

CJEU: General Deficiencies of Judicial Independence Do Not Justify EAW Refusal Alone

News

Thomas Wahl

EU Member States may not impose a general ban on surrender, despite growing doubts about the independence of the Polish judiciary. The CJEU ruled on 17 December 2020 that the execution of a European Arrest Warrant (EAW) may still only be refused if the person concerned runs a real risk of being subjected to an unfair trial (Joined Cases C-354/20 PPU and C-412/20 PPU, “L and P” / *Openbaar Ministerie*). This risk must be examined on a case-by-case basis. In this, the CJEU follows the opinion of Advocate General Campos Sánchez-Bordona. For more background information on the case and the AG’s opinion, → [eucrim 3/2020, 192-193](#).

Background of the case:

The Luxembourg judges uphold their case law established in “LM” (→ [eucrim 2/2018, 104-105](#)). In this case, they established a two-step test, according to which courts in the executing state may reject EAWs on the grounds of violations of the right to a fair trial in the issuing state. In view of the reforms of the Polish judicial system, the Luxembourg judges made it clear at the time that there was a risk that a requested person would not receive a fair trial in Poland. However, an abstract-general examination was not sufficient: next to the assessment of whether systemic and generalised deficiencies exist concerning the independence of the issuing Member State’s judiciary, the respective judicial authority of the executing Member State must determine to what extent such deficiencies are liable to have an actual impact on the situation of the person concerned if he/she is surrendered to the judicial authorities of that issuing state.

On account of recent developments that have raised doubts about the independence of the Polish judiciary, the referring court, the *Rechtbank Amsterdam*, essentially wanted to know from the CJEU whether a case-by-case examination was still required at all – or whether the finding that Poland no longer guarantees the independence of its judiciary is sufficient in itself to justify a refusal to execute an EAW issued by a Polish court.

Findings of the CJEU:

The CJEU rejects this approach: the executing court must still be satisfied that there are substantial grounds for believing that, on account of these deficiencies, the person concerned will run a real risk of breach of his/her right to a fair trial once he/she is surrendered to the authorities of the issuing state. The executing court must consider the individual situation of the person concerned, the nature of the offence in question, and the factual context in which the European Arrest Warrant has been issued. With regard to the specific context of

AUTHOR

Thomas Wahl

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

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the two cases at issue, the CJEU does specify the impact of systemic and generalised deficiencies on the assessment in the second step of the two-step test for both EAWs issued (for the purpose of prosecution and for the purpose of execution of a custodial sentence).

Arguments of the CJEU:

The main lines of argument of the judges in Luxembourg, upholding its case law as established in *LM*, can be summarised as follows:

- The concept of systemic or generalised deficiencies affecting the judiciary's independence cannot lead to the automatic conclusion that all courts of the affected Member State or every decision of these courts fail to be independent;
- Denial of the "issuing judicial authority" status to all courts of the Member State in question would lead to a general exclusion of the Member State from the mutual recognition instrument;
- The above would also imply that the courts of the Member State at issue would no longer be able to submit references for preliminary rulings to the CJEU, since the independence of courts and tribunals is inherent in the concept of Art. 267 TFEU;
- Recent CJEU case law on the concept of "issuing judicial authority" in relation to public prosecutor's offices subordinate to the executive in certain Member States cannot be transferred to Member States' courts (→ [eucrim 1/2019, 31-33](#) and [eucrim 4/2019, 242-245](#) and the news item on the [judgment in Case C-510/19](#));
- The existence of or increase in systemic and generalised deficiencies concerning the independence of the judiciary in the issuing state is indicative of a real risk of breach of the right to a fair trial and the executing judicial authority can exercise vigilance; however, it cannot dispense a specific and precise assessment of this risk;
- Dispensing such an assessment would amount to a general suspension of the EAW mechanism, which would interfere with the procedure provided for in Art. 7(2) TEU.

Put in focus:

It is of note that, in the refusal of EAWs, nearly no argument has been successful to date before a Member State court against the independence of the judiciary in Poland following its justice reforms. An exception is the decision of the Higher Regional Court of Karlsruhe in Germany of 17 February 2020 (→ [eucrim 1/2020, 27-28](#)). The court applied the two-step procedure as defined in *LM* and concluded a real risk of fair trial infringements in Poland in the specific case.

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