



# Stream

Strengthening Trust in the  
European Criminal Justice Area  
through Mutual Recognition  
and the Streamlined Application  
of the European Arrest Warrant

## Research Brief

# Hungary

Petra Bárd<sup>1</sup>



This report was funded by the European Union's Justice Programme (2014-2020). It has been prepared in the context of the STREAM project (JUST AG 101007485). The content of this report represents the views of the author only and is his/her sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

---

<sup>1</sup> Professor, Radboud University, Nijmegen; Research Affiliate, CEU Democracy Institute, Budapest.

## Introduction

This STREAM Research Brief was supposed to provide an overview of how and the extent to which European rule of law guarantees and fundamental rights have been taken into consideration by Hungarian judicial authorities both in the issuing and the executing phases of European Arrest Warrants (EAWs). There are two issues that jeopardize the efforts to fully comply with this research objective.

First, it is difficult to access lower court judgments in Hungary including those related to EAWs. Although there is a publicly available database, hits will only point to extremely short summaries, which in practice only show that an EAW has been issued. The sources for Hungary therefore mean a focus on cases that are available because they either reached the Court of Justice of the European Union (the Court of Justice), or because the executing judicial authority published its response, i.e. the entire judgment concerning EAWs issued in Hungary.

Second, rule of law and fundamental rights issues including violations of judicial independence, if not court capture, and prison conditions, demand special attention. Hungary is one of the countries in the European Union that has systemic problems, as is well documented by EU and extra-EU documents.<sup>2</sup> Hungary consistently appears across the different indices showing declining rule of law patterns. Varieties of Democracy showed that Hungary became an electoral autocracy,<sup>3</sup> a statement shared, among others, by the European Parliament.<sup>4</sup>

The Periodic Country Report for Hungary pays special attention to the effects deriving from the capturing of courts and systemic infringements of fundamental rights. It focuses on the key legal and practical implications that such capturing has for the administration and delivery of criminal justice at the domestic level, and in a cross-border setting. Judgments rendered by ordinary courts are not accessible, but several cases reached apex courts including the Hungarian Constitutional Court and the Court of Justice, among others on controversies of life imprisonment without parole, prison conditions, prison overcrowding and on what constitutes a final judgment. Even though several actors, including EU institutions, identified issues around judicial independence both in Hungary and in surrounding countries,<sup>5</sup> rule of law issues have

---

2 Laurent Pech and Kim Lane Scheppele, "Illiberalism Within: Rule of Law Backsliding in the EU," *Cambridge Yearbook of European Legal Studies* 19 (December 2017): 8, <https://doi.org/10.1017/cel.2017.9>; See also Gábor Halmaj, "Populism, Authoritarianism and Constitutionalism," *German Law Journal* 20, no. 3 (April 2019): 296–313, <https://doi.org/10.1017/glj.2019.23>.

3 <https://www.v-dem.net/en/>, [https://www.v-dem.net/media/filer\\_public/c9/3f/c93f8e74-a3fd-4bac-adfd-ee2cfbc0a375/dr\\_2021.pdf](https://www.v-dem.net/media/filer_public/c9/3f/c93f8e74-a3fd-4bac-adfd-ee2cfbc0a375/dr_2021.pdf)

4 European Parliament Resolution of 15 September 2022 on the Proposal for a Council Decision Determining, Pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on Which the Union Is Founded.

5 See the assessments by the Commission's Annual Rule of Law Reports or the rich case-law of the Court of Justice. Laurent Pech, "The Rule of Law," in *The Evolution of EU Law*, ed. Paul Craig and Gráinne de Búrca (Oxford University Press, 2021), pp. 307–38, <https://doi.org/10.1093/oso/9780192846556.003.0010>; Laurent Pech and Dimitry Kochenov, "Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the

not been raised in the cases analysed, whether Hungary was an issuing or an executing state. Six case studies have been provided.

## **Section I – Fundamental rights: primarily a matter for the issuing state?**

In Hungary, the EAW is issued by a court. Before the indictment is filed, it is issued by the investigating magistrate, and if a custodial sentence needs to be executed, the judge responsible for penitentiary affairs issues the EAW. Public prosecutors are independent by the letter of the Fundamental law, and are to be considered as judicial authorities. Nevertheless, they cannot issue EAWs on their own, but are entitled to submit motions to the court to issue an EAW. The judge sends the EAW to the Minister of Justice (MoJ) and the International Law Enforcement Communication Centre (Nemzetközi Bűnügyi Együttműködési Központ – NEBEK). Upon receipt of the report on the arrest of the accused, the MoJ shall immediately send the EAW to the executing judicial authority.

Upon receipt of the report on the arrest of the accused, the court, the public prosecutor's office, the investigating authority before which the proceedings are pending, or the judge responsible for penitentiary affairs who issued the EAW shall immediately appoint a defence attorney, if the accused does not have a lawyer. At the same time it shall notify the MoJ. The MoJ shall inform the competent authority of the executing Member State about the identity and contact details of the defence attorney in order to inform the accused.

With special regard to EU standards on judicial independence, effective judicial protection, and fair trials rights, the Hungarian judicial authorities' competence and qualification to issue EAWs could be questioned, along the lines of the Court of Justice's judgments of *LM*, *L and P*, or *OG and PI*.<sup>6</sup> However the present author is not aware of any cases where the alleged lack of the independence of the Hungarian judiciary justified the suspension of surrender.

## **Section II - Protecting fundamental rights in the executing state?**

Articles 3 and 4a of the EAW Framework Decision (EAW FD)<sup>7</sup> were transposed as mandatory grounds for refusal into Act CLXXX of 2012 on Cooperation with the Member States of the European Union in Criminal Matters. From among the grounds for optional non-execution of the European Arrest Warrant enshrined in Article 4, Article 4 (1) and (3) EAW FD were transposed as mandatory grounds for refusal, the rest as optional grounds. The Hungarian Act CLXXX of 2012 on Cooperation with the Member States of the European Union in Criminal Matters, in its Article 5(1)f) provides for a mandatory ground for refusal, if

---

Portuguese Judges Case" 2021, no. 3 (2021), <https://www.sieps.se/en/publications/2021/respect-for-the-rule-of-law-in-the-case-law-of-the-european-court-of-justice/>.

<sup>6</sup> Judgments of the Court of Justice of 25 July 2018, *LM*, C-216/18 PPU, ECLI:EU:C:2018:586; of 17 December 2020 in Joined Cases *L and P*, C-354/20 PPU and C-412/20 PPU, ECLI:EU:C:2020:1033; and of 27 May 2019 in Joined Cases *OG and PI*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456.

<sup>7</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *OJ L 190*, 18.7.2002, p. 1.

the execution of the EAW would cause a serious violation of the suspect's or the convict's fundamental rights as they are enshrined in an international treaty or in legal acts of the European Union. During the research we did not come across any cases where the *Aranyosi* or the *LM*-test has been applied by Hungarian courts vis-à-vis another Member State.

There might be several reasons why Hungary fails to address the issue of how to proceed in case of EAWs issued by other Member States' authorities where there are systemic and generalised deficiencies affecting the independence of the judiciary. First, Hungary itself is one of the countries in the EU affected by violations of judicial independence,<sup>8</sup> so although raising the issue would correspond to EU law and the case-law of the Court of Justice, technically the person to be surrendered would not necessarily be better off by staying in Hungary. Second, it may perhaps seem hypocritical and give room for criticism about double standards to demand assurances of judicial independence, whereas the judges asking the questions and applying the *LM*-test could themselves not satisfy the requirements they wish to see guaranteed in the other country. Third, the main problem probably is the chilling effect of retaliation against judges who applied EU law when attacking issues that were relevant from the viewpoint of keeping up the hybrid regime in Hungary (see the next section). It is rational for a Hungarian judge not to question the nature of either the Hungarian regime, or any other hybrid or illiberal State, given retaliation in previous cases. A fourth problem is arbitrary case-allocation:<sup>9</sup> even if there were some brave judges willing to challenge other Member States' adherence to judicial independence, the court administration is likely to be aware of who these judges are (for example because they had previously sent preliminary references to the Court of Justice or had challenged judicial capture internally), and not to assign sensitive cases to them.

The only instance we know of where human rights concerns around surrender have been raised – without applying the two-prong test though – happened in 2018, when the Croatian authorities requested Mr Hernádi's surrender in a case that involved the suspicion of corruption between him as President of the company MOL and then Croatian Prime Minister Ivo Sanader. The case had many stages, and at some point even reached the Court of Justice,<sup>10</sup> but Mr Hernádi's surrender has repeatedly been denied based on various grounds.<sup>11</sup> In 2018 the argument was that the Croatian courts were biased in the given case, and his fair trial rights would not be guaranteed.<sup>12</sup>

---

8 European Commission, "Staff Working Document, 2022 Rule of Law Report Country Chapter on the Rule of Law Situation in Hungary Accompanying the Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 2022 Rule of Law Report. The Rule of Law Situation in the European Union" (SWD(2022) 517 final, July 13, 2022), [https://commission.europa.eu/system/files/2022-07/40\\_1\\_193993\\_coun\\_chap\\_hungary\\_en.pdf](https://commission.europa.eu/system/files/2022-07/40_1_193993_coun_chap_hungary_en.pdf).

9 Petra Bárd et al., "Systemic Problems, Systemic Infringements: The Case of Hungary" (Brussels: The Greens/EFA in the European Parliament, 2022), 85–87, <https://extranet.greens-efa.eu/public/media/file/1/7947>.

10 Judgment of the Court of Justice of 25 July 2018, AY, C-268/17, ECLI:EU:C:2018:602.

11 See the STREAM Periodic Country Report for Hungary.

12 The press release of the judgment is available on the court's website in Hungarian: Budapest-Capital Regional Court – The Budapest-Capital Regional Court refused the surrender of Zs.H. to the Croatian authorities, <https://birosag.hu/aktualis-kozlemenyek/fovarosi-torvenyszek-fovarosi-torvenyszek-megtagadta-h-zs-atadasat-horvat>,

## Section III Protecting fundamental rights through horizontal and vertical cooperation?

We are not aware of cases where the judicial dialogue between national courts as dictated by the Court of Justice took place. This also corresponds to the findings of other national experts exploring EAW cases in Hungary.<sup>13</sup>

National judges are increasingly pressured not to send rule of law-related questions in the form of preliminary references to the Court of Justice in Luxembourg. Judge Csaba Vasvári sent several questions including on the issue of judicial independence to the Court of Justice in a case known as *IS*.<sup>14</sup> The Prosecutor General exercised his right to initiate a review of the order for the preliminary reference in front of the Hungarian Supreme Court (in Hungarian: Kúria),<sup>15</sup> and the Kúria held that the challenged decision was illegal, without attaching any further legal consequences to this finding.<sup>16</sup> The Kúria's decision straightforwardly prohibited lower courts from turning to the Court of Justice through Article 267 TFEU, since – so the judgment goes – the harmony between Hungarian and EU law must not be subject to preliminary references. And due to the hierarchy of courts, this decision was binding on every single ordinary judge in Hungary. The Acting President of the Budapest-Capital Regional Court, expressly because the reference for a preliminary ruling had been rendered illegal by the Kúria, initiated a disciplinary proceeding against the judge referring the case to the Court of Justice.<sup>17</sup> In the meantime, the disciplinary procedure was withdrawn with reference to the 'interest of the judicial organisation', but the case clearly has a chilling effect. The issue is also addressed in the framework of the procedure initiated against Hungary in the framework of the Conditionality Regulation 2020/2092.<sup>18</sup> Disciplinary proceedings are not the only tools to silence judges and to prevent them from taking part in the European judicial dialogue. Gabriella Szabó was not confirmed as a judge after her probationary period as a junior judge,<sup>19</sup> for the sole reason that she had sent a

---

24 August 2018. See also 24.hu, "Azért nem adják ki Hernádit a horvátoknak, mert elfogult lenne a bíróság (Hernádi is not surrendered to Croatia, because the court there is allegedly biased)," August 23, 2018, <https://24.hu/belfold/2018/08/23/azert-nem-adjak-ki-hernadi-a-horvatoknak-mert-elfogult-lenne-a-birosag/>.

13 See the Hungarian answers by Judge László Angyal Szűrés, "Answers to the Questionnaire Improving Mutual Recognition of European Arrest Warrants through Common Practical Guidelines (ImprovEAW). General Secretariat of the Council, Improving Mutual Recognition of European Arrest Warrants through Common Practical Guidelines (ImprovEAW), 13592/22," October 14, 2022, <https://improveaw.eu/files/hungarypdf>.

14 Judgment of the Court of Justice of 23 November 2021, *IS*, C-564/19, ECLI:EU:C:2021:949. For an immediate analysis see Petra Bárd, "The Sanctity of Preliminary References," *Verfassungsblog: On Matters Constitutional*, November 26, 2021, <https://doi.org/10.17176/20211126-215840-0>.

15 Act XC of 2017, Articles 666-669.

16 Act XC of 2017, Article 669(3).

17 File number: 2019.II.IV.K.15/2.

18 European Commission, "Proposal for a Council Implementing Decision on the Approval of the Assessment of the Recovery and Resilience Plan for Hungary" (SWD(2022) 686 final), November 30, 2022), para 21.

19 The Venice Commission criticized the practice of probationary periods back in 2012 when it reviewed the then recent law on the judiciary. See Venice Commission, "Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, Adopted by the Venice Commission at Its 90th Plenary Session, CDL-AD(2012)001-e," March 16, 2012, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2012\)001-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)001-e). But the Hungarian government never followed up the recommendations.

preliminary reference to the Court of Justice on certain Hungarian legal provisions restricting asylum.<sup>20</sup>

Therefore, due to judicial capture, the legislative overwriting of court judgments, and the harassment of judges, courts cannot fulfill their traditional function of being the guardians of the rule of law and fundamental rights, including minority rights.

---

<sup>20</sup> Eszter Zalán, “Hungarian Judge Claims She Was Pushed out for Political Reasons,, <https://euobserver.com/Democracy/152349>,” EUobserver, July 6, 2021.

## REFERENCES

### EU legislation and documents

Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *OJ L 190, 18.7.2002, p. 1.*

Proposal for a Council Implementing Decision on the Approval of the Assessment of the Recovery and Resilience Plan for Hungary. (SWD(2022) 686 final), November 30, 2022.

European Parliament, 'Resolution of 15 September 2022 on the Proposal for a Council Decision.

Determining, Pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on which the Union is Founded' n.d.

### Judgments of the Court of Justice of the European Union

Judgment of 25 July 2018, *AY*, C-268/17, ECLI:EU:C:2018:602.

Judgment of 25 July 2018, *LM*, C-216/18 PPU, ECLI:EU:C:2018:586.

Judgment of 27 May 2019 in Joined Cases *OG and PI*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456.

Judgment of 17 December 2020 in Joined Cases *L and P*, C-354/20 PPU and C-412/20 PPU, ECLI:EU:C:2020:1033.

Judgment of 23 November 2021, *IS*, C-564/19, ECLI:EU:C:2021:949. For an immediate analysis see Petra Bárd, "The Sanctity of Preliminary References," *Verfassungsblog: On Matters Constitutional*, November 26, 2021, <https://doi.org/10.17176/20211126-215840-0>.

### Literature

Bárd, P., 'The Sanctity of Preliminary References', *Verfassungsblog: On Matters Constitutional*, November 26, 2021. <https://doi.org/10.17176/20211126-215840-0>.

Halmi, G., 'Populism, Authoritarianism and Constitutionalism' *German Law Journal* 20, no. 3. (April 2019): pp. 296–313. <https://doi.org/10.1017/glj.2019.23>.



Pech, L., 'The Rule of Law' in *The Evolution of EU Law*, edited by Paul Craig and Gráinne de Búrca, 307–38. Oxford University Press, 2021.

<https://doi.org/10.1093/oso/9780192846556.003.0010>.

Pech, L., and Kochenov, D., 'Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case', 2021, no. 3 (2021). <https://www.sieps.se/en/publications/2021/respect-for-the-rule-of-law-in-the-case-law-of-the-european-court-of-justice/>.

Pech, L., and Scheppele, K. L., 'Illiberalism Within: Rule of Law Backsliding in the EU' *Cambridge Yearbook of European Legal Studies* 19 (December 2017): pp. 3–47. <https://doi.org/10.1017/cel.2017.9>.

## Other Sources

24.hu. "Azért nem adják ki Hernádit a horvátoknak, mert elfogult lenne a bíróság (Hernádi is not surrendered to Croatia, because the court there is allegedly biased)," August 23, 2018. <https://24.hu/belfold/2018/08/23/azert-nem-adjak-ki-hernadi-a-horvatoknak-mert-elfogult-lenne-a-birosag/>.

Angyal Szűrés, László. "Answers to the Questionnaire Improving Mutual Recognition of European Arrest Warrants through Common Practical Guidelines (ImprovEAW). General Secretariat of the Council, Improving Mutual Recognition of European Arrest Warrants through Common Practical Guidelines (ImprovEAW), 13592/22," October 14, 2022. <https://improveaw.eu/files/hungarypdf>.

Bárd, Petra, Zoltán Fleck, Anita Koncsik, and Zsolt Körtvélyesi. "Systemic Problems, Systemic Infringements: The Case of Hungary." Brussels: The Greens/EFA in the European Parliament, 2022. <https://extranet.greens-efa.eu/public/media/file/1/7947>. European Commission. "COMMISSION STAFF WORKING DOCUMENT, 2022 Rule of Law Report Country

Chapter on the Rule of Law Situation in Hungary Accompanying the Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 2022 Rule of Law Report. The Rule of Law Situation in the European Union." SWD (2022) 517 final, July 13, 2022. [https://commission.europa.eu/system/files/2022-07/40\\_1\\_193993\\_coun\\_chap\\_hungary\\_en.pdf](https://commission.europa.eu/system/files/2022-07/40_1_193993_coun_chap_hungary_en.pdf).

Venice Commission. "Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, Adopted by the Venice Commission at Its 90th Plenary Session, CDL-AD(2012)001-e," March 16, 2012. [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2012\)001-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)001-e). Zalán, Eszter. "Hungarian Judge Claims She Was Pushed out for Political Reasons,," <https://Euobserver.Com/Democracy/152349>." *EUobserver*, July 6, 2021.



## Availability of EAW-related jurisprudence

In Hungary only Hungarian Constitutional Courts judgments are fully available. Otherwise Act CLXI of 2011 on the organization and administration of courts provides for the Collection of Court Decisions (BHG), accessible via <https://eakta.birosag.hu/anonimizalt-hatarozatok> in order to ensure the publicity of court decisions. The Supreme Court of Hungary (Kúria), the Regional Courts of Appeal, and the 19 regional courts plus the Budapest-Capital Regional Court – in a somewhat narrower circle – are obliged to publish the decisions made on the merits of the case (i.e. no full texts) in digital and anonymized form. Although no legal obligation exists, some district court judgments are also available in the collection. The so-called edited decisions (BH, BDT, etc.) can typically only be accessed in a subscription database or journal. The Kúria's legal unity decisions, principle decisions, collegium opinions and decisions made in individual cases are fully available on the Kúria's website.

It is extremely difficult to access ordinary lower court judgments in Hungary including those incorporating EAWs issued. One can text search for “European Arrest Warrant”, but the hits will only point to extremely short summaries, which in practice is mostly just a couple of sentences saying that an EAW has been issued. The rest of the text is not following a consequent approach, sometimes some further basic pieces of information are mentioned (such as for example that the suspect agreed to surrender, or the number of crimes he or she has been searched for), or some random excerpts of one or two sentences are taken from the judgment. Once searched for “European Arrest Warrant” AND “fundamental rights” or “European Arrest Warrant” AND “prison conditions” 5 hits and 1 hit respectively were found, but no relevant reference to the search terms was reproduced in the excerpts.

The situation is different with the Budapest-Capital Regional Court as executing authority, where all judgments should be accessible. The system shows 91 hits, none of which were found to be relevant for the current research. Also, to test the system I was trying to find the origins of the Hernádi-case (known as AY in front of the CEU), but I could not find it.