Judicial Independence as a Precondition for Mutual Trust

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As discussed on this blog by Professor Mattias Wendel, in March 2018, in a European Arrest Warrant case concerning a Polish citizen (Celmer) the Irish High Court was confronted with claims that the wanted person's fair trial rights will be undermined due to a lack of judicial independence in Poland following recent 'judicial reforms'. In assessing these claims, the High Court engaged in a meticulous analysis of those reforms, and the Article 7 TEU procedure initiated against Poland by the European Commission. It decided to raise preliminary questions with the CJEU regarding the relationship between judicial independence and intra-EU cooperation in criminal matters based on the principle of mutual recognition. This reference offer the CJEU a chance to answer two of the questions it left open in its jurisprudence thus far (notably in *Aranyosi and Căldăraru,* commented by us in the New Journal of European Criminal Law, 2016, Vol. 7, pp. 439-464):

1. whether rule of law violations trigger suspension of mutual trust; and
2. what pieces of evidence are acceptable.

This case calls for us to reflect on the question what role judicial authorities can and should play in ensuring compliance with democracy, the rule of law and fundamental rights (DRF) in other EU Member States. In our view, judicial authorities ultimately have an independent responsibility to put a halt to surrenders, in case the wanted person's fair trial rights are put in peril due to a general lack of judicial independence in the issuing state. At the same time, the political responsibility for balancing diverse EU constitutional principles needs to be borne by democratically elected institutions. Therefore, the court of the executing state should not only halt or suspend judicial cooperation in the event that persuasive pieces of evidence point to a violation of the values shared by the EU and the Member States in the issuing state, but it should also freeze the case awaiting a resolution of the matter from political actors in accordance with the procedure provided for in Article 7 TEU or the DRF monitoring and enforcement mechanism called for by the European Parliament.

The first issue: the rule of law exception

The Irish case could be construed as a rule of law or as a fundamental rights case. This is due to the nature of judicial independence, which can be understood as a stand-alone subpart of the rule of law, but could also be addressed from a fundamental rights perspective. As to the latter option, *Celmer* could be seen as a direct continuation of *Aranyosi*, with the difference being what is at stake: Article 47, a derogable right of the CFR on the right to an effective remedy and to a fair trial, as opposed to Article 4 CFR, i.e. an absolute right. The infringement case initiated by the Commission on the Act on ordinary courts could underpin this latter argumentation.

Emphasising the human rights element, the High Court of Ireland mentions 'a real risk of a flagrant denial of justice' incorporated into the question that is referred to the CJEU. (*Celmer*, para. 145.) However, the warning of AG Sharpston in *Radu* should be remembered: 'such a test (…) would require that every aspect of the trial process be unfair. But a trial that is only partly fair cannot be guaranteed to ensure that justice is done.'

Alternatively, it may be useful to disentangle the interrelated values of the rule of law and fundamental rights and to construe the case as a pure rule of law violation due to the government's intrusion into judi-

cial independence. Maintaining the distinction is particularly useful at this point, since judicial independence is also crucial for other areas of EU law (for example the fight against fraud).

In Case-C 64/16 *Associação Sindical dos Juízes Portugueses* the CJEU emphasised the importance of the national judiciary for the enforcement of EU law, and entrusted itself with assessing judicial independence of those national courts which apply and interpret EU law. There are several remarkable highlights in this case that are also vital for the Celmer reference. First, since there is no EU law on the salary reductions of national judges – which was at issue in this Portuguese case – the CJEU could not have relied on any specific EU law provision. But that did not prevent the CJEU from going into the merits. Second, the CJEU could have invoked an obvious element of the case at hand to underpin its relevance to EU law. The temporary reduction of salaries in the public sector including the judiciary was a mandatory requirement imposed on Portugal by the EU so as to reduce the former's excessive budget deficit, which was a precondition for receiving financial assistance. But the CJEU took a different path: it held that it is the duty of national courts, 'that in the interpretation and application of the Treaties the law is observed', therefore it is vital for national courts to remain independent. Borrowing the words from Professors Pech and Platon, 'the ECJ has essentially made the EU principle of effective judicial protection (including the principle of judicial independence) a federal standard of review which may be relied upon before national courts in virtually any situation where national measures target national judges who may hear actions based on EU law.' Third, the CJEU refused to construct the case as a judicial independence case as derived from Article 47 CFR, and instead invoked Article 19(1) TEU on the principle of effective judicial protection of individuals in the fields covered by Union law. The judgment can be seen as an invitation to challenge the issue of judicial independence as an essential element of the rule of law in the Member States before the CJEU – and this is also the path the Irish High Court has taken.

The second issue: what evidence is needed to rebut the presumption?

As to the second problem, the evidence presented in *Aranyosi* substantiating the general fundamental rights violations was a solid one. The case followed several judgments of the ECtHR, reports of the CPT, numerous national court judgments, as well as reports by the ombudsman and NGOs condemning prison conditions in the issuing states.

In light of the above, the question emerges whether other pieces of evidence not stemming from international or national court judgments nor from bodies of the Council of Europe or the UN may justify postponement of the decision to execute a European arrest warrant. The question for the CJEU will be whether the Reasoned Proposal in the Article 7(1) case and the sources it relies on are to be considered persuasive.

At this point, the distinction the High Court makes between the outcome and the process of an Article 7 TEU procedure as evidence becomes crucial. Taking the time element into account, the High Court emphasised that it cannot patiently wait for other EU institutions to determine breaches. But even if the Article 7 procedure was moving at a faster pace, it is ill-suited to answer the question whether mutual trust should still hold. As the High Court of Ireland put it, 'the process set out in Article 7 is ultimately political and not legal. The final determination is made at head of state/head of government level by the European Council and not by a judicial body.' (*Celmer*, para. 115) An Article 7 procedure is vital for a national court deciding on surrender, but not because of its outcome. Much more significantly, it has value as persuasive evidence. (*Celmer*, para. 116)

This finding has far-reaching implications. It suggests that mutual trust can be suspended, irrespectively of an Article 7 TEU procedure having been triggered, or even after such a process failed – if there are other pieces of persuasive evidence pointing to systemic problems in the issuing state. At first glance this appears to be ground-breaking, in light of the fact that the Framework Decision on the European Arrest

Warrant (FD EAW) by a textual interpretation of Recital (10) only allows for its suspension if a Member State seriously and persistently breaches the principles set out in Article 2 TEU and is sanctioned by the Council pursuant to Article 7 TEU. However, a textual or historical interpretation of Recital (10) FD EAW is not in keeping with the significant developments since the adoption of the FD EAW, notably the Charter becoming binding and the further elaboration of the values of the EU and their enforcement mechanisms. The High Court's reading corresponds to these new developments and rightly assumes that suspension of mutual trust can be detached from the outcome of an Article 7 TEU procedure.

A proposal: freezing mechanism for judicial cooperation

The fundamental underlying question behind the above debate is whether it should be up to the judiciary in the first place – either the executing state's judicial authority or the CJEU – to determine these instances of breaches and ensure DRF compliance in judicial cooperation. The High Court seems to argue that the judiciary has an independent role to uphold DRF. As Professor Koncewicz put it, 'we are witnessing a switch from the classic paradigm of EU law of «judges asking judges» (dialogue via preliminary rulings) to a more demanding «judges monitoring the judges»'. This reading ultimately burdens the national courts with having to come up with an assessment of the rule of law and fundamental rights situations in all other Member States and thus with performing the tasks that, ideally, an independent body at the heart of the DRF Pact was supposed to perform.

We agree with the assessment of the Irish High Court that judicial authorities ultimately have an independent responsibility to put a halt to surrenders, in case the wanted person's fair trial rights are put in peril due to a general lack of judicial independence in the issuing state. It would not make sense to proceed to a second step – as proposed by the CJEU in *Aranyosi* in relation to potential fundamental rights violations – and engage in a discussion with a judge about his or her own independence and impartiality where this is the very issue that is called into question. But one should also acknowledge the potential dangers of allowing national courts to perform such an assessment and thereby trump the principle of mutual trust, ultimately challenging the primacy, unity, and effectiveness of EU law. (As mentioned in the Case C-399/11, *Melloni* or Opinion 2/13.) The courts' primary concern has to be the protection of individual rights, but the political responsibility needs to be borne by democratically elected institutions.

Therefore, the court of the executing state should not only halt or suspend judicial cooperation but should freeze the case and inform Eurojust and the Commission of its decision. The idea to freeze the situation has been suggested earlier by Professors Sergio Carrera, Elspeth Guild, and Nicholas Hernanz regarding practices in Member States that might undermine EU values. Our proposal is in keeping with that idea.

The Commission should be obliged to monitor the issuing state and pass a general determination about the suspension of mutual trust in case a Member State falls short on one or more of the values listed in Article 2 TEU. Should a clear risk of a serious breach be determined either by an Article 7(1) procedure or by the first prong of the DRF Pact, mutual trust needs to be suspended. While the wording of both processes refers to a 'clear risk', which seems to indicate less certitude than a solid determination of a breach, mutual trust should be suspended anyway. There are at least two reasons justifying this. First, the history of the Union has shown that EU institutions begin considering the determination of a clear risk of a serious breach when other entities already determined this with highly persuasive force. Second, even if the breach was not obvious, it is justified to take a precautionary approach when individual rights are at stake. Needless to say, mutual trust must also be immediately suspended if the existence of a serious and persistent breach of EU values is established either after having invoked Article 7(2) TEU or through the DRF mechanism. The Commission should start a dialogue with the Member State in question, taking into account its country-specific recommendations adopted during the process.

Furthermore, on the basis of continuous scrutiny it should determine when trust can be re-established.

Should the CJEU agree with the Irish High Court, it will have far-reaching implications. The suspension of trust could extend to other subject matters, too. Judicial independence is equally important for the functioning of the single market and the Eurozone – this explains why the assessment of judicial independence plays a central role in the European semester. Lack of judicial independence may jeopardise autonomous EU law concepts. For how could direct effect allow individuals to invoke European law before national courts if these Member State fora do not satisfy the very basic tenets of the rule of law and are not independent?

Article 7(1) is a *lex imperfecta*. Even if the procedure successfully comes to an end, it does not foresee sanctions. The CJEU's interpretation of the procedure's impacts on mutual trust, and perhaps even the direct effect of EU law in general may, however, result in dissuasive legal consequences to rule of law backsliding.

The views expressed in this contribution are solely those of the authors.

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