

# AG: EAWs Cannot Be Refused if there Are no Systemic & Generalised Deficiencies of Fair Trial Protection

Thomas Wahl

The CJEU will have the opportunity to rule again on the fiercely discussed question of the conditions under which a European Arrest Warrant can be refused because the executing judicial authority assumed that fundamental rights of the person concerned were not maintained in the issuing Member State. The case at issue refers to the “Catalan case.”

## Background of the case and questions referred

The quarrel between the Spanish Supreme Court and Belgian courts on the execution of European Arrest Warrants (EAWs) against former Catalan leaders has entered the next round and reached the CJEU. In [Case C-158/21 \(Lluís Puig Gordi and Others\)](#), the Spanish Supreme Court proceeds against the approach taken by Belgian courts, which refused to execute EAWs against Catalan politicians who fled Spain for Belgium after an independence referendum was held in the autonomous community of Catalonia (Spain) on 1 October 2017. The Belgian courts based their refusal particularly on the argument that there was a risk of violation of the persons’ right to be tried by a court established by law, namely that there was no express legal basis for the competence of the Spanish Supreme Court to try the persons claimed. In essence, the EAWs were refused because of a breach of the defendants’ right to a fair trial.

Based on the CJEU’s judgment in *AY* (→ [eu crim 2/2018, 105-106](#); see also the article by *Florentino-Gregorio Ruiz Yamuza* in [eu crim 4/2020, 336-343](#)), the Spanish Supreme Court questions whether an executing judicial authority can refuse to execute an EAW on the basis of a ground for non-execution not contained in Framework Decision 2002/584 (FD EAW). Furthermore, it has doubts about the power of the executing judicial authority to assess the competence of the issuing judicial authority, under the latter’s national law, to judge the defendants and to refuse the execution of the EAW on the basis of an alleged violation of the defendants’ fundamental rights. It argues that the Belgian courts did not take into account the interpretation of the Spanish courts or the fact that the parties had the benefit of first and second degree judicial review of the EAWs issued against them. The Spanish Supreme Court points out that it has to rule on the maintenance or withdrawal of existing EAWs and asks the CJEU about the possible issuance of new EAWs.

## The AG’s opinion

On 14 July 2022, *Advocate General (AG) Richard de la Tour* tabled his opinion in the case. First, he takes the view that an executing judicial authority can only refuse to execute an EAW on account of fundamental rights infringements if it relies on the CJEU’s case law, which lays down strict conditions under which a refusal can

## AUTHOR

Thomas Wahl

Senior Researcher  
Max Planck Institute for the  
Study of Crime, Security and  
Law

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be made in this sense. An executing authority cannot apply a fundamental rights clause widely, meaning that it would lead to a mandatory and automatic basis for refusing to execute an EAW in the event of an alleged breach of the fundamental rights of the person concerned.

Second, the AG puts forth that the FD EAW does not allow an executing judicial authority to review whether an issuing judicial authority is competent to issue an EAW under the law of the issuing Member State. To allow such a review would run counter to the principle of procedural autonomy – under which Member States may designate, according to their national law, the judicial authority with competence to issue an EAW – and the principle of mutual recognition, which forms the “cornerstone” of judicial cooperation in criminal matters.

Third, he asserts that a refusal is not permitted if the existence of systemic or generalised deficiencies affecting the judicial system of the issuing Member State has not been demonstrated. In this context, he argues, *inter alia*, that he sees no reason to admit a refusal ground for fundamental rights infringements in the absence of such deficiencies, because the persons concerned dispose of judicial remedies in Spain to have a possible breach of the fundamental right to a fair trial corrected. He points out that the principle of mutual trust between the Member States, which is of essential importance in creating and maintaining an area without internal borders, must be given full play so that both the objective of speeding up and simplifying judicial cooperation pursued by the FD EAW and the objective of combating impunity can be achieved. A thorough check by the executing judicial authority of the existence of a risk of violation of the fundamental right to a fair trial in the absence of systemic or general deficiencies in the functioning of the judicial system of the issuing Member State would compromise this principle.

Lastly, as regards the possibility of the Spanish Supreme Court to issue new EAWs, the AG is of the opinion that the FD EAW does not preclude an issuing judicial authority from issuing a new EAW against the same person and to the same executing judicial authority if the latter has refused to execute a previous EAW contrary to Union law. However, the issuing authority must examine whether the issuing of the new EAW is proportionate.

#### Put in focus

In the case at issue, the CJEU must answer an open question left over from its previous case law, in particular the landmark decision in LM (→ [eucrim 2/2018, 104-105](#)). For extraditions under the EAW regime, the CJEU has acknowledged a refusal due to infringements of the fundamental right to a fair trial only if a two-step procedure is applied: first, evaluation of systemic and generalised deficiencies in the protection of the fundamental right in the issuing Member State; second, specific and precise assessment of the real risk of the infringement, taking account of the individual situation of the defendant in the issuing country.

The case law in this context to date, however, has only referred to the worrisome rule-of-law situation in Poland, and national courts have easily been able to confirm the first step of the generalised and systemic deficiencies in the current Polish judicial system (→ [eucrim 1/2020, 27-28](#)). But they failed in most cases to answer the second step of the test in the affirmative (→ [article by T. Wahl, eucrim 4/2020, 321-330](#)). Therefore, the CJEU's approach has been criticised as being too narrow, and national courts tried (unsuccessfully) to convince the CJEU to give up the second part of the test, i.e. the individual assessment, so that a refusal can be claimed only if the generalised and systemic deficiencies have been established (→ [eucrim 4/2020, 290-291](#) and [eucrim 1/2022, 33-34](#)).

The *Puig Gordi* case turns the problem around, since it poses the question: Does the FD EAW (i.e. its Art. 1(3)) also include a fundamental rights refusal ground if *only* the assessment of the individual situation of

the persons concerned (the assessment *in concreto*) could lead to the conclusion of a real risk of breaches of fundamental rights in the issuing Member State.

AG *de la Tour's* opinion certainly has explosive force, particularly in two directions: First, the AG turns the general assessment to an autonomous point and does not admit a complementary individual test. This exacerbates the trend as initiated by the LM judgment that successful complaints about fundamental rights infringements will be practically impossible. In the end, the AG's view will lead to a principal preponderance of the effectiveness of law enforcement and surrender over the individuals' rights.

Second, it must be doubted whether the AG's approach is compatible with the ECHR as interpreted by ECtHR case law on extraditions and deportations. According to the judges in Strasbourg, a general assessment is acknowledged, but it is not necessary to determine a "flagrant denial of justice," which would lead to a refusal of extraditions under Art. 6 ECHR. By contrast, the judges in Strasbourg have always allowed applicants to demonstrate the existence of individual circumstances putting them at risk of a fundamental rights infringement, i.e. an assessment *in concreto* (→ Considerations on the AG's Opinion in the case of Puig Gordi and Others by [Johan Callewaert](#)).

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