Articles

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Mutual Recognition in Times of Crisis – Mutual Recognition in Crisis? An Analysis of the New Jurisprudence on the European Arrest Warrant

Abstract

The principle of mutual recognition which was declared to be the cornerstone of judicial cooperation in criminal matters relies on mutual trust between the national authorities involved. The European Union, however, is going through times of crisis – individual Member States deviate from originally common values and convictions, nationalism is on the rise. Under these conditions the existence of mutual trust is difficult to justify. This article tries to analyse whether the recent jurisprudence of the CJEU and some of the national Constitutional Courts reflect these changes. The author favours to uphold the only seemingly outdated "ordre public" proviso as an outlet in order to be prepared to allow exceptions to mutual recognition at least in exceptional cases.

I. Introduction: the EU in crisis

There is little doubt that the European Union – although in many areas extremely successful for the last decades – is in a period of severe crisis: the economic difficulties of many, mostly southern Member States culminating in the "nearly Grexit", the Brexit scheduled for next year, the immigration problem, closely connected with the unwillingness of Member States not to participate in a European-wide solution, leaving the problem to those countries which form the southern border of the EU and finally an increase in nationalism, at least in some Members States (just to mention Poland and Hungary) which goes hand in hand with a decay of democratic structures and results

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in attacks to the fundaments of the rule of law (e.g. the in dependence of judges in Poland).

This crisis description – which can not only be based on objective signs but is also subjectively reflected among the population, e.g. in opinion polls, but even among students in lectures and seminars – is the starting point of my following remarks. I will focus on the judicial cooperation between the Member States in order to bring about effective transnational prosecution. As we will see, the whole system today relies on mutual recognition of foreign judicial decisions which – by itself – presupposes mutual trust. But can there be "mutual trust" in times of crisis? And if not, what is the consequence? Is our system prepared for crisis? Are there (enough) outlets which provide for fair solutions of extraordinary cases which – if treated "normally" – would bring about hardship and unjust results?

II. Mutual recognition in an "area of freedom, security and justice"

1. The single judicial space

The European Union's objective is to create – as art. 67 (1) TFEU puts it – an "area of freedom, security and justice". The territory of the Member States shall constitute one single judicial space. Judicial cooperation must be possible notwithstanding the fact that different substantive and procedural national laws persist. Art. 67 (1) TFEU shows that an end to this form of legal pluralism is neither foreseeable nor intended, as it explicitly stresses the "respect for …. the different legal systems and traditions of the Member States" in its second half-sentence. This is where the concept of mutual recognition comes into play. In relation to cooperation in criminal matters art. 67 (3) TFEU states that "[t]he Union shall endeavour to ensure a high level of security … through the mutual recognition of judgments in criminal matters ….". And art. 82 TFEU adds: "Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions ….".

2. Mutual recognition and its background

The provisions of the TFEU cited so far refer to "mutual recognition", but do not, however, define what this term really encompasses. This is why it is useful – if not necessary – to look at a definition given by the Commission in 2000 in its "Communication to the Council and the European Parliament on Mutual Recognition of Final Decisions in Criminal Matters"[1]: "*Mutual recognition is 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. Mutual trust is an*

1 COM/2000/0495 final, p. 1 et seq.

important element, not only trust in the adequacy of one's partners' rules, but also trust that these rules are correctly applied."[2]

The three main features of mutual recognition are therefore: (1) mutual trust in the adequacy of the rules applied in other Member States, even though they might – and normally will – differ from the own norms and regulations which are applied to a comparable case in the home legal order; (2) mutual trust in the correct application of these rules in the other Member States by the courts and other law-executing bodies and – as a consequence – (3) acceptance of the results achieved in the other Member State on the basis of its laws and regulations as applied by its courts and other law-executing bodies without the result being checked against domestic laws and regulations.

Consequently, the Commission rightly concluded: *"Based on this idea of equivalence and the trust it is based on, the results the other state has reached are allowed to take effect in one's own sphere of legal influence. On this basis, a decision taken by an authority in one state could be accepted as such in another state, even though a comparable authority may not even exist in that state, or could not take such decisions, or would have taken an entirely different decision in a comparable case."*[3]

At first glance it becomes apparent that this is a big step in fostering European integration. The almost natural and traditional mistrust of everything which is "foreign", "alien" and "unknown", is to be replaced by trust – an inversion ordered by law for the good of the creation of a common European judicial space.

Of course, this method of mutual recognition is nothing radically new to the EU. It already had a certain tradition even before the Commission's definition in relation to cooperation in criminal matters was published in 2000: The "principle of mutual recognition"[4] had originally been developed by the Commission for the establishment of the internal market in order to achieve the marketability of goods without a time-consuming and difficult process of harmonisation of national provisions regulating the conditions for marketability in the respective countries.[5] Accordingly through the Union-wide recognition of national judicial decisions, the time-consuming impediments, especially in the area of mutual judicial assistance, are supposed to be removed in order to facilitate effective cross-border enforcement of criminal law without extensive harmonising efforts. Just as the right to free movement makes crossing borders easier for "criminals", the principle of mutual recognition is meant to relax the constraints that national borders impose on law enforcement authorities and their actions

2 COM/2000/0495 final, p. 4.

3 COM/2000/0495 final, p. 4.

4 For further details see *Suominen*, Mutual Recognition in Cooperation, 2011, pp. 17 et seq., 23 et seq., 42 et seq., 66 et seq.; *Erbežnik*, EuCLR 2 (2012), 3, 4 et seq.; *Satzger*, International and European Criminal Law, 2nd Edition 2018, § 8 paras. 26 et seq.

5 See in detail *Satzger*, Strafverteidiger 2003, 137, 141; *Hecker*, Europäisches Strafrecht, 5th edition 2015, § 12 para. 58; *Fletcher/Lööf/Gilmore,* EU Criminal Law, 2008, pp. 109, 188 et seq; on the differences between mutual recognition in the European single market and in the context of judicial cooperation, see *Burchard*, Die Konstitutionalisierung der gegenseitigen Anerkennung, pp. 65 et seq.

and thus opens up the road to a real European area of justice.[6] It corresponds to the predominant view that the successful application of the principle of mutual recognition in the context of creating a single market has been transferred to judicial cooperation in criminal matters.[7] A similar field of application can also be found in the law on asylum – originally laid down in the Dublin Convention 1990, now in the Dublin Regulation.[8]

Eventually – as a first step at least – the Tampere Council of October 1999[9] elevated the principle of mutual recognition as a matter of fact (or in other terms: as a matter of pure legal policy) to the status of a "cornerstone" of judicial cooperation in civil and criminal law.[10] However, it was not until the Treaty of Lisbon entered into force that this principle was incorporated into primary European law (art. 82 [1] TFEU[11]) and thus legally codified as part of EU primary law. Now art. 82 (1) subpara. 2 (a) and (d) TFEU assign the competence to the EU to enact rules for all Member States concerning the mutual recognition of judgments and all forms of judicial decisions. By now a considerable number of framework decisions and directives[12] is based on the idea of mutual recognition, the first and most important being the Framework Decision on the Arrest Warrant of 13th June 2002 (FD-EAW).

3. Mutual trust as the necessary basis for the mechanism of mutual recognition – and the repercussions of the EU crisis?

If the initial diagnosis is correct and the European Union is really suffering severe and manifold crises – and if mutual trust is the indispensable precondition for mutual recognition[13], one question becomes particularly relevant: What happens to the whole system of judicial cooperation in criminal matters if due to tendencies of mistrust among national courts and Member States the principle of mutual recognition tends to lose its necessary basis? Is it still possible to stick to the "principles", just to postulate that there *be* trust in order to save the created system? Or is the system smart enough to cope with those kinds of changes without (major) modifications?

Actually, all these questions have influenced the recent jurisprudence of the CJEU in "*the*" area of mutual recognition, where the principle of mutual recognition has first

6 V.d. Groeben/Schwarze-*Wasmeier,* Kommentar zum Vertrag über die EU und zur Gründung der EG, 6th edition, 2003/2004, Art. 31 EUV paras. 23 et seq.
7 Cf. *Satzger*, International and European Criminal Law, 2nd edition 2018, § 8 paras. 26 et seq.
8 Regulation 604/2013 of 29.6.2013, OJ L 180/31.
9 This European Council exclusively dealt with the creation of an "area of freedom, security and justice" within the EU.
10 Cf. the conclusions: http://www.europarl.europa.eu/summits/tam_en.htm (last visited 10/2018), nos. 33 et seq.
11 Cf also art. III-270 TCE.
12 For an overview see *Satzger*, International and European Criminal Law, 2nd Edition 2018, § 8 paras. 37 et seq.
13 See on this *Ambos*, Internationales Strafrecht, 5th edition 2018, § 9 para. 26 with further references.

been used and which – also among non-lawyers – is perhaps the best known instrument of transnational prosecution: the European Arrest Warrant.

III. European Arrest Warrant as a "litmus test" for the concept of mutual recognition in times of crisis

1. Mutual recognition as realised by the Framework Decision on the EAW (FD-EAW)

The framework decision of 13th June 2002 on the European arrest warrant and the surrender procedures between Member States,[14] which was mainly based on art. 31 (1) (a, b), 34 (2) (b) TEU (old version), is perceived as a role model for subsequent legislative acts.[15] Its main purpose is to abolish (between EU Member States) the traditional procedure of extradition which is widely considered to be time-consuming, cumbersome and complex. On the one hand, the traditional extradition procedure is characterised by two stages: (1) the legal examination of the admissibility of extradition is necessarily followed by (2) a political decision, the so-called grant of extradition. This grant is subject to a discretionary decision made on a case-by-case basis with regard to foreign policy considerations by government officials. This influence of political considerations has often been blamed for the inefficiencies of the extradition procedure.[16] On the other hand, double criminality is traditionally a fundamental principle of extradition. The conduct in respect of which the request for extradition is made has to be a criminal offence under the law of the requesting state as well as the state addressed with the request. The latter can thus refuse its cooperation if a foreign offence is unknown to its own law.[17] The accused person therefore has the possibility of raising various objections with respect to substantive law against his or her extradition which serves the purpose of protecting the individual but at the same time, of course, diminishes the effectiveness of the extradition procedure.[18]

With the introduction of the EAW, the element of a political authorisation is abandoned.[19] Instead, the procedure is to be controlled exclusively by the judiciary, a unified form strictly regulated by the framework decision must be used. The principle of

14 Framework Decision 2002/584/JHA, OJ (EC) 2002 No. L 190/1.
15 See *Mitsilegas*, EU Criminal Law, p. 120; *Rohlff*, Europäischer Haftbefehl, p. 35.
16 *Rohlff*, Europäischer Haftbefehl, p. 41; *Xanthopoulou*, NJECL 7 (2015), 32, 33.
17 *Klimek*, European Arrest Warrant, pp. 81 et seq.; *Klip*, Eur. Criminal Law, pp. 382 et seq.; *Oehler*, ZStW 96 (1984), 555, 557; in more detail e.g. *Asp/v. Hirsch/Frände*, ZIS 1 (2006), 512 et seq.; *Hackner*, in: Wabnitz/Janovsky, Handbuch, ch. 24 para. 134.
18 For criticism against the principle of double criminality, see *Asp/v. Hirsch/Frände*, ZIS 1 (2006), 512, 515 et seq; *Lagodny,* in: Schomburg et al. (eds), Internationale Rechtshilfe in Strafsachen, § 3 IRG para. 2; *Vogel*, JZ 2001, 937, 942.
19 According to art. 2 (1) of the framework decision, an arrest warrant "may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months" (arrest warrant of extradition) or "where a sentence has been passed or a detention order has been made, for sentences of at least four months" (arrest warrant of execution).

double criminality has only been maintained insofar as the extradition can, in general, be made conditional on the relevant conduct being a criminal offence under the law of the Member State of execution as well. However, if the arrest warrant is issued in respect of one of the 32 criminal offences explicitly listed in art. 2 (2) of the framework decision (the so-called "positive list"), double criminality is not required.[20] However, the catalogue offences are only outlined roughly, for instance as "computer-related crime", "counterfeiting and piracy of products", "racism" or "xenophobia". Since the determination of whether a catalogue offence is given is to be made under the national law of the issuing Member State,[21]in some cases it is difficult to determine whether an offence falls within one of the headings.[22]

In its art. 3, 4 and 4a, the FD-EAW contains grounds for non-execution of the arrest warrant. Grounds for mandatory non-execution are, for instance, amnesty, the lack of criminal accountability of the suspect under the law of the Member State of execution due to the suspect's age or a final decision in a Member State[23] that hinders any further prosecution. Besides the absence of double criminality in case of non-catalogue offences, grounds for optional non-execution are, e.g., cases where the prosecution is statute-barred pursuant to the law of the executing Member State, where the person is prosecuted for the same act in the executing Member State or where proceedings have been terminated.[24] Finally, art. 5 stipulates that the execution of the European arrest warrant can be made dependent on special guarantees of the issuing state. For arrest warrants against citizens of the executing Member State, for instance, surrender may be made subject to the condition "that the person is returned to the executing Member State in order to serve the custodial sentence or detention order passed against him in the issuing Member State".[25] Moreover, art. 1 (3) FD-EAW provides that "[t]his Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [EU]" which was – at least originally – perceived as a pure clarification and definitely not as an additional ground for non-execution of a EAW. In the modern discussion – as we will see – this provision has become more and more the centre of the core question

20 On the principle of double criminality and its modifications by the framework decision, see in detail *Pohl*, Vorbehalt und Anerkennung, pp. 136 et seqq.; cf also *Klimek*, European Arrest Warrant, p. 81.

21 Art. 2 (2) of the framework decision.

22 For a critical view, see only *Roxin/Schünemann*, Strafverfahrensrecht, § 3 paras 21 et seq.; *Schünemann*, GA 2002, 501, 507 et seq. The deficient harmonisation of national offences contained in the catalogue of art. 2 (2) of the framework decision is also lamented by *Peers*, CMLR 41 (2004), 5, 29 et seqq.

23 Art. 3 No. 2 of the framework decision. For decisions of a non-EU Member State only an optional ground for non-execution is in place, cf art. 4 No. 5 of the framework decision.

24 For a general caveat with respect to the protection of human rights *Peers*, EU Justice, pp. 708 et seq.; cf concerning the grounds of non-execution *de Groot*, in: Blextoon/van Ballegooij (eds), European Arrest Warrant, pp. 93 et seq.

25 See further *Böse,* in: Momsen et al., Fragmentarisches Strafrecht, pp. 240 et seqq.; *von Heintschel-Heinegg/Rohlff*, GA 2003, 44; for more details, see *de Groot*, in: Blextoon/van Ballegooij (eds), European Arrest Warrant, pp. 93 et seq.

whether the grounds of refusal listed in art. 3-4a of the Framework Decision are of a conclusive character.

2. Recent jurisprudence on mutual recognition and potential exceptions

The recent jurisprudence of the Court of Justice reflects very well the interaction between mutual recognition on the basis of mutual trust on the one hand and the situation of the EU in crisis on the other hand.

a) The CJ's jurisprudence from "Radu" to "LM"

The first decisions, especially the decisions in **Radu**[26] and similarly in **Melloni,**[27] clearly marked the application of a very strict mutual recognition principle where only those exceptions provided for in art. 3-4a could restrict the obligation to cooperate. In Radu (marg. no. 36) the CJEU formulated: *" … according to the provisions of [EAW] Framework Decision …, the Member States may refuse to execute such a warrant only in the cases of mandatory non-execution provided for in Article 3 thereof and in the cases of optional non execution listed in Articles 4 and 4a."*[28] Interestingly, in her opinion in the Radu case **General Advocate *Sharpston*** (paras. 64 et seq.) took a quite different view: She correctly summed up the problem of the meaning and scope of application of art. 1 (3) of the FD-EAW in the following question: Can the competent judicial authority in the executing Member State refuse altogether to execute a warrant where infringements of the requested person's human rights are in issue? In her opinion, a cursory reading of the framework decision supports the CJ's view that the list of grounds of refusal is exhaustive. This conclusion could also be supported taking into account the high level of mutual confidence and the aim to reduce delays inherent in the traditional extradition procedure. Nevertheless, she comes to a different conclusion: "*I do not believe that a narrow approach – which would exclude human rights considerations altogether – is supported either by the wording of the Framework Decision or by the case-law."* Referring to art. 1(3) of the FD-EAW she continues:"*It is implicit that those rights may be taken into account in founding a decision not to execute a warrant. To interpret Article 1(3) otherwise would risk its having no meaning – otherwise, possibly, than as an elegant platitude. … Although mutual recognition is an instrument for strengthening the area of security, freedom and justice, it is equally true that the protection of fundamental rights and freedoms is a precondition which gives legitimacy to the existence and development of this area."*

26 Judgment of 29th January 2013, C-396/1 „Radu", ECLI:EU:C:2013:39 with a comment by *Brodowski*, HRRS 2013, 54 et seq. and *Xanthopoulou*, NJECL 7 (2015), 32, 38 et seq.

27 Judgment of 26th February 2013 in C-399/11, „Melloni", ECLI:EU:C:2013:107 with a comment by *Risse*, HRRS 2014, 104 et seq. and *Xanthopoulou*, NJECL 7 (2015), 32, 45 et seq.

28 A similar formulation can be found in judgment of 26th February 2013 in C-399/11, „Melloni", ECLI:EU:C:2013:107, marg. no. 38.

Obviously the Court of Justice in *Radu* was not yet prepared for such a broad look at the matter and did not or did not want to realize the importance of GA *Sharpston's* argument. Thus it did not make use of her forward-thinking concept.

Only in 2014 in the CJ's opinion 2/13 on the possibility of an accession of the EU to the ECHR we find an – although very weak and perhaps even unconscious – hint in the direction of GA *Sharpston's* view when it formulates that "*the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States,* **save in exceptional circumstances**, *to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law.*"[29]

The court refers to "exceptional circumstances" – is it a *en passant* "reservation"? In my opinion, the court did not have in mind a real and new limitation to the principle of mutual recognition. This can actually clearly be seen by the judgment itself. As an authority for its mentioning the exceptional cases the judgment in Melloni is cited, the court refers to marginal numbers 37 and 63 thereof. In this decision, however, – especially at the marginal numbers cited – the court only refers to the obligation to mutually recognize, but – obviously – not to any limitation thereto. Thus, we may summarise that the jurisprudence of the court – up to 2015 – assumed an unconditional obligation to surrender a person if no explicit reason of non-execution was given.

Against this background, the Court's judgment in **Aranyosi and Căldăraru**[30] marked a re-orientation: The CJEU was confronted with two nearly identical references from the Higher Regional Court of Bremen (Hanseatisches Oberlandesgericht Bremen) in two cases concerning a Hungarian (C-404/15, Aranyosi) and a Romanian national (C-659/15 PPU, Căldăraru): The German Court was principally concerned with GA Sharpston's question, i.e. whether art. 1(3) of the FD-EAW must be interpreted as meaning that a surrender for the purposes of prosecution or for executing criminal sanctions is inadmissible if serious indications exist that the conditions of detention in the issuing Member State infringe the fundamental rights of the requested person. According to the CJEU, the principle of mutual recognition 'in principle' obliges Member States to act on an EAW and they must/may only refuse to execute an EAW under the exhaustive situations laid down in art. 3 and 4 FD-EAW. But – and here "exceptional circumstances" are brought into play – the principles of mutual trust and recognition can be limited. The Court then emphasizes the importance of art. 1(3) FD-EAW and the obligation of Member States to comply with the EU Charter of Fun-

29 Opinion 2/13 of 18th December 2014, ECLI:EU:C:2014:2454 (marg. no. 191 – own emphasis).

30 Judgment of 5th April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198; see on this *Gáspár-Szilágyi*, European Journal for Crime, Criminal Law and Criminal Justice 2016, 197 et seq. and *Satzger*, NStZ 2016, 514, 519 et seq.; affirmation of this jurisprudence in judgment of 25th July 2018, ML, C-220/18 PPU, ECLI:EU:C:2018:589 with a comment by Böhm, Neue Juristische Wochenschrift 2018, 3161 et seq.

damental Rights when implementing EU law. This includes respect for art. 4 of the Charter on the absolute prohibition of inhuman and degrading treatment, which is closely linked to human dignity.

The Court of Justice thus held that, where the executing judicial authority finds that there exists, for the individual who is the subject of a European arrest warrant, a real risk of inhuman or degrading treatment within the meaning of the Charter of Fundamental Rights of the European Union, the execution of that warrant must be postponed[31] – which means, that it does not have to be denied in total. However, according to the Court such postponement always presupposes a two-stage test:[32] First, the executing judicial authority must find that there is a *real risk of inhuman or degrading treatment in the issuing Member State* on account, inter alia, of systemic deficiencies, which amounts to a test of an abstract danger in that country.[33] Second, that authority must ascertain that there are *substantial grounds for believing that the individual concerned by the European arrest warrant will be exposed to such a risk, which means no less than a concrete and individualized danger to that person.*[34] Thus the existence of systemic deficiencies does not necessarily imply that, in a specific case, the individual concerned will be subject to inhuman or degrading treatment in the event that he is surrendered.

Thus, this is the first time the Court recognizes a limitation of the mutual recognition principle on grounds of a European ordre public, even if it is only regarded as being a reason for postponing the surrender.

Rather similar, but endowed with a much higher political explosiveness, is the most recent judgment in the so-called "**LM-case**" following a reference for preliminary ruling from the Republic of Ireland[35] in respect of an European Arrest Warrant from a Polish court: A Polish national, was the subject of three European arrest warrants issued by Polish courts for the purpose of prosecuting him for trafficking in narcotic drugs. After being arrested in Ireland, he did not consent to his surrender to the Polish authorities, on the ground that, on account of the reforms of the Polish system of justice, he maintained to run a real risk of not receiving a fair trial in Poland. The Irish High Court asked the CJEU whether the executing judicial authority, when dealing with an application for surrender liable to lead to a breach of the requested person's fundamental right to a fair trial, must, in accordance with the judgment in Aranyosi and Căldăraru, apply the two-tier test, i.e. establish an abstract as well as a concrete-

31 Judgment of 5th April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, para. 98.

32 Judgment of 5th April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paras. 88 et seq., paras. 91 et seq.

33 In its judgment of 25th July 2018, ML, C-220/18 PPU, ECLI:EU:C:2018:589, the CJ clarifies that the existence of a legal remedy in relation to the prison conditions in the issuing state does not per se exclude the possibility of postponing the surrender (paras. 72 et seq.).

34 In its judgment of 25th July 2018, ML, C-220/18 PPU, ECLI:EU:C:2018:589, the CJ states that for this test all prisons in which it is likely that the person in question will be detained, including on a temporary or transitional basis, have to be taken into account.

35 Judgment of 25th July 2018, Case C-216/18 PPU"LM"; ECLI:EU:C:2018:586

individualised danger or whether it is sufficient to find that there are deficiencies in the Polish system of justice, without having to assess whether the individual concerned is actually exposed to them. Those questions fall within the context of the changes made by the Polish Government to the system of justice, which led the Commission to adopt, in December 2017, a reasoned proposal inviting the Council to determine, on the basis of art. 7(1) TEU, that there was a clear risk of a serious breach by Poland of the rule of law which could lead towards the suspension of several EU membership rights of the Polish republic.[36]

The Court observed first of all that a refusal to execute a European arrest warrant was an exception to the principle of mutual recognition underlying the European arrest warrant mechanism and that exception must accordingly be interpreted strictly. The Court held that the existence of a real risk that the person in respect of whom a European arrest warrant had been issued would suffer a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial was capable of permitting the executing judicial authority to refrain from executing the European arrest warrant. In this connection, the Court pointed out that maintaining the independence of judicial authorities was essential in order to ensure the effective judicial protection of individuals also in the context of the European arrest warrant mechanism.[37]

Nevertheless, the court stressed the necessity of the two-step-examination: *"[T]he executing judicial authority must, as a first step, assess, on the basis of material that is objective, reliable, specific and properly updated concerning the operation of the system of justice in the issuing Member State … whether there is a real risk, connected with a lack of independence of the courts of that Member State on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached."*[38] But – in this respect – the Court considered the Commission's information given to the Council in the above mentioned reasoned proposal as particularly relevant for the purposes of that assessment. As a second step, the executing judicial authority must "*assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run that risk.*"[39] The CJ clarifies that this specific assessment is also necessary where, as in the present instance, the issuing Member State has been the subject of a reasoned proposal of the Commission seeking a determination by the Council that there is a clear risk of a serious breach by that Member State of the values referred to in art. 2 TEU. [40] In case of the two-step-examination being positive, the executing judicial authority must refrain from giving effect to the European arrest warrant. Here, obviously, the Court goes further than in the Aranyosi

36 COM(2017) 835 final.
37 Judgment of 25th July 2018, Case C-216/18 PPU"LM"; ECLI:EU:C:2018:586, marg. no. 55.
38 Judgment of 25th July 2018, Case C-216/18 PPU"LM"; ECLI:EU:C:2018:586, marg. no. 61.
39 Judgment of 25th July 2018, Case C-216/18 PPU"LM"; ECLI:EU:C:2018:586, marg. no. 68.
40 Judgment of 25th July 2018, Case C-216/18 PPU"LM"; ECLI:EU:C:2018:586, marg. no. 69.

and Căldăraru case as it does not restrict the consequence of the positive two-step-examination to merely "postponing" the arrest warrant!

This judgment also clearly shows that the "European ordre public" expressed therein is – as had been maintained before – not only limited to prison conditions. It is submitted that it is applicable to fundamental rights in general – but, of course, only in relation to exceptional cases. As a consequence of the "European ordre public" not being respected, the surrender does not only have to be **postponed**, it can also be **denied**. Although the CJ has not made a statement on that, it obviously depends on whether the obstacle to the surrender is of a temporary or a – more or less – permanent nature; in the latter case a full denial seems to be the only proportionate measure as the executing state cannot legally detain a person for an unforeseeably period of time.

Thus we may summarise the recent development in jurisprudence by stating that in extraordinary cases – and subject to the two-step-examination – the Court acknowledges a "European ordre public"- proviso. Such a limitation of the mutual recognition principle is not only justified in respect of art. 1 (3) of the FD-EAW, but necessary in order to take account of the legal force of the fundamental rights enshrined in the European Charter – especially when those rights are of an absolute or overriding character. Moreover this is the only solution which – as a matter of criminal policy – is "smart and reasonable" enough to build a system of transnational prosecution without a considerable number of flaws and "victims of the system". This solution is, by the way, exactly what has been claimed before by the *European Criminal Policy Initiative* (ECPI) a group of meanwhile more than 20 law professors from all over Europe and beyond in its (2nd) "*Manifesto on European Criminal Procedure Law*"[41].

b) Space for a national ordre public?

Clearly different – and much more complex and contested – is the next step, the relevance of a **national ordre public**, i.e. the question whether a Member State can justify the non-execution of a EAW relying on its own constitutional law or – narrower – on the core of its constitution which forms the "national identity".

aa) Melloni was a clear case where the Spanish judicial authority relied on Spanish constitutional law in order to justify a decision to refrain from surrendering a person to Italy where the person in question was sentenced in absentia. The standards of the Spanish constitution were higher than those prescribed in the FD-EAW for in absentia sentences. This is why – in full respect of the mutual recognition principle – the CJEU ignored the higher constitutional standard in Spain.

bb) Just a few weeks prior to the Aranyosi and Căldăraru ruling of the CJEU, the German Constitutional Court (Bundesverfassungsgericht, **BVerfG**) surprised with its

41 Published in 2013 inter alia in ZIS (www.zis-online.com) 8 (2013), p. 430 et seq.

decision of 15th December 2015:[42] a European arrest warrant that violates the "constitutional identity" which is construed as being resistant to any integration may not be executed in Germany and is subject to a monitoring of preservation of constitutional identity (so-called *"Identitätskontrolle"*) performed exclusively by the BVerfG. According to the BVerfG, the constitutional principles resistant to any integration comprise the principle that every punishment presupposes culpability. This principle is said to be anchored in the guarantee for human dignity of art. 1 (1) GG and may never be encroached on.[43] Thus, the BVerfG considers a national *ordre public* limited to extreme cases and assumes – going further than the ECJ at least in Aranyosi and Căldăraru – that its violation even results in the inadmissibility (not only postponement!) of executing a European arrest warrant, a consequence which is now (as we have seen in the "LM case") also accepted by the CJEU. The fact that the highest German court deviates from the ECJ's judgment is closely connected with an "old" discrepancy as to the opinion of the two courts on the relation between European law and German constitutional law in general.[44] This is an unsolved problem rooted in German constitutional law – but the hope and expectation is that differences between the CJ and the BVerfG will be restricted to very rare and most exceptional cases.[45]

cc) This view is supported by a more recent **decision of the BVerfG's Second Senate's 2nd chamber**[46]: The judges did not accept a constitutional complaint against an extradition to the United Kingdom based on a EAW, as it was considered not to have any prospect of success. The chamber argued that the English law called into question by the complainant (§ 35 Criminal Justice and Public Order Act 1994), which stipulates that remaining silent and non-response to certain questions may have a negative impact on the assessment of evidence for the accused, was indeed not compliant with the right to remain silent guaranteed in the German Constitution (Grundgesetz, GG). However, these circumstances did not violate the constitutional principles resistant to any integration, which are the only standard to be considered in these cases. An extradition would only be out of order if the core principle of *nemo tenetur* was no longer guaranteed, as only these cases were covered by the protection of human dignity set out in art. 1 (1) GG. The English law did, however, not abolish the right to remain silent altogether, but rather restricted it in a way, which did not in itself constitute a violation of human dignity. This il-

42 BVerfG, Decision of 15th December 2015, 2 BvR 2735/14 = NJW 2016, 1149, see on this *Satzger*, International and European Criminal Law, 2nd edition 2018, § 5 para. 23; *idem*, NStZ 2016, 514, 517.

43 BVerfG, Decision of 15th December 2015, 2 BvR 2735/14, para. 49 = NJW 2016, 1149, 1152.

44 Cf. e.g. the short summary of *Satzger*, in Sieber/Satzger/v. Heintschel-Heinegg, Europäisches Strafrecht, 2nd ed. 2014, § 1 marg. no. 7 et seq.; in relation to fundamental rights see *Satzger*, International and European Criminal Law, 2nd edition 2018, § 5 paras. 22 et seq.

45 On this in general, including possible "exceptional cases" *Satzger*, NStZ 2016, 514, 521 et seq.

46 BVerfG, Decision of the 2nd Chamber of the Second Senate of 06th September 2016 – 2 BvR 890/16, ECLI:DE:BVerfG:2016:rk20160906.2bvr089016.

lustrates the Constitutional Court's rather restrictive approach vis-à-vis a national ordre public.

dd) In Italy a comparable problem arose, not in relation to mutual recognition, of course, but in relation to the importance and relevance of "national identity". In the **Taricco case,** the Italian Constitutional Court took the view that certain fundamental rules corresponded to Italy's constitutional tradition and could not be subject to European obligations – rather similar to the line of thought of the BVerfG. In the CJEU's "Taricco I" judgment[47], a case concerning VAT fraud – i.e. fraud (also) to the detriment of the EU – the CJ obliged the Italian courts to leave the relatively extensive Italian statute of limitations, in force at the time of the commission of the VAT crime, unapplied in order to effectively combat criminal offences against the EU in line with the obligation under art. 325 TFEU. The Italian Constitutional Court, however, expressed doubts as to whether the CJ's approach was compatible with the overriding principles of the Italian constitutional order.[48] In particular, according to that court, the CJ's approach might be in contradiction with the principle that offences and penalties must be defined by law, which required that rules of criminal law were precisely determined and could not be applied retroactively.

In Taricco II,[49] the CJ takes account of the fact that, under Italian law (and in so far deviating from many other legal systems) the rules on limitation form part of *substantive* law, and therefore are subject to the rule of non-retroactivity to the detriment of the person concerned. The Court stresses that "*the national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised*".[50]

The Court recalls the requirements of foreseeability, precision and non-retroactivity of criminal law which result from the principle that offences and penalties must be defined by law, enshrined in the Charter of Fundamental Rights of the European Union and the Convention for the Protection of Human Rights and Fundamental Freedoms. Moreover, it stresses that that principle is of essential importance both in the Member States and in the EU legal order. Consequently, the obligation to ensure the effective collection of the EU's resources, resulting from art. 325 TFEU, cannot run counter to the principle that offences and penalties must be defined by law. The Court concludes that if a national court, due to its understanding of the statute of limitations as being substantive law considers that the obligation to apply the principles stated in the Taricco I judgment conflicts with the principle that offences and penalties must be defined

47 Judgment of 8th September 2015, Case C-105/14 „Taricco I", ECLI:EU:C:2015:555 with a comment by *Hochmayr*, HRRS 2015, 239 et seq.

48 Cf. e.g. *Viganò*, EuCLR 7(2017), 103, 120 et seq.

49 Judgment of 5th December 2017, Case C-42/17 „Taricco II", ECLI:EU:C:2017:936 with a comment by *Swoboda*, ZIS 13 (2018), 290 et seq.

50 Judgment of 5th December 2017, Case C-42/17 „Taricco II", ECLI:EU:C:2017:936, para. 47.

by law, it is not required to comply with that obligation, even if compliance would allow a national situation incompatible with EU law to be remedied.[51]

Thus the CJ eventually avoided a conflict with the Italian Constitutional Court. On the basis of accepting the rules on limitation as being substantive according to national law, this was a relatively "easy" task as then the Charter and the ECHR could be cited to reach the conclusion that the actual obligation under art. 325 TFEU had to be limited. Nevertheless – beneath the surface – it is the Italian way of looking at the statute of limitations which activates the European-wide accepted and guaranteed principle of non-retroactivity. In the majority of Member States which look upon the statute of limitations as a procedural question, the outcome would be different. Thus in the end, the constitutional tradition, i.e. the national identity was at the core of the decision and led to the CJ accepting an exception to the obligation under art. 325 TFEU.

ee) Of course, from the EU point of view a national ordre public proviso is difficult to justify. As long as supremacy of EU law is accepted – also in relation to the core of any national constitution –, there is no possibility to "protect" national identity against the influence of EU law. But for those jurisdictions which have certain reservations in relation to accepting a 100% supremacy, as is the case – even though different in detail – for the German and the Italian one, a necessity to limit mutual recognition vis-à-vis the most important, deeply-rooted values and principles of the national legal system which amount to the "national identity", also explicitly respected by EU law, arises. The question is: Can there be essential constitutional rules and values which are so important in one Member State that they may serve as an exception to mutual recognition?

If we concentrate on the principle of mutual recognition – and not on the question of supremacy of EU law in general – "exceptions", also based on national constitutional law are not excluded nor even "negative" in character. This is the consequence of the – in my view – correct understanding of that principle: the concept of mutual recognition must not be understood as being firm and static. Rather, it is dynamic in character. "Ordre public"-provisos to it may work as a useful outlet in order to bring about necessary corrections in extreme cases.

And, in the end, this is neither surprising nor unsystematic nor detrimental to the system as such: we have to depart from the over-simplifying view which has surely been in the mind of many when originally designing and discussing the mutual recognition concept: Mutual recognition does certainly not imply a strict, complete and blind positive acceptance of different national standards. It must rather be considered – as I would like to call it – a "waiver-concept": the executing state waives its sovereignty-based control power and thus the application of – maybe stricter – national standards to a certain extent. But the degree of such a waiver does not necessarily amount to 100%, but depends on the quantity of "mutual trust" which preexisted or which has been created by international instruments in the concrete area of application. Limita-

51 Judgment of 5th December 2017, Case C-42/17 „Taricco II", ECLI:EU:C:2017:936, paras. 48 et seq.

tions and grounds for refusal thus do not constitute *exceptions* to mutual recognition but rather *characterize* the concrete form and degree of mutual recognition.[52]

But then the next question arises: To what extent can the EU order its Member States to waive its control rights, where are the limits? Of course this is not a totally new question. It is about the misuse of national values and national identity for justifying an abstention from EU mechanisms and the disrespect of EU law. We have a similar problem in the provisions on the emergency break in art. 82 (3) and 83 (3) TFEU, where "fundamental aspects" of the national legal orders justify a Member States to go a separate way. Here, we find a starting point to design in theory and practice the limits for those "fundamental aspects" which not only justify the use of the emergency break but also describe the very rare "exceptions" for mutual recognition. Of course – elaborating these "fundamental aspects" is a very difficult task, mainly for the jurisprudence of the CJ. But – with the help of the evolving European criminal law science – it is certainly not an impossible undertaking.[53]

IV. Outlook

As has been demonstrated "mutual trust" is at the core of the present system of judicial cooperation in criminal matters. Although mutual trust may be fostered to a certain extent by the measures indicated, it cannot simply be "created". One cannot order trust to exist. And – what is even more important – one cannot order trust to exist *no matter how circumstances change*. Trust is not static, there is a considerable dynamic element to it. The legal and factual situation in the other countries must be observed continuously; in case of unforeseen events which change the basis for mutual trust, as e.g. a continuous failure to respect fundamental rights or a constitutional crisis the state which is meant to execute the decisions has to intervene or to set an end to cooperation. An "ordre public"-proviso may prevent the EU from saying good-bye to the mutual-recognition-principle in general. In times of change and crisis, a strictly construed "ordre public"-proviso in relation to extreme fundamental rights violations may work as a useful and flexible "outlet" and as such is not at all outdated.

52 Also cf. *Satzger*, International and European Criminal Law, 2nd edition 2018, § 8 para 28.

53 For more details cf. *Satzger*, International and European Criminal Law, 2nd edition 2018, § 7 paras. 47 et seq., *Asp*, Substantive Criminal Law, p. 140; *F. Zimmermann*, Jura 2009, 844, 848; *Ambos*, Internationales Strafrecht, 5th edition 2018, § 11 para. 11 with further references.