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*CURRENT DEVELOPMENTS AND PROBLEMS
OF EUROPEAN CRIMINAL LAW.
THE PRINCIPLE OF MUTUAL RECOGNITION IN TIMES OF CRISIS –
THE NEW JURISPRUDENCE ON THE EUROPEAN ARREST
WARRANT AS AN EXAMPLE*

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1. Introduction

If you read the newspapers or surf the Internet these days, you will find countless quotations from politicians, lawyers, economists and members of all social strata on the subject of Brexit. Even if the contents differ, they show that this is a historical event that is of immense importance not only for the United Kingdom, but for the whole of Europe, and indeed for the entire world. The Telegraph cites the view of many economists, among them the famous US professor Nouriel Roubini, that Brexit is just the “tip of the iceberg” of popular resentment against the EU that could destroy the entire bloc. The decision to leave the EU could trigger the “beginning of the disintegration” of the UK, eurozone and wider trading area, Roubini warned¹.

Therefore the Brexit is only the most obvious sign that Europe today has lost its attraction to people and to States alike – too often Europe grabs the headlines in a very negative manner, in very different contexts:

¹ See <https://www.telegraph.co.uk/business/2016/06/26/brexit-the-tip-of-the-iceberg-as-vote-risks-eus-destruction/> (last visit: 18.04.2019).

- the economic crisis in the south-European countries, especially the euro-crisis and the nearly-Grexit;
- the immigration problem, closely connected with the unwillingness of Member States not to participate in the solution of the problem, leaving it to those countries which form the southern border of the EU;
- increase in nationalism which can clearly be seen in quite some Member States (just to mention Poland and Hungary) where nationalistic parties form the government but which can also be observed in nearly all Member States as nationalistic parties become more and more successful in elections; anti-European sentiments and a loss of support for European law and the European institutions are the corollary which even led to the incredible Polish announcement that it would not respect a judgment of the CJEU against Poland in relation to the immigration problem and to the blatant questioning of respect for (i.a. European) law and human rights by the Austrian Minister of the Interior when demanding “that the law has to follow politics and not politics the law”².

This has little in common with the aims and objectives of the original European (Economic) Community and the EU, which – to a big extent – have been realised successfully. Among these are not only the internal market, the free movement of goods and persons, the Schengen area, – even more importantly – the peaceful decades within Europe but also – last but at no means least – the invention and fostering of programmes like Erasmus, which makes it possible for young students, lecturers and professors to go abroad, to get into contact, to make friends with co-Europeans but also to talk about the value and objectives of the European integration and the European Union as such. But, as usual, people get accustomed to liberties and freedoms quickly – and then take them for granted. The negative feeling about the European Union and – what is perhaps worse – in relation to other Member States and their policies – prevails. The general climate, the feelings among those who deal with Europe, European law and its problems have a direct influence on how reality is shaped. The raising skepticism towards the EU, its institutions and – at least – some of the other Member States and their courts and institutions seems to constitute a very

² Interview with the ORF on 23rd January 2019 (<https://kontrast.at/kicklmenschen-rechte-aussage/> (last visit: 18.04.2019)).

difficult basis for cooperation – also and especially in relation to criminal law cooperation.

The crisis – whether objectively existing or subjectively felt – is the starting point of my further observations. 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 – and this is my fundamental question – can there be “mutual trust” in times of crisis? And if not, what is the consequence? Is our system prepared for crisis, are there outlets which provide for just solutions of extraordinary cases which – if treated “normally” – would bring about hardship and unjust results?

2. Mutual Recognition in an “area of freedom, security and justice”

2.1. 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, although different substantive and procedural national laws do persist. Because: an end to this form of legal pluralism is neither foreseeable nor intended, as is clearly demonstrated by the second half-sentence of the same Art. 67 (1) TFEU which explicitly stresses the “respect for ... the different legal systems and traditions of the Member States”.

Now, this is where the concept of mutual recognition comes into play. In relation to cooperation in criminal matters we usually point to Art. 67 (3) TFEU:

“The Union shall endeavour to ensure a high level of security ... through the mutual recognition of judgments in criminal matters ...”,

but also to Art. 82 TFEU:

“Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions ...”.

2.2. 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”³.

“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 important element, not only trust in the adequacy of one’s partners’ rules, but also trust that these rules are correctly applied”⁴.

The three main features of mutual recognition are therefore:

- 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;
- 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 –;
- 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”⁵.

³ COM/2000/0495 final, p. 1 ss.

⁴ COM/2000/0495 final, p. 4.

⁵ COM/2000/0495 final, p. 4.

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” 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 countries⁶. 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 the border 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 and thus open up the road to a real European area of justice⁷. 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 matters⁸. Similar predecessors can be found in the law on asylum – originally laid down in the Dublin Convention 1990, now in the Dublin Regulation⁹.

⁶ See in detail H. SATZGER, *Gefahren für eine effektive Verteidigung im geplanten europäischen Verfahrensrecht – eine kritische Würdigung des Grünbuchs zum strafrechtlichen Schutz der finanziellen Interessen der Europäischen Gemeinschaften und zur Schaffung einer europäischen Staatsanwaltschaft*, in *Strafverteidiger* 2003, p. 141; B. HECKER, *Europäisches Strafrecht*⁵, Trier 2015, §12 para. 58; M. FLETCHER, R. LÖÖF, B. GILMORE, *EU Criminal Law and Justice*, 2008, p. 109, p. 188 ss.

⁷ Vd. H. VAN DER GROEBEN, J. SCHWARZE (eds.), *Kommentar zum Vertrag über die EU und zur Gründung der EG*⁶, Baden-Baden 2003/2004, Art. 31 EUV paras. 23 ss.

⁸ Cf. H. SATZGER, *International and European Criminal Law*², Munich/Oxford/Baden-Baden 2018, § 8 paras. 26 ss.

⁹ Regulation 604/2013 of 29.6.2013, OJ L 180/31.

Eventually – as a first step at least – the Tampere Council of October 1999¹⁰ 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 law¹¹. 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; cf. also Art. III-270 TCE) 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 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.

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

As depicted in the introduction, the European Union is suffering severe and manifold crisis. The interesting question is: if mutual trust is the precondition of mutual recognition – 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 so smart that it can cope with these kinds of changes without any modifications – and if so, to what limits?

Actually, all these questions have influenced the recent jurisprudence of the CJEU in “*the*” area of mutual recognition, where the principle of mutual recognition was first used and which – also among normal people – is perhaps the best known instrument of transnational prosecution: the European Arrest Warrant.

¹⁰ This European Council exclusively dealt with the creation of an “area of freedom, security and justice” within the EU.

¹¹ Cf. the conclusions: http://www.europarl.europa.eu/summits/tam_en.htm (last visited 18.04.2018), nos. 33 ss.

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

3.1. Mutual recognition as realised by the EAW

The Framework Decision of 13th June 2002 on the European arrest warrant and the surrender procedures between Member States¹², which was mainly based on art. 31 (1) (a, b), 34 (2) (b) TEU (o.v.), is perceived as a role model for subsequent legislative acts¹³. 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: the legal examination of the admissibility of extradition is necessarily followed by 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 procedure¹⁴. 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 law¹⁵. 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 procedure¹⁶.

¹² Framework Decision 2002/584/JHA, OJ (EC) 2002 No. L 190/1.

¹³ See V. MITSILEGAS, *EU Criminal Law*, 2009, p. 120; D. ROHLFF, *Europäischer Haftbefehl*, 2003, p. 35.

¹⁴ D. ROHLFF, *op. cit.*, p. 41; E. XANTHOPOULOU, *The Quest for Proportionality for the EAW: Fundamental Rights Protection in a Mutual Recognition Environment*, in NJECL, 7, 2015, p. 32-33.

¹⁵ L. KLIMEK, *European Arrest Warrant*, 2015, p. 81 ss.; A. KLIP, *European Criminal Law*, 2011, p. 382 ss.; D. OEHLER, *Das neue Recht der Internationalen Rechtshilfe in Strafsachen*, in ZStW, 96, 1984, p. 555, 557; in more detail e.g. P. ASP, A. VON HIRSCH, D. FRÄNDE, *Double Criminality and Transnational Investigative Measures in EU Criminal Proceedings: Some Issues of Principle*, in ZIS, 11/2006, p. 512 ss. (zis-online.com); v. T. HACKNER, in H.B. WABNITZ, T. JANOVSKY, *Handbuch des Wirtschafts- und Steuerstrafrechts*, ch. 24 para. 134.

¹⁶ For criticism of the principle of double criminality see P. ASP, A. VON HIRSCH, D.

With the introduction of the European arrest warrant, the element of a political authorisation is abandoned¹⁷. 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 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 (“positive list”), double criminality is not required¹⁸. 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 State¹⁹, in some cases it is difficult to determine whether an offence falls within one of the headings²⁰.

In art. 3, 4 and 4a the Framework Decision 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 State²¹ that hinders any further prosecution. Besides the absence of double criminality in case of non-catalogue offences,

FRÄNDE, *op. cit.*, p. 515 ss.; O. LAGODNY *et al.*, *Internationale Rechtshilfe in Strafsachen*, § 3 IRG para. 2; J. VOGEL, *Juristenzeitung* 2001, p. 937, 942.

¹⁷ 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).

¹⁸ On the principle of double criminality and its modifications by the framework decision see in detail T. POHL, *Vorbehalt und Anerkennung: der Europäische Haftbefehl zwischen Grundgesetz und europäischem Primärrecht*, 2009, p. 136 ss.; L. KLIMEK, *op. cit.*, p. 81.

¹⁹ Art. 2 (2) of the framework decision.

²⁰ For a critical view see only C. ROXIN, B. SCHÜNEMANN, *Strafverfahrensrecht*²⁹, 2017, § 3 paras 21 ss.; B. SCHÜNEMANN, *GA* 2002, 501, 507 ss. The deficient harmonisation of national offences contained in the catalogue of art. 2 (2) of the framework decision is also lamented by S. PEERS, ‘Mutual recognition and criminal law in the European Union: Has the Council got it wrong?’, in *CMLR*, 41, 2004, p. 29 ss.

²¹ Art. 3 No. 2 of the framework decision, see para 74. 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.

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 terminated²². 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”²³.

Moreover, Art. 1 (3) 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 whether the grounds of refusal listed in Art. 3-4a of the Framework Decision are really conclusive.

3.2. Recent Jurisprudence on mutual recognition and potential exceptions

The recent jurisprudence of the CJEU reflects in a very clear manner 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 first decisions, especially the decisions in the Radu²⁴ and similarly in the Melloni²⁵ case clearly marked the application of a very strict mutual

²² For a general *caveat* with respect to the protection of human rights S. PEERS, *EU Justice*, 2012, p. 708 ss.; cf. concerning the grounds of non-execution S. DE GROOT, *Mutual Trust in (European) Extradition Law*, in R. BLEKXTOON *et al.* (eds.), *Handbook on the European Arrest Warrant*, 2004, p. 93 ss.

²³ See further M. BÖSE, ‘Das Prinzip der gegenseitigen Anerkennung in der transnationalen Strafrechtspflege in der EU’, in C. MOMSEN *et al.* (eds.), *Fragmentarisches Strafrecht*, 2003, p. 240 ss.; B. von Heintschel-Heinegg, D. Roblff, *GA* 2003, p. 44; for more details see S. DE GROOT, *op. cit.*, p. 93 ss.

²⁴ CJEU, Judgment of the Court (Grand Chamber), 29 January 2013, C-396/11, Radu, ECLI:EU:C:2013:39.

²⁵ CJEU, Judgment of the Court (Grand Chamber), 26 February 2013, C-399/11, Melloni, ECLI:EU:C:2013:107.

recognition principle where only those exceptions provided for in Art. 3-4a could restrict the obligation to cooperate.

The CJEU formulated in *Radu*: “... 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”²⁶.

Interestingly, GA Sharpston²⁷ took quite a different view in her opinion on *Radu* when she correctly summed up the problem of the meaning and scope of application of Art. 1 (3) of the Framework Decision on the 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 Framework Decision 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”²⁸.

Obviously, the Court of Justice in *Radu* was not yet prepared for such a broad look at the matter and did not or not even want to realise the importance of GA Sharpston’s argument. Thus it did not make use of her – as we will see in a second – very useful and forward-thinking concept.

²⁶ CJEU, Judgment of the Court (Grand Chamber), 29 January 2013, *Radu*, ECLI:EU:C:2013:39 (marg. no. 36); a similar formulation can be found in *Melloni*, marg. no. 38.

²⁷ Opinion of GA Sharpston, 18 October 2012, *Radu*, ECLI:EU:C:2012:648 (marg. no. 64 ss.).

²⁸ Opinion of GA Sharpston, 18 October 2012, *Radu*, ECLI:EU:C:2012:648 (marg. no. 70, 71).

Only at a latter point of time, in the Court's opinion 2/13 of 18 December 2014 on the possibility of an accession of the EU to the ECHR²⁹ 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"³⁰.

You realised the "*en passant* reservation"? "*Save in exceptional circumstances*"! It is submitted that 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 it cites in brackets as an authority – it is Melloni, and the marginal numbers (Melloni 37, 63) of the judgment, where the court only refers to the obligation to mutually recognise, 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.

This is why the Court's judgment in Aranyosi and Căldăraru constituted a kind of break-through.

The CJEU was confronted with two nearly identical references from the Higher Regional Court of Bremen (Hanseatisches Oberlandesgericht in Bremen) in two cases concerning a Hungarian (C-404/15, Aranyosi) and a Romanian national (C-659/15 PPU, Căldăraru)³¹.

The German Court was principally concerned with GA Sharpston's question, i.e. whether Article 1(3) of the Framework Decision on the European Arrest Warrant (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.

²⁹ ECLI:EU:C:2014:2454.

³⁰ Marg. no. 191.

³¹ Judgment of the Court (Grand Chamber) of 5 April 2016, Joined Cases C-404/15 and C-659/15 PPU, Pál Aranyosi and Robert Căldăraru, ECLI:EU:C:2016:198.

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 Articles 3 and 4 FD-EAW. But – and now it refers to “exceptional circumstances” – the principles of mutual trust and recognition can be limited. The Court then emphasizes the importance of Article 1(3) FD-EAW and the obligation of Member States to comply with the EU Charter of Fundamental Rights when implementing EU law. This includes respect for Article 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 (which means that it does not have to be denied in total).

However, such postponement always presupposes a two-stage test. 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, i.a., of systemic deficiencies, which amounts to a test of an abstract danger in that country. 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. 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.

This is the first time the Court recognises 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 reference for a preliminary ruling from the Republic of Ireland³² in respect of a 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

³² Judgment of the Court (Grand Chamber) of 25 July 2018, C-216/18 PPU, LM, ECLI:EU:C:2018:586.

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 High Court (Ireland) asked the Court of Justice 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-individualised danger or whether it is sufficient for it 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. These 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 Article 7(1) TEU that there is 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.

The Court in the so-called "L.M." case observed – first of all – that a refusal to execute a European arrest warrant is an exception to the principle of mutual recognition underlying the European arrest warrant mechanism and that exception must accordingly be interpreted strictly.

The Court then holds that the existence of a real risk that the person in respect of whom a European arrest warrant has been issued will suffer a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, is capable of permitting the executing judicial authority to refrain from executing the European arrest warrant. In this context, the Court points out that maintaining the independence of judicial authorities is essential in order to ensure the effective judicial protection of individuals, and therefore also in the context of the European arrest warrant mechanism.

Nevertheless, the court stresses the necessity of the two-step-examination: the executing judicial authority must, as a first step, assess, on the basis of material that is objective, reliable, specific and properly updated, whether there is a real risk, connected with a lack of independence of the courts of the issuing Member State on account of deficiencies of that kind, of such a right being breached in the issuing Member State. But – in this respect – the Court considers that information in a reasoned proposal recently addressed by the Commission to the Council on the basis of Article 7(1) TEU is particularly relevant for the purposes of that assessment.

As a second step, the court must assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender, the requested person will run that risk. That 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 Article 2 TEU.

In the case of the two-step-examination being positive, the executing judicial authority *must refrain* from giving effect to the European arrest warrant. The Court goes further than in the Arranyosi case – it does not speak of only “*postponing*” the arrest warrant!

This judgment clearly shows that the “European ordre public” is – as was maintained before – not only applicable to prison conditions alone. It refers to fundamental rights in general – but only in very exceptional cases. The consequence is not only the postponement of the surrender; it is a denial. Obviously, it depends on whether the obstacle to the surrender is of a temporary or a – more or less – permanent nature, in the latter case a denial seems to be the only proportionate measure as the executing state cannot detain a person for an unforeseeable period of time.

We may summarise the recent developments 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 Framework Decision, but necessary in order to take account of the legal force of the fundamental rights in the European Charter – especially if those rights are of an absolute or overriding character. Moreover, this solution is the sole one which is – on the basis of criminal policy – clever and convincing in order to build a system of transnational prosecution without flaws and “victims of the system”. This solution is, by the way, exactly the one the European Criminal Policy Initiative, a group of more than 20 law professors from all over Europe under my leadership, has found in its (2nd) Manifesto on European Criminal Procedure Law³³.

b) Clearly different – and much more complex and contested – is the next step, the relevance of a national ordre public, i.e. the question whether

³³ ECPI, in ZIS, 8, 2013, p. 430 ss. (zis-online.com); also cf. H. SATZGER, T. ZIMMERMANN, in ZIS, 8, 2013, p. 411 (zis-online.com).

a Member State can justify the non-execution of a EAW relying on its constitutional law or even on the core of its constitution itself which forms the national identity.

1) 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 he was sentenced *in absentia*. The standards of the Spanish constitution were higher than those prescribed in the Framework Decision for *in absentia* sentences. This is why – in full application of the mutual recognition principle – the CJEU ignored the higher constitutional standard in Spain.

2) Just a few weeks prior to the Aranyosi ruling of the CJEU, the German BVerfG made an important decision in this context³⁴: 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 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 on³⁵.

Thus, the BVerfG considers a national ordre public limited to extreme cases and assumes – going further than the CJEU, at least in Aranyosi – 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 CJ’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. This is an unsolved problem in German constitutional law – but it is to be expected that differences between the CJ and the BVerfG will be restricted to very rare and most exceptional cases³⁶.

³⁴ BVerfG, Decision of 15th December 2015, 2 BvR 2735/14 = NJW 2016, 1149, see 5 para 23.

³⁵ BVerfG, Decision of 15th December 2015, 2 BvR 2735/14, para. 49 = NJW 2016, 1149, 1152.

³⁶ On this in general, including possible “exceptional cases” H. SATZGER, *Grund- und*

Another proceeding in Germany underlines this solution: the Constitutional Court did not accept a constitutional complaint against an extradition to the United Kingdom based on a European Arrest Warrant, as it had no prospect of success. The Court argued that the English law called into question by the complainant (§ 35 Criminal Justice and Public Order Act 1994), which stipulated that remaining silent and non-response to certain questions might 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 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 when 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 does, however, not abolish the right to remain silent altogether, but rather restricts it in a way which does not in itself pose a violation of human dignity. This illustrates how restrictively the BVerfG interprets and practically applies the – generally accepted – reservation of national ordre public.

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 correspond to Italy’s constitutional tradition and cannot be subject to European obligations – indeed a rather similar line of thought as the one of the BVerfG.

What was the background? To make it short: in the Taricco I judgment³⁷, a case concerning VAT fraud – i.e. fraud (also) to the detriment of the EU – the CJ obliged the Italian courts to leave the Italian statute of limitations, in force at the time of committal of the VAT crime, unapplied in order to effectively combat criminal offences against the EU in line with the obligation under Art. 325 TFEU. In the following, the Italian Constitutional Court expressed doubts as to whether the approach in the CJ’s judgment was compatible with the overriding principles of the Italian constitutional

menschenrechtliche Grenzen für die Vollstreckung eines Europäischen Haftbefehls? „Verfassungsgerichtliche Identitätskontrolle“ durch das BVerfG vs. Vollstreckungsaufschub bei „außergewöhnlichen Umständen“ nach dem EuGH, erscheint demnächst, in NStZ, 2016, 521 ss.

³⁷ Judgment of the Court (Grand Chamber) of 8 September 2015, C-105/14, Taricco I, ECLI:EU:C:2015:555.

order. In particular, according to that court, this approach was susceptible to clash 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 retroactive.

In its so-called *Taricco II* judgment³⁸, the CJEU takes account of the fact that, under Italian law, the rules on limitation form part of substantive law and are subject to the rule of non-retroactivity to the detriment of the person concerned. The Court recalls the requirements of foreseeability, precision and non-retroactivity of the criminal law which follow 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, following from Article 325 TFEU, cannot run counter to the principle that offences and penalties must be defined by law. Consequently, 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 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.

The CJEU avoids a conflict with the Constitutional Court. On the basis of accepting the rules on limitation as being substantive, this was a relatively easy task as then the Charter and the ECHR could be cited to reach the aim that the obligation under Art. 325 TFEU has 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 other countries which look upon the statute of limitations as a procedural question the outcome would be different. Thus, in the end, the constitutional tradition, the national identity was at the core of the decision and made the CJEU accept an exception to the obligation under Art. 325 TFEU.

³⁸ Judgment of the Court (Grand Chamber) of 5 December 2017, C-42/17, MAS and MB (*Taricco II*), ECLI:EU:C:2017:936.

3) A national *ordre public* proviso is difficult to justify. As long as full supremacy of EU law is accepted – also in relation to the core of any national constitution – there is no need and there should not be any 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 remains: 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 a dynamic principle. “*Ordre public*”-provisos to it may work as a useful outlet in order to bring about necessary corrections in extreme cases.

And this is neither surprising nor unsystematic nor detrimental in the end: 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. Limitations and grounds for refusal thus do not constitute *exceptions* to mutual recognition but rather *characterise* the concrete form and degree of mutual recognition³⁹.

³⁹ More in depth in relation to the waiver-concept cf. H. SATZGER, *International cit.*, § 8 para 28.

But in consequence, the following question arises: to what extent can the EU order the Member States to waive its control rights; and where are the limits? Of course this is not a totally new question. It deals with the misuse of national values and national identity for justifying not to take part in EU mechanisms and not to respect EU law. We have a similar problem in the provisions on the emergency break in Art. 82 and 83 TFEU, where “fundamental aspects” of the national legal orders justify a Member State to go a separate way. Here may be the starting point to design the limits for those “fundamental aspects” which not only justify the use of the emergency break but also the very rare “exceptions” for mutual recognition. The task is not impossible, but – admittedly – very difficult.

4. Outlook

As has been depicted, the whole system of transnational judicial cooperation in criminal law rests on “mutual trust”.

Even though mutual trust may be fostered by the measures indicated, mutual trust cannot simply be “created”. One cannot simply order trust to exist. And – what is even more important – one cannot order trust to exist or persist *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 has to set an end to cooperation. An “ordre public”-proviso can provide a solution under these circumstances. Although the situation within the EU is rather stable (at least compared to other parts of the world) and the rule of law and the Charta are in general respected, things may change quickly – as we can see these days (e.g. with a view to Poland or Hungary). Therefore, a strict “ordre public”-proviso – especially in relation to extreme fundamental rights violations – should be considered. It works as a flexible “outlet”. This reservation is by no means obsolete; it is no less needed than before.