

## Executive Summary: Hungary

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### Executive Summary

#### Illiberalism, state capture, mutual trust

- Hungary is one of the EU Member States with systemic problems of the Rule of Law and democratic backsliding, as EU and extra-EU assessments by institutions, think tanks and NGOs demonstrate. Hungary is subjected to an Article 7(1) TEU procedure designed to determine a clear risk of a serious breach of Article 2 TEU values.
- Serious concerns emerge with regard to the independence of the judiciary. Courts in illiberal regimes, or so-called hybrid regimes such as the Hungarian, not only fail to be a check on the government, but they are rubber-stamping laws and practices that would be unconstitutional in functioning constitutional democracies. Furthermore, they assist the government in abusing concepts, such as national sovereignty, constitutional identity or national security to overwrite states' EU law obligations. Apex courts often prolong procedures and offer governments time to complete their policies in violation of the rule of law, by refraining from adjudicating on politically sensitive cases in due time.
- Special attention should be paid on the effects deriving from court capture and a related phenomenon, systemic infringements of fundamental rights in the criminal justice sector, including in cross-border cases.

#### Issuing Procedures

- With special regard to EU standards on judicial independence, effective judicial protection, and fair trials rights, the Hungarian judicial authorities' competence and qualification could be questioned. However, we are not aware of any cases where the lack of the independence of the Hungarian judiciary justified the suspension of surrenders.
- *Overcrowding of prisons and inhuman prison conditions in Hungary (the Aranyosi Case)*  
The CJEU stated that both mutual trust between the Member States and the principle of mutual recognition are of fundamental importance for EU law. Only a closed Article 7 TEU procedure imposing sanctions on a Member State could lead to a general suspension of a mutual recognition-

based law. Otherwise, surrenders may be suspended on a case-by-case basis, if there are deficiencies in the issuing state in general, and if the person concerned by the EAW, will be exposed, to a real risk of inhuman or degrading treatment or punishment, in the event of his or her surrender to that Member State. The requesting and the requested courts must engage in a dialogue about the state of human rights in the issuing state.

- *A dialogue between the ECtHR and the CJEU about prison conditions (the ML case)*

When assessing the effects of potentially overcrowded and substandard prisons on the individual suspect, the CJEU held that the executing judicial authorities are only required to assess the detention conditions in those prisons where the issuing authorities intend to detain the suspect. When looking into what pieces of evidence would prove generic problems, the CJEU referred back to ECtHR case-law. Even though ECtHR judgments were not held to be ultimate proofs that detention conditions changed for the better in Hungary, the bar for determining the potentiality of human rights violations remains to be set by the Strasbourg court.

- *In absentia trials, meaning of fleeing justice, transposition of the FD EAW in disregard of differences between legal families, the question of procedural res iudicata, acquired rights (the Tobin case)*

The difficulties resulting from in absentia trials were illustrated by the Tobin case, where the convict's surrender was on the table for more than a decade. According to the Irish Act adopted to implement the FD EAW, convicts could only be surrendered if they *fled* from the issuing State before commencing to serve the sentence. This requirement has been changed as a direct consequence of the Tobin case, and the legislator as of 2009 foresaw *in absentia* trials where the court agreed to the suspect not to be present. Ultimately, the convict was not surrendered for various reasons, including the finality of previous rulings on surrenders, the argument that the new Irish law served compliance purposes with the FD and did not aim at the alteration of the previous surrender decisions. It was also held that the repeated proceedings amounted to an abuse of process under common law. Finally, one of the judges referenced lack of reciprocity, highlighted differences between the Irish and the Hungarian legal systems and questioned mutual trust.

## Executing Procedures

- *Ne bis idem, finality of the sentence, prosecutor terminating the case, the effect of investigations concerning unknown person (The Hernádi/AY case)*

Different understandings of the *ne bis in idem* principle hindered cross-border cooperation in the AY case. The CJEU determined that the FD EAW must be interpreted as meaning that a decision of the public prosecutor terminating an investigation opened against an unknown person, during which the person subject to the EAW was interviewed as a witness and not as a suspect, may not be relied on for the purpose of refusing to execute that EAW.

- *Denying surrender in the second round and the CJEU discussing what ne bis in idem is not*

The Hungarian executing authority refused to surrender Mr. Hernádi again after the CJEU had rendered the AY judgment. The court held that the fair trial rights of the defendant would be jeopardised in Croatia, with regard to the decisions handed down in the same case at the United Nations Commission on International Trade Law (UNCITRAL). It is questionable however what relevance an award of an arbitration tribunal has on a criminal procedure.

### Key interpretation and implementation challenges

- There is no systemic and all-encompassing monitoring of EU values in the criminal justice sector.
- The EU should be in a position to act without having to wait for rule of law backsliding or gross human rights infringements to occur in order to warn the respective Member State in due time and request a return to these values.
- Also, if a Member State has already breached these values, the EU should not have to wait for external players to indicate generic problems but should rely on a monitoring system of its own. It should attach legal consequences to a monitoring exercise showing that a threshold has been crossed and act promptly by suspending the application of mutual recognition-based EU laws. It should reinstate them, once the outcome of a regular monitoring shows a return to Article 2 TEU values. The EU could establish higher standards than those required by external fora, such as the Council of Europe and the ECtHR.