

CJEU: Refusal of EAW in Case of Fair Trial Infringements Possible as Exception



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News

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On 25 July 2018, the CJEU delivered its judgment on the non-execution of European Arrest Warrants (EAWs) in cases of systemic deficiencies regarding the independence of the judiciary (Case C-216/18 PPU [“LM”]). The case was referred to the CJEU by the Irish High Court, which doubted whether surrender of a Polish national to Poland complies with the EU’s fundamental rights in view of the recent judicial reforms in Poland and the Article 7(1) procedure initiated by the European Commission (for the case, see [eucri](#)m 1-2018, p. 31; for the Article 7 procedure, see news under “Fundamental Rights” in this issue as well as [Cassese](#), [eucri](#)m 1/2018, p. 72). The referring court essentially wanted to know how the judicial authorities of the executing state should apply the CJEU’s judgment in *Aranyosi and Căldăraru* (see also [eucri](#)m 1/2016, p. 16) if there is a real risk of breach of the fundamental right to a fair trial.

The CJEU concluded that the executing authority can refrain from giving effect to a EAW under these circumstances, but under very narrow conditions:

In a first step, the executing authority must assess – on the basis of objective, reliable, specific, and properly updated material – whether there is a real risk of breach of the essence of the right to a fair trial in connection with the lack of independence of the judiciary in the issuing Member State. In this context, the CJEU considers the information in the Commission documents relating to the Article 7(1) procedure to be particularly relevant for this assessment.

In a second step, the executing authority must specifically and precisely assess whether, in the particular circumstances of the case, there are substantial grounds for believing that, following surrender, the requested person runs the real risk of breach of the fundamental right to a fair trial.

The CJEU clarified that reasoned proposals of the Commission within the Article 7(1) procedure or other material showing systemic deficiencies in the light of the values referred to in Art. 2 TEU do not replace this specific assessment. Therefore, the executing authority must examine to what extent the systemic or generalised deficiencies are liable to have an impact at the level of the courts with jurisdiction over the specific case to which the requested person is subject. Even if the executing authority can affirm this impact on the courts in the concrete case, it must further assess whether there are substantial grounds for believing that the individual concerned will run a real risk of breach of his right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial. In this context, the executing authority must pay attention

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to the personal situation, the nature of the alleged offence at issue, and the factual context (as presented in the EAW form).

Lastly, the CJEU calls on the executing authority to request any supplementary information from the issuing judicial authority that it considers necessary for assessing the real risk. The issuing authority may provide any objective material that rules out the existence of said risk to the individual concerned.

In sum, the CJEU transfers the testing programme it developed in the *Aranyosi and Căldăraru* case within the context of ill-treatment (Art. 4 CFR) to alleged violations of the – not absolute – right to a fair trial (Art. 47 CFR). The court maintains the necessity of a two-step assessment, i.e., the affirmation of a real risk of systemic deficiencies in the judicial system of an EU Member State must be accompanied by the affirmation of a real risk to which the individual concerned is actually exposed in the concrete case. The CJEU states more precisely the parameters that the executing judicial authority must take into consideration concerning fair trial infringements in the context of the independence and impartiality of the judiciary. It also clarifies what information the executing authority must obtain from the issuing judicial authority in order to discount a real risk.

From a legal point of view, it is interesting that the CJEU does not follow the concept of a “flagrant denial of justice” – a concept that is common in the case law of the ECtHR and that was taken over by AG *Tranchev* in his [opinion on the case of 28 June 2018](#). It remains to be seen which consequences these different concepts will have on the future European extradition scheme.

On the one hand, the judgment can be considered a success, since the CJEU accepts a fundamental rights exception in the execution of EAWs. The CJEU explicitly bases its decision on Art. 1(3) FD EAW, i.e., the fundamental rights clause. On the other hand, considering the narrow criteria that were set by the Court, it is questionable whether such objections by the individual will be successful in concrete extradition cases. It must also be questioned whether the Court provided the courts with appropriate practical guidance in the executing state.

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