



INSIGHT

## A CHECK MOVE FOR THE PRINCIPLE OF MUTUAL TRUST FROM DUBLIN: THE *CELMER* CASE

MICHAŁ DOROČIAK\* AND WOJCIECH LEWANDOWSKI\*\*

ABSTRACT: This *Insight* comments on the recent referral for a preliminary ruling by the Irish High Court *Minister of Justice and Equality v. Celmer* (judgment of 12 March 2018, no. 2017 EXT 291) in the case concerning a Polish citizen sought by the Republic of Poland pursuant to the European Arrest Warrant. The key problem relates to the question whether a violation of the principle of rule of law, as established by a Member State's court, may constitute a sufficient justification for the non-execution of the Arrest Warrant. As the judgment of the CJEU is pending, the authors present their opinion on the issue at stake. Analysing it from the perspective of the principle of mutual trust, which constitutes the foundation of the EU's Area of Freedom, Security and Justice, they argue that the conditions for the suspension of the Arrest Warrant should be interpreted in a restrictive manner and any attempt of assessing a Member State's compliance with the rule of law by the Court of Justice or other Member States' courts should be considered an *ultra vires* act.

KEYWORDS: European Arrest Warrant – rule of law – right to fair trial – mutual trust – Court of Justice – AFSJ.

### I. INTRODUCTION

The European Union is an international organisation *sui generis* based not only on law and the will of the “High Contracting Parties”, but, as the authors of this *Insight* argue, mainly on trust. The values and principles set in the Treaties and in the jurisprudence of the CJEU are fundamental for building the common partnership and cooperation between the Member States. Two principles are recently repeatedly recalled and commented in the light of unprecedented application of the infamous “nuclear option” of Art. 7 TEU towards Poland – the principles of rule of law and mutual trust. The newest chapter of the “rule of law saga” in Poland commenced on 12 March 2018, when the Irish High Court suspended the execution of the European arrest warrant issued by the

\* PhD student, University of Warsaw, m.dorociak@wpia.uw.edu.pl.

\*\* PhD student, University of Warsaw, wp.lewandowski@uw.edu.pl.

Polish Court under the accused breach of rule of law and asked the preliminary question to the CJEU with request to assess the standards of protection of fundamental rights in Poland. The authors of this *Insight* aim to present a complex perspective on the legal problems related to the application of European Union law to the *Celmer* case. However, the authors intentionally avoid to give their opinion on the answer for the rule of law question in Poland, in order to focus on the legality and legitimacy of the potential CJEU ruling.

The *Insight* is structured as follows: firstly, the principle of mutual trust and its historical grounds are presented. Its interpretation, as suggested by the authors, will serve as a basis for further argumentation developed in the article. Secondly, the preliminary question contained in the judgment of the Irish High Court, which sought to undermine this principle, is described in detail. In the third and fourth parts the authors assess competences of the CJEU and national courts to review another Member State's compliance with the rule of law and fundamental rights respectively. The conclusion comprises an attempt to foresee the upcoming judgment of the CJEU.

## II. POLITICAL DIMENSION OF THE PRINCIPLE OF MUTUAL TRUST

As it was rightly remarked by Armin von Bogdandy “[t]rust is firstly a non-legal phenomenon”.<sup>1</sup> It is principally a social phenomenon, one that binds members of society as “without the general trust that people have in each other, society itself would disintegrate, for very few relationships are based entirely upon what is known with certainty about another person, and very few relationships would endure if trust were not as strong as, or stronger than, rational proof or personal observation”.<sup>2</sup> In recent literature concerning its role in the EU's area of freedom, security and justice, the focus was laid principally on its social dimension.<sup>3</sup> Nevertheless, it should not be forgotten that trust also has strong implications for a political community. According to John Locke, it is trust that propels individuals to create a State and to pass the authority to the government which shall protect them.<sup>4</sup> On the opposite side stands Thomas Hobbes claiming that it is rather a lack of trust that pushes individuals to create a State – according to him, people just prefer to be afraid of one sovereign than of many individuals.<sup>5</sup> Moreover, it is exactly mistrust that constitutes the founding principle of international relations.

<sup>1</sup> A. VON BOGDANDY, *Beyond the Rechtsgemeinschaft, with Trust – Reframing the Concept of European Rule of Law*, in *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper*, no. 2/2018, p. 13.

<sup>2</sup> G. SIMMEL, *The Philosophy of Money*, London: Routledge, 1978, pp. 178-179.

<sup>3</sup> See A. VON BOGDANDY, *Beyond the Rechtsgemeinschaft*, cit.; M. SCHWARTZ, *Let's Talk About Trust, Baby! Theorizing Trust and Mutual Recognition in the EU's Area of Freedom, Security and Justice*, in *European Law Journal*, 2018.

<sup>4</sup> J. LOCKE, *Second Treatise of Government*, 2017, p. 46, [www.earlymoderntexts.com](http://www.earlymoderntexts.com).

<sup>5</sup> T. HOBBS, *Lewiatan*, Warsaw: Aletheia, 2009, p. 271.

The story of modern political settlements in Europe was all about ways of containing this mistrust between States in order to safeguard stability on the Old Continent. The so-called *Westphalian system*, emerging from the Peace of Westphalia of 1648, was based on the breakaway from an idea of Christian universalism and on the creation of an arrangement between sovereign States which have the ultimate power over their territories. Final failure of this system, revealed by the Napoleonic wars, led to another attempt at establishing order in Europe. It was made in Vienna in 1815 and was supposed to create a new *balance of powers*. As also this project appeared to be unsuccessful with the outburst of the First World War and subsequently the Second World War, a common understanding developed among European societies appeared that a completely new order was needed.

The first to call for the new order was probably Winston Churchill, who in his famous speech in Zurich in 1946 raised the necessity of creating United States of Europe.<sup>6</sup> According to Churchill, this new order was to be based on “[the] act of faith in the European family, this act of oblivion against all crimes and follies of the past”.<sup>7</sup>

Four years later, in 1950 a “leap into dark”, according to Schuman’s own words,<sup>8</sup> was taken by him when he announced his plan to launch the European Coal and Steel Community. This was the very beginning of after-war reconciliation between France and Germany based on trust. The role of the latter was fully appreciated by the leaders of both countries. In a symbolic act of trust President de Gaulle in 1958 invited Chancellor Adenauer as the only world leader ever to visit de Gaulle’s home.<sup>9</sup> During his subsequent trip to Berlin in 1962, de Gaulle stated that trust was to become “the foundation stone on which Europe’s unity can and must be erected”.<sup>10</sup>

Since then faith in a common European project based on mutual trust between European States has accompanied all efforts aimed at building the European Union. Although this concept is principally associated with the Area of Freedom Security and Justice (AFSJ), the principle of mutual trust had underpinned the internal market legislation long before the introduction of the AFSJ.<sup>11</sup> However, it was in disguise of the principle of mutual recognition that it appeared for the very first time in the CJEU’s ruling in *Cassis de Dijon*.<sup>12</sup> Quickly enough mutual recognition was applied to all four internal market

<sup>6</sup> W. CHURCHILL, speech delivered at the University of Zurich, 19 September 1946, [www.rm.coe.int](http://www.rm.coe.int).

<sup>7</sup> *Ibidem*.

<sup>8</sup> Words attributed to R. Schuman according to J. MONNET, *Memoirs*, Glasgow: Collins, 1978, pp. 304-305.

<sup>9</sup> E. MOURLON-DRUOL, *Rethinking Franco-German Relations: A Historical Perspective*, in *Bruegel Policy Contribution*, 2017, p. 3.

<sup>10</sup> C. DE GAULLE, speech delivered in Berlin, 9 September 1962, [www.konrad-adenauer.de](http://www.konrad-adenauer.de).

<sup>11</sup> S. PRECHAL, *Mutual Trust before the Court of Justice of the European Union*, in *European Papers*, 2017, Vol. 2, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 77.

<sup>12</sup> Court of Justice, judgment of 20 February 1979, case C-120/78, *Cassis de Dijon*, para. 8.

freedoms and subsequently spread to other EU policies.<sup>13</sup> The reason why this diffusion of the principle of mutual recognition, and the underlying principle of mutual trust,<sup>14</sup> from the internal market to other fields covered by the EU law was possible, is the fact that in all these spheres these principles serve the very same purpose – creation of an area “without internal frontiers”.<sup>15</sup> As a result, an idea of mutual trust underpinning the principle of mutual recognition began to be expressed by European institutions, including the most relevant in this context, the CJEU. Finally, with the establishment of the third pillar of the EU, which was later transformed into the AFSJ, the principle of mutual trust gained “fundamental importance”.<sup>16</sup>

Therefore, the EU law emerging from the Treaties concluded by the Member States and subsequent legislation created by the EU itself should be treated as an expression of the trust between Member States in their ability to cooperate, despite the difficult past and sometimes divergent opinions, for the sake of the common welfare and a better tomorrow. These foundations of EU law consisting in mutual trust were best captured by the CJEU in its Opinion on the adherence of the EU to the European Convention on the Protection of Human Rights and Fundamental Freedoms, where it stated that:

“This [EU] legal structure is based on the fundamental premise that each member state shares with all the other member states, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Art. 2 TEU. That premise implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected”.<sup>17</sup>

Insofar as trust underlies and precedes law, it excludes involvement of a court which is a *product* of law that is created to adjudicate basing on this law. The Court should not decide on the very foundations of the law on which it also stands. If mutual confidence is a *raison d'être* of the EU,<sup>18</sup> it should be left to Member States, *Masters of the Treaties*, to decide on the solidity of the foundations on which they have erected the common building. That is why in the preamble to the Framework Decision on the European Arrest Warrant, being one of the key pillars of the AFSJ, it is expressly stated that implementation of the mechanism of the European Arrest Warrant (EAW) may be suspended only if a *serious and persistent* breach of the EU principles is determined by the

<sup>13</sup> T. WISCHEMEYER, *Generating Trust Through Law? Judicial Cooperation in the European Union and the “Principle of Mutual Trust”*, in *German Law Journal*, 2016, p. 351.

<sup>14</sup> T. MARGUERY, T. VAN DEN BRINIK, *Mutual Recognition and Mutual Trust: Reinforcing EU Integration? Introduction*, in *European Papers*, 2016, Vol. 1, No 3, www.europeanpapers.eu, p. 861.

<sup>15</sup> Art. 3, para. 2, TEU; see N. CAMBIEN, *Mutual Recognition and Mutual Trust in the Internal Market*, in *European Papers*, 2017, Vol. 2, No 1, www.europeanpapers.eu, p. 98.

<sup>16</sup> Court of Justice, opinion 2/13 of 18 December 2014, para. 191.

<sup>17</sup> *Ibidem*, para. 168.

<sup>18</sup> Court of Justice, judgment of 21 December 2011, case C-411/10, *N.S.*, para. 83.

European Council.<sup>19</sup> It is thus left only to EU Member States and their political authorities, represented by the European Council, to decide on the suspension of *a high level of confidence* between them,<sup>20</sup> on which the EAW mechanism and the whole EU is based. As the authors tried to demonstrate above, the decision to trust another Member State, its people and its institutions, is of a strictly political character since it implies this vulnerability to another party that may be justified only through democratic legitimacy. Only democratic legitimacy may serve as a basis of a decision to *leap into the dark* and potentially subject ourselves to the power of those whom we cannot control. Although this seems extremely risky, it also offers a promise of the “arm of the law [becoming] longer by acquiring a transnational reach”.<sup>21</sup>

One of the most important roles of the judiciary in the EU thus becomes a protection of this new area without previously present State borders. Nevertheless, this new task in no way undermines the essential function of courts in protecting fundamental rights. Since the CJEU’s seminal judgment in *van Gend en Loos* we know that subjects of EU law are not only States, but also individuals<sup>22</sup> and protection of their rights is one of the main tasks of the EU. It means that States’ decisions or as in the present case, rather a lack thereof, may not lead to a systemic disrespect for their fundamental rights. Nevertheless, at the same time it means that exceptions should be interpreted in a restrictive manner as was set forth by the CJEU in *Aranyosi-Caldararu*<sup>23</sup> and *NS*.<sup>24</sup> It is exactly the principle of mutual trust that imposes the necessity of restrictive interpretation of exceptions. As the CJEU has stated, this principle requires, particularly with regard to the AFSJ, that each of the Member States “save in exceptional circumstances [to] consider all the other member states to be complying with EU law and particularly with the fundamental rights recognised by the EU law”.<sup>25</sup>

This presumption is based, according to Koen Lenaerts, on the principle of equality of Member States as set forth in Art. 4, para. 2, TEU,<sup>26</sup> which is constitutional for the EU. Where Member States are equal they have no power to decide over each other. The problem of the lack of a mechanism to settle disputes between equals was the very

<sup>19</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision (hereinafter also EAW Framework Decision), preamble, para. 10.

<sup>20</sup> *Ibidem*.

<sup>21</sup> K. LENAERTS, *La vie après l’avis: Exploring the Principle of Mutual (yet not Blind) Trust*, in *Common Market Law Review*, 2017, p. 809.

<sup>22</sup> Court of Justice, judgment of 5 February 1963, case C-26/62, *Van Gend en Loos*.

<sup>23</sup> Court of Justice, judgment of 5 April 2016, case C-405/15, *Aranyosi and Căldăraru*.

<sup>24</sup> *N.S.*, cit.

<sup>25</sup> *Aranyosi and Căldăraru*, cit., paras 78-80; Court of Justice, judgment of 26 February 2013, case C-399/11, *Melloni*, paras 37 and 63; Opinion 2/13, cit., para. 191.

<sup>26</sup> K. LENAERTS, *La vie après*, cit., p. 808.

reason to create a Leviathan according to T. Hobbes.<sup>27</sup> Equals have no power over each other; the same applies to EU Member States and, in particular, to their courts – courts may not have a right to decide on a situation in other Member States. This would be contrary to the fundamental principle of the public international law of State immunity that has never been suspended or cancelled within the EU. Moreover, a right of a court to give a ruling on a situation in another Member State, in particular on compliance of this Member State with the rule of law, would shake the very foundations of the EU project, meticulously built in the after-war period as was described above.

Nevertheless, in a recent judgment, *Minister of Justice and Equality v. Celmer*,<sup>28</sup> the Irish High Court, stating that it has found that Poland had breached the common values of the rule of law and democracy,<sup>29</sup> made an ambitious attempt at checking how solid these foundations are.

Mutual trust is not a blind trust.<sup>30</sup> The presumption of Member States' compliance with common values based on mutual trust, as any other presumption, is not irrefutable. Although, as was argued, a Member State's court cannot have a right to unilaterally "switch off" mutual trust and arbitrarily decide on the rule of law in another Member State, it may however conditionally and exceptionally postpone the execution of the EAW and thereby interrupt smooth operation of the AFSJ where it is necessary to ensure protection of absolute fundamental rights. Still, as the authors presented above, these exceptions must be interpreted in a restrictive manner.

Unfortunately, the Irish High Court that made a referral to the CJEU, which is the main object of this *Insight*, seems not to share this conviction. Therefore, the subsequent part of the paper will be devoted to the analysis of the Irish judgment and then a critical assessment of it will follow.

### III. CONTEXT OF THE REFERRAL

The decision to suspend the proceedings and address the request for a preliminary ruling was taken by the Irish High Court settling the case of a Polish citizen, Artur Celmer, sought by the Republic of Poland pursuant to three European arrest warrants issued by Polish judicial authorities. Mr. Celmer was arrested on the basis of the first two warrants in Ireland on 5th May 2017 and since then he has remained in custody. Polish authorities sought him to stand a trial for offenses that may be summarized as accusa-

<sup>27</sup> T. HOBBS, *Lewiatan*, cit., p. 266.

<sup>28</sup> Irish High Court, judgment of 12 March 2018, *the Minister of for Justice and Equality v. Artur Celmer*, no. 2017 EXT 291.

<sup>29</sup> *Ibidem*, para. 143.

<sup>30</sup> G. ANAGNOSTARAS, *Mutual Confidence is not Blind Trust! Fundamental Rights Protection and the Execution of the European Arrest Warrant: Aranyosi and Caldaru*, in *Common Market Law Review*, 2016, p. 1683; see also K. LENAERTS, *La vie après*, cit., p. 821.

tions of participating in an organized criminal group trafficking and trading narcotic drugs and psychotropic substances, which were distributed in the northern part of Poland between 2002 and 2007. The alleged violations of criminal law are prohibited and penalised in both the Republic of Poland and Republic of Ireland.

The Irish High Court delivered its judgment on 12 March 2018. In its assessment of the case the Court focused on two perspectives: one stemming from Irish law and jurisprudence of the Irish courts and the second one based on EU law and CJEU jurisprudence. For the sake of this *Insight*, it is relevant to analyse solely the EU law arguments as these are the only ones relevant before the Court of Justice.

Approaching the case from the EU law side, the Irish High Court referred to the TEU, EAW Framework Decision and the CJEU's case-law in *Aranyosi and Caldaru* and the European Court of Human Rights' case-law in *NSS* and *Bukoshi*.<sup>31</sup> Beginning with a distinction between Art. 7 process and the evidence before the Court in the form of the Reasoned Proposal of the European Commission, the Court acknowledged that the former is a political process and therefore its possible negative outcome (meaning no determination of Art. 7 TEU breach) should not be understood as a predicament to the Court's determination whether there is a real risk to the respondent's fundamental rights in case he is surrendered to Poland. As a result, the Irish High Court deemed that it was not appropriate to adjourn the case pending the outcome of Art. 7 process – instead, it was decided to continue with the judicial process based on EU and national law, taking into consideration the reasoned proposal of the Commission.

Therefore, the Court moved to analyse whether the decision to surrender the respondent would amount to a violation of fundamental rights. According to Art. 1, para. 3, of the EAW Framework Decision, the obligation to respect them shall not be in any way affected by the compliance with the decision. In the given circumstances it is in particular the right to a fair trial (Art. 47 of the Charter of Fundamental Rights of the European Union) that the Court perceived as systemically endangered. After analysis of the information before it, the Court reached the conclusion that “the rule of law in Poland has been systematically damaged by the cumulative impact of all the legislative changes that have taken place over the last two years”.<sup>32</sup>

As a result thereof, according to the Court, surrender of the respondent will lead to a situation in which there is risk that he will be subjected to arbitrariness in the course of his trial. Having not undertaken an analysis of risks to which the respondent may be exposed in his particular case, the Court limited itself to stating that he will be returning to face trial in a jurisdiction where the Minister of Justice is now the Public Prosecutor and is entitled to play an active role in prosecutions, playing at the same time a disciplinary role over the Presidents of Courts. Responding to the Irish Minister of Justice's remarks that no specific

<sup>31</sup> Irish High Court, *Celmer*, cit., para. 114.

<sup>32</sup> *Ibidem*, para. 124.

threat of fair trial to this individual has been identified<sup>33</sup> and that the legislative changes do not affect trial rights,<sup>34</sup> the Court just claimed that by legislating for gender discrimination amongst the judiciary, changing the organization of the Supreme Court and interfering with the integrity and effectiveness of the Constitutional Tribunal, the common values of the rule of law in Poland had been breached.<sup>35</sup> It further developed its reasoning by declaring that where “there is such a fundamental defect in a system of justice that the rule of law in the member state has been threatened, it is difficult to see how the principles of mutual trust and mutual recognition may operate” and “it appears unrealistic to require a requested person to go further and demonstrate how, in his individual case, these defects will affect his trial”.<sup>36</sup> In the end, before submitting its questions to the CJEU, the Irish Court concluded its position with an assertion that because of “the deficiencies [...] to the edifices of a democracy governed by the rule of law” a two-step test presented by the CJEU in *Aranyosi-Caldararu* – based on: firstly, identification of general or systemic deficiencies in the protections in the issuing State and secondly, seeking all necessary supplementary information from the issuing State as to the protections for the individual concerned – could not be relied upon in the current proceedings, as “it is difficult to see how individual guarantees can be given by the issuing judicial authority as to fair trial when it is the system of justice itself that is no longer operating under the rule of law”.<sup>37</sup> Having stated that, the Irish Court asked the CJEU two questions:

- a. Is the Aranyosi and Caldararu test, which relies upon principles of mutual trust and mutual recognition, the correct test to apply where the High Court, as an executing judicial authority under the Framework Decision, has found that the common value of the rule of law set out in Art. 2 TEU has been breached in Poland?
- b. If the test to be applied is whether the requested person is at real risk of a flagrant denial of justice, does the High Court, as an executing judicial authority, have to revert to the issuing judicial authority for any further necessary information about the trial that this requested person will face, where the High Court has found that there is a systemic breach to the rule of law in Poland?”<sup>38</sup>

Having presented the Irish Court’s judgment, the authors may proceed now with their commentary to the discussed judgment. Therefore, the following part of the present *Insight* will demonstrate that neither the CJEU, nor national courts are competent to assess the Member State’s compliance with the rule of law.

<sup>33</sup> *Ibidem*, para. 129.

<sup>34</sup> *Ibidem*, para. 130.

<sup>35</sup> *Ibidem*, para. 135.

<sup>36</sup> *Ibidem*, para. 141.

<sup>37</sup> *Ibidem*, para. 142.

<sup>38</sup> *Ibidem*, para. 145.

#### IV. THE CJEU'S AND NATIONAL COURTS' LACK OF COMPETENCE TO ASSESS MEMBER STATES' COMPLIANCE WITH THE RULE OF LAW

"It must, in that context, be noted that recital 10 of the Framework Decision [on EAW] states that the implementation of the mechanism of the European arrest warrant as such may be suspended only in the event of serious and persistent breach by one of the member states of the principles referred to in Art. 2 TEU, and in accordance with the procedure provided for in Art. 7 TEU".<sup>39</sup>

The cited quote perfectly sums up the reasons why the assessment of the observance of the rule of law in Poland by either the CJEU or a Member State's court is neither legitimate, nor legal and shall not have any effect on execution of the EAW. The reference to the procedure provided in Art. 7 TEU was made by the CJEU itself *Aranyosi-Caldararu*. As was thoroughly discussed in the first part of this *Insight*, the principle of mutual trust between Member States can be suspended only if a *serious and persistent* breach of the principles referred to in Art. 2 TEU was previously determined in the procedure provided in Art. 7 TEU or if, under exceptional circumstances, the conditions of the *Aranyosi-Caldararu* test as described below are met. As a result, it is demonstrated below that in the *Celmer* case a court's assessment of compliance of Poland with the rule of law is of no relevance and the *Aranyosi-Caldararu* test, contrary to what claims the Irish High Court, can and shall be applied. Here the authors present the arguments that support the above cited statement of the CJEU and demonstrate that the CJEU's judgment assessing the observance of rule of law in Poland cannot have any effect on the execution of the EAW and would constitute an *ultra vires* act.

However, it remains important to discuss the special context of the referral in the *Celmer* case. The CJEU's competence to review the general conformity of Polish legal acts with EU law is provided in the infringement procedure laid down in Art. 258 TFEU (as it is currently pending in case C-192/18, *Commission v. Poland*). In this procedure the CJEU is asked to review the conformity of Member States' laws with the values and principles enshrined in Art. 2 TEU, among others the principle of rule of law.<sup>40</sup> Nevertheless, in such case even the finding of an infringement cannot lead to suspension of the rights of Poland as a Member State, as this could happen only on the basis of a political decision of Member States acting through the Council or European Council in accord-

<sup>39</sup> *Aranyosi and Căldăraru*, cit., para. 81.

<sup>40</sup> K. SCHEPPELE, *What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systemic Infringement Actions*, in *Verfassungsblog*, November 2013, www.verfassungsblog.de, p. 1; D. KOCHENOV, *On Policing Art. 2 TEU Compliance*, in *Polish Yearbook of International Law*, 2013, p. 163; A. VON BOGDANDY, P. BOGDANOWICZ, I. CANOR, M. TABOROWSKI, M. SCHMITT, *A Constitutional Moment for the European Rule of Law – Upcoming Landmark Decisions Concerning the Polish Judiciary*, in *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper*, No. 10/2018, pp. 7-8.

ance with the procedure provided in Art. 7 TEU. Such a review is also fundamentally different to the protection of fundamental rights under the EAW, which is the actual subject of the *Celmer* case. The CJEU, in its recent rulings, made some remarks about the circumstances that it would consider while reviewing the observance of the principles listed in Art. 2 TEU. However, the authors argue that these principles should not be taken into consideration by the CJEU in the *Celmer* case for the reasons presented below.

The CJEU in its recent ruling in case *Associação Sindical dos Juizes Portugueses*<sup>41</sup> did refer to the principle of the rule of law. It did that while assessing the compatibility of measures undertaken by the Portuguese government, which had decreased the remuneration of public officials, including members of the *Tribunal de Contas* (Court of Auditors), with EU law. Nevertheless, it does not automatically mean that the Court in the *Celmer* case is competent to assess a Member State's compliance with the rule of law principle and that such assessment may have influence on the execution of the EAW.

Firstly, worth noting is that the actual state in *Associação Sindical dos Juizes Portugueses* was significantly different to the *Celmer* case. In the former the CJEU stood before the choice of either confirming the EU financial crisis remedies or undermining all the efforts aimed at restoring the financial stability within the EMU. Although formally, the CJEU was delivering the interpretation of Art. 19 TEU and its stance on what national measures it prohibits, in fact it was judging the validity of conditions attached to financial assistance granted to troubled Member States. The referring Court itself stated that “[it] considers that those [national] measures were adopted in the framework of EU law or, at least, are European in origin, on the ground that those requirements were imposed on the Portuguese Government by EU decisions granting, in particular, financial assistance to that member state”.<sup>42</sup> It becomes clear that if the CJEU had delivered a different ruling, it would have stripped these conditions of legal effects and could have led to a return of financial distress in Portugal. Thus, it would be difficult to compare the two situations in *Associação Sindical dos Juizes Portugueses* and *Celmer*.

Secondly, in *Associação Sindical dos Juizes Portugueses* the CJEU distinguished two problems that also cross and interfere in the *Celmer* case. This interference could be misleading and confusing, therefore the authors want to expressly stress that there exists a fundamental difference between evaluation of compliance with the rule of law in another Member State and reviewing the level of observance of the fundamental rights included in the Charter of Fundamental Rights of the European Union (Charter). In *Associação Sindical dos Juizes Portugueses* the CJEU expressly granted itself a competence to review the level of meeting the standards set in Art. 19 TEU and Art. 47 of the Charter by the courts in Member States without in fact reviewing the observance of rule of law

<sup>41</sup> Court of Justice, judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juizes Portugueses*.

<sup>42</sup> *Ibidem*, para. 14.

itself.<sup>43</sup> The CJEU in its judgment referred to the rule of law, but only as a way of underlining the importance of Art. 19 TEU that was said to stem directly from this principle.

As a consequence, it should be stated that the *Associação Sindical dos Juizes Portugueses* judgment confirms that the CJEU may, in justified cases, evaluate the level of protection under fundamental rights included in the Charter, whereas the evaluation of the rule of law in another Member State is preserved to the exclusive competence of Member States acting through the Council or the European Council in the procedure provided in Art. 7 TEU. Such a position is also corroborated by another fundamental principle of the European Union – the principle of conferral.

As was described above, the principle of mutual trust applies to the relations among Member States within the European Union. Pursuant to Art. 5 TEU, the European Union acts only within limits of competences conferred upon it by the Member States. The Member States are therefore the only entities entitled to decide over the suspension of the principle of mutual trust, (with the narrow exception discussed below). This competence is included in Art. 7 TEU. Pursuant thereto the Member States, acting as the Council or as the European Council, might in provided procedure determine the “clear risk of a serious breach” or the “existence of a serious and persistent breach” of the values referred to in Art. 2 TEU. Therefore, it is legitimate to state that the Member States as *Masters of the Treaties* did not confer the competence to suspend the mutual trust between each other upon the CJEU. Such judicial activity of the CJEU would constitute acting *ultra vires* and would lead to bypassing the procedure provided in Art. 7 TEU. As a result, the principle of legalism that provides that the institutions of the European Union act on the basis and within the limits of law would be violated. This in turn would constitute a breach of the principle referred to in Art. 2 TEU – the principle of rule of law.

## V. THE CJEU’S AND NATIONAL COURTS’ COMPETENCE TO REVIEW MEMBER STATES’ COMPLIANCE WITH FUNDAMENTAL RIGHTS

Although only Member States acting through the Council or European Council are competent to assess the observance of any Member State with the principle of rule of law, the CJEU and national courts should remain guardians of fundamental rights. Therefore, they may not be totally isolated from assessing the compliance of a Member State with fundamental rights. However, specific requirements must be met for its legitimacy. These requirements have been developed by the CJEU in the *Aranyosi-Caldararu* ruling. They should be therefore meticulously reviewed before the suspension of the mutual trust by the national court since this is a competence nominally reserved to other institutions.

As the grounds for non-execution of EAW are in detail and comprehensively listed in the EAW Framework Decision, the non-execution of EAW for other reasons can occur

<sup>43</sup> *Ibidem*, paras 40-41.

only for justified grounds. The catalogue of mandatory grounds is contained in Art. 3 of the EAW Framework Decision and covers cases in which execution of the EAW would lead to a fundamental breach of a universal principle of criminal law – *ne bis in idem* – or would withstand against limits of age for criminal responsibility or that the accused offense is covered by an amnesty in the executing Member State. The nature of these grounds is closely related to criminal law and does not leave space for any creativity in expansive interpretation (due to used unequivocal expressions).<sup>44</sup> The same applies for the optional grounds listed in Art. 4 of the EAW Framework Decision. Pursuant to the optional requirements, the court might refuse to execute the EAW in cases when it is more convenient or effective to conduct criminal procedure in the Member State where the accused person is currently staying.<sup>45</sup> As was confirmed by the Irish High Court, none of them has appeared in the present case.

Nevertheless, the CJEU in the *Aranyosi-Caldararu* ruling managed to expand the catalogue of grounds for non-execution of EAW. The *Aranyosi-Caldararu* judgment referred to the situations in which execution of the EAW could potentially lead to a breach of the Charter, in particular to a breach of the prohibition of torture and inhuman or degrading treatment or punishment expressed in Art. 4 of the Charter due to the overpopulation in detention places in Hungary and Romania. However, as the CJEU stated, this possibility of the breach must be inferred from existing systemic or generalised deficiencies in the protection of fundamental rights in a country issuing an EAW. The CJEU ruled that:

“where there is objective, reliable, specific and properly updated evidence [...] that demonstrates that there are deficiencies, which may be systemic or generalised, [...], the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing member state, to a real risk of inhuman or degrading treatment, within the meaning of Art. 4 of the CFR, in the event of his surrender to that member state. To that end, the executing judicial authority must request that supplementary information be provided by the issuing judicial authority [...]. The executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end”.<sup>46</sup>

<sup>44</sup> Art. 3 of the EAW Framework Decision.

<sup>45</sup> *Ibidem*, Art. 4.

<sup>46</sup> *Aranyosi and Căldăraru*, cit., para. 104.

The question to be answered by the CJEU and the authors of this *Insight* is whether this test may be fulfilled when applied to the accused violation of the guarantee of a fair trial before Polish courts.

The application of the *Aranyosi-Caldararu* test to the *Celmer* case results in a negative outcome already in the first stage. In this respect it is necessary to underline the differences between the cases of *Aranyosi-Caldararu* and *Celmer*. In *Aranyosi-Caldararu* the German Court was presented with well-documented problems related to the detention conditions in Hungary and Romania before rejecting the execution of EAW.<sup>47</sup> Moreover, the detention conditions were subject to the several rulings of the European Court of Human Rights that in numerous cases stated that detention in overpopulated jails in these two countries constituted a violation of human rights included in the European Convention on the Protection of Human Rights and Fundamental Freedoms – precisely the violation of prohibition of torture included in Art. 3 of the Convention.<sup>48</sup> Therefore, the Court in Germany did know that executing the EAW would have led to the detention of Mr. Aranyosi and Mr. Caldararu in the conditions that were several times recognized as irreconcilable with fundamental human rights. In other words: the adjudicating judge in cases of Mr. Aranyosi and Mr. Caldararu through the execution of EAW would have been indirectly responsible for the breach of human rights protected in the Charter and European Convention on the Protection of Human Rights and Fundamental Freedoms in relation to the accused. It is important to stress that this train of thought was based on the evidenced grounds and decisions of legitimate institutions confirming the alleged breaches. The same does not apply to the case of Mr. Celmer.

One could argue that violation of the right to a fair trial in Poland is also well-documented and presented in the decision of Irish High Court. The reasoned proposal of the Commission<sup>49</sup> as well as the Opinion of the Venice Commission dated 11 December 2017,<sup>50</sup> cited by the Irish High Court, precisely indicate the legal acts that in total lead to a systemic violation of the rule of law in Poland and, as a result, to the breach of the guarantee of a fair trial before an independent court. The violation of the right to a fair trial could therefore be regarded as evidenced.

However, the authors argue not (yet). As proven above, only Member States, acting through the Council or the European Council, could suspend the mutual trust in relation

<sup>47</sup> *Ibidem*, paras 28-63.

<sup>48</sup> *Ibidem*, paras 43 and 60.

<sup>49</sup> Commission Reasoned Proposal in Accordance with Article 7 (1) of the Treaty on European Union Regarding the Rule of Law in Poland dated 20 December 2017, COM(2017) 835 final 2017/0360.

<sup>50</sup> European Commission for Democracy through Law (Venice Commission), 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, 8-9 December 2017, CDL-AD(2017)031-e: Poland, p. 26.

to another Member State and declare the violation of one of the values of the European Union referred to in Art. 2 TEU in the procedure foreseen in Art. 7 thereof. Until then the justified opinion of the Commission is nothing more than what it actually is – an opinion. The Irish High Court rejected the allegations of inhumane treatment in Polish detention institutions as not sufficiently evidenced because of the lack of documents supporting the argument of degrading conditions in Polish jails. Therefore, it is all the more astounding that the High Court recognised the allegations relating to the respect of the rule of law in Poland as sufficiently supported given their grounds – solely the reasoned proposal of the European Commission and the opinion of the Venice Commission.

Secondly, the violation of the right to a fair trial and effective court protection as defined in Art. 47 of the Charter or in Art. 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms in relation to systemic changes of Polish judiciary has not been yet stated by the CJEU or the European Court of Human Rights. Therefore, the High Court in Ireland was not in an analogous situation to the Court in Germany in *Aranyosi-Caldararu*. As described above, the Court in the cases of Mr. Aranyosi and Mr. Caldararu by executing of EAW would have certainly contributed to a breach of human rights towards Mr. Aranyosi and Mr. Caldararu, whereas the Court in the case of Mr. Celmer could only suspect it – it has raised the objections and allegations that have not been legitimately decided yet.

Thirdly, what seems crucial here is the fact that even the Commission itself did not find the situation in Poland to amount to a “serious and persistent breach” of the rule of law as described in Art. 7, para. 2, TEU. It only initiated proceedings potentially leading to a mere determination of a *clear risk of a serious breach* as defined in Art. 7, para. 1, TEU. If it had identified systemic deficiencies in the rule of law, it could have addressed a proposal to determine a serious and persistent breach as the determination thereof does not require prior determination of a risk.<sup>51</sup> It is thus difficult to argue that the Commission’s opinion is evidence of a systemic deficiency. The same applies to the Venice Commission’s opinions which only identify “a grave threat to the judicial independence as a key element of the rule of law”.

Fourthly, should the CJEU state that there is indeed well-documented evidence of a systemic breach of the rule of law through a violation of judicial independence, these should nevertheless not be deemed as leading to a real risk of inhumane or degrading treatment, within the meaning of Art. 4 of the Charter. The Irish Court itself suggested that a violation of judicial independence should be interpreted in terms of fundamental rights as a breach of a right to fair trial as set forth in Art. 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms and Art. 47 of the Charter.<sup>52</sup> There is thus a vast difference between an inhuman or degrading treatment and a denial

<sup>51</sup> Art. 7, para. 1, TEU.

<sup>52</sup> Irish High Court, *Celmer*, cit., para. 145.

of justice. As the prohibition of the former stems directly from the idea of human dignity and is not subject to any restrictions, the limitations to a right to fair trial may be justifiable “if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for”.<sup>53</sup>

Fifthly, even in case of the CJEU’s decision to extend prohibited threats to Art. 47 of the Charter and Art. 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, it should be considered whether the threat to the right to a fair trial may indeed be established in the present case. As the European Court of Human Rights stated “although the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in the Court’s case-law, neither Art. 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers’ interaction. The question is always whether, in a given case, the requirements of the Convention are met”.<sup>54</sup> Even if there existed justified reasons to determine the systemic infringement of independence of the judiciary in Poland, it is not sufficient to undermine the independence of the particular Polish judge that would be examining the case of Mr. Celmer within criminal procedure in Poland. The systemic changes are not providing sufficient grounds for denial of independence of all Polish judges, including the one that will settle the case of Artur Celmer. Nevertheless, the Irish High Court limited itself to state that “where these are such egregious defects in the system of justice, it appears unrealistic to require a requested person to go further and demonstrate how, in his individual case, these defects will affect his trial”. Thus, the Irish High Court openly rejected the necessity to undertake a second step of the *Aranyosi-Caldararu* test. Such a bold act is at least dubious and, as was argued, was not sufficiently justified.

Finally, it should be borne in mind that the suspension of mutual trust in the present case will amount not only to a suspension of mutual trust towards Poland, but also in general, in the whole European Union. The switch-off of mutual trust in respect to one Member State negatively influences and undermines the whole European community and the rules of its functioning. When 27 parts of one organism are officially said not to trust another part thereof, it leads to the malfunctioning of the entirety, but also each of the parts separately. This consequence results from the grounds of the AFSJ – when the execution of the EAWs stemming from one Member State will be generally suspended because of *systemic irregularities*, other Member States should expect *exodus* of the criminals from Poland who could easily find the safe harbour in another 27 States and avoid criminal responsibility. This is a fundamentally different situation than the particular assessment of respecting the standards of the Charter made by the CJEU

<sup>53</sup> UK Supreme Court, judgment of 5 December 2000, *Brown v. Stott*, 2001 SC (PC) 43.

<sup>54</sup> European Court of Human Rights, judgment of 30 November 2010, no. 23614/08, *Henryk Urban and Ryszard Urban v. Poland*, para. 46.

in *Aranyosi-Caldararu*. When the condemnation of the accused after execution of the EAW by every Polish court could be challenged, under allegation that *in every case* it could constitute violation of the right to a fair trial, because of the systemic regulations relating to the judiciary – the mutual trust among all Member States in fact ceases to exist. Therefore, mutual trust can be suspended only on two occasions: either generally by Member States, who unanimously agree to suspend it, or in a particular situation in respect to the particular court in a particular case. External general suspension by the CJEU would lead to mutual distrust.

For all the above listed grounds the authors find it justified to state that the principle of mutual trust prevents the Irish High Court from non-execution of the EAW issued by Polish court, unless pursuant to recital 10 of the Framework Decision the serious and persistent breach of the values referred to in Art. 2 TEU was stated by the Member States acting as the European Council in the procedure provided in Art. 7 TEU or the conditions of the *Aranyosi-Caldararu* test are met. As the authors thoroughly evidenced none of the abovementioned exceptions was met in the *Celmer* case – *ergo* the Irish High Court had no justified grounds to suspend the execution of the EAW. Another interpretation would result in vast violation of the principles of conferral and legalism, due to the *ultra vires* action.

As Bogdandy argues,<sup>55</sup> the rule of law in the European Union may be threatened not only because of the actions undertaken by governments in Hungary and Poland, but also because of the actions undertaken by the institutions of the European Union without sufficient legal grounds during the time of financial crisis. These mistakes should not be repeated, as the fundamental values should be strengthened and not further weakened. Even if Poland did breach the principle of rule of law, the response to its actions cannot result in another breach of the rule of law committed by the CJEU, the institution erected for protection of this value.

## VI. CONCLUSION

The actions to be undertaken by the CJEU are still unknown, however the analysis of the systemic changes in Polish judiciary may justify the suspension of the execution of the EAW, if the evidence of the risk of violation of the Charter is provided. As presented in this *Insight*, the authors argue that the CJEU should state that the finding of a breach of the rule of law in Poland remains the competence of the European Council and the national court may only suspend the EAW if both conditions of the *Aranyosi-Caldararu* test are met. The eventual review of the rule of law in Poland by the CJEU would constitute an *ultra vires* action, as this competence is determined in the TEU solely for the Member States acting through the Council or the European Council in accordance with the procedure

<sup>55</sup> A. VON BOGDANDY, *Beyond the Rechtsgemeinschaft*, cit., p. 13.

provided in Art. 7 TEU. The CJEU ruling should be limited solely to the application of the *Aranyosi-Caldararu* test to assess whether the systemic changes in the judiciary in Poland comprise a violation of the right to a fair trial as defined in Art. 47 of the Charter. According to the authors, the application of this test is however leading to a negative outcome. Thus, the response of the CJEU to the questions raised by the Irish High Court should lead to rejection of the possibility to suspend the execution of the EAW issued by the Polish Court. Such ruling would also present the safe option for the CJEU that would avoid accusations of making a political decision by the judicative institution.

As this *Insight* was elaborated mainly in May 2018, it does not cover the most recent developments in the *Celmer* case. All interested parties, as well as scholars, politicians and judges in the EU, await the ultimate decision of the CJEU, which is scheduled for the 25<sup>th</sup> of July. All the moves on the judicial EAW chessboard have been already made. The first and only hearing with participation of the governments of the Netherlands, Spain, Hungary and Poland, as well as the European Commission, took place on the 7<sup>th</sup> of June, the AG Tanchev delivered his opinion on the 28<sup>th</sup> of June (it is worth noting that the opinion shares the main findings of the authors of this *Insight*), so the last move in the EAW-game between Dublin and Warsaw belongs to Luxembourg. It will not be known before the 25<sup>th</sup> of July, whether it will be a *checkmate* for the rule of mutual trust or a brave defence thereof. However, one fact seems certain – the king of European judicial authorities has not had a more significant strategic decision to make for the last few years.

