UDC

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**Memorial on the forgotten framework decision**

In the year 2000 the European Commission stated that according to the principle of mutual recognition *a judicial decision once taken in one Member State should automatically be accepted in all other Member States, and have the same or at least similar effects there* [1. P. 440]. In the 2002-2009 (pre-Lisbon) era, the European Union (hereinafter: EU) adopted a special kind of legislative acts, namely *framework decisions* [hereinafter: FDs] in order to foster mutual recognition of judicial decisions between EU Member States in criminal matters [7. P. 14]. Indeed, the drafters of the Lisbon Treaty have abolished the legal basis to adopt FDs from the Treaty on European Union (hereinafter: TEU). Yet, this does not mean that FDs are stone aged relics to be forgotten. At this date, FDs relevantly shape mutual recognition and cooperation in criminal matters on the EU level. Thus, the analysis of FDs` legal nature in connection to mutual recognition is still of contemporary importance.

This is true because, *inter alia*, one of the revolutionary new legal instruments agreed on the EU level in that pre-Lisbon era was the 2002/584/JHA [4.] Council Framework Decision on the European arrest warrant and the surrender procedures between Member States (hereinafter: FD EAW) [5. P. 23]. The FD EAW was the first concrete measure in the field of criminal law implementing the principle of mutual recognition [13. P. 172; 4. point 6]. Mutual trust and mutual recognition are the fundamental principles of the entire area of freedom, security and justice of the European Union [10. P. 167]. The FD EAW is still in force at this date, and will serve as a FD example throughout this paper.

Article 1(1) of the FD EAW defines the European Arrest Warrant (hereinafter: 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*. Moreover, Article 1(2) of the FD EAW obliges the Member States to execute any EAW on the basis of the principle of mutual recognition and in accordance with the FD EAW provisions [12. P. 1319-1320].

Nonetheless, due to the special legal nature of FDs, there are certain hurdles for a smooth application of the mutual recognition principle in case of FD EAW.

Firstly, unlike EU regulations, FDs are not directly applicable. They need to be implemented into national law in order to be applicable on the national level [9. P. 256]. However, improper implementation is often very problematic, and thus mutual recognition legal instruments lose their full effect, since the principle of mutual recognition requires a reciprocal implementation [7. P. 30-31].

In addition, FDs do not have direct effect. The TEU (before the Lisbon treaty) [14.] provided the legal basis to adopt FDs. Article 34(2)(b) TEU stipulated that a FD shall be binding upon the Member States as to the result to be achieved. Yet, in the same paragraph it is explicitly stated that the Framework decisions shall not entail direct effect. This is also an important difference between FDs and directives, which can in certain circumstances, entail direct effect [8. P. 583].

However, despite those deficiencies in legal effects of FDs, the latter entail an indirect effect. Court of Justice of the EU (hereinafter: CJEU) ruled in case *Pupino* [11. P. 4] that “*The national court is required to take into consideration all the rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Framework Decision*.” [2. Para. 61]. Therefore, the Member States have the duty to perform a conforming interpretation. Yet, the according to CJEU the latter cannot lead to the interpretation of national law *contra legem* [8. P. 585].

Consequently, it is important that the FDs are properly implemented into national law in order for their substance to have full effect in the Member States.

Secondly, due to hierarchy of legal acts, the legal effects of a FD (e.g. mutual recognition) are limited with primary EU law and fundamental human rights, for instance the right to fair trial [8. P. 585]. For example, in case of FD EAW this is acknowledged by the legal instrument itself. Article 1(3) FD EAW stipulates that the FD EAW shall not affect the obligation to respect fundamental rights as stipulated in Article 6 TEU. Meaning respecting the Charter of Fundamental Rights of the EU (hereinafter: Charter), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR).

This is reflected also in CJEU case law. For instance, in case *Aranyosi and Căldăraru* [6], in which the risk of degrading and inhumane treatment in the detention facilities of requesting Member States constituted a ground for non-execution of the EAW [1. P. 447; 6. Para. 82-84, 104]. The CJEU reaffirmed its position that “in exceptional circumstances” limitations may be placed on the principles of mutual recognition and mutual trust - meaning refusal to execute an EAW [6. Para. 83]. In this case - due to poor detention conditions – the Court sees that the risk of degrading treatment of individuals could be realized, which results in a breach of Articles 3 ECHR, and 4 of the Charter - both prohibiting torture and inhumane or degrading treatment [6. Para. 42, 73].

Furthermore, it is true that (as mentioned by the CJEU in a recent *LM* case[3]), the principle of mutual trust requires from each Member State - especially in the area of freedom, security and justice - to trust that all other EU Member States legal systems comply with EU law and fundamental human rights [3. Para. 36]. However, this trust is put at risk when a Member State (which issues an EAW) breaches the values enshrined in Article 2 TEU; thus, proceedings against that Member State would be initiated under Article 7 TEU. Consequently, there would be a risk that a right to fair trial would not be observed in that Member State. In such cases the executing judicial authority may refrain to execute an EAW [3. Para. 72, 73].

Hence, it is important to remember that FD EAW is only a legal act of EU secondary law, meaning the EU primary law and human rights must be respected in its application.

In conclusion, despite no further FDs will be enacted on the EU level, they still form an important part of EU law currently in force. FDs provisions cannot be used as a directly applicable legal basis. They only entail indirect effect - guiding the interpretation of relevant national law. Moreover, fundamental human rights and EU Primary law are the red line in applying the FD EAW provisions. Thus, the mutual recognition effects of FDs in the field of criminal matters could be limited by the above-mentioned factors.

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3. Case C-216/18 PPU – *LM*, Judgment of the Court (Grand Chamber) of 25 July 2018, ECLI:EU:C:2018:586.
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