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WATERS: PROPOSAL FOR A UNIQUE
REASONED RISK-BASED TEST**



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Mutual Trust under the European Arrest Warrant and Ongoing Challenges for Fundamental Rights

Navigating Through Risks in Troubled Waters: Proposal for a Unique Reasoned Risk-Based Test

Cecilia Rizcallah ¹

How should a national judge proceed when confronted with a European Arrest Warrant (hereafter 'EAW')² that, if executed, would lead to the separation of a mother from her young child? Should the execution of a EAW be carried out against an individual whose mental health renders them unsuitable for incarceration? These are examples of intricate dilemmas recently adjudicated by the Court of Justice. They pose intricacies as they juxtapose two legitimate objectives: the safeguarding of fundamental rights on the one hand, and the efficacy of criminal cooperation, crucial for ensuring security in the Area of freedom, security, and justice, as well as upholding the fundamental rights of victims, on the other hand.

For quite some time, attention has been focused on such conundrum which, in a broader context, raises questions about the reconciliation of the principle of mutual trust between the Member States of the European Union with the protection of fundamental rights and, more generally, EU values.

This predicament carries a certain paradox. The bedrock of the mutual trust principle rests on Member States upholding these values, including fundamental rights. Why, then, should there be a need to ponder the conciliation of these two imperatives, given their inherent interdependence? The answer lies in the counterintuitive reality that, despite its foundation on respect for fundamental rights, the implementation of the mutual trust principle introduces numerous risks to these rights. When national authorities, possibly with the assistance of the Court of Justice, must implement mutual trust, they therefore conduct a risk analysis, and make a decision based on this assessment.

This is particularly the case in criminal matters, especially with regard to the EAW mechanism. This well-known instrument enables Member States to request, from another one of their peers, the transfer of an individual for the prosecution or execution of a sentence. In this scenario, the executing state must demonstrate confidence in the issuing state, executing the EAW almost automatically. However, what is to be done when, despite the veil of trust, the executing judge cannot ignore that executing a EAW may pose risks to the fundamental rights of the individual concerned or associated third parties?

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2. Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ L 190/1.



Striking the right balance proves to be a difficult endeavour: by setting aside mutual trust to protect fundamental rights, another consequential challenge arises—the risk of impunity

As underscored, this issue is far from novel and has already sparked extensive discussion.³ Nonetheless, it remains far from exhausted, continuing to provoke numerous inquiries and prompting the Court of Justice to navigate through its intricacies judiciously.

This Long-Read provides an occasion to succinctly assess the situation in light of recent judgments from the Court of Justice on this matter. In this regard, it turns out that different approaches are developed by the Court depending on the risk posed by the EAW (I). After exploring these various approaches, we will provide some food for thought on leaving aside these different perspectives in favor of a single reasoned risk-based test (II). Although we acknowledge that this proposal may not resolve all the difficulties related to the implementation of the principle of mutual trust, the objective is more modestly to encourage reflection to enrich the discussion on the topic (III).

I. From one test to another, seeking consistency in the Court of Justice's approaches

For several years now, the Court of Justice has been engaged in delineating the circumstances that may warrant an exception to the execution of a EAW, in particular in the interest of safeguarding fundamental rights. Striking the right balance proves to be a difficult endeavour: by setting aside mutual trust to protect fundamental rights, another consequential challenge arises—the risk of impunity. Indeed, when the execution of a EAW is declined, the individual in question may evade either prosecution or the enforcement of a sentence, given that, in most cases, this can only occur in the state that issued that arrest warrant. This risk differs from other areas governed by the principle of mutual trust. For instance, when rejecting a Dublin transfer in the framework of the Dublin Regulation⁴ due to concerns about the rights of an asylum seeker in the state responsible for the asylum application, another Member State can assume responsibility. Thus, deviating from the principle of mutual trust in this context does not entail the same risks as in criminal matters.

3. See, among others, C. Rizcallah, *The principle of mutual trust in European Union law. An essential principle in the face of a crisis of values* (Bruylant, 2022); E. Xanthopoulou, *Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice. A Role for Proportionality* (Hart publishing 2020) and -K. Lenaerts, 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust', *CMLRev* (2017) p. 805-840

4. Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180/31.

That probably explains why the Court of Justice has not developed precisely the same approaches in these two areas. Indeed, the conditions for setting aside mutual trust appear, in several respects, stricter when dealing with the EAW context. While this can be understood considering the risks of impunity it entails, it may still raise questions, as the protection of fundamental rights should also be ensured vis-à-vis persons suspected or accused in criminal proceedings.

The initial pivotal decision in this matter was delivered in the *Aranyosi and Căldăraru* case,⁵ later confirmed in several judgements including *Dorobantu*.⁶ In this instance, the Court of Justice acknowledged that an exception to the execution of a EAW could be warranted due to the presence of a risk of inhuman and degrading treatment stemming from inadequate detention conditions in the issuing state. However, to uphold the efficacy of the EAW, the Court of Justice devised a rigorous two-step test. Firstly, (i) the executing authority must establish the existence of systemic or generalised deficiencies, or deficiencies affecting certain groups of people, or certain detention centres, concerning the conditions of detention in the issuing Member State. Subsequently, (ii) the authority must demonstrate that, upon surrender, the individual in question will be confronted to a genuine and individualised risk of inhuman or degrading treatment. To assess this risk, the executing authority is required to contact the issuing authority to acquire precise information on the conditions under which the individual is to be detained. Only under these strict conditions can a refusal to execute be justified based on risks associated with detention conditions.

This two-step test has latter be implemented with regard to the right to a fair trial. In the *LM* case,⁷ the Court determined that the execution of a EAW could be declined only if there are (i) systemic or generalized deficiencies related to the judiciary in the issuing state that are likely to undermine the ‘essence’ of the right to a fair trial, encompassing the right to judicial independence, and (ii) compelling and well-substantiated reasons demonstrating the presence of a specific and individualized risk for the person in question to be subjected to that risk.

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5. Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, EU:C:2016:198.

6. Case C-220/18, *Dorobantu*, EU:C:2018:589.

7. Case C-216/18 PPU *LM*, EU:C:2018:586.

An exception to this trend emerges in a recent ruling, delivered in the *E.D.L.* case.⁸ The case concerned a EAW, issued for the purpose of carrying out criminal proceedings whose execution could pose a serious danger to the mental health of the person concerned due to his inability to be incarcerated. Contrary to previous rulings, the Court of Justice deemed that a one-step test could be sufficient to set aside the principle of mutual trust in this context. According to the Court, the sole risk of inhuman and degrading treatment resulting from an individual's personal health situation can justify not executing the EAW. Therefore, there is no need to examine overall state of the healthcare system within or outside the prison environment in the issuing State. In other words, even in presence of a suitable healthcare system for detainees in the issuing State, the execution of the EAW may be refused if the individual situation of the person so requires.

The adoption of a one-step test may have come as a surprise. Why, in this specific case, not take into account the general state of the penitentiary healthcare system of the issuing state? The rationale behind the two-step examination approach, whether addressing deficiencies in detention conditions or the judicial system, is rooted in a principle of shared responsibilities guided by mutual trust. The executing State is not responsible for evaluating the presence of an individualised risk of a fundamental rights violation, as this issue falls within the purview of the functional legal system of the issuing State. Similarly, systemic deficiencies that do not result in an individualized risk in the issuing state should not be the concern of the executing state. The executing state may only address the concrete consequences arising from the execution of the EAW in circumstances where both the systemic and the individual risk are present.⁹ In the presence of systemic problems, one can indeed presume that the individual risk will not be adequately addressed by the problematic system. This is the rationale behind the two-step approach.



8. Case 699/12, *E.D.L.*, EU:C:2023:295.

9. On the issue of the systemic and the particular in EU law, see R. Gadbled and C. Rizcallah, *Special Issue of the German Law Journal*, "The systemic and the particular in EU law", 2023, [available open access](#).

Nevertheless, the Court seems to have considered that this logic should not apply in the *E.D.L.* case, perhaps because it aimed to maintain consistency with its jurisprudence related to the Dublin system. In the *CK* case,¹⁰ it had indeed ruled that even in the absence of systemic deficiencies in the asylum system of the responsible state, the risk of a violation of Article 4 of the Charter due to the individual health condition of the applicant was sufficient to set aside trust and, therefore, prohibit the transfer (in this instance, it also involved an asylum seeker with a mental illness).

While this stance is comprehensible, it introduces a layer of complexity to the coherence concerning exceptions to mutual trust within the context of the EAW.

Another ruling, even more recent, reinstates the two-step test with vigor. The central query in the *GN* case¹¹ was whether a EAW could be set aside given that its execution would have separated young children from their mother. In this context, according to the Court, the execution of the EAW can be refused, solely:

- ‘Where the executing judicial authority called upon to decide on the surrender of a person in respect of whom a European arrest warrant has been issued has evidence indicating that there is such a risk on account of either systemic or generalised deficiencies in the conditions of detention of mothers of young children or of the care of those children in the issuing Member State, or deficiencies in those conditions affecting more specifically an objectively identifiable group of persons, such as children with disabilities, that authority must ascertain, specifically and precisely, whether there are substantial grounds for believing that the persons concerned will run that risk on account of those conditions’ (paragraph 45).

And

- That those deficiencies ‘are liable to have an impact on the conditions of detention of the person who is the subject of the European arrest warrant or of the care of his or her children, and whether, having regard to their personal situation, there are substantial grounds for believing that that person or his or her children will run a real risk of breach of those fundamental rights’ (paragraph 48).

In the view of the Court, the principle of mutual trust indeed implies ‘a presumption that the conditions of detention of the mother of young children and of the care of those children in the issuing Member State are appropriate to such a situation, whether in prison accommodation or in the context of alternative arrangements ensuring that that mother remains available to that Member State’s judicial authorities or that those children are placed outside the prison accommodation’ (paragraph 38). It is only in case of rebuttal of this presumption that the individual risk faced by the person concerned and their children should be assessed by the executing judge. Again, it is only if the systemic and particular risks are materialised that trust should be set aside.

As previously highlighted, the strict conditions surrounding the principle of mutual trust, particularly within the criminal sphere, are justified by the overarching goals of safeguarding security and combating impunity. However, the rationale behind the Court’s diverse approaches in these cases remains challenging for us to fully grasp. Additionally, it appears less than clear for national authorities tasked with implementing this jurisprudence, given the complexity of navigating

10. Case C-578/16 PPU, [C.K.](#), EU:C:2017:127

11. Case C-261/22, [G.N.](#), EU:C:2023:1017

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through various protection standards. These standards not only differ within the different EU law domains (e.g., criminal vs. asylum fields) and depending on the type of risk (e.g., risk because state of mental health vs. risk because of detention conditions or lack of judicial independence) but also differ from those imposed by the European Court of Human Rights. We may wonder how can national authorities be expected to adeptly manage these distinct tests in a context where European law is not thoroughly mastered, and their workload is already overwhelming? More than being concerned about the coherence of jurisprudence, what raises the most questions for us is thus its practical implementation on the ground. For this reason, we have contemplated potential solutions aimed at encouraging the development of more transparent tests for national authorities.

II. Proposal for a unique ‘reasoned risk-based test’

In order to enhance the coherence of the principle of mutual trust and facilitate its implementation by national authorities, we propose to develop a unique ‘reasoned risk-based test’, centered on a sound risk analysis.

As mentioned earlier, the Court of Justice employs different approaches, at times focusing on individual risk assessment and at other times requiring an evaluation of the state’s judicial or detention system before assessing individual risk. We propose streamlining this process into a one-step test that concentrates on the real risk faced by the individual.

Our advocated method relies on a individualised risk analysis, involving characterising the exposed fundamental right, assessing the severity of exposure, and considering the potential vulnerability of the person concerned. Factors like minority, health, or migratory status should in this framework be considered. The risk of setting aside mutual trust (such as the risk of impunity), should be part of the risk analysis.

The risk’s severity is evidently contextual, influenced by the existence (or not) of a protective environment of fundamental rights. Within this context, the former second step of the test is integrated: an evaluation of the state’s (judicial, detention, health ...) ‘system’ is also conducted and is taken into account by the risk analysis. In other words, the evaluation of the state’s ‘system’, which is crucial for trust, could be directly integrated into the assessment of the individual’s risk. A system with systemic issues will in this sense be considered less trustworthy. Thus, eliminating the two-step test doesn’t mean neglecting systemic failures in risk assessment. Moreover, in applying the principle, national authorities communicate with counterparts, seeking assurances for fundamental rights respect. The soundness of a system should in this context play a role in providing assurances, demonstrating the absence of systemic failures.

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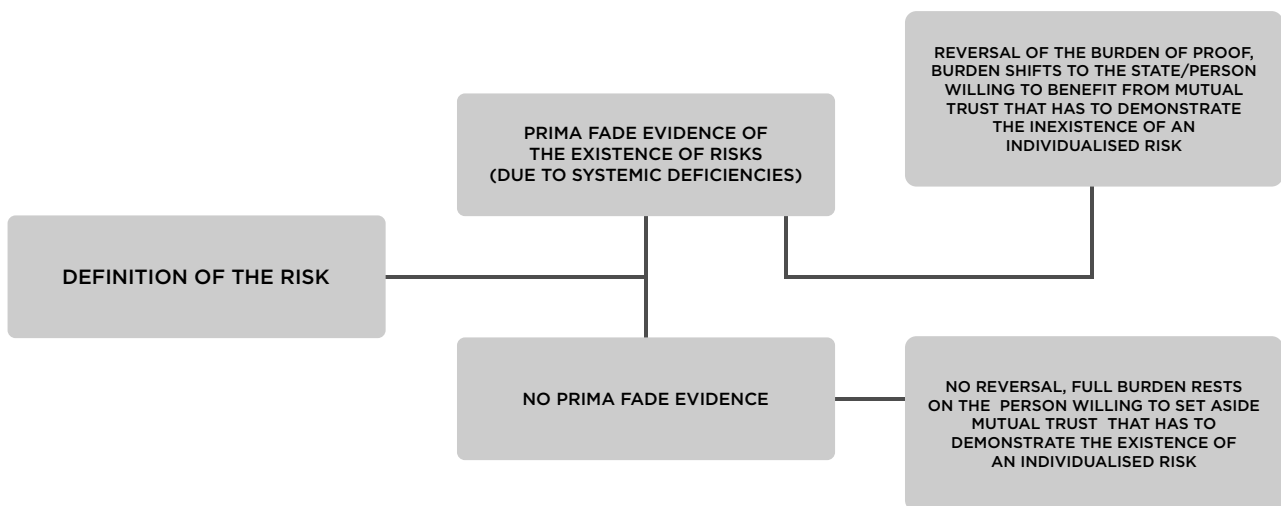
The principle of mutual trust does not disappear. It is reflected in a clearly defined burden of proof. Trust should be demonstrated, unless the risk is clearly demonstrated

Adopting such an approach would not only bring readability, coherence and simplicity, but will also align methodologically with that of the European Court of Human Rights, a standard Member States must adhere to, even in the implementation of EU law. The European Court of Human Rights indeed prioritises individual risk assessment, while considering the legal context in which the risk arises. Consequently, a malfunctioning system would logically be deemed riskier than a functional one.

In the context of this new method, the principle of mutual trust does not disappear. It is reflected in a clearly defined burden of proof. Trust should be demonstrated, unless the risk is clearly demonstrated.

In this regard, the technique used in EU antidiscrimination law could be a source of inspiration. Several directives in this field indeed establish a reversal of the burden of proof when there are indications suggesting the *prima facie* existence of discrimination.¹² In other words, in the presence of such indications, it becomes incumbent upon the individual accused of potential discrimination to establish that they have not engaged in such conduct. Within the framework of mutual trust, one could envisage that, when confronted with systemic deficiencies, it becomes the obligation of the state seeking to invoke mutual trust to demonstrate that these deficiencies will not jeopardise the individual subject to the measure. Such an approach would afford greater protection to the fundamental rights of individuals, who often find themselves in challenging circumstances when tasked with proving the existence of a risk that affects them individually.

The proposed method can be schematised as follows:¹³



12. See, e.g., Article 10 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

13. For a more in-depth exploration of this method, see, C. Rizcallah, *The principle of mutual trust in European Union law. An essential principle in the face of a crisis of values* (Bruylant, 2022).

III. Concluding thoughts

The suggested proposal is certainly not a cure-all. The implementation of the principle of mutual trust, due to the variety of risks it can entail, is inherently a highly complex task. In this context, the EU can be proud to have very effective instruments in the field of criminal cooperation, despite these challenges. Although mutual trust is fragile, it is undeniable that, at least concerning the EAW, one can say that this mechanism works quite well.

Nevertheless, the current system of limitations poses practical challenges due to the complexity of implementing these exceptions that could in our view be weakened with the adoption of the proposed test. Indeed, national authorities may struggle to determine whether a breach or risk of breach of fundamental rights justifies waiving the principle of mutual trust due to varying conditions established by the Court of Justice's jurisprudence.

For this reason, we wish to offer avenues for considering a new, more practicable test. The proposed method, which focuses on risk analysis, helps avoid these various approaches and, moreover, aligns with the standards of the European Convention on Human Rights. This approach is centered on the consideration of individualised risk, taking into account any assurances provided by the Member State in which trust must be placed.

It should be emphasised that this approach is not hostile to trust; on the contrary, it requires taking seriously into account the consequences of not applying mutual trust. In the criminal context, for instance, the risk of human rights violation must be weighed against the risk of impunity. This approach has long been adopted by the European Court of Human Rights (or 'Strasbourg Court'). In the case of *Romeo Castano*,¹⁴ the Strasbourg Court for instance condemned Belgium for not executing a EAW, bypassing mutual trust. According to the Strasbourg Court, this refusal, which resulted in a violation of the fundamental rights of the victims, was not justified by the potential risks for the convicted person's fundamental rights.

Advocating for the abandonment of the two-step test is thus not a plea against mutual trust, it is a call for a more reasoned and, therefore, stronger and enduring trust between the Member States, respectful of fundamental rights which form its bedrock.

14. ECtHR, [Romeo Castaño v. Belgium](#), judgment of 9 July 2019, Application no. 8351/17.



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