

# Drawing Red Lines With No (Significant) Bite – Why an Individual Test Is Not Appropriate in the LM Case

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The judgment in the LM case was expected as the first (and so far the only) opportunity for the CJEU to assess the consequences of the systemic changes restricting judicial independence in Poland. It hinges on the horizontal aspect of the changes – verifying the state of the rule of law by courts of the other Member States. In the case, in which the European Arrest Warrant (EAW) was issued by a Polish judicial authority against a person prosecuted for a drug related crime, the defendant argued before an Irish court that due to the reforms of the Polish judiciary there is a risk of denial of justice if he is transferred to Poland. By deciding it the CJEU drew red lines but arguably established no adequate consequences of crossing them. The Luxemburg court focused on the protection of individuals, leaving the issue of systemic consequences to the Council acting on the basis of Article 7 TEU.

The Irish question was based on the CJEU's case law related to the protection of fundamental rights in the context of mutual recognition of judgments in criminal matters (Aranyosi). According to this case, if the court taking the decision on extradition on the

basis of an EAW possesses evidence of systemic or generalised deficiencies in the protection of fundamental right in the issuing Member State, it should postpone the execution and assess whether the individual concerned will be exposed to a real risk of an inhuman or degrading treatment because of the conditions during detention. The LM judgment followed this path and based its answer on a similar pattern: if the court executing a EAW from another Member State possesses the information that there is a real risk of a breach of the fundamental right to fair trial due to systemic or generalised deficiencies concerning the independence of the issuing Member State's judiciary, it shall assess whether the person incurs such a risk if he is surrendered to that State (individual assessment) (para 79).

It can be argued that the individual assessment required by the Aranyosi judgment is not the proper test in the LM case due to three reasons. Firstly, regular control reverses the logic of the mutual trust developed by the CJEU. Secondly, there is a substantial difference between fundamental rights and the independence of judiciary. Infringements of the latter require other legal mechanisms of protection. Thirdly, the Polish institutional changes affecting judicial independence may influence all 26 EU acts providing for mutual recognition of judgments. A broader perspective should be taken.

## **Regular mutual control contrary to the spirit of mutual trust**

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According to the CJEU the principle of mutual trust has a fundamental importance and “requires (...) each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law” (opinion 2/13, para 191). But in para 69 of the LM judgment the Court seems to introduce an obligation of a regular control to be pursued by the executing court when the issuing member state has been subject of a (well) reasoned proposal adopted by the Commission pursuant to Article 7(1) TEU based on actions impairing the independence of national courts. Maybe the CJEU treated this obligation as a tool of pressure on the member state restricting the independence of judiciary contrary to the recommendations of the Commission – applied until the decision on the basis of Article 7 TEU is taken. But a regular control of judicial decisions from other member state reverses the logic of mutual trust and can impair it in the long term. It would be better from the perspective of mutual trust if a decision of a member state to restrict the independence of the courts (assessed as systemic deficiencies) implies a suspension of participation in all legal acts based on mutual trust in the administration of justice.

## **Substantial differences between fundamental rights and the independence of judiciary**

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There is a substantial difference between fundamental rights and the independence of judiciary. Both values are certainly interconnected: the independence of judiciary is in particular a part of the right to fair trial. But it is not limited to this aspect. Fundamental rights are entitlements of individuals and it is therefore possible to verify whether they are ensured in individual situations. The independence of judiciary is important in an individual

case, but it also remains a key element of the state's system, indispensable to ensure the right balance between public and private interests. In the EU, it also guarantees securing the effective legal protection in the fields covered by Union law. It is important especially if the executive power in a member state openly declares the protection of its own nationals and ignores the European citizenship context. For example, in the case of a child abduction to another state the principle established in the Hague convention and regulation Brussels II bis is that the authority shall order the return of the child forthwith except in exceptional cases. But Polish government treats children which have a Polish parent as Polish children (ignoring the parent of other nationality) and does not hide the wish that they stay in Poland. A law on the central authority in family matters was recently adopted to enable the Ministry of Justice to supervise judicial proceedings in child abduction cases. It provides i.a. for the right of the Ministry to inquire courts about pending cases and for the obligation of the courts to answer them immediately. The purpose of such a supervision is clear from the title of a Ministry's leaflet – "Stop to transferring Polish children abroad" and from the information on the Ministry of Justice website: "Under current law Ministry of Justice has not had possibilities of efficient supervision on such cases. (...) It is time to finish with it. State must protect Polish children".

## Individual assessment often not feasible in European judicial area

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The Irish question relates only to the EAW, but a broader perspective shall be taken as the restriction of independence of judiciary has a potential impact on all the acts providing for mutual recognition of judgments – in criminal (10 framework decisions and 2 directives) and civil matters (14 regulations). The level of integration in the field of judicial cooperation is so high that the judgments of one country are treated as judicial decisions of another member state. For example, in civil cases the majority of judgments is automatically recognised and enforceable in the other member states. In all the EU acts on mutual recognition the review of jurisdiction of another MS or of the content of the judgment to be recognized is prohibited. In some legal instruments, there are even no legal mechanisms allowing to refuse recognition/execution (for example in case of maintenance or Article 42 of 2201/2003 regulation related to child return decisions).

## Conclusions

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In the LM case the CJEU could have stated that the European area of justice is based on a high level of mutual trust in the administration of justice, but at the same time on the responsibility of MSs to ensure independence of the courts. Such an obligation was recently confirmed by the CJEU in the case Associação Sindical dos Juizes Portugueses, para 37. In this case the judicial independence was derived mainly from Articles 2, 4 (3) and 19 TEU, while Article 47 of the Charter was treated only as a subsidiary source. The LM judgment takes Article 2 TEU as a starting point (para 35), repeating the statements of the Associação judgment (paras 51-54) and confirming the importance of judicial independence in the context of the EAW (paras 55-58). But these general statements do not influence the result of the LM case. In the answer given to the Irish court judicial

independence is reduced to the right of an individual to an independent court as a part of a right to a fair trial (paras 59-60 and subs.). It is a step back in comparison to the *Associação* judgment.

A breach of the obligation to ensure independence of the courts should logically result in suspending the participation of a given MS in this EU policy not (only) because the individual right can be impaired but because of the protection of other member states and the EU. It is probable that in the majority of cases Polish judges will resist the political influence. But the courts in other member states will never know whether it actually is the case. They would have to make embarrassing investigations about the substantial issues of the cases and of the division of powers in Poland. It can contravene the spirit of mutual trust between the courts and often will be impossible in practice.

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