

AG: Unlawful Appointment of Polish Judges Does Not Justify Non-Execution of EAWs per se

News

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The CJEU was again asked to clarify its case law as to when EAWs from Poland can be refused due to the controversial justice reforms in the country and recent national court practice.

Background of the case

Following its reference for a preliminary ruling in Joined Cases C-354/20 PPU and C-412/20 PPU (→ [euclid 4/2020, 290-291](#)), the *Rechtbank Amsterdam* sought further clarification on which consequences should be drawn for the execution of European Arrest Warrants issued in the country, following the problematic appointment of Polish judges in the wake of judicial reforms in Poland. In [Joined Cases C-562/21 PPU and C-563/21 PPU](#), the *Rechtbank Amsterdam* essentially asked which criteria must be applied to be able to conclude whether or not the refusal of the execution of EAWs from Poland are justified or not. The following critical points were among the considerations:

- The controversial appointment of judges, which has not been in line with Union law (cf. the CJEU's recent case law on Poland → [euclid 3/2021, 135-137](#) and [2/2021, 71-72](#) with further references);
- The lack of remedies to challenge the appointment of judges, which infringes the individual's fundamental rights (right to a tribunal previously established by law) and consequently.

Opinion of AG Rantos

In his [opinion of 16 December 2021](#), Advocate General (AG) *Athanasios Rantos* reiterated the principles of the CJEU's case law on possible refusals due to the lack of judicial independence in the issuing country (cf. judgment in Case C-216/18 PPU (*LM*) → [euclid 2/2018, 104-105](#)). In particular, a refusal is only possible in "exceptional circumstances" and the judicial authority executing EAWs must strictly stick to the two-step test established by the CJEU in *LM*. According to the AG, in the present case, this means that an irregularity in the appointment of judges cannot justify *per se* a real risk for the person concerned, namely that his/her case will not be treated in an impartial manner. The executing authority must ascertain that a real risk of violation of the fundamental right of the requested person to an independent tribunal exists and give reasons why it is believed that such a situation is likely to adversely affect the requested person's own case. The following points must be considered:

- The relevant conditions relating to his/her personal situation;
- The nature of the offences in question;

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- The factual context underlying the EAW.

Therefore, the circumstances leading to a real risk (that the person will not be tried by a tribunal previously established by law after surrender and that an effective remedy to challenge the composition of the court is lacking) do not exempt the *Rechtbank Amsterdam* from assessing the concrete risk of violation of the right to a fair trial for that person. In particular, it is incumbent on the *Rechtbank Amsterdam* to ascertain whether the person sought, once surrendered, runs the risk of his or her right to a fair trial being affected by the executive interfering in the competent courts.

Lastly, the AG examined the consequences of the recent decision by the Polish Constitutional Tribunal of 7 October 2021, which called into question the primacy of Union law (→ [eucrim 3/2021, 137](#)). The premise must be to avoid impunity and not undermine the principle of mutual recognition. The fact, however, that there is currently no realistic opportunity for the defendant to challenge the controversial appointment of Polish judges, together with said reasons posing a real risk not to be tried fairly, may allow the *Rechtbank Amsterdam* reach the conclusion to suspend the execution of the EAWs.

Put in focus

On the one hand, the AG stresses that there is no alternative solution other than to strictly follow the CJEU's two-step approach if the executing authority is concerned about violations of the fundamental right to a fair trial in the country that issued an EAW. It will remain difficult for national courts and the defendant to provide evidence of a concrete endangerment of this fundamental rights infringement in trials if the appointment of judges or the composition of courts is blamed. On the other hand, there is a silver lining, since the AG does not fully exclude the possibility of suspending the execution of Polish EAWs if, under the current case law of the Polish Constitutional Tribunal, there is no genuine possibility to challenge court compositions that have been established contrary to Union law.

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