Refusal of European Arrest Warrants Due to Fair Trial Infringements

Review of the CJEU's Judgment in "LM" by National Courts in Europe

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Article

ABSTRACT

One of the most controversially discussed and unresolved issues in extradition law, namely whether extradition can be denied because elements of a fair trial will not be ensured in the requesting (issuing) State, gained new momentum after the CJEU's judgment in "LM" of 25 July 2018 (C-216/18 PPU). This judgment relates to the framework of the European Arrest Warrant – the surrender system established in the EU in 2002. After briefly classifying the problem doctrinally and discussing the approach taken by the ECtHR, the article explains the CJEU's line of arguments in LM. The analysis focuses, in particular, on the necessary test phases that the executing judicial authority must carry out in order to find out possible fundamental rights breaches in the issuing EU Member State. The article then analyses the reviews of this judgment by national courts. The follow-up decision of the referring Irish court is compared with court decisions addressing, in detail, this specific problem of fair trial infringements in the United Kingdom, Germany, and the Netherlands. In doing so, the practical challenges that are encountered by the national courts in applying the CJEU's required test are also identified.

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I. Background: The Human Rights Exception in European Extradition Law

One of the most controversially discussed but unresolved issues in extradition law is the question of whether – and, if so, to what extent – an extradition request can be denied by the authorities of the requested State if certain fundamental rights standards are not upheld in the requesting State. In legal doctrine, this issue is dealt with under the catchphrases "human rights exception/clause" or "public policy/order reservation" or "*ordre public*."[1] Although scholars often advocate the full application of fundamental rights protection in transnational situations,[2] it can be discerned from the case law of national and European courts that the protection of fundamental rights (as ensured by the system in domestic cases) should not and cannot be transferred to transnational cases. This holds true for extradition cases, in particular, as the most prominent form of international cooperation in criminal matters.[3] Courts admit that it is necessary to lower one's sights concerning the level of fundamental rights protection for the sake of achieving effectiveness in the cross-border fight against crime and fostering the mutual trust inherent to international cooperation in criminal matters. Therefore, courts have developed a formula that strives to strike a balance between the interests of international justice and the individual's interest in having his/her fundamental rights protected in the extradition scheme. This is especially true when the defence argues that certain procedural safeguards will not be maintained in the requesting State following surrender, as a consequence of which the right to a fair trial would be breached. These safeguards include the right to be tried before an independent and impartial judge, the right to be heard, the right to be present at trial, the right not to incriminate oneself, the right to an effective legal remedy, the right to have access to a lawyer of one's own choice, etc.

In view of these counterarguments, the European Court of Human Rights (ECtHR) established the "flagrant denial of justice" concept in its landmark judgment in *Soering* in 1989 and further clarified it in *Othman* in 2012. Accordingly, a requested CoE Member State must refrain from extraditing if "the circumstances lead the fugitive to suffer or risk suffering *a flagrant denial of a fair trial* in the requesting country."[4] This requires "a breach of the principles of fair trial guaranteed by Article 6 ECHR which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article."[5]

The CJEU only had occasion to establish its concept in relation to potential breaches of the Charter of Fundamental Rights of the European Union (CFR) in 2018. The case is officially referred to as *LM* but has also been dubbed the "*Celmer* case," referring to the person in surrender proceedings in Ireland. Surrender of the person had been requested by Poland on the basis of a European Arrest Warrant for the purpose of conducting criminal prosecutions*, inter alia,* for trafficking in narcotics and psychotropic substances. In contrast to ECtHR case law at the time, which predominantly dealt with extraditions involving a CoE Member State and a third country (e.g., the USA), the CJEU was concerned with the question of fair trial infringements within the Union's "new" surrender scheme, which is based on Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States[6] (hereafter FD EAW). The alarming structural reforms of the Polish judicial system that impinge on the independence and legitimacy of constitutional review as well as on the independence of the ordinary judiciary,[7] prompted the Irish High Court to seek guidance as to which requirements Union law poses for the test to deny surrender on the grounds of possible fair trial infringements in the requesting (= issuing) State.[8] The response of the CJEU's Grand Chamber[9] (detailed in the following section) was mainly driven by its previous groundbreaking judgment in *Aranyosi and Căldăraru.*[10] In this judgment, for the first time, the judges in Luxembourg accepted possible fundamental rights refusals of EAWs due to infringements of the absolutely protected prohibition of torture and inhuman or degrading treatment or punishment, as enshrined in Art. 4 CFR (due to insufficient detention conditions in certain EU Member States).

II. The Approach of the CJEU in *LM*

1. Main parameters of the decision

In its judgment of 25 July 2018, the CJEU first reiterates the cornerstones of its previous case law on the meaning of fundamental rights in the context of judicial cooperation in criminal matters in the EU, based on the principles of mutual trust and mutual recognition:[11]

- In general, presumption that all EU Member States comply with the fundamental rights recognised by EU law.
- As a rule, no fundamental rights check in a specific case by other Member States;
- Refusal only on the grounds for non-execution expressly and exhaustively listed in Arts. 3, 4, 4a, and 5 of the FD EAW.

The judges in Luxembourg accept, however, that limitations to these principles may be placed in "exceptional circumstances," i.e., on the grounds of non-respect for fundamental rights on the basis of the general fundamental rights clause in Art. 1(3) FD EAW.[12] The CJEU admits first that not only the fundamental rights embodied in Art. 4 CFR but also those laid down in Art. 47(2) CFR are suitable for enabling the executing authority to refrain from executing an EAW. The main reasons are as follows:

- A simplified surrender system involving only judicial authorities can only work if the independence of the authorities in the issuing State is guaranteed;
- The high level of mutual trust between Member States is founded only on the premise that the criminal courts of the other Members States meet the requirements of effective judicial protection, particularly including the independence and impartiality of these courts.

Second, the CJEU largely extends the application of the "*Aranyosi & Căldăraru test"* to the right to a fair trial, i.e., a two-step assessment is necessary:[13]

- First step: Based on objective, reliable, specific, and properly updated material concerning the operation of the system of justice in the issuing Member State, the executing authority must assess whether there is a **real risk** of the fundamental right to a fair trial being breached that is connected to a lack of independence of the courts in the issuing Member State, on account of **systemic or generalised** deficiencies there.[14] In other words, the executing court must be convinced that an danger to the fundamental rights of the individual exists *in abstracto* (as standardised in Art. 47(2) CFR).
- Second step: The executing authority must **specifically and precisely assess** whether, in the particular case, there are substantial grounds for believing that the requested suspect will run the real risk of being subject to a breach of the **essence** of his fundamental right to a fair trial, as laid down in Art. 47 CFR.[15] In other words, the executing authority must examine whether there is a probability that the danger will be realised *in concreto*.

In contrast to *Aranyosi & Căldăraru,* where the CJEU only required the national judge to ascertain the presence of an individualised risk, the test in *LM* requires the national judge to consider all the individual circumstances of the case and obliges the judge to carry out **two sub-steps**:[16]

- Asking first whether the risk established in the first step applies at the level of the court with jurisdiction over the criminal proceedings to which the requested person (extraditee) will be subject;

- Asking secondly whether the risk exists in the case of the requested person himself/herself, having regard to his/her personal situation, as well as to the nature of the crime for which he/she is being prosecuted.

As set out in *Aranyosi & Căldăraru,* the CJEU further establishes the necessity of a **dialogue** between the executing State and the issuing State: Pursuant to Art. 15(2) FD EAW, the executing judicial authority must request from the issuing judicial authority any **supplementary information** that it considers necessary for assessing whether there is such a risk. The issuing authority should particularly have the task to provide any objective material on any changes concerning the conditions for protecting the guarantee of judicial independence in the issuing State, material which may rule out the existence of that risk for the individual concerned.[17]

2. Interim conclusion

For the first time, the CJEU explicitly admits that rights which are not also absolute in nature are capable of limiting the operativeness of mutual recognition. From this point of view, the CJEU's judgment in *LM* can indeed be considered a "genuinely ground-breaking decision, a new milestone leading to a turning point in the jurisprudence of the CJEU in the matter [of having the technical possibility to refuse an EAW on the grounds of a hazard for procedural rights]."[18] On closer inspection, the judgment reveals some parallels to the approach of the ECtHR briefly described above: It resembles the ECtHR's rulings in that fundamental rights can only limit surrender in exceptional circumstances.[19] Both the ECtHR and the CJEU rule out the refusal of extradition in case of mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Art. 6 ECHR / Art. 47 CFR if occurring within the State itself.[20] In addition, both courts established that general irregularities in the judicial system of the requesting State do not suffice for a refusal. Instead they established the "real risk doctrine:" A specific and precise individual assessment as to the existence of a real risk is necessary. In *LM,* the CJEU clarified that there must be a substantial link between the general deficiencies of (judicial) independence/disregard for fair trial standards and the denial of fair trial rights in the concrete criminal proceedings. Therefore, a case-orientated analysis by the national judge deciding on the execution of an EAW is indispensable.

The latter concept is certainly shared by the ECtHR. However, the reasoning followed by the CJEU for a concrete test is different, due to peculiarities in Union law. First, in the view of the judges in Luxembourg, exceptions to the principles of mutual recognition and trust (even those not clearly stipulated in the underlying legal act, such as the human rights exception in the FD EAW) must be construed narrowly.

Second, the founders of the FD EAW already anticipated a possible conflict between general rule-of-law deficiencies in an EU country and application of the EAW. In Recital 10 of the FD EAW, they took account of the sanctioning mechanism in Article 7 TEU (introduced 5 years before by the (1997) Amsterdam Treaty) if an EU country is at risk of breaching the bloc's core values. According to the founders of the EAW, only the second step of this Article 7 procedure should have effects on the EAW, i.e., the implementation of the EAW can generally be suspended if the European Council determined a *serious and persistent breach* of the Member State concerned of the principles set out in Art. 2 TEU (with the consequences set out in Art. 7(2) TEU). By insisting on a concrete assessment, the CJEU wishes to avoid blurring the boundaries between a general suspension of the EAW scheme vis-à-vis a particular EU Member State (following the Article 7 procedure as set out in Recital 10) and fundamental rights protection (as grounded in Art. 1(3) FD EAW). With regard to the different competencies of the CJEU and the Council in the envisaged Article 7 procedure, it is already not deemed compatible to create a blanket approach to surrender refusals.[21] The CJEU concedes that a Commission proposal addressed to the Council to determine a "*clear risk of serious breach*" of EU values by the

accused country as set out in Art. 7(1) TEU could indicate the fulfilment of the "systemic and generalised deficiencies."[22]

Everything considered, one can formulate an "as-long-as reservation:" As long as the European Council does not decide that there has been a "serious and persistent" breach of the rule of law as the second step of the Article 7 procedure, execution of an EAW can only be refused in exceptional circumstances, namely if the executing authority acknowledges a real risk of violation of the essence of the right to a fair trial on account of a specific and precise examination of the individual case.

III. Follow-Up to the *LM* Judgment by National Courts

The CJEU's judgment in *LM* seems to have been received differently in the jurisdictions of the EU Member States. In some jurisdictions the case has seemingly not experienced much – or even any – attention in court cases,[23] whereas, in other jurisdictions, arguments like those in *LM* were often put forward, and courts delivered several follow-up decisions. In most of the latter jurisdictions, test cases were selected, which served as orientation for subsequent decisions on EAW cases in the respective country. The following gives an overview of the court decisions that are subsequently analysed in detail:

- In Ireland, the Irish High Court (which, as the referring court, was the main addressee of the CJEU's judgment) rendered its follow-up decision on the extradition of *Celmer* on 19 November 2018 (hereinafter IEHC in *Celmer*).[24]
- This decision referred to a large extent also the judgment of the High Court of Justice of England and Wales of 31 October 2018 in the extradition proceedings of *Lis, Lange and Chmielewski* (hereinafter EWHC in *Lis*).[25] The EWHC (based in London) resumed extradition proceedings in which the defence claimed the discontinuance of the defendant's surrender to Poland in light of the preliminary ruling put forward by the Irish court.
- In Scotland, a basic decision was taken by the Sheriff Court of Lothian and Borders in Edinburgh in the case of *Maciejec* who was also being sought by Polish authorities by means of an EAW (hereinafter SC Edinburgh in *Maciejec*).[26]
- The *LM* judgment was raised in a number of cases before the Rechtbank Amsterdam (the central court instance that decides on the execution of all incoming EAWs in the Netherlands).[27] The Rechtbank Amsterdam took leading decisions on 16 August 2018[28] and 4 October 2018,[29] by which surrenders to Poland were suspended for the time being. In July 2020, the Rechtbank Amsterdam again decided to refer two EAW cases to the CJEU, seeking clarification of the CJEU's approach in *LM* in the light of recent developments involving the deterioration of Poland's rule of law.[30]
- As a neighbouring country to Poland, the issues of the *LM* judgment have also frequently been dealt with by German courts. Since there is no central instance in Germany for extradition cases, several decisions have been handed down by various Higher Regional Courts (*Oberlandesgerichte*).[31] The following will discuss, in particular, the path taken by the Higher Regional Court of Karlsruhe (hereafter HRC of Karlsruhe). In several subsequent decisions, the court intensively and thoroughly dealt with the argumentation given by the CJEU in *LM*.[32] According to the current state of knowledge, it is the only court to date that confirmed a concrete individualised danger to the essence of fair trial by Poland on the basis of the standards established by the CJEU in *LM*. Its decisions of February 2020[33] and November 2020[34] therefore actually led to the refusal of surrender.

The following will not re-narrate one judgment after another but instead discuss commonalities and differences between said decisions as a follow-up to *LM* at the national level.

1. Commonalities

a) Standard of fundamental rights examination

All examined court decisions implement the two-step test established in *LM*. Hence, there is no fragmentation in the sense that some executing judicial authorities apply the test but others do not. For Germany, in particular, this is not a matter of course, since the Federal Constitutional Court (based in Karlsruhe) took a different stance as the CJEU in its 2015 "identity control decision."[35] Accordingly, German courts are obliged to refuse the execution of an EAW if there are sufficient grounds to believe that the essential fundamental rights guarantees embodied in Art. 1 (human dignity) and Art. 20 (rule of law) of the German Constitution – the principles resistant to any integration compromise – are not ensured in the issuing (requesting) EU Member State. This approach differs in various aspects to the one taken by the CJEU a bit later in *Aranyosi & Căldăraru* (II. above),[36] which left the judges at the German Higher Regional Courts sitting between two chairs (and having to reconcile obligations put forward by the highest court of their own jurisdiction in Karlsruhe and the leading court in Luxembourg when interpreting Union law).[37] It also triggered the question of whether the threshold for refusing EAWs on the grounds of fundamental rights violations (*ordre public "à la facon allemande*") is lower than the thresholds established by the CJEU in *Aranyosi & Căldăraru* and *LM,* respectively.[38]

b) Results of the concrete test

All courts confirmed the abstract danger to the right to an independent tribunal and thus to the right to a fair trial in Poland, as a consequence of which the first requirement of the *LM* test was considered fulfilled. Courts base their decisions on various sources; the main source here is the Commission's Reasoned Proposal for a Decision of the Council on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, which was issued on 20 December 2017 in the framework of the Article 7 TEU procedure.[39] Therefore, the decisive and most critical stage for all courts was the second step of the test. It entailed the necessity to carry out an assessment of whether the systemic and generalised deficiencies in the independence of the Polish judiciary have an impact on the extraditee's individual situation. The courts executing the Polish EAWs agree that it is a stringent test with rather narrow criteria and often highlight that refusal can only be admitted in exceptional circumstances.[40]

Except for the HRC of Karlsruhe in the recent judgments cited above, all courts have so far negated the fulfilment of the requirements of the second stage, i.e., they refused to assume the realisation of a concrete danger of fair trial infringements towards the requested person once he/she is surrendered to Poland. In *Celmer*, Justice *Donnelly* clarified that, although the Minister of Justice had replaced the presidents of each of the Polish courts in which the defendant would stand trial if surrendered, all other indications of fair trial rights in Poland remain intact.[41] Therefore, the essence of the right to a fair trial of Mr. *Celmer* was not at risk. The SC Edinburgh in *Maciejec* strongly resorted to expert witness statements from defence lawyers practising extradition law in Poland and from NGO lawyers. The SC stated that the witnesses were all critical of the changes in Polish law and in Poland's judicial structure, but they could not point to a proven instance of an unfair trial. From the case law to date, we can therefore conclude the following:

- It did not suffice that the requested persons referred to changes at the ordinary courts, which were brought about by the judicial reforms, and to disciplinary power of the Polish Minister of Justice over the Presidents of the Courts as well as the chilling effect it has had on the administration of justice;

- It did not suffice that the requested persons referred to statements made by Polish justice officials in the media against them, thus leaving doubts as to the presumption of innocence;
- It did not suffice that evidence given by witnesses (even by Polish judges) was in the defendants' favour in voicing serious concerns over the independence of Polish judges, because the statements at the same time pointed out that judges try to perform their obligations to the best of their abilities to administer justice impartially and free from pressure.

In its first follow-up decision of January 2019, the HRC of Karlsruhe shared these lines of argument, stressing that the changes at the "supreme level" of the Polish judiciary – including the introduction of the "exceptional appeal" that has enabled the Polish Supreme Court to adjudicate on the case, even though no application was made by the parties to the proceedings – have not affected the capabilities of the ordinary courts to decide on criminal cases in an independent and impartial manner. The deteriorations in the rule of law, however, that occurred after the so-called "muzzle law" took effect on 14 February 2020 were the turning point for the HRC. The law particularly resulted in a tightening of the disciplinary responsibilities of judges, also at the ordinary court level.

In its groundbreaking decision of 17 February 2020, the HRC of Karlsruhe produced excerpts from the translation of the new law and stressed that the elements enabling disciplinary proceedings against judges are far-reaching and not delimited. The court also took into account developments against the Polish reform at the EU level that occurred after the CJEU's judgment in *LM*. The HRC paid particular attention to the CJEU's judgment of 19 November 2019, in which doubts were raised as to the independence and impartiality of the new Disciplinary Chamber at the Polish Supreme Court.[42] It also took into consideration other (pending) infringement actions against the reform referred to the CJEU by the European Commission. Against this background, an unfair trial due to a lack of judges' independence is no longer an abstract danger, because the new disciplinary regime has foreseen repercussions for the entire judiciary, including for judges at the competent criminal court deciding on the offense for which the EAW was issued. In its decision of 27 November 2020, the HRC of Karlsruhe indicated that – in view of the status of the judicial reform and the continuing struggle between EU institutions and the Polish government to respect the EU's core rule-of-law value of an independent judiciary – non-extradition to Poland is principally to be assumed for the moment, unless a different result can be concluded after comprehensive investigation of the facts/situation.

c) Burden of proof

Notwithstanding this new case law development in Germany, which has seemingly not taken been up in other EU jurisdictions so far (see also 2. below as regards the new reference for a preliminary ruling by the Rechtbank Amsterdam), the approach towards the burden of proof still remains a major obstacle for the defendant: For the assessment, the courts normally consider the information provided by the requested person, i.e. the defendant is placed to substantiate that the fair trial infringement would concretely affect his/her case.[43] It can be observed that most cases have failed, because the defence counsel of the requested person could not provide substantial grounds for believing that fair trial standards are not being upheld in the client's concrete trial case. In other words, the failure at step 2, substep 2 demonstrates that the threshold of the test for the requested person is nearly not achievable.

d) Nature of the offense

Another important issue in the argumentation of the courts is the nature of the offence at issue. It plays a decisive role in the applicability of the test. The EWHC properly put it by saying that "run-of-the mill criminal allegations," such as drug trafficking, tax evasion, and sexual abuse without a political connotation, can hardly justify an individualised real risk of fair trial infringement.[44] The EWHC but also the SC Edinburgh, Ger-

man HRCs, and especially the Rechtbank Amsterdam stress the nature of the offence and the factual context as important elements of the second sub-step in *LM*. Therefore, the result may be different if the requested person demonstrates a political or special government interest in his/her punishment/prosecution or the probability of discriminatory treatment for social or ethnic reasons. The HRC of Karlsruhe additionally stressed the aspect of whether the defendant deliberately absented himself for his/her trial or is willing to stand trial in the *executing* Member State, if necessary.[45]

e) Purpose of EAWs

Lastly, courts have stated that a distinction must be made between EAWs issued for the purpose of conducting a criminal prosecution and EAWs issued for the purpose of enforcing a custodial sentence (see also Art. 1(1) FD EAW). The HRC of Bremen stressed that it is nearly impossible to establish a real risk of an unfair trial at the extradition stage of proceedings, when EAWs issued for the purpose of enforcing sentences, because it is not clear whether it will actually come to further court decisions. Similarly, the SC Edinburgh in *Maciejec* and the EWHC in *Lis* argued that, in execution cases, there is either a court decision on early release (if there is a conviction for a single charge) or a disaggregation hearing (if *a cumulo* sentence is imposed after multiple convictions). Both prospective procedures must be assumed to be within the guarantees of Art. 6 ECHR and Arts. 47, 48 CFR, however, unless the hearings are particularly sensitive or political in nature.

2. Differences

a) "Flagrancy" or "essence" test?

Parties before the IEHC and the EWHC raised the question as to which threshold exactly needs to be observed, since the CJEU in *LM* has not explicitly aligned its case law to that of the ECtHR. This conclusion stems particularly from the fact that the CJEU referred in *LM* to a breach of the *essence* of the fundamental right to a fair trial. The CJEU avoided using the phrase "flagrant denial of justice," although AG *Tanchev* recommended that the judge's bench follow suit with the flagrancy test, as established by the ECtHR in *Soering* (I. above). Parties before the IEHC and the EWHC therefore wondered whether the CJEU's approach means a lower threshold for denying the execution of EAWs than the refusal ground for extraditions in the remit of the ECHR. In the affirmative, this would also have altered the evidentiary standards required to establish a breach on the part of the defence. This question was not discussed by the German and Dutch courts and was even skipped (SC Edinburgh). Both the IRHC and the EWHC concluded, however, that the "flagrancy" and "essence" tests are the same. They are of the opinion that the CJEU did not amend the test of a "flagrant denial of justice."[46] One of their lines of argumentation is remarkable: if the Luxembourg Court were seeking to differ from the often-repeated formulation of a flagrant denial of justice of the Strasbourg Court, it would have said so.

b) Consequences of systemic and generalised deficiencies in judicial independence

In the cases *Celmer* and *Lis,* the IEHC and EWHC also had to discuss the question of whether the establishment of systemic or generalised deficiencies in the independence of the Polish courts would (more or less automatically) amount to a flagrant denial of justice and whether this is sufficient to refuse an EAW from Poland. This may sound surprising, since the CJEU made clear in *LM* that the mere conclusion of systemic and generalised deficiencies in itself does not justify the refusal of an EAW. The defence counsels before the IEHC and EWHC argued, however, that independence of judicial authorities is so fundamental, that a lack of independence would distort the foundation upon which the EAW mechanism functions and, therefore, the Polish court issuing an EAW can no longer be considered a judicial authority within the meaning of the FD EAW.

Interestingly, the Rechtbank Amsterdam argued similarly when it put forward its reference for a preliminary ruling in July/September 2020 (see above). However, the Amsterdam court took up the latest developments concerning judicial reforms in Poland (see above III.1.b). Against this backdrop, the Rechtbank Amsterdam argued that the reforms aggravating rule-of-law compatibility now affect all Polish courts and, consequently, the right of all individuals in Poland to an independent tribunal is no longer ensured.[47] The CJEU was asked whether this finding is sufficient in itself to deny the status of "issuing judicial authority" to the court that issued the EAW and to presume that there are substantial grounds for believing that the requested person will run a real risk of breach of his/her fundamental right to a fair trial – without there being any need to examine the impact of deficiencies in the particular circumstances of the case.[48] In its reply of 17 December 2020, the CJEU completely upheld its approach taken in *LM*. National courts must pay regard to the individual situation of the person concerned and be convinced that the concrete danger of the deficiencies is likely to be realised in the proceedings against that person. Denial of the status "issuing judicial authorities" to all courts of the Member State in question, due to the assumption of systemic and generalised deficiencies in the independence of judges (even if the seriousness of the deficiencies increased), would lead to a general exclusion of the Member State from the mutual recognition instrument.[49] The existence of or increase in the systemic and generalised deficiencies can only be indicative. Furthermore, dispensing a specific and precise assessment would mean a general suspension of the EAW mechanism, which would blur the lines of the procedure provided for in Article 7(2) TEU.[50]

This standpoint was also taken by the IEHC and EWHC in their preceding decisions. Objecting to the counter-arguments by the defence counsel, the courts in Dublin and London advocated that the flagrant denial test requires something more than the mere establishment of a lack of independence, be it systemic or generalised. The court must be convinced of exceptional circumstances. In conclusion, it is therefore necessary to point to specific concerns about the lack of impartiality and independence, as this is what may affect the individual requested person.

c) Evidentiary basis

A large difference exists as regards the evidence adduced by the courts that forms the basis of their rulings. The different traditions between common law and civil law cultures are responsible for the differences when deciding extradition cases: Whereas continental European courts heavily rely on the supplementary information sought officially from requesting/issuing authorities, common law courts extensively rely on expert witnesses. The latter invite neutral legal experts from the issuing State, who are not involved parties of the case, to give a statement on the legal situation in their country and their position on the controversial issues of the case. This not only includes written statements but also the presence of experts at oral hearings before the British, Scottish, and Irish courts, where they are also cross-examined.[51] Supplementary information from the official Polish authorities is only used to contribute to the overall court assessment, i.e., as a basis to be properly informed. The parties to the extradition proceedings, including the defendant, have the opportunity to participate intensively in drafting the questions for submission to the issuing judicial authority.

In contrast, the German courts and the Rechtbank Amsterdam considered supplementary information essential and it therefore serves as the main basis for their surrender decisions.[52] The Rechtbank Amsterdam emphasised that the dialogue launched by requesting supplementary information in accordance with Art. 15 para. 2 FD EAW is an important basis for objective information about changes in the issuing State or about conditions for the protection of the individual's fundamental rights. As a result, both the HRC of Karlsruhe and the Rechtbank Amsterdam submitted a long list of detailed questions to the Polish District Court, which had issued the EAW.[53] Both courts placed weight on the answers from their colleagues in Poland in order to dispel doubts about whether the requested person does or does not run a concrete risk of being subject to an unfair trial.

The evidentiary value of the additional information from the issuing country in the second step of the *LM* test is, incidentally, viewed differently. The EWHC held that it is impossible to give information on the second prong of the test. Therefore, the court did not submit any supplementary information, because they were only to underpin general deficiencies that were already clearly evidenced by the Reasoned Opinion of the Commission in the Article 7 procedure as well as other supporting material from public bodies, NGOs, and expert witnesses. In contrast, the IEHC considered the additional information necessary to support its findings.

d) Safety net and assurances

At the end of its ruling of January 2019 (first follow-up decision), the HRC of Karlsruhe posed the question of whether an additional safety net, established by means of assurances or by setting conditions, is needed if *no* real risk of breach of fundamental rights to an independent tribunal is determined in the concrete case. In *Celmer*, Justice *Donnelly* contemplated this option only in the reverse, i.e., if she had admitted in the specific and precise assessment that there are substantial grounds for believing that *Celmer* would be at real risk of breach of his fundamental rights to an independent tribunal, the Polish authorities would have to give assurances that he would not. The other courts that are the subject of the present analysis do not even mention the problem or the possibility of assurances. Insofar, the HRC of Karlsruhe stands out: In its decision of January 2019 – which, in principal, backs the surrender of the requested person to Poland – it stated that the issuing authority was unable to give the requested binding assurance (that the deciding judges would not be subject to disciplinary proceedings). However, in order to rule out that a political or improper influence governs the proceedings at issue, the surrender is to be granted under the condition that the German ambassador in Poland or his representative can take part in the trial against the requested person and visit the person in jail if he is convicted. This reflects the stance that the executing authorities have a certain duty of care towards the requested person (regardless of his/her nationality) and must proactively take measures against possible fair trial infringements – an approach that has seemingly not been followed by any other court. In reaction to this stance, the HRC of Cologne bluntly rejected the inclusion of any condition in the admissibility decision by arguing that there is no factual basis for assuming unfairness in the trial proceedings of the defendant in Poland.[54]

IV. Final Remarks

The majority of national courts has come to the same conclusions, i.e., that the reforms of the judiciary in Poland have not yet affected the fundamental rights position of the person concerned in the concrete criminal trial proceedings. The analyses in this article showed that this finding was reached via different routes and approaches. They also demonstrated that the test established in *LM* is a very stringent – and, in the end, too narrowly construed – test, one which has produced much paperwork but has hardly led to any added value for the person concerned (extraditee).[55] From the perspective of defence lawyers, the test is rather disappointing: they must invest too much effort to provide the respective material evidencing potential fair trial violations against the client in the issuing State, with little effects. Against this backdrop, the *LM* judgment might be considered a Pyrrhic victory only.

Although the CJEU in *LM* reached the long overdue clarification that human rights can and must play a role in surrender proceedings, thereby acknowledging that the EAW is not a black box that must be automatically recognized,[56] the door for refusing EAWs on fundamental rights grounds is merely ajar. In practice, the approach triggers a number of challenges and questions for national judges, e.g.:

- How can the judge reconcile serious concerns put forward by the individual within the tight time limits for taking surrender decisions foreseen in the FD EAW?

- Which type of evidence is suitable for the different steps of the test, in the end proving the specific circumstances of the person concerned?
- Which questions can be addressed within the framework of the required dialogue with the issuing judicial authority (bearing in mind the tension between the Damocles sword of mutual recognition, on the one hand, and doubts over mutual trust, on the other)?
- Is the request for supplementary information expedient and are the answers received trustworthy?
- Which more mitigating efforts can be taken instead of refusal (e.g., the request for assurances or the setting of conditions vis-à-vis the issuing authority)?
- What are the consequences if there is no indication of systemic and generalised deficiencies in relation to fair trial guarantees in an EU Member State but if the guarantee is likely not to be maintained in a specific case (e.g., in the case of a politically motivated criminal trial in Member State X)?[57]

Notwithstanding, the HRC of Karlsruhe demonstrated in its recent jurisprudence (decisions of February and November 2020) that the diverging extradition interests can also be adequately reconciled within the framework of the established *LM* test. The court showed that the CJEU's approach includes a certain amount of leeway for interpretation by the national authorities examining the execution of EAWs from countries in which shadows lie over the rule of law. If well founded, the second prong of the test can be affirmed, especially when considering the recent, most alarming rule-of-law developments in the respective Member State. It would be a positive development if other courts in the EU took greater account of this courageous approach.

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1. S. Maffei, *Extradition Law and Practice*, 2019, p. 24; S. Gleß/T. Wahl/F. Zimmermann, HT I, "§ 73 Grenzen der Rechtshilfe", mn. 1, in: Schomburg/Lagodny, *Internationale Rechtshilfe in Strafsachen*, 6th ed. 2020; J. Vogel/C. Burchard, "IRG, Vor § 1", mn. 229, in: Grützner/Pötz/Kreß/Gazeas (eds.), Internationaler Rechtshilfeverkehr in Strafsachen, 3rd ed.↩
2. *O. Lagodny*, *Die Rechtsstellung in der Bundesrepublik Deutschland*, 1987, p. 256; Gleß/Wahl/Zimmermann, *op. cit.* (n. 1), mn. 14 et seq.↩
3. Cf. ECtHR, 7 July 1989, *Soering v United Kingdom*, Applic. no. 14038/88, para. 89 stressing that the establishment of safe havens would endanger the foundations of extradition. Analyses of the CJEU's case law allow a similar approach to be concluded: compare the *LM* judgment discussed in this article and the CJEU's judgment of 27 February 2018 in Case C-64/16, *Associação Sindical dos Juízes Portugueses* (cf. A. Torres Pérez, "From Portugal to Poland: The Court of Justice of the European Union as a watchdog of judicial independence", (2020) 27 *MJ*, 105; M. Wendel, "Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after LM", (2019) 15 *European Constitutional Law Review*, 17, 47; A. Frąckowiak-Adamska, "Drawing Red Lines With No (Significant) Bite – Why an Individual Test Is Not Appropriate in the LM Case", *Verfassungsblog* (30 July 2018), <https://verfassungsblog.de/drawing-red-lines-with-no-significant-bite-why-an-individual-test-is-not-appropriate-in-the-lm-case/> accessed 21 January 2021. For the approach of the German Federal Constitutional Court, cf. BVerfG, Official Case Reports E 75, 1, 16, entitled by *Vogel* as "*restriktive Einheits- und Mischformel*" (literally translated: "restrictive omnium and mixing formula") – see J. Vogel, "IRG, § 73", mn. 51, in: Grützner/Pötz/Kreß/Gazeas, *Internationaler Rechtshilfeverkehr in Strafsachen*, *op. cit.* (n. 1).↩
4. ECtHR, *Soering*, *op. cit.* (n. 3), para. 113.↩
5. ECtHR, 17 January 2012, *Othman [Abu Qatada] v United Kingdom*, Applic. no. 8139/09, paras. 259/260. In the case at issue, the ECtHR confirmed a "flagrant denial of justice" because it was well founded that evidence obtained by means of torture would be used at retrial in the requesting state (Jordan) against the person concerned. The ECtHR also gives examples of other cases having the potential of a flagrant denial of the guarantees enshrined in Art. 6 ECHR. For subsequent ECtHR case law see also Advocate General *Tanchev*, Opinion of 28 June 2018 in Case C-216/18 PPU, *LM*, para. 84.↩
6. *O.J.* L 190, 18.7.2002, 1.↩
7. As detailed by the European Commission in its Reasoned Proposal of 20 December 2020 on Art. 7 TEU requesting the Council to determine that there is a clear risk of a serious beach by the Republic of Poland of the rule of law, COM(2017) 835 final.↩
8. [2018] IEHC 153.↩
9. CJEU, 25 July 2018, Case C-216/18 PPU, *LM*; see also T. Wahl, "CJEU: Refusal of EAW in Case of Fair Trial Infringements Possible as Exception", (2018) *eucrim*, 104.↩
10. CJEU, 5 April 2016, Joined Cases C-404/15 and C-659/15 PPU, see also T. Wahl, "CJEU Strives to Balance Human Rights and Mutual Recognition", (2016) *eucrim*, 16.↩
11. CJEU, *LM*, *op. cit.* (n. 9), para. 36.↩
12. CJEU, *LM*, *op. cit.* (n. 9), paras. 43 et seq. referring to the judgment in *Aranyosi & Căldăraru* (op cit. n. 10).↩

13. See also P. Bárd and W. van Ballegoij, "The CJEU in the Celmer case: One Step Forward, Two Steps Back for Upholding the Rule of Law Within the EU", *Verfassungsblog*, 29 July 2018, <https://verfassungsblog.de/the-cjeu-in-the-celmer-case-one-step-forward-two-steps-back-for-upholding-the-rule-of-law-within-the-eu/>, accessed 23 January 2021; M. Payandeh, "Europäischer Haftbefehl und Grundrecht auf ein faires Verfahren", (2018) *Juristische Schulung (JuS)*, 919, 920.↩
14. CJEU, *LM*, *op. cit.* (n. 9), para. 61; CJEU, *Aranyosi* & *Căldăraru*, *op. cit.* (n. 10), para. 92.↩
15. CJEU, *LM*, *op. cit.* (n. 9), para. 68; CJEU, Aranyosi & *Căldăraru*, *op. cit.* (n. 10), para. 94.↩
16. CJEU, *LM*, *op. cit.* (n. 9), para. 74 et seq.; M. A. Simonelli, "'…And Justice for All?' The right to an independent tribunal after the ruling of the Court of Justice in *LM*", 10 (2019) *New Journal of European Criminal Law (NJECL)*, 1, 7 ; A. Martufi/D. Gigengack, "Exploring mutual trust through the lens of an executing authority: The practice of the Court of Amsterdam in EAW proceedings", 11 (2020), *NJECL*, 282, 288.↩
17. CJEU, *LM*, *op. cit.* (n. 9), paras, 76, 77.↩
18. F-G. Ruiz Yamuza, "LM case, a new horizon in shielding fundamental rights within cooperation based on mutual recognition. Flying in the coffin corner", 20 (2020) *ERA Forum*, 371, 388.↩
19. Cf. ECtHR, *Othman*, *op. cit.* (n. 5), para. 258; ECtHR, *Soering*, *op. cit.* (n. 3), para. 113.↩
20. Cf. the formulation in *Othman*, ibid.↩
21. J. Geneuss/A. Werkmeister, "Faire Strafverfahren vor systemisch abhängigen Gerichten?", 132 (2020) *ZStW*, 102, 113; M. Krajewski, "Who is Afraid of the European Council? The Court of Justice's Cautious Approach to the Independence of Domestic Judges", 14 (2019) *European Const. Law Rev.*, 792, 805; D. Sarmiento, "A comment on the CJEU's judgment in LM", (2018) 25 *MJ*, 385 – all stressing the "Article 7 dilemma" implied in the FD EAW. *Payandeh* ((2018) *JuS*, *op. cit.* (n. 13), 921) criticizes the CJEU's approach, because it makes a judicial question dependent on a political mechanism.↩
22. CJEU, *LM*, *op. cit.* (n. 9), para, 61.↩
23. This conclusion results from desk research and replies that the author received from foreign experts of the International Extradition Group in September 2019. The International Extradition Group was initiated by *Prof. Dr. Stefano Maffei*/University of Parma in 2016 and is a forum for extradition lawyers and scholars all over the world. More information on the group is available at <https://internationalextradition.org/>.↩
24. [2018] IEHC 639.↩
25. [2018] EWHC 2848 (Admin).↩
26. [2019] SC EDIN 37.↩
27. See the overview at Martufi/Gigengack, *op. cit.* (n. 16), 11 (2020) *NJECL*, 294 et seq.↩
28. ECLI:NL:RBAMS:2018:5925.↩
29. ECLI:NL:RBAMS:2018:7032; see also T. Wahl, "Fair Trial Violation: Amsterdam Court Refuses Surrender to Poland", (2019) *eucrim*, 159.↩
30. Joined Cases C-354/20 PPU and C-412/20 PPU, "*L and P"/Openbaar Ministerie.*↩
31. Decisions in Germany that can be considered as a follow-up to *LM* are, for instance: HRC of Brandenburg, Decision of 18 August 2020 – 2 AR 16/20; HRC of Berlin, Decision of 3 April 2020 – (4) 151 AuslA 201/19 (234/19); HRC of Düsseldorf, Decision of 14 June 2019 – 4 AR 38/19; HRC of Cologne, Decision of 15 January 2019 – 6 AuslA 115/18 – 80; HRC of Bremen, Decision of 7 September 2018 – 1 Ausl. A 31/18.↩
32. Cf. the decisions of the HRC of Karlsruhe in case Ausl 301 AR 95/18, in particular the decision of 7 January 2019. This decision is commented in English by A. Oehmichen at <https://www.linkedin.com/pulse/after-cjeus-decision-lm-25072018-c21618-ppu-german-court-oehmichen?trk=portfolio_article-card_title>.↩
33. HRC of Karlsruhe, Decision of 17 February 2020, Ausl 301 AR 156/19. This decision is summarised in English by T. Wahl, "Fair Trial Concerns: German Court Suspends Execution of Polish EAW", (2020) *eucrim*, 27-28.↩
34. HRC of Karlsruhe, Decision of 27 November 2020, Ausl 301 AR 104/19, BeckRS 2020, 36266.↩
35. Federal Constitutional Court, Order of 15 December 2015. An English summary is provided by the press release available at <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-004.html> accessed 21 January 2021.↩
36. H. Satzger, "Mutual Recognition in Times of Crisis – Mutual Recognition in Crisis? An Analysis of the New Jurisprudence on the European Arrest Warrant", 8 (2018) *EuCLR*, 317, 327 et seq.↩
37. T. Wahl and A. Oppers, "European criminal procedure law in Germany: Between tradition and innovation", in: E. Sellier and A. Weyembergh (eds.), *Criminal Procedures and Cross-Border Cooperation in the EU Area of Criminal Justice*, 2020, pp. 54, 104.↩
38. T. Wahl, "Federal Constitutional Court Invokes Identity Review in EAW Case", (2016) *eucrim*, 17.↩
39. COM(2017) 835 final, *op. cit.* (n. 7).↩
40. IEHC in *Celmer*, mn. 71; EWHC in *Lis*, mn. 71; HRC of Karlsruhe, Decision of 27 November 2020, mn. 43.↩
41. IEHC in *Celm*er, mn. 105↩
42. Joined Cases C-585/18, C-624/18, and C-625/18; see details in *eucrim* 3/2019, pp. 155-156.↩
43. For the approach by the Rechtbank Amsterdam, see Martufi/Gigengack, *op. cit.* (n. 16), 11 (2020) *NJECL*, 295. See also R. Kert, "Grundrechtsschutz und gegenseitige Anerkennung strafrechtlicher Entscheidungen in einem Raum der Freiheit, der Sicherheit und des Rechts", (2020) *ÖJZ*, 719, 728, who is critical to the CJEU's approach to expect the defendant to prove repercussions of deficiencies in his/her individual case.↩
44. This was also the main argument by the HRC of Brandenburg (*op. cit.* (n. 31): A (general) extradition ban cannot be accepted if the defendant is accused of "common criminal offences", such as breach of maintenance obligation.↩
45. Decision of 27 November 2020, mn. 41.↩
46. After Brexit (i.e., from 1 January 2021 onwards), UK courts must decide, however, to which test they feel inclined in extradition cases with EU countries, since they are no longer bound to the EU's mutual recognition instruments and the CFR (see the questions raised in Sheriff Court (Edinburgh), judgment of 21 December 2020, [2020] 12 WLUK 457, *Lord Advocate v Zagajewska & Others*). Notwithstanding, the "essence" of the fundamental right to a fair trial is difficult to define (cf. M. Wendel, (2019) 15 *Europ Const L Rev*, *op. cit.* (n. 3), 27; in general, K. Gutmann, "The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best is Yet to Come?" (2019) 20 *German Law Journal*, 884).↩

47. Using similar arguments, the EWHC granted permission to appeal against an extradition to Poland (cf. [2020] EWHC 1459 (Admin), *Wozniak v Poland*).↩
48. Cf. CJEU, 17 December 2020, Joined Cases C-354/20 PPU and C-412/20 PPU, *"L and P"*, para. 33.↩
49. CJEU, "*L and P*", *op. cit.* (n. 48), para. 43.↩
50. CJEU, "*L and P*", *op. cit.* (n. 48), para. 59; some authors share the CJEU's approach: M. Bonelli, "*Intermezzo* in the Rule of Law Play: The Court of Justice's *LM* Case", in: A. von Bogdandy et al. (eds.), *Defending Checks and Balances in EU Member States,* 2021, p. 455; L. Bachmaier Winter, "Judicial independence in the Member States of the Council of Europe and the EU: evaluation and action", (2019) *ERA Forum* 20, 113, 125.↩
51. The SC Edinburgh judgment in *Maciejec* is instructive in this sense. In the *Celm*er case before the IEHC, the Irish Human Rights and Equality Commission – an NGO – was invited *amicus curiae*; it assisted in the assessment of evidence.↩
52. For the approach of the Amsterdam court emphasing the dialogue with the Polish authorities, see Martufi/Gigengack, *op. cit.* (n. 16), 11 (2020) *NJECL*, 282.↩
53. The length of the list of questions seeking supplementary information is not unproblematic. In relation to bad prison conditions (Art. 4 CFR), the CJEU stressed that the list must be practicable and in compliance with the duty of sincere cooperation and cannot lead to a "standstill" of the cooperation instrument (CJEU, 25 July 2018, Case C-220/18 PPU, "*ML/Generalstaatsanwaltschaft Bremen*", paras. 103-104).↩
54. HRC of Cologne, *op. cit.* (n. 31).↩
55. The CJEU's too narrowly designed test and the difficulty of performing the test in practice are also the major points of criticism in the legal literature. See, for instance, P. Bárd and W. van Ballegoij, "Judicial Independence as a precondition for mutual trust? The CJEU in *Minister for Justice and Equality v LM*", (2019) *NJECL*, 353, 360; N. Šubic, "Executing a European Arrest Warrant in the Middle of the Rule of Law Crisis: Case C-216/18 PPU Minister for Justice and Equality (LM/Celmer)", (2018) 21 *Irish Journal of European Law*, 98; Simonelli, *op. cit.* (n. 16), 1; Krajewski, *op. cit.* (n. 21), 811; Geneuss/Werkmeister, *op. cit.* (n. 21), 102.↩
56. This is a longstanding call by German practitioners and academics. Cf. T. Wahl, "The perception of the principle of mutual recognition of judicial decisions in criminal matters in Germany," in: G. Vernimmen-Van Tiggelen, L. Surano and A. Weyembergh (eds.), *The future of mutual recognition in criminal matters in the European Union*, 2009, p. 115, 121.↩
57. For an example, see the case [2020] EWHC 2709 (Admin), *Adamescu v Romania*.↩

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