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Sommario / *Contents*

GIORNALE DI STORIA COSTITUZIONALE n. 45 / I semestre 2023
JOURNAL OF CONSTITUTIONAL HISTORY n. 45 / I semester 2023

Obtaining and Assessing Information about Rule-of-Law Compliance in Member State Courts. Using the European Arrest Warrant as an Illustration

LOTTA MAUNSBACH

1. *Introduction*

In recent years, the rule of law and the judicial system have come under threat in some Member States of the European Union (EU) as the legislative and executive powers in those Member States have tried to influence the courts in different ways[1]. As a result, it has been questioned whether the courts in those Member States are able to act independently. This applies in particular to Poland, but the judicial systems of other Member States such as Hungary and Romania have also been similarly questioned[2].

Not only the legal community in general – including legal organisations of various kinds – but also, and above all, different EU institutions have questioned whether Poland can live up to its commitment under EU law and whether Polish law allows Polish courts to act autonomously and independently[3]. In particular, the Commission has brought several infringement actions against Poland based on various violations of EU law; the common denominator of them all is Poland's failure to uphold the rule of law[4].

In the wake of the backsliding of the rule of law in Poland, national courts there have requested preliminary rulings from the Court of Justice of the European Union (CJEU) on whether newly adopted national legislation regarding the judicial system is compatible with EU law, above all with the right to a fair trial before an independent tribunal previously established by law[5]. Several Member States have also questioned[6] whether persons whose surrender to Poland is requested by means of a European Arrest Warrant (EAW) issued by virtue of the EAW Framework Decision (EAW FD)[7] should actually be surrendered to that Member State, considering that it violates the fundamental rights arising from Article 47 of the Charter of Fundamental Rights of the European Union (CFR)[8] and Article 6 of the European Convention on Human Rights (ECHR)[9].

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In its case-law concerning such reluctance to execute EAWs, the CJEU has developed the *exceptional-circumstances doctrine*, which constitutes an exception from the main rule, following from the principle of mutual trust and recognition between the Member States, that a person subject to an EAW must be surrendered to the issuing Member State. Specifically, the surrender of a requested person may be refused under exceptional circumstances, namely if that person, were he or she to be surrendered, would run a real risk of breach of his or her fundamental right to a fair trial before an independent tribunal previously established by law.

For the concrete application of this exception, in order to determine whether a requested person should be surrendered to the issuing Member State or whether such surrender should be refused or postponed, the CJEU has empowered the executing judicial authorities[10] – which are often national courts of first instance – to perform a "rule-of-law check" of the issuing judicial authority. They are to do this by assessing the independence and impartiality of that authority using a two-step test referred to, after one of the judgments where it was first applied, as the "*LM* test"[11]. In short, the *LM* test requires the executing judicial authority to determine, in a *first* step, whether there is a real risk of breach of the fundamental right to a fair trial in the issuing Member State on account of systematic or generalised deficiencies so far as concerns the independence of that Member State's judiciary. Then, in a *second* step, the executing judicial authority must determine the tangible impact, if any, that the deficiencies identified in the first step may have on the requested person's situation, in order to determine whether there are substantial reasons for believing that that person will run such a real risk if he or she is surrendered to the issuing Member State. This may sound straightforward, but in practice the *LM* test has proved to be a complicated one for executing judicial authorities to apply. There are several reasons for this, not least that it is not obvious how the executing judicial authority should go about obtaining reliable information about the rule-of-law situation in the issuing Member State, which it needs for the first step of the *LM* test, as well as reliable information about the possible impact of that situation in the individual case, which it needs for the second step of that test.

This article discusses the conditions under which an executing judicial authority may refuse to execute an EAW with reference to the risk that the requested person's right to a fair trial before an independent tribunal previously established by law may be breached if he or she is surrendered to the issuing Member State[12]. In the following, the relevant situation will be referred to as a *surrender request* and the relevant ground for non-execution will be referred to as *fair-trial breaches*.

The development of the CJEU's case-law regarding the *LM* test will be analysed to answer the following questions: (1) What criteria are essential for the executing judicial authority's assessment? (2) How does the executing judicial authority obtain access to adequate and reliable information about the conditions in the issuing Member State? and (3) How should that information be assessed, both at a general level and in relation to a requested person in a specific case?

However, to establish the precise meaning of an EAW as well as the grounds entitling an issuing judicial authority to request the surrender of a person located in another Member State to the issuing Member State, this article begins with a brief presentation of the EAW framework and its purpose. Next, executing judicial authorities' right to refuse to execute an EAW issued by another Member State is discussed, with particular reference to the exceptional-circumstances doctrine. To effectively analyse the *LM* test, it is necessary to understand its meaning and the context in which it was developed. For this reason, before the LM test is analysed in greater detail, the CJEU's case-law developing that test will be presented. Once this has been done, a more detailed analysis of the *LM* test follows, to answer the question of how executing judicial authorities should apply that test in individual cases when assessing whether a requested person should be surrendered to an issuing Member State.

This article uses only cases involving EAWs issued by Poland to illustrate the problems faced by executing judicial authorities having to decide whether a surrender request should be refused because of deficiencies in the issuing Member State's judicial system that risk entailing a violation of the requested person's fundamental right to a fair trial. However, it needs to be pointed out that the same considerations of course apply to surrender requests from any Member State that fails to uphold the rule of law to the extent that deficiencies in its judicial system may jeopardise a requested person's right to a fair trial.

2. *The European arrest warrant (EAW)*

2.1. *Background and purpose*

The origin of the EAW system can be traced back to the Tampere European Council of 1999. In its conclusions, the European Council emphasised the importance of co-operation between the EU Member States in the field of criminal law. Based on those conclusions, the Council of the European Union noted the desirability of co-operation within the EU based on mutual recognition of decisions in criminal matters[13]. As a result of the Tampere European Council, the earlier extradition procedures applied within the EU were to be replaced by a simplified and faster procedure where judicial authorities in one Member State would, after a limited examination, surrender a requested person to another Member State in order for that Member State to conduct a criminal prosecution or execute a custodial sentence or detention order[14]. After extensive negotiations, agreement was reached. On 13 June 2002, the EAW FD was adopted.

The foundation of the EAW FD consists of the principles of mutual trust and recognition between Member States in the field of criminal law, which the European Council has referred to as the «cornerstone» of judicial co-operation between Member States[15]. The EAW mechanism is indeed based on a high level of confidence between Member States[16]. Concretely, a decision issued by Member State A and addressed to Member State B should be recognised and executed by Member State B without further formalities, unless there are specific grounds for refusal. In other words, in the context of this judicial co-operation, which

is based on mutual trust (and the rebuttable presumption that Member States comply with fundamental rights), Member States do not question each other's legal systems (save in exceptional circumstances)[17].

The main rule is that a request from an issuing Member State for the surrender of a requested person *must* be executed[18]. It follows from the EAW FD that an EAW is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person for the purposes of (1) conducting a criminal prosecution or (2) executing a custodial sentence or detention order[19]. In the following, the former case will be referred to as a *prosecution request* and the latter will be referred to as a *custodial-sentence request.*

Depending on the purpose for which the issuing judicial authority requests the surrender of a person, fair-trial problems may manifest themselves in different ways. There are basically two scenarios. In the first one, the risk of a fair-trial violation is in the future, and the execution of the EAW may facilitate such a violation. This applies in particular to prosecution requests but could also be relevant for custodial-sentence requests, for example if the requested person is to be brought before a court after being surrendered to have the previous sentence reviewed. In the second scenario, the violation may already have happened in the issuing Member State, and the execution of the EAW would then compound that violation. This is obviously relevant mainly for custodial-sentence requests, where court proceedings will already have taken place in the issuing Member State.

It should be pointed out that the EAW FD specifies a number of situations that entail an exception from the main rule in that the executing judicial authority may (or must) refuse to execute an EAW. However, given that Member States have a duty of sincere co-operation because of the principles of mutual trust and mutual recognition, those exceptions are specific and must be interpreted strictly[20].

2.2. *Exceptions from the duty to execute an EAW*

The CJEU has emphasised on several occasions[21] that, in principle, an executing judicial authority may refuse to execute an EAW only on the specific grounds for non-execution exhaustively listed by the EAW FD and subject to the guarantees to be given by the issuing Member State in particular cases[22].

The EAW FD sets out a number of either mandatory[23] or optional[24] grounds for the non-execution of an EAW. However, those grounds do not apply to the surrender requests discussed here. In fact, the EAW FD does not contain any provision relating to non-execution based on a breach of the requested person's fundamental right to a fair trial in the issuing Member State. Nevertheless, it follows from Article 1(3) of the EAW FD, read together with its Recital 12, that the fundamental rights and fundamental legal principles enshrined in Article 6 ECHR and the second paragraph of Article 47 CFR should be respected in the context of EAWs[25]. It is under Article 1(3) of the EAW FD that the CJEU has developed its exceptional-circumstances doctrine[26].

As already mentioned, that doctrine allows executing judicial authorities to refuse to execute an EAW when exceptional cir-

cumstances obtain. In this context, as also mentioned above, the CJEU has established a two-step test (the *LM* test) for executing judicial authorities to carry out when deciding whether a requested person should be surrendered. The CJEU first established this test in 2016 in *Aranyos*i, in a context involving poor detention circumstances and a risk of inhuman or degrading treatment in detention facilities[27]. Subsequently, in 2018, the exceptional-circumstances doctrine was expanded in *LM*[28] to cover *the right to a fair trial before an independent tribunal previously established by law*. To some extent, it has since been further developed in subsequent case-law from the CJEU[29]. After completing both steps of the test, an executing judicial authority may exceptionally refuse to surrender a requested person if there is a real risk of breach of his or her fundamental right to a fair trial, as guaranteed by the second paragraph of Article 47 CFR, on account of systemic or generalised deficiencies as regards the independence of the issuing Member State's judiciary.

3. *The establishment and development of the two-step* LM *test*

3.1. *Background*

As noted at the outset, the question of whether the rule of law is upheld in Poland has been the subject of discussion in recent years[30]. Alarming reports about the overall judicial situation, conditions at various courts and the situation of individual judges in Poland have been part of the news feed for several years. Several EU Member States have expressed concerns about the situation in Poland, and not least have their national courts repeatedly asked the CJEU to give preliminary rulings on whether requested persons should be surrendered to Poland by virtue of an EAW issued by a judicial authority there. It is in response to those requests that the CJEU has developed the two-step *LM* test that executing judicial authorities are to perform in order to determine whether such an EAW should be executed.

It all began in May 2017, when a person was arrested in Ireland on the basis of two EAWs issued by Poland against him for the purpose of conducting criminal prosecutions. The requested person did not consent to his surrender to the issuing Polish judicial authority. In support of his opposition, he argued that his surrender would expose him to a real risk of flagrant denial of justice in contravention of Article 6 ECHR. In addition, he argued that the recent legislative reforms of the judicial system in Poland would deny him the right to a fair trial and that those reforms fundamentally jeopardised the basis of mutual trust between the issuing judicial authority and the executing judicial authority[31]. Against this background, the Irish High Court, the executing judicial authority, decided to refer questions to the CJEU for a preliminary ruling.

The referring court considered that, since the wide and unchecked powers of the judicial system in Poland were inconsistent with those granted in a democratic State subject to the rule of law, there was a real risk that the requested person would be subjected to arbitrariness in the course of his trial there. Hence a surrender of the requested person would violate his rights under Article 6 ECHR. For this reason, the

referring court considered that it should decide, by virtue of Irish law and Article 1(3) of the EAW FD read in conjunction with Recital 10 thereof, to refuse to surrender the requested person[32].

The High Court referred two questions to the CJEU. *First*, it wondered whether, if a national court determines that there is convincing evidence that conditions in the issuing Member State are incompatible with the fundamental right to a fair trial because the judicial system of that Member State itself no longer operates under the rule of law, it is necessary for the executing judicial authority to make any further assessment as to the requested person's risk of being denied a fair trial, given that his or her trial will then take place in a system no longer operating according to the rule of law. *Second*, it asked whether, if the test to be applied requires a specific assessment of the requested person's real risk of a flagrant denial of justice, and if the executing judicial authority has established that there is a systematic breach of the rule of law in the issuing Member State, the executing judicial authority is obliged to revert to the issuing judicial authority in order to obtain any additional information that it may need to exclude the possibility that the requested person is at risk of being denied a fair trial. To the extent that this would be the case, the referring court also asked what guarantees as to a fair trial would be required[33].

The CJEU concluded that the two-step test established in *Aranyosi* applies to risks of fair-trial breaches. In this context, it first recalled that the principles of mutual trust and recognition between Member States are fundamental within EU law and that, save in exceptional circumstances, every Member State must assume that other Member States comply with EU law, particularly with the fundamental rights that are recognised by EU law[34]. However, the CJEU also noted that it had recognised that the principles of mutual trust and recognition between Member States can be limited in *exceptional circumstances*[35]. According to the CJEU, Article 1(3) of the EAW FD allows an executing judicial authority to refrain, by way of exception, from giving effect to an EAW if the requested person runs a real risk of breach of his or her fundamental right to an independent tribunal and therefore of the fundamental right to a fair trial laid down in the second paragraph of Article 47 CFR[36]. To establish whether such a real risk exists, the executing judicial authority must perform the above-mentioned two-step test. The first step of that test is a *general assessment* of the conditions in the issuing Member State to establish whether there are deficiencies in that Member State's judicial system that may entail a real risk of fair-trial breaches if a person is surrendered to that Member State[37]. The second step is an *individual assessment* of the circumstances in the specific case to establish whether the deficiencies identified in the first step are likely to affect the requested person, were he or she to be surrendered[38].

3.2. *The development of the* LM *test in the CJEU's case-law*

The rule-of-law problems in Poland did not end after *LM*. On the contrary, they increased[39]. New legislation that limited the ability of individual judges to act independently of the State and the executive power was introduced, prompting the

Commission to bring several infringement actions against Poland[40]. There were also frequent alarming reports from judges in Poland about their situation, and several individual judges had disciplinary sanctions imposed on them by a newly established Disciplinary Chamber of the Polish Supreme Court[41]. That Chamber has been criticised on several levels, mainly for not being considered to protect Polish judges from control by the ruling political party but also because of the procedure for appointing judges to it[42]. A further complication in this context is that, according to the "new" Law on the Supreme Court, the Disciplinary Chamber must be constituted solely of newly elected judges, meaning that those already sitting on the Supreme Court are excluded[43]. Against this background, executing judicial authorities in other Member States kept wondering whether the surrender of requested persons to Poland would expose them to a risk of fair-trial breaches and hence whether EAWs from Poland should be executed[44].

However, those authorities found the *LM* test difficult to apply and asked the CJEU for further guidance on its interpretation. A central question in this context was whether an executing judicial authority had to carry out the second step if it had established, in the first step, that systematic or generalised deficiencies in the Polish judicial system entail that there is a real risk of fair-trial breaches if requested persons are surrendered to that Member State. Considering the deterioration of the situation in Poland that had taken place since the judgment in *LM* was given in the summer of 2018, the District Court of Amsterdam (the Rechtbank Amsterdam)[45] decided in September 2020 (*L & P*) to ask the CJEU that very question. The Rechtbank Amsterdam had received two EAWs issued by two different Polish courts, requesting the surrender of two nationals for the purpose of conducting a criminal prosecution (L), and for the purpose of executing a custodial sentence (P), respectively. The main argument of the Rechtbank Amsterdam was that, if the generalised and systematic deficiencies have become so widespread that it is safe to assume that *no-one* will in fact receive a fair trial, it would be pointless to carry out the second step of the *LM* test[46].

This referral gave the CJEU an opportunity to clarify the meaning and interpretation of the *LM* test. However, it did not appear to be swayed by the arguments of the Rechtbank Amsterdam. In fact, in its judgment in *L & P*[47] the CJEU did not really provide any clarifications (or set out any modifications) as regards how the *LM* test should be performed or what criteria are relevant when an executing judicial authority is to determine whether to surrender a requested person to an issuing Member State about which it harbours doubts[48]. Rather, the CJEU reiterated what it had laid down in *LM* and stressed that, even if the executing judicial authority has evidence of systematic or generalised deficiencies concerning the independence of the judiciary of the issuing Member State, exceptional circumstances are still required to refuse to execute an EAW under Article 1(3) of the EAW FD, and establishing whether such circumstances exist does require a two-step examination[49]. According to the CJEU, the executing judicial authority cannot deny, in one fell swoop, all judges or all courts of that Member State the status of "issuing judicial authority" within the meaning of Article 6(1) of the EAW FD[50].

The Rechtbank Amsterdam did not give up. In September 2021, it submitted another request for a preliminary ruling (*X & Y*) to the CJEU, demanding clarifications as to the performance of the *LM* test but also, again, asking whether the executing judicial authority is really obliged to perform the second step of that test if it is established that, on a general level, there is a real risk of breach of the fundamental right to a fair trial in the issuing Member State[51]. The Rechtbank Amsterdam had received two EAWs, issued by two different Polish district courts, requesting the surrender of two Polish nationals for the purpose of executing a custodial sentence (X) and for the purpose of conducting a criminal prosecution (Y), respectively. Once again, the Rechtbank Amsterdam expressed concerns because there had been further deterioration in the systematic or generalised deficiencies relating to the independence of the judiciary in Poland that had existed since 2017. It stressed that those deficiencies affected the fundamental right to an independent tribunal previously established by law guaranteed in the second paragraph of Article 47 CFR. The main argument put forward by the Rechtbank Amsterdam was that several judges who heard criminal cases in Poland had been appointed by the National Council for the Judiciary (NCJ), a body that, because it was directly subordinated to political authorities after a judicial reform having entered into force in 2018[52], could not be considered independent[53]. The Rechtbank Amsterdam also claimed that there was no effective remedy available to the requested persons in Poland for challenging the validity of judicial appointments, and finally, it raised the question of whether it should apply the criteria that the European Court of Human Rights (ECtHR) had applied in its case-law to assess whether irregularities in a procedure for the appointment of judges entail a violation of the right to a tribunal previously established by law under Article 6(1) ECHR[54].

The CJEU delivered its judgment in February 2022, confirming its previous case-law: the executing judicial authority must carry out a full, two-step examination regarding the risk of breach of the requested person's fundamental right to a fair trial[55]. However, this time the CJEU did specify, to some extent, the criteria to be applied in that examination and the conditions under which executing judicial authorities may refuse to surrender a requested person[56].

Specifically, the CJEU ruled that, as a first step, to assess whether there is a real risk of fair-trial breaches in the issuing Member State, the executing judicial authority must carry out an *overall assessment* of the judicial system of that Member State based on any evidence that is objective, reliable, specific and properly updated concerning the operation of that system, in particular the procedure for the appointment of judges. In this context, however, the CJEU also noted that the fact that a body consisting predominantly of members representing, or appointed by, the legislative or executive power, such as the NCJ in Poland, participates in the procedure for the appointment of judges is not in itself a sufficient reason to refuse to execute an EAW[57].

What was new in *X & Y* was that the CJEU explicitly enumerated factors of particular relevance to the assessment in the first step[58]. Some of those factors it had already stressed in *LM*[59], including the information contained in a reasoned proposal addressed by the European Commission to

the Council based on Article 7(1) of the Treaty on European Union (TEU)[60]. However, new relevant factors mentioned by the CJEU included resolutions of the Polish Supreme Court as well as the case-law of both the CJEU[61] and the ECtHR[62], in line with a specific request from the Rechtbank Amsterdam. In addition, the CJEU mentioned constitutional case-law of the issuing Member State challenging the primacy of EU law and the binding nature of the ECHR[63]. The first step of the *LM* test will be discussed in greater detail in Section 4.

However, the CJEU remained adamant in *X & Y* that the executing judicial authority must perform a second step to establish whether any systematic or generalised deficiencies in the issuing Member State identified in the first step of the *LM* test are likely to have an impact on the requested person in the *individual case*. The CJEU made it clear that it is for the requested person to adduce evidence to prove that there is a risk that the deficiencies in the judicial system of the issuing Member State have had or are liable to have a tangible influence on the handling of his or her criminal case[64]. As the CJEU established in *LM*, the requested person can prove this by referring to his or her personal situation, to the nature of the offence and to the factual context forming the basis of the EAW[65]. However, in *X & Y*, the CJEU expanded upon and clarified the criteria to which the requested person may refer, noting that those criteria include the composition of the panel of judges, the procedure for the appointment of the judges concerned and the availability of legal remedies in that respect[66]. The second step of the *LM* test will be discussed in greater detail in Section 5.

In parallel with the Rechtbank Amsterdam's request for a preliminary ruling in *X & Y*, the Irish Supreme Court also requested (*WO & JL*) a preliminary ruling from the CJEU regarding the rule-of-law deficiencies in Poland and their impact on the execution of EAWs issued by that Member State. In July 2022, the CJEU replied to the Irish Supreme Court's request by issuing a reasoned order[67].

The background, in that case, was that several Polish regional courts had issued EAWs against two Polish nationals, WO and JL. The EAWs issued against WO concerned both prosecution and custodial-sentence requests, while that against JL concerned a prosecution request. In the main proceedings in Ireland, the requested persons had argued that there were deficiencies in Poland that would affect their fundamental right to a fair trial if they were surrendered. Once again, the main argument put forward was that the situation in Poland had worsened since the judgments in *LM* and *L & P*, in particular because of the adoption of new legislation concerning the organisation of the Polish courts – both the ordinary ones and the Supreme Court. The requested persons argued that there was a risk that the Polish courts examining their cases would not have been constituted in accordance with the requirements of independence previously laid down by the CJEU in its case-law[68]. In addition, they argued that there was no mechanism in Poland that enabled them to challenge that illegality. The main issue, once again, was whether it was necessary to perform the second step of the *LM* test. The requested persons pointed out that a court must have been established in accordance with the law to qualify as a court. Hence, in their opinion, if a body does not

meet that criterion, it is not a court, and so there is no need to determine, in an individual case, whether that non-court body is independent or impartial[69].

Some of the questions that the Irish Supreme Court had referred to the CJEU were answered in *X & Y*. As a consequence, the Irish Supreme Court withdrew those questions. After this, only one question remained, concerning the right to an effective remedy or, in particular, how the executing judicial authority should assess the evidence put before it in a case where the absence of an effective remedy is at issue and where it would appear that the body before which the requested persons are summoned is not a court previously established by law[70].

In its order, the CJEU confirmed that the executing judicial authority had to assess whether the deficiencies identified in the Polish judiciary would affect the requested person in the individual case. However, the CJEU also clarified the standard of proof and again widened the range of information that can be relied upon by the requested person or the executing authority[71]. Further, the CJEU made some clarifications regarding EAWs issued for the purpose of conducting a criminal prosecution. Specifically, it noted that the fact that the composition of the future panel of judges who will hear the requested person's case, or the identity of the individual judge who will do so, is not known beforehand does not constitute a sufficient ground for refusing to surrender the requested person. Instead, the executing judicial authority must base its decision whether to surrender the requested person on an overall assessment of all information provided by that person and any additional information from the issuing Member State[72]. In this connection, the CJEU emphasised, first, that, as part of its overall assessment, the executing judicial authority may take into consideration any relevant factor concerning the possibility of seeking the recusal of one or more members of the panel of judges who will be called upon to hear the criminal case of the requested person and, second, that, when that authority evaluates, in the second step of the *LM* test, the real risk of fair-trial breaches, the question of whether the recusal procedure or the legal remedies in the issuing Member State are ineffective will be relevant[73].

What was new in *WO & JL* is that the CJEU made it clear that its own task differs from that of the national courts. The national courts (and the executing judicial authorities) must evaluate the facts presented to them in order to assess whether the requested person is to be surrendered to the issuing Member State. Making that assessment is a matter for the executive judicial authority alone[74] – this is not a task for the CJEU to perform[75]. What the CJEU is empowered to do is to give rulings on the interpretation or the validity of an EU provision, solely based on the facts that the referring court has presented to it[76].

To conclude, the CJEU has made the application of the *LM* test clearer through its recent case-law, at least to some extent. However, executing judicial authorities are still likely to run into difficulties when carrying out the second step of that test. For this reason, it will be interesting to see what will happen next in the development of the *LM* test. In the following, the two steps of that test will be analysed in greater detail, with a special focus on the criteria that are relevant to the executing judicial author-

ities' assessment – both in the general assessment in the first step and in the individual assessment in the second step – as well as on the methods that those authorities may use to obtain factual information about conditions in the issuing Member State.

4. *The first step – the general assessment*

4.1. *Introduction*

An executing judicial authority having received a surrender request may execute that request only if it harbours no doubts that the requested person, after being surrendered to the issuing Member State, will be given a fair trial before an *independent tribunal* previously *established by law*. According to the CJEU's case-law, both of the italicised concepts are inherent in, and part of the essence of, the fundamental right to a fair trial according to the second paragraph of Article 47 CFR and Article 6 (1) ECHR[77]. As noted above, the assessment to be carried out by the executing judicial authority involves an examination in two steps[78].

The first of those steps is a *general assessment* of conditions in the issuing Member State to establish whether there are systematic or generalised deficiencies concerning the independence of that Member State's judiciary that entail a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 CFR. This assessment must be made on the basis of *objective*, *reliable*, *specific* and *properly updated* material concerning the operation of the system of justice in the issuing Member State[79]. Hence the purpose of the first step is to establish *in abstracto* that systematic deficiencies *exist* in the issuing Member State's judicial system, without examining the specific outcome that any such deficiencies might have *in concreto* in the individual case at hand.

4.2. *Criteria of importance for the general assessment*

There can be no doubt that the existence of independent tribunals forms part of the essence of the fundamental right to a fair trial[80]. However, it may not be obvious how to interpret the concept of independence[81]. In *LM*, the CJEU emphasised that a court must be protected against external interventions or pressure liable to impair its members' independent judgement and influence their decisions. For this to be the case, courts must exercise their functions wholly autonomously without receiving orders or instructions from any source. Concretely, the protection of those whose task it is to adjudicate in a dispute requires guarantees against such pressure, such as guarantees against removal from office and guarantees that they will receive proper remuneration.

Even in *LM*, the CJEU already emphasised that the requirement of independence presupposes that the disciplinary regime for the persons entrusted with the administration of justice within a Member State contains the guarantees necessary to prevent any risk of that regime being used as a system to exercise political control over the content of judicial decisions. It must be foreseeable to judges what conduct may amount to a disciplinary offence and what disciplinary measures or penalties may be

applicable, and disciplinary decisions must be made by a body that fully safeguards the rights enshrined in the right to a fair trial[82]. Specifically, to guarantee the independence inherent in the tasks of judges and to avoid exposing them to the risk that their disciplinary liability may be triggered solely because of the decisions taken by them, there must be rules that define in a sufficiently clear and precise manner what forms of conduct may give rise to disciplinary action against judges[83].

In a democratic State governed by the rule of law, this is not something remarkable but rather a matter of course. However, problems arise when a Member State enacts legislation that affects the rule of law in various ways, as has happened in Poland. One example of this is the legislation[84] on the establishment of a Disciplinary Chamber within the Supreme Court, where questions have been raised both regarding the procedure for the appointment of the members of that Chamber and regarding its function, in practice, as a "supervisory body" in relation to judges in Poland who are deemed "awkward" by the political authorities and do not bow to their influence[85]. Further, it has also been claimed that the independence of national judges is affected by provisions in national law that expose them to the risk of disciplinary measures for actions that they undertake in their capacity as judges, for example, submitting a reference for a preliminary ruling to the CJEU[86].

Another example is the reform carried out in 2017 regarding the organisation of the NCJ, which has led to it being questioned whether the "new" NCJ is a body that is independent of political power. The primary role of the NCJ is to safeguard the independence of courts and judges[87]. A body with such a role may indeed make the process for the appointment of judges more objective[88]. However, it can be questioned whether the NCJ is independent of political power. The NCJ consists of twenty-five members. In the past, fifteen of them were judges selected by their peers, but now those members are appointed by a branch of the Polish legislature. Another eight members are appointed in different ways by political authorities. Hence, of the twenty-five members of the NCJ in its new composition, twenty-three have been appointed by, or are members of, the executive or legislature[89]. Therefore, it is highly questionable whether the NCJ fulfils the independence requirement vis-à-vis the legislative and executive powers. As a result, the legitimacy of the NCJ has been questioned by the Polish Supreme Court[90], the ECtHR[91] and the CJEU[92]. This is serious, given the decisive role of the NCJ in appointing judges to the newly established Disciplinary Chamber of the Supreme Court.

One question that executing judicial authorities have asked the CJEU is whether, assuming that evidence exists that the generalised or systemic deficiencies in Poland have reached the level where it can be assumed that *no-one* will have access to a fair trial if surrendered to the Polish judiciary, the executing judicial authority can *presume* that the requested person will run such a risk if surrendered to Poland[93]. One piece of such alleged evidence is the involvement of the disputed NCJ in the procedure for the appointment of judges, both to ordinary courts and to the contested Disciplinary Chamber of the Supreme Court[94]. The CJEU has answered that question in the negative.

Two forms of breaches are particularly important for the general assessment: a

lack of independence of the tribunals of the issuing Member State, and a failure to comply with the requirement of a tribunal established by law[95]. One prerequisite for the independence of courts is the existence of legislation regarding the composition of the decision-making body, the appointment procedure, the length of service, and the grounds for abstention, rejection and dismissal of its members[96]. Specifically, the CJEU has clarified the importance of rules regarding the procedures for the appointment of judges. Both the substantive conditions and the detailed procedural rules governing appointment decisions must be such that they do not give rise to reasonable doubts about the imperviousness of the judges appointed to external factors and about those judges' neutrality with respect to the interests before them[97]. A tribunal cannot be considered independent if the judges sitting on it have been appointed in the absence of such rules.

As regards the second key concept, the requirement of a tribunal previously established by law, the CJEU has found, with reference to the ECtHR's case-law[98], that this requirement, and in particular the "established by law" element, reflects, inter alia, the principle of the rule of law. In fact, the right to be judged by a tribunal "established by law" encompasses, by its very nature, the judicial appointment procedure[99]. If there are circumstances that, after an overall assessment, give rise to reasonable doubts in individuals regarding the independence of judges, this affects the assessment of whether a court is established by law. It is perfectly conceivable that a body such as the NCJ which, for the most part, is made up of members chosen by the legislature and which is involved in the procedure for the appointment of judges, should not be considered an independent body. However, the CJEU is clear that this circumstance cannot in itself give rise to doubts about the independence of the judges appointed through such a procedure and that it is therefore not a sufficient reason to refuse to surrender a requested person in accordance with an EAW. As the CJEU points out, the result of the assessment may be different if there are other relevant factors that, together with the conditions for appointing judges, lead to such doubts being raised. The executing judicial authority must make an overall assessment of all available facts to establish whether there are generalised or systematic deficiencies in the issuing Member State[100].

Because of the developments that have taken place in Poland in recent years regarding the dismantling of the rule of law through the establishment of legislation that undermines the independence of the courts, it is not particularly controversial for an executing judicial authority to conclude that *there is a real risk of breach of the fundamental right to a fair trial* guaranteed by the second paragraph of Article 47 CFR. However, the CJEU has so far refused to accept that such shortcomings in themselves would be sufficient to refuse to surrender a requested person to the issuing Member State. Hence executing judicial authorities are still required to perform the individual assessment constituting the second step of the *LM* test to establish whether the deficiencies identified in the assessment forming the first step are likely to affect the requested person in the individual case if he or she is surrendered to the issuing Member State.

5. *The second step – the individual assessment*

5.1. *Introduction*

As noted above, the second step of the *LM* test is an *individual assessment* – a case-by-case examination – of (i) whether the deficiencies established in the first step of the test are liable to have an impact/ likely to materialise[101] if the requested person is surrendered to the issuing Member State and (ii) whether that person, if surrendered, will thus run a real risk of breach of his or her fundamental right to a fair trial before an independent tribunal previously established by law[102], as enshrined in the second paragraph of Article 47 CFR[103].

The executing judicial authority must, specifically and precisely, determine whether the deficiencies identified are liable to have an impact at the level of the courts of the issuing Member State, which have jurisdiction over the proceedings regarding the requested person[104]. In this context, the executing judicial authority must take into account not only the requested person's *personal situation*, the *nature of the offence* for which he or she is being prosecuted and *the factual context* in which the EAW was issued, but also any information provided by the issuing Member State[105].

5.2. *Criteria of importance for the individual assessment*

The individual assessment is a challenging task for the executing judicial authority. To perform it, the executing judicial authority needs to know how to interpret the three above-mentioned criteria of personal situation, nature of the offence and factual context[106].

The risk that a requested person's right to a fair trial will be violated depends on the purpose for which the issuing Member State has issued an EAW. In this context, the CJEU has made a clear distinction between prosecution requests and custodial-sentence requests[107]. One essential question in this regard pertains to the *point in time* at which a tribunal (i.e., the issuing judicial authority) must fulfil the independence requirement.

In the case of a prosecution request, the court proceedings will take place in the future. Hence the executing judicial authority must consider the impact of any deficiencies in the issuing Member State's judicial system which may have arisen after the issue of the EAW. This also applies to certain custodial-sentence requests, namely those where the requested person, for one reason or another, will be subject to court proceedings in the issuing Member State if surrendered. However, for all custodial-sentence requests, the executing judicial authority must also examine whether, given the particular circumstances of the case, any systematic or generalised deficiencies that existed at the time of issue of the EAW have affected the independence of the court that imposed the custodial sentence or issued the detention order for which surrender is now sought[108]. The message given by the CJEU in its judgments is clear: when a court exercises its judicial function, it must always fulfil the requirements of independence. However, it may be difficult to obtain factual information about a court's composition in an individual case – espe-

cially, of course, if the court proceedings will take place in the future.

In the case of a custodial-sentence request, the executing judicial authority must have access to factual information about the identity of the judges who tried the criminal case in the issuing Member State as well as about whether any of those judges did not fulfil the requirement for independence. Given that a trial has already taken place in the issuing Member State, it should be possible, in principle, to obtain such information. The problem is rather how the executing judicial authority should assess this information. For example, suppose that the executing judicial authority receives information to the effect that Judge A, who has been appointed on the recommendation of the NCJ in Poland, was involved in adjudication and sentencing in the criminal case concerned. In that situation, one might well think that, provided that it is established that the NCJ is not an independent body, it should be sufficient for the requested person to show that there was a risk that he or she was deprived of the right to a fair trial before an independent tribunal established by law. However, with regard to that type of situation, the CJEU has stated that it is not enough that the NCJ was involved in the appointment procedure[109]. The requested person must also provide factual information about how the specific judges who participated in the criminal proceedings were appointed and, where applicable, seconded to those proceedings. It is then up to the executing judicial authority to assess whether this information is sufficient to conclude whether the composition of the court may have affected the requested person's right to a fair trial before an independent tribunal established by law[110].

In procedural law, *appearances* of independence and impartiality are crucial, as reflected in the dictum that «justice must not only be done, it must also be seen to be done»[111], because the tribunals must inspire public confidence essential in a democratic society[112]. Against this background, and given that judges in Poland are appointed by (or on the recommendation of) the NCJ – a body which several courts have established is not an independent body[113] – it ought, in my opinion, to be sufficient grounds for refusing to execute an EAW that a person has been, or is at risk of being, convicted by a court in the appointment of whose judges the NCJ has been involved and that that person is therefore likely to be denied his or her right to a fair trial before an independent tribunal established by law. How else can the "appearance" requirement be fulfilled?

The situation is even more problematic with regard to prosecution requests. In such cases, a trial has not yet been held in the issuing Member State but will take place if the requested person is surrendered to that Member State. Even so, the requested person is still required to produce evidence about the composition of the future panel of judges who will hear his or her case in the issuing Member State. In many countries, it is in fact not possible to obtain such information beforehand. For example, it may be known which court in a country has jurisdiction to try a specific person or hear a specific case but not what specific judges will be on the panel. Then it will clearly be impossible for the requested person to provide the executing judicial authority with such information. What is particularly troublesome in this context is that the CJEU has stated that the fact that the requested

person cannot know beforehand the identity of the judges who will be called upon to hear his or her criminal case is not in itself sufficient for refusing to surrender the requested person[114]. Nor would it presumably be enough to show that the NCJ was involved in the appointment procedure for all judges who could conceivably be involved in a case[115]. What else must a requested person do to prove that he or she would run a risk of fair-trial breaches if surrendered? The CJEU's answer to that question is that the executing judicial authority must make an overall assessment of the circumstances of the individual case, taking into account the information provided by the requested person and by the issuing Member State[116].

One factor to be considered in that overall assessment is whether the requested person had (for custodial-sentence requests) or will have (for prosecution requests) the possibility to request the rejection of one or more members of the panel of judges who heard or will hear, respectively, his or her case[117]. In this connection, the CJEU has made some remarks regarding custodial-sentence requests. Specifically, it has noted that, in the second step of the *LM* test, the executing judicial authority must take into consideration whether the requested person could request that a judge, for one reason or another, be relieved of his duties as a judge in the panel of judges that tried the requested person's case, whether the requested person used this possibility and, if so, what the outcome of that request was[118]. In its most recent case-law, the CJEU has emphasised that, if an executing judicial authority considers itself to have access to information showing that it may be called into question whether a requested person can make such requests for rejection, there is nothing to prevent that authority from concluding that the requested person should not be surrendered[119].

Further, in my opinion, even if the law of the issuing Member State formally allows such recusal to be sought, that alone is not a sufficient reason to surrender the requested person. The executing judicial authority must still make an overall assessment, taking all information provided to it or otherwise known to it into consideration. In this context, it does not matter that the possibility of raising objections lies in the future.

A few words on other considerations of relevance here may be in order. First, one of the main purposes of the EAW is to combat the *impunity* of a person who is present in a territory other than that where he or she is alleged to have committed an offence. The risk of such impunity must therefore be weighed against the requested person's "personal situation"[120]. Second, the executing judicial authority must weigh the requested person's right to a fair trial before an independent tribunal established by law against the *fundamental rights of the victim(s) of the offence concerned*[121]. These considerations in fact combine into quite a conundrum: how does a requested person's risk of suffering fair-trial breaches weigh against the risk of that person's impunity and against the rights of the victim(s)? Unfortunately, the CJEU has not yet been able to give a clear answer to that question.

6. *Standard of proof*

The CJEU has established some standards of proof for the two steps of the *LM* test. The first and most essential one is that the

executing judicial authority must establish that there is *a real risk* of fair-trial breaches. That standard of proof is common to the assessments performed in both steps of the test, although it refers to a general risk in the first step and to a specific one in the second[122].

In practice, it has proved difficult for executing judicial authorities to apply the *LM* test, not least when it comes to establishing whether the real risk established in the first step is likely to be present in the individual case. For this reason, the CJEU has supplemented the "real risk" requirement with another requirement for the second step of the test, namely that the executing judicial authority must determine whether the systematic or generalised deficiencies established in the first step of the test are *liable to have an impact on* the issuing Member State's courts with jurisdiction over the proceedings to which the requested person will be subject[123]. The CJEU has also used another wording for what might well appear to be the same requirement, namely that it is to be determined whether the deficiencies established in the first step of the test are *likely to materialise* if the requested person is surrendered to the issuing Member State[124]. It is not clear why the CJEU uses both of these expressions about the assessment to be carried out in the second step, and nor is it clear whether there is intended to be any difference between these two requirements in terms of the standard of proof.

One problem with standards of proof such as "a real risk", "liable to have an impact" and "likely to materialise" is that they are flexible concepts such that there are no fixed criteria that can be used to determine whether they are met in a specific situation. For this reason, the executing judicial authority must perform a probability assessment of whether there are deficiencies in the issuing Member State's judicial system and whether those are likely to affect the person requested, often on the basis of hypothetical facts[125]. This is especially difficult for prosecution requests, where, as noted in Section 5.2, there has not yet been a trial in the issuing Member State and it is more or less impossible for the executing judicial authority to obtain information about the composition of the future panel of judges. Even so, the CJEU requires the executing judicial authority to perform, in the second step of the *LM* test, an overall assessment to determine whether there is a risk of fair-trial breaches affecting the requested person if he or she is surrendered to the issuing Member State.

However, the CJEU has facilitated executing judicial authorities' task by emphasising that it is ultimately for them to assess whether the facts available are sufficient to refuse to surrender a requested person, since the CJEU lacks a mandate to tell a national court how to assess an individual case. One way for the CJEU to further facilitate the executing judicial authorities' assessment would be to explicitly declare that certain factual circumstances are sufficient to meet the "real risk" standard of proof. For instance, one such circumstance with regard to a prosecution request could be that it has been established that the judges who will hear the requested person's case have been appointed by (or on the recommendation of) the NCJ. However, the CJEU has been clear that it cannot go that far in establishing specific criteria for refusing to execute an EAW. In the current state of EU law, it falls to the executing judicial author-

ity to decide whether there are exceptional circumstances in the individual case that justify a refusal to surrender a requested person[126]. Indeed, there is nothing to prevent an executing judicial authority from reaching this conclusion: there are examples where executing judicial authorities have decided, after applying the *LM* test to the circumstances in a specific case, to refuse to surrender a requested person to Poland[127].

7. *The information-gathering process*

7.1. *Introduction*

There is no doubt that each Member State must ensure, subject to final review by the CJEU, that the independence of its judiciary is safeguarded by refraining from any measures that might undermine that independence and by otherwise protecting the value of the rule of law. The EAW FD is indeed based on the principles of mutual trust and mutual recognition between Member States. However, for those principles to be upheld in a credible manner rather than "automatically", it is also essential that executing judicial authorities refrain from enforcing EAWs where, after an overall assessment of all available information, they find this to be necessary in order to protect the rule of law[128]. Such an overall assessment must be based on *all available information*, and it is obvious that this information must be *reliable*. This poses two important questions: *first*, who provides the executing judicial authority with that information; and, *second*, what that information may consist of.

7.2. *Who provides the executing judicial authority with information?*

An executing judicial authority can gain access to relevant information in three ways: it may receive it from the requested person, it may receive it from the issuing judicial authority, or the information may be notorious and already known to it.

The CJEU has stated that *the requested person has the burden of proof* and must adduce specific evidence to provide the executing judicial authority with information that, for custodial-sentence requests, gives reason to believe that the systematic or generalised deficiencies established in the first step of the *LM* test had a tangible influence on the handling of his or her criminal case or, for prosecution requests, that those deficiencies are liable to have such an influence. In fulfilling the burden of proof in a prosecution-request case, the requested person may rely on *any ad hoc factors* specific to the case in question that are capable of demonstrating that the procedure to which that person is to be surrendered will tangibly undermine his or her fundamental right to a fair trial[129].

However, as noted in Section 5.2, where an EAW concerns a custodial-sentence request, the surrender of a requested person cannot be refused on the sole ground that one or more judges who participated in the proceedings leading to the conviction were appointed on the proposal of a body whose independence can be questioned, such as the NCJ[130]. Rather, the requested person must provide more specific information about the appointment of the judge or judges who heard the criminal case against him or her[131]. The same requirement in fact applies to prosecution-request EAWs[132].

The question, then, is how the requested person can fulfil his or her burden of proof[133]. It would appear that the requested person must provide more specific information about how each judge who participated in the criminal case against him or her was appointed[134]. As an example of compromising information, the CJEU mentions a situation where the Minister for Justice has decided to second a particular judge within the panel of judges hearing a criminal case, where the criteria on the basis of which that secondment was decided were not known in advance, and where the minister can terminate that secondment at any time without having to give reasons for that decision. In such a situation, according to the CJEU, the executing judicial authority may consider that there is good reason to assume that there is a real risk of breach, in the specific case of the requested person, of the fundamental right to a fair trial[135]. It should be noted that this example concerns a particular and concrete situation. It shows that great demands are placed on a requested person when it comes to proving that there is a real risk of breaches of his or her fundamental right to a fair trial. In many cases, the deficiencies will be less apparent and less tangible.

The fact that the requested person bears the burden of proof does not exempt the executing judicial authority from making inquiries itself about the conditions of the judiciary in the issuing Member State. In fact, where the executing judicial authority does not consider that the information communicated by the issuing Member State is sufficient to show that there is a real risk of fair-trial breaches, Article 15(2) of the EAW FD requires that authority to request the issuing judicial authority to furnish, as a matter of urgency, any supplementary information that the executing judicial authority deems necessary[136]. The issuing judicial authority is obliged to provide that information to the executing judicial authority[137]. Should the issuing Member State fail to co-operate, by not answering the executing judicial authority's questions at all or by not providing the requested information, this could be interpreted as a lack of sincere co-operation on the part of the issuing judicial authority. Such a lack of sincere co-operation must be considered by the executing judicial authority when it decides whether to execute the relevant EAW[138].

Finally, the executing judicial authority must consider, within its sovereign discretion, *any evidence* available when assessing the real risk of breach of a requested person's fundamental right to a fair trial[139]. This means that the executing judicial authority may consider information to which it has access regardless of whether that information has been provided by the parties or by the issuing Member State, or whether that authority has obtained access to it in any other way. In this context, the CJEU has referred, among other things, to statements made by public authorities. It must be pointed out that there is at present a great deal of information available from various institutions and organisations that highlights significant shortcomings within the Polish judicial system.

7.3. *What information is relevant?*

Since the deficiencies of the Polish judicial system have grown more pronounced in re-

cent years, and since Member States have continued to refer questions to the CJEU pertaining to the interpretation of the *LM* test, the CJEU has been forced to reflect on the issue of what information may be relevant to the executing judicial authorities' assessments within the framework of that test. To begin with, it has identified legislation in the issuing Member State as an essential source of information as well as a natural starting point for the assessment. As noted in Section 4.2, the executing judicial authority must establish that there is legislation governing the organisation of the judiciary in the issuing Member State. This refers to legislation governing the organisation of the courts and the judicial system as well as legislation governing the possibility for individual judges to exercise their duties. There must be legislation enabling individual judges to act autonomously and independently of the State and the executive without running the risk of being removed from office or subjected to disciplinary action because of their actions in their capacity as judges[140]. However, when an executing judicial authority does not consider it possible to draw any conclusions from legislation about the risk of fundamental fair-trial breaches, it must ask the issuing judicial authority for supplementary information[141].

The CJEU has also highlighted other relevant types of information[142], including reasoned proposals addressed by the Commission to the Council on the basis of Article 7(1) TEU, judgments delivered by the CJEU in cases where the Commission had brought an infringement action against the issuing Member State[143] and decisions of national courts in the issuing Member State, such as a judgment of the Polish Supreme Court in which it rejected the NCJ as an independent body[144]. In addition, the CJEU has stressed that other case-law dealing with issues related to the rule-of-law problem in Poland must also be considered by executing judicial authorities when making their assessments[145].

As new legislation has been adopted in Poland, the consequences of that legislation have also been examined by various courts, particularly regarding whether this legislation enables Polish judges to act independently and autonomously in relation to the legislative and executive powers in Poland. This has not gone unnoticed by the CJEU. In its most recent case-law regarding the interpretation of the *LM* test, the referring courts had highlighted recent rulings from both the ECtHR and Polish national courts as signs that conditions in Poland are even more troubling and serious than they were when the CJEU delivered its judgment in *LM*. The CJEU has expressly identified rulings of other courts as an essential source of information for the executing judicial authorities' assessments. One example of such a ruling is a judgment given by the ECtHR in which it found that new Polish legislation governing the appointment of national judges violated the requirement of a tribunal established by law[146].

In addition, the CJEU has highlighted as relevant information the fact that the Polish Constitutional Tribunal, in a decision of July 2021, challenged the primacy of EU law and the binding nature of the ECHR as well as the binding force of judgments from the CJEU and the ECtHR where those courts take a position on Polish legislation regarding the organisation of the national judicial system, in particular the appointment of judges[147], and on the compatibility of such

legislation with EU law and the ECHR[148]. These challenges from the Polish Constitutional Tribunal have prompted the Commission to bring yet another infringement action against Poland. In the Commission's opinion, the Polish Constitutional Tribunal no longer meets the requirement of an independent and impartial tribunal previously established by law[149].

The general assessment made as the first step of the *LM* test must be based on *objective*, *reliable*, *specific* and *duly updated* material. What the sources of information mentioned above have in common is that they all provide a concrete and objective picture of the deficiencies within the judicial system in Poland. Although the executing judicial authority is formally required to make an overall assessment on the basis of *all* available information, there can hardly be any doubt that the information drawn from those sources is sufficient in order for an executing judicial authority to conclude that there is a real risk of fair-trial breaches if a requested person is surrendered to Poland.

By contrast, the individual assessment constituting the second step of the *LM* test is considerably more difficult for the executing judicial authority to carry out. To a large extent, the information from the material mentioned above will form the basis of the individual assessment as well[150]. However, in the second step of the test, that information must be weighed against the *personal situation* of the requested person, the *nature of the offence* and the *factual context* in which the EAW concerned was issued.

Hence the executing judicial authority must determine the significance in the individual case of the general information gathered in the first step of the test. In doing that, the executing judicial authority must make an «overall assessment» and «take into consideration all the information which it considers to be relevant»[151]. Judging from this wording, there is no limit to the information that the executing judicial authority may rely on in its assessment. By contrast, what may constitute a problem for the executing judicial authority is how to establish the significance of a given piece of information in its individual assessment. It is clear from the CJEU's most recent case-law that the executing judicial authority has sole responsibility for making that assessment and that it alone decides what value such information should be ascribed in an individual case. Further, it is also clear that the CJEU does not object in principle to the idea of an executing judicial authority refusing to surrender a person because it considers itself to have access to information showing that there is a real risk of that person being subjected to breaches of fundamental rights[152]. Hence it is unlikely that the CJEU will set out more precise criteria than it has already done or provide more explicit guidance regarding the importance to be attributed to specific information in an individual case. By contrast, something that the CJEU might conceivably do is to conclude that, if it can be established that certain specific circumstances are present, for example, that the court that will hear a case consists mainly of judges appointed on the recommendation of a body that does not meet the requirement of independence, such as the NCJ, this situation can be presumed to entail a real risk of fair-trial breaches for a requested person, were he or she to be surrendered to the issuing Member State. Such a presumption would make it possible to skip the second step of the

LM test in certain situations. However, the CJEU has not yet taken that step.

7.4. *Organisational matters*

It is essential that experience from the handling of previous EAWs and surrender requests should be considered, in each Member State, whenever the circumstances surrounding an issuing Member State's judicial system are to be assessed – not least because an executing judicial authority has an obligation to consider all available information on the situation in the issuing Member State. However, given that the issuance of EAWs and the making of surrender requests are part of judicial co-operation in criminal matters within the EU, such experience and the knowledge deriving from it may be harder to come by than for purely national legal matters.

The processing and execution of EAWs is handled differently in different Member States. For instance, the approach taken may be more or less centralised in nature. Sweden is one example of a Member State with a fairly decentralised approach. Although the initial investigating phase is handled by a particular unit of the National Public Prosecution Department (the National Unit against Organised Crime), the final decision on whether to surrender the requested person is taken by one of the country's 48 district courts; which of them has jurisdiction depends on where the requested person was arrested[153]. By contrast, the approach taken in the Netherlands is more centralised. All decision-making regarding EAWs is centralised to a single prosecutor (the Public Prosecution Office Amsterdam) and a single court (Rechtbank Amsterdam), which has exclusive jurisdiction to decide on the execution of EAWs[154].

One might think that a system like the Swedish one, where decision-making is dispersed across a great many courts, would make it harder to obtain knowledge about conditions in an issuing Member State, compared with a system like the Dutch one, with a centralised decision-making procedure. However, it should be kept in mind that the investigative part of the handling of EAWs is centralised to a specific unit within the Swedish Prosecution Authority, even though the final decision-making is not. Even so, the level of knowledge about conditions in an issuing Member State will undoubtedly differ from one Swedish district court to another, and it is not unlikely that judges at a small district court which has had limited experience with EAWs will hesitate to make a decision that goes against the stated aim of the EAW FD and the principles of mutual trust and recognition between Member States. It can be noted that no Swedish district court has so far requested a preliminary ruling from the CJEU regarding the question of whether the surrender of a requested person to another Member State should be refused owing to a risk of fair-trial breaches.

8. *Why does the CJEU insist that the second step of the* LM *test must always be carried out?*

As noted above, EU law is based on the fundamental premiss that all Member States share a set of common values, including the principles of mutual trust and recognition between Member States. Accordingly, each

Member State has, save in exceptional circumstances, an obligation to consider all the other Member States to comply with EU law, particularly with the fundamental rights recognised by EU law. However, when it can be established that a Member State does not live up to that commitment, the question arises as to whether individuals should be surrendered to that Member State on the basis of an EAW. Member State courts have repeatedly questioned whether the second step of the *LM* test really needs to be carried out when it can already be established in the first step of that test that there are deficiencies in the judicial system of the issuing Member State which entail a real risk of fair-trial breaches – as has become the case with Poland. This is a reasonable question, especially given that those deficiencies have continued to increase since the CJEU delivered its judgment in *LM*. However, the CJEU has been adamant that executing judicial authorities must still carry out the second step of the test.

The main argument put forward by the CJEU in favour of that conclusion is that, if it were enough to carry out only the first step of the *LM* test with regard to a given Member State, for which it had been determined, through the general assessment of conditions in that Member State which constitutes that first step, that systematic or generalised deficiencies regarding the independence of that Member State's judiciary entailed a real risk of breach of the right to a fair trial as guaranteed by the second paragraph of Article 47 CFR, this would, in practice, mean that no EAWs issued by judicial authorities in that Member State could be executed. Moreover, in such a situation, no court in that Member State could be regarded as a "court or tribunal" for the purposes of other provisions of EU law, including Article 267 TFEU (which governs the preliminary-ruling procedure)[155].

Against this background, the CJEU has continued to emphasise in its case-law that only the European Council could make a decision to that effect. In fact, it follows from the wording of Recital 10 of the EAW FD that it is only if a Member State seriously and persistently breaches the principles laid down in Article 2 TEU, including the rule of law, that the implementation of the EAW system may be suspended in relation to that Member State, and the European Council has the power to make such a decision in accordance with the principles set out in Article 7(1) and 7(2) TEU[156].

In other words, the CJEU does not consider itself to have the authority to decide that the deficiencies in a Member State have reached a point where the assessment performed as the first step of the *LM* test is sufficient in that it justifies the conclusion that *no-one* who is surrendered to that Member State will receive a fair trial. Hence it is always necessary also to perform an individual assessment of the risks that the requested person in the individual case would be exposed to, were he or she to be surrendered to the issuing Member State.

The main objective of the EAW mechanism is to ensure that alleged perpetrators cannot avoid trial or punishment by staying in a country other than the one where they are alleged to have committed an offence or have been convicted of one. As noted in Section 5.2, the CJEU considers that the second step of the *LM* test must always be carried out, meaning that, in order to refuse the execution of an EAW, the executing judicial authority must always assess whether the requested person runs a real risk of

fair-trial breaches if surrendered to the issuing Member State[157]. Importantly, however, in the context of the effort to combat impunity, it is not only the requested person's fundamental rights that must be considered but also those of the victim(s) of the offence(s) concerned[158].

Another aspect that is not explicitly elaborated on in the CJEU's case-law is that if the court system of the issuing Member State, in this case Poland, were to be rejected on a general level owing to the deficiencies of that system, this would also mean that judges in the national courts of that Member State would be "abandoned"[159]. In recent years, national courts in Poland have frequently requested preliminary rulings from the CJEU regarding various issues related to the rule of law. Those courts have often asked the CJEU to assess whether new Polish legislation is compatible with EU law. This represents an essential means for national judges to draw the attention of the rest of Europe to the deficiencies and problems of the Polish judiciary, which pervade the everyday life of those judges. For example, Polish judges have on several occasions been put under pressure in their adjudication. Many of them have also been subject to disciplinary proceedings before the newly established Disciplinary Board of the Supreme Court – which, as noted above, both the CJEU and the ECtHR have found not to be an independent court[160]. Considering this, it would be devastating to many judges in Poland if the CJEU were to disqualify the entire Polish court system, since this would mean that no Polish court could classify as a "court or tribunal" under EU law, which would deprive all Polish judges of the right to request preliminary rulings from the CJEU. This would pull the rug from under them at a time when this is the last thing they need.

9. *Conclusions*

There is no doubt that conditions in Poland are alarming as far as the country's judicial system is concerned and that there is little to suggest that there are any changes in sight. Polish judges acting within this system do what they can to bring its deficiencies to the outside world's attention. As noted before, they frequently submit references for preliminary rulings to the CJEU, asking to have the compatibility of Polish legislation with EU law reviewed. The CJEU has repeatedly ruled that Polish legislation on the organisation of the courts is contrary to EU law.

A well-established mechanism for judicial co-operation in criminal matters within the EU allows Member States to issue EAWs against requested persons. The key issue dealt with in this article is whether an executing judicial authority should automatically refuse to surrender a requested person to a Member State, such as Poland, whose judicial system does not enable its judges to act independently and autonomously vis-à-vis the legislative and executive powers. The CJEU has been adamant that, before deciding to refuse to execute an EAW, an executing judicial authority must carry out not only a general assessment of conditions in the issuing Member State (the first step of the *LM* test) but also an individual assessment to determine whether there is a real risk of fair-trial breaches affecting the requested person, were he or

she to be surrendered to that Member State (the second step of the *LM* test).

This article shows that performing the assessment constituting the second step of the *LM* test is a challenging task. The CJEU has specified a number of criteria that are of importance for this assessment. At the same time, however, it has also explicitly stated that certain concrete facts do not in themselves justify a presumption of fair-trial breaches. I must admit that, in some cases, I find this surprising. For example, in my opinion, an executing judicial authority should be considered to have sufficient grounds for refusing to execute an EAW if it has obtained information showing that the judge or judges who heard (or will hear) the criminal case in question were appointed on the proposal of a body that is not independent of the legislative and executive powers. It is perfectly possible to draw such a conclusion in an individual case without condemning the entire court system in Poland. After all, there are still active judges in Poland who were not appointed on the proposal of the NCJ, and this ground for refusing to execute an EAW would exist only in cases where it can be established that the requested person has been convicted (or risks being convicted) by a court where the NCJ was involved in the procedure for the appointment of judges.

Finally, it should be stressed that there is nothing to prevent an executing judicial authority from finding that the risks of fair-trial breaches in an individual case are so significant that exceptional circumstances are at hand, meaning that the EAW in question should not be executed. The CJEU's case-law is clear on this point: making that assessment is the sole duty of the executing judicial authority. However, in practice, such an authority will need to obtain credible information about conditions in the issuing Member State on which it can base its assessment, and that authority must also have the "courage" and "confidence" to refuse to execute the EAW, even though doing so runs contrary to the main rule of the EAW FD as well as its underlying purpose. While it is perfectly conceivable that an individual district court in a Member State where the handling of EAWs is decentralised, such as Sweden, may adopt such a decision, it might be a good idea to strengthen executing judicial authorities by centralising – as has been done, for example, in the Netherlands – the competence to execute EAWs to a single court.

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[2] E.g., L. Pech, D. Kochenov, *Respect for the Rule of Law of the European Court of Justice. A Casebook Overview of Key Judgments since the Portuguese Judges Case*, Swedish Institute for European Policy Studies (SIEPS), n. 3, 202, and A. Von Bogdandy, *Principles of a systematic deficiencies doctrine: How to protect checks and balance in the Member States*, in «Common Market Law Review», n. 57, 2020, pp. 705-740.

[3] E.g., European Commission, 2022 Rule of Law Report. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, COM(2022) 500 final. See also the joint urgent opinion regarding Poland of the European Commission for Democracy through Law (Venice Commission) and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on amendments to the Law on the common courts, the Law on the Supreme Court, and some other laws, Opinion Nr. 977/2020, CDL-PI(2020)002.

[4] Three of them have been decided by judgment of 5 November 2019 in case C-192/18, *Commission v. Poland (Independence of ordinary courts)*, ECLI:EU:C:2019:924, judgment of 24 June 2019 in case C-619/18, *Commission v. Poland (Independence of the Supreme Court)*, ECLI:EU:C:2019:531, and judgment of 15 July 2021 in case C-791/19, *Commission v. Poland* (*Disciplinary regime for judges*), ECLI:EU:C:2021:596. One is pending: case C-204/21, *Commission v. Poland*; the Advocate General presented his Opinion on 15 December 2022, ECLI:EU:C:2022:991. The fifth action was announced on 15 February 2023, the Commission announced in a press release (IP/23/842) that it had decided to bring Poland before the Court of Justice of the European Union for violations of EU law committed by its Constitutional Tribunal.

[5] According to Article 267 of the Treaty on the Functioning of the European Union (TFEU), the CJEU shall have jurisdiction to give preliminary rulings. Article 267 TFEU mentions both "courts" and "tribunals" as being entitled to refer questions for a preliminary ruling, while Article 6(1) of the European Convention on Human Rights, which concerns the right to a fair trial, mentions only "tribunals" (and "courts" regarding public access to proceedings, whilst the French version is consistent in its use of "tribunal" only). In the present article, the terms "tribunal" and "court" will be used interchangeably to include all judicial authorities.

[6] See, e.g., judgment of 25 July 2018 in case C-216/18 PPU, *LM*, ECLI:EU:C:2018:586, judgment of 17 December 2020 in joined cases C-354/20 PPU and C-412/20 PPU, *L & P*, ECLI:EU:C:220:1033, judgment of 22 February 2022 in joined cases C-562/21 PPU and C-563/21 PPU, *Openbaar Ministerie*, ECLI:EU:C:2022:100, and order of 12 July 2022 in case C-480/21, *Minister for Justice and Equality*, ECLI:EU:C:2022:592.

[7] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.07.2002, p. 1.

[8] Charter of Fundamental Rights of the European Union (2000/C 364/01), OJ C 364, 18.12.2000, p. 1.

[9] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950.

[10] The executing judicial authority is the judicial authority of the Member State of execution which is competent to execute the EAW by virtue of the law of that State (Articles 3 and 6(2) EAW FD). The issuing judicial authority is the judicial authority of the issuing Member State which is competent to issue an EAW by virtue of the law of that State (Article 6(1) EAW FD).

[11] *LM* cit. That case concerned the risk of breaches of a requested person's fundamental right to a fair trial before an independent tribunal.

[12] The *LM* test is also applicable with regard to detention circumstances in the issuing Member State. However, that issue will not be specifically analysed in this paper; cf. judgment of 5 April 2016 in joined cases C-404/15 and C-659/15 PPU, *Aranyosi* and *Căldăraru*, ECLI:EU:C:2016:198.

[13] Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, (2001/C 12/02), OJ C 12, 15.1.2001, p. 10.

[14] L. Klimek, *European Arrest Warrant*, s.l., Springer, 2015, p. 32.

[15] EAW FD, Recital 6.

[16] EAW FD, Recital 10.

[17] Cf. judgment of 10 November 2016 in case C-452/16 PPU, *Poltorak*, ECLI:EU:C:2016:858, p. 26, and *LM* cit., p. 36.

[18] EAW FD, Article 1(2).

[19] EAW FD, Article 1(1).

[20] *LM* cit., p. 43, and judgment of 10 August 2017 in case C-270/17 PPU, *Tupikas*, EU:C:2017:628, p. 50.

[21] E.g., *LM* cit., p. 41, and *Openbaar Ministerie* cit., pp. 43-44.

[22] EAW FD, Articles 3, 4, 4a and 5. Article 4a was added to the EAW FD by Council Framework Decision 2009/299/JHA of 26 February 2009, OJ L 81, 27.3.2009, p. 24.

[23] EAW FD, Article 3.

[24] EAW FD, Articles 4 and 4a.

[25] Commission Notice – Handbook on how to issue and execute a

European arrest warrant (2017/C 335/01), p. 33.

[26] E.g., *Aranyosi* and *Căldăraru* cit., pp. 82-83, and *LM* cit., pp. 43-45.

[27] *Aranyosi* and *Căldăraru* cit., pp. 88-93.

[28] *LM* cit., pp. 61-62, 68.

[29] *L & P* cit., *Openbaar Ministerie* cit., and *Minister for Justice and Equality* cit.

[30] For an overview of the CJEU case-law regarding the rule-of-law crises in Poland, see Pech, Kochenov, *Respect for the Rule of Law in the Case-Law of the European Court of Justice* cit.

[31] *LM* cit., pp. 15-16.

[32] Ivi, p. 22.

[33] Ivi, p. 25.

[34] Ivi, pp. 35-37.

[35] Ivi, p. 43.

[36] Ivi, p. 47.

[37] Ivi, p. 61.

[38] Ivi, p. 68.

[39] For a summary of the problems that executing judicial authorities have run into when trying to apply the *LM* test, see, e.g., P. Bárd, J. Morijn, *Luxembourg's Unworkable Test to Protect the Rule of Law in the EU: Decoding the Amsterdam and Karlsruhe Courts' post LM Rulings (Part I)*, in «Verfassungsblog», 18 April 2020 <https://verfassungsblog.de/luxembourgs-unworkable-test-to-protect-the-rule-of-law-in-the-eu/> (last visited on 15 May 2023), and *Domestic Courts Pushing for a Workable Test to Protect the Rule of Law in the EU: Decoding the Amsterdam and Karlsruhe Courts' post LM Rulings (Part II)*, in «Verfassungsblog», 19 April 2020, <https://verfassungsblog.de/domestic-courts-pushing-for-a-workable-test-to-protect-the-rule-of-law-in-the-eu/> (last visited on 15 May 2023).

[40] See *Commission v. Poland (Independence of the Supreme Court)* cit., *Commission v. Poland (Independence of ordinary courts)* cit. and *Commission v. Poland (Disciplinary regime for judges)* cit., where the action was brought on 22 November 2019, that is, after the LM judgment was pronounced but before the L & P judgment (see below) was pronounced.

[41] Its Polish name is *Sąd Najwyższy, Izba Dyscyplinarna*; it was established in 2017 by Article 3 of the Law of 8 December 2017 on the Supreme Court.

[42] The judges sitting on the Disciplinary Chamber are appointed by the President of the Republic on a proposal of the Polish National Council for the Judiciary (a body further discussed below), which is the same procedure used to appoint judges for the other chambers of the Supreme Court; Article 179 of the Polish Constitution [Constitution of the Republic of Poland of 2 April 1997] and Article 29 of the Law on the Supreme Court. See also judgment of 19 November 2019 in joined cases C-585/18, C-624/18 and C-625/18, *A.K. and Others*, ECLI:EU:C:2019:982, p. 136.

[43] Article 131 of the Law on the Supreme Court. See also *A.K. and Others* cit., p. 150, and ECtHR, 22 July 2021, *Reczkowicz v. Poland*, ECLI:CE:ECHR:2021:0722JUD004344719, §§ 23-24.

[44] *L & P* cit., *Openbaar Ministerie* cit. and *Minister for Justice and Equality* cit.

[45] The chamber for international legal assistance at the District Court of Amsterdam (Rechtbank Amsterdam) deals with all EAW cases in the Netherlands. Cf. V. Glerum, H. Kijlstra, *The practice of the Netherlands on the European arrest warrants*, in *European Arrest Warrants. Practice in Greece, the Netherlands and Poland*, The Hague, Eleven International Publishing, 2022, p. 131.

[46] Regarding the issue of how the two-step test would be implemented at the national level in the Netherlands, see A. Martufi, D. Gigengack, *Exploring mutual trust through the lens of an executing judicial authority: The practice of the Court of Amsterdam in EAW proceedings*, in «New Journal of European Criminal Law», 11, n. 3, 2020, pp. 282-298.

[47] *L & P* cit.

[48] For an in-depth analysis of the L & P judgment, see A. Frackowiak-Adamska, *Trust until it is too late! Mutual recognition of judgments and limitations of judicial independence in a Member State: L and P*, in «Common Market Law Review», n. 59, 2022, pp. 113-150.

[49] *L & P* cit., p. 53. The reasons why the CJEU insisted, and insists, that the second step of the *LM* test must always be carried out will be further discussed in Section 8.

[50] Ivi, pp. 41-43.

[51] *Openbaar Ministerie* cit., pp. 22, 30-31.

[52] Law amending the Law on the National Council of the Judiciary and certain other laws, of 8 December 2017 (Dz. U. of 2018, item 3).

[53] The Rechtbank Amsterdam referred, inter alia, to a judgment from July 2021 where the CJEU had determined that the newly established Disciplinary Chamber of the Supreme Court is incompatible with EU law: *Commission v. Poland* (*Disciplinary regime for judges*) cit., pp. 108, 110.

[54] *Openbaar Ministerie* cit., pp. 14-20, 26-29.

[55] Ivi, p. 66.

[56] The relevant criteria for the assessments to be carried out in the first and second steps of the *LM* test will be further discussed in Sections 4.2 and 5.2, respectively. The information-gathering processes and the issue of what information is relevant to the executing judicial authorities' assessment will be discussed in Section 7.

[57] *Openbaar Ministerie* cit., pp. 76-77.

[58] Ivi, pp. 78-80.

[59] *LM* cit., p. 61.

[60] Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012, p. 13; under Article 7(1) TEU, the Commission (and others) may address a reasoned proposal to the Council, which may then determine that there is a clear risk of a serious breach by

a Member State of the values referred to in Article 2 TEU (which include the rule of law).

[61] *A.K. and Others* cit., judgment of 2 March 2021 in case C-824/18, *A.B. and Others*, ECLI:EU:C:2021:153, *Commission v. Poland (Disciplinary regime for judges)* cit. and judgment of 6 October 2021 in case C-487/19, *W.Ż.*, EU:C:2021:798.

[62] *Reczkowicz v. Poland* cit.

[63] In its judgment, the CJEU does not refer to any specific ruling. However, it is not far-fetched to assume that what it has in mind are the judgment of 14 July 2021 of the Polish Constitutional Tribunal in case P 7/20 and the same Tribunal's judgment of 14 October 2021 in case K 3/21. In the former case, the Constitutional Tribunal ruled that Poland is not obliged to comply with interim measures ordered by the CJEU if those measures relate to the organisation and functioning of the Polish judiciary. In the latter case, the Constitutional Tribunal, by ruling that Articles 1 and 19 TEU are incompatible with the Polish Constitution, denied the existence of the obligation to provide effective and independent legal protection in the area of EU law (a manifestation of the rule of law) as well as the primacy of EU law relative to national constitutional law.

[64] *Openbaar Ministerie* cit., p. 83.

[65] *LM* cit., p. 75.

[66] *Openbaar Ministerie* cit., pp. 87-90, 98.

[67] *Minister for Justice and Equality* cit.

[68] *A.B. and Others* cit.

[69] *Minister for Justice and Equality* cit., pp. 7-9.

[70] Ivi, pp. 15, 25-30, 33.

[71] See below, Sections 6 and 7.

[72] *Openbaar Ministerie* cit., pp. 93-96.

[73] *Minister for Justice and Equality* cit., pp. 54-56.

[74] Ivi, p. 52.

[75] Ivi, pp. 46-48.

[76] Judgment of 20 April 2021 in case C-896/19, *Repubblika*, EU:C:2021:311, p. 28 and the case-law cited.

[77] *LM* cit., p. 48, and *Openbaar Ministerie* cit., pp. 55-58. See also ECtHR, 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland*, ECLI:CE:ECHR:2020:1201JUD002637418, §§ 227, 232.

[78] *LM* cit., p. 53.

[79] *LM* cit., p. 61, *L & P* cit., p. 54, *Openbaar Ministerie* cit., p. 52, and *Minister for Justice and Equality* cit., p. 35.

[80] *LM* cit., pp. 62-63, *L & P* cit., p. 39, and *Openbaar Ministerie* cit., p. 58.

[81] For a more in-depth analysis of the concept of independence, see, L. Maunsbach, *Procedural Aspects on Impartial and Independent Judging*, in «Journal of Constitutional History», n. 44, 2/2022, pp. 131-153.

[82] *LM* cit., p. 67.

[83] *Commission v. Poland (Disciplinary regime for judges)* cit., p. 140.

[84] See Section 3.2.

[85] The CJEU has declared this system to be contrary to EU law; *Commission v. Poland (Disciplinary regime for judges)* cit., p. 112. The ECtHR has stressed that the Disciplinary Chamber of the Supreme Court is not a "tribunal established by law"; *Reczkowicz v. Poland* cit., §§ 280-281.

[86] Judgment of 26 March 2020 in joined cases C-558/18 and C-563/18, *Miasto Łowicz and Prokurator Generalny*, ECLI:EU:C:2020:234, p. 59 and the case-law cited.

[87] Article 186(1) of the Polish Constitution.

[88] *Commission v. Poland (Disciplinary regime for judges)* cit., p. 99, and *Reczkowicz v. Poland* cit., § 233.

[89] *A.K. and Others* cit., p. 143, *Commission v. Poland (Disciplinary regime for judges)* cit., pp. 103-104, and *Reczkowicz v. Poland* cit., § 233.

[90] Judgment of the Polish Supreme Court in case BSA I-4110-1/20, resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber, 23 January 2020.

[91] *Reczkowicz v. Poland* cit., § 280. Cf. also ECtHR, 15 March 2022, *Grzęda v. Poland*, ECLI:CE:ECHR:2022:0315JUD004357218, § 348 and the case-law cited.

[92] Cf. *Commission v. Poland (Disciplinary regime for judges)* cit., pp. 108, 110.

[93] *L & P* cit., p. 51.

[94] Cf. *Openbaar Ministerie* cit., pp. 30-31, 39.

[95] Ivi, p. 67.

[96] *LM* cit., pp. 63-66.

[97] *Openbaar Ministerie* cit., p. 70.

[98] E.g., ECtHR, 2 May 2019, *Pasquini v. San Marion*, ECLI:CE:ECHR:2020:1020JUD002334917, §§ 100-101. Cf. also *Reczkowicz v. Poland* cit., §§ 216-220, and ECtHR, 3 February 2022, *Advance Pharma sp. z o.o v. Poland*, ECLI:CE:ECHR:2022:0203JUD000146920, §§ 294-298.

[99] *Openbaar Ministerie* cit., p. 71.

[100] Ivi, pp. 75-77.

[101] E.g., *Minister for Justice and Equality* cit., pp. 36, 39. The issue of (potentially) different standards of proof will be further discussed in Section 6.

[102] The first two decisions dealing with the *LM* test – *LM* cit. and *L & P* cit. – turned on the risk of the right to an *independent tribunal* being undermined. Only in the last two decisions – *Openbaar Ministerie* cit. and *Minister for Justice and Equality* cit. – did the *LM* test come to include the issue of the right to a *tribunal previously established by law* being undermined in relation to the possibility of refusing to execute an EAW issued by Poland.

[103] *LM* cit., p. 59, *L & P* cit., p. 55, *Openbaar Ministerie* cit., p. 82, and *Minister for Justice and Equality* cit., p. 34.

[104] *LM* cit., p. 74, and *Openbaar Ministerie* cit., p. 53.

[105] *LM* cit., p. 68, *L & P* cit., p. 61, *Openbaar Ministerie* cit., p. 53, and *Minister for Justice and Equality* cit., p. 36.

[106] The information-gathering process, and the forms of information that are important to the assessment, will be discussed in Section 7.

[107] EAW FD, Article 1(1)-1(2).
[108] *L & P* cit., pp. 66-68, and *Openbaar Ministerie* cit., p. 86.
[109] *Openbaar Ministerie* cit., p. 87.
[110] Ivi, pp. 88-89, and *Minister for Justice and Equality* cit., p. 42.
[111] ECtHR, 9 January 2013, *Oleksandr Volkov v. Ukraine*, ECLI:CE:ECHR:2013:0109JUD002172211, § 106.
[112] Ivi, §§ 106-107.
[113] See footnotes 90-92.
[114] *Openbaar Ministerie* cit., pp. 93-94, and *Minister for Justice and Equality* cit., pp. 49-50.
[115] *Openbaar Ministerie* cit., p. 98.
[116] Ivi, p. 96, and *Minister for Justice and Equality* cit., pp. 51-52.
[117] *Openbaar Ministerie* cit., pp. 90, 99-100, and *Minister for Justice and Equality* cit., pp. 43, 54-55.
[118] *Openbaar Ministerie* cit., p. 90.
[119] *Minister for Justice and Equality* cit., pp. 46-48.
[120] *L & P* cit., pp. 62-64.
[121] Ivi, pp. 62-64, and *Openbaar Ministerie* cit., pp. 60-62.
[122] *LM* cit., p. 61 (the first step) and p. 68 (the second step), *L & P* cit., p. 54 (the first step) and p. 55 (the second step), *Openbaar Ministerie* cit., p. 52 (the first step) and p. 53 (the second step), and *Minister for Justice and Equality* cit., p. 35 (the first step) and p. 36 (the second step).
[123] *LM* cit., p. 74, *L & P* cit., p. 55, *Openbaar Ministerie* cit., p. 53, and *Minister for Justice and Equality* cit., p. 36.
[124] *Openbaar Ministerie* cit., p. 82. It should be noted that, in the same judgment, the CJEU also uses the expression «are liable to have an impact on» (p. 53). In its most recent case-law, the CJEU also uses both expressions (*Minister for Justice and Equality* cit., pp. 36, 39).
[125] Cf. L. Mancano, *You'll never work alone: A systematic assessment of the European arrest warrant and judicial independence*, in «Common Market Law Review», n. 58, 2021, pp. 699-702.
[126] *Minister for Justice and Equality* cit., pp. 46-48.
[127] Courts in both the Netherlands (Rechtbank Amsterdam) and Germany (Oberlandesgericht [Higher Regional Court] Karlsruhe) have refused to execute an EAW pertaining to a surrender request from Poland. For further details, see, e.g., the articles by P. Bárd and J. Morijn referred to in footnote 39 as well as the case-law cited in those articles. See also Rechtbank Amsterdam's press release of 10 February 2021: *International Legal Assistance Division decides against surrender of a Polish Accused*, referring to case ECLI:NL:RBAMS:2021:420, <https://www.rechtspraak.nl/SiteCollectionDocuments/4501679623-zaak-ml-tbv-vertaling.pdf> (last visited on 15 May 2023), and the German case OLG Karlsruhe, 27 November 2020 – Ausl 301 AR 104/19, <https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=OLG%20Karlsruhe&Datum=27.11.2020&Aktenzeichen=Ausl%20301%20AR%20104%2F19> (last visited on 15 May 2023).
[128] Cfr. *Openbaar Ministerie* cit., p. 46.
[129] Ivi, p. 83, and *Minister for Justice and Equality* cit., p. 40.
[130] *Openbaar Ministerie* cit., pp. 76, 87.
[131] Ivi, p. 88.
[132] *Ibidem*.
[133] It has actually been questioned whether it is at all possible for a requested person to prove that individual harm is to be expected in his or her case. See P. Bárd, J. Morijn, *Luxembourg's Unworkable Test to Protect the Rule of Law in the EU: Decoding the Amsterdam and Karlsruhe Courts' post LM Rulings (Part I)*, in «Verfassungsblog», 2020/4/18, <https://verfassungsblog.de/luxembourgs-unworkable-test-to-protect-the-rule-of-law-in-the-eu/> (last visited on 15 May 2023).
[134] Cf. Section 5.2.
[135] *Openbaar Ministerie* cit., pp. 87-89, and *Minister for Justice and Equality* cit., p. 42. Cf. also judgment of 16 November 2021 in joined cases C-748/19 and C-754/19, *Prokuratura Rejonowa w Mińsku Mazowiecki*, EU:C:2021:931, pp. 77, 90.
[136] Cfr. *LM* cit., pp. 76-77, and *Openbaar Ministerie* cit., p. 84.
[137] Judgment of 25 July 2018 in case C-220/18 PPU, *Generalstaatsanwaltschaft (ML)*, EU:C:2018:589, p. 64.
[138] *Openbaar Ministerie* cit., p. 85.
[139] *Minister for Justice and Equality* cit., p. 56.
[140] Cfr. *LM* cit., pp. 63-67, *L & P* cit., pp. 47-48, and *Openbaar Ministerie* cit., pp. 58, 69-70. Cfr. also *Minister for Justice and Equality* cit., pp. 42-43.
[141] EAW FD, Article 15(2).
[142] *Openbaar Ministerie* cit., p. 78, and *Minister for Justice and Equality* cit., p. 38.
[143] E.g., *Commission v. Poland (Disciplinary regime for judges)* cit.
[144] See footnote 90.
[145] E.g., *A.K. and Others* cit., *A.B. and Others* cit. and *W.Ż.* cit.
[146] *Reczkowicz v. Poland* cit.
[147] Judgment of 14 July 2021, ref. No. P 7/20, and judgment of 7 October 2021, ref. No. K 3/21. Cf. also *Primacy of EU law and jurisprudence of Polish Constitutional Tribunal*, Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies, European Parliament, 732.475 – June 2022, <https://www.europarl.europa.eu/RegData/etudes/STUD/2022/732475/IPOL_STU(2022)732475_EN.pdf> (last visited on 15 May 2023).
[148] *Openbaar Ministerie* cit., pp. 79-80, and *Minister for Justice and Equality* cit., p. 38.
[149] Commission press release (IP/23/842) of 15 February 2023, <https://ec.europa.eu/commission/presscorner/detail/EN/IP_23_842> (last visited on 15 May 2023).
[150] Cfr. *Openbaar Ministerie* cit., pp. 86-101, and *Minister for Justice and Equality* cit., pp. 41-43, 51-55.
[151] *Minister for Justice and Equality* cit., pp. 52-53; cf. also *Openbaar*

Ministerie cit., p. 97.

[152] *Minister for Justice and Equality* cit., pp. 44-48.

[153] Chapter 4, Section 2, of the National Prosecution Authority's Regulations on International Co-operation (ÅFS 2007:12; consolidated version last modified by ÅFS 2022:1).

[154] Glerum, Kijlstra, *The practice of the Netherlands on the European arrest warrants* cit., pp. 127-133.

[155] Cfr. *L & P* cit., pp. 41-44, 59-60, and *Minister for Justice and Equality* cit., p. 38.

[156] *LM* cit., pp. 70-73, *L & P* cit., pp. 57-60, *Openbaar Ministerie* cit., pp. 63-65, and *Minister for Justice and Equality* cit., p. 37.

[157] *L & P* cit., pp. 62-64, and *Openbaar Ministerie* cit., p. 62.

[158] *Openbaar Ministerie* cit., p. 60.

[159] Cfr., however, *L & P* cit., p. 44.

[160] See Sections 4.2 and 5.2.