SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2023), pp. 115-130

CREATION OF A NEW GROUND FOR REFUSAL OF EXECUTION OF THE EUROPEAN ARREST WARRANT BY CASE-LAW: THE EXISTENCE OF A SERIOUS, CHRONIC AND POTENTIALLY INCURABLE DISEASE - A POSSIBLE IMPUNITY? EFFECTS ON PUBLIC SAFETY

S. FRANGULOIU

Received 30.10.2023; accepted 29.11.2023
https://doi.org/10.55516/ijlso.v3i1.133

Simona FRANGULOIU
Contributor Transilvania University Brasov
Trainer National Institute of Magistracy
E-mail: simonafranguloiu@yahoo.com; simona.franguloiu@unitbv.ro
ORCID: https://orcid.org/0009-0004-0659-0512

Abstract

In the Advocate General's view, the executing court must in principle respect the (exhaustive) grounds for non-execution expressly provided for in Framework Decision 2002/584 (Articles 3, 4 and 4a), i.e. grounds strictly related to the offences prosecuted and the progress of the criminal proceedings against them and only in exceptional circumstances, where there are sufficient grounds for assessing a serious risk of a breach of Articles 3 or 4 of the Charter for reasons inherent in the state of health of the sought person, which endangers his life, the executing court may, after receiving relevant information from the issuing court and insofar as the serious risk persists, suspend the execution of the EAW (European Arrest Warrant) already decided, but not lead to its refusal. The exceptional character would result not so much from the general conditions of detention or medical care in the issuing Member State itself, but from the surrender itself, in so far as it could, as such, imminently endanger the life, physical integrity or health of the sought person. Likewise, the circumstances of the case do not allow the surrender to be classified as inhuman treatment, since there are no indications to date to suggest that the wanted person will not receive the necessary medical care in the issuing State.

Key words: *Union law; European arrest warrant; Risk of impunity; Public safety.*

INTRODUCTION

The importance of international judicial cooperation, particularly between Member States, is of paramount importance, especially in the enforcement of the European Arrest Warrant, as a streamlined form of extradition, and also has an impact on the principle of social security, in terms of legal certainty. The grounds for refusing to execute a European arrest warrant are expressly and exhaustively specified in the Framework Decision, to which the Court of Justice of the European Union has added other grounds. The present scientific approach aims to analyze the latest ground for refusal of execution added by the European Court, which has major implications for public security and safety through the new ground added which could lead in practice to the risk of impunity and inefficiency of the criminal process, including the sentencing decision.

I. THE FACTS AND THE PRELIMINARY QUESTION

The opinion of Advocate General Manuel Campos Sanchez Bordona presented on 1 December 2022[1], which is of high scientific value, once again provides us with a brief analysis not only of the grounds for refusing to execute a European arrest warrant, but also an analysis of the possibility of extending the mandatory grounds for non-execution of a EAW not provided for in the FD by means of case law, as the CJEU did in this case[2].This analysis, in the view of the grounds relied on by the referral court, without attempting to substitute ourselves for the European court which ruled in the case and without criticizing the solution handed down, obliges us to carry out an analytical exercise from the perspective of the possibility of impunity, but also from the point in view of the public safety implications, which would contravene the very aim for which the EAW mechanism was created - the fight against impunity and the simplification of the surrender procedures between Member States[3] for the expedited return from another MS of a person who has committed a serious crime, whether for the purpose of prosecution or execution of a sentence, subject to the requirement of proportionate use of the EAW.

The factual situation giving birth to the litigation and the preliminary question: in essence *(Excerpt from AG opinion, idem supra 1),* on 9 September 2019, the Municipal Court of Zadar, Croatia, issued an EAW for the purpose of

[1] https://curia.europa.eu/juris/document/documen t.jsf?docid=268241&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=3122885

[2] ttps://curia.europa.eu/juris/document/document.jsf;jsessionid=CDACAD4C9C3CA3FEFF2A8C686F8607F1?text=&docid=272583&pageIndex=0&doclang=RO&mode=req&dir=&occ=first&part=1&cid=1863728

[3] Recitals 1, 5 of Council FD 2002/584 on the EAW and the surrender proceedings between MS, as amended by Council FD 2009/299/JHA, https://eur-lex. europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02002F0584-20090328&from=EN

criminal prosecution against E. D. L., who was charged with an offence of possession of narcotic substances for the purpose of sale and distribution, committed on Croatian territory in 2014. E. D. L. presented medical documents before the Court of Appeal in Milan, Italy, attesting to the existence of psychiatric disorders related to past drug abuse. Following a medical expert's report, he found with regard to the applicant E. D. L. – "the existence of a psychotic disorder requiring continued medical and psychotherapeutic treatment to avoid probable episodes of mental decompensation. As well it was found a significant risk of suicide in the event of incarceration." This expert opinion concluded that, "in view of the need for and continuation of the therapeutic course, E. D. L. would be an individual unadapted to prison life." On the basis of this expert opinion, the Milan Court of Appeal found that the transfer of E. D. L. to Croatia, in execution of the EAW, would interrupt the treatment, which would result in a worsening of the general state of health of the person concerned and a definite risk to his health. However, the court pointed out that the obligation to execute an EAW can be limited only by the grounds for refusal set out exhaustively in Articles 18 and 18a of Act No 69 of 2005, which do not include the need to avoid infringements of the fundamental rights of the person sought, such as the right to health. That court therefore stayed the proceedings and initiated proceedings on constitutionality before the Italian Constitutional Court. Having taken into account that neither the Italian law *(Legge no. 69 of 2005, https://www.gazzettaufficiale.it/eli/id/2005/04/29/005G0081/sg)* transposing the FD nor the Framework Decision provides for such a ground for refusing to hand over the wanted person, it referred the question to the ECJ as follows:

"Must Article 1(3) of Framework Decision 2002/584/JHA [...], read in the light of Articles 3, 4 and 35 of [the Charter], be interpreted as meaning that the executing judicial authority, where it considers that the surrender of a person suffering from a serious, chronic and potentially irreversible illness may expose that person to the risk of suffering serious harm to his or her health, must ask the issuing judicial authority for information enabling the existence of that risk to be excluded and is obliged to refuse surrender where it does not obtain assurances to that effect within a reasonable time?"

The referring court itself raised the question *"whether it would be possible to adequately remove the risk of harm to the health of the requested person by suspending surrender under Article 23(4) of Framework Decision 2002/584. However, that solution does not appear to be suitable for chronic conditions of indefinite duration such as those from which E.D.L. suffers"*.

II. ANALYSIS OF THE SOLUTION PROPOSED BY THE GENERAL ADVOCATE: TEMPORARY SUSPENSION OF THE EXECUTION OF THE EAW

Having carried out an extremely thorough, rigorous and clear analysis of the EU and national legal provisions applicable to the case, the General Advocate proposed to the European Court a response which was not only relevant and balanced but also of great legal value, starting from an understanding of the fears expressed by the referring court of the possible unconstitutionality of certain provisions of the law which transposed FD 2002/584/JHA into Italian law, which might be contrary to the right to health guaranteed by the Italian Constitution, and which requested the CJEU to rule on the case.

However, the European Court departed from the AG's view and extended the possibility of temporary suspending the enforcement of the warrant to the refusal to execute, thus adding a new ground for refusal to those already provided for in the FD, consisting of "a real risk of a significant reduction in his or her life expectancy; or of a rapid, significant and irremediable deterioration in the health of the requested person" which cannot be removed within a reasonable time. However, the Court added, if that risk "can be removed within such a time-limit, a new surrender date must be agreed with the issuing judicial authority." (Recital 55). In our view, this extension of the list of grounds for refusal could lead to the emergence of a risk of impunity and, implicitly, to the emergence of a risk to public safety, since it could be considered that if a person who is being prosecuted or sentenced cannot be surrendered on the grounds that he or she cannot tolerate the prison environment because of drug use, and there would be such a risk, a high risk of suicide, i.e. the 'real risk of a significant reduction in his life expectancy or of a rapid, significant and irreparable deterioration in his state of health', especially since it is well known that drug use has increased significantly among people of all ages, particularly young people. However, the requested person would have to be seriously ill in order to benefit from this exception to the execution of the warrant, as a result of the impossibility of proving the removal of this risk within a reasonable time.

Without going back to the legal provisions applicable to the case, analyzed by the AG, but also by the European Court (recital 7), the interpretation appears to be necessary in the light of Italian law which provides in Article 23(3) of Law No 69 of 22 April 2005: *"If there are humanitarian reasons or serious grounds for considering that surrender would jeopardize the person's life or health, the President of the Court of Appeal or the magistrate delegated by him may, by reasoned order, suspend the execution of the surrender decision, immediately informing the Minister of Justice of this circumstance"*.

Although at first glance the issue may seem quite simple, from the perspective of the application of the EU Charter of Fundamental Rights, which has the same value as the Treaties, the issue at stake is a combination of issues on which the enforcing court must make checks: the conditions of detention in the

issuing State, the possibilities of treatment (including in prison or detention) for the condition of the requested person with the correct assessment of the seriousness of the condition, the reference standards (including medical standards) which may be considered by the executing State and, last but not least, the supremacy of Union law over national rules of law, even if they are constitutional. All of this is based on the need included in the very aim of the FD, namely the avoidance of impunity.

Since entering fully into application of the EAW mechanism, and in particular since the decision of the CJEU in the Aranyosi and Căldăraru cases (*Joined Cases C-404/15 and C-659/15 PPU, details Pătrăuș, 2021, p. 95-99*), the judicial enforcement authorities have in some cases been faced with opposition to the surrender of the requested person on medical grounds. In these cases, the executing authority has initiated consultations with the issuing State to determine whether, in view of the medical situation (usually very serious, as the person concerned suffers from conditions that make him or her non-removable), the sentencing State maintains its request for surrender or would agree to take over enforcement of the sentence. Thus, consultations were initiated between judicial authorities and specific questions were asked about the possibilities of treatment and rehabilitation in prisons/other medical facilities in the issuing State, in relation to the specific conditions invoked in each case, which the AG also took into account when drafting the opinion.

Therefore, in the context of the present scientific approach, we consider that the preliminary question requires a more in-depth analysis on multiple levels which, in our opinion, supports the legitimacy of the solution proposed by the AG, starting from the basic principle of loyal judicial cooperation, i.e. the system of Mutual Recognition, reflected in Article 1(2) of FD 2002/584, according to which Member States are obliged to execute the EAW based on this principle and in compliance with the rules of the FD. In principle, their national judicial authorities may decline to enforce an EAW only on the grounds listed exhaustively in the Framework Decision itself, including respect for the procedural rights of the wanted person (*Bitanga, M; Franguloiu, S.; Sanchez-Hermosilla, F., 2018, p. 27-32*).

First of all, it is necessary to have a correspondence, by the way of additional information, between the enforcing State and the sending State-conditions of detention and confirmed medical conditions/illnesses and medical treatment adapted to the needs of the requested person (*As underlined by the AG both in paragraph 83 of the opinion and in the proposed reply*).

The precarious state of health invoked by the requested person's lawyers is closely linked to the possibilities of treatment that he would benefit from during his detention in the executing State as a result of his surrender. We therefore

consider that the CJEU's case-law is applicable, leading to the application of the mechanism established by the judgment in Joined Cases C-404/15 and C-659/15 Aranyosi - Caldararu, paragraphs 92, 93 and 94.

Thus, once the existence of such a risk has been established, it is then necessary for the executing judicial authority to assess, specifically and precisely, whether there are serious and well-founded reasons to believe that the person concerned will face that risk as a result of the conditions of his detention envisaged in the issuing Member State.

The mere existence of evidence of shortcomings, whether systemic or generalized, affecting certain groups of persons or even certain detention units, in the conditions of detention in the issuing Member State does not necessarily imply that in a specific case the person concerned would be subjected to inhuman or degrading treatment if he were surrendered to the authorities of that Member State. Consequently, in order to ensure compliance with Article 4 of the Charter in the individual case of the person who is the subject of the European arrest warrant, the executing judicial authority, faced with objective, reliable, accurate and duly updated evidence of such deficiencies, is required to verify whether, in the circumstances of the case, there are serious and substantial grounds for believing that, following his surrender to the issuing Member State, that person would face a real risk of being subjected in that Member State to inhuman or degrading treatment within the meaning of that article.

III. DETENTION CONDITIONS AND MEDICAL TREATMENT POSSIBILITIES. SUICIDE RISK DUE TO MALADJUSTMENT TO THE PRISON ENVIRONMENT

If the requested person opposes surrender on grounds relating to detention conditions and implicitly to the possibilities of treatment during detention for the requested person's proven illnesses, the executing authority is to clarify the merits and veracity of the allegations by requesting further information from the executing authority on these matters, a step which is mentioned in the jurisprudence of the CJEU. The mutual trust Principle precludes, in our view, a judicial executing authority from automatically presuming, of its own motion and without carrying out minimum checks, the precariousness of the custodial arrangements in the issuing State, without carrying out mandatory consultations with the issuing State. The consultation stage is laid down as mandatory in the CJEU jurisprudence, as mentioned above.

It emerges from the application for a Preliminary Ruling, as submitted by the requesting court, according to which the Italian referring court assumed that the transfer to Croatia of the person concerned would interrupt the treatment, resulting in a worsening of the general state of health of the concerned person, and that this decision was adopted on the legal expert opinion presented by the defenders of the requested person (page 3 points 2 and 3 of the application for a Preliminary Ruling).

According to the operative part of the CJEU decision in Aranyosi and Căldăraru cases C-404/15 and C-659/15 „*the enforcing judicial authority shall verify specifically and precisely whether there are serious and well-founded reasons for believing that the person concerned by a EAW issued for the purpose of the prosecution or the enforcement of a custodial penalty will as a result of the conditions of his detention in the Member State concerned be subject to a real risk of suffering torture or cruel, inhuman or degrading treatment*".

As is clear from the AG's opinion and the European Court's judgment, it appears that the Italian authority took a decision without giving both parties (including the issuing authority) the opportunity to present their position on the evidence and decided that the surrender of the requested person would present a concrete risk to his health, on the premise that the treatment he was allegedly currently undergoing could not be continued in Croatia, without asking the issuing authority for its views specifying in concrete terms what treatment possibilities it could offer the requested person.

We allow ourselves to consider that this exchange of information was absolutely mandatory, and that the illness from which the requested person is allegedly suffering is quite common, representing the consequences of drug use.

Nor are the elements which led the Italian court to take this decision without consulting the Croatian issuing authority, especially as it is unreasonable to assume that this treatment cannot be continued in Croatia, a point which also emerges from the AG's opinion and which was taken up in part by the European court.

From this perspective, it seems fully justified to note that according to the World Health Organization, chronic diseases have been divided into four categories: cardiovascular diseases; cancer; chronic respiratory diseases (including asthma); diabetes[4]. As can be seen, conditions caused by drug abuse do not fall under the WHO classification.

However, as the Advocate General rightly observed, the key issue in this case is whether the risk of suicide caused by detention, whether due to drug or alcohol abuse or for reasons unrelated to the existence of systemic deficiencies in the prison system of the issuing State, is likely to trigger a denial of execution of the EAW by extending the mandatory grounds for refusal on a preliminary basis, given the nature of the right to be protected.

The question also arises as to what extent the existence of this risk of suicide could lead to impunity, given that the experience of a prison environment is, in itself, an unpleasant experience, given that it involves the execution of a

[4] https://www.who.int/news-room/fact-sheets/detail /noncommunicable-diseases

custodial sentence or security measure for any person, and we would like to express the opinion that no person is suited to a prison environment.

If we were to accept this idea, it suggests that the very idea of imprisoning a person becomes irreconcilable with the detention regime, leading to impunity for any person, which is against the purpose of the relevant Union legislation.

Of course, this obviously does not involve abdicating respect for fundamental rights in the sense of the ECHR, but also respect for the due process rights of the suspected or accused person in criminal proceedings as defined in the Roadmap under the Stockholm Programme [5] and ensuring the fairness of proceedings as a whole.

It is also apparent from the application for a reference for a preliminary ruling on this matter whether the serious, chronic and potentially irreversible illnesses referred to in the present case, from which the applicant suffers, according to the documentation provided by his lawyers, as also noted in the judgment at issue, and are caused by drug use. In addition, the presence of a "high risk of suicide linked to possible imprisonment. The conclusion was reached that the person concerned was not adapted to life in prison".

The way in which this expert report was interpreted by the Milan Court of Appeal and the conclusions reached by the executing authority is contradicted by the President of the Council of Ministers in the proceedings before the Italian Constitutional Court as the referring court (point 8 of the request for a preliminary reference). He pointed out that "the results of the expert opinion ordered by the Corte d'appello di Milani reveal neither the irreversibility of the mental illness from which the person concerned allegedly suffers, nor elements likely to confirm the risk of suicide".

Consequently, two courts in the same State were unable to reach a consensus on the conclusions of the same expert's report, and the manner in which one of them understood the conclusions of that forensic report was presented to the European Court as a reason for imposing, by way of a preliminary ruling, a mandatory ground for refusing the European arrest warrant. In view of the implications of this finding, which is contested even at national level, we consider that clear criteria are needed which leave no room for discretionary judgments, as pointed out by the AG. The judge is free (within the legal margin of discretion) to assess the evidence and its importance and value for the outcome of the case.

Nor does it appear in this case that the Croatian authorities were consulted on the programmes envisaged to reduce the risk of suicide during detention, although in our view the referring court was under an obligation to do so, a point also stressed by the AG.

[5] https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32009G1204(01)

In addition, the incompatibility with the detention regime and the fact that "the person in question is not adapted to imprisonment" (as stated in the psychiatric expert report submitted to the Milan Court of Appeal), can be invoked with regard to any person who is imprisoned at least for the first time. We consider that such a statement, for a better understanding, should also mention the objective arguments taken into account to determine whether or not a person is suitable for life in prison, as an argument to be taken into account to determine the need for a custodial measure, given that this circumstance is not a criterion for the individualization of criminal treatment in any legislation of any Member State or third country.

IV. FAILURE TO ADAPT TO THE PRISON ENVIRONMENT. PURPOSE OF PUNISHMENT. RISK OF IMPUNITY. CONSEQUENCES FOR LEGAL CERTAINTY

With regard to the referring court's assertion that the applicant is not adapted to life in prison, we would like to make a few observations, starting from the premise that the majority of persons who are subject to criminal liability through the enforcement of custodial sentences (as a last resort) are not prepared to experience the prison environment.

Without entering into a debate on the history of the political and legal foundations of the state's right to punish, on which jurists, philosophers and theologians have offered many explanations, of a more or less progressive nature, it is necessary to note the moral nature of punishment as a means of ensuring balance in society, social defence and avoiding social chaos, preventing the commission of new offences while reintegrating the offender into society, aspects which have been stressed many times in doctrine and judicial practice.

In this regard, it is worth mentioning that the founder of the classical school of criminal law (*Beccaria C., 1965*) argued that "in the interests of strengthening the important connection between the criminal act and the punishment" it is necessary "that the penalty be as consonant as possible with the essence of the offence", so that "punishment is the symmetry of the crime", without being predominantly retributive in character, with the interests of the individual harmoniously combined with those of society, and respect for the law by all persons is the major desideratum of the rule of law.

Thus, in any democracy governed by the separation of state powers and compliance with the rule of law, the judge has the power to determine the individual punishment, in accordance with the individualization criteria common to democratic states, while respecting all the rights of the presumed or charged person in criminal proceedings (according to the Stockholm Programme - Roadmap for the work of the European Union in the area of justice, freedom and security, cited above).

Therefore, the system of penalties in force in the European area has marked a progress in the evolution of criminal law and highlights, on critical examination, the sufficient number of main penalties and especially their strong re-educational character, which explains the current concern of the legislator that basic penalties be doubled by alternative sanctions, and the means of individualization and execution of penalties be diversified, according to European standards.

From this point of view, the primary role of punishment is to prevent new crimes and not to repress them (It should be emphasized that the beginning of "penology" coincides with the movement to humanize prisons, started in the 18th century thanks to the English philanthropist John Howard who, through his writings, drew attention to the physical and moral misery in which prisoners lived at that time. It is true that even before this movement the horrors of European prisons had been reported (Mabillon, Krausold) and even sporadic measures were taken to correct them. However, it is to the credit of Howard and those who embraced the movement he started (Bentham, Brissot de Warvill and Wagniz in Europe, but also William Penn and B. Francklin in America) that he "lifted the penitentiary problem to the rank of a problem of humanity", emphasizing the predominantly educational role of punishment and not the retributive one, in *Dongoroz, V., reprint of the 1939 edition, 2000, p. 482*), because only preventive action can have beneficial effects in terms of adapting the conduct of the recipients of the criminal law, in developing the legal and moral awareness of the members of society and only if, objectively, the harm to the social values protected by the criminal law could be repeated, should coercion be used.

From the perspective of the role and purpose of the penalty, it is important to point out that in order to fulfil its role as an inhibiting factor in the triggering of criminal activities, the penalty must have a certain degree of severity (as recommended by the European legislator itself in the provisions of some normative acts, stating that for certain types of offences there shall be "effective, proportionate and dissuasive penalties": e.g. recital 3 of Directive 2014/42/EU of the EP and of the Council on the freezing and confiscation of instrumentalities and the proceeds of offences committed within the EU; Report from the Commission to the EP and the Council on the implementation of Directive (EU) 2017/1371 of the EP and of the Council of 5 July 2017 on combating fraud to the Union's financial interests by criminal law means, COM(2022) 466 final[6] bearing in mind also that, in order to act on the convicted person's conscience, to induce him to change his behaviour, to consciously adopt a different attitude to the rules of social coexistence, the constraint must be rational and fair, proportionate to the social danger of the offence, and only exercised in the forms and within the limits

[6] Accessible https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX: 52022DC0466

necessary for the punishment to fulfil its main function, that of re-education, of social rehabilitation of the person.

This can solely be reached by promoting the ECHR and the ECFR, which incorporate comprehensive and rational principles, concerning both the offender and the person who has committed a punishable conduct, and in relation to other members of society who have complied with the law, and the defence of protected social values does not mean applying punishments with the same intransigence, only with firmness, by firmness we mean whether a particular punishment is capable of achieving its main purpose, not a severe punishment; the concept and requirement of firmness in criminal law requires that offences be discovered and offenders prosecuted promptly, without undermining the imperative of discovering the truth and rigorously observing the law.

Nor can it be maintained, as the referring court held, that the impact of the prison environment could constitute a ground for refusal in the procedure for the execution of the European arrest warrant, since that would lead to impunity and would open the way for persons who have been definitively sentenced to be held criminally unaccountable for their acts, which is contrary to the very principles of European Union law, since for any person in the world the experience of that environment is neither pleasant nor a happy experience, but quite the opposite.

Moreover, as has often been pointed out in the doctrine, if society does not react and "does not immediately apply the appropriate sanction, this attitude of passivity, of indifference, will mean that no one in the future will take any notice of the rule of law that has been violated. If the public authorities do not react to the offender, the person who has suffered as a result of the offence will consider the law to be a mere lie and will take the law into his own hands, causing a new disturbance of public order. Likewise, members of the social group, dissatisfied with the inertia of the public authorities who do not apply sanctions, will seek to react themselves. Even those members of the social group who will stand aside in the face of the passive attitude of the public authorities will lose confidence in the law, will lose the sense of security and peace of mind without which the legal order is an empty word, and will seek to leave the social group or resort to their own defensive measures" (Dongoroz, 2000, p. 462-463). Although these ideas were expressed almost 100 years ago by one of the most valuable professors of his time, they are still fully valid today, because the European court's solution is tantamount to the dissolution of Rule of Law and the optional observance of the law, which runs counter to the Rule of Law principle itself.

It should also be noted that any sentenced person serving a sentence enjoys respect for all legal rights, in compliance with the laws of each MS and in accordance with the rights laid down in the ECHR, in particular Article 7,

according to the rich case law of the ECtHR, which is binding on all contracting states.

Most prisons have programmes designed for the adaptation of persons deprived of their liberty to the prison regime which should be considered by the Italian court, in concrete terms, according to the opportunities available in Croatian prisons.

In addition, the issuing court was not given the opportunity to present the possibilities offered by Croatian national law regarding the possibility of suspending the trial, suspending or interrupting the execution of any sentence for medical reasons. We consider that such an assessment can only be made by the court in which the case is pending and which still has jurisdiction to deal with the case arising from the commission of a criminal offence (possession of narcotic products for the purpose of sale and distribution).

Finally, as the Advocate General pointed out, starting from the absoluteness of the ban on cruel, inhuman or degrading treatment, which is directly related to compliance with respecting human dignity, according to the Charter, the executing court should verify *"if there are reasonable grounds for considering that the person involved, after his or her handing over to the issuing MS, will run a genuine threat of being deprived of his/her fundamental rights"*. In the case under analysis, the risk to the person's health does not arise from a situation which is plausible only in a context of generalized deficiencies which would in principle be inconceivable in a Member State (Recital 41 of the AG opinion), but may result from the possibility that a specific disease cannot be treated (also specifically) in the Member State where the EAW was issued. In this respect, we fully endorse the AG's opinion which pointed out: *"in order to assess the scale and extent of this risk, it is not necessarily necessary to examine the entire health or prison system of the issuing Member State. What is important is to check whether the requested person will be guaranteed the medical care he or she might need. In order to carry out this verification, it is not indispensable to assess ex ante the health/prison system as a whole. Rather, it should assess the possibilities of care for the requested person that can reasonably be anticipated"*. Otherwise, accepting a "new" ground for refusal to execute an EAW on health grounds *"could create a loophole in the whole EAW system and mechanism. This would lead to a multitude of requests from the affected persons, which would subsequently hamper the system of surrender to the issuing Member State. The consequence will lead to a lack of efficiency of international judicial cooperation and to the ineffectiveness of European legislation underpinned by the principle of Mutual Trust and Mutual Recognition of judgments delivered in Member States."*

Therefore, in line with the AG's opinion, we express the view that such a situation cannot lead to an extension of the list of mandatory grounds for refusal, but could possibly suspend, exceptionally and provisionally, the surrender of the person concerned for as long as there is still a serious risk to his/her health.

Unfortunately, the CJEU has decided that the catalogue of possible grounds for non-execution of EAWs should be extended, which will, in our view, lead to the situations already described by the AG in his opinion mentioned above.

The doubt of the referring court could be eliminated by a teleological approach and interpretation of the Framework Decision in the sense observed and exploited by the AG, that of exchange of information, the executing judicial authority being able to obtain from the issuing judicial authority explanations on the medical treatment available in the detention or custody centres, adapted to the medical needs of the requested person, and at the same time, the executing authority having the possibility to reassess the adequacy of the EAW, as the European Court itself pointed out.

CONCLUSION

We would like to note that we agree with the decision of the Court of Justice of the European Union, with the critical note concerning the extension not only of the preliminary questions, but also of the grounds for refusing to execute the European arrest warrant. We note that the "real risk of a significant reduction in his life expectancy or of a rapid, significant and irremediable deterioration in his state of health" and that this risk cannot be removed within a reasonable time and that it is "subsumed by a risk of violation of fundamental rights may allow the executing judicial authority to refrain, by way of exception and following an appropriate examination, from executing a European arrest warrant". In our view, the consequence is the weakening of judicial cooperation in the MS, founded on the removal of the concept of mutual trust and loyal cooperation.

The grounds for non-execution of an EAW are expressly and restrictively listed in the FD; they refer only to objective grounds, which relate to the offences on that basis, their severity as well as the course of criminal proceedings arising from those offences.

By adding a further ground for refusal of execution, by way of a preliminary ruling, the Court has created the way for obvious difficulties and disparities to arise in the framework of non-execution based on the legal structure of the Member State's criminal systems, since it is a subjective ground for refusal of execution which will be invoked by the majority of the persons requested and could lead to an assessment of the entire medical system, as a whole, in the issuing Member State, which would be likely to result in huge delays in the procedure established by the Framework Decision. Our allegation is based on the fact that the procedure was conceived by the European Legislator as a flexible, fast, efficient and effective procedure which should be completed within a few days, of course respecting all the rights and guarantees offered by law to the

person sought. However, extensive forensic psychiatric expertise (which can only be carried out with the person's admission to a specialist hospital) confirming that the person's lack of adaptation to the prison environment, the risk of suicide (as this was the risk exposed in this case and defined by the European court as "a realistic risk of a considerable shortening of average life expectancy" which could be caused either by the impact of the prison environment, or drug use (as in the present case) or other personal reasons, might require an assessment of the medical system of the issuing MS itself and, consequently, a number of other difficulties, given that there are significant differences between such systems in the EU and in the world.

It is particularly important to point out that the European Court failed to note that the referring court did not carry out minimal checks, by way of a request for additional information, on the possibility of providing the necessary medical assistance and treatment in the issuing State, and we are convinced that the Croatian State would have responded promptly to such a request. Thus, a presumption of the referring court has been raised to the level of a proven fact, which in our opinion, is contrary to the rules of due process and all rules of Union law and undermines the legitimacy of this solution.

Moreover, the conditions of detention in general, including the medical care provided by the prisons in all Member States, are available to all courts and any interested person on the website of the European Agency for Fundamental Rights.[7]

Not least, it is worth pointing out that, where such a risk is real, all Member States also have alternatives to detention available (for those situations where they may be applicable[8] *including electronic monitoring.*

BIBLIOGRAPHY

Monographs, articles, studies

1. Cesare Beccaria, *Dei delitii e de le pene*, published by Editura Științifică, Bucharest, 1965;

2. Bitanga, Marijan; Franguloiu, Simona; Sanchez-Hermosilla, Fernando, *Guide on the procedural rights of suspected or accused persons: the right to information and the right to translation and interpretation*, Onești, Magic Print Publishing House, 2018, also available https://e-justice.europa.eu/fileDownload.do?id=ed8a8a52-4047-41cb-84d2-d979daa45d72 and at https://www.just.ro/DMSWS/api/v1/download/by_token2/43c39ec2a1438c3a9383f6be2809d5ec3b261c3a82cc39bc3a0c3aa2a46e032b14c2b12e6259e2809aca9212d;

[7] *https://fra.europa.eu/en/databases/criminal-detention/* .

[8] *Wahl T., https://eucrim.eu/news/commission-and-council-discuss-way-forward-on-pre-trial-detention-and-detention-conditions/*

3. Dongoroz, Vintilă, *Criminal law*, reprint of the 1939 edition, Romanian Association of Criminal Sciences, Bucharest, 2000;
4. Craig, Paul; de Burca, Grainne, *European Union Law, Commentaries, case law and doctrine*, Hamangiu Publishing House, Bucharest 2017;
5. Pătrăuș, Mihaela, *International judicial cooperation in criminal matters. Compendium. Legislation, in doctrine, European and national case law*, Universul Juridic Publishing House, Bucharest, 2021;
6. Thomas Wahl, *Commission and Council Discuss Way Forward on Pre-Trial Detention and Detention Conditions*, https://eucrim.eu/news/commission-and-council-discuss-way-forward-on-pre-trial-detention-and-detention-conditions/.

Legislation

1. Treaty on European Union, OJEU, Series C 326/13 of 26.10.2012,https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0001.02/DOC_1&format=PDF;
2. Treaty on the Functioning of the European Union, OJEU, Series C 326/47 of 26.10.2012 https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0001.02/DOC_2&format=PDF;
3. Charter of Fundamental Rights of the European Union, OJEU, Series C 326 of 26.10.2012;
4. Council Framework Decision 2002/584 on the European Arrest Warrant on surrender proceedings in Member States, as amended by Council Framework Decision 2009/299/JHA, https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:02002F0584-20090328&from=RO ;
5. European Parliament and Council Directive 2014/42/EU on the freezing and confiscation of instruments and other proceeds of offences within the European Union; the Commission Report to the EP and the Council on the implementation of the Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on countering fraud against the Union's Financial Interests by the use of criminal law means, COM(2022) 466 final, available https://eur-lex.Europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:52022DC0466
6. Law No 69 of 2005, https://www.gazzettaufficiale.it/eli/id/2005/04/29/005G0081/sg

Case law

7. Joined Cases C-404/15 and C-659/15 PPU
https://curia.europa.eu/juris/document/document.jsf?docid=268241&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=3122885
https://curia.europa.eu/juris/document/document.jsf;jsessionid=CDACAD4C9C3CA3FEFF2A8C686F8607F1?text=&docid=272583&pageIndex=0&doclang=RO&mode=req&dir=&occ=first&part=1&cid=1863728

https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32009G1204(01)