A Clever Compromise or a Tectonic Shift? The LM Jugment of the CJEU

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It would have been difficult to overstate the stakes of the LM case. Faced with the question whether ultimately a polish citizen charged with drug trafficking can be surrendered from Ireland to Poland on the basis of a European arrest warrant, the CJEU seemed to be confronted with a nearly impossible choice. Deciding that the Irish executing judicial authority must disregard the ongoing crisis surrounding the independence of the judiciary in Poland and surrender the person for the purposes of criminal prosecution would have ridiculed the fundamental values enshrined in Art. 2 TEU, or, even worse – as von Bogdandy and his co-authors rightly point out – it would have contributed to transforming the understanding of these values within the EU to include illiberal tendencies and solutions (see the contribution of von Bodgandy et al in this debate).

In contrast, allowing the Irish High Court to refuse to surrender the person concerned because of the systemic concerns relating to the independence of the Polish judiciary could have effectively questioned the participation of Poland in the European Union. If for systemic reasons Polish courts are not independent enough to guarantee a fair trial in a criminal case, are they better suited to handle any case based on EU law? And if not, how could the effective enforcement of EU law and the effective protection of the rights of EU citizens be provided for? These are questions the answer to which would probably forego the conclusions of an eventual Article 7 procedure against Poland.

The CJEU was thus navigating highly dangerous waters. How difficult the dilemma was is aptly demonstrated by the opinion of AG Tanchev in the case (or an analyses of the opinion see Petra Bárd, Wouter van Ballegooij). Lead by the obvious desire to do as little harm to the business as usual operation of EU law as possible while maintaining respect for the values in Art. 2 TEU, the opinion sought to utilise the case law of the European Court of Human Rights on the extraterritorial effect of Art. 6 (1) ECHR in extradition cases. The applicable standard as suggested by AG Tanchev was accordingly high: only the possibility of a flagrant denial of justice in the individual case should have been sufficient to refuse the execution of the EAW. Not only would have this solution ignored the fundamental difference between a solely intra EU situation and an extradition to a non-ECHR member state. It would also have eliminated the underlying idea of mutual recognition and mutual trust, namely a sufficiently coherent level of respect for the rule of law and human rights in all EU member states.

Against this background one has to commend the CJEU for its wisdom in finding a far more elegant compromise between the interests of the everyday operation of the EU and respect for its basic values. This wisdom is demonstrated by insisting on judicial

independence as the essence of the right to a fair trial and linking it to the values in Art. 2 TEU, while, at the same time, requiring a specific assessment of the individual risks the person concerned would be exposed to in case of his surrender to Poland.

The repeated references to the requirement that courts be independent which forms part of the essence of the right to a fair trial (see paragraphs 63, 68, 73 of the judgment) suggest that the CJEU is not ready to compromise on the independence of the judiciary and regards it essential for the rule of law and the operation of EU law as such. This may have consequences for the infringement procedure pending against Poland before the CJEU in relation to the retirement scheme in the Law on Ordinary Courts, as well as the infringement procedure launched by a letter of formal notice by the Commission on 2 July to protect the independence of the Polish Supreme Court.

The judgment also provides specific aspects which need be considered while assessing the independence of the judiciary: Paragraphs 66-67 of the Judgment list the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, the requirement that dismissals of its members should be determined by express legislative provisions as well as the requirement that disciplinary regime governing those who have the task of adjudicating in a dispute must display the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions. This is to be welcomed even if the Court does dot get very specific and invites the Irish High Court to consider essentially non-judicial documents like the European Commission's Reasoned Proposal for a Council Decision under Art. 7 TEU.

In spite of this clear stance on judicial independence, the judgment effectively ensures that systemic deficiencies in the judiciary of a member state do not question the participation of this very member state in the EU. This magic is performed by sticking with both parts of the Aranyosi et al test (see the contribution of Wendel in this debate) and requiring an individual assessment of the risks the person concerned would face in case of his surrender.

First, the list of circumstances to be considered in this individual assessment – the personal situation of the person concerned, the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant – is unduly limited. Is it possible to argue that absent specific circumstances of the individual suggesting a certain bias by the court a fair trial is guaranteed even if there are legislative measures in place which challenge the independence of the judiciary as a whole? To take an extreme example, imagine military commissions comparable to the US were to decide on criminal charges. This would clearly be an institutional deficiency and not an individual risk. Would this fit the test suggested by the CJEU?

Second, the circumstances to be considered by the executing judicial authority are extremely difficult to prove in practice. What would be the evidence the person concerned needs to submit in order to convince the Irish judge in our case that he faces an individual risk on account of the specific circumstances of his case? Is it enough for a suspected drug dealer to argue that the Polish government is determined to fight drug trafficking? If so,

would political statements of Government officials suffice to support this allegation? These evidentiary difficulties raise the probability of the actual surrender of the person concerned. The difficulties will not be alleviated by the procedure suggested by the judgment whereby the executing judicial authority shall seek further information from the issuing authority. Not only would this procedure put the issuing authority in a subordinated position in relation to the executing authority. If the courts in the country issuing the EAW are not independent, how would they confirm this information which is so uncomfortable for their government?

Third, most importantly, by requiring an individual assessment of the case the CJEU implies that a fair trial is possible even if the independence of the judiciary is systemically flawed, or, at least, the systemic flaws of the Polish judicial system are not so serious that they would automatically exclude the possibility of a fair trial. This assumption clearly applies also outside of the context of EAW. Even if this assumption is reasonable, it raises the question of why we have to insist on systemic institutional guarantees of judicial independence. Nevertheless, this underlying assumption is indispensable for keeping a member state with a flawed judiciary within the EU. Without this assumption, the only possible conclusion could be that the respective member state can no longer ensure respect for EU law domestically.

That being said, the LM judgment is certainly not the end, rather the beginning of a development. The Court is ready to take seriously judicial independence as an essential part of the rule of law. What is more, the CJEU is ready to offer its contribution to maintaining the values of Art. 2 TEU and does not regard this as the sole domain of political processes. In the coming infringement procedures, the CJEU will be forced to pronounce on the concerns relating to the independence of the judiciary in Poland and will certainly follow up on the standards outlined in this present case. The teaching of LM is not that systemic deficiencies of the judiciary do not matter. Rather, such deficiencies shall be addressed systemically, either in infringement procedures or within the framework of an Article 7 TEU procedure. Such systemic solutions may force the respective member state to adjust without making its participation in the EU abruptly impossible. Viewed from this angle, the LM judgment certainly does not constitute a tectonic shift, but it carries the possibility of changes of that magnitude.

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