


The (lack of) consequences of reasonable doubts on the independence of the judiciary system on cooperation in criminal matters in the EU¹

A (ausência) de consequências em caso de dúvida razoável sobre a independência do sistema judicial na cooperação em matéria penal na União Europeia

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ABSTRACT: The article analyses the consequences of the violation of judicial independence in the cooperation in criminal matters. The right to an independent court is not only a fundamental value in the rule of law (Article 2 TEU, Article 19(1)), but also one of the fundamental rights (Article 47 CFR). Jeopardising the independence of the judiciary in one of the EU countries should have an impact on the possibility of cooperation in criminal matters. Leaving the standard of independence of the judiciary resulting from the ECHR jurisprudence, the article summarises the current jurisprudence of the CJEU concerning the independence of the judiciary and the impartiality of judges at two levels: general (or systemic), and in connection with the operation of the EAW. The article analyses present situation in Poland and recent judgments of the CJEU in “Polish cases” – about the problem of executing the EAW and evaluating the independence of the judiciary system in Poland.

KEYWORDS: rule of law in Poland; judicial cooperation in criminal proceedings; EAW; independence of judiciary; the CJEU jurisprudence.

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RESUMO: O artigo analisa as consequências da violação à independência judicial no caso de cooperação em matéria criminal. O direito a um juízo independente não é somente um valor fundamental do Estado de Direito (art. 2, Tratado da União Europeia, art. 19(1)), mas também um dos direitos fundamentais (art. 47, Carta dos Direitos Fundamentais da União Europeia). A violação da independência do Judiciário em um país da UE deve impactar na possibilidade de cooperação em matéria criminal. Considerando o standard de independência do Judiciário a partir da jurisprudência do TEDH, o artigo resume a atual jurisprudência do TJUE relacionada à independência do Judiciário e à imparcialidade dos juizes em dois níveis: geral (ou sistêmico), e em conexão com a operação do mandado de detenção europeu. O artigo examina a situação na Polônia e os julgamentos recentes do TJUE nos “casos da Polônia” – sobre o problema de executar o mandado de detenção europeu e avaliar a independência do sistema judicial na Polônia.

PALAVRAS-CHAVE: Estado de Direito na Polônia; cooperação judicial em processo penal; mandado de detenção europeu; independência do Judiciário; jurisprudência do TJUE.

1. INTRODUCTION

Judicial cooperation in criminal matters is based on mutual trust in respect of the rule of law principle, democracy and fundamental rights³ by all European Union countries. Mutual trust, however, is not a ‘blind trust’ given to the EU countries once and for all⁴. To build an area of freedom, security and justice, where the rights and freedoms are

³ The European Commission refers to these values in the proposal for a regulation on the rule of law. See: Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States; COM/2018/324 final - 2018/0136 (COD).

⁴ Agnieszka FRĄCKOWIAK-ADAMSKA, *The Limits of Mutual Trust in the Area of Freedom, Security and Justice*, European Judicial Review, 2014, no. 2, p. 20; K. LENAERTS, *La vie après l’avis: Exploring the principle of mutual (yet not blind) trust*, Common Market Law Review, 2017, No. 3, p. 811; Agnieszka GRZELAK, *Mutual trust as a basis for judicial cooperation between EU Member States in criminal matters (remarks on the margin of the preliminary reference in Case C-216/18 PPU Celmer)*, State and Law, 2018, No 10, p. 59.

respected, it should be possible to verify, whether a country complies with the obligations of being a Member State of the EU. M. Kusak states that, although the introducing of the principle of mutual trust was accompanied by optimism, from the very beginning the concept was in crisis⁵. The differences in the level of protection of fundamental rights have been evident in the early phase of the EAW being in force⁶, but the CJEU - until the *Aranyosi and Caldárraru judgment*⁷ - had given priority to the principle of mutual recognition⁸. V. Mitsilegas observes that the EU institutions sometimes sacrificed the protection of fundamental rights for the effective implementation of the principle of mutual recognition⁹. However, is this thesis still valid? Or maybe, the development of human rights law has made the protection of individual rights more important than the functioning of the principle of mutual recognition?

In recent years, the principle of mutual recognition and mutual trust has been at the greatest crisis. The threats of violations of the principle of the rule of law, interference in the independence of the judiciary system and, as a result, violation of the right to a fair trial, raise questions about the future of the EU's cooperation in criminal matters.

⁵ Martyna KUSAK, *Zasada wzajemnego zaufania a kryzys praworządności*, [in:] Dominika CZERNIAK, Jerzy SKORUPKA, *Europejskie gwarancje prawidłowego wymiaru sprawiedliwości w sprawach karnych*, C.H. BECK, Warszawa 2021, p. 49.

⁶ Martyna KUSAK, *The principle of mutual trust*, p. 50-55. Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002, p. 1–20, hereinafter: the EAW.

⁷ COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 5 April 2016*, C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*. See also: Georgios ANAGNOSTARAS, *Mutual confidence is not blind trust! Fundamental rights protection and the execution of the European arrest warrant: Aranyosi and Caldárraru*, *Common Market Law Review*, 2016, v. 53, No. 6, p. 1675 – 1704; Koen BOVEND'EERDT, *The Joined Cases Aranyosi and Caldárraru. A New Limit to the Mutual Trust Presumption in the Area of Freedom, Security, and Justice*, *Utrecht Journal of International and European Law*, 2016, v. 32, p. 112-122.

⁸ COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 26 February 2013*, C-399/11, *Stefano Melloni v Ministerio Fiscal*.

⁹ Valsamis MITSILEGAS, *EU Criminal Law after Lisbon*, Bloomsbury Publishing 2016, p. 141.

The question arises as to whether it is possible to continue to “turn a blind eye” to violations of the fundamental values in the European Union to preserve the integrity of the principle of mutual recognition of judgments. To maintain the coherence of the European community, EU institutions must balance the interests of various parties. Also the CJEU, in its judgments, also considers the possible political effects. The question is, whether the limit of tolerance for violating the values on which the EU is based, has already been crossed.

2. THE RIGHT TO EFFECTIVE LEGAL PROTECTION (ARTICLE 19(1) TEU) AND INDEPENDENCE OF THE JUDICIARY

The Article 19(1) TEU¹⁰ obliges the EU Member States to establish the measures necessary to provide effective legal protection in the areas covered by the Union law. The scope of Article 19(1) TEU is potentially unlimited¹¹. Indeed, this provision covers all national laws and practices which may violate the obligation of Member States to establish effective legal remedies necessary to ensure effective judicial protection¹². It therefore makes no difference whether the national courts are dealing with a matter within the scope of Union law or only a domestic matter¹³. In any case, the possibility of effective judicial protection of the rights of

¹⁰ Treaty on European Union; hereinafter: TEU; <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT> (accessed: 27.03.2022)

¹¹ The indefinite scope of Article 19(1) TEU does not mean that a national court may submit a question for a preliminary ruling in every case. The possibility depends on whether there is a connection between the case at issue and European Union law. See: COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 26 March 2020, C-558/18 and C-563/18, Miasto Łowicz*, § 48-52 with further reference to the CJEU case law. COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 23 November 2021, C-564/19, IS*, § 141-146.

¹² OPINION OF ADVOCATE GENERAL MICHAEL BOBEK delivered on 4 March 2021; C-357/19 and C-547/19; § 71.

¹³ Currently, it is difficult to find an area of law that is entirely free from the influence of the EU law. The development of the human rights in the EU law means that most areas of law are more or less changed by the EU standards. This does not mean, however, that in every case the national courts apply acts of EU law.

the person must be ensured. The principle of effective judicial protection is also one of the elements of the rule of law, one of the values on which the Union is founded in Article 2 TEU¹⁴. After all, only in the State that fulfil the rule of law principle, the rights and freedoms of individuals can be effectively ensured¹⁵. Undermining this principle may constitute a systemic (structural) threat to the independence of judiciary¹⁶. The

¹⁴ Maciej TABOROWSKI, Piotr BOGDANOWICZ, *Lack of independence of national courts as a fault obligation within the meaning of Article 258 TFEU (Part I)*, European Judicial Review, 2018, No. 1, p. 5; Armin von BOGDANDY, *Ways to Frame the European Rule of Law: Rechtsgemeinschaft, Trust, Revolution, and Kantian Peace*, European Constitutional Law Review 2018, Volume 14, Issue 4, pp. 675 – 699; Armin von BOGDANDY and Luke DIMITRIOS SPIEKER, *Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges*, European Constitutional Law Review 2019, Volume 15, Issue 3, pp. 391 – 426 COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of March 28/2017, C-72/15, PJS Rosneft Oil Company v. Her Majesty's Treasury and others*, § 72.

¹⁵ Przemysław MIKŁASZEWICZ, *Independence of courts and independence of judges in the context of the rule of law - an essential element of the functioning of the EU in the light of CJEU case law*, State and Law, 2018, No. 3, p. 41.

¹⁶ Ireneusz C. KAMIŃSKI, *Uniajna zasada praworządności (państwo prawa) i uprawnienia sądów*, [in:] Łukasz BOJARSKI, Krzysztof GRAJEWSKI, Jan KREMER, Gabriela OTT, Waldemar ŻUREK, *Konstytucja, praworządność, władza sądownicza*, Wolters Kluwer, 2019, Warszawa, p. 37-64. There is no common definition of the “rule of law” but most of authors underline four crucial elements of “rule of law”:

1. “rule by law (legal basis of any actions)
2. state actions are subject to law;
3. formal legality (law must be clear and certain in its content, accessible and predictable for the subject, and general in its application)
4. democracy (consent determines or influences the content of the law and legal actions)”.

See definition's problem in: Adriaan BEDNER, *An Elementary Approach to the Rule of Law*, Hague Journal on the Rule of Law, 2010, v. 2., No 1, p. 48-74. See also: Robert SPANO, *The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary*, European Law Journal, 2021, <https://onlinelibrary.wiley.com/doi/epdf/10.1111/eulj.12377> (accessed: 6.02.2022); Andrzej Marian ŚWIĄTKOWSKI, *The EU concept of the rule of law. Judgment of the Court of Justice of the European Union in Case C-791/19 - Effective judicial protection - European Commission v. Republic of Poland*, Przegląd Sądowy, 2021, No. 10, p. 5-24. It is worth to mentioned that sometimes the fourth element is contested. G.

right to an independent court is also one of fundamental right (Article 47 of the CFR)¹⁷.

The CJEU highlights the link between Article 19(1) TEU and Article 47 CFR¹⁸. Effective judicial protection is only possible before an independent and impartial tribunal¹⁹, and the right to an independent and impartial tribunal is one of the human rights (Article 47 CFR, Article 6(1) ECHR)²⁰. There is an inseparable link between effective judicial protection, judicial independence, the rule of law principle and respect for fundamental rights. Only in a state, where the rule of law principle

Palombella observes that there is no inextricable relationship between the rule of law and democracy, and the first three elements (especially the structure of the state) are more important. The Author emphasises that: “The long history of the rule of law has many incarnations, and this final absolute identification with the latest version would fail to grasp the general and non-contingent sense of this normative concept, which developed even before the emergence of the constitutional state and its organisation. Finally it does not stand for some fixed perennial rules or substantive contents, and cannot be equated with the requirements of, “democracy” or the democratic state: the nature of the political structure of the sovereign is not, strictly speaking, the most important question here”. See: Gianluigi PALOMBELLA, *The Rule of Law and Its Core* [in:] Gianluigi PALOMBELLA, Neil WALKER (eds.), *Relocating the Rule of Law*, Hart Publishers, 2009, p. 21. See also: Martin KRYGIER, *The Rule of Law: Legality, Teleology, Sociology*, [in:] Gianluigi PALOMBELLA, Neil WALKER (eds.), *Relocating the Rule of Law*, Hart Publishers, 2009.

¹⁷ Charter of Fundamental Rights of the European Union; <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012P%2FTXT> (accessed: 27.03.2022).

¹⁸ See COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 27 February 2018, C-64/16, Associação Sindical dos Juizes Portugueses*, § 35; COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 21 December 2021; Criminal proceedings against PM and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, § 219 and the CJEU judgment mentioned in this paragraph. See also: Michał KRAJEWSKI, *Associação Sindical dos Juizes Portugueses: The Court of Justice and Athena’s Dilemma* European Papers Vol. 3, 2018, No 1, pp. 395-40.

¹⁹ Also: Agnieszka GRZELAK, Andrzej SAKOWICZ, *The requirement of the independence of the national court as an element of effective judicial protection (remarks against the background of the CJ judgment of 19.11.2019 for the Polish judiciary*, State and Law 2020, No. 5, pp. 59-76.

²⁰ COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 27 February 2018, C-64/16, Associação Sindical dos Juizes Portugueses*; § 35.

is respected, courts may be independent and guarantee effective judicial protection. The European Union does not require the Member States to adopt a specific organisational model for the judiciary system²¹ to ensure, in particular, that the requirement for independence is met²². The principle of loyalty (Article 4(3) TEU) only requires states to take measures which would guarantee the effectiveness of the EU law²³. While it does not interfere with the traditions of the Member States, the EU only imposes a requirement that the judicial system as a whole must be independent and guarantee the effective protection of the rights of the individual. The discretion to create their own systems and procedures of the states of the European Union is limited - as to the result - by the provisions of the TEU and the CFR. Whether a court is independent depends on both institutional factors (the court as a public authority deciding on the rights and obligations of the individual; the external aspect of independence) and personal aspects related to the individual judge (the internal aspect of independence, impartial).

The CJEU - as a rule - is not to assess the structure of national courts, judicial institutions and the competences of national authorities, in particular: those of the executive. However, in exceptional situations, where the entire judiciary system of a state no longer fulfils the requirements of the rule of law, the Court has the right to intervene²⁴. In its case law, the

²¹ See also some interesting remarks: Jerg GUTMANN, Stefan VOIGT, *Judicial independence in the EU: a puzzle*, European Journal of Law and Economics, 2020, v. 49, p. 83-100.

²² Those are arguments of the Polish Government in the proceedings in the CJEU. The Government points out that the EU is exceeding its powers and the judicial organisation is one of the exclusive competence of the EU member states.

²³ COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 18 May 2021, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, IS*, § 176. Besides taking steps to ensure the effectiveness of the EU law, states are obliged to resolve any unlawful consequences of a breach of the EU law.

²⁴ In the opinion, the advocate general M. Bobek said: "I must emphasise that, in my view, it is not the role of this Court to assess, in a general manner, the structure and competences of national (judicial) institutions. With the exception of the extreme and unfortunate scenarios in which an entire judicial institution (or even parts of the judicial system) no longer satisfy the

CJEU has developed criteria to assess whether the courts of a Member State are independent (externally and internally) within the meaning of Article 47 of the CFR and whether they guarantee effective legal protection under Article 19(1) TEU.

As regards “external independence”²⁵, the Court observes whether the body concerned (the court) acts with complete autonomy, without hierarchical subordination, and free from instructions or guidelines from any source²⁶. It is important to ensure institutional protection against direct or indirect influence on a decision/judgments²⁷. Indirect interference means a situation, where a judge is threatened with disciplinary consequences as a result of the judgment, e.g. as a result of a reference to

systemic requirements of the rule of law and thus can no longer be referred to as an independent court, and when the institutional analysis of a national judicial actor becomes inevitable, the Court has always limited its analysis to substantive issues raised by a referring court. It is true that within such a discussion, the previous decision of another, even a higher judicial institution within the same legal order, might be indirectly called into question. However, the subject matter of that discussion was always primarily the substance of that decision, not an abstract assessment of the competences or the general authority of a national institution issuing it”. OPINION OF ADVOCATE GENERAL MICHAEL BOBEK delivered on 4 March 2021; C-357/19 and C-547/19; § 198.

²⁵ The concepts of independence (of the judiciary; *independence*) and judicial *autonomy/independence* (independence) are distinguished in the Polish legal sciences. Independence is connected with the court as an institution. Judicial autonomy/independence is an attribute of a certain judge. Maciej TABOROWSKI, Piotr BOGDANOWICZ, *Lack of independence of national courts as a breach of an obligation within the meaning of Article 258 TFEU (Part I)*, European Judicial Review, 2018, No, 1, p. 7.

²⁶ COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 20 April 2021, C-896/19 Repubblica*, § 55. A phrase “any source” refers also to e.g. guidelines made by the other courts or a president of a court. See: European Commission for democracy through law (Venice Commission). Rule of law checklist p. 33; https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf (accessed: 27.03.2022).

²⁷ See also: COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 27 May 2019, C-508/18 and C-82/19 PPU, OG and PI*, § 65-74.

EU law in a judgment or as a result of the erroneous application of national law. For the assessment of external independence²⁸, important factors are:

1. the procedure for the nomination of judges²⁹,
2. the period of judicial mandate (term of judge's office)³⁰, as well as whether the term of mandate may be terminated by legislative or executive authority³¹;

²⁸ The criteria for assessing the independence of the judiciary have been developed in the jurisprudence of the ECtHR. They have been implemented in EU law. See: EUROPEAN COURT OF HUMAN RIGHTS. Judgment of 28 June 1984, *Campbell and Fell v. UK*, no. 7819/77 7878/77; Jutta LIMBACH *Judicial Independence: Law and Practice and Appointments to the European Court of Human Rights*; Interights 2003.

²⁹ COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 2 March 2021, C-824/18, AB and the Others*, § 115. COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 20 April 2021, C-896/19 Repubblica*, § 53-57. COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 19 November 2019, C-585/18, C-624/18 and C-625/18, A. K.*, § 133-150. COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 15 July 2021, C-791/19, European Commission v. Poland*. See also Anna RAKOWSKA-TRELA, *The National Council of the Judiciary after the entry into force of the amendment of 8.12.2017. - organ still constitutional or extra-constitutional*, [in] Łukasz BOJARSKI, Krzysztof GRAJEWSKI, Jan KREMER, Gabriela OTT, Waldemar ŻUREK, *Konstytucja, praworządność, władza sądownicza*, Wolters Kluwer, 2019, Warsaw, p. 107-122.

³⁰ COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 19 September 2006, C-506/04, Wilson*, § 53 and judgments mentioned in this paragraph. COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 25 July 2018, C-216/18 PPU, LM*, § 66 and judgments mentioned in this paragraph.

³¹ COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 24 June 2019, C-619/18, European Commission v Republic of Poland* (lowering of the retirement age of Supreme Court judges; possibility of continuing to carry out the duties of judge beyond that age subject to obtaining authorisation granted by discretionary decision of the President of the Republic). See: Piotr BOGDANOWICZ, Maciej TABOROWSKI, *Retirement regulations as a tool for removing a certain group of judges from holding office as a judge of the Supreme Court - remarks against the background of the judgment of the Court of Justice of 24.06.2019, C-619/18, European Commission v. Republic of Poland*, *European Judicial Review*, 2019, No. 12, p. 15-26; Paweł FILIPEK, *The irremovability of judges and the limits of a Member State's competence to regulate the national judiciary - remarks in light of the judgment of the*

3. the absence/presence of institutional safeguards to protect against a judge influence from other body/authority³², the possibility of his/her delegation to another position by representatives of the executive;
4. the general reputation of the judicial authorities - whether the society considers the courts to be independent and impartial and whether their work evokes trust in the society³³.

It is worth mentioning: the fact that the executive or legislative authorities are involved in the process of the appointment of judges, does not in itself cause an automatic interdependence between the judge (court) and representatives of the executive. If, after their appointment, judges are not exposed to any pressure, do not receive instructions or demonstrate by their behaviour any association with a particular political option (the ruling party), then there are no grounds for supposing that they are not independent. On the other hand, the existence “on paper” of any institutional guarantees that should protect the court (judge) from external pressure is insufficient. The system of disciplinary liability, which was intended to be one of the guarantees of their independence, may be designed in such a way, that it will become one of the method of repression against judges or a political control instrument over jurisprudence in some state³⁴.

Court of Justice of 24.06.2019, C-619/18, European Commission v. Republic of Poland, European Judicial Review, 2019, No. 12, p. 4-13.

³² COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 2 March 2021, C-824/18, AB and the Others*, § 119, 134.

³³ COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 15 July 2021, C-791/19, European Commission v Republic of Poland*, § 165-168. See also: COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 26 March 2020,, C-542/18 RX-II and C-543/18 RX-II Simpson/Council and HG/Commission*, § 57.

³⁴ COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 21 December 2021; Criminal proceedings against PM and Others, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19*, § 227; COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 18 May 2021, C-83/19 etc, Forum of Romanian Judges*, § 199-206 and 213-222. The disciplinary proceedings for implementing the EU law (the primacy of the EU law), requesting for preliminary ruling can have a “freezing effect” among the judges. See: Aneta ŁAZARSKA, *Reflections on factors “freezing”*

However, with regard to internal independence, the CJEU emphasises a need of appropriate distance from the parties to the proceedings, the matter at issue and the absence of any interest in the merits of the case³⁵. In opinion to the case *Criminal proceedings against PM and Others*³⁶, The Advocate General also noted the “so-called doctrine of pretence”. This is because, irrespective of a judge’s individual conduct, ascertainable circumstances may cause reasonable doubts to his/her impartiality. For example, if the judge-appointment procedure has been organised in such a way that the public is likely to have well-founded concerns as to the impartiality of the newly-appointed judges³⁷.

It is occasionally argued that the internal independence (impartiality) of a judge is not verified³⁸. A judge can also be internally independent (impartial) when the independence of the courts as a body is compromised or - when the courts as such do not meet the standard of independence - because it is to the judge to decide how to behave. Of course it is possible for a judge to be faithful to his or her judicial oath even

the European preliminary ruling dialogue, European Judicial Review, 2019, No. 12, p. 7-9; Laurent PECH, Dimitry KOCHENOV, *Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid*, <https://reconnect-europe.eu/wp-content/uploads/2019/07/RECONNECT-policy-brief-Pech-Kochenov-2019June-publish.pdf> (accessed: 6.02.2022). Media informed about the disciplinary proceedings initiated against judges Synakiewicz and Piłńnik for following the principle of priority of the EU law; <https://www.rp.pl/sady-i-trybunaly/art19006211-izba-dyscyplinarna-ma-zdecydowac-o-losie-sedziow-synakiewiczza-i-pilnsnik> (accessed: 6.02.2022).

³⁵ COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 19 November 2019*, C-585/18, C-624/18, C-625/18, AK and Others, § 121-122.

³⁶ OPINION OF ADVOCATE GENERAL MICHAEL BOBEK delivered on 4 March 2021; C-357/19 and C-547/19, § 212.

³⁷ COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 19 November 2019*, C-585/18, C-624/18, C-625/18, AK and Others, § 134.

³⁸ Paweł SKUCZYŃSKI, *Lawyers’ attitudes towards the constitutional crisis and judicial independence*, National Council of the Judiciary, [in:] Grzegorz BORKOWSKI (ed.), *Granice niezawisłości sędziów i niezależności sądów?*, Warsaw-Toruń 2016, p. 149-166. See also: Wojciech JASIŃSKI, *Bezstronność sądu i jej gwarancje w polskim procesie karnym*, Wolters Kluwer, Warszawa 2009.

under adverse circumstances. But, no one can be expected to demonstrate a kind of heroism by, for example, ruling in defiance of pressure from his or her superiors, the executive, etc. The role of the legislature and the executive is to create such an institutional “environment” that a judge can - without fear of possible professional or disciplinary consequences - resolve conflicts between parties involved in proceedings. Moreover, a judge can hardly be considered to have no interest in the *meritis* of a case if he or she is aware about possibility of a disciplinary responsibility for e.g., applying the EU law to the case or ask a for a preliminary ruling. The independence of the judiciary (external independence) ensures that the judge can be impartial (internal independence). In order to guarantee the “effective legal protection” of the Article 19(1) TEU, the internal and external independence of the court (Article 47 CFR) should not be considered separately and the two values should not be treated as partly distinct from each other. The real, practical right to effective judicial protection and the right to a fair trial cannot depend on the courage of particular judge and whether or not, at the risk of possible negative consequences, he or she will rule without regard to external pressure, political influence and orders from his/hers superiors.

Analysing the case-law of the CJEU, it appears that the Court – as to the integrity of the European Union and the efficient application of the principle of mutual recognition - requires national judges to be internally independent to apply the EU law; to judge in accordance with their own beliefs and within the limits of the law, even when the structure of the judiciary and the system of disciplinary responsibility violates the EU standard of independence. Domestic courts are obliged to apply the provisions of the EU law and to ensure their full effectiveness, with the consequence that they may have to disapply provisions of national law that are contrary to them. Any practice or provision limiting the effectiveness of the EU law is incompatible with the longstanding case-law of the CJEU, and the same applies to constitutional norms and decisions³⁹. In *Criminal Proceedings against PM and Others*, the CJEU stated that “the principle of the primacy of European Union law must be interpreted as preventing

³⁹ COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 27 June 2019, C-585/18, C-624/18 and C-625/18, A.K. and others*, § 155.

national legislation or practice which provides that courts and tribunals are bound by the decisions of a national constitutional court and cannot therefore, under the risk of a disciplinary offence, derogate from the case-law of those courts and tribunals where they consider that that case-law is incompatible with Article 19(1) TEU”⁴⁰. This has the effect of transferring the burden of being considered a “court” within the meaning of the EU law⁴¹ to the judge in the specific case. If there are structural doubts about the independence of the judiciary, but in a particular case a judge demonstrates internal independence by his or her behaviour, then he or she meets the standard arising from Article 19(1) TEU and Article 47 CFR. In providing such a solution, the EU institutions will not help to resolve the structural problem of judicial independence. By focusing on the individual case, the more general problem of the EU Member State creating the proper conditions for a judge, without fear of disciplinary consequences, to be genuinely independent is evaded.

3. REFUSAL TO EXECUTE THE EAW BECAUSE OF REAL RISK OF VIOLATION OF RIGHT TO AN INDEPENDENT COURT

3.1 THE LM TEST

The lack of judicial independence as a ground for refusal to execute the EAW was first considered in the *LM* case (*Artur Celmer*)⁴². The Irish

⁴⁰ COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 21 December 2021; Criminal proceedings against PM and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, § 262.

⁴¹ The definition of the term “judicial authority” see: COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 27 May 2019, C-508/18 and C-82/19 PPU, OG and PI*, § 65-74. See also: Marcin MROWICKI, *Independence from the executive as a condition for recognition as a ‘judicial authority’ - gloss to the judgment of the Court of Justice of 24.11.2020, C-510/19, Openbaar Ministerie, YU, ZV v. AZ*, European Judicial Review 2021, no. 6, p. 19-28; Tomasz OSTROPOLSKI, *The concept of a judicial authority in the framework of judicial cooperation in criminal matters*, European Judicial Review 2019, no. 9, p. 21-30.

⁴² COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 25 July 2018, C-216/18 PPU, LM*.

court in its preliminary question had doubts as to whether the judicial system in Poland, following the changes introduced between 2015 and 2018⁴³, met the EU standard of independence. The CJEU introduced a three-stage test⁴⁴ to assess whether concerns about judicial independence are genuine in a specific case:

1. the court of the executing state has verifiable information in its possession about systemic, general malfunctions in the judicial system of the other EU Member State, e.g. on the basis of opinions of independent bodies (the Venice Commission), information from studies by non-governmental organisations, or the initiation of a procedure under Article 7 TEU⁴⁵, and there is a real risk of a breach of the right to a fair trial
2. it is the obligation of the court executing the EAW to determine whether a systemic threat to the independence of the judiciary and the independence of the judiciary applies to the court that requested the EAW, e.g. by addressing appropriate questions to the court requesting the EAW
3. the final stage is to apply an individualised assessment, i.e. whether in the specific case the person transferred under the EAW will have the right to an independent and impartial tribunal; in making that assessment, it should be considered, inter alia, the personal situation of the person, the nature of the offence, the circumstances in which the offence was committed, the context in which the EAW was issued⁴⁶.

⁴³ See timeline of crisis in: Devvrat Singh SHEKHAWAT, *Rule of law crisis deepens in Poland: Fresh Attack on the EU*, <https://pathforeurope.eu/rule-of-law-crisis-deepens-in-poland-fresh-attack-on-the-eu/> (accessed: 6.02.2022). Current information are available at the website: <https://ruleoflaw.pl/>.

⁴⁴ The test based on the Caldaru and Aranyosi test. See COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 5 April 2016, C-404/15 and C-659/15 PPU, Aranyosi and Căldăraru*.

⁴⁵ OPINION OF ADVOCATE GENERAL EVGENI TANCHEV *delivered on 28 June 2018, C-216/18 PPU, LM, § 128-130*.

⁴⁶ COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 25 July 2018, C-216/18 PPU, LM, § 75*. See also: Stanisław BIERNAT, Paweł FILIPEK, *The Assessment of Judicial Independence Following the CJEU Ruling in C-216/18 LM*, [in:] Armin von BOGDANDY, Piotr BOGDANOWICZ, Iris CANOR, Christoph GRABENWARTER, Maciej TABOROWSKI,

The *LM judgment test* forces the EU courts to start a horizontal dialogue⁴⁷. If there are structural doubts about the independence of the judiciary in a certain state, it is the duty of the EAW requesting court to clarify whether there is a real risk of a violation of fundamental rights (deprivation of the right to a fair trial) in a specific case. However, it may be doubted whether the responses of the EAW requesting court will allow for a correct assessment of the independence of this body. It should not be forgotten that the court is the “judge in its own case” and in its response it will explain whether it is independent/impartial. S. Biernat and P. Filipek point out that asking a judge to assess his or her own independence is not an optimal solution, and the credibility of the answer may be questioned⁴⁸. It is doubtful whether a judge in response to questions from a foreign court will indicate that he or she is not independent. It seems that in their answers judges tend to demonstrate that, despite systemic deficiencies in the independence of the judiciary, their attitude, the nature of the case, and the circumstances of the act do not give grounds for the assumption that the right to a fair trial is at risk⁴⁹.

3.2. IS THE LM TEST APPROPRIATE FOR ASSESSING JUDICIAL INDEPENDENCE?

The question arises, whether an individualised assessment in the LM judgment is an appropriate method of evaluating the independence of the judiciary and independence (impartiality) of specific judge. Especially when there is increasing crisis of the rule of law in several countries EU Member States, including Poland⁵⁰. Whether the problem of independence

Matthias SCHMIDT (eds.), *Defending Checks and Balances in EU Member States. Taking Stock of Europe's Actions*, Springer 2021, p. 415-420

⁴⁷ See Koen LENAERTS, *The Court of Justice and national courts: a dialogue based on mutual trust and judicial independence*. <http://www.nsa.gov.pl/download.php?id=753> (accessed: 6.02.2022).

⁴⁸ See: Regional Court in Warsaw (Letter of 26 September 2018). <http://bip.warszawa.so.gov.pl/attachments/download/7511> (accessed: 6.02.2022).

⁴⁹ Stanisław BIERNAT, Paweł FILIPEK, *The Assessment of Judicial Independence*, p. 426-427.

⁵⁰ Barbara GRABOWSKA-MOROZ, Olga ŚNIADACH, *The Role of Civil Society in Protecting Judicial Independence in Times of Rule of Law Backsliding in Poland*,

of the judiciary is a matter of human rights protection (Article 6(1) of the ECHR, Article 47 of the CFR) or it is a matter of respect for fundamental values, the very foundations of the European Union (Article 2 TEU, Article 19(1) TEU)? The case law of the CJEU does not provide an appropriate answer to the abovementioned problem. A. Frąckowiak-Adamska notes that the Luxembourg Court is not consistent in explaining the legal basis for the obligation of Member States to provide effective legal protection before an independent court (Article 19 TEU). In the *LM* judgment, the Court held that the right to an independent court/tribunal is one of the fundamental rights, which is primarily derived from Article 2 TEU⁵¹, with a subsidiary reference to Article 47 CFR and the right to a fair trial⁵². However, the issue of the Article 19(1) TEU was omitted. In the *Portuguese judges judgment* a broader view of judicial independence was taken by the CJEU. The Luxembourg court referred mainly to Articles 2, 4(3) and 19 TEU. Similarly, as in Case C-487/19 concerning the possibility of judges who were appointed in a flawed procedure being considered as a “court”, where the basis of the Court’s analysis was precisely Article 19(1) TEU⁵³.

The individual assessment based on the test in the *Aranyoisi and Caldararu* or the *LM* judgments may strengthen respect for fundamental rights when there are significant differences in respecting them e.g. with regard to the conditions of imprisonment, the in absentia proceedings, the response of the EU institutions and Member States courts to incorrect

Utrecht Law Review, 2021, v. 17, No. 2, p. 56-69; Laurent PECH, Patryk WACHOWIEC, Dariusz MAZUR, *Poland’s Rule of Law Breakdown: A Five-Year Assessment of EU’s (In)Action*, Hague Journal on the Rule of Law, 2021, v. 13, p. 1-43.

⁵¹ Agnieszka FRĄCKOWIAK-ADAMSKA, *Drawing Red Lines with No (Significant) Bites: Why an Individual Test Is Not Appropriate in the LM Case*, [in:] Armin von BOGDANDY, Piotr BOGDANOWICZ, Iris CANOR, Christoph GRABENWARTER, Maciej TABOROWSKI, Matthias SCHMIDT (eds.), *Defending Checks and Balances in EU Member States. Taking Stock of Europe’s Actions*, Springer 2021, p. 448-449.

⁵² COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 25 July 2018, C-216/18 PPU, LM*, § 70-72. COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 17 December 2020, C-354/20 PPU and C-412/20 PPU, L and P*, §39 .

⁵³ COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 6 October 2021, C-487/19, WŻ*, § 159-160.

implementation of EU directives. However, it is not an adequate measure to ensure respect for the rule of law and the independence of the judiciary. The independence of the judiciary is a precondition for ensuring effective judicial protection in democratic states governed by the rule of law. The issue is whether the courts of a given EU country can be regarded as a ‘judicial authority’ within the meaning of the CJEU case law. If systemic deficiencies regarding the system of appointment of judges, the disciplinary responsibility regime, the possibility of political influence on the judiciary, the image of the judiciary in a particular EU country indicate a general, overall threat to the independence of the courts, it cannot be claimed that the problem of the independence or lack of independence of a specific court is only of an individual, incidental nature. The aforementioned issues have been highlighted by the Court of Amsterdam⁵⁴. In its question for a preliminary ruling, the Amsterdam Court emphasised that the existence of systemic and general flaws in the independence of the Polish judicial authorities meant that no person obliged to appear before a Polish court had a guaranteed right to an independent court⁵⁵. Furthermore, an individual assessment based on the LM test may not be appropriate and sufficient to protect the right to a fair trial if “Polish judges are at risk of being prosecuted before a disciplinary body [the Disciplinary Chamber of the Supreme Court⁵⁶] which does not provide guarantees of independence, in particular in cases in which Polish judges examine whether the judge

⁵⁴ See: Case C-354/20 PPU. Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice; <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=230982&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=2211314> (accessed: 6.02.2022).

⁵⁵ COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 17 December 2020, C-354/20 PPU and C-412/20 PPU, L and P*, § 13.

⁵⁶ COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 15 July 2021, C-791/19*, § 235. In this judgment, the CJEU held that the Disciplinary Chamber did not comply with the conditions of Article 19(1), and that the persons ruling in the chamber did not meet the condition of “independence”. The Polish government agreed to implement the CJEU judgment and to change the system of disciplinary liability of judges. However, it has not fulfilled this commitment. Poland was fined €1,000,000 per day as a result of its failure to comply with the CJEU’s rulings. ORDER OF THE VICE-PRESIDENT OF THE COURT 27 October 2021, C-204/21 R.

or the court in question meets the guarantees of independence required by the Union law”⁵⁷.

Regarding concerns about the independence of the judiciary in Poland, there is a difference between the CJEU judgments concerning the Article 19(1) TEU and those issued in connection with the EAW procedure. In cases of a general nature, the Court takes a strict approach, highlighting systemic deficiencies, and examines the issue of the independence of the judiciary and the independence of judges from the broader perspective of respect for the rule of law (Article 2 TEU, Article 4(3) TEU, Article 19(1) TEU). In its rulings on the EAW and the principle of mutual recognition, the CJEU leaves considerable margin of discretion for case-by-case assessment, somehow reversing the burden of proving “independence” by the court that issued the EAW. In opinion on the Case C-562/21⁵⁸ the Advocate General indicated that, even where there may be evidence of systemic or general deficiencies in judicial authority which existed at the date the EAW was issued, the executing authority cannot refuse the status of “judicial authority” under Article 6(1) of the Framework Decision⁵⁹. He also noted the deepening crisis of the rule of law in Poland and the disregard for both the EU law and the CJEU rulings. Referring to the judgements of the Polish Constitutional Tribunal⁶⁰, the Advocate General observed that the Constitutional Tribunal aims to challenge the fundamental principles and values of the EU, without questioning Poland’s membership in the EU⁶¹. Regardless of these doubts, the Advocate General highlighted the crucial importance of the second stage of the *LM* test, i.e. checking whether the executive interference may affect a specific case,

⁵⁷ COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 17 December 2020, C-354/20 PPU and C-412/20 PPU, L and P*, § 15.

⁵⁸ OPINION OF ADVOCATE GENERAL ATHANASIOS RANTOS *delivered of 16 December 2021, C-562/21 PPU and C-563/21, X and Y*, § 52-57

⁵⁹ *Ibidem*, § 40 and other judgments mentioned in this paragraph.

⁶⁰ *Ibidem*, § 67-71

⁶¹ The Constitutional Tribunal, in its rulings of 14 July 2021 (P 7/20) and 7 October 2021 (K 3/21), considered the provisions of the EU Treaties incompatible with the Polish Constitution, expressly challenging the primacy of EU law. See: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_7070 (accessed: 6.02.2022).

due to its the individual circumstances⁶². It is indicated that absolutisation and generalisation of grounds for refusal to execute the EAW would lead to a number of offences being unpunished, would discredit the work of Polish judges and would jeopardise the rights of victims⁶³.

In the recent judgment in the case C-562/21 the Court decided not to withdraw from the test of the LM judgment⁶⁴. The CJEU stated that: “where the executing judicial authority called upon to decide on the surrender of a person in respect of whom a European arrest warrant has been issued has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State, in particular as regards the procedure for the appointment of the members of the judiciary, that authority may refuse to surrender that person:

– in the context of a European arrest warrant issued for the purposes of executing a custodial sentence or detention order, only if that authority finds that, in the particular circumstances of the case, there are substantial grounds for believing that, having regard inter alia to the information provided by that person relating to the composition of the panel of judges who heard his or her criminal case or to any other circumstance relevant to the assessment of the independence and impartiality of that panel, there has been a breach of that person’s fundamental right to a fair trial before an independent and impartial tribunal previously established

⁶² OPINION OF ADVOCATE GENERAL ATHANASIOS RANTOS *delivered of 16 December 2021, C-562/21 PPU and C-563/21, X and Y*, § 60. In § 47 the advocate general pointed out: “In essence, this case law teaches us that irregularities in the appointment of certain judges may have an impact on the specific situation of individuals, when they pose a risk of interference by the executive in the administration of justice and thus raise, in the opinion of individuals, reasonable doubts as to the independence and impartiality of the judges and courts concerned, whom they were assigned. These indications lead me to the conclusion that, in the second stage of the examination in the main proceedings, it should be verified whether the situation of the persons concerned, taking into account the relevant criteria, is of interest to the executive, which goes beyond the specific elements of the offenses alleged against them and puts them at risk that their cases will not be dealt with impartially, as I will explain below”.

⁶³ OPINION OF ADVOCATE GENERAL ATHANASIOS RANTOS *delivered of 16 December 2021, C-562/21 PPU and C-563/21, X and Y*, § 69.

⁶⁴ COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 22 February 2022, C-562/21 PPU i C-563/21 PPU, X and Y*.

by law, enshrined in the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, and

– in the context of a European arrest warrant issued for the purposes of conducting a criminal prosecution, only if that authority finds that, in the particular circumstances of the case, there are substantial grounds for believing that, having regard inter alia to the information provided by the person concerned relating to his or her personal situation, the nature of the offence for which that person is prosecuted, the factual context surrounding that European arrest warrant or any other circumstance relevant to the assessment of the independence and impartiality of the panel of judges likely to be called upon to hear the proceedings in respect of that person, the latter, if surrendered, runs a real risk of breach of that fundamental right”.

3.3. THE NEED TO MODIFY THE LM TEST

However, the LM test should be modified and adapted to the current situation of the EU in terms of Member States’ respect for the rule of law. In the period when the LM judgment was delivered, the CJEU’s attempt to ensure an appropriate balance between judicial independence as an individual right and the functioning of the principle of mutual recognition, was understandable. Currently, however, the limits of the disregard or even hostility to the EU law presented by the Polish government should have not only political consequences (e.g. financial penalties), but also implications in the sphere of cooperation in criminal matters. A. Frąckowiak-Adamska suggests that violation of judicial independence - as one of the values on which the EU is based - should result in suspension of the cooperation based on the principle of mutual recognition⁶⁵. Otherwise, the limits of tolerance for non-compliance with the principles of the rule of law and independence of the judiciary will continue to be “tested”, to the detriment of the principle of mutual recognition. The very need for an individual assessment of whether a Polish court - despite systemic doubts - is a judicial authority within the

⁶⁵ Agnieszka FRĄCKOWIAK-ADAMSKA, *Drawing Red Lines*, p. 451. Currently, in the EU there are 20 instruments based on the mutual recognition principle.

meaning of EU law and meets the standard of independence does not correspond to the concept of mutual recognition of judgments and mutual trust of states in their compliance with fundamental principles of the EU.

4 CONCLUSIONS

The thesis of V. Mitsilegas about “sacrificing” the protection of fundamental rights for the efficient implementation of the principle of mutual recognition has not lost its relevance. Moreover, it seems that nowadays the EU institutions agree to limit not only human rights, but also to extend the limits of tolerance for violation of the rule of law and effective protection of rights in the EU (Article 19(1) TEU). There is an inseparable link between the rule of law, independence of the judiciary and respect for human rights (effective protection of rights). One value follows from the other and they cannot be separated. It is impossible to claim independence of the judiciary if the state does not respect the rule of law. It is also difficult to assume that effective judicial protection is possible if there are systemic doubts about the independence of the judiciary.

The CJEU tries to “rescue” the principle of mutual recognition in the crisis of the rule of law principle by introducing a case-by-case assessment of whether, in a particular case, the right to trial by an independent court (Article 47 of the CFR) is at risk. It requires (e.g. Polish) judges to declare that they will be independent within the meaning of the EU law, even if the judicial system as a whole raises doubts about independence. However, it is difficult for a judge to be independent internally if he or she does not have “institutional safety”, i.e. without fear of possible consequences, whether career-related (transfer to another division of the court, delegation to another court) or disciplinary, he or she will be able to decide on the basis and within the limits of the law, in accordance with his or her own beliefs, without being exposed to any pressure. Especially when the disciplinary bodies related to the executive authority initiate proceedings against judges who, for example, have directly applied EU law or submitted a question for a preliminary ruling. Such activities can have a chilling effect on other judges, potentially restricting the right to a fair trial of participants in criminal proceedings.

It is also worth mentioning another weakness of the LM judgment test (individual assessment). A court requesting an EAW and answering questions from another EU court assesses for itself whether it will be independent in the case.

At the moment, there are basically no real consequences in the area of judicial cooperation in criminal matters for violations of judicial independence. While protecting the principle of mutual recognition, the EU institutions are constantly moving the tolerance limits for breaches of obligations resulting from membership of the EU. The example of Poland shows that the lack of decisive measures by the CJEU only increases the problem of respect for the rule of law and the independence of the courts. However, it is rather difficult to assess whether in the future the EU will decide, for example, to suspend cooperation on the basis of the principle of mutual recognition, if a member state questions the fundamental values on which the EU is based.

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