



20 Years Anniversary of the Tampere Programme

Europeanisation Dynamics of the EU Area of Freedom, Security and Justice

Sergio Carrera, Deirdre Curtin and Andrew Geddes



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Freedom, Security and Justice

EDITED BY

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EU2019.FI Finland's Presidency
of the Council
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18. 'SCENES FROM A MARRIAGE': TRUST, DISTRUST AND (RE)ASSURANCES IN THE EXECUTION OF A EUROPEAN ARREST WARRANT

Pedro Caeiro

1. Introduction

In the twentieth anniversary of the famous Conclusions of the Tampere European Council, it might be interesting to revisit the notion of mutual trust as the proclaimed foundations of mutual recognition: back in 1999, was the 'cornerstone' built on solid grounds – or has it been floating, since then, over a romantic plan drawn by some *bona fide* architects? This Chapter will focus on trust and assurances and, especially, on the most recent jurisprudence of the Court of Justice of the European Union (CJEU) on the subject¹.

1 CJEU, Judgment, Case C-220/18 PPU, *ML / Generalstaatsanwaltschaft Bremen*, 25 July 2018, ECLI:EU:C:2018:589 (hereinafter, *ML*), and CJEU, Judgment, Case C-128/18, *Dorobantu*, 15 October 2019, ECLI:EU:C:2019:857 (hereinfter, *Dorobantu*).

2. Context

For the past twenty years, mutual recognition has basically amounted to enhancing the effectiveness of judicial cooperation, or, to be more precise, it has worked as the driving belt of the criminal policy of the issuing Member State(s), extending the reach of domestic decisions in criminal matters across the whole territory of the European Union. The lubricant used on that driving belt was mutual trust, more as a normative assumption than as an empirically ascertained situation.

Up until 2016, several decisions of the CJEU have equated mutual recognition with maximal execution. To that purpose, they have built a system of judicial cooperation hermetically sealed vis-à-vis the protection of human/fundamental rights not reflected in secondary law² and have affirmed – obviously, within the scope of EU law – the prevalence of EU standards of protection over the ones provided for by national constitutions, even where the former were lower than the latter³.

However, the judgment in *Aranyosi / Caldăraru*⁴ has brought an important change of perspective to the law and practice of judicial cooperation in the EU and, in particular, to the configuration of mutual recognition. The Court has made clear that the principle of mutual recognition and the duties arising therefrom do not supersede the positive obligation to prevent inhuman or degrading treatment of the individual sought.

Therefore, ‘where the judicial authority of the executing Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State, (...) that judicial authority is bound to assess the

2 See CJEU, Judgment, Case C-396/11, *Radu*, 29 January 2013, ECLI:EU:C:2013:39, para. 36: ‘the executing judicial authority may make the execution of a European arrest warrant subject solely to the conditions set out in Article 5 of that framework decision.’

3 CJEU, Judgment, Case C-399/11, *Melloni*, 26 February 2013, ECLI:EU:C:2013:107, esp. para. 55 f.

4 CJEU, Judgment, Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi / Căldăraru*, 5 April 2016, ECLI:EU:C:2016:198 (hereinafter *Aranyosi*).

existence of that risk when it is called upon to decide on the surrender to the authorities of the issuing Member State of the individual sought by a European arrest warrant. The consequence of the execution of such a warrant must not be that that individual suffers inhuman or degrading treatment⁵.

The judgment in the case *ML* led the Court to develop the second step of the test put forward in *Aranyosi*. The Court stated that, under Article 15 (2) of the Framework Decision on the European Arrest Warrant⁶ and the principle of sincere cooperation, 'the executing judicial authority and the issuing judicial authority may, respectively, request information or give assurances concerning the actual and precise conditions in which the person concerned will be detained in the issuing Member State'⁷.

As far as this author knows, it is the first time that the Court uses the concept of assurances / guarantees in the field of judicial cooperation in criminal matters since the revocation, in 2009, of the former Article 5 (1) of the Framework Decision on the European Arrest Warrant⁸. In that context, the executing authority could ask for an assurance that the individual tried *in absentia* would have the right to request a new trial. Strictly speaking, it was not really an assurance, in the sense of a guarantee of future practice, but rather a request for certified information on the foreign legal system to be provided by a reliable source (the issuing judicial authority). In contrast, the notion of assurances in *ML* seems to correspond broadly to the one used in classic judicial cooperation, because the assurances refer to the way in which the surrendered person will be dealt with, in cases that presuppose, to some extent, a situation of distrust. This raises four questions.

5 *Ibid.*, para. 88.

6 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002, p. 1 f.

7 *ML*, para. 110; in a similar vein, see *Dorobantu*, para. 67 f.

8 Article 2 (1) of the Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, OJ 81, 27.3.2009, p. 24 f.

3. The Questions

First question: should the judgments in *ML* and *Dorobantu* be interpreted in the sense that, in the said cases, the executing authorities are entitled to *request* from the issuing authorities *guarantees* that the detainee's rights will be respected?

Apparently, the answer should be in the negative. In *ML*, the Court said that the executing and the issuing authorities may, '*respectively*, request information or give assurances' (emphasis added).

Nevertheless, in *Dorobantu*, the distinction is not as clear, and a *dictum* in the judgment suggests yet a different approach: 'Last, it should be pointed out that, while it is open to the Member States to make provision in respect of their own prison system for minimum standards in terms of detention conditions that are higher than those resulting from Article 4 of the Charter and Article 3 of the ECHR, as interpreted by the European Court of Human Rights, a Member State may nevertheless, as the executing Member State, *make the surrender to the issuing Member State of the person concerned by a European arrest warrant subject only to compliance with the latter requirements*, and not with those resulting from its own national law' (emphasis added)⁹.

It is unclear whether the Court meant to rule that the executing authorities can make surrender *conditional* on compliance (following guarantees) – a sort of resolute condition that would allow for, eg., the revocation of the decision to surrender should the issuing Member State fail to honour the assurances¹⁰ – or

⁹ *Dorobantu*, para. 79.

¹⁰ This was the stance taken by the Portuguese courts in the notorious case *Abu-Salem*: following a motion filed by the extradited individual after his extradition to India, the High Court of Lisbon found that the Republic of India had failed to fulfil the assurances it had provided regarding, *inter alia*, the respect for the specialty rule, and has thus revoked the decision to extradite (*Acórdão do Tribunal da Relação de Lisboa*, proc. 3880/03-3, 14 September 2011, available at www.dgsi.pt). The decision was upheld by the Portuguese Supreme Court, which found further that the presence of the individual in India is now 'illegal' (*Acórdão do Supremo Tribunal de Justiça*, proc. 111/11.7YFLSB, 11-01-2012, available at www.dgsi.pt). Nevertheless, the Portuguese Government has not (yet) enforced the decision by requesting the return of the individual.

simply meant to restate *Melloni* and stress that the standards with which the guarantees (if provided) must comply is the one set by European law.

Be it as it may, since the Court has also ruled that guarantees of a certain kind *must* be relied upon by the executing authorities, save for exceptional circumstances¹¹, it is likely that providing them in these cases will become common practice. In this context, assurances are intended to restore the shaken confidence – or, borrowing from Günther Jakobs's doctrine, they are used to counterfactually reaffirm the worthiness of trust. This is also in line with the argument according to which trust relates to the practice, to the empirical action of the authorities, not to the legal systems of the Member States¹².

Let us now turn to the second question. In his Opinion, the Advocate General has justified the special relevance of the assurances as follows: 'as the expression of an obligation which has been formally assumed, if that commitment is breached, it may be relied on by the person sought before the judicial authority of the issuing Member State'¹³.

The Court agreed, in essence, with this reasoning, but has nevertheless added a conditional clause that may change the meaning of the said assertion: 'a failure to give effect to such an assurance, in so far as it may bind the entity that has given it, may be relied on as against that entity before the courts of the issuing Member State'¹⁴.

11 See *infra*.

12 P. Caeiro (2018), 'Una nota sobre reconocimiento mutuo y armonización penal sustantiva en la Unión Europea', in L. Arroyo Jiménez and A. Nieto Martín (eds.), *El Reconocimiento Mutuo en el Derecho español y europeo* (Marcial Pons), p. 305–310.

13 Opinion of Advocate General Campos Sánchez-Bordona, Case C-220/18 PPU, 4 July 2018, ECLI:EU:C:2018:547, para. 64. In the original language: 'En cuanto expresión de una obligación asumida de manera formal, si se viera defraudada, podrá hacerse valer ante la autoridad judicial del Estado de emisión por la persona reclamada'.

14 Almost all of the linguistic versions that this author is able to understand concur with the English version: 'la violation d'une telle assurance, en ce qu'elle est susceptible de lier son auteur, pourrait être invoquée à l'encontre de ce dernier devant les juridictions de l'État membre d'émission'; 'könnte ein Verstoß gegen eine solche Zusicherung, soweit sie den Erklärenden bindet, diesem gegenüber vor den Gerichten des Ausstellungsmitgliedstaats geltend gemacht werden'; 'la violazione di una simile garanzia, poiché è ido-

Apparently, the AG has boldly affirmed the right of the individual to avail him or herself of the guarantee before the issuing authorities, whereas the Court has taken a more cautious approach, according to which such right may be exercised *if* the guarantee is binding on the authorities of the issuing State.

Both perspectives seem problematic. Neither of them identifies the source where such right is to be drawn from. Is it implicitly granted by EU law? If that is the case, a much deeper and more precise elaboration would be needed, in order to point out the principles and norms that generate that individual right. In the second place, the approach taken by the Court (*‘in so far as it may bind the entity that has given it, may be relied on’*) raises more questions than answers. As guarantees are generally binding in the horizontal relations (between States)¹⁵, the Court seems to refer to their binding effect in the vertical relations (between the State and the individual). However, the Court does not provide criteria in order to determine whether or when are the guarantees binding in the latter sense.

True, the conditional clause might intend to refer the issue to the domestic legal order of the issuing Member State: the right may be exercised... as long as the respective national law provides for it. If that is the purpose of this jurisprudence, it does not really add much to the protection of the individual, since the Court has not made the duty to execute the EAW conditional on the actual ability of the assurance to generate individual rights under the respective domestic law.

nea a vincolare il suo autore, potrebbe essere fatta valere, in caso di sua violazione, dinanzi alle autorità giudiziarie dello Stato membro emittente’; ‘el incumplimiento de esta garantía, en la medida en que puede vincular a quien la preste, podría invocarse contra este ante los órganos jurisdiccionales del Estado miembro emisor’ (emphasis added). The sole exception is the Portuguese version, which does not render the notion of conditionality, but affirms that the commitment *is* binding on the entity that undertakes it and its breach *can actually* be relied upon by the sought individual before the courts of the issuing Member State, thereby keeping the exact meaning of the Opinion of the Advocate General: *‘a violação desse compromisso, que vincula o seu autor, poderá ser invocada contra ele perante os órgãos jurisdicionais do Estado-Membro de emissão’ (emphasis added).*

15 On the binding nature of guarantees, as unilateral acts (promises), under international law, see C. Eckart (2012), *Promises of States under International Law*, Hart Publ.

Finally, neither the Opinion nor the decisions establish to which *effects* may the individual avail himself or herself of the violation of the assurance. For instance: if the issuing State breaches its commitment not to incarcerate the individual in overpopulated prisons, may he or she resort to the respective courts with a view to obtain a judicial decision ordering that the competent authority respects the guarantee? Or does the violation (only) give rise to a right to compensation? Or – again – will the consequences be those provided for by the issuing State's law (if any)?

The last two issues contend with the relationship between the CJEU and the European Court of Human Rights (ECtHR). In principle, the latter will refrain from examining issues related to the protection of human rights when they fall within the competence of the EU, pursuant to the principle of equivalent protection¹⁶. Nevertheless, after the 'warning' in *Pirozzi*¹⁷, the ECtHR made clear, in *Castaño*¹⁸, that its jurisdiction over human rights violations is not precluded by the circumstance that such violations occur within the scope of application of EU law, in particular in the execution of a European arrest warrant.

The first question is the *sufficiency* of guarantees provided by *judicial authorities*. Relying on the Opinion of the Advocate-General in *ML*, the CJEU found that 'When that assurance has been given, or at least endorsed, by the issuing judicial authority, (...) the executing judicial authority, in view of the mutual trust which must exist between the judicial authorities of the Member States and on which the European arrest warrant system is based, must rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of Article 4 of the Charter'¹⁹. In contrast, as guarantees provided by the Executive or by its members are 'not given by a judicial authority', they 'must be evaluated by carrying out an

16 ECtHR, Judgment, App. no. 45036/98, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, 30 June 2005, esp. para 156 f. and 165.

17 ECtHR, Judgment, Req. no. 21055/11, *Pirozzi c. Belgique*, 17 April 2018.

18 ECtHR, Judgment, Req. no. 8351/17, *Romeo Castaño c. Belgique*, 9 July 2019.

19 *ML*, cit., para. 112.

overall assessment of all the information available to the executing judicial authority²⁰ – in other words, they are only to be taken into consideration as a piece of relevant information.

The almost absolute obligation to execute an EAW when the assurances are given or endorsed by the issuing judicial authorities is consistent with the paradigm underlying the EAW. However, one may wonder whether such guarantees satisfy the criteria of the ECtHR. The Strasbourg Court has consistently held that the guarantees provided by the office of judicial authorities such as the Public Prosecutor were not binding on the respective States and thus could not be accepted as a means of circumventing the obstacles to extradition arising from the risk of ill-treatment by the requesting State²¹.

Against this background, the case-law of the CJEU seems paradoxical. On the one hand, judicial authorities do not have the competence to bind their states at the international level. On the other hand, the Court does not give particular relevance to the guarantees provided by the bodies which usually have the competence to act in the international sphere and bind their state vis-à-vis other States.

The picture that emerges from this reasoning is that trust within the EU has an *institutional* nature: every judicial act is to be fully trusted, but non-judicial acts are only to be taken into consideration, even when they are issued by authorities who have the competence to take on international obligations.

Nevertheless, it would not be surprising that the Strasbourg Court would apply the *Bosphorus* doctrine in this regard and come to the conclusion that guarantees in the execution of a EAW are an *autonomous* concept of EU law²², forming part of a *sui generis* pro-

20 *ML*, cit., para. 114.

21 ECtHR, Judgment, App. no. 14038/88, *Soering v. The United Kingdom*, 7 July 1989, para. 97 f.; ECtHR, Judgment, App. no. 2440/07, *Soldatenko v. Ukraine*, 23 October 2008, para. 73 f.; ECtHR, Judgment, App. no. 54131/08, *Baysakov and Others v. Ukraine*, 18 May 2010, para. 51.

22 This could well be one of the autonomous concepts ‘underpinning the system of mutual recognition’: see V. Mitsilegas, ‘Autonomous Concepts, Diversity Management and

cedure in a *sui generis* political context²³. As a consequence, they are *not* classic promises under public international law and do not have to bear the same features, as long as the system where they operate affords, as a whole, an equivalent protection to human rights.

Concerning the scope of the duty to ensure the rights of the surrendered person, the Court ruled that the executing authority does not have the obligation to check whether the whole prison system of the issuing Member State complies with fundamental rights, but only to assess the conditions of the prison where the individual will stay immediately after surrender and the facilities where he or she will presumably serve his / her sentence²⁴. The pragmatic reasons underlying this decision are obvious. But – again – is this enough to comply with the criteria set by the ECtHR?

Arguably, the jurisprudence in *ML* and *Dorobantu* is hardly sufficient to provide an effective protection against ill-treatment, especially in cases which presuppose, by definition, systemic or generalised deficiencies of such protection. If the ECtHR faced a case where a non-EU State had provided reliable guarantees that the rights of the detainee would be respected (no torture, no ill-treatment) in *some* prisons, but not necessarily in *other prisons* to which he or she might be transferred in the course of the execution of the sentence, would the decision to extradite comply with the Convention? Arguably it would not, because the guarantees would not have effectively averted the risk of ill-treatment.

Moreover, the compliance with the absolute obligation imposed by Article 4 of the Charter of the Fundamental Rights of the European Union and Article 3 of the European Convention on Human Rights cannot be weighed against the 'excessive' amount of work for the authorities involved, or with the 'risk of impunity', as sug-

Mutual Trust in Europe's Area of Criminal Justice', forthcoming in *Common Market Law Review* (publication expected in issue 1/2020); manuscript kindly made available by the author.

23 In this sense, the recognition of autonomous concepts of EU law by the ECtHR would be the dogmatic correlate of the institutional approach taken in *Bosphorus*.

24 *ML*, cit., para 77 f.; *Dorobantu*, cit., para 64 f.

gested by the Court. There seems to be no place, in this respect, for the ‘EU exception’, grounded on the circumstance that the requesting/issuing state is a member of the EU.

The convergence with the criteria set by the ECtHR can only be ensured if the CJEU allows the executing Member State to request from the issuing Member State *comprehensive* assurances that bind the latter to always comply with Article 4 of the Charter while dealing with that particular individual. Apparently, such requests already take place at an informal level, allowing for the execution of European arrest warrants in situations which otherwise could be problematic.

4. Conclusion

At first glance, the provision of guarantees does not bode well with cooperation mechanisms based on mutual trust. However, life changes overtime and this might affect trust. The very nature of the object of trust – the practice of the States – renders it vulnerable to departures more or less serious or frequent from the applicable pattern, even when the legal regulation lives up to irreprehensible levels of protection. In any case, after 20 years of marriage, it is better to renew the vows than to let distrust fester and contaminate the relationship.

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