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ARTICLE

Special Issue: The Systemic and the Particular in European Law

The Systemic and the Particular in European Law—Judicial Cooperation in Criminal Matters*

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Abstract
The article discusses the role for systemic and particular deficiencies in EU criminal law. It does so by analyzing in depth that law as regards the European Arrest Warrant (EAW), but also across measures of EU criminal law that have not yet been explored under this light. While the attention of the literature has been mainly on the EAW and the way those deficiencies can led to refusing the execution of the warrant, a wider assessment reveals the existence of a latent law of the systemic and the particular in this field. The conclusions reveal that the understanding and application of systemic and particular deficiencies in EU criminal law have significant implications in terms of the principle of mutual trust and the complex interaction between different EU values.

Keywords: EU criminal law; Fundamental rights; European Arrest Warrant; Court of Justice

A. Introduction

The objective of the article is to investigate the role for the "systemic" and the "particular" in EU criminal law. More specifically, the article seeks to identify the criteria used by courts and enforcers of legal standards to establish that a breach of such standards by Member States has a systemic dimension, or says something about a system. The question is closely related to the identification of the consequences ensuing from a "finding" that the violation has a systemic nature. Consistently with the conceptual framework of the special issue, three main types of non-mutually exclusive "systemisms" are relevant to this article. First, there are breaches with systemic implications and of such seriousness that would not need repetition. Second, the "system deficiency" entails a flaw in the functioning of a system relied on to ensure the proper application of EU law—such as a system of effective remedy. Third, the general and persistent breaches are characterized by a quantitative element.

So far, the "systemic" in relation to violations of legal standards in the context of EU criminal law has found rather limited application: That is, in the context of the European Arrest Warrant Framework Decision (EAW FD)[1] mechanism. As all instruments of EU judicial cooperation, the EAW implements the principle of mutual recognition and is based on mutual trust—the

*The article has been updated since original publication. A notice detailing the change has also been published.

[1]Council Framework Decision 2002/584/JHA, 2002 O.J. (L 190/1) (EU) (hereinafter European Arrest Warrant Framework Decision).

rebuttable presumption that Member States comply with EU fundamental rights standards, premised on the commitment to EU values deriving from their status of EU Members.[2] In that context, the finding that systemic deficiencies exist in the protection of a certain fundamental right in the Member State issuing the EAW might lead the executing State to refusing execution. The rights so far involved in this test have been the prohibition of degrading treatment under Article 4 of the EU Charter of Fundamental Rights (CFR or the Charter),[3] and the right to a fair trial as enshrined in Article 47(2) CFR.[4]

Admittedly, the existing law of the systemic and the particular in EU criminal law seems rather narrow in scope. In most cases, it unfolds through a probability assessment: With the burden of proof on the person defying recognition of the EAW, a national court finds—possibly corroborated by a Court of Justice's ruling—that the existence of systemic deficiencies will probably result in the breach of a fundamental right in the specific case, if the EAW is executed. Its main function is to prevent a likely breach of legal standards, or the compounding thereof, by the issuing State.[5] Such a function manifests itself in the reversal of the presumption of mutual trust, and the refusal to surrender the person concerned. The framework just described has been set up by the Court of Justice, via a creative interpretation of Article 1(3) EAW FD.

The discussion on the systemic and the particular in EU criminal law is, however, only deceptively limited. First, the current use of these concepts in the context of the EAW raises, of itself, complex legal questions of great relevance to the EU legal order *and* the persons concerned. Second, this body of law has developed and been applied to the EAW but it has the potential to acquire a much wider scope of application. The "spill-over" could concern other rights that might be relied on to challenge the execution of an EAW, other instances of EU judicial cooperation in criminal law such as the transfer of prisoners, or other legal areas beyond EU criminal law such as competition law. Third, to better understand the role for the systemic and the particular in EU criminal law, within the framework of this special issue, we should broaden our horizon beyond the jurisprudential developments occurred so far and uncover the inactivated law of the systemic and the particular in this domain. The analysis of these three aspects proves that the systemic and the particular are a sleeping giant in EU criminal law.[6]

First, the article provides a primer on the structural features of EU criminal law. Second, the law of the systemic and the particular in the EAW is discussed. Third, the article looks beyond the EAW. It considers measures from different generations of EU criminal law, which cover a wide spectrum of stages of criminal procedures. Fourth, in light of the previous analysis, the article puts forward two concrete proposals for a more nuanced understanding of the systemic and the particular, as well as their mutual relations, in EU criminal law. The conclusions reveal that the meaning and role for the systemic and the particular depends on the given understanding of mutual trust underlying EU criminal law, which in turn shapes the interaction between different EU's values.

[2]Opinion 2/13 pursuant to Article 218(11) TFEU, ECLI:EU:C:2014:2454 (Dec. 18, 2014), para. 168, http://curia.europa.eu/juris/liste.jsf?language=en&num=C-371/08; see also ECJ, Case C-216/18 PPU, Minister for Justice and Equality (Deficiencies in the system of justice), ECLI:EU:C:2018:586 (July 25, 2018), http://curia.europa.eu/juris/liste.jsf?language=en&num=C-371/08.

[3]ECJ, Joined Cases C-404 & C-659/15 PPU, Aranyosi and Căldăraru, ECLI:EU:C:2016:198 (Apr. 5, 2016), http://curia.europa.eu/juris/liste.jsf?language=en&num=C-371/08.

[4]*Minister for Justice and Equality (Deficiencies in the system of justice)*, Case C-216/18 PPU, ECLI:EU:C:2018:586 (July 25, 2018), http://curia.europa.eu/juris/liste.jsf?language=en&num=C-371/08.

[5]This is specifically the case where the EAW is issued for enforcement. Potentially, the breach of the right to a fair trial has already occurred and resulted in a conviction, but the execution of the EAW would amplify that violation.

[6]For reasons of space, this article does not address the issue concerning the identification of the relevant standard that is allegedly being breached. There are two main facets to this issue: the substantive content of the standard (e.g. what amounts to inhuman and degrading treatment?), and the standard that applies in the specific situation.

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B. The Role of Standards. The Static and Dynamic Dimension of EU Criminal Law

The presumption of mutual trust, on which judicial cooperation in criminal matters is built, constrains Member States in two ways: They may not check other Member States' compliance in each case, and they may not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law.[7]

There are structural features of the EU legal order, and of this area of law more specifically, that affect the legal development. First, EU criminal law is an area where conflicts—or at least inconsistencies—are more prone to arising, because of its importance to national sovereignty. Unsurprisingly, Articles 82 and 83 of the Treaty on the Functioning of the European Union (TFEU) limit approximation to minimum rules and, in most cases, only via directives.[8] Second, approximation can concern static or dynamic rules. The latter regulate inter-state cooperation, the former consist of provisions establishing a level-playing field throughout the EU of defense rights and substantive criminal law. Third, the connection between approximation of static, and dynamic, rules is stated explicitly in primary and secondary EU law. The EU has competence to enact common minimum rules in certain areas "to the extent necessary" to facilitate judicial and police cooperation.[9] Directive 2010/64, for example, establishes common rules on the right to information and translation in criminal proceedings *and* in proceedings for the execution of an EAW.[10] Fourth, the content of dynamic measures go beyond the mere regulation of the mechanics of cooperation in a specific area. These measures can be the vector for the establishment of standards as well, inter alia vis-à-vis actors and remedies.[11]

Fifth, the degree of approximation in both static and dynamic instruments can vary. On the one hand, some aspects have been completely harmonized. For example, Member States may not introduce grounds for refusing the execution of an EAW in addition to those laid down in the FD. On the other, only certain procedural safeguards have been subject to approximation, with these instruments leaving Member States a certain implementation leeway. Furthermore, these measures have also undoubtedly created a fragmented legal framework. On many aspects—most prominently, pre-trial detention and material detention conditions—Member States have long resisted the creation of common standards on different grounds—including the lack of a suitable legal basis in the Treaties. This does not necessarily dovetail with the way in which criminal procedure works, since its different aspects are often inextricably linked and not susceptible of compartmentalization. Sixth, in the decentralized system of EU judicial cooperation in criminal matters, national standards are particularly important as they feed into EU criminal law through legal parallelisms.[12] On the definition of the cooperating actors and the available remedies especially, Member States extend the standards applied in similar domestic situations to matters governed by EU law.[13]

Finally, the cross-fertilization of standards can be even more complex than that. For example, in the context of the Directive on privacy and electronic communications and thus in purely internal situations,[14] the ECJ has established that public prosecutors cannot authorize access of a public authority to traffic and location data for the purposes of a criminal investigation, as only judges or independent administrative authorities offer the required standards of impartiality.[15] That principle has been transposed to the European Investigation Order (EIO) mechanism, with

[7]*Opinion 2/13*, para. 168, http://curia.europa.eu/juris/liste.jsf?language=en&num=C-371/08.

[8]What that specifically means, and how rigorously that condition is respected by the EU legislature, are different questions.

[9]Treaty on the Functioning of the European Union, art. 82(2).

[10]Directive 2010/64, 2010 O.J. (L 280/1) (EU).

[11]As shown below, this is particularly to do with the role played by the Court in developing autonomous concepts of EU law such as 'judicial authority.'

[12]Leandro Mancano, *A Theory of Justice? Securing the Normative Foundations of EU Criminal Law Through an Integrated Approach to Independence*, 27 EUR. L. J. 477, 488 (2022).

[13]See for example Council Directive 2010/64, art. 6(1)(b), 2010 O.J. (L280/1) (EU).

[14]Directive 2002/58/EC, 2002 O.J. (L 201/37) (EC).

[15]ECJ, Case C-746/18, Prokuratuur, ECLI:EU:C:2021:152 (Mar. 2, 2021), http://curia.europa.eu/juris/liste.jsf?language=en&num=C-371/08.

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the Court finding that Member States cannot empower a prosecutor to issue an EIO for the acquisition of traffic and location data, since in a comparable domestic situation only a judge would have the competence to obtain access to such data.[16] Therefore, national procedural autonomy and the presumption of functional equivalence go hand in hand to ensure the functioning of a system built on mutual trust. Against this background, the next sections delve into the law of the systemic and the particular in the context of the EAW.

C. The Visible Law of Systemic and the Particular in EU Criminal Law. The European Arrest Warrant

The EAW FD is inevitably the core of a discussion about the systemic and the particular in EU criminal law. The FD itself features, uniquely in the EU criminal law landscape, a specific "clause" on systemic deficiencies. There are three main ways in which the systemic emerges from the legal framework. First, the preamble of the FD states that its implementation

> [M]ay 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 6(1) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.[17]

While this is not legally binding, the case law of the Court shows that a decision having—de jure or the de facto—the effect of suspending the EAW towards a Member State will have to come from the EU's institutions empowered to do so under the FD.[18] The references to the Article 7 TEU procedure as a "nuclear option" betray the apocalyptic aura surrounding it: Bringing that procedure to completion—as far as required for the suspension of the EAW FD—has proved nearly impossible even in a situation as serious as that concerning the Polish judiciary.[19]

Second, there is the requirement that the issuing and executing authorities be the competent judicial authorities under the law of the relevant States.[20] The ECJ has established the principle that authorities involved in the administration of justice, such as public prosecutors, can act as judicial authorities in the context of the EAW provided that: The EU State has statutory rules and an institutional framework in place guaranteeing the external independence of prosecutors; the decision of the latter can be subject to proceedings ensuring effective judicial protection—i.e., they are reviewable by an independent court or tribunal established by law.[21] Compliance with these conditions, which are expression of the separation of powers and the rule of law, justifies the high level of confidence that underpins the EAW.[22] Police authorities or the Ministry of Justice do not meet those requirements.[23] These standards are relevant not only for issuing and executing an EAW, but for all steps where the FD refers to a judicial authority.[24] There is a distinct systemic

[16]ECJ, Case C-724/19 HP, ECLI:EU:C:2021:1020 (Dec. 16, 2021), http://curia.europa.eu/juris/liste.jsf?language=en&num=C-371/08.

[17]European Arrest Warrant Framework Decision, at recital 10.

[18]Joined Cases C-562 & C-563/21 PPU, X v. Openbaar Ministerie, ECLI:EU:C:2022:100 (Feb. 22, 2022), para. 63.

[19]*See* Laurent Pech, *Article 7 TEU: From 'Nuclear Option' to 'Sisyphean Procedure?'*, in CONSTITUTIONALISM UNDER STRESS (Uladzislau Belavusau & Aleksandra Gliszczynska-Grabias eds., 2020).

[20]European Arrest Warrant Framework Decision, art. 6.

[21]ECJ, Joined Cases C-508 & 82/19 PPU, Minister for Justice and Equality v. OG and PI, ECLI:EU:C:2019:456 (May 27, 2019), para. 74; see *id.* at para. 75.

[22]ECJ, Joined Cases C-354 & 412/20 PPU, L. and P., ECLI:EU:C:2020:925 (Dec. 17, 2020), para. 40.

[23]ECJ, Case C-452/16 PPU, Openbaar Ministerie v Krzysztof Marek Poltorak, ECLI:EU:C:2016:858 (Nov. 10, 2016), http://curia.europa.eu/juris/liste.jsf?language=en&num=C-371/08; ECJ, Case C-477/16, Openbaar Ministerie v Ruslanas Kovalkovas, ECLI:EU:C:2016:861 (Nov. 10, 2016), ==http://curia.europa.eu/juris/liste.jsf?language=en&num=C-371/08.

[24]EJC, Case C-804/21 PPU, CD, v Syyttäjä, ECLI:EU:C:2022:307 (Apr. 28, 2022), paras. 59–76, http://curia.europa.eu/juris/liste.jsf?language=en&num=C-371/08.

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"flavor" in this case law: The absence of statutory rules and an institutional framework means that an EAW issued by such authorities is legally invalid and non-existent.[25] However, the discussion below shows that more complex situations can arise, with the issue of the competent judicial authority becoming important for the "particular" as well.

Third, the EAW FD features no general ground for refusing execution based on a risk for fundamental rights, but Article 1(3) thereof stipulates—just like any instrument of EU judicial cooperation in criminal matters—that it shall not have the effect of modifying the obligation to respect EU fundamental rights and principles. That provision has been the lever used by the Court to create the famous two-step test that executing authorities must carry out, when concerns are raised about the prospect of a fundamental right violation in the issuing State.[26] The test can also be referred to as *exceptional circumstances* doctrine, since it is only in such circumstances that a Member State can rebut the presumption of mutual trust on which the EAW is built, and refuse the execution of the warrant.[27] The two steps operate as follows. First, systemic deficiencies must exist in the protection of the right in question in the issuing State. Second, those deficiencies must be likely to impact the specific case under consideration. The next sub-sections unpack the complexity of its implementation and articulation vis-à-vis the rights under threat.

I. Systemic Deficiencies and Refusal of Execution. A Flexible Concept

The Court has developed the two-step test in reaction to concerns about the protection, in the issuing State, of the right to an independent tribunal established by law, and the right not to be subject to inhuman treatment due to poor detention conditions. While the Court has developed the test in slightly different ways depending on the right at stake, it has also strived for uniformity as far as possible. In what has become a pattern in the ECJ's reasoning, the role for systemic violations in the context of the two-step test is usually addressed after a reminder of the structural importance of the EAW, mutual recognition, and mutual trust, to achieve a EU's fundamental objective: The creation and preservation of an area without internal frontiers.[28]

There is also a clear connection between the risk of a violation and the values of the Union. Articles 4 and 47 CFR are directly linked to human dignity and the rule of law, respectively.[29]

As for the meaning of "systemic deficiencies," the Court dwells on the periphery of the concept without directly engaging with the substance thereof. First, the assessment must be carried out having regard to the standard of protection of the fundamental right concerned:[30] Namely, the standard set by EU law. It might sound obvious, but this detail resonates with some of the most important constitutional questions in the recent history of the EU[31] and might do so in the future as well. Second, the ECJ provides the executing authority with guidance about the required qualities of the information used to establish that the deficiencies are systemic in nature. The information must be objective, reliable, specific and properly updated.[32] Third, the Court "outsources" the definition of systemic deficiencies by referring to a non-exhaustive list of sources that can be relied on by the executing authority: Judgments of international courts, such as the

[25]ECJ, Case C-489/19 PPU, NJ (Parquet de Vienne), ECLI:EU:C:2019:849 (Oct. 9, 2019).

[26]The provision states that nothing in the FD should affect the obligation to comply with fundamental rights.

[27]This is based on the definition of mutual trust provided by the Court in Opinion 2/13 pursuant to Article 218(11) TFEU, ECLI:EU:C:2014:2454 (Dec. 18, 2014), paras. 191–92, http://curia.europa.eu/juris/liste.jsf?language=en&num=C-371/08.

[28]See, among many, ECJ, Joined Cases C-562 & C-563/21 PPU, X and Y v. Openbaar Ministerie, ECLI:EU:C:2022:100 (Feb. 22, 2022), para. 40.

[29]*Aranyosi and Căldăraru*, Joined Case C-404/15 and C-659-15 PPU, at paras. 85, 90; *X v. Openbaar Ministerie*, Case C-562/21 PPU, at para. 45.

[30]ECJ, C-371/08, Nural Ziebell v. Land Baden- Württemberg, ECLI:EU:C:2018:586 (July 25, 2018), at para. 62, http://curia.europa.eu/juris/liste.jsf?language=en&num=C-371/08.

[31]ECJ, Case C-399/11, Melloni v. Ministerio Fiscal, ECLI:EU:C:2013:107 (Feb. 26, 2013).

[32]*Aranyosi and Căldăraru*, ECLI:EU:C:2016:198, at para. 89.

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ECtHR, judgments of courts of the issuing State, decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN, information in a Commission's reasoned proposal adopted under Article 7(1).[33]

Unlikely as it might seem, we cannot rule out *a priori* a scenario where different sources come to different conclusions—more or less explicitly—about the existence of systemic deficiencies. The Court would probably state that conflicting information should be treated by the executing authority with an "in dubio pro trust" approach. Inconsistency between sources, however, would surely require a concrete assessment of a series of variables[34] and thus incentivize judicial subsidiarity towards national courts. Furthermore, such inconsistencies create a greater dilemma only if we regard the systemic step as necessary in all cases—a point discussed below in the article.

Another important question relates to the "weight" attached to a source that does possess the qualities mentioned above. A source of such a kind which contains relevant information but is not directly related to the person's situation *may* be taken into account by the executing authority to assess the existence of those deficiencies. It would not suffice on its own to establish that systemic deficiencies exist.[35]

That being the (non)meaning of systemic deficiencies, the function of the latter changes depending on what right is under siege. When it comes to Article 4 CFR and detention conditions, the information must be on the detention conditions *prevailing* in the issuing State and showing the existence of deficiencies, which may be systemic or generalized, *or* which may affect certain groups of people, *or* which may affect certain places of detention.[36] These last two categories are hereinafter referred to as "targeted deficiencies." In the second step of the test, the executing State must determine, specifically and precisely, whether, in the circumstances of a particular case, there is a real risk that that person will be subject to inhuman or degrading treatment in the issuing State.[37] The assessment must concern: The conditions of detention in the *prisons* (plural) in which, according to the information available, the person is likely to be detained, including on a temporary or transitional basis; the actual and precise conditions of detention of the person concerned that are relevant for determining whether that person will be exposed to a real risk of inhuman or degrading treatment within the meaning of Article 4 CFR.[38] Therefore, the assessment may not concern "the general conditions of detention in *all* the prisons in the issuing Member State in which the individual concerned *might* be detained."[39] This can prove problematic: Focusing only on the specific prisons even where the issuing State is experiencing systemic deficiencies means that, once surrendered, the person might still end up detained in degrading conditions, in a facility that was not amongst those that were deemed likely to be used at the time of the risk-assessment.[40] When deciding about surrender, the finding that a real risk exists cannot be weighed against the efficacy of judicial cooperation in criminal matters and the principles of mutual trust and recognition.[41]

"The executing … authority must … rely on information … on the detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies." This might be read as meaning that the information relied on should allow the executing authority to acquire an idea of the bigger picture concerning detention conditions in the issuing State. The word *prevailing* would thus define the size of the assessment field. There would be no requirement that inhuman

[33]Except for this last one source, referred to in Case C-216/18 PPU, at para. 78, the other ones have been mentioned in cases of risk of inhuman treatment.

[34]For example, their times of publication, their context and scope.

[35]Case C-158/21, Puig Gordi, ECLI:EU:C:2023:57 (Jan. 31, 2023), at para. 126.

[36]*Aranyosi and Căldăraru*, Joined Case C-404/15 and C-659-15 PPU, at para. 104.

[37]Case C-220/18 PPU, at para. 62.

[38]*Id.* at para. 103.

[39]*Id.* at para. 78 (emphasis added).

[40]See in this sense Anne Weyembergh & Lucas Pinelli, *Detention Conditions in the Issuing Member State As A Ground for Non-Execution of the European Arrest Warrant: State of Play and Challenges Ahead*, 12 Eur. Crim. L. Rev. 25, 40 (2022).

[41]ECJ, Case C-128/18, Dumitru-Tudor Dorobantu, ECLI:EU:C:2019:857 (Oct. 15, 2019), at para. 84.

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detention conditions be *prevailing* in the issuing State. This interpretation would be consistent with the Court's next step in the reasoning: The information need not show that the deficiencies be *systemic or generalized*, since they can also concern certain places of detention or groups of people.[42] The question arises as to how literally the instruction to use information on detention conditions *prevailing* in the issuing State should be followed: Depending on the sources available, it might be hard to perform that task within the deadline for execution set in the EAW FD.[43]

The other right that has served as a lever to challenge the execution of an EAW is Article 47(2) CFR. The absence of criteria to identify systemic deficiencies in the independence of the justice system of the issuing state is even louder than that of Article 4 CFR.[44] Other than the finding that a Commission's reasoned opinion would be an important source,[45] there is no indication of what might constitute systemic deficiencies.[46] We do know, however, that those deficiencies alone may not justify automatic non-execution of an EAW. The second step of the test is required, mostly on the basis of the following arguments: Allowing refusal of execution on grounds of systemic deficiencies would amount to a de facto suspension of the EAW, while other EU institutions are tasked with doing that;[47] it would create a high risk of impunity and undermine victims' rights.[48] As the challenges against execution of an EAW based on Article 47(2) CFR have evolved, so has the legal framework. Similarly to the criteria established for possible violations of Article 4 CFR, the first step is met where there is evidence showing the existence of deficiencies which may be systemic, or concerning an identifiable group of people to which the person belongs.[49]

Issues can arise in particular in cases where the court in the issuing State that has heard, or is likely to hear, the case, allegedly: (1) lacks independence; (2) is not compliant with the requirement of being a court or tribunal established by law.

In the first scenario, the information relied on by the executing authority must focus on the independence of the judiciary of the issuing State. In the second scenario, the risk can be caused by different factors, which in turn determine a slightly different "assessment field." Irregularities in appointment procedures of the relevant panel of judges can potentially cause a breach of the "tribunal established by law" requirement. Furthermore, a court would not be established by law if it lacks jurisdiction to hear the case for which surrender via the EAW is sought. In both scenarios, the assessment must revolve around the operation of the issuing State's judicial system. The specific focus changes, however.

In the former case, attention must be paid in particular to the general context of appointment of judges, relevant factors including judgments of the ECJ, the ECtHR as well as the issuing State's Constitutional Court challenging the binding nature of those first two Courts' rulings.[50] In case of

[42]It is true that in both cases that followed *Căldăraru*, the conclusions start with "when the executing judicial authority has . . . information showing there to be systemic or generalized deficiencies in the conditions of detention in the prisons of the issuing Member state." However, the reference to the systemic deficiencies (alone) can be arguably explained by the fact that, in those two subsequent cases, the executing authority had indeed information of that kind and therefore mentioning the *Căldăraru* alternatives—groups of people or places of detention—would have been redundant.

[43]Which is why, presumably, the Court refers to the suspension of execution as a first step in the real risk-assessment process, coupled with the obligation to check that the prolonged period of detention is compliant with the principle of proportionality.

[44]The Court does, however, refer to the content of the standard as defined by the ECtHR in relation the personal space available of the detainee. *See Dumitru-Tudor Dorobantu*, Case C-128/18, at para. 70. This relates to the situations that might constitute a degrading treatment, rather than their systemic nature.

[45]*Minister for Justice and Equality*, Case C-216/18 PPU, at para. 78.

[46]At best, we see references to the reasons why the referring court believes that such deficiencies exist. It is mostly related to the laws impacting the independence of the judiciary. See for example *X v. Openbaar Ministerie*, Joined Cases C-562 & C-563/21 PPU, at para. 51.

[47]*Id.* at para. 63.

[48]*Id.* at paras. 60, 62.

[49]*Puig Gordi*, Case C-158/21, at para. 102.

[50]*X v. Openbaar Ministerie*, Joined Cases C-562 & C-563/21 PPU, at paras. 77–81.

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doubts related to the jurisdiction of the trying court, the executing authority must conclude that there are systemic or targeted deficiencies where "the individuals concerned are generally deprived ... of an effective legal remedy enabling a review of the jurisdiction of the criminal court called upon to try them."[51] For that purpose, the executing authority must take account of the course of proceedings relating to a EAW before the courts of the issuing State, "in so far as it gives indications as to the practices of those courts and their interpretation of the relevant national rules," especially where the issuing authority and the trying court coincide.[52] Hence, the first step will be met if materials show that generalized or targeted deficiencies in the issuing State affect judicial independence, or the system of judicial appointment, or the use of effective remedies as regards certain actions/legal challenges.

As for the second step, this was initially framed as requiring that the "first-step deficiencies" would be likely to affect the court with jurisdiction in the main proceedings, *and* that there would be a real risk for the person's right to an independent tribunal on account of their personal situation, the type of offence or the factual background of the EAW. However, the second step has evolved in harmony with the complex landscape concerning the establishment of systemic or targeted deficiencies vis-à-vis compliance with 47(2) CFR. First, there is the case of alleged irregularities in judicial appointment procedures. As to EAWs issued for enforcement, the information should show that systemic deficiencies in the issuing State had a tangible influence on the trial and in particular on the composition of the panel that judged on the case.[53] That information can relate to the appointment procedures and possible secondment of one or more of the judges hearing the case, showing that there are substantial grounds to believe that the composition of that panel affected that person's fundamental right to a fair trial before an independent and impartial tribunal previously established by law.[54] As for EAWs issued for prosecution, the second step of the test can be carried out by relying on *any* information available concerning the panel of judges likely to have jurisdiction to hear the case in the issuing State.[55]

Second, there is the scenario where the trying court might be lacking jurisdiction. Here, the executing authority could refuse execution if there were substantial grounds to believe that, in light of the applicable rules in the issuing State, and taking into account inter alia the information provided by the person that relates to any relevant circumstance, the court likely to hear the proceedings manifestly lacks jurisdiction.[56]

The EAW features different mechanisms to ensure that the breach of legal standards of a systemic nature has consequences. The practical role played by the systemic—refusing execution of an EAW—is expression of a wider dynamic. Close cross-border cooperation must work smoothly to achieve a fundamental objective of the EU as a polity—the creation of an AFSJ—which is in turn conducive to upholding justice. That must still be consistent with the rule of law. This section has provided a glimpse of the relevance of the particular to the pursuit of such a delicate balance. The way in which the executing authority ascertains the existence of systemic deficiencies is, in fact, only half of the story. The next section shows that the "particular" is as least as important, in the overall functioning of the EAW and therefore the EU more broadly.

II. Exceptional Circumstances in the Absence of Systemic Deficiencies? The Relevance of the Particular

The systemic and the particular in the two-step test are not there by chance. The specific function of these concepts relates to refusing execution of an EAW, which is premised on the rebuttal of the

[51] *Puig Gordi*, Case C-158/21, at para. 119.
[52] *Id.* at para. 105.
[53] *X v. Openbaar Ministerie*, Joined Cases C-562 & C-563/21 PPU, at paras. 83–86.
[54] *Id.* at para. 88.
[55] *Id.* at para. 102.
[56] *Puig Gordi*, Case C-158/21, at para. 119.

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presumption of mutual trust. It must, therefore, comply with the conditions set by the Court: *Save in exceptional circumstances*, Member States cannot check that other Member States have actually complied with EU law in the specific case. This has in turn very important structural consequences. The connection, established by the Court, between the EAW and the EU's fundamental objectives highlights the far-reaching implications of its judgments. As preliminary rulings establish an interpretation that bind all Member States, the Court's response to a question raised by a national court is not purely about that specific case. To the contrary, the definition and role of both the systemic and the particular in this context determine the threshold for successfully challenging *any* EAW on fundamental rights grounds, which would in many cases leave the warrant unexecuted. This, in turn, might jeopardize the effectiveness of the EAW mechanism itself and, through that, prosecution and punishment of crimes on a Union scale, casting serious doubts on the upholding of the value of justice in the EU. Even though the Court has not yet explicitly connected its interpretation to justice and Article 2 TEU, it goes without saying that the references to the fight against impunity and the protection of victims point in that direction. Of course, that argument is legitimate as long as proceedings are compliant with the rule of law. In many cases concerning execution of an EAW, the answer to the question as to whether there will be—or there has been—a breach of legal standards is not straightforward.

We have seen that, regardless of the type of right allegedly under threat, the likelihood of a breach in the specific circumstances must always be assessed. Given that the Court is not empowered to suspend the EAW towards a Member State, the need for a case-by-case assessment within a framework that binds the authorities of all EU states is inevitable. Furthermore, the two steps must involve an analysis of the information obtained on the basis of different criteria, and those steps cannot overlap.[57]

A fundamental observation in this regard, which is partly related to the way in which the law has evolved, is that "first step" and "finding of systemic deficiencies" cannot be used interchangeably. Regardless of whether a challenge to execution is brought on the basis of Article 4 or 47 CFR, the existence of systemic deficiencies is not necessary as long as targeted deficiencies emerge. Or else, "systemic" must be used in a polyhedric way to mean that the deficiencies in question are: Widespread or characterized by repetition in relation to a certain group of people, or defined by the seriousness of the violation, or affecting a system such as that of remedy.

Given that the Court defines "systemic" as an alternative to, for example, targeted deficiencies, it might be less confusing to frame the question as follows: Would (should) the *first step* always be required to refuse execution? The role for systemic or targeted deficiencies in this context links directly to the type of right affected: Whether the risk concerns an absolute right or prohibition, like that enshrined in Article 4 CFR, or a relative right that can be lawfully subject to restriction such as Article 47(2) CFR. Furthermore, the first step must be placed in the broader context of the reasons potentially leading to the lawful refusal of execution of the EAW, which presupposes an analysis of the part played by the "particular." There are three main scenarios where systemic or targeted deficiencies are not required to oppose the execution of an EAW. First, there are Articles 3, 4 and 5 EAW FD. These two provisions establish a series of mandatory and optional grounds for refusal—or conditional surrender—in order to prevent e.g. a violation of the ne bis in idem. Second, the EAW mechanism is dotted with a series of pre-conditions to validly issue a warrant. In the absence of such conditions, the EAW should be regarded as non-existent.[58] For the purposes of this article, two such conditions are worth mentioning: The evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect coming within the scope of Articles 1 and 2 FD;[59] the fact that the warrant was issued by a judicial authority competent to do so in the issuing

[57]*Id.* at para. 109.

[58]*Id.* at para. 70.

[59]Also, it might be argued that, if the conviction underlying an EAW is issued by a court lacking independence, that enforceable decision would be non-existent and so it would be the EAW issued on that basis.

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State.[60] Third, there is the *exceptional circumstances* doctrine. While systemic deficiencies are not a precondition for refusing execution, completion of the first step is.

The three scenarios are obviously different. In the first two cases, we are talking about provisions featured in the FD. Since secondary law crystallizes and fosters the state of mutual trust between Member States in the subject it governs, it could be argued that the FD operates by definition *within* the boundaries of mutual trust itself. It sets the parameters of confidence that States must have towards one another. The case law-based *exceptional circumstances* doctrine, on the other hand, is developed in a legislative vacuum—at least insofar as the FD features no explicit and general ground for refusal for fundamental rights concerns. Non-execution based on that must thus be handled with greater care. Furthermore, the concrete application of those built-in provisions might as well pave the way to unexpected hermeneutic adventures. The definitions of "enforceable judicial decision" and "competent issuing judicial authority" are cases in point. While we have observed no major legal development about the former, we have seen that the ECJ has identified criteria to define the concept of "judicial authority." The conditions concerning the "statutory rules and institutional framework" of independent prosecutors have a systemic flavor, and the same holds true for the violations thereof: Non-compliance with those legal requirements would make the EAW legally non-existent. Such a generalized and automatic finding of invalidity would only be justified in cases where the legal framework does not guarantee the independence of the prosecutors *and* entrusts the latter with the exclusive competence to issue EAWs without providing any mechanism of judicial validation. However, things are likely to be more complex than that.

The Court distinguishes between (a) systemic deficiencies in the independence of the judiciary to which the issuing authority belongs, on the one hand, and (b) lack of independence "on account of statutory rules and an institutional framework, adopted by that Member State by virtue of its procedural autonomy," on the other. For example, this would be the case where a prosecutor can be subject to instructions from the executive in the specific case related to an EAW. The ECJ ruled that, in scenario (a), the two-step test must apply.[61] What if doubts existed about the lack of jurisdiction of the authority issuing the warrant, or of the court likely to hear the case behind the EAW, *in the absence* of systemic deficiencies in the justice system of the issuing State? The question of jurisdiction is key to the requirement that a tribunal be established by law.[62] Furthermore, Article 6(1) EAW FD stipulates—unsurprisingly—that the issuing authority must be the judicial authority *competent* to do so under the law of the issuing State.

The executing authority must ensure that the EAW has been issued by a judicial authority as per Article 6(1) EAW FD, but it cannot verify that the issuing authority has jurisdiction to issue the EAW on the basis of the law of that State. An interpretation to the contrary would provide the executing authority with a "a general function of reviewing the procedural decisions adopted in the issuing State."[63] Potential lack of jurisdiction to hear the case in the issuing State must be, however, treated differently from the lack of jurisdiction to issue the warrant.[64] As mentioned above, the two steps of the test must apply. Taking account of, inter alia, how EAW proceedings are handled in the issuing State, the executing authority must consider whether that State's system of remedies against the possible lack of a jurisdiction of a court is deficient or ineffective, and, if so, whether the court likely to hear the case manifestly lacks jurisdiction.[65] The ECJ acknowledges that the executing authority will have to assess how the issuing State's judiciary conducts proceedings and review the jurisdiction of the trying court vis-à-vis pursuant to its law. It is not entirely clear why that cannot be the case for the jurisdiction of the issuing authority as well. The review needs

[60]Council Framework Decision 2002/584/JHA, arts. 6(1)–(2), 2002 O.J. (L 190/1) (EU).

[61]*L. and P.*, Joined Cases C-354 & C-412/20 PPU, at paras. 48, 69.

[62]Guðmundur Andri Ástráðsson v. Iceland, App. No. 26374/18, para. 217 (Dec. 1, 2020), https://hudoc.echr.coe.int/fre?i=001-191701 and case law cited.

[63]*Puig Gordi*, Case C-158/21, at para. 88.

[64]Although, in the specific case under consideration, the law of the issuing State empowered the same authority to do both.

[65]Needless to say, the assessment must be based on the law of the issuing State.

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not to be automatic or expression of a general function, but limited to serious or manifest cases. On the one hand, the Court has aligned the first step of the test under Article 47 CFR to that of Article 4 CFR, and has confirmed that any relevant information can be used in the assessment of the 'particular'. On the other, it has upheld both steps in cases—such as that of lack of jurisdiction of the issuing authority—that can affect the very legal existence of the warrant.

The need for performing the first step of the test could be questioned not only where doubts exist about the validity of the warrant, but also on the basis of the type of right at stake. Several provisions of the Charter might be relevant to challenge execution of an EAW—or at least incentivize the authorities to cooperate closely to reduce the risk of a violation. A case has been made for using the right to liberty where detention conditions in the issuing State are in breach of legal standards, but they do not reach the threshold of inhuman treatment.[66] Questions about the execution of an EAW for prosecution of a person in charge as sole custodian of a minor EU citizen might also materialize.[67] A question that has actually been raised concerns the possibility to refuse an EAW on health grounds, in light of Articles 3—right to physical integrity—4 and 35—right to health—CFR.[68] The case concerns a EAW issued by Croatian authorities with the view to prosecuting E.D.L., charged with possession of drugs for distribution and sale thereof. A psychiatric examination, ordered by the court with jurisdiction over the proceedings,[69] revealed that E.D.L. suffers from psychotic disorder requiring treatment, as well as a high suicide risk associated with possible imprisonment. Article 23(4) EAW FD allows the executing authority to exceptionally postpone the surrender but only on a temporary basis. However, this would not be suitable in a case of serious chronic medical conditions of an indefinite nature. A postponement *sine die* would prevent prosecution, and the situation of perpetual uncertainty might worsen E.D.L.'s conditions.

It is argued that the case constitutes a "hybrid" between *Aranyosi and Căldăraru* and the *C.K.* judgment.[70] *C.K* revolved around the possible transfer of asylum seekers from Slovenia—the EU State where the application was submitted—to Croatia—the EU State identified as responsible for the examination of the claim under the Dublin Regulation. The Court found that a transfer would amount to a violation of Article 4 CFR, in case a *real and proven risk* was found that that transfer would result in the *significant and permanent deterioration* in the person's state of health.[71] While the Croatian authorities in *C.K.* had reassured that the person would be provided with treatment, the Court observed that there might be cases where the transfer itself could create a real risk of inhuman and degrading treatment—regardless of the quality of reception and care. On that basis, the authorities of the transferring State must assess the risk, and eliminate any serious doubts concerning the impact of the transfer on the person's health.[72]

C.K. and *E.D.L.* undoubtedly share a certain degree of similarity, but also structural differences. *C.K.* was rendered against the background of the Dublin Regulation,[73] a measure governing the identification of the member state responsible for the examination of an asylum claim. *E.D.L.* relates to the prosecution for the commission of what appears to be a serious offence.

[66]*See* Leandro Mancano, *Storming the Bastille: Detention Conditions, the Right to Liberty and the Case for Approximation in EU Law*, 56 Common Mkt. L. Rev. 61 (2019), pp. 21-25.

[67]The reference to prosecution specifically is due to the fact that Article 4(6) EAW FD features a ground of non-execution of EAWs against a person who is a national, a resident or staying in the executing State, as long as the latter undertakes to enforce the penalty.

[68]ECJ, Case 699/21, E. D. L. (Motif de refus fondé sur la maladie), ECLI:EU:C:2022:955 (April 18, 2023).

[69]This is the Milan Court of Appeal, which noted that, just like the EAW FD, the Italian law implementing the EAW makes no reference to the possibility of refusing execution on grounds of health. Therefore, the Appeal Court brought an action to determine the constitutionality of the Italian Law in light of the right to health as protected by the Italian Constitution.

[70]ECJ, Case C-578/16, C.K. and Others v. Republika Slovenija, ECLI:EU:C:2017:127 (Feb. 16, 2017).

[71]*Id.* at para. 74.

[72]*Id.* at para. 85.

[73]Regulation 604/2013, 2013 O.J., (L180/31) (EU).

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Furthermore, Article 17(1) Dublin Regulation empowers Member States to examine the asylum claim even if they would not be responsible under the criteria established in the Regulation. No such equivalent provision or measure can be found in the case under consideration. Being extremely creative, the closest scenario that comes to mind is the transfer of proceedings. This is not—yet—governed by EU law,[74] and to this author's knowledge the 1972 Council of Europe (CoE) Convention[75] on the subject matter has not been ratified by the cooperating States. The fight against impunity has emerged as a fundamental objective orienting the interpretation of the Court in different areas.[76] When deciding about surrender, however, the executing court cannot weigh the finding of a real risk of inhuman treatment against considerations relating to the efficacy of judicial cooperation in criminal matters and to the principles of mutual trust and recognition.[77] The AG in *E.D.L.* opined that the execution could be suspended but not abandoned. However, the AG also stated that only if "the postponement of surrender has to be extended beyond a [reasonable] time limit the reasonableness of which must be assessed ... by the executing authority, will it be appropriate for the surrender ... not to be executed."[78] It is submitted that a case such as *E.D.L.* falls squarely under the category of "exceptional circumstances." In such a case, and as observed by the AG as well, the first step of the test would be "totally unnecessary."[79] The Court found in a way that was not too dissimilar from the Opinion. The executing authority must first suspend the execution, and then make a decision based on the supplementary information requested of the issuing authority. The main difference lies in that the phrasing, as the Court seemed to frame the possibility of refusal in much less "exceptional" terms as the AG.[80]

III. Actors and Remedies

In this discussion, we have seen how actors and remedies in EU judicial cooperation in criminal matters have emerged as very important factors. They have been woven into the discussion so far, but they also deserve a separate section to highlight their relevance and role. They are part of the bigger picture concerning the operation of judicial cooperation and mutual trust. The issuing and executing authorities must meet certain requirements for cooperation to lawfully take place. Prosecutors can be in a position, as executing authorities, to assess the existence of systemic or targeted deficiencies. This may sound controversial, but it is worth remembering that the decision must be amenable to judicial review.

Remedies are relevant in different respects. Other than the one just mentioned in relation to the competent authorities, a system of effective judicial protection is an essential component of the presumption of mutual trust. If there is a functioning system of effective judicial protection in the issuing State, execution of the warrant cannot be successfully challenged only on the basis of the second step of the test. The legal framework is nuanced. The way in which the *exceptional circumstances* doctrine has evolved shows that the role for remedies is heavily dependent on the kind of right under siege.

[74]See, for an update, *Legislative Initiative on Transfer of Criminal Proceedings: In "A New Push for European* Democracy," Eur. Parliament (May 20, 2023), https://www.europarl.europa.eu/legislative-train/theme-a-new-push-for-european-democracy/file-new-legislative-file-transfer-of-criminal-proceedings.

[75]Council of Europe, *European Convention on the Transfer of Proceedings in Criminal Matters*, (Council of Eur., Eur. Treaty Series No. 73, 1972), https://rm.coe.int/1680072d42.

[76]See for a comprehensive perspective on the subject, Luisa Marin & Stefano Montaldo, The Fight Against Impunity in EU Law (Luisa Marin & Stefano Montaldo eds., 2020).

[77]See *Dumitru-Tudor Dorobantu*, Case C-128/18, para. 84.

[78]Opinion of Advocate General Sánchez-Bordona, ECJ, Case C-699/21, E.D.L. (Motif de refus fondé sur la maladie), ECLI:EU:C:2022:955 (Dec. 1, 2022)., at para. 95.

[79]*Id.* at para. 46.

[80]*E. D. L. (Motif de refus fondé sur la maladie)*, Case 699/21, at para. 55.

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If there is a risk of inhuman treatments, the existence of legal remedies is a circumstance that the executing authority can take into account, but is not in itself capable of eliminating the risk of a breach. The situation changes when it comes to Article 47(2) CFR. The court that will conduct—in EAWs for prosecution—or has conducted—in EAWs for enforcement—the trial must be independent, impartial and established by law. Where compliance with those fundamental requirements is questioned, the existence of effective remedies can impact the outcome of the risk assessment carried out by the executing authority. As to EAWs issued for enforcement, the executing State *must* take account of the possibility for a person to reject one or more members of the panel of judges, as well as the exercise of that right and the outcome of the request.[81] The existence of such a possibility *may* be considered in case of EAWs issued for prosecution.[82]

The Court emphasized the importance of the effectiveness of the remedies formally provided by law, when assessing the real risk.[83] The effectiveness of a remedy, it is argued, should not be measured only by looking at the probability that that remedy will be granted. It also, and fundamentally, is to do with the suitability of that specific remedy for addressing the violation. Legal remedies play a different role, depending on whether the risk of a breach concerns Article 47(2), or Article 4, CFR. The distinction is justified. On the one hand, the risk of violations of Article 47(2) CFR would have to be assessed by looking at the overall fairness of the trial, following the well-established approach of the ECtHR.[84] On the other, as noted above, the existence of a remedy—regardless of how effective it is—says very little about the risk of being detained in inhuman conditions.

An effective system of remedies has emerged as an autonomous area of assessment in the execution of EAWs. It is more than a factor in the context of the second step of the test when there are concerns, for example, about the appointment procedures of the relevant panel of judges. Deficiencies in the system of remedies against the lack of jurisdiction of the court conducting the trial post-surrender could lead to non-execution, if compounded by a finding that that court would manifestly lack jurisdiction. While the deficiency affects a system of remedy, the scope of the assessment is limited to one or more types of legal challenges, in the context of types of proceedings—related to the EAW—or groups of persons. The autonomous role of this system—as opposed to systemic strictly understood—deficiency is incredibly important because it extends the range of possible reasons for non-execution way beyond issues of independence and impartiality. Deficiencies in the system of remedy, or remedies, in a Member State, combined with the risk of violation in the specific circumstances even in the absence of systemic deficiencies, would thus reach the threshold of exceptionality required to refuse execution.

The recent development in the Court's case law confirms that. In *Puig Gordi*, the question arose as to whether the execution of an EAW could be refused, in the absence of systemic deficiencies where there are concerns that the person will be tried by a court lacking jurisdiction. The Court found that the executing authority should perform both steps of the test. However, the ECJ also stated that the first step would be met if the defendants—as belonging to an objectively identifiable group—were not able to effectively challenge the lack of jurisdiction of the relevant court in the issuing State. Such remedies must make it possible to avoid the very occurrence of that infringement or, in any event, to avoid irreparable damage arising from that infringement.[85] This is a crucial passage, insofar as it casts doubts on the need for the first step in cases where the infringement is likely to happen, and even more where it could lead to irreparable harm. There is another part of the Court's legal reasoning that makes further development in this area

[81]*X v. Openbaar Ministerie*, Joined Cases C-562 & C-563/21 PPU, at para. 90.

[82]*Id.* at para. 99.

[83]ECJ, Case C-480/21, W. O. and J. L. v. Minister for Justice and Equality, ECLI:EU:C:2022:59 (July 12, 2022), para. 56.

[84]Granted, the ECtHR's approach is applied to past violations rather to prospective breaches—as it would be the case with EAWs for prosecution. This is without prejudice to an application by analogy, if adjusted.

[85]*Puig Gordi*, Case C-158/21, at para. 113.

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foreseeable: In the absence of systemic or targeted deficiencies, the risk to the person's right may, *in principle*, be ruled out and the executing judicial authority cannot "*presume* that the legal remedies ... are lacking or ... ineffective."[86] The wording of the Court is not entirely peremptory. Has the door been left ajar on non-execution through the second step only? Or is it merely an optical illusion? Only time will tell.

The next section expands upon the themes discussed in this part. The horizon now widens to measures of judicial cooperation beyond the EAW. The "immediate" function of the systemic and the particular is to challenge execution of an EAW. Underpinning that, however, there is the structural understanding of mutual trust and the role that the latter plays in ensuring that the EU values of the rule of law and justice are upheld. Against that background, systemic and particular breaches of legal standards live in a complex relationship, with questions arising as to what "weight" should be attributed to either of them. These questions involve, fundamentally, the qualities of the cooperating actors and the access to remedies. As shown below, these issues are not at all unique to the EAW, but concern this whole area of law more broadly.

D. The Systemic and the Particular Beyond the EAW

The EAW is undoubtedly the main laboratory of development, when it comes to the systemic and the particular in EU criminal law. The discussion developed in the previous section has been useful to set out some of the key issues concerning compliance with legal standards and this area of law. Against that background, the article now widens the perspective to judicial cooperation beyond the EAW. It is very important to remember that EU criminal justice has reached a high level of interdependence, so that a breach of standards—be it of systemic nature or not—in one Member State can spread like wildfire across the Union. Amongst other measures, EU law requires Member States to recognize each other States' financial[87] and custodial[88] penalties, probation measures,[89] and take into account each other's convictions in the context of internal criminal proceedings—which could, in turn, lead to harsher penalties.[90] Issues affecting, for example, judicial independence in a Member State will easily metastasize across the Union. In this part as well, the analysis focuses on: Meaning and function of systemic deficiencies, the definition of the competent enforcers, the role of remedies. Because of the range of measures of EU criminal law, the analysis relies on specific instruments that cover the different stages of proceedings.

I. Systemic or Particular. To Each Mechanism Its Own Test?

The law of the systemic and the particular in EU criminal law beyond the EAW is thinner than the latter. There is little case law indicating what role deficiencies can play in these instruments—with some notable exceptions discussed below. Looking at the measures, the three scenarios outlined with regard to the EAW FD are relevant here too. Mutual recognition measures of different kind feature: "Statutory" grounds for refusal;[91] conditions of validity of the decision/certificate to be recognized;[92] and, a general clause stipulating that the measure shall not have the effect of

[86] *Id.* at paras. 112, 114.

[87] Council Framework Decision 2005/214/JHA, 2005 O.J. (L 76/16) (EU).

[88] Council Framework Decision 2008/909/JHA, 2008 O.J. (L 327/27) (EU).

[89] Council Framework Decision 2008/947/JHA, 2008 O.J. (L 337/102) (EU).

[90] Council Framework Decision 2008/675/JHA, 2008 O.J. (L 220/32) (EU).

[91] Directive 2014/41/EU, European Investigation Order, art. 11, 2014 O.J. (L 130/1); Council Framework Decision 2008/909/JHA, art. 9, 2008 O.J. (L 327/27) (transfer of prisoners FD); Council Framework Decision 2009/829, 2009 O.J. (L 294/20); Council Framework Decision 2008/947/JHA, Probation Measure FD, art. 11, 2008 O.J. (L220/32).

[92] Directive 2014/41/EU, European Investigation Order, art. 6, 2014 O.J. (L 130/1); Council Framework Decision 2008/909/JHA, art. 4, 2008 O.J. (L 327/27); Council Framework Decision 2009/829, art. 9, 2009 O.J. (L 294/20); Council Framework Decision 2008/947/JHA, art. 5, 2008 O.J. (L220/32).

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modifying the obligation to respect the fundamental rights.[93] Considered together, the different instruments of judicial cooperation cover a wider spectrum of criminal proceedings—if not all aspect thereof of course—from investigation to the trial through to the enforcement of the penalty. They have been adopted over different eras, with some of them pre-dating Lisbon while some others having been enacted—or proposed—after the most recent Treaty change.

The European Investigation Order Directive[94] constitutes a remarkable step forward in intra-EU cooperation in criminal matters. Based on a high level of trust between the Member States, the Directive aims to replace the fragmented framework for the gathering of evidence in criminal cases with a cross-border dimension, and seeks to facilitate and accelerate judicial cooperation.[95] While the Directive contains a "fundamental right compliance" clause,[96] it also allows the executing authority to refuse execution of an EIO where there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations under Article 6 TEU and the Charter.[97]

Another example is the European Commission's proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters falls squarely within this category.[98] The Regulation concerns the production or preservation of electronic evidence by service providers offering services in the Union, upon the request of Member States' authorities and regardless of the location of data.[99] Production or preservation orders (EPOs and EPrOs) shall be addressed directly to a legal representative designated by the service provider for the purpose of gathering evidence in criminal proceedings.[100] The grounds for not complying with production order include the situation where there are grounds to believe that the execution would entail a manifest breach of the Charter.[101]

In different ways, these two post-Lisbon measures—feature a provision explicitly allowing an objection to cooperation where the risk of breach of legal standards exist. The wording thereof should not be interpreted as implicitly requiring a two-step test. This would find no clear justification in the wording of the provisions, and would be inconsistent with the overall design of the instruments. The case-by-case assessment would not require ascertaining the existence of systemic deficiencies. The preamble of the EIO Directive clearly states that *any limitation* of the rights of defense by an investigative measure ordered in accordance with the Directive should fully conform to the requirements of necessity and proportionality.[102] Given the rebuttable nature of the presumption of mutual trust on which the Directive is built, the execution of the EIO should be refused if there are substantial grounds for believing that the execution of an investigative measure indicated in the EIO would result in a breach of a fundamental right.[103] It is thus clear that systemic deficiencies are not required for refusing the execution of an EIO. The same goes for the

[93]Directive 2014/41/EU, European Investigation Order, art. 1(4), 2014 O.J. (L 130/1); Council Framework Decision 2008/909/JHA, art. 3(4), 2008 O.J. (L 327/27); Article 5, Council Framework Decision 2009/829; Council Framework Decision 2008/947/JHA, art. 1(4), 2008 O.J. (L220/32).

[94]Directive 2014/41/EU, European Investigation Order, 2014 O.J. (L 130/1). For comments, see Libor Klimek, Mutual Recognition of Judicial Decisions in European Criminal Law, 11 (2017); Alina Szabo, *The European Investigation Order—An Instrument of Cooperation for a Stronger European Union*, 11 Ctr. Eur. Stud. 259 (2019); J. Eduardo Guerra & Christine Jannsen, *Legal and Practical Challenges in the Application of the European Investigation Order*, 1 eucrim 46 (2019).

[95]ECJ, Case C-584/19, Staatsanwaltschaft Wien (Ordres de virement falsifiés), ECLI:EU:C:2020:1002 (Dec. 8, 2020), para. 39.

[96]Directive 2014/41/EU, European Investigation Order, art. 1(4), 2014 O.J. (L 130/1).

[97]Directive 2014/41/EU, European Investigation Order, art. 11(1)(f), 2014 O.J. (L 130/1).

[98]Commission Proposal for a Regulation of the European Parliament and of Council on European Production and Preservation Orders for Electronic Evidence in Criminal Matters, at 11, COM (2018) 225 final (Apr. 17, 2018). The Council and the EP recently reached an agreement on the text of the proposal. For the agreed text, see 2018/0108(OCD).

[99]*Id.* at art. 1.

[100]*Id.* at art. 7.

[101]*Id.* at art. 10a.

[102]These are the requirements established in Article 52 CFR. *See* Directive 2014/41/EU, recital 12, 2014 O.J. (L 130/1).

[103]*Id.* at recital 19.

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EPO Regulation, although the latter set a higher threshold for refusal—see "substantial grounds" of the EIO *v* the "manifest violation" of the EPO proposal.

This is expression of an important trend. Systemic deficiencies in this area have the main purpose of reversing the presumption of mutual trust and halting cooperation, which in turn has implications in terms of justice running its course. As we move towards an increasingly integrated model of cooperation, the relevance of systemic deficiencies decreases. This is manifested—one might say, taken to the extreme—in the EPO Regulation: The control in the State of execution is removed, while a risk in the specific case is sufficient to challenge the order—if on the basis of a high evidentiary threshold.

There is a noticeable difference between these measures, and instruments from the same "generation" as the EAW FD: Namely, the three FDs on the mutual recognition of judgments imposing (1) custodial or (2) non-custodial penalties, and (3) measures alternative to provisional detention. They provide, as usual, a general "fundamental rights compliance" clause,[104] but they contain no general fundamental-right-based grounds for refusal. One explanation might indeed be "generational." Adopted in the earlier years of mutual recognition in criminal matters, the approach of the legislature—and of the Court—was to tighten mutual trust and cooperation while leaving very little room for challenges thereto. A more mature and settled AFSJ, and principle of mutual trust, can afford to allow refusal of recognition in the particular case. Another—non-mutually exclusive—explanation lies in the mechanisms set up by these instruments. The EIO Directive—as the EPO Regulation would—entails a request for a specific measure so that a purely "individualized" assessment for refusal makes sense. The execution of an EAW—like with the other three FDs—is sought in order to set in motion a wider legal process—be it prosecution or enforcement—and there might be cases in which requiring a systemic assessment would be more suitable for the characteristics of the mechanism. In fact, the functioning of these instruments is entirely premised on the lawfulness of the judgment of conviction.[105] Substantiated doubts about the legal existence of the decision whose recognition is sought certainly warrant the assessment of the individual circumstances, but cast doubts on the need for the first step.[106]

There is another fundamental feature characterizing the FDs on mutual recognition of custodial and non-custodial penalties, and pre-trial measures alternative to detention. The dynamic of cooperation established by these FDs is reversed, compared to what happens in most cases: Here, the issuing EU State seeking recognition of a decision is the one that, upon recognition, will transfer the person to the executing State—unless the person is already there. The executing State is the one that, by recognizing the decision, undertakes to enforce the custodial or non-custodial penalty or measure—depending on the situation and the FD relied on.[107] As discussed below, this reverse dynamic—in comparison to e.g. the EAW—warrants a reverse *exceptional circumstances* doctrine. The variety of measures in EU criminal law create a multi-layered legal landscape. The next section uncovers that further, by discussing the issues of actors of cooperation and remedies.

[104] *Id.*

[105] A question is pending before the ECJ as to whether, in light of the rule of law backsliding in Poland, an executing court can refuse to recognize the judgment of another member state whose judicial system is affected by systemic deficiencies and, if so, whether the second step of the test should be carried out. *See* ECJ, Case C-819/21, Staatsanwaltschaft Aachen, ECLI:EU:C:2023:386 (Apr. 5, 2023). The question focused on the interpretation of Article 3(4) of FD 2008/909, in conjunction with Article 47(2) CFR and the principle of the rule of law enshrined in Article 2 TEU.

[106] Council Framework Decision 2008/909/JHA, art. 3, 2008 O.J. (L 327/27); Council Framework Decision 2008/947/JHA, art. 1, 2008 O.J. (L 337/102).

[107] For example, an Estonian national is arrested in Spain on suspicion of having committed a crime. If the person is not resident in Spain, they are likely to be placed in pre-trial detention as there would be no other mechanisms of monitoring them effectively. In principle, Spanish authorities could issue a European Supervision Order, addressed to Estonian authorities—or the authorities of the EU state where the person lives. Upon recognition of that order, the person would be transfer to the EU state where they could be monitored without being held in custody, while proceedings go ahead in Estonia.

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II. Actors and Remedies

In judicial cooperation, the cooperating authorities—in particular the executing ones—are those primarily tasked with assessing the existence of deficiencies and, on that basis, making a decision about execution. Other than courts and tribunals, prosecutors can act as judicial authorities in this context as long as certain conditions are met. Identifying the competent issuing *and* executing authorities is therefore key: The former matters primarily in relation to the validity of the decision issued for recognition, while the latter is the "checkpoint" of compliance with legal standards.

In the wider context of EU judicial cooperation in criminal matters, courts and prosecutors are not the only actors empowered to cooperate. A European Investigation Order can be issued by "any other competent authority" as defined by the issuing State and competent to order the gathering of evidence in accordance with national law. In the latter scenario, the order shall be validated by a judge, court, investigating judge or a public prosecutor.[108] When the EIO has not been issued by an authority as defined by the Directive, the executing authority shall return it to the issuing State.[109] The proposed European Production Order Regulation goes even further.[110] The proposal does away with judicial control in the executing State altogether, with authorities in the latter State being capable of stepping in only where the service provider has refused to execute the order.[111] The inversely proportional relation between level of integration and the "weight" of systemic deficiencies reveals a stronger understanding of mutual trust: The refusal to cooperate only on the basis of the specific circumstances of the case is not capable of undermining the whole system of EU criminal justice.

Similarly to the EIO Directive, the three FDs under consideration in this section embed the principle of parallel competences: Member States may designate non-judicial authorities for taking decisions under the FDs, provided that such authorities have competence for taking decisions of a similar nature under their national law and procedures.[112] Mutual trust underpins the decentralized system of EU criminal justice and the great role for national procedural autonomy, with national laws and practices shaping cooperation. This, however, creates questions about the quality of the "control" over compliance with standards, as well as access to an effective remedy.

Remedies have acquired an increasingly important role in the law of the systemic and the particular. The issue of a decision the recognition of which would entail a breach of fundamental rights, and of the right to an effective remedy especially, would be contrary to the principle of mutual trust and sincere cooperation.[113] As the Court eloquently put it, "it is for the issuing Member State to create the conditions under which the executing authority may usefully grant its assistance in accordance with EU law."[114] A "system deficiency" concerning remedies in the issuing State can thus lead to refusal of execution of an EAW or an EIO. Would this principle also apply to the three FDs addressed in this section? These FDs establish no obligation, on Member States, to provide for legal remedies against decisions taken under those instruments.[115] A possible explanation might lie in the fact that the FDs explicitly state that they create no right of release, or

[108]Directive 2014/41/EU, European Investigation Order, art. 2(c), 2014 O.J. (L 130/1).

[109]*Id.* at art. 9(3).

[110]*Commission Proposal for a Regulation of the European Parliament and of Council on European Production and Preservation Orders for Electronic Evidence in Criminal Matters*, at art. 4, COM (2018) 225 final (Apr. 17, 2018).

[111]*Id.* at art. 14.

[112]*See* Council Framework Decision 2009/829, art. 6(2), 2009 O.J. (L 294/20); Council Framework Decision 2008/947/JHA, arts. 3(2)–3(3), 2008 O.J. (L220/32).

[113]This principle has been first stated in the context of the European Investigation order, see ECJ, C-852/19, Gavanozov II, ECLI:EU:C:2021:902 (Nov. 11, 2021), para. 60 and extended to the EAW (*Puig Gordi*, Case C-158/21, at para. 142).

[114]*Gavanozov II*, Case C-852/19, at para. 58.

[115]Recital 21 of the FD on probation measures states that

All Member states should ensure that sentenced persons, in respect of whom decisions under this Framework Decision are taken, are subject to a set of legal rights and remedies in accordance with their national law, regardless of whether the competent authorities designated to take decisions under this Framework Decision are of a judicial or a non-judicial nature.

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access to non-custodial penalties. This argument works only to an extent. There might be decisions, taken on the basis of the FDs, which could be open to review without this resulting in the creation of any such right. Or else, the absence of references in this regard might imply that the decision about what remedy—if any—to grant is entirely up to each Member State.[116] In light of Articles 19 TEU and 47 CFR, however, it seems unplausible that Member States could get away with a "system deficiency" in remedies in the context of these FDs. Part of the complexity of this issue relates to the peculiar dynamic of cooperation established by these FDs, as mentioned above: The State that would have to initiate cooperation is the same that would transfer the person. Especially in the case of the FD on non-custodial penalty and pre-trial measure alternative to detention, activating cooperation would be for the benefit of the person's concerned. However, the State where the person is has no obligation to issue an order for recognition. This issue of potential "system deficiency" concerning the lack of remedy against, for example, a decision of the State rejecting a request to start cooperation and transfer is potentially linked to a "systemic deficiency." The person might request transfer to their State of residence or nationality because being held in custody in the State where they currently are might expose them to inhuman treatment.

Looking back at the issues raised in the previous sections, the article puts forward interpretative solutions to bridge the existing gaps of protection.

E. A New Look for Mutual Trust. A One-Step Test and a 'Reverse *Căldăraru*'

So far, we have mostly considered the concepts of systemic, targeted and particular deficiencies as a way to halt cooperation in criminal matters and prevent the breach of legal standards.

In the context of Article 47(2) CFR, the *exceptional circumstances* doctrine —or two-step test— was at first developed to address concerns about EAWs for prosecution and the independence of the trying court: The validity itself of the warrant was not questioned. The situation has grown more complex, as the different scenarios of non-execution are not watertight. What if doubts arise about aspects that might affect the validity of the EAW, such as the independence of the issuing authority or the legality of the national decision underpinning the EAW?[117] A method to answer those questions will have to apply, and the Court stated that such a method is the *exceptional circumstances* doctrine.

It is clear that systemic deficiencies, and the first step of the test more broadly, are a very powerful "filter" to challenges against execution. However, a more nuanced approach to the role for that step in the context of the *exceptional circumstances* doctrine would not jeopardize the principle of mutual trust. It is argued that a real risk in the specific circumstances would suffice in two situations: The breach could not be remedied—or, to be better say, undone—such as the case of Article 4 CFR; a condition of validity of the warrant is at stake. It is reasonable to expect that a one-step test will be allowed in cases of a risk of irreparable harm à-la-*E.D.L.* As for conditions of validity, the Court itself stated that a remedy in the issuing State must be effective and make it possible to prevent the very occurrence of the infringement. The use of effective remedies in the issuing State might indeed avoid that a trial is held by a court lacking jurisdiction. It might not achieve that, however, where the issue concerns the validity of the EAW itself, which would be the case where the warrant was issued by an authority lacking jurisdiction. In such cases, if reliable and objective evidence show that the execution of an EAW will likely lead to a breach, it seems more logical to address the issue before surrender, rather than allow that likely violation to happen only for the latter to then be corrected. First, the refusal would still happen only in exceptional circumstances—for example, where a condition of validity of the EAW is manifestly lacking.

[116]This interpretation would be supported by the wording of Article 12(2) ESO FD, stipulating that "If a legal remedy has been introduced against a decision."

[117]For example, because it might have been issued by a body not meeting the requirements established in Article 47(2) CFR.

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Second, a healthy judicial system should be able to quickly "absorb" and rectify the disruption before surrender, so that the EAW can be issued by an authority in compliance with the requirements of effective judicial protection.[118] The predictable objection that such a revised version of the *exceptional circumstances* doctrine might open the floodgates to systemic challenges to execution is not tenable. The check would not take place automatically and every time—which would indeed undermine mutual trust. To the contrary, there would have to be substantial grounds to believe that either of the conditions mentioned above applies. This is obviously premised on the cooperating authorities abiding by the principle of sincere cooperation. EU cooperation in criminal matters is inherently reliant on judicial subsidiarity, and the practice shows that, sometimes, the actors involved are not particularly cooperative regardless of how high a threshold for challenging execution is.[119]

The analysis of the other pre-Lisbon measures of judicial cooperation showed a possible gap of protection. It is not clear whether the two-step test would apply to those measures; this is mostly due to their functioning, which is reversed when compared to the EAW. The fact that the issuing State is the one that would then transfer the person has resulted in significant under-use of those instruments and especially the FD on pre-trial measures alternative to detention. Could the risk of a breach of legal standards—systemic, targeted and/or particular—be used to foster—or force—rather than halt, cooperation? As the law stands at present, the question seems to be mostly hypothetical. For example, the person is on remand in the issuing State, and recognition by—and transfer to—the State of residence or nationality, would allow proper supervision without deprivation of liberty while proceedings continue in the issuing State. The EU State supposed to activate cooperation is also the one unlikely to willingly forfeit "control."

Recourse to this, and the other, FDs might be particularly important especially in cases where *not* serving the sentence—or the supervision measure—in the country of residence or nationality might cause a risk of irreparable harm due to, for example, prison overcrowding in the issuing State. The FDs do not explicitly oblige a Member State to forward a judgment/decision for recognition—and subsequent transfer of the person—and even less so on fundamental rights grounds. However, neither does the EAW FD explicitly allow for refusal of execution for those reasons: The Court pulled the test from the hat of Article 1(3) EAW FD. Considering that an equivalent clause is featured in these FDs as well, it is argued that a "reverse *Căldăraru*" would find no strong legal objections.[120] The three FDs on custodial and non-custodial penalties, and pre-trial measures alternative to detention, stipulate that the issuing State *may* forward a judgment or certificate upon request of the person concerned, subject to the consent of the executing State.[121] Those States are also bound by the Charter. If either State rejected a request of transfer, made pursuant to the FD on the basis of a real risk of violation of e.g., Article 4 CFR, and that violation occurred following the States' refusal to cooperate, it is difficult to see how they would *not* be in breach. Obviously, a reverse *Căldăraru* would only be applicable in exceptional circumstances such as those mentioned above. Furthermore, it would have the advantage of fostering—rather than undermining—a mutual trust. It would potentially heighten the level of compliance with EU fundamental rights standards—or at least reducing the risk of violating them. In a symmetrical dynamic to that usually associated with mutual trust in EU criminal law, it would force EU States to trust each other; this time, that trust will be about—primarily—enforcement and monitoring.

[118]The Court acknowledges that the issuing of successive EAWs "may prove necessary, in particular after the factors which prevented the execution of a previous European arrest warrant have been ruled out." *See Puig Gordi*, Case C-158/21, at para. 141.

[119]*See Puig Gordi*, Case C-158/21, at paras. 29–30.

[120]In terms of willingness to do that, that's another story.

[121]Council Framework Decision 2008/947/JHA, arts. 5(1)–(2), 2008 O.J. (L220/32); Council Framework Decision 2008/909/JHA, art. 4(5), 2008 O.J. (L 327/27); Council Framework Decision 2009/829, arts. 9(2)–(3), 2009 O.J. (L 294/20).

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F. Conclusions

This article has analyzed the meaning, function and operation of systemic and particular deficiencies in EU criminal law. It has done so by placing those concepts in the wider context in which they have developed: The relationship between different EU values such as rule of law and justice, and the evolutionary understanding of the principle of mutual trust as a tool to handle that complex interaction. The systemic and the particular have materialized most visibly as the two steps of the test that the executing authorities must apply when there are concerns that the execution of an EAW will result in the breach of a fundamental right. This observation must be nuanced in two main ways. First, that manifestation is deceptively limited. In fact, the Court's definition of the meaning and role of the systemic and the particular has an impact on a Union-scale as regards the non-execution of EAWs. Second, this article has shown that a latent law of the systemic and the particular exists as well. This is apparent from an analysis of measures of judicial cooperation that are either more recent, or have been much less used, than the EAW. The discussion has brought to the fore certain golden threads, running through different generations of instruments. The Court seems to use "systemic" in a restrictive way, compared to the different understanding of that adjective proposed in this special issue. The situations that might lead the executing authority to consider that the first step has been met, however, seem to relate to different types of "systemism."

In potentially halting inter-state cooperation in criminal matters, systemic and particular breaches operate differently across the spectrum of this area of law. On the one hand, newer instruments, such as the EIO Directive and unlike the EAW FD, are built on what seem a stronger understanding of mutual trust: A specific ground for refusal without the need to demonstrate systemic deficiencies go hand in hand with a legal set-up that increasingly sees the EU as one legal space. This is partly achieved through legal parallelisms and national procedural autonomy. On the other, in certain mechanisms of cooperation such as that on mutual recognition of pre-trial measures alternative to detention, the State that must trigger cooperation is the one that is also tasked with transferring the person to another state. With that in mind, this article puts forward two proposals. In measures such as the EAW FD, providing no explicit grounds for refusal based on fundamental rights concerns, the first step should not be required where there is a real risk that, in the specific case: The person would suffer from irreparable harm, such as the case of inhuman treatment; or, the judicial decision at the basis of cooperation, such as the arrest warrant, is non-existent because one of its conditions of validity has not been met. Furthermore, for measures where the issuing and the transferring State coincide, the latter should be considered under the obligation to activate cooperation where there is a real risk that not doing so would result in a breach of fundamental rights.

The pursuit of justice and compliance with procedural safeguards has characterized EU criminal law since its inception. As this field has grown over the last decades, the increasing complexity of the legal framework has resulted in even more challenging legal dilemmas, which warrants the adoption of a nuanced approach to the questions raised in this article.

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