

UDC 341.645.2(4-672EU)
Review paper
Received: April 6, 2022
Accepted: April 29, 2022
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“RELATIVIZATION” OF THE PRINCIPLES OF MUTUAL RECOGNITION AND MUTUAL TRUST BETWEEN EU MEMBER STATES: THE CASE LAW OF THE EU COURT OF JUSTICE

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Abstract: *The principles of mutual recognition and mutual trust between EU member states, are an irrefutable precondition for efficient and facilitated cooperation of competent judicial bodies in the field of criminal law, which is a condition for successful fight against cross-border crime. Despite the indicated importance, the realization of the stated principles cannot be done at the expense of the protection and respect of basic human rights, since the EU law is based on their proclamation, respect and protection. Achieving efficiency and facilitating judicial cooperation while respecting basic human rights was ensured by the first measure adopted in the light of the principles of mutual recognition and mutual trust. It’s about the European Arrest Warrant (EAW) established by the Framework Decision on the European Arrest Warrant (FDEAW). The FDEAW prescribes the conditions of execution, as well as the grounds for mandatory or possible non-execution of the EAW. However, in the practice of applying the EAW, the question arose of the possibility of non-execution or delaying the execution of the EAW in cases not provided for in the FDEAW. The Court of Justice of the European Union (CJEU) has found that the execution of the EAW in exceptional cases may be postponed out of the FDEAW. The stated opinion of CJEU is justified from the aspect of protection of absolute rights of individuals regulated by both EU law and the The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), bearing in mind that their protection, ie prohibition of inhuman and degrading treatment cannot be subordinated to efficiency and facilitation of judicial cooperation.*

Keyword: *Mutual Recognition and Mutual Trust, European Arrest Warrant, Prohibition on Inhuman and Degrading Treatment, The EU’s Court of Justice Case Law*

INTRODUCTION:

The need for faster and easier cooperation based on mutual recognition of decisions (in the field of criminal law) was recognized and emphasized in mid-June 1998 in Cardiff by the United Kingdom. Recognition of this need is the result of finding the best way to apply the provisions of Treaty of Amsterdam signed in early October 1997. After recognizing the importance of the principle of mutual recognition by the European Council, there was a reconsideration of this principle in 1999 at the Tampere summit, during which the Conclusions of the European Council (Tampere European Council 15-16 October 1999 Presidency conclusions) established that mutual recognition should be the “cornerstone” of judicial cooperation in civil and criminal matters (see also Mitsilegas, 2009; Bugarski, 2014). Subsequently, in 2001, the European Commission adopted the Program of Measures for the Implementation of the Principle of Mutual Recognition of Decisions in Criminal Matters (Official Journal of the the European Communities 2001/C 12/02). The principle of mutual recognition is proclaimed by the Treaty of Lisbon in Art. 68 A (Official Journal of the European Union 2007/C 306/01), which provides that “judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 69 B”.

EAW is envisaged as the first measure of mutual recognition. It is an informal form of international legal cooperation in criminal matters, which has replaced all previous instruments that prescribed extradition. The EAW is regulated by the FDEAW (2002/584/JHA: C: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision). Established to facilitate and expedite judicial cooperation, the FDEAW protects the fundamental rights and principles set forth in Art. 6 of the Treaty on European Union (TEU) (Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union 2012/C 326/01), which form an integral part of the Charter of Fundamental Rights of the European Union (the Charter) to Chapter VI – *Justice* (Official Journal of the European Union, 2012/C 326/02). The importance of protecting and respecting proclaimed rights under EU law and the ECHR is pointed out by the CJEU, which in its decisions “relativized” the principle of mutual trust between EU

Member States, providing that the execution of an EAW may be postponed and in cases not provided for in the FDEAW in order to prohibition inhuman and degrading treatment of the individual to whom the EAW applies.

1. PRINCIPLE OF MUTUAL RECOGNITION AND MUTUAL TRUST BETWEEN EU MEMBER STATES IN THE LIGHT OF PROVIDING INTERNATIONAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

Recognition of the principles of mutual recognition and mutual trust between EU Member States, as a cornerstone of judicial cooperation in criminal matters, is a result of the need to overcome obstacles and shortcomings in providing formal, traditional international legal assistance in criminal matters. The main shortcomings of formal forms of international legal assistance in criminal matters (see also Mitsilegas, 2009) were reflected in the complex and slow procedure that was realized between the the judicial authority of the Member State.

The principle of mutual recognition of decisions is based on the principle of trust between states and is reflected in the mutual acceptance of decisions as their own, even though they were made by the competent authorities of another EU Member State, which is why there is no need to verify the legality of the decision in question. As established in the Communication from the Commission to the Council and the European Parliament (Mutual Recognition of Final Decisions in Criminal Matters, Brussels, 26.7.2000, 4: COM (2000) 495 final), mutual trust to achievement the principle of mutual recognition is enormous important element, and refers not only to trust in the legal system of a state, but also to the trust that normative provisions will be applied in a proper, lawful manner. CJEU found that “EU law is based on the premise that each Member State shares these values with the other Member States, and so each Member State can trust these values to be recognised and EU law that implements them to be respected” (Slovakia v Achmea), similarly, the court found in the decision Commission v Poland, para. 42-43. In this sense, the realization of the principle of mutual trust is based on the assumption that each EU Member State respects EU law, ie all specific rights, especially in the field of freedom, security and justice (see judgments N. S. and Others, para. 78 to 80 and Melloni, para. 37 and 63). Also, the CJEU found that the “Member States have mutual trust in their criminal justice systems and that each of them

recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied” (joined cases Gözütok and Brügge).

As a principle of mutual trust between Member States, which is also based on respect for and protection of fundamental human rights, it is extremely important in EU law, bearing in mind that it enables the realization and maintenance of areas without internal borders (Opinion 2/13 of the Court) in order to achieve it, the European Commission adopted in Brussels 2003. Green Paper (Green Paper from the Commission - Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union (COM/2003/0075 final).

Cooperation built on this principle of mutual recognition, which is also regulated by the Lisbon Treaty, takes a very important place in the fight against cross-border crime as well as in achieving efficient and effective judicial cooperation. The most important forms of informal cooperation are achieved through the European Arrest Warrant as the first measures taken in the light of the principles of mutual recognition, the European Evidence Warrant, the European Investigation Warrant.

1.1. Significance of the European arrest warrant in the light of international legal assistance in criminal matters

The European Arrest Warrant¹ is the first measure adopted in the light of the principle of mutual recognition, and represents one of the most important informal form of cooperation in providing international legal assistance in criminal matters. FDEAW, adopted June 13, 2002. The FDEAW entered into force on 13 January 2003

¹ FDEAW in article 1 gives a definition EAW: „the European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order”. FDEAW, further in the same article, paragraph 2 provides that „Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision”, also that „this Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union (par. 3)“.

and has been in force in the EU since 1 January 2004. The traditional system of extradition, which had numerous weaknesses such as ineffectiveness, inefficiency, slowness, could not survive as an adequate and effective way of providing international assistance in criminal matters in an era of rising cross-border crime rates. With the adoption of the EAW, the judiciary organized by the Member State has been deprived of numerous restrictions and obstacles in terms of achieving effective cooperation and effective combating against cross-border crime.

Having in mind the prescribed grounds for execution, ie grounds for non-execution EAW, its creators sought to ensure both efficient and facilitated judicial cooperation (Ciprian Vasile Radu, para. 34; West, para. 53) and effective combating against cross-border crime, as well as protection of human rights of persons in relation to whom the EAW was issued. The benefits of implementing EAW were established soon after its implementation, as indicated by the Report of the European Commission (Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [SEC(2007) 979], COM/2007/0407 final), in which it is stated that the EAW is performed in less than five weeks and in frequent cases in 11 days. Contrary to the above, it took an average of about a year to execute the request under the old extradition procedure. Also, in the mentioned Report, the European Commission concluded that “its positive impact is borne out daily in terms of judicial control, efficiency and speed, always with full respect for fundamental rights”. In this sense, the EAW is an example of how the efficiency of the justice system is achieved only if individual rights are respected and protected (Marguery, 2016)².

The importance of the EAW, in addition to achieving the efficiency of the justice system, facilitating judicial cooperation (Melloni, para. 37; F., para. 35 and Lanigan, para. 28) and the protection of human rights is reflected in the fact that, as stated by the European Commission “the free movement of persons within the EU by providing a

² When it comes to the protection of human rights in EU law, it is important to note that the original treaties of the European Communities did not contain provisions on respect for human rights. However, the CJEU recognized the need for respect for human rights to be a general principle of EU law, which is today proclaimed by the Treaty of European Union, the Lisbon Treaty and the Charter of Fundamental Rights of the European Union (see also Dadomo and Quéniwet, 2020).

more efficient mechanism to ensure that open borders are not exploited by those seeking to evade justice” (Report from the Commission to the European Parliament and the Council On the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, SEC (2011) 430 final). From the above, it can be concluded that the primary importance of the EAW is reflected in the efficiency, ie speeding up the provision of international legal assistance in criminal matters, respect and protection of human rights of individuals, as well as preventing and suppressing abuse of open borders for cross-border criminal activities.

2. “RELATIVIZATION” OF THE PRINCIPLE OF MUTUAL RECOGNITION IN THE PRACTICE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN THE CASE OF THE EUROPEAN ARREST WARRANT

The FDEAW shall prescribe the grounds for execution as well as the grounds for non-execution of the EAW. The scope of the EAW is determined by the gravity of the crime, ie by prescribing the amount of imprisonment threatened or imposed. For certain criminal offenses, the FDEAW (Art. 2) has departed from the principle of the prohibition of double criminality. These are criminal offenses listed in the FDEAW, for which a maximum sentence of imprisonment of at least three years is threatened or detention has been ordered. Apart from the above, the list of criminal offenses for which the principle of double criminality is excluded is not final. The provisions of Art. 2 the FDEAW, the Council of Europe, is empowered by unanimous decision, after consulting the European Parliament, to extend the list to other categories of criminal offenses.

In addition to determining the scope of application of the EAW, the FDEAW also prescribes obstacles, ie the grounds for mandatory or possible refusal to execute the EAW. Articles 3 and 4 of the FDEAW, prescribes the grounds of mandatory and optional non-execution EAW. The mentioned interference can be divided into absolute and relative. In case of existence of absolute interference from Art. 3 FDEAW, executing judicial authority, must refuse to execute the EAW: “the judicial authority of the Member State of execution shall refuse to execute the European arrest warrant in the following cases: 1. if the offence on which the arrest warrant is based is covered by

amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law; 2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State; 3. if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State. When it comes to obstacles of a relative nature, due to which the executing state may refuse to execute the EAW, FDEAW Art. 4 prescribes that “the executing judicial authority may refuse to execute the European arrest warrant: 1. if, in one of the cases referred to in Article 2(4), the act on which the European arrest warrant is based does not constitute an offence under the law of the executing Member State; however, in relation to taxes or duties, customs and exchange, execution of the European arrest warrant shall not be refused on the ground that the law of the executing Member State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the issuing Member State; 2. where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based; 3. where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings; 4. where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law; 5. if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country; 6. if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law; 7. where the European arrest warrant relates to offences which: (a) are

regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or (b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.”

It is important to note that the FDEAW in Art. 5 prescribes the guarantees that must, in some cases, be provided by the issuing Member State, which ensures the protection of the fundamental procedural rights of the individual as well as the principle of due process, which is the basis of modern criminal procedure legislation. In Art. 5 the FDEAW prescribes that “the execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions: 1. where the European arrest warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered in absentia and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment; 2. if the offence on the basis of which the European arrest warrant has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure; 3. where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State”

Having in mind the strictly prescribed grounds for the obligatory or optional non-execution the EAW, the CJEU in the decision of Melloni, para. 61-64, found that the execution of the EAW beyond the stated grounds cannot be refused. The stated opinion

of the CJEU is based on the argument that the principle of mutual trust implies the assumption that the executing Member State believe that the issuing Member State fully respects the rights of the individual. As the principle of mutual recognition is a cornerstone of judicial cooperation, the CJEU points out that Member States, according to thr FDEAW, are obligated to execute the EAW (Lanigan, para. 36; Aranyosi and Căldăraru, para. 79). In Radu's case, para. 36-42, the CJEU found that “that a breach of a fundamental right (in case, the right to be heard) that is recognized by EU law but not included in the FDEAW, cannot justify non-execution” (about cited above see also Pieter van der Mei, 2017).

It is important to note here that the FDEAW provides for the possibility of suspending the application of the EAW mechanism only in the case of “a serious and persistent breach by one of the Member States. Article 6 (1) of the Treaty on European Union, determined by the Council pursuant to Article 7 (1) of the said Treaty with the consequences set out in Article 7 (2) thereof“. Also, the FDEAW provides that “nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons”, also that “no person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment”.

However, the CJEU has identified the possibility of limiting the principles of mutual recognition and trust in “exceptional situations“. These are cases of prohibition of inhuman or degrading treatment or punishment prescribed in Art. 4 of the Charter, which has an absolute prohibition because it is closely related to respect for human dignity from Art. 1 of the Charter. Namely, the fundamental values of the Union and its Member States are reflected in the protection of the inviolability of human dignity proclaimed in Art. 1 of the Charter, then in the prohibition of torture and inhuman or degrading treatment or punishment (Art. 4), as in Art. 3 of the ECHR, which regulates the prohibition of torture (Aranyosi and Căldăraru, para. 87). In view of the above, in the case of knowledge that there is a real danger of inhuman and degrading treatment

of persons deprived of their liberty in the issuing Member State, the judicial authority of the Member State to execute the EAW is obliged to assess the existence of such danger (Aranyosi and Căldăraru, para. 88).

In order for the executing judicial authority of the Member State to be able to postpone the enforcement of the EAW, certain conditions must be fulfilled. The first, objective condition, is that the executing Member needs to have certain, but not any, but qualified information on certain deficiencies related to the detention (deprivation of liberty) of the issuing Member State. The above information could serve as a basis for postponing the execution of the EAW (with cumulative fulfillment and other conditions), this information should be “objective, reliable, specific and properly updated” relating to the conditions of detention in the issuing Member State and which indicate the existence of deficiencies which may be characterized as systemic or general, or in relation to which there is a possibility of influencing certain groups of people, or which may affect certain places of detention. As noted, the fulfillment of this condition is not sufficient for the executing Member State to postpone the execution of the EAW. In order to delay the execution of the EAW, it is necessary that it is cumulatively fulfilled, in addition to the objective and personal condition. The personal condition implies the possibility of the existence of a real danger that the person to whom the EAW applies will be subjected to inhuman and degrading treatment or punishment in accordance with Art. 4 Charter (Aranyosi and Căldăraru, para. 91, 92, 104). In order for the executing Member State to assess the existence of the said personal condition for postponing the execution of the EAW, it is necessary to request the provision of additional information from the issuing Member State. The issuing Member State must provide the requested information within the time limit specified in the request. In this regard, the Member State of enforcement will postpone its decision on the enforcement of the EAW until the issuing State of the EAW has provided the requested information. If the risk of inhuman and degrading treatment or punishment of the person to whom the EAW relates cannot be remedied within a reasonable time, the executing State of EAW must decide whether the surrender procedure should be brought to an end (Aranyosi and Căldăraru, para. 104).

Bearing in mind the above practice of the ECJU, it is clear that the ECJU has enabled the relativization of the principles of mutual recognition and mutual trust, in relation to the FDEAW, as the executing Member State may postpone the above

conditions. In this regard, the CJEU has additionally provided protection of basic human rights that have an absolute character, and provided protection to the individual from inhuman and degrading treatment or punishment in the issuing Member. This is justified bearing in mind that EU law is based on respect for human rights on the one hand, while on the other hand, it would not be justified to assume the efficiency and facilitation of judicial cooperation in criminal matters to protect the absolute rights of individuals.

CONCLUSION

Efficiency and facilitation of judicial cooperation in criminal matters is a condition for successfully combating cross-border crime and criminal acts with elements of foreignness. Having in mind the above, at the end of the last and the beginning of the present century, the European Community began to take measures to ensure the efficiency of judicial cooperation in order to overcome the difficulties, shortcomings and obstacles encountered by Member States by providing formal forms of cooperation in criminal matters. These shortcomings in the implementation of formal forms of cooperation were reflected in the slowness, inefficiency and politicization between EU Member States. By recognizing and proclaiming the principles of mutual recognition of decisions and mutual trust, a step was taken towards replacing formal forms with informal forms of providing international legal assistance in criminal matters. Of great importance for this are the Conclusions of the Council of Europe from Tampere (1999), the Program of measures to implement the principle of mutual recognition of decisions in criminal matters (2001), the Framework Decision on the European arrest warrant and the surrender procedures between Member States (2002), Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community (2007). The first measure adopted in the light of the principles of mutual recognition and mutual trust is the FDEAW. With this measure, the creators of FDEAW ensured the simultaneous realization of the principles of efficiency of judicial cooperation in criminal matters and its facilitation, effective combating against cross-border crime as well as respect and protection of basic human rights that form the basis of EU law. Although the FDEAW clearly prescribes the conditions for the execution of the EAW, as well as for the refusal to execute the EAW, in practice, disputable issues

have arisen regarding the postponement to execute the EAW out of FDEAW. These are situations where there is a danger that a person for whom an EAW is issued in the country that issued the EAW will be subjected to inhuman and degrading treatment or punishment, and whose prohibition is prescribed by Treaty of European Union and the Charter and the ECHR. If the conditions cumulatively fulfilled, which are a standard established in the decisions of the CJEU, the state executed the EAW and in exceptional cases may postpone the execution of the EAW, out of the conditions prescribed by the FDEAW. In this way, the ECJU justifiably “relativized” the principle of mutual recognition and trust, giving priority to the protection of the absolute rights of the individual over the execution of the EAW under the conditions regulated by the FDEAW. Namely, it cannot be considered that the principles of EU law are realized if it violates the absolute rights of the individual, which represent the pillar of the principle of fair procedure, as well as the realization of the principles of democracy and humanity.

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