**Sky is not the limit: Mutual Trust and Mutual Recognition *aprés* *Aranyosi and Căldăraru***

**Adam Łazowski[[1]](#footnote-2)\***

**1. Introduction**

As Ernest Hemingway wrote: “the way to make people trust-worthy is to trust them.”[[2]](#footnote-3) This, however, is easier said than done. Unless one deals with a case of blind trust, it is a well-known fact of life that for trust to develop several pre-conditions have to be met. And then, in equal measure, trust may be gained, put to a test and eventually lost. The first frequently takes a long time, the second and the third may happen in a split second and, once the damage is done, it is rather difficult to recover. When it comes to EU law, trust - or more precisely - the principle of mutual trust, has been from the start a cornerstone of the Area of Freedom, Security and Justice and, at the same time, a precondition for the mutual recognition in criminal matters.[[3]](#footnote-4) However, from the early days questions have been raised whether sky is the limit or, in the alternative, where the limits to mutual trust and mutual recognition lay.[[4]](#footnote-5) These questions have arisen not only in the academic discourse but also among the national judges.[[5]](#footnote-6) A reminder is fitting that as per well-established and rehearsed jurisprudence of the Court of Justice, the national courts are in charge of enforcement of EU law and, by the same token, entrusted to secure its effectiveness.[[6]](#footnote-7) Furthermore, the European Union is based on the rule of law and, as per recent jurisprudence of the Court of Justice, it can be upheld only if national courts are independent. So, the role of domestic courts in the development of the EU legal order is paramount; national judges are also EU judges. This applies to all areas of EU law, starting with the free movement of goods and ending with the judicial co-operation in criminal matters. The latter is, however, a relatively new phenomenon. While the foundations had been laid in the early 1990s *qua* Treaty on European Union, the area in question only started to develop more robustly at the turn of centuries and, at the time of writing, it was still in its formational years.[[7]](#footnote-8) As the legislative activity has steadily continued, the enforcement of adopted rules, in particular the controversial litmus test for mutual recognition - the European Arrest Warrant - has been heading for troubled waters. The mutual trust, and consequentially also mutual recognition, has been cracking as respect for human rights in several Member States, for instance in relation to the detention conditions, was questionable.[[8]](#footnote-9) The foundations of mutual recognition have also started to break as Poland and Hungary have become rather economical in their compliance with Article 2 TEU.[[9]](#footnote-10) To put it differently, the questionable human rights records and the brewing rule of law crises in several Member States have forced not only the EU institutions to act but also persuaded national judges around the European Union to become more vocal with their doubts as to the limits of mutual trust and mutual recognition. The judgment in joined cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*[[10]](#footnote-11) is a very good example when such doubts are shared with the Court of Justice, which - as well-known - provides assistance to national courts when interpretation of EU law is unclear, or validity of secondary legislation is under scrutiny.[[11]](#footnote-12) This time the judges at Kirchberg were dragged into the dilemmas of their domestic counterparts as where to draw the lines between the three constituent elements of the mantra: freedom, security and justice and how to answer the paraphrased Shakespearean question: to surrender or not to surrender. Although the judgment in question is - without a shadow of doubt - a groundbreaking development, it has been also - as rightly put by W. Van Ballegooij and P. Bárd - “only the start of a discussion between the CJEU and national courts on the scope and application of the fundamental rights exception”.[[12]](#footnote-13) This has proven to be true in most recent jurisprudence on the power of national courts not to entertain European Arrest Warrants on human rights/rule of law related grounds.[[13]](#footnote-14) In the present article these judgments are put under the academic microscope together with the case *Aranyosi and Căldăraru*. The analysis that follows is conducted through the lenses of domestic judges. It starts by drawing a broader picture of challenges that the domestic judiciary faces when it comes to EU criminal law, in particular the mutual recognition instruments. It argues that judges are faced not only with the legal framework of sometimes questionable quality but also with potential conflicts of loyalty resulting from multiplicity and occasional inconsistency of applicable legal regimes (section 2). In turn the analysis moves to the exegesis of *Aranyosi and Căldăraru* line of jurisprudence, in particular to the already mentioned security vs justice conundrum, which domestic judges sometimes face (section 3). This article ends with conclusions looking into the current state of affairs and suggestions as to the way forward.

**2. Competing loyalties in a multifaceted legal environment**

**2.1. Introduction**

When we look at the *Aranyosi* and *Căldăraru* line of jurisprudence through the lenses of national judges the emerging picture is not even close to a nicely balanced Rembrandt but has more of the dottiness known from the works of Pollock. It is notable, however, that it may somewhat vary, depending on whether one uses the lenses of a judge sitting at a constitutional court or whether at an ordinary criminal court. For the first the challenges emerging from development of EU criminal law, in particular the mutual recognition, are comparable to the ones faced in other areas of EU law. For decades now, the constitutional courts in many of the Member States have been engaged in - depending on the perspective - judicial battles or judicial dialogue with the Court of Justice of the European Union regarding the doctrine of supremacy. For reasons which merit no explanation, EU Criminal Law has become part of this equation shorty after adoption of the Framework Decision on the European Arrest Warrant.[[14]](#footnote-15) Prior to that EC/EU law had been largely *terra incognita* for national criminal courts. The initial years following entry into force of the Treaty on European Union have been marred by uncertainties. Firstly, until the Treaty of Lisbon, the suite of legal instruments employed by the European Union in criminal matters was very much different from the traditional set of regulations and directives used in the former first pillar of the EU.[[15]](#footnote-16) Secondly, the rules on their enforcement at the national level were undefined. Thirdly, the jurisdiction of the Court of Justice was limited. Even after the reform introduced by the Treaty of Amsterdam the Court had no jurisdiction to determine compatibility of national laws with EU Criminal Law. Furthermore, it provided assistance to national courts *qua* preliminary procedure only in cases of those Member States, which recognised its jurisdiction.[[16]](#footnote-17) The end result was that the judges in domestic criminal courts were, whenever in doubt, left partly to their own devices. Still, as argued by the present author elsewhere, the Court of Justice has managed to put its firm mark on the evolving EU Criminal Law.[[17]](#footnote-18) This includes the principle of mutual recognition, in particular its flagship instrument - the European Arrest Warrant. Not only its human rights credentials were challenged several times[[18]](#footnote-19) but also many aspects of the EAW *modus operandi* have reached the Kirchberg courtrooms.[[19]](#footnote-20) In this context, the *Aranyosi and Căldăraru* line of jurisprudence seemed to have been inevitable as from the early days of the Framework Decision 584/2001/JHA questions were raised if national judges may refuse to surrender on human rights grounds. The legal framework was somewhat confused as the Framework Decision 584/2001/JHA was not the finest hour of the EU legislator and the transposition effort by the national parliaments has been of questionable quality. The situation was exacerbated by the already mentioned lack of infringement proceedings in criminal matters, which - arguably - was partly to blame for incomplete transposition of EU Criminal Law to domestic legal orders.[[20]](#footnote-21)

**2.2. Thou shalt be my master: who art thou?**

In order to appreciate the complexities of *Aranyosi* *and* *Căldăraru* line of jurisprudence it is worth to explore further the competing loyalties that national criminal courts face in the very multifaceted legal environment they are operating in. It is a well-known treatise that national judges in the EU Member States serve at least two masters: the domestic and EU legal orders. On the one hand, as per national laws, the task of national judges is to enforce the domestic law. On the other hand, the same judges have been mandated by the Court of Justice to guarantee the effectiveness of EU law and, by this token, to make sure it is enforced at the domestic level. In accordance with the doctrine of primacy, as developed by the judges at Kirchberg, in cases of conflict between the domestic and EU law a national judge is governed by the *Simmenthal* mandate.[[21]](#footnote-22) Thus, in a given case it has to set aside the domestic law and to give EU law priority. This, in itself, is a challenge for the national judiciaries, in particular when countries join the European Union. Over the years its membership (and of its predecessor the European Community) has grown from the six founding countries to the current twenty-seven.[[22]](#footnote-23) This has brought under the same umbrella a very diverse group of European states with different legal traditions and cultures as well as different attitudes to non-domestic sources of law.[[23]](#footnote-24) But the legal environment in which national judges operate goes beyond the EU and national legal orders. As well-known, all Member States of the European Union are also members of Council of Europe and, by the same token, parties to the European Convention of Human Rights and Fundamental Freedoms as well as subject to scrutiny by the European Court of Human Rights. Navigating such a multifaced, and not always consistent, web of rules is at times an unenviable task. In an average case of European Arrest Warrant a domestic court, which deals with its execution, will face, on the one hand, the domestic Constitution and national rules giving effect to the Framework Decision 584/2001/JHA and, on the other hand, the Framework Decision 584/2001/JHA itself as well as the Charter of Fundamental Rights and the ECHR. In this respect the case *Melloni*[[24]](#footnote-25) and the Opinion 2/13 on accession to ECHR[[25]](#footnote-26) demonstrate the potential complexities rather well. In *Melloni* the Court of Justice was asked by the Spanish Constitutional Court whether the domestic constitutional standard of human rights protection should prevail over the Framework Decision on the European Arrest Warrant. The answer of the Court of Justice was controversial, to say the least.[[26]](#footnote-27) The Court held that while the Framework Decision 584/2001/JHA complied with the Charter of Fundamental Rights, the Spanish courts could not apply a higher standard of human rights protection developed on the basis of the Spanish Constitution. Arguably, the Court of Justice seems to have sacrificed justice on the altar of security, but that must have been for a reason: the judges at Kirchberg feared that to rule otherwise would undermine the effectiveness of the mutual recognition or, more broadly, EU law. This was confirmed a few years later in Opinion 2/13, in which the Court of Justice rejected the possibility of accession to ECHR under the terms of the negotiated Accession Agreement.[[27]](#footnote-28) One of the main reasons behind the Court’s decision was protection of the mutual recognition in criminal matters.

For criminal courts the jurisprudence on enforcement of framework decisions was of equal importance. It was clear from the start that they cannot produce direct effect as the former Article 34 TEU was unequivocal in this respect. However, the subsequent jurisprudence of the Court extended the application of the doctrine of indirect effect to framework decisions. The starting point was case C-105/03 *Pupino*[[28]](#footnote-29), while judgments in cases C-42/11 *Da Silva Jorge*[[29]](#footnote-30) and C-579/15 *Popławski*[[30]](#footnote-31) provided further guidance to national judges. But the question is whether the answers of the Court of Justice have made the tasks of national judges clearer or, *au contraire*, they have led to confusion. For instance, in case C-579/15 *Popławski* the Court of Justice held:

“the fact remains that the principle that national law must be interpreted in conformity with EU law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, with a view to ensuring that the framework decision in question is fully effective and to achieving an outcome consistent with the objective pursued by it.”[[31]](#footnote-32)

In theoretical terms such a conclusion is plausible but for many domestic judges it may seem confusing how to square the circle in a courtroom. In case of the Framework Decision on the European Arrest Warrant the challenges are exacerbated by the fact that, as already mentioned above, the domestic provisions of many Member States do not loyally mirror the EU legislation in question. For instance, the national legislators were quite economical with transposition of grounds for refusal to surrender laid down in Article 4 of the Framework Decision.[[32]](#footnote-33) Furthermore, some Member States have included the human rights grounds even though they are neither mentioned on the list of obligatory grounds or optional grounds for refusal to surrender. Yet, at the same time, as per Article 1(3) of EAW FD the legislation in question does not modify the obligation to respect the fundamental rights and principles outlined in Article 6 TEU. Does it mean it is yet another ground for refusal to surrender and, if so, to which category does it belong to (compulsory or discretionary)? Furthermore, recitals 12 and 13 of the Preamble give an indication that domestic courts should not surrender individuals on several human rights related grounds. This is an example of a legal cacophony, which demonstrates a number of important phenomena mentioned earlier in the present contribution. Firstly, it proves that the Framework Decision in question was not the finest hour of the EU legislator. It was rushed in the post 9/11 political climate and subject to unanimous approval of the Council. Big compromises usually come at a price and, in this respect, the Framework Decision in question is a fitting evidence. Secondly, it also exemplifies the quagmires of competing loyalties that the domestic judges are exposed to. On the one hand, they have the domestic Constitutions and legislation on EAW to apply. On the other hand, as per jurisprudence of the Court of Justice, the interpretation of the latter should take into account the Framework Decision 584/2001/JHA, the jurisprudence of the Court of Justice as well as the Charter of Fundamental Rights. Last but not least, the domestic courts have also to comply with the ECHR and, for instance, the right to fair trial laid down therein. It is against this background that one should look at the *Aranyosi* *and Căldăraru* line of cases.

**3. *Aranyosi and Căldăraru* and follow-up**

**3.1. Introduction**

Case *Aranyosi* *and Căldăraru* was - no doubt - a turning point. Prior to the judgment of the Court of Justice several national courts refused to surrender individuals on the human rights grounds. Furthermore, the German Constitutional Court conducted its Constitutional identity review, whereby it sent strong signals into the legal stratosphere.[[33]](#footnote-34) Inevitably, the matter in question has eventually reached the Court of Justice *qua* the preliminary ruling procedure.[[34]](#footnote-35) As it is frequently the case with landmark and groundbreaking judgments of the Court, further references from national courts have followed. Cases C-216/18PPU *LM*[[35]](#footnote-36), C-220/18PPU *ML*[[36]](#footnote-37), and C-327/18PPU *RO*[[37]](#footnote-38) are presented in turn.

**3.2. *Aranyosi and Căldăraru*: can we trust your detention conditions?**

*3.2.1. Introduction*

For the domestic courts the judgment in joint cases *Aranyosi* and *Căldăraru* offers a very much overdue clarification of how the national judges should proceed when faced with argumentation and evidence proving that at the receiving end the person being subject to EAW may be exposed inhuman treatment at detention facility(ies).[[38]](#footnote-39) The Court has ruled that even though the system is based on presumption of mutual trust and mutual recognition, in extraordinary circumstances, and subject to a number of preliminary procedural steps, a domestic court may decide to bring the surrender procedure to an end.[[39]](#footnote-40) This is not, however, by any stretch of imagination a straight-forward affair. From the point of view of national judges at least three aspects of this decision are problematic and merit attention in this article.

To begin with, the already mentioned legal quagmire of relationship between Articles 3-4a (grounds for refusal to surrender), Article 1(3) (fundamental rights) of the EAW Framework Decision and Article 4 of the Charter of Fundamental Rights comes to the fore. The key question is: do we have now an additional ground for refusal to surrender? If so, why fundamental rights were included neither in the catalogue of mandatory grounds, nor on the list of discretionary grounds as good law-making principles would dictate. It is very instructive to look how the Court of Justice framed this issue and what it means for the national authorities in charge of executing the European Arrest Warrants. Secondly, the procedural *modus operandi* developed by the Court of Justice is plausible at first sight. When in doubt, the national court should first make a general determination of the situation at the receiving and, should that be necessary, also seek a clarification from its counterpart in the requesting country. The key questions, however, are what kind of information may be used in the first instance, and, in turn, what sort of clarification may requested from a counterpart in another Member State and how comprehensive it should be. Thirdly, under what circumstances the national court can refuse to surrender, or, as euphemistically put by the Court of Justice, may bring the surrender procedure to an end.

*3.2.2. Aranyosi and Căldăraru: a new ground for non-execution of European Arrest Warrant?*

The substantive part of the judgment starts, as one would expect, with a truncated expose covering the foundations of the mutual recognition in criminal matters. The picture drawn by the judges at Kirchberg seems to be clear: the system is based on mutual trust and benefits from the presumption that the Member States provide “equivalent and effective protection of the fundamental right recognized at EU level, particularly in the Charter”.[[40]](#footnote-41) The trouble starts if one reads paragraph 80 of the judgment in a literal fashion. The Court emphasizes that an authority, which executes a European Arrest Warrant may refuse to do so on grounds “exhaustively listed” in Articles 3, 4-4a of Framework Decision 584/2002/JHA. The choice of words employed by the Court of Justice makes it unequivocally clear that the list of grounds is exhaustive. To put it differently, it is the limit. If such a reading were to be correct, it would mean that national authorities may not, at least as per EAW Framework Decision, refuse to surrender on the human rights grounds. Then, however, the Court of Justice ventures away from the Framework Decision itself and continues its analysis by putting the centre of gravity on Article 4 of the Charter of Fundamental Rights.[[41]](#footnote-42) In this respect Article 1(3) of the Framework Decision serves as the bridge between these legal acts. It provides, that the EAW Framework Decision, does not modify the obligation to respect fundamental rights enshrined in Article 6 TEU. This, as clarified by the Court of Justice in the commented case, also comprises the Charter of Fundamental Rights. The judges confirm, in turn, that the Charter applies to the case at hand as application of national provisions transposing the EAW Framework Decision constitutes implementation of EU law, which - as per Article 51(1) – is *conditio sine qua non* for application of the Charter.[[42]](#footnote-43) For a national judge a confusion may allegedly arise from comparative analysis of interpretation of Article 1(3) of the EAW Framework Decision by the Advocate General Bot and the conclusions of the Court.[[43]](#footnote-44) Arguably, it is one of those examples where it would have served national judges if the Court of Justice openly agreed or disagreed with its own advocate general.[[44]](#footnote-45) While Advocate General Bot claimed that the provision in question may not serve as a ground for refusal to surrender, the Court of Justice used it as a vehicle to a conclusion, which offers a mixed bag of legal bases. The judges’ final conclusion is based on Article 1(3), 5 and 6(1) of the EAW Framework Decision. It is notable that Articles 3, 4 and 4a covering the grounds for non-execution of the European Arrest Warrant are nowhere to be seen. This, as argued later in this article, may have been the reason behind a very cautious wording employed by the Court of Justice to describe options available to a national court, should its doubts be not discounted after clarifications coming from the requesting country.

*3.2.3. Towards a creative interpretation of the EAW Framework Decision*

Voltaire acutely observed that “doubt is an uncomfortable condition”.[[45]](#footnote-46) It is particularly so when a national judge doubts the respect for fundamental rights in the requesting country and considers whether to surrender an individual or not. Arguably, the references in cases joint cases *Aranyosi and Căldăraru* also put the Court of Justice in an uncomfortable position as it forced the judges to engage in a balancing act of reconciling the mutual trust and mutual recognition with risks to respect for fundamental rights. At this stage of the analysis it is fitting to focus on how the Court of Justice interpreted the Charter of Fundamental Rights and the way it designed a procedure that national judges should follow when they find themselves in the same predicament as *Hanseatisches Oberlandesgericht* in Bremen (from which both references originated).

To begin with, the Court of Justice emphasised that when national authorities deal with the execution of the European Arrest Warrant, they need to take into account Article 4 of the Charter, which prohibits inhuman and degrading treatment or punishment.[[46]](#footnote-47) Since it is modelled on Article 3 of ECHR it has to be interpreted accordingly, that is taking into account the jurisprudence of the European Court of Human Rights.[[47]](#footnote-48) The question that emerged in cases *Aranyosi* and *Căldăraru* is how to square the circle, taking into account the Framework Decision 584/2002/JHA and Article 4 of the Charter of Fundamental Rights. To put it differently, how a national judge should proceed when, on the one hand, Articles 3-4/4a of the Framework Decision provide for an exhaustive catalogue of grounds for refusal to surrender and yet, on the other hand, such a surrender may not expose a person concerned to inhuman and degrading treatment. In this respect the Court of Justice has proven to be quite creative, developing a two-tier test that should be followed. As will be argued below, it provides some clarity as a matter of principle, but at the same time, a fair degree of uncertainty when it comes to national courtrooms. This is further elaborated in turn.

As a first step the executing judicial authority must establish whether there is a risk of degrading treatment at the detention conditions in the receiving country. Such argumentation with evidence is likely to be submitted by defence lawyers aiming at non-surrender of their clients. The question is what kind of evidence must be submitted to prove the point. In this respect para. 89 of the judgment is very instrumental. The Court of Justice ruled that:

“the executing judicial authority must, initially, rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention”.[[48]](#footnote-49)

The test is not only about the categories and quality of information that will be employed to make the assessment but also about the substantive criteria to be used to determine what is specific enough. In this respect the following paragraph of the judgment is crucial as the Court of Justice elaborates further on the detention standards developed in its jurisprudence by the European Court of Human Rights. It held:

“it follows from the case-law of the ECtHR that Article 3 ECHR imposes, on the authorities of the State on whose territory an individual is detained, a positive obligation to ensure that any prisoner is detained in conditions which guarantee respect for human dignity, that the way in which detention is enforced does not cause the individual concerned distress or hardship of an intensity exceeding the unavoidable level of suffering that is inherent in detention and that, having regard to the practical requirements of imprisonment, the health and well-being of the prisoner are adequately protected (see judgment of the ECtHR in *Torreggiani and Others v. Italy* […].” [[49]](#footnote-50)

All the above is plausible as far as the principles are concerned. Yet, when one looks at it through the lenses of national judges several questions emerge. While it is true that it gives the domestic courts discretion and flexibility, at the same time it merely provides vague indications and puts the uniform application of EU law at risk. Firstly, the test laid down in para. 89 of the judgment is characterised by a rather vague wording. The adjectives employed by the Court of Justice are quite open-ended. The test requires a national judge to base the assessment on data, which is: “objective, reliable, specific and properly updated”. The first three notions are largely linked to the source and quality of information, where the assessment of a national judge will be rather subjective. The fourth criterion requires a more objective evaluation and, thus, it remains the easiest in this set. In practical terms, the key dilemma that the domestic judges face is whom to trust. To put it differently, which sources may be treated as trustworthy, so that to guarantee that information meets the discussed requirements. The Court of Justice, seemingly aware of the matter in question, indicated that judgments of international courts as well as national courts may be taken into account. This, obviously, includes the judgments of the European Court of Human Rights. Furthermore, documents produced by Council of Europe or UN related authorities will also serve the purpose. Surely, the reports of the Committee for Prevention of Torture, operating within the Council of Europe, can be of use. It should be noted, however, that the list laid down in para. 89 of the judgment is non-exhaustive. Hence, it is for national judges to make a selection of sources of information when acting *ex officio* and to decide what kind of material submitted by defence lawyers should be treated as credible. It leaves it open whether sources coming from NGOs, local or international, should be considered by national judges as “objective” and “reliable”.

From the academic point of view, one may conclude that the Court of Justice found the balance between providing assistance to national courts and leaving them a solid margin of discretion. In reality, however, the conclusions of the Court are based on a rather optimistic presumption that national judges are *au courant*, for instance,with jurisprudence of the European Court of Human Rights or outputs of such outlets as already mentioned Committee for Prevention of Torture. It is also based on a presumption that national judges and their clerks are fluent in foreign languages. This is particularly relevant for the matter at hand as the language regime of the Council of Europe is rather modest when compared to the European Union. To put it differently, judgments or reports are not – as a rule – translated *en masse* into languages of all members of Council of Europe. A reminder is fitting, that the EAW proceedings are subject to a very tight time regime leaving very little space for translation.

As already mentioned, the Court of Justice requires the information to be “specific”, which – again – may be considered as problematic. A simple question emerges as to what is specific enough to satisfy the test. Would the level of detail required by national judge depend on a particular requesting country? For instance, should the level of detail correspond to the level of trust in the judiciary, law enforcement apparatus and detention conditions in the requesting country? To put it differently, should less trust translate into higher level of detail required to meet the test? It has been left to the national practice to decide.

Once the “objective, reliable, specific and properly updated [information] on detention conditions” is collected the executing authority needs to determine whether there is “a real risk of inhuman or degrading treatment by virtue of general conditions of detention in the issuing Member State”. If there is no such risk, then the domestic authority has to proceed with the execution of the European Arrest Warrant (providing there are no other grounds for refusal to surrender). If, however, systemic or generalised deficiencies existing, their existence is not *per se* an indication that a person, whose is subject of a European Arrest Warrant, will be exposed to a treatment that would be in breach of Article 4 of the Charter of Fundamental Rights. This needs to be determined by the executing authority separately by liaising with its counterparts in the requesting country. For that purpose, the procedural mechanism laid down in Article 15(2) of the EAW Framework Decision should be employed. The Court of Justice clarified, in very general fashion, that the evidence obtained must, again, be “objective, reliable, specific and properly updated” in order to verify if there are “substantial grounds” to believe that a person in question “will run a real risk” of being subject to inhuman or degrading treatment.[[50]](#footnote-51) It may include information about *modi operandi* for monitoring of detention conditions. However, all other details are left to the decision of national judges, which – in itself – opens a host of problems and challenges. For instance, how detailed such a request for supplementary information should be and should the national court of the requesting country be trusted blindly. Not surprisingly, the matters in question have returned to the Court of Justice like a boomerang in cases discussed later in the present article.

Once all necessary general and individualised information is in place it is for the national executing authority to decide whether to surrender the person in question or not. In this respect, the Court of Justice has provided general guidance how the domestic judges should proceed. Should the conclusion be that there is a “real risk of inhuman or degrading treatment” the execution of the European Arrest Warrant must be postponed. However, as the Court of Justice phrased it, the execution “cannot be abandoned”.[[51]](#footnote-52) On the one hand, the postponement of surrender gives the executing authority a chance to seek further clarification from the requesting court, and, for the latter, one more opportunity to discount the doubts as to existence of risk of inhumane or degrading treatment of the person subject to the European Arrest Warrant. On the other hand, the solution preferred by the Court of Justice triggers numerous challenges for the national courts related to, for instance, detention of the person concerned during the period of suspension. Furthermore, it is entirely unclear how long such a suspension should last. The Court of Justice has only provided an indication that the time period should be “reasonable”.[[52]](#footnote-53) This is a blessing and a curse. On the one hand, it gives the national judges’ discretion but, on the other hand, it painfully lacks detail and offers limited guidance, especially that in the next step a national court may take its final decision to refuse to surrender.

As already mentioned, the Court of Justice has confirmed its earlier jurisprudence in joint cases *Aranyosi and Căldăraru* that limitations of the principles of mutual recognition and mutual trust are on the menu, however only in exceptional circumstances. As the commented judgment clarifies, such exceptional circumstances may occur when the national court in charge of execution of a European Arrest Warrant cannot discount doubts as to the risk of inhuman or degrading treatment that a person subject to EAW may face. Should that be the case the domestic judges may bring the procedure to an end. The already mentioned euphemistic language employed by the Court is a departure from the statutory vocabulary used by the EU legislator in the EAW Framework Decision. *Raison d'être* behind the decision not to call a spade a spade will remain locked behind the doors of the deliberation room at Kirchberg. It is, however, worth emphasising that the Court of Justice deliberately talks about bringing procedure to an end, instead of refusal to surrender. Perhaps this is related to the fact that neither Article 3, nor Articles 4-4a of the EAW Framework Decision (which deal with grounds for non-execution of the surrender requests) are mentioned in the final conclusions of the Court. Does this mean that the Court has developed a parallel *modus operandi* on the top of the existing grounds for non-execution? Alas, this is not clear from the judgment at hand.

*3.2.4. Conclusions*

Overall, the judgment in joint cases *Aranyosi and Căldăraru* triggers – not surprisingly - mixed emotions. On the one hand, it offers a long overdue clarification, and, in a way, it brings EU *acquis* in sync with domestic practice in some of the Member States. Furthermore, it eases the loyalty conflicts discussed above, which face the national judges in such cases. As argued earlier, while providing a clarification this judgment also triggers a host of new challenges and questions for national judges. Not surprisingly some of them have found their way to the Court of Justice *qua* subsequent references for preliminary ruling, which are analysed in turn.

**3.3. Case C-220/18PPU ML: can we really trust your detention conditions?**

*3.3.1. Introduction*

Case C-220/18PPU *ML* is surely a follow-up to joined cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* and proves the point made by W. Van Ballegooij and P. Bárd that the latter case was just the beginning of the dialogue between national courts and the Court of Justice.[[53]](#footnote-54) The judgment in case *ML* also fits into a more general trend that whenever the Court of Justice delivers a ground-breaking judgment setting a principle it frequently shies from giving it a satisfactory level of detail.[[54]](#footnote-55) Consequentially, domestic courts follow with further references, seeking a clarification of the earlier jurisprudential output.[[55]](#footnote-56) The *ML* case is ideal to demonstrate the phenomenon in question and, no doubt, further references are due to follow. For the purposes of the analysis that follows it is enough to provide a reminder that the gist of the reference was centred around two main issues.[[56]](#footnote-57) Firstly, whether the *Aranyosi and Căldăraru* test requires verification of information regarding all detention conditions in the receiving countries or, in alternative, only those detention centres where the person covered by the European Arrest Warrant is likely to be transferred to. Secondly, the question was how detailed the request for information should be. As explained earlier in the present article, on the one hand, the judgment in *Aranyosi and Căldăraru* gives the national authorities discretion to determine what kind of information is specific enough to meet the test. On the other hand, the question emerges if there are limits to the discretion. Arguably, the latter may be inextricably linked to the level of trust in the judicial system at the receiving end. To put it differently, the less trust, the more information may be required and considered to be desirably specific. It could, of course, also work the other way around: the more trust, the less information is required.

*3.3.2. How deep is your trust?*

In the case C-220/18PPU *ML* the levels of trust in the Hungarian detention centres were, perhaps, not particularly impressive. This was hardly surprising bearing in mind the evidence available to the referring court, comprising, *inter alia*, judgments of the European Court of Human Rights.[[57]](#footnote-58) Yet, when looking at the requests for clarification submitted to the Hungarian authorities, it may well be that the case was handled by overzealous judges, who wished to know as much as possible about the Hungarian detention facilities. Either way the Court of Justice was asked for clarification of the judgment in *Aranyosi and Căldăraru.* The preliminary observations made by the judges at Kirchberg offer domestic judges, including the referring court, nothing new. The Court of Justice has provided the systemic background of the principles of mutual trust and mutual recognition, which is well-known from its previous jurisprudence.[[58]](#footnote-59) However, the parts of the reasoning that follow are undoubtedly very useful from the perspective of national judges.

To begin with, the Court of Justice has attended to the relevance of a new legal remedy available as per Hungarian law to challenge the legality of detention conditions. The judges clarified that the existence of such remedy may not, *per se*, rule out the risk of inhuman and degrading treatment at detention centres. By the same token, it does not free the executing judicial authority from the obligation to conduct the general assessment required by the *Aranyosi and Căldăraru* test. The Court in turn has proceeded to clarify how much information may be required as a supplementary clarification by the executing authority. It is notable that in the case at hand the German authorities sent a total of 78 questions to their Hungarian counterparts. This, as argued earlier, may be the evidence of limited trust combined, perhaps, with a pinch of overzealousness. Nevertheless, it allowed the Court of Justice to provide a necessary clarification of its earlier ruling in *Aranyosi and Căldăraru.* Firstly, the executing judicial authority should make enquiries only related to the detention conditions in prisons, where the person subject to European Arrest Warrant may be detained. This includes outlets where the surrendered person will be detained on temporary or transitional basis. *Au contraire*, this precludes general requests covering all national prisons. Secondly, only conditions of detention which are relevant for determination of a real risk of inhuman or degrading treatment should be enquired about and used for the assessment. In this respect, the Court of Justice has relied - as indicators – on relevant standards developed by the European Court of Human Rights.[[59]](#footnote-60) Bearing in mind lack of relevant EU standards this is the most obvious choice, which – among others – provides for domestic judges a useful clarification of interaction between EU law and ECHR standards. By the same token, it helps them to navigate the multifaced legal environment they are exposed to.

**3.4. Case C-216/18PPPU LM: errrm…..are you independent enough to trust you?**

*3.4.1. Introduction*

Case C-216/18PPPU *LM* was delivered against a very precarious political background of a Member State, which has downgraded its rule of law standards in a staggering anti-democratic blitz. Ever since the elections in 2015 the Polish Government, the Parliament and the President, driven by the right wing nationalist *Prawo i Sprawiedliwość* (Law and Justice, *SIC!)*, have implemented a series of reforms, which largely de-activated the country’s Constitutional Tribunal and heavily undermined the independence of the entire judiciary, including most recently also the Supreme Court.[[60]](#footnote-61) To put it differently, the reforms have considerably blurred the boundaries between the executive and the judiciary, raising the fundamental question whether Poland was still meeting the standard laid down in Article 2 TEU. Not surprisingly this attracted the attention of several international actors[[61]](#footnote-62) and triggered the alarm bells around the European Union. Alas, it has also raised the questions whether the existing *modi operandi* employed by the European Union to remedy breaches of EU law by the Member States are fit for purpose and whether they can be utilized when the rule of law is at stake.[[62]](#footnote-63) When this article was completed the European Commission was at the stage of testing the waters if the standard infringement proceedings based on Article 258 TFEU could be invoked. It has already submitted two infractions to the Court of Justice where it openly challenged the compatibility of the changes in the Polish law with, among others, Article 19 TEU.[[63]](#footnote-64) At the same time, it has triggered the *par excellence* political procedure based on Article 7 TEU.[[64]](#footnote-65) In course of it the European Commission identified several threats to respect for the EU values laid down in Article 2 TEU and as per procedural requirements laid down in Article 7(1) TEU it issued a reasoned proposal.[[65]](#footnote-66) Furthermore, several Polish courts, including the Supreme Court, have proceeded with references for preliminary ruling aiming for a clarification if the alleged reforms, which led to a purge in judiciary, were compatible with EU law.[[66]](#footnote-67) Not surprisingly, questions were also raised in national courts across the European Union whether the Polish judicial system should continue to benefit from principles of mutual trust and mutual recognition. This matter, too, reached the Kirchberg courtroom in case C-216/18PPPU *LM*.

*3.4.2. The quagmires of the High Court of Ireland*

The reference in case C-216/18PPPU *LM* was submitted by the High Court of Ireland, which received a number of European Arrest Warrants issued by the Polish authorities with the view of conducting criminal prosecution of a Polish national, who was accused of drug trafficking. It should be noted that at the material time the already mentioned Article 7 TEU procedure was already triggered by the European Commission and its recommendations made available to the public. Bearing this in mind the referring court faced the dilemma whether to clear the surrender of the person in question to Poland or, in the alternative, whether to refuse to do so, taking into account the fact that Polish courts are no longer independent. The latter, potentially, could expose the person surrendered to an unfair trial. Not surprisingly, the High Court of Ireland proceeded with a reference for preliminary ruling to the Court of Justice. The referring court not only analysed *in extenso* the situation in Poland but also questioned whether the *Aranyosi and Căldăraru modus operandi* is fit for purpose in the case at hand. According to the High Court of Ireland, it is questionable whether any clarification received from the requesting judicial authority should be treated as acceptable. To put it differently, would assurances of independence issued by a national court that is not independent, discount the doubts of a court asked to entertain a request for surrender.[[67]](#footnote-68) Not surprisingly, the Court of Justice decided to employ the urgent preliminary ruling procedure and, bearing in mind the gravity of the situation and importance of the legal issues raised, the case was assigned to the Grand Chamber.

*3.4.3. Aranyosi and Căldăraru revisited*

The judgment rendered by the Court of Justice raises a plethora of legal issues and merits a comprehensive analysis. This, no doubt, is likely follow in the academic literature.[[68]](#footnote-69) The present article, as outlined in the introduction, aims to look at *Aranyosi and Căldăraru* line of jurisprudence through the lenses of national judges. Hence, the analysis that follows focuses only on selected legal issues raised by the judges at Kirchberg.

To begin with, the Court of Justice made an attempt to draw a line between Article 7 TEU proceedings and the EAW Framework Decision. A reminder is fitting that the latter provides, albeit only in the preamble, that the European Council may suspend the application of the European Arrest Warrant machinery only in cases of serious and persistent breach of principles laid down in Article 6 (1) TEU. For that to happen, a unanimous decision of the European Council is required as per Article 7(2) TEU. The Court of Justice clarified that in such event, the executing judicial authority would be required to automatically refuse the execution of a European Arrest Warrant. In the current political constellation this scenario is merely a theoretical proposition that is very unlikely to materialise. The political character of Article 7 TEU proceedings, combined with a dominant role prescribed to the Member States (acting either as the European Council or the Council) and the unanimity requirement for the key decision as well as the fact that two allied Member States are currently subject to the procedure, makes any determination of serious and persistent breach of EU values a highly illusory exercise. This, in a nutshell, means that the suspension of the EAW mechanism *vis-à-vis* Poland or Hungary is not on the cards. It does not, however, change the fact that in course of EAW proceedings national courts face the dilemmas similar to those expressed by the referring court in case C-216/18PPPU *LM*. In this respect the Court of Justice has offered a solution along the lines of the *Aranyosi and Căldăraru* ruling.

To begin with, the Court of Justice made it clear that until the European Council freezes the EAW mechanism in relation to a particular Member State, the national executing authorities may refuse to give effect to European Arrest Warrants in exceptional circumstances after a thorough individual assessment if in a particular case the person surrendered could be exposed to unfair trail, resulting from lack of independence of the domestic court. The Court of Justice has ruled that such a decision may be made on the basis of Article 1(3) of EAW Framework Decision. This, as compared to *Aranyosi and Căldăraru* ruling and its constructive ambiguity discussed above, is a welcome clarification. Once again it shows an inventive side of the Court of Justice and the way in which it interprets EU law. It is notable, however, that the judges at Kirchberg again opted for phraseology departing from the language of the EAW Framework Decision. As the Court of Justice put it, the executing authority “may refrain […] to give effect to a European arrest warrant”.[[69]](#footnote-70) In practical terms there is, if any, very little difference between “refraining” and “non-executing” a request for surrender. It seems now confirmed that the Court of Justice has opted to turn Article 1(3) of EAW Framework Decision into an additional ground for refusal to surrender. The picture emerging from the judgment in question is that such a decision should be neither automatic nor taken lightly. Hence, the bulk of the Court’s reply to the Irish High Court comprises a detailed account of what amounts to judicial independence and what factors should be taken into account by national courts when applying the *Aranyosi and Căldăraru* test.

There are two central elements in the Courts’ reasoning. Firstly, the Court of Justice found it fitting to elaborate *in extenso* on the importance of rule of law and, in more general terms, the meaning and the scope of Articles 2 and 19 TEU. Secondly, the judges at Kirchberg have addressed the impact of rule of law breaches on the European Arrest Warrant mechanism. It is not surprising that the Court of Justice has put so much emphasis on the rule of law matters. In many respects the judges operate in a legal lacuna and face competence dilemmas. On the one hand, respect for EU values is a pre-condition for EU membership and it is at the heart of EU integration. On the other hand, the EU operates under the principle of conferral, which – in general terms – precludes interventions into areas not falling within its competences.[[70]](#footnote-71) One of the problems currently faced by the EU and its institutions is that the very generous wording of Article 2 TEU is not matched by extensive competences in rule of law matters. Nevertheless, it is rather obvious that respect for rule of law and existence of independent national judiciaries are *conditiones sine qua non* for application as well as effectiveness of EU law. This link has been extensively dealt with by the Court of Justice in Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*[[71]](#footnote-72) and the discussed judgment case C-216/18PPPU *LM* cements this emerging line of jurisprudence and equips the Court of Justice with legal ammunition to deal with the already mentioned rule of law infringement proceedings against Poland and references from the Polish Courts. One has to agree with Matteo Bonelli and Monica Claes that case C-64/16 *Associação Sindical dos Juízes Portugueses* arrived at a perfect time and amounted to judicial serendipity.[[72]](#footnote-73) It allowed the Court of Justice to develop key principles in a case of lesser political gravity. By the same token, it paved the way for highly politicised cases regarding respect for rule of law in Poland and Hungary. As already noted, case C-216/18PPPU *LM* has been the first in line. The Court of Justice has emphasised that judicial independence is at the heart of the fundamental right to fair trial, which is guaranteed by Article 47 of the Charter of Fundamental Rights.[[73]](#footnote-74) The Court of Justice has also brought to the fore Article 19 TEU, which “gives concrete expression to the value of the rule of law affirmed in Article 2 TEU”.[[74]](#footnote-75) It creates an obligation for national courts to guarantee full application of EU law in the Member States and protect the rights of individuals. This is a well-known treatise, which with entry into force of the Treaty of Lisbon, found a proper legal basis in the EU Founding Treaties (Article 19 TEU). In this context independence of national courts is a core requirement, also for effective functioning of the EAW, based on mutual trust and mutual recognition. The Court of Justice has clarified in turn that the decisions on issuing and on execution of the European Arrest Warrants need to be taken by independent courts. Furthermore, in para. 57 the judges have rather boldly emphasised the obvious that even in the areas not covered by EU law the Member States have to observe the ECHR, in particular the right to fair trial. The Court has in turn provided guidance to national courts as to factors, which should be taken into account by the executing judicial authority when conducting an assessment of state of affairs in the requesting country. For instance, the Court of Justice delved into external and internal aspects of judicial independence.[[75]](#footnote-76) This led to the exact *modus operandi* the national courts should follow. The Court of Justice has followed in this respect the test laid down in judgment *Aranyosi and Căldăraru*, requiring the national judges to start with a general assessment and then, should doubts arise, follow-up with an individual analysis based on clarifications received from the requesting judicial authority. The latter is required even, as in the case at hand, when the European Commission publishes a reasoned proposal and, by the same token, triggers Article 7 TEU proceedings. The two-step process has been summarised by the Court of Justice in the following fashion:

“If, having regard to the requirements noted in paragraphs 62 to 67 of the present judgment, the executing judicial authority finds that there is, in the issuing Member State, a real risk of breach of the essence of the fundamental right to a fair trial on account of systemic or generalised deficiencies concerning the judiciary of that Member State, such as to compromise the independence of that State’s courts, that authority must, as a second step, 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.”[[76]](#footnote-77)

This amounts to *Aranyosi and Căldăraru* revisited and does not follow the suggestions made by Advocate General Tanchev in his opinion.[[77]](#footnote-78) Furthermore, it fails to address the concerns raised by the Irish High Court in its reference for preliminary ruling about the second step, which for reasons explained further below, may prove not to be fit for purpose. When it comes to the general assessment, which constitutes the first step, the Court of Justice has followed the test laid down in case *Aranyosi and Căldăraru.* In a nutshell, the executing judicial authority must make its assessment based on information that is “objective, reliable, specific and properly updated”.[[78]](#footnote-79) The Court of Justice has indicated that the material provided by the European Commission in its reasoned proposal based on Article 7(1) TEU. Although this is not mentioned by the Court, one should assume that reports of other bodies could be taken into account as well. This would include, for instance, reports of the Venice Commission, which operates under the auspices of the Council of Europe.[[79]](#footnote-80) *Prima facie*, the Courts’ conclusion is sound, yet, it does not take into account the “whom to trust” dilemma. Not surprisingly, the reports of the Venice Commission as well as the reasoned proposal of the European Commission have been discredited by the Polish authorities, which prefer and promote an alternative understanding of independence of judiciary and the rule of law. The question is whether this in itself may lead to confusion among the national courts of other Member States. Should they trust face value the assessments made by international institutions or the national authorities of a Member State concerned? The first phase, however, seems to be a relatively easy step to go through when one looks further at the second procedural step required by the Court of Justice. Indeed, particular challenges may arise when the national executing authority proceeds to engage in dialogue with the authorities of the requesting country. This boils down to a fundamental question whether one can trust an assessment and evidence provided by a national court, which – allegedly – is not independent. In the case at hand, the doubts expressed by the Irish High Court were exacerbated by a rather blunt statement courtesy of the Polish Deputy Minister of Justice, who acted in breach of presumption of innocence by alluding that the person, who is subject to the European Arrest Warrant, is a criminal.[[80]](#footnote-81) This has surely undermined already cracking trust in the Polish judiciary and its independence. In case C-216/18PPPU *LM* the Court of Justice concluded that if doubts of the requested court cannot be discounted it may refuse to surrender a person requested under the European Arrest Warrant. This has to happen when the executing judicial authority concludes that there is “a real risk that the individual concerned will suffer in the issuing Member State a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial”.[[81]](#footnote-82) In this respect it is interesting to note the two differences between the discussed judgment and decision of the Court of Justice in *Aranyosi and Căldăraru*. Firstly, Article 1(3) of the EAW Framework Decision is employed unequivocally as the legal basis for such a decision. Secondly, the Court uses a different language to describe the actions of executing authorities. While in *Aranyosi and Căldăraru* the Court talks about bring EAW procedure to an end, in the present case the judges at Kirchberg have instructed their domestic counterparts to “refrain from giving effect to the European Arrest Warrant”.[[82]](#footnote-83) Irrespective of the phraseology, the end result is, however, just the same.

*3.4.4. Conclusions*

Case C-216/18PPPU *LM* arrived at a crucial time and, not surprisingly, it has triggered a lot of commotion. From the point of view of principles of mutual trust and mutual recognition it encapsulates well the evolving legal landscape, which no longer features blind and unconditional trust in judicial systems of other Member States. For many national judges it is a welcome development, even though, as academic commentators put it, the case-by-case *modus operandi* laid down therein requires passing of “Herculean hurdles”.[[83]](#footnote-84) The High Court of Ireland, which submitted the reference in the present case, eventually ruled on 19 November 2018, that the surrender to Poland should be ordered as, despite systemic and generalised deficiencies in the independence of the Polish judiciary, there was no real risk that the requested person would be exposed to a flagrant denial of its right to fair trial.[[84]](#footnote-85) This, arguably, is one of the first cases and many will follow. The key question is how domestic courts will proceed in the months to come. Since general suspension of the European Arrest Warrant system is neither politically possible nor desired, the burden to assess how much trust there is left in the Polish judicial system will remain on the shoulders of national judges.

**3.5. Mutual trust and mutual recognition at the time of Brexit**

*3.5.1. Introduction*

The final judgment of this saga deals with the operation of the principles of mutual trust and mutual recognition at the time of Brexit. As well-known and documented in the academic literature, the UK’s withdrawal from the European Union will have profound legal implications for both, the departing country and the remaining twenty-seven Member States of the European Union. This, of course, extends to the Area of Freedom, Security and Justice, even though the United Kingdom has for years benefited from a variety of opt-outs.[[85]](#footnote-86) Not surprisingly the uncertainties surrounding the withdrawal itself, as well as the shape of post-Brexit relations between the EU and the UK, have triggered doubts of national judges dealing with the European Arrest Warrants and other mutual recognition instruments. This eventually led to the reference for preliminary ruling from the Irish High Court and, consequentially, to the judgment of the Court of Justice in case C-327/18PPU *RO*.

*3.5.1. Does Brexit undermine mutual trust?*

As the title of the present section suggests, the key question that the Court of Justice had been asked to answer is whether pending withdrawal of the United Kingdom from the European Union undermines the principle of mutual trust and, as a result, also the mutual recognition underpinning the judicial co-operation in criminal matters. In a nutshell, the judges at Kirchberg answered in the negative. To put it differently, as long as a Member State remains in the European Union - even having triggered the withdrawal procedure – it is business as usual. As the Court put it:

“it must be observed that such a notification does not have the effect of suspending the application of EU law in the Member State that has given notice of its intention to withdraw from the European Union and, consequently, EU law, which encompasses the provisions of the Framework Decision and the principles of mutual trust and mutual recognition inherent in that decision, continues in full force and effect in that State until the time of its actual withdrawal from the European Union.”[[86]](#footnote-87)

The judges agreed with the Advocate General Szpunar that to rule to the contrary would amount to unilateral suspension of the EAW Framework Decision and, at the same time, it would be in breach of its recital 10, which permits only for suspension taken in the context of Article 7 TEU proceedings. So, to cut a long story short, the notification of intention to withdraw from the European Union does not *per se* constitute a circumstance justifying refusal to surrender under the EAW procedural apparatus. Yet, as the Court of Justice made clear, it does not de-activate the obligations resting on the shoulders of national judges as per *Aranyosi and Căldăraru* ruling. In order to discount the doubts of the referring court and, presumably, also other executing authorities, even when Article 4 of the Charter ceases to apply to the United Kingdom on the date of withdrawal, it will be still bound by the ECHR, in particular its Article 3, which also prohibits inhuman and degrading treatment. In equal measure the Court of Justice attempted to discount the trepidation of the referring court as regards a continuous application of the principle of specialty.

*3.5.2. Conclusions*

Judgment in case C-327/18PPU *RO* has arrived at a crucial time, when many legal aspects of Brexit remain unknown. It makes it clear that the notification of intention to withdraw by itself does not undermine the mutual trust and the mutual recognition. Yet, it gives national executing authorities room for manoeuvre when they handle requests for surrender closer to the date of Brexit. This is achieved by extending the application of *Aranyosi* and *Căldăraru* test. When this article was completed all bets were off. In a scenario guaranteeing legal certainty at the time of political chaos, the United Kingdom would leave the EU in accordance with the Withdrawal Agreement. If that were the case, it would be subject to a transitional period during which the mutual recognition instruments will continuously apply. At the same time, a chaotic unilateral withdrawal should not be dismissed. Leaving political speculations aside, if it were to materialise, it would mean that EU law, including EAW Framework Decision would apply to the United Kingdom until 2020 (or even longer). Would that remain business as usual? Time will tell, however, more references for preliminary ruling to the Court of Justice seem inevitable.[[87]](#footnote-88)

**4. Conclusions**

What does the judgment in joint cases *Aranyosi* and *Căldăraru* and the follow-up decisionsleave us with? To begin with, it has been a breaking point for the mutual recognition and mutual trust in criminal matters. Although carefully worded, and setting the *modus operandi* that should be followed in case of doubts about the respect for fundamental rights at the receiving end, the Court in fact has opened the door national judges to refuse execution of the European Arrest Warrants. It should be noted that everyday practice will determine whether the door has been made merely ajar or wide open. On the one hand, the discussed judgments are the answers to dilemmas faced in the multifaceted legal environment. On the other hand, they are a challenge to the principle of mutual trust. EU law now allows domestic judges to question openly the trust in their counterparts and the legal systems of other Member States. At the same time, this eases the tensions between the obligations resting on the shoulders of domestic judges, courtesy of national law combined with ECHR and Framework Decision 584/2001/JHA on the European Arrest Warrant (and some other mutual recognition instruments). In more general terms, as argued by L. Mancano, the shift in the jurisprudence of the Court of Justice “restores the balance between fundamental rights protection and enforcement demands in the European Arrest Warrant system”.[[88]](#footnote-89) By the same token the Court of Justice has movedthe centre of gravity from security closer to justice. The question is whether the conclusions reached in joined cases *Aranyosi* and *Căldăraru* should be now also addressed by the EU legislator. To put it differently, if a revision of EAW Framework Decision were to materialise, should Articles 3-4a be amended in order to codify the jurisprudence coming from Kirchberg? It should be noted, that a precedent has been set in Directive 2014/41/EU on European Investigation Order, which envisages fundamental rights as a non-recognition ground.[[89]](#footnote-90) Yet, for now, any formal revision of EAW Framework Decision remains merely a theoretical proposition as there is clearly no appetite to proceed with any revision with the legal act in question. This, in turn means, that the question whether to surrender or not, when in doubt about the respect for fundamental rights, will remain to be answered solely by national courts (assisted by the Court of Justice). And this will boil down to the fundamental question whether their counterparts in other Member States can be trusted. Trust has not been lost yet, however, as cases discussed in this article demonstrate, it has been put to a test.

1. \* Professor of Law of the European Union, Westminster Law School, London. [↑](#footnote-ref-2)
2. C. Baker (ed.), *Ernest Hemingway Selected Letters 1917-1961*, Letter to Dorothy Connable (17 February 1953), New York 1981, at p. 805. [↑](#footnote-ref-3)
3. For an academic appraisal see, *inter alia*, A. Suominen, *The Principle of Mutual Recognition in Cooperation in Criminal Matters*, Brussels 2011; Ch. Janssens, *The Principle of Mutual Recognition in EU Law*, Oxford University Press, Oxford 2013; L. Klimek, Mutual Recognition of Judicial Decisions in European Criminal Law, Springer 2017; W van Ballegooij, *The Nature of Mutual Recognition in European Law*, Intersentia, Antwerp 2015; E. Xanthopoulou, *Mutual trust and rights in EU criminal and asylum law: Three phases of evolution and the uncharted territory beyond blind trust*, 55 CMLRev. (2018) pp. 489–509. For doubts if this was the right way forward see, for instance, S. Peers, *Mutual recognition and criminal law in the European Union. Has the Council got it wrong?*, 41 CMLRev. (2004) pp. 5-36. [↑](#footnote-ref-4)
4. See, *exempli gratia*, V. Mitsilegas, *The Limits of Mutual Trust on Europe’s Freedom, Security and Justice. From Automatic Inter-State Cooperation to the Slow Emergence of the Individual*, 31 YEL (2012) 2012, pp. 319–372. [↑](#footnote-ref-5)
5. See, for instance the reference for preliminary ruling submitted by the Finnish Korkein oikeus in case C-105/10 *Public prosecutor v Malik Gataev, Khadizhat Gataeva*, OJ 2010, C 100/32. The reference, however, was subsequently withdrawn by the referring court and removed from the register of the Court of Justice. [↑](#footnote-ref-6)
6. Post Lisbon Treaty this stems from Article 19 TEU, as confirmed by the Court of Justice, *inter alia*, in case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, ECLI:EU:C:2018:117. For an academic appraisal, see *exempli gratia*, M. Bonelli and M. Claes, *Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses*, 14 EUConst (2018) pp. 622-643. [↑](#footnote-ref-7)
7. See, *inter alia*, V. Mitsilegas, *EU Criminal Law,* Oxford and Portland, Oregon 2009, pp. 5-58; S. Miettinen, *The Evolution of Competence Distribution Between the European Union and the Member States in the Criminal Field*, in Ch. Brière and A. Weyembergh (eds), *The Needed Balances in EU Criminal Law. Past, Present and Future*, Oxford and Portland, Oregon 2018, pp. 35-64; V. Mitsilegas, *EU Criminal Law after Lisbon. Rights, Trust and the Transformation of Justice in Europe*, Hart Publishing, 2016, pp. 153-184. [↑](#footnote-ref-8)
8. See, for instance, Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 3 to 12 April 2013, available at: <https://rm.coe.int/1680696b7f> [↑](#footnote-ref-9)
9. See, *inter alia*, Z. Szente, *Challenging the Basic Values – The Problems of the Rule of Law in Hungary and the Failure of the European Union to Tackle Them*, in A. Jakab, D. Kochenov (eds), *The Enforcement of EU Law and Values*, Oxford: Oxford University Press, 2017, pp.; B. Bugaric, A. Kuhelj, *Varieties of Populism in Europe: Is the Rule of Law in Danger?*, 10 Hague Journal of Rule of Law (2018), pp. 21-33; W. Rech, *Some remarks on the EU’s action on the erosion of the rule of law in Poland and Hungary*, 26 Journal of Contemporary European Studies (2018) pp. 334-345; P. Filipek, *Challenges to the Rule of Law in the European Union: the distressing case of Poland*, 17 (2017) Revista do Instituto Brasileiro de Direitos Humanos /Journal of the Brazilian Institute of Human Rights, pp. [forthcoming, page numbers to be added at proof stage]. [↑](#footnote-ref-10)
10. CoJ, Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, ECLI:EU:C:2016:198. For an academic appraisal, see *inter alia*, G. Anagnostaras, *Mutual confidence is not blind trust! Fundamental rights protection and the execution of the European arrest warrant: Aranyosi and Caldararu*, 53 CMLRev. (2016) pp. 1675–1704; Sz. Gáspár-Szilágyi *Joined Cases Aranyosi and Căldăraru: Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant*, 24 European Journal of Crime Criminal Law and Criminal Justice (2016) pp. 197-219; F. Korenica, D. Doli, *No more unconditional "mutual trust" between the Member States: an analysis of the landmark decision of the CJEU in Aranyosi and Căldăraru*, 21 E.H.R.L.R. (2016), p. 542-555. [↑](#footnote-ref-11)
11. The Court does so under the preliminary ruling procedure laid down in Article 267 TFEU. See further, *inter alia*, M. Broberg, N. Fenger, *Preliminary References to the European Court of Justice*, 2nd ed., Oxford University Press, Oxford 2014. [↑](#footnote-ref-12)
12. W. Van Ballegooij, P. Bárd, *Mutual Recognition and Individual Rights. Did the Court Get it Right?*, 7 NJEUCL (2016) pp. 439-464, at p. 462. [↑](#footnote-ref-13)
13. Case C-216/18 PPU *LM*, ECLI:EU:C:2018:586; Case C-220/18PPU *ML*, ECLI:EU:C:2018:589; Case C-327/18PPU *RO*, ECLI:EU:C:2018:733. [↑](#footnote-ref-14)
14. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1. For an academic appraisal see, *inter alia*, R. Blekxtoon, W. van Ballegooij (eds), *Handbook on the European Arrest Warrant*, Asser Press, The Hague 2005; N. Keizer and E. van Sliedregt (eds), *The European Arrest Warrant in Practice*, Asser Press, The Hauge 2009. [↑](#footnote-ref-15)
15. See further, A. Łazowski, B. Kurcz, *Two Sides of the Same Coin? Framework Decisions and Directives Compared*, 25 YEL (2006) pp. 177–204. See also M.J. Borgers, *Implementing framework decisions*, 44 CMLRev. (2007) pp. 1361–1386; A. Hinarejos, *On the legal effects of framework decisions and decisions: Directly applicable, directly effective, self-executing, supreme?*, 14 ELJ (2008), pp. 20–34. [↑](#footnote-ref-16)
16. For a comprehensive overview, see, *inter alia*, A. Hinarejos, *Judicial Control in the European Union. Reforming Jurisdiction in the Intergovernmental Pillars*, Oxford 2009. [↑](#footnote-ref-17)
17. A. Łazowski, *Stepping into Uncharted Waters No More: The Court of Justice and EU Criminal Law*, in C. Brière, C. and A. Weyembergh, (ed.) *The needed balances in EU Criminal Law: past present and future*, Oxford and Portland, Oregon Hart Publishing, 2017, pp. 111-139. [↑](#footnote-ref-18)
18. Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, ECLI:EU:C:2007:261; Case C-396/11 *Ciprian Vasile Radu*, ECLI:EU:C:2013:39. [↑](#footnote-ref-19)
19. See, *exempli gratia*, C-66/08 *Proceedings concerning the execution of a European arrest warrant issued against Szymon Kozłowski*, ECLI:EU:C:2008:437; C-123/08 *Dominic Wolzenburg*, ECLI:EU:C:2009:616; C-306/09 *I.B*., ECLI:EU:C:2010:626; C-237/15PPU *Minister for Justice and Equality v. Francis Lanigan*, ECLI:EU:C:2015:474. [↑](#footnote-ref-20)
20. In relation to pre-Lisbon EU legal acts that had been adopted under the Third Pillar of the European Union, the infringement proceedings envisaged in Articles 258-260 TFEU apply only as of 1 December 2014. See further A. Łazowski, *Stepping into Uncharted Waters No More: The Court of Justice and EU Criminal Law*, *op. cit*., pp. 114-118. [↑](#footnote-ref-21)
21. See, *inter alia*, B. de Witte, *Direct Effect, Primacy, and the Nature of the Legal Order*, in P. Craig, G. de Búrca, *The Evolution of EU Law*, 2nd ed., Oxford 2011, pp. 323-362; D. Leczykiewicz, *Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability*, in A. Arnull, D. Chalmers, *The Oxford Handbook of European Union Law*, Oxford 2015, pp. 212-248; A. Capik, *Five Decades since Van Gend en Loos and Costa came to town: primacy, direct and indirect effect revisited*, in A. Łazowski, S. Blockmans (eds), *Research Handbook on EU Institutional Law*, Cheltenham 2016, pp. 379-420. [↑](#footnote-ref-22)
22. It is notable that the European Union is expected to experience the first reduction of its membership, when the United Kingdom leaves on 29 March 2019. [↑](#footnote-ref-23)
23. See, *inter alia*, A. Łazowski (ed.), *The Application of EU Law in the New Member States. Brave New World*, The Hague, Asser Press 2010; M. Bobek (ed.), *Central European Judges Under the European Influence. The Transformative Power of the EU Revisited*, Oxford-Portland, Oregon, Hart Publishing 2015. [↑](#footnote-ref-24)
24. C-399/11 *Stefano Melloni v Ministerio Fiscal*, ECLI:EU:C:2013:107. [↑](#footnote-ref-25)
25. Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECLI:EU:C:2014:2454. [↑](#footnote-ref-26)
26. It obviously attracted a flurry of academic commentary. See, *inter alia*, A. Tinsley, *Note on the Reference in Case C-399/11 Melloni*, 3 NJECL (2012) p.19-30; N. De Boer, *Addressing rights divergence under the Charter: Melloni*, 50 CMLRev. (2013) pp.1083-1103; M. De Visser, *Dealing with Divergences in Fundamental Rights Standards*, MJECL (2013) pp. 576-588; A. Pliakos, G. Anagnostaras, *Fundamental Rights and the New Battle over Legal and Judicial Supremacy: Lessons from Melloni*, 34 YEL (2015) pp. 97-126; G. Cavallone, *European arrest warrant and fundamental rights in decisions rendered in absentia: the extent of Union law in the case C-399/11 Melloni v. Ministerio Fiscal,* ECLR 2014, pp. 19-40; L. F.M. Besselink, The parameters of constitutional conflict after Melloni, ELRev. 2014 pp. 531-552; J. Vervaele, *The European Arrest Warrant and Applicable Standards of Fundamental Rights in the EU*, Rev.EAL (2013) pp. 37-54. [↑](#footnote-ref-27)
27. For an academic appraisal see, *inter alia*, D. Halberstam, *“It’s the Autonomy, Stupid!” A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward*, 16 GLJ (2015) pp. 105–146; C. Krenn, *Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13*, 16 GLJ (2015) pp. 147–168; S. Øby Johansen, *The Reinterpretation of TFEU Article 344 in Opinion 2/13 and its Potential Consequences*, 16 GLJ (2015) pp. 169–178; A. Łazowski and R.A. Wessel, *When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR*, 16 GLJ (2015) pp. 179–212; S. Peers, *The EU’s Accession to the ECHR: The Dream Becomes a Nightmare*, 16 GLJ (2015) pp. 213–222; P. Eeckhout, *Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky*, 38 Fordham Int'l L.J. (2015) p. 955; B. de Witte and Š. Imamović, *Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court*, 40 ELRev. (2015) pp. 683–705; B. H. Pirker, S. Reitemeyer, *Between Discursive and Exclusive Autonomy – Opinion 2/13, the Protection of Fundamental Rights and the Autonomy of EU Law*, 17 CYELS (2015) pp. 168-188. [↑](#footnote-ref-28)
28. C-105/03 *Criminal proceedings against Maria Pupino*, ECLI:EU:C:2005:386. For an academic appraisal see, *inter alia*, M. Fletcher, Extending “indirect effect” to the third pillar: the significance of Pupino?, 30 ELRev. (2005) pp. 862–877; E. Spaventa, *Opening Pandora’s Box: Some Reflections on the Constitutional Effects of the Decision in Pupino*, 3 EuConst (2007) pp. 5–24. [↑](#footnote-ref-29)
29. Case C-42/11 *Proceedings concerning the execution of a European arrest warrant issued against João Pedro Lopes Da Silva Jorge*, ECLI:EU:C:2012:517. For an academic appraisal see, *inter alia*, Ch Janssens, *Differentiation on the Basis of Nationality in Surrender Cases: The Court of Justice Clarifies in Case C-42/11 Lopes Da Silva Jorge the Member States’ Margin of Discretion*, 19 CJEL (2013) pp. 553–571. [↑](#footnote-ref-30)
30. Case C-579/15 *Openbaar Ministerie against Daniel Adam Popławski*, ECLI:EU:C:2017:116. [↑](#footnote-ref-31)
31. Para. 34. [↑](#footnote-ref-32)
32. See Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM (2005) 63 final; Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (revised version), COM (2006) 8 final. [↑](#footnote-ref-33)
33. Order of 15 December 2015, 2 BvR 2735/14. For an academic appraisal see, *inter alia*, F. Meyer, *From Solange II to Forever I’ the German Federal Constitutional Court and the European Arrest Warrant (and How the CJEU Responded)*, 7 NJECL (2016) pp. 277–294; M. Hong, *Human dignity, identity review of the European Arrest Warrant and the Court of Justice as a listener in the dialogue of courts, Solange-III and Aranyosi : BVerfG 15 December 2015, 2 BvR 2735/14, Solange III, and ECJ (Grand Chamber) 5 April 2016, joined cases C-404/15 and C-659/15 PPU, Aranyosi and Căldăraru*, 12 EUConst (2016) pp. 549-563. [↑](#footnote-ref-34)
34. In the early case-law see Case C-396/11 *Ciprian Vasile Radu*, ECLI:EU:C:2013:39 and, especially, Opinion of Advocate General Sharpston Case C‑396/11 *Ministerul Public – Parchetul de pe lângă Curtea de Apel Constanţa v Ciprian Vasile Radu*, ECLI:EU:C:2012:648. [↑](#footnote-ref-35)
35. Case C-216/18 PPU *LM*, ECLI:EU:C:2018:586. [↑](#footnote-ref-36)
36. Case C-220/18PPU *ML*, ECLI:EU:C:2018:589. [↑](#footnote-ref-37)
37. Case C-327/18PPU *RO*, ECLI:EU:C:2018:733. [↑](#footnote-ref-38)
38. See, *inter alia*, A. Łazowski, S. Nash, *Detention*, in: N. Keijzer, E. van Sliedregt (eds), *The European Arrest Warrant in Practice*, The Hague 2009, pp. 33-50. [↑](#footnote-ref-39)
39. Para. 104 of the judgment. [↑](#footnote-ref-40)
40. Para. 77 of the judgment. [↑](#footnote-ref-41)
41. For an academic appraisal of Article 4 of the Charter see, *inter alia*, M. Nowak, A. Charbord, *Article 4*, in S. Peers, T. Hervey, J. Kenner, A. Ward (eds), *The EU Charter of Fundamental Rights. A Commentary*, Oxford and Portland, Oregon 2014, pp. 61-99. [↑](#footnote-ref-42)
42. See further, *inter alia*, A. Ward, *Article 51*, in S. Peers, T. Hervey, J. Kenner, A. Ward (eds), *The EU Charter of Fundamental Rights. A Commentary*, Oxford and Portland, Oregon 2014, pp. 1413-1454. [↑](#footnote-ref-43)
43. See also Opinion of Advocate General Sharpston Case C‑396/11 *Ministerul Public – Parchetul de pe lângă Curtea de Apel Constanţa v Ciprian Vasile Radu*, ECLI:EU:C:2012:648. [↑](#footnote-ref-44)
44. For an academic appraisal of advocates general and their role at the Court of Justice see, *exempli gratia*, N. Burrows and R. Graves, *The Advocate General and EC Law*, Oxford University Press, Oxford 2007. [↑](#footnote-ref-45)
45. Complete Works of Voltaire, Volume 12, Part 1. [↑](#footnote-ref-46)
46. For an academic appraisal see, *inter alia*, M. Nowak, A. Charbord, *Article 4*, in S. Peers, T. Hervey, J. Kenner, A. Ward (eds), *The EU Charter of Fundamental Rights. A Commentary*, Oxford and Portland, Oregon 2014, pp. 61-99. [↑](#footnote-ref-47)
47. As per Article 52 of the Charter. [↑](#footnote-ref-48)
48. Para. 89 of the judgment. [↑](#footnote-ref-49)
49. Para. 90 of the judgment. [↑](#footnote-ref-50)
50. Para. 94 of the judgment. [↑](#footnote-ref-51)
51. Para 98 of the judgment. [↑](#footnote-ref-52)
52. Para. 104 of the judgment. [↑](#footnote-ref-53)
53. W. Van Ballegooij, P. Bárd, *Mutual Recognition and Individual Rights. Did the Court Get it Right?*, *op. cit*., at p. 462. [↑](#footnote-ref-54)
54. Many a times it is a consequence of the way in which the Court of Justice operates. As frequently discussed in the academic literature, the rules governing functioning of the Court of Justice do not permit for dissenting opinions, therefore the judgments, as well as opinions or orders of the Court, are products of compromises between judges forming a particular chamber. Allegedly, this may have impact on the quality of judicial discourse and, by the same token, the judgments of the Court. See further, *inter alia*, M. Adams, H. de Waele, J. Meeusen, G. Straetmans (eds), *Judging Europe’s Judges: The Legitimacy of the Case Law of the European Court of Justice*, Hart Publishing, Oxford and Portland-Oregon 2013. [↑](#footnote-ref-55)
55. In this respect a good example is judgment in Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l’emploi (ONEm)*, ECLI:EU:C:2011:124. [↑](#footnote-ref-56)
56. It is notable that the referring court submitted over a page worth of questions to the Court of Justice. See para. 40 of the judgment. [↑](#footnote-ref-57)
57. For instance judgment of ECtHR of 10 March 2015, Varga and Others v. Hungary, CE:ECHR:2015:0310JUD001409712, paras. 79-92. [↑](#footnote-ref-58)
58. The only exception are paras. 68-71 where the Court of Justice reacts to submissions of the Hungarian government, disputing the existence of deficiencies in the Hungarian detention centres. The Court of Justice, rightly so, concludes that the existence of such deficiencies is neither the subject of the reference for preliminary ruling, nor determination of their existence is a task of the Court of Justice. [↑](#footnote-ref-59)
59. See paras. 90-100 of the judgment. [↑](#footnote-ref-60)
60. For an overview see, *inter alia*, P. Filipek, *Challenges to the Rule of Law in the European Union: the distressing case of Poland*, 17 (2017) Revista do Instituto Brasileiro de Direitos Humanos /Journal of the Brazilian Institute of Human Rights, pp. [forthcoming, page numbers to be added at proof stage]. [↑](#footnote-ref-61)
61. For instance, the Commission for Democracy through Law of the Council of Europe (usually referred to as the Venice Commission) issued several critical reports about the reforms in Poland. See, *inter alia*, Poland - Opinion on the Act on the Constitutional Tribunal, adopted by the Venice Commission at its 108th Plenary Session, (Venice, 14-15 October 2016), <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)026-e>; Poland - Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, adopted by the Commission at its 113th Plenary Session (Venice, 8-9 December 2017), available at: <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)031-e> [↑](#footnote-ref-62)
62. See, *inter alia*, D. Kochenov and L. Pech, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, 11 EUConst. (2015) pp. 512-540; D. Kochenov, *On Policing Article 2 TEU Compliance - Reverse Solange and Systemic Infringements Analyzed*, XXXIII PoLYBIL (2013) pp. 145-170; A. Von Bogdandy, M. Kottmann, C. Antpöhler, J. Dickschen, S. Hentrei, M. Smrkolj, *Reverse Solange–Protecting the essence of fundamental rights against EU Member States*, 49 CMLRev. (2012) pp. 489–519; M. Schmidt, P. Bogdanowicz, *The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU*, 55 CMLRev. (2018) pp. 1061–1100. [↑](#footnote-ref-63)
63. For instance, pending case C-619/18 *Commission v. Poland*. See Order of the Vicepresident of the Court of Justice C-619/18P *Commission v. Poland*, 19 October 2018, ECLI:EU:C:2018:852. [↑](#footnote-ref-64)
64. For an appraisal of Article 7 TEU and its progeny, see, *exempli gratia*, W. Sadurski, *Adding Bite to a Bark: The Story of Article 7, E.U. Enlargement, and Jörg Haider*, 16 CJEL (2010) pp. 385-. [↑](#footnote-ref-65)
65. Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM (2017) 835 final. [↑](#footnote-ref-66)
66. See, *inter alia*, pending references for preliminary ruling submitted by the Polish Supreme Court: C-522/18 *D.Ś. v. Zakładowi Ubezpieczeń Społecznych Oddział w Jaśle*; C-537/18 *Krajowa Rada Sądownictwa*; C-585/18 *Krajowa Rada Sądownictwa*. [↑](#footnote-ref-67)
67. Irish High Court, Minister for Justice and Equality -v- Celmer (No.1), judgment of 12 March 2018, [2018] IEHC 119. For an academic appraisal, see *inter alia*, M. Dorociak, W. Lewandowski, *A Check Move for the Principle of Mutual Trust from Dublin: The Celmer Case*, 3 European Papesr (2018) pp. 857-873; S. Carrera, V. Mitsilegas, Upholding the Rule of Law by Scrutinising Judicial Independence: The Irish Court’s request for a preliminary ruling on the European Arrest Warrant, CEPS Commentary 2018, available at: <https://www.ceps.eu/system/files/SCandVM_ROL.pdf> [↑](#footnote-ref-68)
68. For an early appraisal see, *inter alia*, P. Bárd, W. van Ballegooij, *Judicial independence as a precondition for mutual trust? The CJEU in Minister for Justice and Equality v. LM*, 9 NJECL (2018) pp. 353–365. [↑](#footnote-ref-69)
69. Para. 73 of the judgment. [↑](#footnote-ref-70)
70. For an academic appraisal of the principle of conferral after entry into force of the Treaty of Lisbon see, *inter alia*, G. Davies, *The post-Laeken division of competences*, 28 ELRev (2003) pp. 686-698; M. Dougan, *The Convention’s draft Constitutional Treaty: bringing Europe closer to its lawyers?*, 28 ELRev (2003) pp. 763-793; P. Craig, *Competence: clarity, conferral, containment and consideration*, 29 ELRev (2004) pp. 323-344; T. Tridimas, *Competence after Lisbon. The elusive search for bright lines*, in D. Ashiagbor, N. Countouris, I. Lianos (eds), *The European Union after the Treaty of Lisbon*, Cambridge 2012, pp. 50-51, M. Dougan, *The Treaty of Lisbon 2007: Winning Minds not Hearts*, 45 CMLRev. (2008) pp. 617-703; M. Claes, B. de Witte, *Competences: Codification and Contestation*, in: A. Łazowski, S. Blockmans (eds), *Research Handbook on EU Institutional Law*, Cheltenham 2016, pp. 46-87. [↑](#footnote-ref-71)
71. Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, ECLI:EU:C:2018:117. [↑](#footnote-ref-72)
72. M. Bonelli and M. Claes, *Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses*, 14 EUConst (2018) pp. 622-643. [↑](#footnote-ref-73)
73. See further, *inter alia*, A. Ward, *Article 47*, in S. Peers, T. Hervey, J. Kenner, A. Ward (eds), *The EU Charter of Fundamental Rights. A Commentary*, Oxford and Portland, Oregon 2014, pp. 1197-1275. [↑](#footnote-ref-74)
74. Para. 50 of the judgment. [↑](#footnote-ref-75)
75. Paras. 63-65 of the judgment. [↑](#footnote-ref-76)
76. Para. 68 of the judgment. [↑](#footnote-ref-77)
77. Opinion of Advocate General Tanchev delivered on 28 June 2018 in Case C‑216/18 PPU Minister for Justice and Equality v LM (Deficiencies in the system of justice), ECLI:EU:C:2018:517. [↑](#footnote-ref-78)
78. Para. 61 of the judgment. [↑](#footnote-ref-79)
79. See *loc. cit.* n. 57. [↑](#footnote-ref-80)
80. See Irish High Court, *Minister for Justice and Equality -v- Celmer (No.4)*, judgment of 1 August 2018, [2018] IEHC 484. [↑](#footnote-ref-81)
81. Para. 77 of the judgment. [↑](#footnote-ref-82)
82. Para. 77 of the judgment. [↑](#footnote-ref-83)
83. P. Bárd, W. van Ballegooij, *Judicial independence as a precondition for mutual trust? The CJEU in Minister for Justice and Equality v. LM*, 9 NJECL (2018) pp. 353–365. [↑](#footnote-ref-84)
84. Irish High Court, The Minister for Justice and Equality -v- Celmer No.5, 19 November 2018, [2018] IEHC 639, at para. 123. [↑](#footnote-ref-85)
85. See, *inter alia*, V. Mitsilegas, *Cross-Border Criminal Cooperation after Brexit*, in: M. Dougan (ed.), *The UK after Brexit. Legal and Policy Challenges*, Cambridge-Antwerp-Portland 2017, pp. 203-221; A. Weyembergh, *Consequences of Brexit for European Union criminal law*, 8 NJECL (2017) pp. 284-299. [↑](#footnote-ref-86)
86. Para. 45 of the judgment. [↑](#footnote-ref-87)
87. See reference in case C-191/18 *KN v The Minister for Justice and Equality*, which was withdrawn by the referring court in the wake of judgment in the discussed case C-327/18PPU *RO*. [↑](#footnote-ref-88)
88. L. Mancano, *A New Hope? The Court of Justice Restores the Balance Between Fundamental Rights Protection and Enforcement Demands in the European Arrest Warrant System*, in: Ch. Brière and A. Weyembergh (eds), *The Needed Balances in EU Criminal Law. Past, Present and Future*, Oxford and Portland, Oregon 2018, pp. 285-312. [↑](#footnote-ref-89)
89. Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130/2014, p. 1. See further A. Erbežnik, *Mutual Recognition in EU Criminal Law and Fundamental Rights – The Necessity for Sensitive Approach*, in: Ch. Brière and A. Weyembergh (eds), *The Needed Balances in EU Criminal Law. Past, Present and Future*, Oxford and Portland, Oregon 2018, pp. 185-211, at pp. 197-199. [↑](#footnote-ref-90)