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Mutual trust and the Rule of law

A study of the effect of the procedures under Article 7 TEU on the legal preconditions for the future application of the Framework Decision on the European arrest warrant

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Abstract

For the first time in the history of the European Union (EU), proceedings under Article 7(1) Treaty on the European Union (TEU) have been initiated, inviting the Council to determine the existence of a risk of violations of fundamental values enshrined in Article 2 TEU in Poland and Hungary. Even if such decisions would only have the function of a preventative measure with no sanctions, judgments from the Court of Justice indicate that national courts have shown doubts whether to execute requests for surrenders under the Framework Decision on the European arrest warrant (FD-EAW) to Member States criticised under Article 7(1) TEU. The purpose of this thesis is therefore to examine the effect of the procedures under Article 7(1) TEU on the legal preconditions for future application of the FD-EAW. The thesis is comprised of an analytical study of judgments from the Court of Justice on the European arrest warrant, using Article 7 TEU in its reasoning. The scope of study is limited to four judgments: C-220/18 PPU *M.L.*; C-216/18 PPU *L.M.*; C-404/15 *Aranyosi* and C-695/15 *Căldăraru*.

The conclusion of this thesis is that the procedure under Article 7(1) TEU has the effect of altering the notion of trust upon which the entire legal cooperation in the Area of Freedom, Security and Justice is based. The responsibility to assess the objective and individual real risk is a responsibility left for the national courts to carry out on a case-to-case-basis. It is argued in this thesis that the reasoned proposals under Article 7(1) TEU affects both prongs of the *Aranyosi*-test by creating a close to automatic fulfilment of the first prong and an almost obligation on the executing Member State to assess the individual real risk under the second prong. It is argued that the assessment on a case-to-case basis corrodes the principles of mutual trust and recognition. Consequently, this study questions that the FD-EAW can be considered a system based on a high level of trust in the future, if the Member States are obliged to double check each other's capacity to ensure protection of fundamental rights before executing a surrender. By setting clear boundaries for the trust so that where there is mutual trust, the level of confidence in each other's capacity to comply with fundamental values is both high and substantial, the corrosion of the principle of mutual trust can be prevented, which is essential for the future proper operation of the judicial cooperation in the Area of Freedom, Security and Justice.

Keywords: Article 7 TEU, Framework Decision on the European arrest warrant, Rule of law, fundamental values, Article 2 TEU, mutual trust, mutual recognition

List of abbreviations

AFSJ	Area of Freedom, Security and Justice
AG	Advocate General
the Charter	The European Union Charter of Fundamental Freedoms
the Commission	the European Commission
the Council	The Council of the European Union
Court of Justice	the Court of Justice of the European Union
EAW	European arrest warrant
ECHR	European Convention of the Human Rights
ECtHR	European Court of the Human Rights
European Council	The European Council of the European Union
EU	European Union
FD-EAW	2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1
JHA	Justice and Home Affairs
no.	number
nos.	numbers
p.	page
pp.	pages
para/s	paragraph/s
the Parliament	The European Parliament
Tampere Conclusions	European Council, Presidency Conclusions of the Tampere European Council, 15 and 16 October 1999
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on the European Union
Treaties	The Treaty on the Functioning of the European Union and the Treaty of the European Union

I. Introduction

I.I. Mutual trust and the Rule of law

“Trust takes years to build, seconds to break and forever to repair”

(Unknown)

Mutual trust is the basis for the principle of mutual recognition.¹ Given that it allows the operation of an internal market without internal borders, mutual trust is of fundamental importance to the operation of the European Union (EU) legal system.² The notion of trust implies that the Member States have confidence in each other’s capacity to ensure fair and effective judicial systems throughout the EU. Mutual trust is often regarded as a general principle of EU law, and although the legal ground for it is not entirely clear, it can be regarded as closely connected to the notion of sincere cooperation under Article 4(3) Treaty on the European Union (TEU), meaning that the Member States and the EU shall assist each other in carrying out tasks flowing from the Treaties in full mutual respect.³ Moreover, in an article on the principle of mutual (yet not blind) trust, Lenaerts argued that the constitutional basis for the principle of mutual trust can furthermore be traced to the principle of “equality of Member States before the law” in Article 4(2) TEU.⁴

Accordingly, when implementing EU law, “the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.”⁵ The strong presumption of high confidence among

¹ E. Herlin-Karnell, ‘Constitutional Principles in the EU Area of Freedom, Security and Justice’ in *EU Security and Justice Law*, D. Acosta & C. Murphy (eds), Oxford, Hart Publishing, 2014, pp. 38-53, p. 42.

² Opinion 2/13 of the Court (Full Court) of 18 December 2014, *on the accession of the European Union to the European Convention of the Human Rights*, ECLI:EU:C:2014:2454, para 191.

³ C. Janssens (Ed), ‘The Principle of Mutual recognition as Judicial Impetus for the Free Movement Provisions’, in *The Principle of Mutual recognition in EU Law*, Oxford University Press, 2013.

⁴ K. Lenaerts, ‘La vie après l’avis: Exploring the principle of mutual (yet not blind) trust’, *Common Market Law Review*, vol.54, no.3, 2017, pp. 805-840, p. 807.

⁵ Opinion 2/13 of the Court (Full Court) of 18 December 2014, *on the accession of the European Union to the European Convention of the Human Rights*, ECLI:EU:C:2014:2454, para 192.

the Member States hence demonstrates that mutual trust is paramount to the judicial cooperation and based on the presumption that all Member States respect the set of fundamental values common to the Member States and upon which the EU is built, such as those enshrined in Article 2 TEU.

At its origin, the principle of mutual recognition emerged as way to circumvent bureaucratic obstacles to deepened market integration. The purpose of the principle was to eliminate, to the greatest extent possible, barriers to trade resulting from different national regulations relating to non-harmonised areas of trade. The formal introduction of the principle of mutual recognition is commonly linked to the judgment in *Cassis de Dijon*.⁶ In that case, which concerned the production and selling of alcoholic beverages, the Court of Justice established that there is “no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State”.⁷ In other words, the principle of mutual recognition practically implies that once a product has been lawfully recognised on the market of one Member State, all other Member States are obliged to recognise and allow the free movement of that product on the entire internal market.

Considering the Area of Freedom, Security and Justice (AFSJ), Herlin-Karnell argued that the “idea of trust in has in many ways been used to overcome the lack of uniformity in national criminal justice systems.”⁸ The principle of mutual recognition enables judicial decisions to move freely across the Member States by presupposing a level of trust between the different national legal systems. According to this logic, it must be irrelevant whether the legal systems are different in different Member States, since all of them, presumably, ensure a sufficiently high level of protection.

The first concrete measure implementing the principle of mutual recognition in the AFSJ was the 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (FD-EAW).⁹ In accordance with

⁶ Judgment of 20 February 1979, *Rewe v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, C-120/78, ECLI:EU:C:1979:42.

⁷ *Ibid.*, para 14.

⁸ E. Herlin-Karnell, ‘Constitutional Principles in the EU Area of Freedom, Security and Justice’ in *EU Security and Justice Law*, D. Acosta & C. Murphy (eds), Oxford, Hart Publishing, 2014, pp. 38-53, p. 42.

⁹ 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1, recital 6 of the Preamble.

the European Council Tampere conclusions from 1999 on the creation of the AFSJ (Tampere Conclusions),¹⁰ the purpose of the FD-EAW was to facilitate the system of surrender by removing some of the complexity and potential delay inherent in the then prevailing mechanisms of surrender.¹¹ Article 1(1) FD-EAW defines the European arrest warrant (EAW) as “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.”¹² Since the EAW became the “flagship measure” of the AFSJ, the principle of mutual recognition has been assigned increased importance.¹³ It is explicitly stipulated in Article 1(2) FD-EAW that the EAW mechanism shall be executed “on the basis of the principle of mutual recognition.”¹⁴

There are, nevertheless, some exceptions to the presumption of surrender on the basis of mutual recognition. Article 1(3) FD-EAW, stating that the EAW “shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in [Article 2 TEU]”, presents a potential exception from executing a EAW on grounds of fundamental rights protection. The exact application and scope of the general fundamental rights exception is, however, not entirely clear.

Additionally, it is stated in recital 10 of the preamble to the FD-EAW that the implementation of the FD-EAW “may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in [Article 2 TEU], determined by the Council pursuant to [Article 7(2) TEU] with the consequences set out in [Article 7(3) TEU].”¹⁵ The triggering of the mechanism under Article 7 TEU hence presents an additional possibility to refuse to give effect to a requested surrender under the FD-EAW.

¹⁰ European Council, Presidency Conclusions of the Tampere European Council, 15 and 16 October 1999, para 37.

¹¹ 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1, recital 6 of the Preamble.

¹² *Ibid.*, Article 1(1).

¹³ E. Herlin-Karnell, ‘Constitutional Principles in the EU Area of Freedom, Security and Justice’ in *EU Security and Justice Law*, D. Acosta & C. Murphy (eds), Oxford, Hart Publishing, 2014, pp. 38-53, p. 42.

¹⁴ 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1, Article 1(2).

¹⁵ *Ibid.*, recital 10 of the Preamble. New article numbers in square brackets.

The procedure under Article 7 TEU is divided into two different parts: a ‘preventative measure’ and a ‘sanctions mechanism’.¹⁶ Article 7(1) TEU provides for the special procedure through which the Council of the European Union (the Council), acting on a reasoned proposal by either the European Commission (the Commission) or the European Parliament (the Parliament), may determine the existence of a risk of violation of the fundamental values. The procedure of the ‘preventative measure’ is described in Article 7(1) TEU:

”1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in [Article 2 [TEU]]. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.”

Article 7(2) and (3) TEU, on the other hand, describe two interrelated steps of the ‘sanctions mechanism’ under Article 7 TEU. These steps shall hence be considered as independent from the preventative measures under Article 7(1) TEU.

“2. The European Council,¹⁷ acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

¹⁶ European Parliament, ‘Rule of Law concerns in Member States: how the EU can act – infographics’, accessed 25 April 2019, <http://www.europarl.europa.eu/news/en/headlines/eu-affairs/20180222STO98434/rule-of-law-concerns-how-the-eu-can-act-infographic>

¹⁷ Not to be confused with the Council. While the Council consist of representatives of the governments of the Member States its composition varies depending on what topic is being discussed, whereas the European Council is always composed of the Heads of State.

The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.”

While recital 10 of the preamble to the FD-EAW refers to the sanctions mechanism under Article 7(3) TEU as a factor that may suspend the implementation of the FD-EAW, it shall be noted that Article 7(3) TEU speaks only of the suspension of “certain rights” deriving from the Treaties, including the voting rights in the Council. Article 7(2) and (3) TEU are hence silent in regard to whether, and if so in what ways, a decision under Article 7 TEU would affect the individual application of legal acts within the area of the AFSJ. Moreover, the sanctions mechanism under Article 7(3) TEU has never, to this date, been initiated.

1.2. Problem identification – questioning the presumption of trust

In December 2017, the Commission submitted a reasoned proposal in accordance with Article 7(1) TEU regarding incompliance with the rule of law in Poland. The concerns of the Commission regarded the lack of independent and legitimate constitutional review and the adoption of a new legislation relating to the retirement ages of judges which, according to the Commission, raised concerns as regards judicial independence and thereby posed a systematic threat to the rule of law.¹⁸ Moreover, in September 2018, the Parliament submitted a proposal pursuant to Article 7(1) TEU regarding Hungary, calling on the Council to determine the existence of a clear risk of a serious breach of fundamental values in Hungary. The proposal refers to that “the facts and trends [...] taken together represent a systematic threat to the values of Article 2 TEU and constitute a clear risk of a breach thereof” and emphasises that the outcome of the parliamentary elections in Hungary “highlights the fact that any Hungarian government is responsible for the elimination of the risk of a serious breach of the values of Article 2 TEU, even if this risk is a lasting consequence of the policy decisions suggested or approved by previous governments”.¹⁹ Both Poland and Hungary have pledged not to support any sanctions against, and to block any decision regarding, one another.²⁰ To this date, both proposals are still pending before the Council to determine the existence of a risk.

¹⁸ European Commission ‘Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland’, 20 December 2017, COM (2017) 835 final.

¹⁹ European Parliament, European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded’

²⁰J. Shotter & V. Hopkins, ‘Poland pledges to veto sanctions against Hungary’ in *Financial Times*. 12 September 2018, accessed 25 April 2019, <https://www.ft.com/content/b743c0b2-b6cd-11e8-bbc3-ccd7de085ffe> 2019-02-22

It is essential to note that even if the Council were to follow the reasoned proposals and come to a decision under Article 7(1) TEU, this would merely imply that it has determined the existence of a *risk* of a breach. The preventative measure does not automatically lead to further sanctions or consequences, but shall be regarded primarily as a mechanism of name-and-shame. Nonetheless, judgments from the Court of Justice indicates that national courts are starting to question the presumption of a high level of mutual trust among the Member States with reference to the reasoned proposals pursuant to Article 7(1) TEU, by showing doubts as to whether requests of surrenders under the FD-EAW to Member States that have been criticised under Article 7(1) TEU ought to be executed. This thesis is, hence, based on the premise that Article 7(1) TEU appears to have had a potential effect on the application of the FD-EAW nonetheless. Given that the procedure under Article 7 TEU is unprecedented, the full impact of legal provisions referring to it has not previously been considered. In light of the procedures under Article 7 TEU pursuant to Poland and Hungary, this is of specific interest to investigate.

1.3. Purpose – studying the effect of the Article 7 TEU procedures on the legal preconditions for future application of the FD-EAW

The purpose of this thesis is to study the effect of the procedures under Article 7 TEU on the legal preconditions for future application of the FD-EAW. The answer to this question could moreover provide pointers as regards the future of the principle of mutual recognition in the AFSJ in general, which is a matter of issue that has been requested by the Swedish Department of Justice.²¹ This study is motivated by the perception that the mechanism initiated under Article 7 TEU affects the high level of confidence upon which the judicial cooperation in the AFSJ is based and that this, as a result, affects the way in which the FD-EAW is intended to operate. In answering the overarching research question, this thesis also aims to study how the proceedings

; A. Wróbel, ‘Hungarian Parliament votes to support Poland in fight against EU’ in *Politico*. 20 February 2018, accessed 25 April 2019, <https://www.politico.eu/article/hungarian-parliament-votes-to-support-poland-in-fight-against-eu/>

²¹ On 11 March 2019, the Swedish Department of Justice issued its annual list of requested research topics for law student essays. One of the requested topics concerned the future of the principle of mutual recognition, based on a presumption of a high level of confidence between the Member States in the light of Member States, including Poland and Romania, being criticised for non-compliance with the standards set out in the ECHR.

Regeringskansliet Justitiedepartementet Förteckning över förslag till uppsatsämnen, <https://www.regeringen.se/495e66/contentassets/441a0cb0b061400fb34c3e8d0b8b0ebd/forteckning-over-forslag-till-uppsatsamnen-justitiedepartementet.pdf>, accessed 11 March 2019.

pursuant to Article 7 TEU affect the legal prerequisites for making exceptions from the rule in Article 1(2) FD-EAW, namely that “Member States shall execute any [EAW] on the basis of the principle of mutual recognition and in accordance with the provisions of [the FD-EAW].”²²

1.4. Method

In order to investigate the effect of the procedure under Article 7(1) TEU on the legal preconditions for the future application of the FD-EAW, the method used in this thesis is studying judgments from the Court of Justice covering arguments related to the studied topic. It is frequently argued that the Court of Justice has played the most important role in the dynamic development of EU law and that that the Court of Justice creates law through its judgments.²³ Therefore, by studying the arguments related to Article 7 TEU, this thesis seeks to comprehend in what ways and in what situations such arguments may have an impact on the application of the FD-EAW in the future.

The method used could be described as a kind of analytical legal method.²⁴ The analytical legal method is characterised by an ambition to go beyond merely establishing what the law is, although establishing what the law is often is necessary as a step of the analysis. This thesis is thus based on a perspective of legal realism that does not suffice at merely answering what the law is.²⁵ In other words, the study is based on the presumption that the legal system is open and free in the sense that there is no single correct answer to what the law is, but rather that the legal practice contains several legitimate alternatives to choose between when faced with a complicated legal issue.²⁶ Since the analytical legal method allows for the study of a wider range of sources, it provides useful tools to critically study the motives behind the design of a certain legal mechanism or institution.

²² 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1, Article 1(2).

²³ J. Reichel, 'EU-rättslig metod' in *Juridisk Metodlära*, F. Korling & M Zamboni (eds), Studentlitteratur, Lund, 2013, pp. 109-140, p. 130.

²⁴ C. Sandgren, *Rättsvetenskap för uppsatsförfattare – Ämne, material, metod och argumentation* (4th edn) Norstedts Juridik, Stockholm, 2018, p. 50-51.

²⁵ For further reading on legal realism see, *inter alia*, R. Wacks, *Understanding Jurisprudence: An introduction to legal theory* (5th edn) Oxford University Press, Oxford, 2017, p. 173-192.

²⁶ C. Sandgren, *Rättsvetenskap för uppsatsförfattare – Ämne, material, metod och argumentation* (4th edn) Norstedts Juridik, Stockholm, 2018, p. 50-51

The wide variety of sources provides for a nuanced analysis of the topic. However, the wide scope of sources also requires an effort in selection which essentially affects what conclusions can be drawn from the studied material and which, in turn, affects the scientific value of the findings. In order to render the study transparent, it is therefore of essence to consider the material used for the purpose of this thesis. This study consists primarily of analytical textual readings of different sources of legal documents and articles. In the subsequent section some methodological and material considerations are presented.

1.4.1. Selection of cases

In order to investigate how the legal preconditions for future application of the FD-EAW is affected by the reasoned proposals under Article 7 TEU, this thesis is comprised of a study of judgments that are delivered by the Court of Justice mentioning Article 7 TEU in the arguments and reasoning. When using judgments as part of a study, it is essential to be mindful about the selectivity and potential bias in the collection of cases. For the purpose of this study, cases have been found using the search phrase “Article 7 TEU” at the Curia database search forum.²⁷ The search was pursued 29 April 2019 and generated a list of sixteen results.²⁸

Since the purpose of this thesis is to study of the effect of the procedures under Article 7 TEU on the legal preconditions for future application of the FD-EAW, the scope of judgments studied is limited to the cases concerning surrenders pursuant to the FD-EAW. Having

²⁷InfoCuria, ‘Case law of the Court of Justice’, using search phrase “Article 7 TEU” on 14 March 2019, <http://curia.europa.eu/juris/recherche.jsf?language=en>,

²⁸ The complete list of results included the following: Judgment of 4 December 2018, *Wightman and Others*, C-621/18, Opinion of AG Campos Sánchez-Bordona, ECLI:EU:C:2018:978 ; Judgment of 11 April 2019, *Commission v Poland (Indépendance de la Cour suprême)*, C-619/18, Opinion of AG Tanchev, ECLI:EU:C:2019:325 ; Judgment of 4 July 2018, *Generalstaatsanwaltschaft (Conditions de détention en Hongrie) ‘M.L.’*, Opinion of AG Campos Sánchez-Bordona, C-220/18, ECLI:EU:C:2018:547 ; Judgment of 25 July 2018, *L.M.*, C-216/18, ECLI:EU:C:2018:586 ; Judgment of 5 April 2016, *Joined cases Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198 ; Judgment of 25 July 2018, *L.M.*, C-216/18, Opinion of AG Tanchev, ECLI:EU:C:2018:517 ; Judgment of 9 November 2017, *Egenberger*, C-414/16, Opinion of AG Tanchev, ECLI:EU:C:2017:851 , Judgment of 5 April 2016, *Joined cases Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, Opinion of AG Bot, ECLI:EU:C:2016:140 ; Judgment of 7 April 2016, *H v Council and Others*, C-455/14 P, Opinion of AG Wahl, ECLI:EU:C:2016:212 ; Judgment of 26 October 2012, *Pringle*, C-370/12, View of AG Kokott, ECLI:EU:C:2012:675 ; Judgment of 8 September 2011, *Dominguez*, C-282/10, Opinion of AG Trstenjak, ECLI:EU:C:2011:559 ; Order (OJ) of 22 February 2019 *MLPS v Commission*, T-304/18 ; Application (OJ) of 8 April 2016, *Hungary v Commission*, T-50/16 ; Judgment of 10 May 2016, *Izsák and Dabis v Commission*, T-529/13, ECLI:EU:T:2016:282 ; Judgment of 10 December 2015, *Front Polisario v Council*, T-512/12, ECLI:EU:T:2015:953

narrowed down the scope in accordance with that criteria, the scope of study is limited to four judgments. These are: C-220/18 PPU *M.L.*, C-216/18 PPU *L.M.*, C-404/15 *Aranyosi* and C-695/15 *Căldăraru*. Only one of those cases, the *L.M.* judgment, dealt specifically with the question of how the reasoned proposals affect the possibility or obligation to refrain from giving effect to the surrender. Nonetheless, the other judgments are of relevance to study in order to understand the context in which the *L.M.* judgment was delivered and in what ways, if any, the initiated procedure under Article 7(1) TEU may have affected the reasoning. Since *Aranyosi* and *Căldăraru* were dealt with as joined cases, they are also, naturally, jointly analysed for the purpose of this thesis. Furthermore, although the Court of Justice is under no obligation to follow them, the Opinions of the Advocate Generals (AG) generally provide valuable interpretations on the legal matters at issue in the judgments. Therefore, the analysis of the cases includes not only a study of the judgment itself, but also the Opinions pertaining to the judgments.²⁹

1.4.2. Consideration of material

The term ‘EU law’ is made up of a set of different types of sources, essentially comprising primary law, secondary legislation, various delegated regulations for the implementation of laws and the case law of the Court of Justice.³⁰ The primary law of the EU includes the Treaties, which set out the competences of the EU and its institutions in relation the Member States and lay down broad guidelines for the general objectives of the EU.³¹ In addition, and the European Union Charter of Fundamental Freedoms (the Charter) is commonly considered as part of the EU primary law. The primary law thus sets out the legal framework of the EU. The primary legislation of the EU has direct applicability, meaning that the Treaties instantly become part of the binding law of the Member State upon entering the EU and does not need to be incorporated.³² The secondary law of the EU consists of regulations, directives and decisions, as well as certain international agreements to which the EU is party. The secondary sources of law are legal acts based on the Treaties, particularly in Article 288 Treaty on the Functioning of the European Union (TFEU), and are comprised of regulations, directives and decisions, recommendations and Opinions. In addition, supplementary sources of EU law include

²⁹ P. Craig and G. De Búrca, *EU law: text, cases and materials*, (6th edn) Oxford University Press, Oxford, 2015, p. 61.

³⁰ N. Foster, *EU Law*, (6th edn), Oxford University Press, Oxford, 2018, p. 105.

³¹ *Ibid.*, p. 111.

³² *Ibid.*

judgments of the Court of Justice, some provisions of international agreements and conventions.

Another prominent feature of EU law is the inclination to refer to general principles. Deriving primarily from various external sources, some general principles have been actively incorporated into the EU primary law, such as the principles of proportionality and subsidiarity. Other general principles of EU law have been introduced to the legal order of the EU through the case law of the Court of Justice, including, prominently, the principles of direct effect, supremacy and mutual recognition.³³ The primary function of the general principles is to guide the interpretation and application of EU legislation and they are therefore important instruments for the Court of Justice.

In the later years, the EU legal system has emerged as a more or less coordinated system of different legal and political institutions cooperating to achieve an effective application of EU law at the national level, given that the EU lacks a general competence to harmonise internal administration of application of EU rules at a local level.³⁴ Therefore, a salient feature of the EU system is that different policy areas have developed in different ways and in response to the different policy interests that are prominent for each particular area. Documents authored by different institutions have therefore emerged as important sources of law, so called 'soft law'. In the context of this study, provisions of 'soft law' include, *inter alia*, the reasoned proposals issued by the Commission and the Parliament under Article 7 TEU. Considering the legal status of such provisions, it shall be noted that 'soft law' provisions are not legally binding.³⁵ This implies, for example, that such provisions are precluded from having direct effect.³⁶ Nonetheless, such provisions are often of vital importance in the interpretation and application of EU law, not least in the normative sense.³⁷ Moreover, given that recital 10 of the preamble to the FD-EAW specifically refers to the Article 7 TEU procedure and the determination of the Council under Article 7(3) TEU, it is certainly of significance for the purpose of this thesis to consider 'soft law' provisions as a relevant source of authority.

³³ Ibid., p. 121.

³⁴ J. Reichel, 'EU-rättslig metod' in *Juridisk Metodlära*, F. Korling & M Zamboni (eds), Studentlitteratur, Lund, 2013, pp. 109-140, p. 127.

³⁵ Ibid.

³⁶ P. Craig and G. De Búrca, *EU law: text, cases and materials*, (6th edn) Oxford University Press, Oxford, 2015, p. 109.

³⁷ J. Reichel, 'EU-rättslig metod' in *Juridisk Metodlära*, F. Korling & M Zamboni (eds), Studentlitteratur, Lund, 2013, pp. 109-140, p. 128.

1.4.3. Studying case law for the purpose of conducting a legal study

Given that a significant part of this thesis is comprised of a study of judgments, it is of relevance to elaborate on the value of studying case law for the purpose of conducting a legal study. According to Reichel, EU law and regulations are generally technical and detailed to its nature whereas judgments of the Court of Justice tend to lean heavily on principles.³⁸ The great importance assigned to the case law of the Court of Justice is a prominent feature of EU law. Historically, the Court has played a central role in the process of European integration.³⁹ In fact, it is sometimes argued that the Court of Justice has played an even more important role in the development of EU law than the formal law-making institutions of the EU.⁴⁰ As a result, the Court of Justice is sometimes criticised of pursuing judicial activism in the sense that it takes on a role of creating, rather than merely applying, law to an extent that could be considered to go beyond its intended function. For example, the Court of Justice is commonly criticised for its tendency to lean on general principles that it itself has created when interpreting EU law.⁴¹

The imperative role of the Court of Justice is particularly evident when studying the principle of mutual recognition. The principle of mutual recognition was, to a large extent, invented by the Court of Justice as a means of fuelling European integration in times when the political institutions of the EU were unable to do so due to lack of unanimity.⁴² In other words, seen in its historical context, the principle of mutual recognition thus emerged as a means of facilitating market integration. Through the principle of mutual recognition, tendencies of national protectionism hindering the free movement on the internal market could be removed without unanimously agreeing on European rules governing all sorts of behaviour and regulations on the national market. The principle of mutual recognition has since been transposed from the area of market trade to other areas of EU law. However, it is still of importance to consider the judgments of the Court of Justice, being the kernel of the development of the substantial context of the principle, in order to trace its evolvement.

³⁸ Ibid., p. 116.

³⁹ Ibid., p. 130.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² C. Janssens (Ed), 'The Principle of Mutual recognition as Judicial Impetus for the Free Movement Provisions', in *The Principle of Mutual recognition in EU Law*, Oxford University Press, 2013.

Using judgments as a legal source of authority is nevertheless a choice that needs deliberation, as it unavailingly requires a level of interpretation and thus must result in an extent of bias. When studying judgments delivered pursuant to Article 267 TFEU and the preliminary reference procedure, it must be taken into consideration what has initiated the order for reference and what has caused the referring court to ask the question. Although questions referred to the Court of Justice pursuant to the preliminary reference procedure under Article 267 TFEU concerns the interpretation or validity of the Treaties and the EU legal acts, the preliminary procedure is ultimately initiated by a referring court when it has considered such an interpretation necessary in order to enable a judgment at the national level. It is hence essential to recall that judgments pursuant to Article 267 TFEU are delivered in a specific context motivated by a certain order for reference, which ultimately could affect their value as sources of law.

1.4.4. Interpretative methods of the Court of Justice

The main interpretative method used by the Court of Justice is, somewhat simplistically described, teleological and purpose-driven.⁴³ It shall be noted in this context that it is not always clear in what sense certain purposes of EU law are to be achieved. As a result, the Court of Justice sometimes has to interpret both the *telos* of the rules to be interpreted and the *telos* of the legal context in which those rules operate.⁴⁴ This is particularly important to bear in mind when considering that the overarching purpose of creating the AFSJ, according to the Tampere Conclusions, was to enable the free movement of judicial decisions within the internal market, that the principle of mutual recognition is the cornerstone for judicial cooperation in the AFSJ and that the principle of mutual recognition is based on a high level of mutual trust between the Member States.⁴⁵

⁴³ J. Hettne & I. Otken Eriksson (eds.), *EU-rättslig metod: teori och genomslag i svenska domstolar*, (2nd edn), Norstedts Juridik, Stockholm, 2011, p.167.

⁴⁴ L M. Poiars Pessoa Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism', *European Journal of Legal Studies*, vol. 1, no.2, 2007, pp. 1-21, p. 5.

⁴⁵ European Council, Presidency Conclusions of the Tampere European Council, 15 and 16 October 1999.

1.4.5. Articles and literature

The theoretical understanding of the topic that this thesis covers further requires certain study of relevant literature. Such has been found primarily using University of Gothenburg Library online database, using numerous search words such as ‘Article 7 TEU procedure’, ‘rule of law and mutual trust’, ‘mutual recognition in criminal matters’, ‘mutual trust in AFSJ’, and ‘C-216/18 *L.M.* judgment’. This search procedure has, naturally, generated a vast number of articles. Although the study has been carried out with the ambition to provide a wholesome picture of the area of issue, the specific purpose of the thesis has required a qualitative selection of what articles and literature to study. Since the method of this thesis is to study judgments, many of the articles referenced to in this thesis are related to the judgments analysed. An attempt has been made to study primarily published and reviewed texts, but where applicable, the study also includes articles by less renowned authors. In addition, articles and texts have been found through references of articles referencing to further reading, for example via footnotes.

2. Theoretical background

2.1. The European arrest warrant (EAW)

Since the purpose of this thesis is to study how the legal preconditions for application of the FD-EAW are affected by the procedure under Article 7 TEU, it must first be established what constitutes such a legal precondition. While it is stated in Article 1(2) that any EAW shall be executed “on the basis of mutual recognition”, and the main rule must be construed to imply that a request for a surrender under a EAW shall be executed, the FD-EAW actualises the principle of mutual recognition at different levels.

Article 2(2) FD-EAW contains an exhaustive list of broadly defined categories of offences for which the verification of the dual criminality test shall be abolished under certain circumstances.⁴⁶ The listed offences, as defined by the law of the Member State issuing the EAW, give rise to the execution of a EAW without the verification of dual criminality if

⁴⁶ 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1, Article 2(2).

punishable in the issuing Member State by a custodial sentence or detention order for a maximum period of at least three years.⁴⁷ Hence, in the situations listed, the execution of the EAW requires an even higher level of trust and an even higher level of confidence in the judiciary of the executing Member States and even lesser possibility to control, compared to the cases in which dual criminality is a precondition for surrender.

There are, however, several exceptions from giving effect to a request for surrender under a EAW. Articles 3 and 4 FD-EAW list exhaustive grounds for mandatory and optional non-execution. For example, mandatory grounds for non-execution include that the alleged offence is covered by amnesty or that the requested person has already been finally judged by another judicial authority in the same matter.⁴⁸ The optional grounds for non-execution of a EAW include, *inter alia*, some situations in which the offence does not fulfil the requirement of dual criminality, the judicial authorities in the executing Member State have chosen not to prosecute, or the requested individual has already been subject to a proceeding on the same matter.⁴⁹ Hence, the grounds for non-execution appear to be in line with the objective of effective judicial cooperation based on mutual recognition and the idea that a person should neither be subject to proceedings twice nor escape justice solely based on the fact that he or she has used his or her freedom of movement on the internal market and relocated to another Member State with another, perhaps more benign, legislation in regard to an alleged offence.

Article 1(3) FD-EAW, stating that the EAW “shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in [Article 2 TEU]”, provides a possibility to refuse to give effect to a request for surrender under a EAW when doing so would entail violation of fundamental rights. Moreover, recital 10 of the preamble to the FD-EAW provides that the implementation of the FD-EAW may be suspended in the event of serious and persistent breach of the fundamental values enshrined in Article 2 TEU by the relevant Member State, determined by the Council pursuant to Article 7(2) and (3) TEU. This could thus be interpreted as yet another possibility to refuse to give effect to a surrender on the basis of fundamental rights protection.

In order to investigate the effect of the Article 7 TEU procedure on the legal preconditions for

⁴⁷ Ibid.

⁴⁸ Ibid., Article 3.

⁴⁹ Ibid., Article 4.

future application of the FD-EAW, the focus of study is therefore, more specifically, how the possibilities to make exceptions from executing a surrender are affected.

2.2. The link between respect for the rule of law and protection of fundamental rights

Although respect for the rule of law is a value enshrined in Article 2 TEU, the exact content of the principles and standards stemming from it may vary at the national level.⁵⁰ The fact that the conception of respect for the rule of law is understood differently in different Member States invites the possibility of conflicts in relation to rule of law compliance. Nevertheless, the general understanding of the rule of law in the case law of the Court of Justice, the European Court of the Human Rights (ECtHR) and in guidelines provided by the Council of Europe, is that the concept of rule of law entails respect for certain principles. These include the principle of legality which “implies a transparent, accountable, democratic and pluralistic process for enacting laws”; legal certainty; prohibition of arbitrariness of the executive powers; judicial independence and impartiality of courts; effective judicial review; respect for fundamental rights and equality before the law.⁵¹ The function of the rule of law is to ensure compliance with respect for democracy and human rights. This is of particular importance in the EU legal system, since the respect for rule of law is a prerequisite for upholding all rights and obligations deriving from the Treaties since the cooperation under EU law is so delicately balanced on the confidence among all legal authorities within the EU legal system. This means that the respect for rule of law is inherently linked to the respect for those values; one cannot be upheld if the other is not respected.

⁵⁰ European Commission, ‘Communication from the Commission to the European Parliament and the Council – A new EU framework to strengthen the Rule of Law’, COM (2014) 158 final, p. 4.

⁵¹ Ibid.

2.3. Limits to the high level of confidence and mutual trust between the Member States

It shall be noted, firstly, that the FD-EAW speaks of both mutual recognition and mutual confidence. Article 1(2) FD-EAW states that Member States “shall execute any [EAW] on the basis of the principle of *mutual recognition*”,⁵² whereas the mechanism of the EAW is based on “a *high level of confidence* between Member States”.⁵³ In his Opinion on *Aranyosi and Căldăraru*, AG Bot submitted that in the “‘mutual recognition/mutual confidence’ relationship the former imposes the latter on the Member States [and that from] the moment the principle of mutual recognition applies and constitutes the essential rule on which judicial cooperation is based, the Member States must have mutual confidence in each other.”⁵⁴ While it is evident that these are interrelated concepts, it is not entirely clear in which ways and to what extent these differ, and whether such potential discrepancies are at all intended. According to Lenaerts, “the expressions ‘mutual trust’ and ‘mutual confidence’ are interchangeable” as “in French, both those expressions are translated as ‘*confiance mutuelle*’.”⁵⁵ Consequently, for the purpose of this thesis, the concepts of mutual trust and mutual confidence are both to be considered as related to the more general notion of trust between Member States, implying the presumption of confidence in each other’s judicial systems, access to justice and compliance with fundamental rights standards by the Member States. For the purpose of this study, these are both regarded as prerequisites for the principle of mutual recognition, which more specifically means that a judicial decision lawfully decided in a Member State is recognised throughout the EU.

One of the main objections against the principle of mutual recognition as the basis for judicial cooperation in criminal matters is that such an instrument, aimed at facilitating and rendering more effective judicial cooperation, is not properly counterbalanced by guarantees of the protection of fundamental values.⁵⁶ This criticism has been particularly relevant since the draft

⁵² 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1, Article 1(2). *Emphasis added*.

⁵³ *Ibid.*, recital 10 of the preamble. *Emphasis added*.

⁵⁴ Judgment of 5 April 2016, *Joined cases Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, Opinion of AG Bot, ECLI:EU:C:2016:140, para 99.

⁵⁵ K. Lenaerts, ‘La vie après l’avis: Exploring the principle of mutual (yet not blind) trust’, *Common Market Law Review*, vol.54, no.3, 2017, pp. 805-840, p.813 footnote 28.

⁵⁶ L. Bachmaier, ‘Mutual recognition Instruments and the Role of the CJEU: The Grounds for Non-Execution’, *New Journal of European Criminal Law*, vol. 6, no.4, December, 2015, pp. 505-526.

agreement on the EU accession to the European Convention of the Human Rights (ECHR) was rejected on the grounds that such an accession would upset the underlying balance of the EU and undermine the autonomy of EU law. The reason behind this, the Court of Justice argued in Opinion 2/13, was that contracting parties to the ECHR would be required “to check that another Member State has observed fundamental rights even though EU law imposes an obligation of mutual trust between those Member States.”⁵⁷

Due to this, it could be argued that the EU lacks a proper control mechanism for checking effective protection of fundamental rights. Moreover, the EU has been criticised for seeming to allot greater importance to the principles of mutual trust and recognition than to protection of fundamental values.⁵⁸ Möstl argued in an article on the preconditions and limits of mutual trust that the application of the principle of mutual recognition in judicial matters must be regarded as “a difficult balancing act between the respect for freedoms and rights of the individual, on the one hand, and the legitimate pursuit of public interests on the other; and it is only if this balance is struck in a responsible manner that the principle works.”⁵⁹ In his book on rights, trust and transformation of justice in EU criminal law, Mitsilegas further argued that “questions related to the limits of mutual trust arising from the concerns regarding the protection of fundamental rights across the EU have morphed essentially into rule of law questions”.⁶⁰ Therefore, he criticised, it is not enough “to examine whether all Member States respect fundamental rights in individual cases [but] rather it is also essential to ascertain that fundamental rule of law safeguards are applicable in practice.”⁶¹ This includes assessment of the independence of the judiciary, as it is for the judiciary to apply the principle of mutual trust in the field of criminal law. Apart from the existence of uncertainties regarding what prerequisites need to be taken into consideration when applying the principle of mutual recognition, one of the main problems, hence, appear to be that the EU legal system lacks a proper control mechanism to ensure that a balance is struck, and EU scholars disagree to what extent this ought to be an issue of concern.

⁵⁷ Opinion 2/13 of the Court (Full Court) of 18 December 2014, *on the accession of the European Union to the European Convention of the Human Rights*, ECLI:EU:C:2014:2454, para 194.

⁵⁸ K. Lenaerts, ‘La vie après l’avis: Exploring the principle of mutual (yet not blind) trust’, *Common Market Law Review*, vol.54, no.3, 2017, pp. 805-840, p. 806.

⁵⁹ M. Möstl, ‘Preconditions and Limits of Mutual recognition’, *Common Market Law Review*, vol. 47, no. 2, 2010, pp. 405-436, p. 407.

⁶⁰ V. Mitsilegas, *EU Criminal Law after Lisbon – Rights, Trust and Transformation of Justice in Europe*, Hart Publishing, Oxford, 2016, p. 147.

⁶¹ *Ibid.*

This thesis does not, however, aim to re-examine the balance between effective judicial cooperation under mutual recognition and the protection of fundamental rights and values on a general level, but focuses specifically on the unprecedented context of having Member States potentially violating the fundamental values enshrined in Article 2 TEU. Nonetheless, the possible issue of imbalance is essential to bear in mind.

2.4. The introduction of a general fundamental rights exception from mutual trust

Although it is generally agreed that the principle of mutual recognition constitutes the cornerstone for judicial cooperation in the AFSJ,⁶² the successful operation of the principle implies that Member States must trust in each other's ability to comply with fundamental rights. Lenaerts expressed in a speech on the topic of the principle of mutual recognition in the AFSJ that this implies that "the principle of mutual recognition presupposes mutual trust and comity among the national judiciaries."⁶³ In an article on the limits of mutual trust in the AFSJ, Mitsilegas argued that the *N.S.* judgment, relating to the field of asylum law and the Dublin Regulation, constituted "a turning point in the evolution of inter-state cooperation in the [AFSJ]".⁶⁴ The "rejection by the [Court of Justice] of the conclusive presumption of fundamental rights compliance by EU Member States" he argued "signifies the end of automaticity in inter-state cooperation not only as regards the Dublin Regulation, but also as regards cooperative systems in the fields of criminal law and civil law."⁶⁵ The case in *N.S.* concerned asylum seekers from Afghanistan who were to be transferred from, respectively, the United Kingdom and Ireland, where they were presently located, to Greece, where they had

⁶² European Council, Presidency Conclusions of the Tampere European Council, 15 and 16 October 1999, establishing that the creation of a genuine European area of justice called for "enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation", emphasising that mutual recognition "would facilitate co-operation between authorities and the judicial protection of individual rights."

⁶³ K. Lenaerts, 'The Principle of Mutual recognition in the area of Freedom, Security and Justice.' Speech at The Fourth Annual Sir Jeremy Lever Lecture, All Souls College, University of Oxford, 30 January 2015, transcript accessed 25 April 2019,

https://www.law.ox.ac.uk/sites/files/oxlaw/the_principle_of_mutual_recognition_in_the_area_of_freedom_judge_lenaerts.pdf

⁶⁴ V. Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual', *Yearbook of European Law*, vol. 31, no. 1, 2012, pp. 319-372, p. 358.

⁶⁵ *Ibid.*

first entered the EU and according to the Dublin regulation had to seek asylum. The asylum seekers challenged this decision on the grounds that if they were to be transferred, they would run a real risk of being subject to inhuman or degrading treatment. It was submitted by the UK Secretary of State that the claim that the transferral to Greece would violate his rights under the ECHR was “clearly unfounded, since Greece is on the ‘list of safe countries’ in Part 2 of Schedule 3 to the 2004 Asylum Act.”⁶⁶ The Court of Justice proceeded to state that “it must be assumed that the treatment of asylum seekers in all Member States complies with the requirements of the Charter, the Geneva Convention and the ECHR.”⁶⁷ The Court of Justice further emphasised that this issue touches upon the very *raison d’être* of the EU, and in particular the creation of the AFSJ, that the mechanism of surrender is based on mutual confidence and the presumption of compliance with in particular fundamental rights by other Member States.⁶⁸ Here, it appears that the ‘safe list’ constituted a rule based on the Member States’ mutual trust in each other’s ability to ensure effective protection of fundamental rights.

However, even though the Court of Justice so strongly emphasised that the judicial cooperation is built upon the presumption that all Member States comply with fundamental rights, it was submitted that the presumption must not be considered as absolutely irrebuttable. In the *N.S.* case, it was stated that Member States must not transfer asylum seekers to another Member State “where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.”⁶⁹ Hence, by deciding that exceptions could be made from the ‘safe list’ based on mutual trust, the Court of Justice recognised that the principle does have limits and ought not constitute blind trust.

⁶⁶ Judgment of 21 December 2011, *N.S.*, C-411/10, ECLI:EU:C:2011:865, para. 38.

⁶⁷ *Ibid.*, para 80.

⁶⁸ *Ibid.*, para 83.

⁶⁹ *Ibid.*, para 94.

2.4.I. Fundamental rights – a mandatory ground for refusal or only in exceptional cases?

On basis of that, Mitsilegas argued that the *N.S.* case introduced fundamental rights as a mandatory ground for refusal of mutual recognition in criminal and civil matters.⁷⁰ Not only did the prospect of facing a real risk of being subject to inhuman or degrading treatment operate as a *possibility* for the executing Member State to refuse surrender, but it also constituted an *obligation* not to transfer. Lenaerts, on the other hand, disagreed that the *N.S.* judgment should be seen as such a general fundamental rights exception and claimed that the *N.S.* rationale must only be applied in exceptional circumstances, as the notion of ‘systematic deficiencies’ ought to be separated from ‘mere infringements’ of fundamental rights.⁷¹ If not treated as an exceptional case, Lenaerts argued, “the principle of mutual trust would become devoid of purpose and substance, triggering the fragmentation of the AFSJ.”⁷² It thus remained unclear in what ways and in which situations the violation of fundamental rights or fundamental values could be used as grounds for exception.

2.5. An issue of both political and legal character

Given that the question is of a general character, there are potentially many factors affecting the studied area of interest. The issue of this thesis can be classified in the intersection of several legal and political aspects and the topic of this thesis is essentially both legal and political by nature. As a consequence, it is not evident by which procedure issues of fundamental rights violations and issues of rule of law shall be handled.

In his Opinion on the (to this date not yet delivered) judgment in *Commission v Poland*,⁷³ AG Tanchev pondered the function of the Article 7 TEU procedure. It is debated, AG Tanchev

⁷⁰ V. Mitsilegas, ‘The Limits of Mutual Trust in Europe’s Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual’, *Yearbook of European Law*, vol. 31, no. 1, 2012, pp. 319-372, p. 358.

⁷¹ K. Lenaerts, ‘The Principle of Mutual recognition in the area of Freedom, Security and Justice.’ Speech at The Fourth Annual Sir Jeremy Lever Lecture, All Souls College, University of Oxford, 30 January 2015, transcript accessed 25 April 2019, https://www.law.ox.ac.uk/sites/files/oxlaw/the_principle_of_mutual_recognition_in_the_area_of_freedom_judge_lenaerts.pdf.

⁷² Ibid.

⁷³ Judgment of 11 April 2019, *Commission v Poland (Indépendance de la Cour suprême)*, C-619/18, Opinion of AG Tanchev, ECLI:EU:C:2019:325.

submitted, “whether Article 7 TEU operates as a *lex specialis* for monitoring and sanctioning (non-) observance of EU values” and that the infringement procedure thereby is subordinated to the Article 7 TEU procedure.⁷⁴ In the words of AG Tanchev, Article 7 TEU is “essentially a ‘political’ procedure to combat a Member State’s ‘serious and persistent breach’ of values set out in Article 2 TEU” whereas “Article 258 TFEU constitutes a direct ‘legal’ route before the [Court of Justice] for ensuring the enforcement of EU law by the Member State”.⁷⁵ Therefore, AG Tanchev concluded, the legal and political procedures are capable of running parallel to each other. It might even be argued that the combination of legal and political procedures might create greater pressure on the political authorities of the Member State in question to conform with the requirements of fundamental values set out under EU law.

2.5.1. The rule of law as matter under the jurisdiction of the Court of Justice

In the judgment of *Associação Sindical dos Juizes Portugueses*, which concerned whether the temporary withholding of salaries for judges constituted a violation of judicial independence under Article 47 of the Charter, the Court of Justice established a link between the requirement of judicial independence and the Member States’ obligation to provide remedies sufficient to ensure effective legal protection of EU law under Article 19(1) TEU.⁷⁶ According to Article 19(1) TEU, the Member States “shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.” The Court of Justice held that the “principle of effective judicial cooperation of individual’s rights under EU law referred to in [Article 19(1) TEU] is a general principle of EU law stemming from the constitutional traditions common to the Member States” and that the “very existence of effective judicial review is designed to ensure compliance with EU law is of essence to the rule of law.”⁷⁷ Furthermore, the Court proceeded to establish that it “follows that every Member State must ensure that the bodies [...] meet the requirements of effective judicial protection.”⁷⁸

The fact that the Court of Justice assumed jurisdiction over the question on the basis of Article 19(1) TEU, and in connection with Article 47 of the Charter, was “as ground-breaking as it was

⁷⁴ Ibid., para 49.

⁷⁵ Ibid., para 50.

⁷⁶ Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117.

⁷⁷ Ibid., para 36.

⁷⁸ Ibid., para 37.

surprising, even if the outcome itself was predictable”.⁷⁹ *Associação Sindical dos Juizes Portugueses* was the first time the Court of Justice opted for the solution via Article 19(1) TEU instead of just Article 47 of the Charter, since Article 19(1) TEU had never previously acted as an independent standard of review of a Member State’s ability to comply with fundamental EU values. By enabling the standard of review via Article 19(1) TEU, it could be argued that the Court of Justice brought “virtually the entire national judicial organisation under its purview”.⁸⁰

Some argue that the key to comprehend the novel solution in *Associação Sindical dos Juizes Portugueses* was the desire to enable a way for the Court of Justice to intervene in the situation of the coming case of the Polish judges.⁸¹ By arguing from the basis of Article 19(1) TEU, rather than Article 47 of the Charter, the Court of Justice avoided having to discuss in detail the scope of the Charter. This was crucial in the case of Poland, since it seemed some of the controversial changes in the Polish law did not appear to fall within the scope of EU law, but rather as questions of procedural autonomy.⁸² This constituted an important change in approach, since following the *Associação Sindical dos Juizes Portugueses*, it appears that the pivotal factor to determine whether an issue falls within the scope of the Court of Justice’s jurisdiction is not primarily whether the case concern matters regulated by EU law, but what is important is instead the role and function of the national courts as parts of the EU legal system as a whole.⁸³ The rationale behind this reasoning was that the efficient independence of courts and tribunals is vital for the judicial protection in areas of EU law to be effective. In a speech to the Polish Supreme Administrative Court in March 2018, Lenaerts argued that this is key in order for courts to be able to trust in each other’s ability to pursue EU law; in other words, it is essential in order to maintain the proper operation of a legal system based on mutual trust.⁸⁴ By establishing that judicial independence is an obligation under Article 19 TEU, being a provision of primary EU law, the Court of Justice enabled itself to deliver judgments on the rule of law situation in Poland.⁸⁵ In his Opinion on *Commission v Poland*, however, AG Tanchev,

⁷⁹ M. Bonelli & M Claes, Judicial Serendipity: how Portuguese Judges came to rescue of the Polish judiciary, *European Constitutional Law Review*, no. 14, 2018, pp. 622-643.

⁸⁰ *Ibid.*, p. 623.

⁸¹ *Ibid.*

⁸² *Ibid.*, p. 628.

⁸³ *Ibid.*, p. 631.

⁸⁴ K. Lenaerts, ‘The Court of Justice and national courts: a dialogue based on mutual trust and judicial independence’, Speech at the supreme Administrative Court of the Republic of Poland, Warsaw, 19 March 2018, transcript accessed 10 May 2019, www.nsa.gov.pl/download.php?id=753&mod=m/11/1/

⁸⁵ M. Bonelli & M Claes, Judicial Serendipity: how Portuguese Judges came to rescue of the Polish judiciary, *European Constitutional Law Review*, no. 14, 2018, pp. 622-643, p. 639.

emphasised that it is essential to demonstrate that the contested measures fall within the material scopes of Article 47 of the Charter and Article 19(1) TEU independently.⁸⁶ Nonetheless, the linking of Article 47 Charter and Article 19(1) TEU constitutes an advancement of the EU system of judicial cooperation. Hence, along with the Article 7 TEU procedure, the Court of Justice has created another, *legal*, way to deal with issues concerning the rule of law by way of reference to Article 19(1) TEU.

3. Analysis of case law

3.1. *Aranyosi and Căldăraru* - balancing mutual recognition with protection for fundamental rights

The combined judgments of *Aranyosi and Căldăraru*, were delivered by the Court on 5 April 2016, hence well before the reasoned proposals calling upon the Council to determine a breach by Hungary of the fundamental values in Article 2 TEU.⁸⁷ Yet, the Court of Justice nonetheless emphasises recital 10 of the preamble to the FD-EAW by stating that the implementation of the mechanism may be suspended only in the event of a determination under Article 7 TEU of a serious and persistent breach of fundamental values.⁸⁸ Also, the *Aranyosi and Căldăraru* judgment laid the basis for subsequent judgments in the related area of law.

The case concerned the requested surrender of two individuals in accordance with the EAW mechanism. The first request pertained to the surrender of Mr. Aranyosi, a Hungarian national accused of theft and temporarily arrested in Germany for the purpose of being subject to a prosecution in Hungary. However, the German court, recognising the prosecution *per se*, refused to surrender Mr. Aranyosi on the grounds that the Public Prosecutor of the Hungarian court could not provide information which prison Mr. Aranyosi would be held in, and it was

⁸⁶ Judgment of 11 April 2019, *Commission v Poland (Indépendance de la Cour suprême)*, C-619/18, Opinion of AG Tanchev, ECLI:EU:C:2019:325, para 60.

⁸⁷ European Parliament, European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded'

⁸⁸ Judgment of 5 April 2016, *Joined cases Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para 81.

therefore impossible to ascertain the conditions of the detention.⁸⁹ Mr. Căldăraru, a Romanian national, was convicted and sentenced to imprisonment for the offence of driving without a driving license. Mr. Căldăraru, too, was arrested in Germany. Again, the German court considered the inability of the Romanian authorities to provide information on the conditions of the prison in which Mr. Căldăraru would be held made it doubtful whether he could be surrendered under the EAW mechanism.⁹⁰

The referring courts asked, in essence, whether Article 1(3) FD-EAW should be interpreted in the sense that a Member State may or must refuse to execute a EAW where there is solid evidence that detention conditions in the issuing Member State are incompatible with fundamental rights such that no one shall be subjected to torture or inhuman or degrading treatment as enshrined in Article 4 of the Charter. Article 1(3) FD-EAW states that the EAW mechanism “shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in [Articles 2 and 6 TEU]”.

From a broader perspective, the referred question concerns whether Article 1(3) FD-EAW should be interpreted as a general fundamental rights exception to the execution of a EAW in this context, even though the wording of Article 1(3) does not explicitly provide for such an interpretation. Although mutual recognition is the basis for judicial cooperation in criminal matters, implying the presumption that all Member States comply with the fundamental values of the EU, it is recognised that violations of fundamental rights exist in the Member States.⁹¹

In answering the referred questions, the Court of Justice highlighted that the purpose of the EAW mechanism is to create a system of surrender based on the principle of mutual recognition, which itself is based upon the mutual confidence between Member States that their respective national legal systems are apt to provide equal and effective protection of the fundamental

⁸⁹ Ibid., para 39.

⁹⁰ Ibid., paras 47-57.

⁹¹ See, *inter alia*, European Commission, ‘Report 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’, COM (2011) 175 final, where reference is made to the ECtHR judgments in the cases *Peers v Greece* Application no 28524/95 (ECtHR, 19 April 2001); *Sulejmanovic v. Italy* Application no. 22635/03 (ECtHR, 16 July 2009); *Orchowski v. Poland* Application no. 17885/04 (ECtHR, 22 January 2019), concerning deficiencies in prisons in the EU.

values common to the EU.⁹² These are recognised as essential features of the AFSJ, contributing to the creation and preservation of an area without internal borders. Therefore, in order for the principle of mutual trust to operate as intended, the Member States are required to consider that all other Member States are complying with fundamental values recognised by EU law.⁹³

Aranyosi and Căldăraru was the first case in which the Court of Justice dealt directly with the balance between mutual recognition and protection of fundamental rights.⁹⁴ Essentially, the judgment affects the notion of mutual trust, upon which the principle of mutual recognition is built. In his Opinion on the case, AG Bot identified that the underlying question in both cases was “whether the force of the principle of mutual recognition is limited if there is a breakdown in the confidence which the Member States should have in each other, owing to a potential infringement of the fundamental rights which they are presumed to respect.”⁹⁵ In light of that, the Court of Justice stressed the matter in recital 10 of the preamble to the FD-EAW, in other words that the EAW mechanism as such may be suspended *only* after a determination under Article 7 TEU.⁹⁶ In the case of *Aranyosi and Căldăraru*, no such procedure had been initiated for the relevant Member States. Nonetheless, the Court of Justice recognised, exceptions from the principles of mutual recognition could be made “in exceptional circumstances”, as established in Opinion 2/13.⁹⁷ In that regard, the executing judicial authority must take into consideration information which may incur the risk of violating fundamental values. The Court of Justice moreover discussed that according to the case-law of the ECtHR, the risk of violation of Article 3 ECHR, the equivalence of Article 4 of the Charter, even creates a positive obligation on the executing Member State to make further assessments of the situation in the issuing Member State prior to executing a surrender.⁹⁸

⁹² Judgment of 5 April 2016, *Joined cases Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, paras 75 and 77.

⁹³ *Ibid.*, para 78.

⁹⁴ K. Bovend'Eerd, ‘The Joined Cases *Aranyosi and Căldăraru*: A New Limit to the Mutual Trust Presumption in the Area of Freedom, Security, and Justice?’, *Utrecht Journal of International and European Law*, vol. 32, no. 83, 2016, pp.112–121.

⁹⁵ Judgment of 5 April 2016, *Joined cases Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, paras 3-4.

⁹⁶ *Ibid.*, para 81.

⁹⁷ *Ibid.*, para 82 and Opinion 2/13 of the Court (Full Court) of 18 December 2014, *on the accession of the European Union to the European Convention of the Human Rights*, ECLI:EU:C:2014:2454 para 191.

⁹⁸ Judgment of 5 April 2016, *Joined cases Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para 90.

AG Bot also discussed the notion of creating a positive obligation to assess the conditions in the executing Member State, connecting it to the *N.S.* rationale. In the Opinion of AG Bot, the *N.S.* rationale, creating not only a possibility for, but an obligation on, the Member States to refuse to execute a request for surrender when there is evidence of systematic deficiencies in the protection of fundamental values in the issuing Member State, could not be transposed to the EAW mechanism “however tempting it may be, particularly owing to its simplicity”.⁹⁹ The reasons for this, he suggested, included that such an approach would undermine the purpose of the EAW mechanism, being to “break with the traditional rules governing the extradition [in a fashion that] is perfectly justified where the intention is to replace [the traditional rules governing extradition, i.e. with more extensive checks prior to surrender] with judicial cooperation based on mutual recognition and mutual confidence.”¹⁰⁰

Considering the potential implications of recital 10 of the preamble to the FD-EAW, AG Bot emphasised that the FD-EAW advocates “the ultimate intervention of political leaders to suspend the [EAW mechanism], since only the European Council [...] may initiate the procedure to suspend the rights of the Member State in question.”¹⁰¹ Therefore, according to his logic, had the EU legislature intended to afford the possibility to refuse to surrender, it would have done so and thus it cannot be a coincidence that it is designed in this fashion. He states that “[b]y allowing only the European Council to suspend the mechanism of the EAW by means of [Article 7(2) TEU], the Union legislature wished to regulate that situation very strictly and clearly did not intend to allow the executing judicial authorities to refuse to execute a [EAW] in such circumstances.”¹⁰²

3.1.1. The two-pronged ‘Aranyosi-test’

While the Court of Justice concluded that the existence of indications of a risk of inhuman or degrading treatment did not justify a refusal to execute a EAW in itself, it held that whenever the existence of such a risk is identified, it is necessary that the executing judicial authority make a further assessment. However, the mere existence of such a risk does not automatically

⁹⁹ Judgment of 5 April 2016, *Joined cases Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, Opinion of AG Bot, ECLI:EU:C:2016:140, para 43.

¹⁰⁰ *Ibid.*, para 48.

¹⁰¹ *Ibid.*, para 86.

¹⁰² *Ibid.*, para 87.

imply that the individual concerned will actually be subject to inhuman or degrading treatment.¹⁰³ Hence, Article 1(3) FD-EAW shall not be interpreted in the sense that the information of a mere existence of a risk of a violation of fundamental rights constitutes a general fundamental rights exception from executing a EAW. In order for the exception to be applicable, the Court of Justice held that national courts faced with this situation must perform a two-pronged test.¹⁰⁴

In the first step of the test, the executing court has to assess whether, objectively, there is evidence of such conditions indicating a violation of fundamental values.¹⁰⁵ In the second step of the test, the executing court has to further assess whether the requested individual runs a real risk of being subject to a violation of his or her fundamental rights as a consequence of the surrender.¹⁰⁶ If the two-pronged test is answered in the affirmative in both regards, the executing court may refuse to execute the surrender. Hence, in any event, it is up to the executing court to decide whether the criteria of the test are fulfilled. In that sense, it appears that the Court of Justice aims to limit the exceptions to the principle of mutual recognition in criminal matters.¹⁰⁷ While at one hand, the Court of Justice recognised that the refusal to execute and exceptions from executing a surrender on the basis of mutual recognition is justifiable in ‘exceptional cases’, it, on the other hand, left the job of determining what practically constitutes an ‘exceptional case’ for the national courts to decide.

In summary, with reference to recital 10 of the preamble to the FD-EAW, in the absence of a decision pursuant to Article 7(2) and (3) TEU, it is insufficient to establish the existence of an objective risk of violation of fundamental rights. In order for indications of violating fundamental rights as a consequence of surrender to motivate an exception from executing a request for surrender under a EAW, it is further necessary to assess the individual risk. It is essential to notice that the Court of Justice merely allowed for the *postponement*, and not permanent refusal, of a surrender in the event that both limbs of the two-pronged test should be fulfilled. This implies that the presumption of a high level of confidence is particularly strong

¹⁰³Judgment of 5 April 2016, *Joined cases Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, paras 92-93.

¹⁰⁴ *Ibid.*, paras 89-93.

¹⁰⁵ *Ibid.*, para 89.

¹⁰⁶ *Ibid.*, para 93.

¹⁰⁷ M. Krajewski ‘Who is Afraid of the European Council? The Court of Justice’s Cautious Approach to the Independence of Domestic Judges’ *European Constitutional Law Review*, vol.14, 2018, pp. 792-813.

and cannot be permanently void, but only excepted from until the deficiencies have been remedied.

3.2. *M.L.* - gauging the extent of the exceptions

In the case of *M.L.*, the request for preliminary ruling under Article 267 TFEU concerned the execution of an EAW for the purpose of surrendering Mr. M.L. for the execution of a custodial sentence in Hungary. The *M.L.* judgment was delivered on 25 July 2018, on the same day as the *L.M.* judgment, thus after the reasoned proposal regarding the alleged breach of fundamental values in Poland was submitted but around two months before the reasoned proposal regarding the conditions in Hungary was proposed to the Council. Neither Article 7 TEU nor recital 10 of the preamble to the FD-EAW are mentioned in the reasoning of the Court of Justice, most likely since no such procedure had yet been initiated against Hungary. Article 7 TEU was, however, briefly elaborated on in the Opinion by AG Campos Sánchez Bordona.¹⁰⁸

Recalling the judgment in *Aranyosi*, AG Campos Sánchez Bordona established that although recital 10 of the preamble to the FD-EAW implies that the implementation of the EAW mechanism may only be suspended in the event of a determined breach of fundamental values in accordance with Article 7 TEU, EU law allows the non-execution of a EAW by way of exception in other specific cases.¹⁰⁹ Therefore, whilst not specifically dealing with the potential impact of a determination of breach under Article 7 TEU, given that such a proposal had, at the time, not yet been submitted for Hungary, the judgment in *M.L.* is of interest to consider since it elaborates on the extent of the possible situations in which exceptions can be made from the execution of a EAW on the basis of mutual recognition. Hence, while *Aranyosi* established that exceptions can be made in exceptional circumstances, the *M.L.* judgment contributes to estimate the scope of the exceptions and the further assessment that the executing Member State is obliged to carry out when faced with indications of violations of fundamental values in order for such conditions to justify an exception from surrender on the basis of Article 1(3) FD-EAW.

¹⁰⁸ Judgment of 4 July 2018, *M.L.*, C-220/18, Opinion of AG Campos Sánchez Bordona ECLI:EU:C:2018:547

¹⁰⁹ *Ibid.*, para 36.

In the *M.L.* case, the referring court had submitted that it possessed information following *Varga and Others v. Hungary*,¹¹⁰ a judgment delivered by the ECtHR in which it was held that there was a risk of inhuman or degrading treatment in Hungarian prisons due to overcrowding. The question at issue in the case of *M.L.* was thus whether this information could rule out the existence of a real risk that the individual concerned will be subjected to violation of his fundamental rights enshrined in Article 4 of the Charter.¹¹¹ The Court of Justice held, however, that the executing judicial authority would still be required to undertake the two-pronged test from *Aranyosi* in its assessment of the existence of a real risk.¹¹² The scope of the assessment, it further held, could only include the conditions in the prison to which the individual concerned would be subject and not to evaluate the conditions of Hungarian prisons in general.¹¹³ Regarding the actual assessment of the conditions, the Court of Justice recalled that the executing judicial authority has a positive obligation to satisfy themselves that a prisoner is treated in a manner consistent with respect for his fundamental rights, in the absence of harmonised minimum standards under EU law regarding detention conditions.¹¹⁴

3.2.1. The mere receipt of a EAW is not an invitation to assess another Member State

To conclude, the mere receipt of a request for a surrender under a EAW must not be considered an invitation to assess the conditions in the issuing Member State. The reason for this approach, AG Campos Sánchez Bordona argued in his Opinion on the case, is that it is most compatible with “the principles underpinning the [FD-EAW] and with respect due to the courts of each State [...] which must not be tainted without good reason with the suspicion of widespread collusion in the infringement of Article 4 of the Charter when they issue EAWs”.¹¹⁵ The system of cooperation in criminal matters based on “mutual judicial trust”, he continued to argue, “cannot survive if the courts of the receiving State deal with requests made by the courts of the issuing State as if the latter have less sensitivity than the former when it comes to guaranteeing the protection of fundamental rights.”¹¹⁶ In other words, the receipt of a EAW cannot be

¹¹⁰ *Varga and Others v. Hungary* (Application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13) 10 March 2015.

¹¹¹ Judgment of 25 July 2018 C-220/18 PPU *M.L.*, ECLI:EU:C:2018:589, para 70.

¹¹² *Ibid.*, para 75.

¹¹³ *Ibid.*, para 78.

¹¹⁴ *Ibid.*, para 90.

¹¹⁵ Judgment of 4 July 2018, *M.L.*, C-220/18, Opinion of AG Campos Sánchez Bordona ECLI:EU:C:2018:547, para 54.

¹¹⁶ *Ibid.*, para 54.

grounds enough for the executing court to carry out an assessment of the conditions in the issuing Member State as a whole or to assess another Member State's system with reference to its own domestic standards.¹¹⁷ Hence, quite elementary, in lack of harmonisation of a minimum standard, the Member States cannot at any insinuation of deviating conditions in another Member State refuse to execute a surrender under a EAW until it has pursued an assessment satisfying its own domestic standards. That is, essentially, the entire point of judicial cooperation based on a high level of confidence. Although this presumption is not absolute, in the absence of a decision under Article 7 TEU, it cannot be rebutted without satisfying the two-pronged *Aranyosi*-test. The scope of the possibilities to refuse to execute a request for a surrender under a EAW is thus to be conceived as relatively narrow.

3.3. *L.M.* - the first indications of the effect on the judicial cooperation following the Article 7 TEU procedure

The *L.M.* judgment was, like the *M.L.* judgment, delivered on 25 July 2018. In contrast to the *M.L.* case, however, the *L.M.* concerned a surrender under a EAW issued by Poland, towards which the Commission had submitted its reasoned proposal regarding violations on the rule of law in December 2017.¹¹⁸ In that regard, *L.M.* constituted a critical point at which in the absence of a decision under Article 7(1) or (2) TEU, the Court of Justice found itself in a situation where it had to decide either to await the Council and the European Council or lead the way itself by making a decision.

The reference for preliminary ruling under Article 267 TFEU in *L.M.* fell within the context of the development and reforms of the Polish judicial system. In that sense, the *L.M.* case provided the first indications of the expected instabilities in the judicial cooperation between the Member States and Poland following the Commission's reasoned proposal submitted to the Council pursuant to Article 7(1) TEU, inviting it to confirm the existence of a clear risk of a serious breach of the rule of law.¹¹⁹ The question referred concerned whether the procedure initiated under Article 7 TEU should motivate an exception from the presumption of surrender on basis of mutual recognition under Article 1(3) FD-EAW without the executing court having to assess

¹¹⁷ Ibid., para 55.

¹¹⁸ European Commission, 'Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland', 20 December 2017, COM (2017) 835 final.

¹¹⁹ Ibid.

the real risk for the individual. In other words, the question concerned whether the second prong of the *Aranyosi*-test should be deemed unnecessary to pursue given the procedure under Article 7 TEU.¹²⁰ In *Aranyosi and Căldăraru*, the Court of Justice had recalled that the implementation of the FD-EAW could be suspended only in the event of a serious and persistent breach of the values set out in Article 2 TEU and in accordance with the procedure provided for in Article 7 TEU. In contrast to the case of *Aranyosi and Căldăraru*, a proceeding under Article 7 TEU had indeed been initiated at the time when the case of *L.M.* was delivered.

Before engaging in a deeper study of the *L.M.* case, there are a few preliminary points that shall be taken into consideration. It is noticeable that the Polish government submitted that the question should not be answered on the basis that it is hypothetical as it cannot give rise to non-surrender of a EAW. The Hungarian government contended that the question was inadmissible for the same reason.¹²¹ This contention is perhaps owing to the fact that the proceedings under Article 7(1) TEU referred to by the Irish court was merely an invitation to the Council to determine the existence of a *risk* of breach and not the determination of an actual breach in accordance with the sanctions mechanism under Article 7(2) and (3) TEU. Moreover, the Council had not even taken on the invitation in the reasoned proposals and determined the existence of a risk under Article 7(1) TEU. It shall further be recalled that recital 10 of the FD-EAW infers that the implementation of the FD-EAW shall be suspended only where there has been a decision under Article 7(2) and (3) TEU, whereas it is silent in regard to the potential effects of a procedure Article 7(1) TEU. AG Tanchev, however, dismissed these arguments following the logic that since the referring court has found it necessary to refer a question for interpretation in order to deliver a judgment on the substance matter, the presumption is strong that the question shall be answered. The Court of Justice did not address the admissibility of the question at all.

Mr. ‘L.M.’ a polish national at the time situated in Ireland, had allegedly committed multiple crimes in Poland, including illicit production, processing and smuggling of drugs and participation in an organised criminal group dealing with drugs. To that end, Mr. ‘L.M.’ was the subject of three EAWs, issued by Polish courts, for the purpose of criminal prosecution.¹²² Mr. ‘L.M.’ contended his surrender with reference to, *inter alia*, that his surrender “would

¹²⁰ Judgment of 25 July 2018, *L.M.*, C-216/18, ECLI:EU:C:2018:586, para 34.

¹²¹ Judgment of 25 July 2018, *L.M.*, C-216/18, Opinion of AG Tanchev, ECLI:EU:C:2018:517, para 30.

¹²² *Ibid.*, para 18.

expose him to a real risk of a flagrant denial of justice in contravention of Article 6 ECHR” due to, in particular, that “the recent legislative reforms of the system of justice in the Republic of Poland [would] deny him his right to a fair trial.”¹²³ In his submission, Mr. ‘L.M.’ maintained that the legislative reforms and the changes in the judiciary “fundamentally undermine the basis of the mutual trust between the authority issuing the [EAW] and the executing authority, calling the operation of the [EAW] into question.”¹²⁴

To that end, the Irish court was hesitant to surrender Mr. ‘L.M.’, as it doubted the ability of the Polish courts to pursue a fair trial in accordance with Article 47 of the Charter and Article 6 ECHR. With reference to the reasoned proposal pursuant to Article 7 TEU, the Irish court considered that the “wide and unchecked powers of the system of justice in the Republic of Poland are inconsistent with those granted in a democratic State subject to the rule of law”.¹²⁵ Therefore, there is a danger that a person surrendered for the purpose of criminal prosecution runs a real risk of being “subject to arbitrariness in the course of his trial in the issuing Member State.”¹²⁶ It therefore argued that the surrender should be refused as it would otherwise constitute a breach of the surrendered person’s rights laid down in Article 6 ECHR. This interpretation, the Irish court submitted, is also called upon by the protection of rights under Irish law and in accordance with Article 1(3) in conjunction with recital 10 of the preamble to the FD-EAW.

In contrast to the cases of *Aranyosi and Căldăraru*, and *M.L.* in which the question at issue was whether the individuals concerned ran the risk of being subject to inhuman or degrading treatment in the Hungarian and Romanian prisons, the question at issue in *L.M.* concerned whether the individual ran a risk of being deprived of the right to a fair trial due to recent changes of the Polish judiciary. The questions referred to the Court of Justice for preliminary ruling concerned, notwithstanding the conclusions in *Aranyosi and Căldăraru*, whether it is necessary for the executing judicial authority to make an assessment of the real risk of unfair trial when a national court “determines that there is cogent evidence that conditions in the issuing Member State is incompatible with the fundamental right to a fair trial because the

¹²³ Judgment of 25 July 2018, *L.M.*, C-216/18, ECLI:EU:C:2018:586, para 16.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*, para 22.

¹²⁶ *Ibid.*

system of justice itself [...] is no longer operating under the rule of law.”¹²⁷ In addition, it asked, if the answer to the first question is that a specific assessment of the requested person’s real risk of flagrant denial of justice, “is the national court obliged to revert to the issuing judicial authority for any further necessary information that could enable the national court to discount the existence of the risk to an unfair trial”¹²⁸ and if so, what guarantees would be required. It was questionable, the referring court argued, whether such specific guarantees as to a fair trial for an individual could ever be given by an issuing court where the common value of the rule of law enshrined in Article 2 TEU has been breached, given that the systematic breach of the rule of law constitutes, by its nature, a fundamental defect in the system of justice.¹²⁹ The question in *L.M.* thus concerned, more specifically, whether the setting in motion of the procedure under Article 7 TEU, without the decision being taken to its conclusion, could constitute an automatic exception from the obligation to execute a EAW on the basis of mutual recognition.

3.3.1. Regardless of Article 7(1) TEU – *Aranyosi*-test still necessary

The Court of Justice began by emphasising that “EU law is based on the fundamental premise that each Member State shares with all the other Member States [...] a set of common values on which the European Union is founded and stated in Article 2 TEU.”¹³⁰ It further settled that this is the premise that both implies and justifies the existence of mutual trust between Member States. As a result of this, Member States may be required to presume that fundamental rights, such as the right to a fair trial, have been observed by the other Member States when implementing EU law.¹³¹ Consequently, a Member State may neither require a higher national level of protection of fundamental rights than provided by EU law nor, save in exceptional cases, check whether the other Member State has actually observed the fundamental rights protection guaranteed by EU law in a specific case.¹³²

¹²⁷ Ibid., para 25.

¹²⁸ Ibid., para 26.

¹²⁹ Ibid., para 24.

¹³⁰ Ibid., para 35.

¹³¹ Ibid., with reference to Opinion 2/13 of the Court (Full Court) of 18 December 2014, *on the accession of the European Union to the European Convention of the Human Rights*, ECLI:EU:C:2014:2454, para 192.

¹³² Opinion 2/13 of the Court (Full Court) of 18 December 2014, *on the accession of the European Union to the European Convention of the Human Rights*, ECLI:EU:C:2014:2454 para 192.

Having recalled its judgment in *Aranyosi and Căldăraru*, the first issue that the Court of Justice elaborated on was whether the risk of being deprived of the right to a fair trial, like the risk of being subject to degrading or inhuman treatment, is at all capable of motivating an exception from mutual recognition as the basis for surrender.¹³³ With reference to the judgment in *Associação Sindical dos Juizes Portugueses*, it emphasised that “judicial independence forms part of the essence of the fundamental right to a fair trial” and that the right to a fair trial is “of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the value common to all Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded.”¹³⁴ Since the overarching objective of the AFSJ is to create an area characterised by freedom, security and justice, it is essential that the EAW as the facilitated mechanism for surrender is carried out between independent judicial authorities. Therefore, it is essential that the independence of judicial authorities is maintained.¹³⁵ It further established that the mutual trust upon which the EAW mechanism is built is founded on the premise that the courts in the other Member States fulfil the conditions of effective judicial protection, including the independence of courts. Consequently, in order to establish the existence of such a real risk, the Court of Justice withheld that the two-pronged test from *Aranyosi and Căldăraru*, evaluating both the objective risk and the real risk that the individual concerned will be subject to deprivation in order to justify a non-surrender.

In its decision, the Court of Justice held that “information in a reasoned proposal recently addressed by the Commission to the Council on the basis of Article 7(1) TEU is particularly relevant for the purposes of that assessment.”¹³⁶ Further, the Court of Justice explicitly established that “it is apparent from recital 10 of the [FD-EAW] that the implementation of the [...] mechanism may be suspended only in the event of a serious and persistent breach [...] of the values set out in Article 2 TEU, determined by the European Council pursuant to Article 7(2) TEU, with the consequences set out in Article 7(3) TEU.”¹³⁷ It emphasised that it follows from the very wording of recital 10 that it is for the European Council to determine a breach of the values enshrined in Article 2 TEU, and that the application of the EAW mechanism could be suspended in respect of the Member State.¹³⁸ Therefore, the Court of Justice continued to

¹³³ Ibid., para 47.

¹³⁴ Ibid., para 48.

¹³⁵ Ibid., para 55.

¹³⁶ Ibid., para 61.

¹³⁷ Ibid., para 70.

¹³⁸ Ibid., para 71.

argue, “it is only if the European Council were to adopt a decision determining, as provided for in Article 7(2) TEU, that there is a serious and persistent breach in the issuing Member State of the principles set out in Article 2 TEU, such as those inherent in the rule of law, and the Council were then to suspend [the FD-EAW] in respect of that Member State that the executing judicial authority would be required to refuse *automatically* to execute any [EAW] issued by it, without having to carry out any specific assessment of whether the individual concerned runs a real risk that the essence of his fundamental right to a fair trial will be affected.”¹³⁹ However, since no such determination had been made by the European Council pursuant to Article 7(2) TEU, and to this date it still pending, the Court of Justice held that the two-pronged test from *Aranyosi and Căldăraru*, would still need to be applied and determined by the executing court.¹⁴⁰

3.4. Concluding the cases

In conclusion, several inferences can be drawn from the above cases regarding the effect of the Article 7 TEU procedure on the legal preconditions for future application of the FD-EAW. A primary observation is that the Court of Justice appeared to adopt a very restrictive approach when it came to allowing exceptions from surrendering. The *Aranyosi* judgment was, arguably, a breakthrough in the sense that it recognised that the breach of fundamental rights could constitute a ground for non-surrender under the EAW mechanism.¹⁴¹ The conclusion from the *Aranyosi* judgment was, however, that the mere existence of indications of a risk of violation of fundamental values could not in itself motivate an exception under Article 1(3) FD-EAW from executing a EAW on the basis of mutual recognition. Hence, only if the two-pronged *Aranyosi*-test is satisfied may exceptions be made under Article 1(3) FD-EAW, meaning that in addition to the identification of an objective risk of a violation of fundamental values, the referring court would further have to assess whether there is a real risk that the individual concerned is affected by it as a consequence of being surrendered.

The *M.L.* judgment contributed, to some extent, to gauge the scope to the protection of fundamental rights as an exception from executing a surrender. Withstanding that it would be against the very purpose of a system of judicial cooperation based on trust if the mere existence

¹³⁹ Ibid., para 72. *Emphasis added.*

¹⁴⁰ Ibid., para 73.

¹⁴¹ A. P. van der Mei, ‘The European Arrest Warrant system: Recent developments in the case law of the Court of Justice’, *Maastricht Journal of European and Comparative Law*, vol. 24, no. 6, 2017, pp. 882–904, p. 904.

of a risk in an issuing Member State could justify the right for the executing Member State to pursue an assessment based on its own standards in lack of a common EU minimum standard, the Court of Justice sustained that the scope of the possibility of refusing to execute a surrender is still narrow.

3.4.1. The impact of the Article 7(1) TEU procedure

When considering the effect that the reasoned proposals under Article 7(1) TEU appears to have had on the possibilities of refusing to surrender on the basis of fundamental rights protection, the *L.M.* judgment indicated that the impact is small. In *L.M.*, in contrast to *Aranyosi* and *M.L.* the reasoned proposals under Article 7(1) TEU constituted a factor indicating a risk of breach of fundamental values. However, even though proceedings under Article 7(1) TEU had been initiated when the *L.M.* judgment was delivered, the conclusion of the Court of Justice was still the same as in the *Aranyosi* and *M.L.* judgments. In other words, even though proceedings under Article 7(1) TEU had been initiated by the Commission or the Parliament pursuant to alleged incompatibility with the rule of law, the national court must still carry out the two-pronged test and establish that there is a real risk of deprivation in the individual case in order to motivate a non-surrender.

Considering this, it seems even a decision by the Council under Article 7(1) TEU would make little difference in regard to the EAW mechanism in practice. It appears the same kind of two-pronged *Aranyosi*-test would have to be carried out in order to motivate a non-surrender based on fundamental rights protection even if the Council were to determine the existence of a clear risk of breach of Article 2 TEU. Certainly, such a decision would provide a significant factor to take into consideration when performing the two-pronged test, but the test would nonetheless have to be carried out. Referring to recital 10 of the preamble to the FD-EAW, the Court of Justice established that it is only if the Council were to come to a decision under Article 7(2) TEU and establish that there actually exists a breach of fundamental values that the implementation of the FD-EAW would be suspended. However, it is not entirely clear that a suspension of the implementation of the FD-EAW would lead to the automatic obligation to refuse to give effect to a request of a surrender under the EAW mechanism.

4. Discussion and concluding remarks

4.1 Discussion

At this point, having concluded the analysis of the cases, it is of value to shed light on some general aspects on the effect of the procedures under Article 7 TEU on the legal preconditions for future application of the FD-EAW

4.1.1. Not to be treated as a general fundamental rights exception - compare *N.S.*

In contrast to what was held in the *N.S.* judgment considering surrenders within the asylum system, the judgments analysed in this study do not provide for an obligation on the Member States to refrain from surrendering when “they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment”.¹⁴² The imposition of an obligation on the surrendering Member States was motivated by the logic that otherwise, it would imply severe deficiencies in the protection of fundamental rights in the EU legal system. A comparable rationale could be considered to be contained in Article 1(3) FD-EAW. Considering the similarity, the Mitsilegas/Lenaerts controversy of how to interpret the extent of the fundamental rights exception in the *N.S.* judgment could therefore also be relevant to the interpretation of the possibilities of non-execution of a EAW on the grounds of fundamental rights protection.¹⁴³ Mitsilegas argued that the *N.S.* judgment implied a *mandatory* ground for refusal, so that the prospect of facing a real risk of being subject to inhuman or degrading treatment operates as an *obligation*, and not merely a possibility, for the executing Member State to refuse to give effect to a surrender.¹⁴⁴ Lenaerts, on the other hand, considered the *N.S.* rationale to be applicable in *exceptional cases only*, arguing that the notion of ‘systematic deficiencies’ ought to be treated separate from ‘mere infringements’ of fundamental rights, as “the principle of mutual trust

¹⁴² Judgment of 21 December 2011, *N.S.*, C-411/10, ECLI:EU:C:2011:865, para 94.

¹⁴³ See part 2.3 above on the Mitsilegas/Lenaerts controversy.

¹⁴⁴ V. Mitsilegas, ‘The Limits of Mutual Trust in Europe’s Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual’, *Yearbook of European Law*, vol. 31, no. 1, 2012, pp. 319-372, p. 358.

would [otherwise] become devoid of purpose and substance, triggering the fragmentation of the AFSJ.”¹⁴⁵ The findings of the above case analysis indicates that in the case of the FD-EAW, it appears that the Court of Justice opted for Lenaerts’, rather than Mitsilegas’, interpretation of the extent of the exception. It shall be noted, however, that Lenaerts currently holds the position as President of the Court of Justice.

4.1.2. Pushing responsibility to national courts

Even though it may be debated how general the exception should be interpreted, in the absence of a decision under Article 7(2) and (3) TEU, the task of determining whether an individual runs a real risk of being deprived of fundamental rights by being surrendered is a responsibility of the national courts. The effect of holding on to the two-pronged *Aranyosi*-test even in the event of a procedure under Article 7(1) TEU is that the responsibility to decide the state of trust could be handed over to the national courts. As a result, from a practical perspective, the national courts are faced with a situation that is both delicate and dubious. There are indeed some potential positive effects of having the national courts assess the situation on a case-to-case basis rather than construing an automatic obligation not to surrender. For example, it allows for the executing court to determine in the individual case whether the execution of a surrender would actually run a risk of violating fundamental rights and values or not. In that sense, recalling the reasoning of AG Campos Sánchez Bordona in his Opinion on *M.L.*, the risk of tainting Member States’ good reputation without good reason and the spreading of suspicion among the Member States could perhaps be avoided.¹⁴⁶ The approach of making it the responsibility to the national courts to determine could thereby be viewed as a method of strengthening the Member States’ confidence in each other. Considering that the AFSJ is built upon a high level of confidence among the Member States, being the *raison d’être* of the EU,¹⁴⁷ the notion of mutual trust must be regarded as a value of the highest interest to preserve. Such

¹⁴⁵ K. Lenaerts, ‘The Principle of Mutual recognition in the area of Freedom, Security and Justice.’ Speech at The Fourth Annual Sir Jeremy Lever Lecture, All Souls College, University of Oxford, 30 January 2015, transcript accessed 25 April 2019,

https://www.law.ox.ac.uk/sites/files/oxlaw/the_principle_of_mutual_recognition_in_the_area_of_freedom_judge_lenaerts.pdf

¹⁴⁶ Judgment of 4 July 2018, *M.L.*, C-220/18, Opinion of AG Campos Sánchez Bordona ECLI:EU:C:2018:547, para 54.

¹⁴⁷ See, for example, Judgment of 21 December 2011, *N.S.*, C-411/10, ECLI:EU:C:2011:865, para 83.

an approach is further more lenient with the general objective of the FD-EAW to enable the free movement of judicial decisions and facilitate the procedure of surrender.

Another question that arises in this context is how much and what kind of evidence the executing court must gather in order to be able to ensure that conditions are satisfactory enough to surrender a requested individual. Both the *L.M.* and *Aranyosi* judgments stated that the executing judicial authority must assess “on the basis of material that is objective, reliable, specific and properly updated concerning the operation of the system of justice in the issuing Member State”¹⁴⁸ without specifying what such material could be and how much material would be enough to justify a non-surrender. While the *M.L.* judgment provided some guidance in what sort of evidence would be of interest for the assessment, the extent of detail is scarce.¹⁴⁹

Even though it is stated that the reasoned proposals submitted under Article 7(1) TEU are of particular interest when a national court perform the two-pronged test from *Aranyosi*, it is still up to the national courts to draw the proper inferences from the reasoned proposals. In other words, the practical implications of this approach are that it is up to national courts to determine whether the entire legal system of another Member State is generally deficient in protecting fundamental values and the rule of law. For example, in the case of *L.M.*, the referring court, consisting of a one-man judiciary, was left with the job of assessing whether the events and judicial changes pointed out in the reasoned proposals submitted under Article 7(1) TEU could constitute a violation of the rule of law to the extent that it could motivate a non-surrender. Considering the political and legal complexity of the situation, it can be questioned whether it is at all reasonable that a single judge should be left with the responsibility to reject the ability of another Member State to respect the rule of law, and at what discretion the national court may come to such a conclusion.

4.1.3. Cautious to apply rationale from *Associação Sindical dos Juizes Portugueses*

It shall be noticed, further, that even though the instrument creating the preconditions to rule on the substantial compatibility with Article 19(1) TEU had been laid down in the *Associação*

¹⁴⁸ Judgment of 25 July 2018, *L.M.*, C-216/18, ECLI:EU:C:2018:586, para 61 and Judgment of 5 April 2016, *Joined cases Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para 89.

¹⁴⁹ See, for example, Judgment of 4 July 2018, *M.L.*, C-220/18, Opinion of AG Campos Sánchez Bordona ECLI:EU:C:2018:547, para 78.

Sindical dos Juizes Portugueses judgment, the Court of Justice did not choose that path in *L.M.* While mentioned in the *L.M.* judgment, Article 19(1) TEU is merely used to establish the connection between fundamental rights protection and the rule of law, and that there can be no substantial fundamental rights protection if the judiciary is not independent.¹⁵⁰

The case of *Associação Sindical dos Juizes Portugueses* laid the ground for establishing that certain national measures are incompatible with Article 19(1) TEU and therefore must not be allowed. Had the Court of Justice chosen to apply that rationale from *Associação Sindical dos Juizes Portugueses* in *L.M.*, it would have been possible, particularly with regard to the reasoned proposal under Article 7(1) TEU, to establish that the changes in the Polish judiciary constituted a threat to the judicial independence due to its shortcomings in respect of the rule of law and therefore a breach of Article 19(1) TEU. Considering that the right to be heard by an independent court is a fundamental right ensured by Article 47 of the Charter, perhaps it would then have been possible to further construe that Article 1(3) FD-EAW would prohibit surrenders to Poland under the EAW mechanism until the situation that caused the criticism under Article 7(1) TEU was improved. Had the Court of Justice adopted such an approach, it could have established clear limits to the mutual trust, implying that trust cannot constitute the basis for surrenders where there is no substantial trust in one another's ability to observe fundamental rights and effective compliance with values such as the rule of law. The Court of Justice did not, however, choose that approach.

Following this, the reasoned proposals under Article 7(1) TEU must hence not be considered as a general fundamental rights exception, but according to the judgments analysed for the purpose of this thesis, the exceptions based on the protection of fundamental rights must only be applied in exceptional cases. Consequently, it could be interpreted as meaning that 'systematic deficiencies', in contrast to 'mere infringements', must be established in accordance with Article 7(2) and (3) TEU in order to create an automatic obligation on the executing Member State to refuse to give effect to a request in accordance with the EAW mechanism.

¹⁵⁰ Judgment of 25 July 2018, *L.M.*, C-216/18, ECLI:EU:C:2018:586, para 48.

4.2 Conclusion

The purpose of this thesis was to study the effects of the procedure under Article 7 TEU on the legal preconditions for future application of the FD-EAW. In conclusion, considering the findings in the above analysis, this study argues that the reasoned proposals under Article 7(1) TEU affects both prongs of the *Aranyosi*-test, however in different ways. It could be argued that the reasoned proposals under Article 7(1) TEU, even in the absence of a formal determination of the existence of a risk by the Council, increases, albeit only indirectly, the possibilities of making exceptions from executing a request for a surrender under the EAW mechanism by providing a close to automatic fulfilment of the first prong of the *Aranyosi*-test. In other words, the existence of reasoned proposals pursuant to Article 7(1) TEU provides significant evidence as regards the existence of an objective risk of breach of fundamental values. Still, in order for a refusal to execute a surrender to be motivated, the second prong of the *Aranyosi*-test, assessing the individual real risk, nonetheless needs to be assessed. Considering this, the reasoned proposals under Article 7(1) TEU creates at the same time an automatic obligation on the executing court to assess the individual real risk. Otherwise a surrender under the EAW mechanism would run the risk of being executed in breach of Article 1(3) FD-EAW.

Pondering this, could it really be considered a system based on a high level of trust if the Member States are obliged to double check each other's capacity to ensure protection of fundamental rights before executing a surrender? This study questions that presumption. Whilst emphasising the vital importance of the high level of confidence and the preserving of the principle of mutual recognition as an argument for non-refusal, the judgments studied indicate that the approach taken by the Court of Justice could nonetheless end up harming the high level of confidence among the Member States. This study suggests that, by letting the national courts decide on a case-to-case basis, the principle of mutual trust is diminished. If a national court is obliged to carry out further assessments when there are indications that a surrender has the potential of violating fundamental values, it will essentially come down to testing another Member State's sufficient levels of fundamental rights protection in each individual situation and hence determining on a case-to-case basis whether there is indeed confidence in each other's capacity to ensure sufficiently high levels of fundamental rights protection. In that sense, the principle of mutual trust runs the risk of being corroded. This approach appears

incompatible with the premise that mutual trust, upon which the principle of mutual recognition is based, implies that Member States may have to assume that all Member States comply with a satisfactory level of protection of fundamental values. It could be argued that once it becomes an obligation on the Member States to double check compliance in the individual situation on a case-to-case-basis, the high level of confidence between the Member States is instantly impeded. Hence, since it is for the Member State to determine whether deficiencies in the requesting Member State is enough to motivate a non-surrender on a case-to-case-basis, it results in a corrosion of the mutual trust upon which the principle of mutual recognition is based. Consequently, since mutual recognition is the cornerstone for judicial cooperation, this development may have the potential of affecting the entire operation of judicial cooperation within the AFSJ.

If the very act of letting the national courts pursue the assessment constitutes a corrosion of the principle of mutual trust, perhaps it would be beneficial for the future operation of the FD-EAW to automatically postpone requests for surrender under the EAW mechanism when a procedure under Article 7(1) TEU has been initiated. In that sense, the limits to the principles of mutual trust and recognition would be clearer. Indeed, such an approach would ultimately have an intrusive effect on the principle mutual trust by making its area of application a bit smaller. On the other hand, at least then the Member States would be able to rely on the fact that where there is mutual trust, the confidence in each other's capacity to protect and comply with fundamental values is profound. Therefore, in the long run, such intrusive measures may be the way to help the principle of mutual recognition survive as the basis for judicial cooperation in the AFSJ.

In other words, in order to protect the notion of confidence in each other's capacity to comply with fundamental values, perhaps it is necessary to automatically postpone the application of the FD-EAW in regard of the Member State in question and not apply the two-pronged *Aranyosi*-test. In the *L.M.* case, being so far the only case delivered pursuant to Article 7 TEU after such a proceeding has actually been initiated, the Court of Justice recognised that the procedure under Article 7(1) TEU is of importance even though it only has the potential of establishing a risk and not establish the actual existence of a breach. Therefore, it ought not be considered too contentious to take the reasoned proposals into consideration until the opposite has been proven, given that the EAW mechanism and the AFSJ in its entirety is based on a notion of a high level of mutual confidence in each other's capacity to ensure fair and effective

judicial systems throughout the EU. Such an approach would mean that the mutual trust among the Member States is slightly reduced. Nevertheless, it would ensure that where there is mutual trust, at least it is profound and not blind.

4.3. Final reflections and suggestions for further research

Beyond the scope of this thesis, it can be pondered why the Court of Justice chose not to apply the *Associação Sindical dos Juizes Portugueses* rationale in its judgment on *L.M.* The case of *Commission v Poland* raised the question of whether issues with the rule of law as a result of the organisation of the national court system really ought to fall under the jurisdiction of the Court of Justice or whether it is to be considered a matter of procedural autonomy. Perhaps the awaited judgment by the Court of Justice in the *Commission v Poland* case will provide clarity to the question. Nonetheless, further research on the principle of mutual trust in relation to issues of the rule of law is indispensable for the future proper operation of a system of judicial cooperation based on trust. In relation to that, it is also of relevance to further consider what function the Article 7 TEU procedure shall have. Following the findings presented in this study, particularly the function and impact of the preventative measures under Article 7(1) TEU on the judicial cooperation in the AFSJ is uncertain.

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