

The CJEU in the Celmer case: One Step Forward, Two Steps Back for Upholding the Rule of Law Within the EU

VB [verfassungsblog.de/the-cjeu-in-the-celmer-case-one-step-forward-two-steps-back-for-upholding-the-rule-of-law-within-](https://verfassungsblog.de/the-cjeu-in-the-celmer-case-one-step-forward-two-steps-back-for-upholding-the-rule-of-law-within-the-eu/)

the-eu/
Wouter van Ballegooij , Petra Bárd So 29 Jul 2018

So 29 Jul 2018

On 25 July 2018, the Court of Justice delivered its judgment in the Case C-216/18 PPU *Minister for Justice and Equality v LM*.

The issue concerned whether LM, a crime suspect, should be surrendered from Ireland to Poland when the executing judicial authority has serious doubts as to whether the suspect would receive a fair trial in the issuing state, due to the lack of independence of the judiciary resulting from changes to the Polish judicial system.

The case questions the principle of mutual trust between Member States, on which the EU rules regarding procedures for surrender between Member States – the Framework Decision on the European Arrest Warrant – is based. In accordance with the principle of mutual trust, it is emphasised that one Member State may not take unilateral action that overrides mutual recognition in order to address shortcomings in the implementation of EU law by another Member State. Instead, an executing state should presume the adherence of the issuing state to the values enshrined in Article 2 of the Treaty on European Union (TEU), the Charter of Fundamental Rights, as well as the safeguards found in secondary pieces of EU legislation. Proper implementation should be ensured in accordance with the tools provided for in the Treaties: the infringement procedure, to be initiated by either the European Commission or a Member State, or the procedure foreseen in Article 7 TEU. The presumption that all Member States fully comply with shared foundational values and corresponding international obligations enables the swift hand-over of suspects and sentenced persons, with limited exceptions.

The main legal issue in *LM* was whether and to what extent the joined cases of *Aranyosi and Căldăraru*, which carved out exceptions for surrender on human rights grounds, should be followed. We have previously [argued on this blog](#) that the CJEU needs to go beyond its case law and frame the case primarily as a problem of rule of law. While acknowledging that judicial authorities have an independent responsibility to put a halt to surrender if it would result in the violation of the wanted person's fair trial rights due to a general lack of judicial independence in the issuing state, we also insisted that political responsibility for balancing diverse EU constitutional principles needs to be borne by democratically elected institutions. Therefore, we proposed that executing judicial authorities should freeze judicial cooperation in the event that doubts arise as to respect for the rule of law in the issuing Member State. This measure should stay in place until the matter is resolved in accordance with the procedure provided for in Article 7 TEU or the DRF Pact called for by the European



Parliament, designed to monitor and enforce democracy, the rule of law, and fundamental rights in the Member States. If a Member State falls short in adhering to the above values, or if a country-specific assessment shows that there is either a clear risk of a serious breach or a serious and persistent breach of the values referred to in Article 2 TEU, mutual trust should be suspended until the next periodic review shows that the situation has sufficiently improved.

The Court, however, constructed the case as a possible violation of the right to a fair trial, the essence of which includes the requirement that tribunals are independent and impartial. This latter aspect could be seen as a positive step forward in the sense that the *Aranyosi* case law now includes rule of law considerations with regard to judicial independence. However, the practical hurdles imposed by the Court on the defence in terms of proving such violations and on judicial authorities to accept them in individual cases might amount to two steps back in upholding the rule of law within the EU.

1. Suspending mutual trust at the political level rendered practically impossible

The referring court, the High Court of Ireland, emphasised the political nature of Article 7 TEU and it concluded that the *outcome* of an Article 7 procedure is less relevant for a national court deciding on issues of surrender. Instead, they reasoned that documents produced during the *process* may serve as persuasive evidence to be taken into account when deciding whether the European Arrest Warrant should be executed. The Court of Justice, however, does not accept ‘a clear risk of a serious breach’ of EU values (Article 7(1)) as a benchmark. Rather, it holds that the application of the Framework Decision on the EAW may only be suspended in accordance with Recital 10 if the sanctioning prong of Article 7 TEU (current Article 7(2)–(3)) is invoked and the Council determines a breach of EU values (paragraphs 7, 70). This understanding is based on a reading which disregards the historical evolution of Article 7 TEU. The reason Recital 10 is silent about current Article 7(1) TEU is that it did not exist at the time the Framework Decision had been drafted. Since a preventive arm has been added in the meantime, one could argue that the drafters of the Framework Decision intended to refer to Article 7 as such, and the preventive arm should also be read into Recital 10. Such an interpretation would have been preferable in light of the inherent asymmetry between the individual and the state, especially in the area of criminal law.

The Court reserved the task of suspending mutual trust exclusively to the European Council (see paragraphs 71–72), and only if the sanctioning prong of Article 7 TEU were executed, which is unlikely to ever happen. The Lisbon Treaty prescribes different voting majorities to the different prongs. Reaching consensus on even a risk of a serious breach is difficult, as it requires a four-fifths majority in the Council. But the process under the second prong, i.e. Article 7(2), is even more unlikely to be carried out, since the procedure can be vetoed by any Member State save for the one concerned. Therefore, the Court in effect precluded the possibility of having the EAW regime suspended vis-à-vis a state that violates Article 2 TEU values. Only individual surrenders may be suspended on a case-by-case basis (paragraph 73).

2. Halting surrenders on a case-by-case basis: Herculean hurdles

The Court interpreted the Framework Decision such that the national court is allocated the responsibility to decide whether or not to execute a European Arrest Warrant even where an Article 7 procedure is pending. The Court also ruled that the two-step test in *Aranyosi* needs to be followed by the executing judicial authority when making this decision.

First, on the basis of objective the executing court must assess reliable, specific, and properly updated material concerning the operation of the justice system in the issuing Member State and determine whether there is a real risk of a breach of the fair trial rights of the person concerned, also with regard to a potential lack of independence of the courts (paragraph 61; cf. *Aranyosi* paragraph 89). When discussing judicial independence, the Court heavily relied on the case *Associação Sindical dos Juizes Portugueses*, and emphasised that both judicial independence and impartiality are crucial for the right to fair trial to be respected (paragraphs 64–67).

Second, if the first element of the test is satisfied, the executing judiciary must specifically and precisely assess whether, in the case at hand, there are substantial grounds for believing that the requested suspect will run the real risk of being subject to a breach of the essence of the right to a fair trial (paragraph 68; cf. *Aranyosi* paragraphs 92 and 94).

The judgment avoids the flaws of the AG Opinion and does not consider the question of whether and under what circumstances derogable rights, such as the right to a fair trial, could lead to suspending mutual trust in individual cases. It takes for granted that the potential breach of any fundamental right can trigger the *Aranyosi* test (paragraphs 59–60). Nor does the Court apply the AG's extremely high 'flagrant denial of justice' test (see our analysis on this [blog](#)). Whereas the AG Opinion would have rendered both a general suspension of mutual trust as well as a case-by-case suspension of surrenders virtually impossible, the Court's judgment enables the latter. But it does give rise to Herculean hurdles in which the Court echoes its position in Opinion 2/13 that limitations to mutual trust are to be reserved for 'exceptional cases' ([Opinion 2/13](#) paragraph 192).

We disagree with the Court's assertion that the only alternative to an Article 7(2)–(3) TEU procedure resulting in the suspension of instruments based on mutual trust is the executing national authority proceeding along the *Aranyosi* doctrine (paragraph 60). Instead, it could have followed its prior case law in *Associação Sindical dos Juizes Portugueses*, where the CJEU emphasised the importance that the national judiciary, in the enforcement of EU law, acknowledges that a lack of judicial independence jeopardises all fundamental rights, not just the right to an independent tribunal as an element of the right to a fair trial singled out in this case (paragraph 59).

We also disagree with the imposition of the second step of the test where a real risk of a breach of the rule of law is established. The Court's requirement mixes up the responsibilities of the Commission as guardian of the rule of law, of the European Council – which is now given the sole power to suspend mutual trust –, and of individuals, who do not possess an apparatus demonstrating risks to their fundamental rights. Once the first step of the test is satisfied, the onus should shift to the stronger party, i.e. the state accused of rule

of law violations, in light of the bedrock of the principle of a fair trial embedded in all constitutions of the democratic world and international human rights documents: the lack of equality of arms.

The Court's insistence that *Aranyosi* includes the requirement that the executing authority acquire supplementary information from the issuing judicial authority (paragraphs 76-77), and that the two courts should engage in a 'dialogue', presupposes that a captured court will admit its lack of independence. Such a self-criticism is highly unlikely, not only because the issuing court would destroy its own reputation, but also because it would thereby criticise the issuing state's executive, i.e. the branch of government upon which it is dependent.

3. Assessment of the judicial test in *LM*

The Court's acknowledgment that a lack of judicial independence may ultimately lead to a refusal to execute an EAW is to be welcomed as a step forward in upholding the rule of law within the Union. The Irish High Court will probably find sufficient ground to suspend surrender along the logic it presented in the reference for a preliminary ruling. If other national fora follow, the judgment could have a deterrent effect on Member States undermining the rule of law, thereby reinforcing other currently existing and employed mechanisms designed to enforce EU values.

However, the Court also takes us two steps back in upholding the rule of law. First, the Court's suggestion that EAW procedures in general may only be suspended once the Article 7 (2)–(3) procedures have been completed vis-à-vis the issuing Member State will effectively result in shifting too much of a burden on national courts. If these courts do not or are unable to take up that responsibility, it will result in both impunity for Member States violating the rule of law as well as the proliferation of violations of individual rights. Second, with its large hurdles the modified two-step *Aranyosi* test is likely to be applied by some executing judicial authorities, but not by others. This will lead to the fragmentation of EU law and discriminatory treatment among EU citizens and residents.

4. Conclusion

Surrender cases are litmus tests for the EU's approach towards the enforcement of the rule of law in the Member States. Without judicial independence and other elements of the rule of law concept, EU law will cease to be operational, whether in the context of the single market or outside of it. Controversies involving a criminal law element are ideal test cases, because consequences caused by the EU's inaction are more apparent and immediate due to the nature of that branch of law, which by definition includes limitations of individual rights. *Aranyosi* and *LM* are the beginning of a long journey. In a more general sense, these cases demonstrate that ultimately – as in all incomplete constitutional systems – it is the courts which play a crucial role in carving out and applying rule of law and fundamental rights exceptions. But as the *LM* judgment proves, it is difficult to come up with tests that, on the one hand, respect the duty of loyal cooperation and the presumption of trust vested in the protection offered by the issuing Member States, and on the other hand, make the Court act as a constitutional court.

In providing guidance to national judicial authorities on the application of rule of law exceptions, the EU – as Jan Willem van Rossem put it – needs to be serious about the Court’s ‘claim that the Union constitutes an entity with distinct constitutional features [...] It should be prepared to translate this into a policy of deference towards external norms. [...] Under a modern, liberal reading of the concept, more autonomy vis-à-vis international law in effect might mean less autonomy’. Limitations could be imposed from the top or the bottom. From the top would mean that the *sui generis* constitutional character of EU law predestines it to the status of ‘domestic law’ that could potentially be reviewed by the ECtHR. From the bottom would entail the establishment of a permanent and regular monitoring mechanism based on objective standards, developed along scientific rigour, sound methodology, and equal treatment of Member States, which, if necessary, leads to a warning when autonomous legal concepts such as mutual trust need to be suspended or reinstated. With the latter approach, instead of decentralised and fragmented rule of law attacks by national courts, an overall suspension of surrenders – and other forms of cooperation between Member States – would apply until such a quarantine is lifted by the same mechanism, but without the heavy political and practical burdens of an Article 7 TEU procedure.

The views expressed in this contribution are solely those of the authors.

LICENSED UNDER CC BY NC ND

SUGGESTED CITATION van Ballegooij, Wouter; Bárd, Petra: *The CJEU in the Celmer case: One Step Forward, Two Steps Back for Upholding the Rule of Law Within the EU*, *VerfBlog*, 2018/7/29, <https://verfassungsblog.de/the-cjeu-in-the-celmer-case-one-step-forward-two-steps-back-for-upholding-the-rule-of-law-within-the-eu/>.