The *LM* test and the Italian Court of Cassation: Compliance with the CJEU's case law and doubts concerning the protection of the right to an independent and impartial tribunal established by law

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- **EAW:** extradition mechanism that applies between the EU Member States
    1. Based on the principle of mutual recognition
    2. Cooperation between judicial authorities of the Member States
    3. Grounds for refusal of recognition and execution typified in the framework decision
- Among the grounds for refusal, one concerns the *ne bis in idem* principle, another the *in absentia* proceedings, but none relates to the protection of fundamental rights in general
- Principle of mutual trust: requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States **to be complying with EU law and particularly with the fundamental rights recognised by EU law** (Avis C-2/13, para 191)

ECJ 5 April 2016, joined cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*

- Court's reasoning based on ECJ 21 December 2011, joined cases C-411/10 and C-493/10, *NS and others*
- Problems caused by systemic deficiencies in the detention conditions in Hungary and Romania (Article 4 of the Charter of Fundamental Rights / Article 3 ECHR)
- Step one: risk of being exposed to a systemic or generalised deficiency (information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State)
- Step two: verify in a specific and concrete manner whether there are serious and substantiated reasons to believe that the person concerned runs the risk of being subjected to a violation of their rights

ECJ 25 July 2018, case C-220/18, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*

- Confirms *Aranyosi and Căldăraru*
- How to verify detention conditions?
  - ECtHR: holistic approach, *Mursić v Croatia*. If the detainee has less than 3 square metres of space, strong presumption unless
    - the limitation of personal space was brief, occasional and minor
    - there was adequate freedom of movement outside the cell, which was reflected in suitable activities
    - the detention facility has been found to have decent overall conditions and there are no circumstances that aggravate detention

ECJ 15 October 2019, case C-128/18, *Dorobantu*

- Confirms previous case law
- The executing judicial authority must take account of all the relevant aspects of the detention condition in the prison in which it is actually intended that that person will be detained, such as the personal space available to each detainee in the cells, sanitary conditions and the extent of the detainee's freedom of movement within the prison.
- As regards, in particular, the personal space available to each detainee, the area occupied by sanitary facilities should not be considered, while the area occupied by furniture should be taken into account. Detainees must have the possibility of moving normally within the cell

Court of Cassation:

- **Judgment I June 2016, n. 23227 (*Barbu*):**
  - Annulment with referral and criticism of the Court of Appeal for failing to take into account the elements resulting from a report of the European Committee for the Prevention of Torture concerning overcrowding in Romanian prisons, poor hygienic conditions and poor lighting, and ventilation, and for holding, on the contrary, that the document did not demonstrate the current and concrete danger that the requested person could be exposed to the risk of inhuman treatments or torture
  - The Court of Appeal is urged to carry out an additional preliminary enquiry in order to obtain additional information concerning the fact that the requested person would be detained in a prison facility, the name of the facility, the minimum intramuratory space, the hygienic and sanitary conditions and the national or international mechanisms for monitoring the actual detention conditions

Court of Cassation:

- **Subsequent case law:**
  - Focus on the objective, reliable, specific and properly updated information resulting from the ECtHR case law
  - In some cases, the reason for annulment was the failure to carry out the test and to request information from the competent authorities of the issuing Member State **(judgment I January 2016, n. 23277; judgment 18 August 2016, n. 35255; judgment 21 September 2016, n. 40032)**
  - In others, the Court based its ruling on the fact that the information, although obtained by the Courts of Appeal, was not sufficient to carry out the assessment required by the Court of Justice, as it was inadequate to identify the prison where the requested person would serve their sentence and/or the detention regime that would apply to them and/or the space available in the cell **(judgment 11 October 2017, n. 47891 and judgment 6 November 2017, n. 51287)**

Court of Cassation:

- **Subsequent case law:**
  - In other cases, however, the Court of Cassation rejected the appeals lodged by the defendants
  - The Courts of Appeal had received adequate information to carry out their assessment, ruling out even the hypothetical danger of inhuman or degrading treatment
  - Or, more frequently, the defendants had merely referred to *Aranyosi and Căldăraru* without attaching any element that would make it possible to consider the danger proven
  - **Judgment 10 May 2018, n. 21175; Judgment 6 July 2018, n. 31375; Judgment 30 May 2019, n. 24436**

ECJ, 25 July 2018, C-216/18 PPU, *Minister for Justice and Equality (Deficiencies in the system of justice) (LM)*

- The *Aranyosi and Căldăraru* test applies to violation of the right to a fair trial (right to an independent tribunal)

ECJ, 17 December 2020, joined cases C-354/20 PPU e C-412/20 PPU, *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)*

- The second part of the test must always be performed

ECJ, 22 February 2022, joined C-562/21 PPU and C-563/21 PPU, *Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)*

- First step of the *Aranyosi and Căldăraru* test: overall assessment
- Second step of the test (if EAW issued for conducting a criminal prosecution): information provided by the requested person relating to his or her personal situation, the nature of the offence for which that person is prosecuted, the factual context surrounding that EAW or any other circumstance relevant to the assessment of the independence and impartiality of the panel of judges likely to be called upon to hear the proceedings in respect of that person
- Second step of the test (if *in executivis* EAW): information provided by the requested person relating to the composition of the panel of judges who heard his or her criminal case or to any other circumstance relevant to the assessment of the independence and impartiality of that panel

ECJ, 31 January 2023, C-158/21, *Puig Gordi and others*

- The *LM* test applies to cases of systemic or generalised deficiencies in the operation of the judicial system of the issuing Member State where the competent judicial authorities manifestly lack jurisdiction

Court of Cassation:

- ***LM* test:**
  - Focus on the objective, reliable, specific and properly updated information resulting from the ECtHR (e.g. Disciplinary Chamber of the Polish Supreme Court) and the ECJ case law (infringement procedures against Poland)
  - Applications rejected as based on mere references to the ECJ's case law. Lacking any reference to the actual impact of the reforms affecting the independence of the judiciary on the criminal proceedings conducted or to be conducted in Poland, the refusal to surrender cannot be based on general remarks **(judgment 29 november 2018, n. 54220; judgment 3 December 2019, n. 49548)**

Court of Cassation:

- ***LM* test:**
  - In order to refuse surrender to another Member State because of the danger that the person may be subjected to proceedings in violation of the right to a fair trial, it is not sufficient for the requested person merely to denounce the serious systemic deficiencies in the issuing Member State, since they must allege specific and actual circumstances that may justify the suspicion of the unfair nature of the proceedings **(judgment 17 February 2021, n. 6633; judgment 14 April 2022, n. 14937)**
  - By reason of their relevance, the elements that have arisen in particular after the judgment under appeal was issued require a new assessment of the question as to the lawfulness of the surrender. Such an assessment must necessarily be carried out by the Court of Appeal, since the Court of Cassation, although competent to examine the merits of the issues referred to it, cannot substitute itself to the latter in the factual assessment of new elements **(judgment 21 May 2020, n. 15924)**

Foreign courts:

- **Ireland**
  - *Artur Celmer* (2019): “There was no evidence of the impact of any of the criticised changes upon trials conducted in any of the three regional courts involved”
  - *Dariusz Florczak* (2020), *Jakub Liszkiewicz* (2021), *Rafał Łukasik* (2021), *Tomasz Latek* (2021), *Wojciech Orlowski* (2021), *Liszkiewicz e Orlowski* (2022)
  - *Rafał Łukasik*: “Nowhere in her report does (the lawyer) identify any particular feature of the respondent’s circumstances, or any particular feature of the proceedings involving the respondent, which would indicate a particular risk for the respondent”

- **United Kingdom**
  - *Lis, Lange, Chmielewski* (2018), *Lis and Anor v Regional Court in Warsaw* (2019), *Circuit Court of Warszawa-Praga against Patryk Michal Maciejec* (2019), *Wozniak v District Court in Gniezno* (2020): no individual risk

Foreign courts:

- **The Netherlands**
  - "All information provided on these measures confirmed the impact on the independence of the Polish judiciary and, as a result, on the right to a fair trial of the concerned individuals"
  - "In the absence of any information provided by the requested person demonstrating a substantial risk of violation the CoA maintained that surrender should be allowed"
  - A. Martufi, D. Gigengack, *Exploring mutual trust through the lens of an executing judicial authority: The practice of the Court of Amsterdam in EAW proceedings*, in *New Journal of European Criminal Law*, 2020, p. 296
  - **ECJ, 17 December 2020, joined cases C-354/20 PPU e C-412/20 PPU, *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)***

ECJ, 27 May 2019, joined cases C-508/18 and C-82/19 PPU, *OG (Parquet de Lübeck)*

- Authorities that participate in the administration of justice
- The decision to issue the EAW is based on a national procedure subject to review by a court → The requested person must have benefitted from adequate procedural safeguards in the issuing Member State and the protection of their fundamental rights must be ensured
- This requires independent judicial authorities
- They are independent if there are statutory rules and an institutional framework capable of guaranteeing that the issuing judicial authority is not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, inter alia, to an instruction in a specific case from the executive

ECJ, 17 December 2020, joined cases C-354/20 PPU e C-412/20 PPU, *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)*