-called LM judgment,¹³ which became the second landmark decision on Art. 1(3) of the EAW Framework Decision as an extraordinary ground for refusal. Upon a request for a preliminary ruling by the Irish High Court, the CJEU ruled that this provision on the European *ordre public* also precludes surrender if the requested person subsequently would run a real risk that, due to deficiencies regarding the independence of the judiciary in the issuing Member State, his or her fundamental right to a fair trial is breached. What deserves particular attention is that this guarantee, unlike the one of Art. 4 CFR on which the Aranyosi and Căldăraru judgment was based, is not an absolute one.¹⁴ Instead, it derives its particular importance from the fact that all other fundamental rights are of little value if there are no independent courts to protect them.¹⁵ The case had its origins in Poland's much-debat-

9 Joined cases C-404/15 and C-659/15 PPU, Aranyosi and Căldăraru, judgment of 5 April 2016 = ECLI:EU:C:2016:198.

10 *Ibid.*, §§ 84–87.

11 Cf. Satzger, EuCLR 2018, 317 (327).

12 Of a different opinion: Bård/van Ballegooij, NJECL 2018, 353 (360); Wendel, European Constitutional Law Review 2019, 17 (29 et seq.); Frąckowiak-Adamska, in: von Bogdandy et al (eds.), Defending Checks and Balances in EU Member States, Springer 2021, p. 443 (446 et seq.).

13 CJEU, case C-216/18 PPU, LM, judgment of 25 July 2018 = ECLI:EU:C:2018:586.

14 Wendel, European Constitutional Law Review 2019, 17 (19); Simonelli, NJECL 2019, 329 (334); von Bogdandy/Bogdanowicz/Canor/Rugge/Schmidt/Taborowski, in: von Bogdandy et al (eds.), Defending Checks and Balances in EU Member States, Springer 2021, p. 385 (394 et seq.).

15 Banach-Gutierrez, NJECL 2020, 54 (61); Dupré, in: von Bogdandy et al (eds.), Defending Checks and Balances in EU Member States, Springer 2021, p. 431 (438).

ed reform of the judiciary, which caused the High Court concerns regarding the independence of Polish judges and has triggered numerous infringements proceedings pursuant to Art. 258 TFEU¹⁶ as well as a proceeding pursuant to Art. 7(1) TEU¹⁷ and several judgments by the European Court of Human Rights holding that the reform is in breach of Art. 6(1) ECHR.¹⁸ This is certainly not the place to discuss the specific topic of the legislative reforms in Poland. Instead, the present contribution is concerned with the more general question on if and how the EAW should be handled when the fundament of trust¹⁹ is shattered with a view to a particular Member State.

a) Main findings

The Court of Justice did not base its LM decision solely on rule of law considerations. Similar to the Aranyosi and Căldăraru judgment, it additionally – one could even say primarily²⁰ – examined doubts regarding the independence of Polish judges against the background of the right to a fair trial pursuant to Art. 47(2) CFR, and thus from a fundamental rights perspective.²¹ But the parallels between the two decisions do not end there, as the Court also transferred the two-step-approach²² developed in the Aranyosi and Căldăraru case: in the first place, an exceptional ground for refusal based on Art. 1(3) of the EAW Framework Decision requires a systemic or generalised deficiency which leads to a real risk that a fundamental right will be breached if the person concerned is surrendered to the issuing Member State.²³ That assessment needs to be carried out on the basis of material that is objective, reliable, specific and properly updated.²⁴ Obviously, this first part of the test remains an abstract one as it merely takes into account the general situation in the issuing Member State.²⁵ On a second level of

16 CJEU, case C-619/18, *Commission v. The Republic of Poland*, judgment of 24 June 2019 = ECLI:EU:C:2019:531; case C-192/18, *Commission v. The Republic of Poland*, judgment of 5 November 2019 = ECLI:EU:C:2019:924; case C-791/19, *Commission v. The Republic of Poland*, judgment of 15 July 2021 = ECLI:EU:C:2021:596; case C-204/21, *Commission v. The Republic of Poland* (still pending).

17 COM(2017) 835 final.

18 ECtHR, application no. 4907/18, *Xero Flor w Polsce sp. z o.o. v. Poland*, judgment of 7 May 2021; application no. 43447/19, *Reczkowicz v. Poland*, judgment of 22 July 2021; application nos. 49868/19 and 57511/19, *Dolińska-Ficek and Ozimek v. Poland*, judgment of 8 November 2021; application no. 1469/20, *Advance Pharma sp. z o.o. v. Poland*, judgment of 3 February 2022.

19 Cf. recital no. 10 to the Framework Decision on the European Arrest Warrant.

20 The ruling only refers to the right to a fair trial, not to the rule of law.

21 CJEU, case C-216/18 PPU, LM, judgment of 25 July 2018 = ECLI:EU:C:2018:586, §§ 47, 53, 59, 61.

22 It has been argued that the Court of Justice actually imposed a test consisting of three steps, as it subdivided the individual examination of the case into two parts, see *Simonelli*, NJECL 2019, 329 (335); *Biernat/Filipek*, in: von Bogdandy et al (eds.), *Defending Checks and Balances in EU Member States*, Springer 2021, p. 403 (413 et seq.).

23 CJEU, case C-216/18 PPU, LM, judgment of 25 July 2018 = ECLI:EU:C:2018:586, § 60.

24 *Ibid.*, § 61.

25 Cf. *Satzger*, EuCLR 2018, 317 (325 et seq.).

scrutiny, however, the CJEU demands that the individual situation of the person concerned be analysed as well: following a surrender, that person must actually run a risk that his or her right to a fair trial will be breached.²⁶ On the one hand, this requires that the general lack of judicial independence in the issuing Member State must also affect the court that is competent to adjudicate the particular case.²⁷ In other words, the question is: will the systemic or generalised deficiency have an impact on the very proceeding?²⁸ On the other hand, the Court of Justice identified several parameters that it considered helpful for the second part of the test: the competent court of the executing Member State must have regard to the “personal situation, as well as to the nature of the offence for which [the requested person] is being prosecuted and the factual context that form the basis of the European arrest warrant.”²⁹

In the Aranyosi and Căldăraru case, this two-step-approach did not seem so problematic yet because it was quite obvious that bad conditions in *some* prisons cannot legitimate suspending the cooperation with the Member State concerned completely. Notably, the Court did not necessarily require a systemic or general deficiency in that first judgment but was also satisfied with a deficiency that affected (only) “certain places of detention”.³⁰ In a situation where the entire architecture of the judiciary is shattered by a legislative reform, it appears less evident to make the non-execution of an EAW dependent upon the circumstances of the individual case. However, the aforementioned recital no. 10 of the EAW Framework Decision provides for an additional systematic argument: the Court of Justice construes the exceptional ground for refusal as a sort of preliminary stage that precedes a possible decision by the European Council based on Art. 7(2) TEU,³¹ which would suspend the EAW entirely with regard to a particular Member State.³² As long as the European Council has not taken such a decision, the Court of Justice concludes, a refusal to execute an EAW can thus only be admissible under additional circumstances, *i.e.*, the systemic or generalised deficiency must personally affect the requested individual.³³ It must be admitted that this line of argument appears quite convincing if one only takes into consideration the EAW Framework Decision and considers rule of law problems in the issuing Member State as no more than an interpretative challenge for the application of that legal instrument. However, it will be argued below that such an approach may be too superficial at least for certain types of systemic deficiencies (*infra* III.2.b)cc) and III.3.c)).

26 CJEU, case C-216/18 PPU, LM, judgment of 25 July 2018 = ECLI:EU:C:2018:586, § 68.

27 *Ibid.*, § 74.

28 *Simonelli*, NJECL 2019, 329 (335).

29 CJEU, case C-216/18 PPU, LM, judgment of 25 July 2018 = ECLI:EU:C:2018:586, § 75.

30 Joined cases C-404/15 and C-659/15 PPU, Aranyosi and Căldăraru, judgment of 5 April 2016 = ECLI:EU:C:2016:198, § 89.

31 Cf. *Bárd/van Ballegooij*, NJECL 2018, 353 (359).

32 *Sarmiento*, Maastricht Journal of European and Comparative Law 2018, 385 (386); apparently critical in this regard European Parliament resolution of 20 January 2021 (P9_TA(2021)0006), no. 32.

33 CJEU, case C-216/18 PPU, LM, judgment of 25 July 2018 = ECLI:EU:C:2018:586, §§ 70–73.

b) Follow-up case(s) and critical analysis

The part of the LM decision that most obviously provokes criticism is the one regarding the second level of scrutiny, *i.e.*, the requirement that the systemic or general deficiency in the issuing Member State must have an impact on the situation of the requested individual. Many observers have argued that this is always the case when the independence of the judiciary is under pressure, because literally every suspect then runs the risk that his or her case will not be decided by an institutionally independent court.³⁴ It is striking that the Court of Justice itself employed a very similar reasoning in a different decision when it stated that “the mere prospect [...] of being the subject of disciplinary proceedings [...] is likely to undermine the effective exercise by the national judges concerned of the discretion and the functions referred to in the preceding paragraph [with regard to references for a preliminary ruling to the Court of Justice].”³⁵ Therefore, it did not come as a surprise when a Dutch court argued soon after the LM decision that, due to the concerns as to Polish court’s independence, every suspect in Poland faces the real risk of an unfair proceeding, and asked the Court of Justice to reconsider its two-step-approach. Yet, this follow-up case did not change the Court’s position, as the CJEU stuck to the test established in the LM judgment.³⁶

aa) The difficulty to identify adequate criteria for the second step of the examination

If one accepts therefore, as a starting point and for the sake of the argument, that the second level of scrutiny shall also apply when there are doubts regarding the respect for the rule of law in the issuing Member State, it is not easy to come up with criteria which indicate that the person concerned is particularly exposed to this systemic or general deficiency. When, for instance, the German Oberlandesgericht in Karlsruhe reacted to the CJEU decision in C-216/18 PPU by sending a Polish court a catalogue of questions, including whether a judge of that court had previously been replaced or sanctioned,³⁷ this missed the crucial point: as seen above, even the Court of Justice admits that already the mere possibility that members of a court might be subjected to repressions by the government is likely to influence their decisions and thus affect their independence.

The three criteria mentioned by the Court of Justice (the situation of the person concerned, the nature of the offence and the factual context) are, despite their palpable

34 Cf. *Bárd/van Ballegooij*, NJECL 2018, 353 (361); *von Bogdandy/Bogdanowicz/Canor/Rugge/Schmidt/Taborowski*, in: von Bogdandy et al (eds.), *Defending Checks and Balances in EU Member States*, Springer 2021, p. 385 (398 et seq.). *Simonelli*, NJECL 2019, 329 (336 et seq.), rightly points out that the second part of the Court of Justice’s test mixes up the (institutional) independence of courts with the impartiality of the individual judge.

35 Joined cases C-558/18 and C-563/18, *Miasto Łowicz and Skarb Państwa — Wojewoda Łódzki*, judgment of 26 March 2020 = ECLI:EU:C:2020:234, § 58.

36 Joined cases C-354/20 PPU and C-412/20 PPU, *L and P*, judgment of 17 December 2020 = ECLI:EU:C:2020:1033, §§ 53 et seq.

37 Oberlandesgericht Karlsruhe, Ausl 301 AR 95/18, decision of 7 January 2019.

vagueness, more convincing because they focus on the characteristics of the criminal proceeding for which the EAW has been issued. In particular, these criteria will support the non-execution of an EAW when – for whatever reason – the government might have a particular interest in the outcome of the proceeding and therefore exercise pressure on the criminal court.³⁸ By contrast, a systemic deficiency with regard to the independence of judges will normally be of less relevance for ordinary criminal cases that are of no interest for the government.³⁹

As a side note, it can be observed that one of the criteria which the CJEU mentions for the second part of the test is well-known from traditional extradition law: outside the EU, the political nature of the offence often gives the requested State a right to refuse extradition.⁴⁰ The Framework Decision on the EAW, however, sought to abolish this political offence exception within the area of freedom, security and justice. More generally speaking, the EAW is intended to remove political considerations from surrender proceedings and turn them into purely judicial affairs. Even though reintroducing a ground for refusal based on an abstract categorisation of the offence as being a political one (whatever that means precisely) is certainly not what the Court of Justice had in mind, the LM decision kind of “reactivated” this traditional obstacle to extraditions – albeit now as a mere indicator for a case that is problematic from a rule of law perspective. But also in a more general sense, the LM decision shows that, although the EU legislator wanted to overcome the former political character of extradition proceedings, a rest of a political dimension survived in the nexus of the EAW with Art. 7 TEU: as a decision based on Art. 7(2) TEU must – unanimously – be taken by the European heads of State and government, this “rule of law proceeding” is clearly of a political nature.⁴¹

bb) Inconsistencies with the OG and PI judgment

Leaving these details aside, the more fundamental question is whether the requirement of a second level of scrutiny is in fact convincing when the rule of law is at stake. This appears dubious if one contrasts the LM judgment with the Court of Justice’s much harsher approach in cases where the independence of the issuing authority is questionable. Most notably, the Court of Justice held in its famous OG and PI judgment, that the mere possibility that German prosecutors might be subject to orders by the executive is incompatible with their capacity as judicial authorities and thus deprives them of

38 Cf. the High Court of England and Wales, [2018] EWHC 2848 (Admin), *Lis, Lange and Chmielewski*, judgment of 31 October 2018, §§ 67, 69 and 71, available at <https://www.judiciary.uk/wp-content/uploads/2018/11/lis-judgment-2011101.pdf> (last visited 18 February 2022); found at: *Simonelli*, NJECL 2019, 329 (337).

39 Cf. CJEU, joined cases C-354/20 PPU and C-412/20 PPU, *L and P*, judgment of 17 December 2020 = ECLI:EU:C:2020:1033, § 42. See also *Simonelli*, NJECL 2019, 329 (340 et seq.).

40 Cf. Art. 3(1) of the European Convention on Extradition of 1957.

41 *Sarmiento*, Maastricht Journal of European and Comparative Law 2018, 385 (387).

the possibility to issue an EAW.⁴² Technically, it is of course a different provision of the EAW Framework Decision that applies in these situations: Art. 1(3) in the LM case, Art. 6(1) in the OG and PI case. In the end however, the Court accepted a ground for refusal not provided for in the catalogues of Arts. 3, 4 and 4a of the Framework Decision in both cases. It is quite astonishing that an additional requirement (the one that the transferred person is individually affected by the general lacuna in the issuing state) shall only be relevant with regard to the judges deciding the criminal case: it does not seem very reasonable to attribute more weight to a lack of independence of an authority concerned with a preliminary decision (*i.e.*, the issuing of an EAW) than to a lack of independence in the person of the judge who ultimately imposes a criminal sanction.

The already mentioned reference for a preliminary ruling by a Dutch court also pointed to this inconsistency between the LM decision and the OG and PI decision.⁴³ In fact, it would have been easy for the Court of Justice to adjust the two standards, as the respective EAWs had been issued by Polish *courts* (the regional courts of Poznań and Sieradz⁴⁴): when Polish courts, according to well-settled European case-law, lack independence, this automatically holds true also for courts that issue an EAW. The consequence would be that, as in the OG and PI case with regard to German prosecutors, an execution of the EAW can be refused on the basis of Art. 6(1) of the Framework Decision, without the need to establish the impact of the general deficiency on the individual suspect. However, the Court of Justice did not choose this path and tried to find differences between the two cases instead. It pointed out that it had rendered the OG and PI judgment “not on the basis of material indicating the existence of systemic or generalised deficiencies concerning the independence of the judiciary of the Member State to which those public prosecutors belonged, but on account of statutory rules and an institutional framework, adopted by that Member State by virtue of its procedural autonomy.” It is submitted, however, that this makes it even less understandable why a lack of independence of an issuing prosecutor shall always amount to a ground for non-execution, whereas deficiencies with regard to the independence of courts shall only have that effect when the individual concerned is personally affected. Isn’t a systemic deficiency much more alarming than a Member State’s exercise of its “procedural autonomy”?

However, even if one shares the author’s opinion that the Court of Justice’s differentiation between the two cases is not convincing, a plausible conclusion is that the OG and PI judgment simply went too far and should have required an individual assessment of the particular case, too.

42 Joined cases C-508/18 and 82/19 PPU, OG and PI, judgment of 27 May 2019 = ECLI:EU:C:2019:456, §§ 84 and 88.

43 Cf. CJEU, joined cases C-354/20 PPU and C-412/20 PPU, L and P, judgment of 17 December 2020 = ECLI:EU:C:2020:1033, § 45.

44 *Ibid.*, §§ 9 and 22.

cc) On recitals and fundamental rights

As seen above, recital no. 10 to the EAW Framework Decision was a key argument for the Court of Justice when it transferred its two-step approach first developed in the Aranyosi and Căldăraru judgment to the LM case. If one only examines the EAW Framework Decision as such, this appears quite convincing. However, the Court of Justice itself highlighted many times in the LM decision that the independence of courts is not only a formal matter for the organisation of the judiciary, but affects the individual's fundamental right to a fair trial pursuant to Art. 47(2) CFR, and even touches upon the essence of that right.⁴⁵ The question is therefore: can a recital of a secondary law instrument truly be a crucial argument when fundamental rights guaranteed in primary law are at stake? Under Art. 52(1) CFR, any limitation to a fundamental right does not only have to be provided for "by law" (so that, arguably, a recital alone does not suffice), but also must respect the essence of that right. When a systemic deficiency jeopardises the very essence of the right to a fair trial, it seems, therefore, difficult to justify further cooperation with the Member State concerned in EAW proceedings – already without an additional assessment of each individual case.

Nevertheless, the specific type of deficiency must not be overlooked. As long as concerns regarding the independence of courts remain abstract and are relevant only for proceedings with a political element, but do not affect the large majority of ordinary criminal cases (see *supra* III.2.b)aa)), it is submitted that the Court of Justice's two-step-approach is still sufficient to protect the essence of the right to a fair trial. It should not be forgotten that EU Member States regularly cooperate with third States that do not (fully) comply with European rule of law standards either. When cooperating with such States, the requested State retains far greater possibilities to refuse extradition than under the EAW regime (for instance based on the domestic *ordre public*, the political offence exception, a much stricter double criminality test, etc.). But all these grounds for refusal ultimately require an assessment of the individual case. So, requiring that type of examination on the basis of the LM judgment, too, does not seem exaggerate. Of course, there should be no doubt that respect for the rule of law is absolutely essential within the EU. Deficiencies in this regard must, therefore, entail sharp consequences on the political level, such as an activation of the budgetary rule of law mechanism provided for in Regulation 2020/2092 (which the Court of Justice has just declared compatible with primary law⁴⁶), as well as infringement proceedings. But given the judicial nature of the EAW, this instrument is not the right tool to "punish" a Member State and force judicial reforms (or their abolition).

45 CJEU, case C-216/18 PPU, LM, judgment of 25 July 2018 = ECLI:EU:C:2018:586, §§ 59, 60, 63, 68, 72, 73, 75, 78; critically with regard to that concept: *Wendel*, European Constitutional Law Review 2019, 17 (25 et seqq.).

46 CJEU, case C-156/21, Hungary./. Parliament and Council, judgment of 16 February 2022 = ECLI:EU:C:2022:97; case C-157/21, Republic of Poland./. Parliament and Council, judgment of 16 February 2022 = ECLI:EU:C:2022:98.

The picture changes, however, when a systemic deficiency regarding the independence of the judiciary no longer remains restricted to single cases with political implications but is likely to produce effects in all or at least most EAW proceedings. Then, the second level of scrutiny does not only become an unnecessary formality, but the requested individual's obligation to prove that he or she is personally affected turns into an inappropriate restriction of the right to a fair trial. In the light of the most recent developments in Poland, this may ultimately make it necessary to revise the LM decision (see *infra* III.3.c)).

3. Other deficiencies that might amount to a ground for refusal (mostly yet hypothetical)

The existing case-law on Art. 1(3) of the EAW Framework Decision leaves us with the question of whether further situations might give rise to an extraordinary ground for refusal: as the rule of law comprises much more than just the independence of courts, it is in no way excluded that the Court of Justice might extend its LM jurisprudence to other situations in the future.⁴⁷ Whereas most of the examples mentioned in the following paragraphs to date remain hypothetical ones, two very recent judgments by the Polish Constitutional Tribunal might become a game-changer for the application of the EAW in regard to that particular Member State.

a) A loss of EU law guarantees after Brexit

At least in one occasion, the Court of Justice demonstrated that it is ready to transfer its LM approach to other types of systemic deficiencies: it applied the two-step-examination described above to a case involving a surrender to the United Kingdom which caused the fear that the person concerned might lose guarantees enshrined in the EU Charter of Fundamental Rights following the Brexit.⁴⁸ The Court of Justice, however, made it clear once again that general doubts regarding the respect for human rights shall not suffice to suspend the EAW.⁴⁹ And, the Court of Justice continued, as long as the issuing Member State is (at least) bound by ECHR guarantees, there is no sufficiently concrete risk of human rights violations for the person concerned.

b) Hypothetical further examples

It is not very difficult to come up with further examples where an exceptional ground for refusal based on Art. 1(3) of the EAW Framework Decision might become relevant: first, concerns regarding the respect for human rights are particularly plausible when

⁴⁷ *Wendel*, European Constitutional Law Review 2019, 17 (33).

⁴⁸ Case C-327/18 PPU, RO, judgment of 19 September 2018 = ECLI:EU:C:2018:733.

⁴⁹ *Ibid.*, § 49.

an EAW is ultimately based on a criminal proceeding in a third State that is not bound by Union law.⁵⁰ A second case where questions regarding the rule of law could have become relevant in the context of the EAW is the one of Catalonia's former regional president Carles Puigdemont, whose surrender Spanish authorities requested from Germany: due to Puigdemont's commitment for the independence of Catalonia and the Spanish authorities' "creative" interpretation of the positive list in Art. 2(2) of the EAW Framework Decision,⁵¹ concerns regarding the impartiality of Spanish courts and the fairness of the proceeding did not appear far-fetched from the outset. But also apart from these very specific cases, problems with the rule of law in the issuing Member State might challenge the functioning of the EAW. To give some examples, one could think of:

- the systemic discrimination of a particular group of people, for instance based on racist or political motives, their religion or sexual orientation. However, recital no. 12 of the EAW Framework Decision⁵² allows for the conclusion that the execution of an EAW in these cases actually does not even require the existence of a systemic deficiency;
- systemic deficiencies with regard to the rights of the defence, which could, for instance, result from an insufficient implementation of a pertinent EU Directive;
- a persistent lack of judicial capacities that regularly leads to extremely lengthy proceedings;
- chronic corruption in the judicial system that jeopardizes the fairness of the single proceeding, etc.

Often, the crucial question will be which shortcomings in the criminal justice system are so serious that they undermine the rule of law itself. Coming back to what has been stated above, it seems advisable to focus on particularly serious violations of fundamental rights.

c) The most recent affronts by the Polish Constitutional Tribunal

After the Polish judicial reforms and the LM decision, the system of mutual recognition in the EU was, figuratively speaking, already ablaze. In the fall of 2021, two further decisions by the Polish Constitutional Tribunal added fuel to the fire: first, it de-

50 Cf. Advocate General *Kokott*, opinion in case C-488/19, JR, delivered on 17 September 2020, ECLI: EU:C:2020:738, §§ 57–59.

51 Cf. *Foffani*, EuCLR 2018, 196 (199 et seq.).

52 "Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons." (Emphasis added).

clared several provisions of EU primary law, amongst them Art. 19 TEU and its requirement of effective judicial review in order to ensure compliance with EU law (from which the Court of Justice had derived that national courts have to be independent⁵³), incompatible with the Polish constitution.⁵⁴ It followed a second judgment with which the Constitutional Tribunal declared itself not to be a court in the sense of Art. 6(1) ECHR, meaning that its independence could not be questioned under the Convention.⁵⁵ It is submitted that an additional, even more fundamental systemic deficiency of the Polish (criminal) justice system results from these two judgments: according to the first one, Polish courts shall, in the event of a conflict with national constitutional law, no longer be entitled to apply EU law. This ruling cannot be defended by the argument that it only refers to a specific question regarding the scope of Art. 19 TEU and the internal organisation of the Polish judiciary: the crucial point behind it is that the Constitutional Tribunal claims for itself the right to decide whether Polish courts are bound by EU law or not. As this ruling lays hand on the primacy of EU law over national law, it already marks a significant escalation in the conflict between Poland and the Union when taken alone, all the more because the judgment aims at curtailing the possibilities of the Court of Justice in Luxembourg to ensure respect for Art. 47(2) CFR.⁵⁶ With the second judgment, the Constitutional Tribunal even goes a step further and reserves for itself a right to determine the scope of application of Art. 6 ECHR. This would ultimately give Poland the chance to deny suspects and accused persons the right to a fair trial, as it is construed by the ECtHR in its uniform interpretation of the Convention. Also the second European court that offers protection to citizens when their procedural rights are at stake would thus be pushed aside. Taken together, the two judgments demonstrate that the Polish Constitutional Tribunal is no longer willing to respect elementary principles of EU law nor the European fundamental rights on which the entire Union – and the cooperation system of the EAW – is built. This deficiency can no longer be said to affect only selected cases with political implications. As every single proceeding for which an EAW is issued automatically raises questions of EU law⁵⁷ and unconditionally must respect European fundamental rights, including the right to a fair trial and the right to have access to the courts in Luxembourg and Strasbourg, it is necessary to reconsider the two-step-ap-

53 CJEU, case C-64/16, *Associação Sindical dos Juizes Portugueses*, judgment of 27 February 2018 = ECLI:EU:C:2018:117, § 32; case C-216/18 PPU, LM, judgment of 25 July 2018 = ECLI:EU:C:2018:586, §§ 50–53.

54 Polish Constitution Tribunal, case K 3/21, judgment of 7 October 2021, available in English at <https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej> (last visited: 15 February 2022).

55 Polish Constitution Tribunal, case K 6/21, judgment of 24 November 2021; for an English summary see *Łatowska*, *The Honest (though Embarrassing) Coming-out of the Polish Constitutional Tribunal*, *VerfBlog*, 2021/11/29, <https://verfassungsblog.de/the-honest-though-embarrassing-coming-out-of-the-polish-constitutional-tribunal/> (last visited: 15 February 2022).

56 The risk of such development had already been envisaged by *Bárd/van Ballegooij*, NJECL 2018, 353 (363 et seq.).

57 Cf. Arts. 26, 27 and 28 of the EAW Framework Decision.

proach taken in the LM judgment. At this point, it may be helpful to recall the Court of Justice's RO judgment, which dealt with a possible loss of European fundamental rights following the Brexit (*supra* III.3.a): there, the Court emphasised that the UK remained bound by the ECHR. For Poland, this cannot be taken for granted any longer after the second judgment of the Polish Constitutional Tribunal mentioned above. In the light of these highly deplorable developments, it appears preferable to abandon the second level of scrutiny required by the Court of Justice in the LM case. As seen above, a mere recital in a secondary law instrument cannot provide a sufficient argument when such an imminent threat to European fundamental rights exists – not even recital no. 10 of the EAW Framework Decision.

IV. Comparison with other mutual recognition instruments – is Union law coherent?

Unlike the EAW Framework Decision (adopted in 2002), other legal instruments do provide for an explicit ground for refusal when the rule of law or fundamental rights are at stake in the issuing Member State. The pertinent provisions are Art. 20(3) of the Framework Decision on the mutual recognition of financial penalties,⁵⁸ which was adopted as early as 2005, Art. 11(1)(f) of the Directive on the European Investigation Order (EIO)⁵⁹ and Art. 8(1)(f) of the Regulation on the mutual recognition of confiscation orders.⁶⁰ Interestingly, the recitals of these legal acts do not make reference to the proceeding pursuant to Art. 7(2) TEU. Instead, recital no. 19 of the EIO Directive simply states: “The creation of an area of freedom, security and justice within the Union is based on mutual confidence and a presumption of compliance by other Member States with Union law and, in particular, with fundamental rights. However, that presumption is rebuttable.”

Against that background, the lack of an explicit ground for refusal in the EAW Framework Decision is unsatisfactory already with a view to the coherence of Union law.⁶¹ What makes things worse is that a person's surrender to a criminal justice system that for him or her will often be a foreign one is far more intrusive than other measures. It seems impossible to justify that the most serious interference with fundamental rights in the course of a criminal proceeding shall be subject to less restrictions than, say, the enforcement of a fine or the handing over of an official document. On the one hand, this discrepancy between the different mutual recognition instruments reflects a welcome learning process: obviously, the EU legislator is nowadays more aware of the severe consequences that mutual recognition instruments can have for the individual than it was at the time when the EAW was adopted. On the other hand,

58 Framework Decision 2005/214/JHA, OJ 2005 no. L 76 of 22 March 2005, p. 16.

59 Directive 2014/41/EU, OJ no. L 130 of 1 May 2014, p. 1.

60 Regulation (EU) 2018/1805, OJ no. L 303 of 28 November 2018, p. 1.

61 On the need of coherence with a view to the different mutual recognition instruments see also: European Parliament resolution of 20 January 2021 (P9_TA(2021)0006), no. 46.

the fact that the presumption of mutual trust is today considered “rebuttable” urgently calls for a reform of the EAW.

However, the comparison of the EAW with other mutual recognition instruments does not only illustrate the need for a legislative reform, but it is also instructive with a view to its possible content: most notably, the grounds for refusal mentioned above do not require the existence of a systemic or general deficiency in the issuing Member State. Instead, they build upon a one-step-approach that merely focuses on the individual situation of the person concerned. This reveals that not only the second step of the LM test should be subject to criticism. Rather, an analysis of the three afore-mentioned provisions results in a critique of the Court of Justice’s first level of scrutiny. With them, the Union legislator admits that even in a well-functioning system of cooperation without systemic deficiencies in any of the participating Member States it is impossible to categorically rule out serious mistakes – exceptional as they may be.⁶² But when Member States cooperate on the basis of an EU instrument, they have a shared responsibility to ensure respect for European fundamental rights.⁶³ In these cases, the executing Member State also has therefore an obligation to protect the fundamental rights of the individual concerned – and in order to comply with this obligation, that Member State must have a chance to refuse cooperation, at least in manifest cases.⁶⁴

It is submitted that this approach is clearly preferable compared to the one taken in the EAW Framework Decision: From the individual’s perspective, the executing Member State remains obliged to ensure respect for European fundamental rights even without a systemic deficiency in the issuing Member State.⁶⁵ From a practitioner’s point of view, there is therefore no need to define criteria when a deficiency is “systemic” or “generalised”. Finally, a refusal to execute a judicial decision taken in another Member State does not have a political dimension when it is based merely on the individual circumstances of the case and not on the shortcomings of the issuing Member State’s justice system as a whole.

However, it should be noted that the explicit grounds for non-execution provided in other mutual recognition instruments are not fully coherent either:

- According to the Framework Decision on the mutual recognition of financial penalties, it shall suffice that fundamental rights or fundamental principles *may*

62 See with a view to the EIO *Trautmann/Zimmermann*, in: Schomburg/Lagodny, *Internationale Rechtshilfe in Strafsachen*, 6th ed. (2020), § 91b margin no. 18; more generally also *Gleiß/Wahl/Zimmermann*, *ibid.*, § 73 margin no. 148.

63 *Vogel/Burchard*, in: Grützner/Pötz/Kreß/Gazeas, *Internationaler Rechtshilfeverkehr in Strafsachen*, 3rd ed. (loose-leaf, July 2017), Vor § 1 IRG, margin nos. 124, 135; Schomburg/Lagodny, *Internationale Rechtshilfe in Strafsachen*, 6th ed. (2020), Einleitung margin no. 183. Critical in this regard: *Wendel*, *European Constitutional Law Review* 2019, 17 (36 et seq.).

64 From the perspective of administrative law see also: *Warin*, *Review of European Administrative Law* 2020, 7 (23 et seqq.).

65 For similar tendencies in asylum law see *Wendel*, *European Constitutional Law Review* 2019, 17 (37 et seqq.), who nevertheless defends the systemic deficiency criterion.

have been infringed. On the other hand, such possibility must directly follow from the certificate sent by the issuing Member State.

- Much narrower is the ground for refusal in the Regulation on confiscation orders in that it requires a *manifest* breach of a *relevant* fundamental right (aren't all fundamental rights "relevant"?), and explicitly shall remain restricted to *exceptional* circumstances.
- The comparably most balanced wording is the one of Art. 11(1)(f) of the EIO Directive, which gives a right not to carry out the investigative measure indicated in an EIO if there are *substantial grounds to believe* that this would be incompatible with the executing Member State's obligations in accordance with Art. 6 TEU and the Charter of Fundamental Rights.

If, on the basis of the foregoing analysis, a legislative reform shall be initiated, it may therefore be worthy of consideration not to limit it to the EAW. Instead, the EU legislator should aim at establishing a homogeneous mechanism that limits the principle of mutual recognition when problems regarding the rule of law in general and fundamental rights in particular occur in the issuing Member State.⁶⁶

V. Possible solutions and options for a legislative reform

In the following paragraph, several options to solve the problems posed by concerns regarding the rule of law in the system of the EAW will be discussed.

1. Option 1: Strengthening the importance of the rule of law *de lege lata*

One way to strengthen the rule of law in European cooperation in criminal matters would consist in a reinterpretation of Art. 1(3), read in conjunction with recital no. 10 of the EAW Framework Decision: the extraordinary ground for non-execution first recognised by the Court of Justice in the LM judgment should no longer presuppose an examination of the individual case if the systemic deficiency automatically affects all EAW proceedings. As has been argued above, this was not necessarily the case as long as concerns regarding the independence of Polish courts could be expected to affect only a limited number of criminal cases. After the most recent judgments by the Polish Constitutional Tribunal, however, there should be room for the argument that anyone who is surrendered to Poland can no longer rely on the primacy of EU law (including its fundamental rights) nor on ECHR guarantees. This option would not require any legislative steps. However, it is not clear whether the Court of Justice will be willing to modify its case-law in this sense. Furthermore, this option would neither address the problems connected with the high threshold of a systemic or generalised deficiency,

⁶⁶ See already the first (limitation of mutual recognition) and the fourth demand (coherence) of the Manifesto on European Criminal Procedure Law: *European Criminal Policy Initiative*, ZIS 2013, 430 (430 and 432).

nor would it fully abolish the inconsistencies with other mutual recognition instruments.

2. Option 2: Amending the recitals of the EAW Framework Decision

A second possibility, that is probably of a rather theoretical nature, would consist in a minimal change of recital no. 10 of the EAW Framework Decision: instead of making the suspension of the EAW dependent upon a unanimous decision by the European Council, a decision based on Art. 7(2) TEU could be turned into a mere example. The recital would then no longer be a systematic argument for the need of a second level of scrutiny in all cases and could have the following wording (amendment in italics, references to the TEU adjusted to the current version of the Treaty):

“Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 2 of the Treaty on European Union, *in particular when* determined by the European Council pursuant to Article 7(2) of the said Treaty with the consequences set out in Article 7(3) thereof.”

Apart from the fact that also this option would require a systemic deficiency and leave the inconsistencies with other mutual recognition instruments unsolved, it is questionable whether a legislative proceeding that only modifies a recital actually makes sense.

3. Option 3: Legislative reform of the EAW Framework Decision

The third option, which intuitively is the most obvious one, consists in an amendment not only of recital no. 10, but of the legislative part of the EAW Framework Decision. Although it may be cumbersome to reach the necessary consensus on the political level, this type of reform would be rather easy to implement from a technical perspective. It is submitted that it should consist of two accumulated elements:

a) Ground for refusal when the EAW conflicts with fundamental rights

First and foremost, a new ground for refusal should be introduced when there are substantial grounds to believe that the execution of an EAW would be incompatible with the executing Member State’s obligations under Art. 6 TEU and the Charter of Fundamental Rights.⁶⁷ As in Art. 11(1)(f) of the EIO Directive, this ground for refusal would not require the existence of a systemic or generalised deficiency, but merely look at the individual case. In doing so, it would avoid the political stigma that goes along with an Art. 7 proceeding; and a provision of that type would also reflect that, even in well-

⁶⁷ In the same vein: European Parliament resolution of 20 January 2021 (P9_TA(2021)0006), no. 9.

functioning democracies, public authorities do make mistakes that lead to a violation of fundamental rights. As argued above, the executing Member State has a responsibility to ensure respect for EU fundamental rights in such a situation, and with the suggested ground for refusal, it could finally assume that responsibility. Moreover, the new ground for refusal would bring the EAW in line with other mutual recognition instruments that already contain a comparable provision (apart from the EIO also the Framework Decision on the mutual recognition of financial penalties and the Regulation on the mutual recognition of confiscation orders).

b) “Halt mechanism” in case of repeated (systemic) problems

As a second element of an EAW reform, it should be considered to maintain a mechanism that stops mutual recognition when problems with a particular Member State occur repeatedly.⁶⁸ However, such a “halt mechanism” would not necessarily have to exclude the surrender of suspects or convicted persons to the Member State concerned entirely: it could merely “reset” the cooperation to the basic regime that applies with third States (for instance: extradition on the basis of Council of Europe or UN conventions). The reason is that all Member States do regularly cooperate with third States which do not fully comply with European rule of law standards. The level of cooperation within in the EU should at least not be lower. In practice, the “halt mechanism” would have the consequence that the requested Member State obtains additional possibilities to refuse cooperation (in particular: on the basis of national *ordre public* clauses, a full double criminality test, the non-extradition of own nationals, etc.). Unlike the current recital no. 10 of the EAW Framework Decision, this “halt mechanism” should not build upon a proceeding pursuant to Art. 7(2) TEU, and in particular it should not require a unanimous decision by the European Council. Instead, the decision could be taken by a neutral, non-political body of experts.⁶⁹ Once the “halt mechanism” has been activated, it would not be necessary for the executing authority to establish a violation of fundamental rights in the individual case (which often proves difficult⁷⁰) any longer. However, that type of decision could be given an expiry date and end automatically (e.g.: after six months), so that mutual recognition restarts automatically, unless the competent body renews its decision.

68 For similar proposals see *Bárd/van Ballegooij*, NJECL 2018, 353 (362 et seq.); *Carreras/Mit-silegas*, CEPS commentary: Upholding the Rule of Law by Scrutinising Judicial Independence, available at: <https://www.ceps.eu/ceps-publications/upholding-rule-law-scrutinising-judicial-independence-irish-courts-request-preliminary/> (last accessed 18 February 2022).

69 In the same vein: *Bárd/van Ballegooij*, NJECL 2018, 353 (362 et seq.).

70 See also *Bárd/van Ballegooij*, NJECL 2018, 353 (361).

4. Option 4: Horizontal legislative reform

The fourth option would entail the most far-reaching, but arguably also the most convincing solution. Instead of amending only the EAW Framework Decision, a new horizontal legislative act could add homogeneous safeguards against rule of law problems and violations of fundamental rights to all mutual recognition instruments. This technique is not without precedent: in 2009, a Framework Decision introduced uniform rules for the mutual recognition of judgments in absentia that amended the EAW Framework Decision as well as four other Framework Decisions.⁷¹ Nowadays, on the basis of Art. 82(1) TFEU, that type of horizontal reform could be accomplished by means of a Directive or a Regulation. This horizontal instrument could again combine both elements described for option 3, *i.e.*, a uniform ground for refusal if fundamental rights are at risk (but without the need to determine a systemic deficiency), as well as a “halt mechanism” in case of repeated infringements. This solution would streamline the incoherent wording of the already existing fundamental rights clauses. At the same time, introducing a “halt mechanism” also to the EIO and other mutual recognition instruments would mitigate difficulties that nowadays can occur when the defence wants to raise concerns regarding respect for the rule of law in the issuing Member State: except for the EAW, the existing instruments do not provide a mechanism for systemic deficiencies. Finally, this fourth option might even be easier to implement on the political level, as it would not make it necessary to renegotiate the EAW as a whole.

VI. Conclusion

The EAW Framework Decision, which was adopted 20 years ago, was the first legislative act that implemented the principle of mutual recognition of judicial decisions in criminal matters. From today’s perspective, it can be concluded that the impact of this instrument on the rights of the individual in extradition proceedings had not yet been fully understood in 2002. Likewise, the expectation (or the hope?) that the Member States of the European Union would always remain stable democracies fully respecting the rule of law has not been fulfilled. In subsequent instruments, the EU legislator reacted to this insight and included grounds for refusal when the execution of another Member State’s judicial decision would undermine European fundamental rights. It is high time that the Union’s institutions react to the new reality and initiate a reform of the EAW. The most promising option for this endeavour consists of two elements: a new ground for non-execution should apply when the EAW risks violating fundamental rights – irrespective of a systemic deficiency in the issuing Member State. This ground for refusal should be combined with a “halt mechanism” which resets the cooperation with a Member State to the level of third States when infringements of fundamental rights occur repeatedly. To ensure the coherence of EU law, both elements should not only be included into the EAW Framework Decision, but apply

71 Framework Decision 2009/299/JHA, OJ 2009 no. L 81 of 27 March 2009, p. 24.

to all mutual recognition instruments in a homogeneous manner. For the time being, the decline of the rule of law in Poland makes it necessary to develop a solution *de lege lata*. To this aim, the Court of Justice should reconsider its two-step-approach from the LM judgment: as every single EAW is affected by the Polish Constitutional Tribunal's refusal to accept the primacy of EU law and the review of its decisions by the courts in Luxemburg and Strasbourg, it should no longer be necessary to examine the effects of that systemic deficiency on the individual case. A blatant disregard of the rule of law and citizens' European fundamental rights must not remain without consequences in a system of cooperation that builds upon mutual trust.