Two-Step Test Master of None

Limits and Inconsistencies in the Application of the Two-step Test in Tagu Case

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Within the recurring use of the two-step test in EU criminal judicial cooperation (and possibly soon in its civil counterpart), Advocate General ("AG") Richard de la Tour's Opinion, delivered on 22 January 2026, suggests a new role for the test: ensuring that the execution of a European Arrest Warrant ("EAW") safeguards the proportionality principle under Article 49(3) of the EU Charter of Fundamental Rights ("CFR"). While this development strengthens exceptions to mutual trust, it also exposes the test's limits in addressing proportionality breaches, revealing an uneven protection of fundamental rights.

Facts of the case and Opinion of the Advocate General

In 2024, a Romanian court ("issuing court") issued an EAW against the defendant convicted of importing small quantities of cannabis and MDMA. For this offence, Romanian law prescribes a minimum sentence of seven years' imprisonment, which the EAW sought to enforce. Although the drugs were for personal use and no trafficking intent was found, the sentence was not reduced since it already corresponded to the statutory minimum. The defendant opposed his surrender, arguing that the sentence was disproportionate under Article 49(3) CFR. The Dutch court ("executing court") receiving the EAW stayed the proceedings and asked the European Court of Justice ("ECJ" or "Court") whether Article 1(3) of the Framework Decision on the EAW ("FDEAW") required it to assess if surrender would expose the defendant to a disproportionate sentence under Article 49(3) CFR, what test applies, and whether mandatory minimums or assurances from Romania could remove the risk.

The AG analysed these questions together. He held that an EAW cannot be refused solely because of sentence disproportionality, since the FDEAW provides no such refusal ground (para. 33), and ECJ case law places primary responsibility for proportionality on the issuing court (paras. 34-37). Allowing executing courts to review proportionality would risk turning them into appellate bodies or paralysing the EAW system (paras. 42-47). However, surrender may be exceptionally refused where there is a serious risk of a manifestly disproportionate sentence (para. 48). To determine this, the AG proposed resorting to the two-step test (para. 56), a judicially administered framework developed by the Court in 2016 to protect individuals against inhuman and degrading treatment under Article 4 CFR, and which has since been applied to other fundamental rights.

In the case of proportionality under Article 49(3) CFR, the executing court must first assess whether the issuing Member State's legal system systematically prevents courts from individualising sentences based on the offence and personal circumstances – a concern largely excluded where judicial individualisation rules and appeal mechanisms exist (paras. 71-73). Second, if deficiencies are found, the executing court must assess whether they create a real risk of a fundamental rights breach (para. 59). A breach arises only where the sentence clearly exceeds what is necessary to punish the offence (para. 75). Disproportionality cannot be inferred from differences between national sentencing levels alone, as Article 49(3) CFR establishes an autonomous EU law standard (para. 76), nor does it require conditions severe enough to breach Article 4 CFR (para. 78).

Applying the test, the AG found no systemic deficiency, as the issuing court could individualise sentences (paras. 79-83). Since the court was legally able (but chose not) to reduce the sentence below its statutory minimum imposed by Romanian law, any

alleged disproportionality concerned the court's discretionary judgment and could be challenged by domestic appeal (para. 84).

An eternal struggle

This Opinion showcases the enduring tension between the goal of swift judicial cooperation, and the requirement to comply with fundamental rights. The two-step test has now become the standard mechanism for assessing whether execution of an EAW (but also other instruments, see here and here) should be refused due to a serious risk of a fundamental rights' breach. Its origins relate to the limited refusal grounds listed in the FDEAW which, in turn, reflect the instrument's core purpose: ensuring fast extradition procedures based on mutual trust between Member States' legal systems (recital 5). However, mutual trust cannot override fundamental rights obligations – an issue the EAW is silent on when it comes to non-execution.

To address this gap, with its landmark *Aranyosi e Căldăraru* judgment, the ECJ interpreted the obligation to respect fundamental rights under Article 1(3) FDEAW as a refusal ground. This obligation has been enforced through a two-step test where the executing court must identify systemic or generalised deficiencies in the issuing Member State's protection of a particular right and, if found, assess whether they expose the individual to a real risk of a breach. Initially applied to detention conditions under Article 4 CFR, the test has since encompassed other rights, including the right to a fair trial under Article 47 CFR (see here), and the right to private and family life and the rights of the child under Articles 7 and 24 CFR (see here). According to the AG, the same reasoning applies to proportionality under Article 49(3) CFR.

The test's angles morts

Despite the benefit of extending the test's application to another fundamental right, its current formulation may still fail to capture evident violations of proportionality. The AG held that, for the first step to be satisfied, the issuing court must not retain the possibility to individualise the sentence. Otherwise, that discretion alone, even if limited, excludes finding systemic deficiencies (para. 74). It does not matter that, in practice, this individualisation cannot take place because the sentence was already reduced to its minimum (*just* seven years of detention: the defendant should consider himself lucky, because the minimum penalty has now been increased to ten years). Of course, the AG notes that the FDEAW cannot harmonise national criminal laws (para. 47), therefore proportionality and mutual trust must be balanced cautiously. Nonetheless, as currently defined, the first step fails to address evident breaches of Article 49(3) CFR. For instance, if the minimum sentence for a minor offence were increased to twenty, thirty or forty years, the inability to depart below that would still not appear as systemic deficiency under this approach. The AG acknowledges that executing courts may consider whether a foreign sentence "clearly exceeds what is necessary to punish an offence" (para. 75). However, this only forms part of the second step, which cannot be reached unless the first is satisfied.

Two safeguards emerge from the Opinion against disproportionate sentencing: EU-level harmonisation of substantive criminal law, and the availability of appellate review in the issuing Member State. Yet, neither convincingly remedies the problem. Minimal harmonisation typically allows Member States to adopt stricter national standards, and anyway EU law does not harmonise penalties for personal drug use. Similarly, while the AG treats the existence of an appellate mechanism as *a fortiori* evidence that sentences can be individualised, this assumption ignores that courts might refuse to deviate from legislative rules, as in this case. In a judicial system where, as the executing court itself observes, questions on the EAW execution could have also been framed from the perspective of the issuing court's independence vis-à-vis the legislature (see the preliminary ruling request itself on point 2.2.7), the mere availability of appeals does not appear as a persuasive guarantee of sentence individualisation.

From a fundamental rights perspective, this outcome raises concerns. Although sentencing certainly remains a national matter in the absence of EU law harmonisation, once it acquires an EU dimen-

sion through judicial cooperation instruments, it should comply with EU law protections. However, the current framework could enable Member States to impose penalties that potentially breach Article 49(3) CFR without activating the protection granted by the two-step test.

One test, many applications

Scholars have long questioned the practicality of the two-step test (see here), warning that it may even encourage Member States to weaken their fundamental rights protections (see here). Although the Court frequently resorts to the test as a safety valve against all fundamental rights breaches, this Opinion highlights a newly emerging symptom affecting its functioning.

The application of the two-step test under Article 4 CFR requires an executing court to determine the existence of (i) systemic or generalised deficiencies in detention conditions in the issuing Member State that could expose detainees to inhuman or degrading treatment and, if so (ii) a real risk of such treatment for the individual. While the issuing court is under an obligation to provide this evidence, and it might even be incentivised to do so to avoid responsibility for additional detainees, it is complex for an executing court to perform this analysis. In the *E.D.L.* judgment, the ECJ dispensed with the first step and moved directly to the individual assessment given the person's particular health needs. For an absolute right such as Article 4 CFR, the Court has thus recognised exceptions to the otherwise mandatory first step, a necessity also acknowledged by the AG (paras. 61-64). Under Article 47 CFR, the two-step test requires the executing court to determine the existence of (i) systemic or generalised deficiencies affecting the independence of the judiciary in the issuing Member State and, if so (ii) a real risk of a fair-trial breach for the individual. While demanding, the test enables executing courts to consider the entirety of the operation of the issuing Member State's justice system. Its rigour perhaps reflects the close link between Article 47 CFR and the value of the rule of law under Article 2 TEU, which is increasingly protected by the ECJ.

For Articles 7 and 24 CFR, the two-step test becomes more restrictive. The executing court must determine the existence of (i) systemic or generalised deficiencies in the issuing Member State affecting *an identifiable group* (such as detained mothers or children with disabilities) that may breach Articles 7 or 24 CFR and, if so (ii) a real risk of such a breach for the individual concerned or their children. This narrows the test's scope and sits uneasily with situations involving highly individualised vulnerabilities, such as specific health conditions or caregiving needs. Therefore, for rights that are neither absolute nor tied to Article 2 TEU values, no relaxation of the test applies – if anything, it suffers from more constraints. Finally, for Article 49(3) CFR the two-step test appears least effective in protecting fundamental rights as, apart from the regular difficulties, its analysis even excludes key factors (such as the sentence's minimum duration). Beyond not qualifying as an absolute right, Article 49(3) CFR touches on criminal policy, a domain in which the EU holds only shared competence and where interference is seen as highly intrusive, likely explaining the caution exercised by the AG.

Altogether, this results in divergent applications of the two-step test depending on the right invoked, increasingly narrowing the executing court's discretion in its assessment. While distinctions between absolute and non-absolute rights may be justified, the more thorough application of the two-step test under Article 47 CFR compared to Articles 7, 24, and 49(3) CFR – all non-absolute rights – suggests the existence of an implicit hierarchy. Moreover, as already pointed out here, the test's application could interfere with the obligations stemming from the European Convention of Human Rights, which do not admit subjecting an individualised assessment to a more generalised one (see here). The narrow application of the two-step test under Article 49(3) CFR is also somewhat paradoxical, given the executing court's doubts on whether to approach fundamental rights protection from the perspective of sentence proportionality or judicial independence. Had the court formulated its referral differently, the Opinion might have provided different

content to the test (perhaps offering a more robust scrutiny of proportionality), despite the same facts.

Conclusion

The AG's Opinion highlights two core issues. First, the current formulation of the two-step test may prove insufficient to capture even clear breaches of proportionality under Article 49(3) CFR. Second, the test's protective strength seems to vary depending on the fundamental right at stake, which might decrease legal certainty and risk arbitrary prioritisations. With the matter now before the ECJ, the Court will have an opportunity to uphold or redefine the balance between national sentencing discretion and the protection of Article 49(3) CFR – ideally reaffirming that the implementation of EU law must adhere to EU-mandated standards of fundamental rights protection.

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