

CJEU: No Carte Blanche to Refuse EAWs from Poland

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News

In its judgments of 22 February 2022 in the Joined Cases C-562/21 PPU and C-563/21 PPU, the CJEU upheld its case-law on the refusal of European Arrest Warrants (EAWs) issued by Polish authorities if the requested person put forward infringements of fair trial. The case law developed for the possible refusal of EAWs in case of complaints about the independence and impartiality of the judiciary (inherent in the fundamental right to a fair trial) also applies if the right to a tribunal previously established by law is at issue. The judges in Luxembourg stressed that the executing judicial authority must stick to the two-step examination regarding breaches of the requested person's fundamental right to a fair trial but they specified the criteria for this examination.

[The preliminary ruling question](#)

The CJEU, sitting in for the Grand Chamber, replied to references for preliminary rulings by the *Rechtbank Amsterdam*. In essence, the Dutch court asked under which circumstances a refusal of Polish EAWs is permitted if the panel of judges who adjudicate a criminal case was appointed by the Polish National Council of Judiciary ("the KRS"). The *Rechtbank Amsterdam* argued that the KRS can no longer be considered an independent body after the judicial reforms that entered into force in 2018. In addition, there is no effective legal remedy for the defendant in Poland (as the issuing Member State) to challenge the validity of the judicial appointment. For more background information on the case and the opinion of the Advocate General → [eucrim 4/2021, 227-228](#).

[Findings of the CJEU upholding the two-step examination](#)

The judges in Luxembourg reiterated their standing case law on the importance of the principles of mutual trust and mutual recognition for the execution of EAWs. They stressed that a refusal of the execution of an EAW for reasons of fundamental rights infringements is only possible in exceptional circumstances. Moreover, the operability of the EAW scheme must be ensured, which is why a dialogue between the executing and issuing authority as a consequence of the duty of sincere cooperation must be kept up. Against this background, an executing authority cannot dispense with a specific and precise verification which takes account of, *inter alia*, the requested person's personal situation, the nature of the offence and the factual context, if there is evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State. Even an increase in systemic or generalised deficiencies cannot in itself justify a refusal of the EAW. As developed in previous case law in relation to the rights to an

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independent and impartial court (→ [eucrim 2/2018, 104-105](#) and [eucrim 4/2020, 290-291](#)), the executing authority must therefore determine:

- in a first step, a real risk of breach of the fundamental right to a fair trial in the issuing Member State on account of systemic or generalised deficiencies, plus
- in a second step, the concrete impact of the deficiencies on the person's situation, i.e. there must be substantial reasons for believing that that person will run such a risk if he/she is surrendered.

The CJEU justified the necessity to carry out the two-step examination mainly by the following arguments:

- Inextricable links between the guarantees of judicial independence and impartiality and of access to a tribunal previously established by law as parts of the fundamental right to a fair trial (enshrined in Art. 47(2) CFR);
- Need not to undermine the objectives of Framework Decision 2002/584 on the EAW and the principle of mutual trust, notably considering that impunity must be avoided;
- Coherence with the other rule-of-law mechanisms in place, in particular the competences of the European Council and Council in the Article 7 procedure must be respected.

Clarification of the criteria for examination

Subsequently, the CJEU specified the detailed rules for applying the two-step examination regarding the fundamental rights at stake in the present case.

Regarding the first step, the executing authority must consider the standard of protection of the fundamental right guaranteed in Art. 47(2) CFR. In this regard, the right to be judged by a tribunal "established by law" encompasses, by its very nature, the judicial appointment procedure. It is stressed, however, that the executing judicial authority must carry out an overall assessment of a number of factors, on the basis of any evidence that is objective, reliable, specific and properly updated concerning the operation of the issuing Member State's judicial system. The fact that a body, such as the KRS, which is involved in the appointment of judges, is made up, for the most part, of members representing or chosen by the legislature and the executive, is *per se* not sufficient to justify a refusal decision by the judicial authority executing an EAW.

Regarding the second step, the judges in Luxembourg found that, in general, the requested person must adduce specific evidence to suggest that systemic or generalised deficiencies in the judicial system had a tangible influence on the handling of his or her criminal case or are liable, in the event of surrender, to have such an influence. Such evidence can be supplemented, as appropriate, by information provided by the issuing judicial authority. As regards the specific information which must be provided a distinction must be made according to the purpose of the EAW:

- If the EAW was issued for the purpose of executing a custodial sentence information must be provided on the composition of the panel of judges who heard the criminal case, the appointment procedure of the judges concerned and their possible secondment, and the exercise of the right to reject judges as well as the outcome of this request.
- If the EAW was issued for the purpose of conducting a criminal prosecution, the executing authority must rely on information concerning the requested person's personal situation, the nature of the offence for which that person is prosecuted, the factual context surrounding that EAW or any other circumstance relevant to the assessment of the independence and impartiality of the panel of judges likely to be called upon to hear the proceedings after surrender. On this basis, an overall assessment is required whether the person runs a real risk of breach of the fundamental right.

By contrast, the fact that the identity of the judges who will be called upon eventually to hear the case of the person concerned is not known at the time of the decision on surrender or, when their identity is known, that those judges were appointed on application of a body such as the KRS is not sufficient to refuse that surrender.

Put in focus

The decided case follows the line of arguments established by the CJEU in the famous “LM” judgment (→ [eucrim 2/2018, 104-105](#)) and it is closely related to the Joined Cases C-354/20 PPU and C-412/20 PPU which were brought forward by the Rechtbank Amsterdam as well (→ [eucrim 4/2020, 290-291](#)). The Dutch court fails for the second time with the attempt to reach a wider interpretation of the refusal ground on fundamental rights infringements in an EU Member State which puts maintenance of rule-of-law principles at stake. The judges in Luxembourg deny to give green light to a more or less general halt of judicial cooperation with such countries as they have already done in previous judgments. The main arguments remain the need to avoid impunity and not to interfere into the Article 7 procedure. However, the judgment does not much take into account that impunity could be avoided by transfer of the criminal proceedings. Furthermore, it should be recognised that the Article 7 procedure is currently in a political cul-de-sac since the Council has not taken any decision to determine that there is a clear risk of a serious breach by Poland of the values referred to in Art. 2 TEU.

Another critical point from the defence perspective is the imposition of several duties for the person concerned to produce evidence. This relates to both the first and second step of the examination of whether there is a real risk of a breach of the fundamental rights to a fair trial and of whether this risk will materialise in the concrete situation of the defendant. In sum, in practice, it will hardly be possible to produce the needed, in order to convince the executing judicial authority that the EAW should be refused due to fundamental rights infringements in the issuing country. Thus, the CJEU’s case law as established in “LM” will remain a paper tiger. The “success rate” for the defendant will nearly be zero.

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