

# ECJ: Deficiencies in Fair Trial Protection Can Block Recognition of Custodial Sentence

Thomas Wahl

Requests from courts of a Member State for mutual recognition for the enforcement of judgments imposing custodial sentences do not have to be recognized if the court in the executing state has doubts about the fairness of the proceedings. This conclusion was drawn in the ECJ's judgment of 9 November 2023 in [Case C-819/21 \(Staatsanwaltschaft Aachen v M.D.\)](#). Thus, the ECJ transferred its case law on Framework Decision 2002/584 on the European arrest warrant to [Framework Decision 2008/909](#) on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

## Facts of the case and question referred

The case presented by the Regional Court of Aachen (Germany) concerns a Polish national habitually resident in Germany; he was sentenced in Poland in his absence to six months' imprisonment for unlawful appropriation and forgery of documents. The suspended sentence was revoked and Poland applied for the sentence to be enforced in Aachen. When questioned about this, the Pole explained that, firstly, he was innocent and, secondly, he had not received a summons to the main hearing at all. The file revealed that the summons had only been sent to his Polish address, although he already lived in Germany. The Aachen Regional Court wished to refuse to enforce the Polish custodial sentence in Germany due to the shortcomings of the Polish judicial system. However, the court doubted whether the relevant ECJ case law on the European Arrest Warrant, in particular the judgment of 25 July 2018 in Case C-216/18 ("*LM*" → [eu crim 2/2018, 104-105](#)), was transferable to the application of Framework Decision 2008/909.

The Aachen Regional Court then referred the question to the ECJ as to whether it is compatible with Union law to refuse to enforce the sentence if there are indications that the underlying criminal proceedings suffered from serious deficiencies and that these deficiencies had an impact on the conviction. Furthermore, the Regional Court asked what point in time must be taken into account for these deficiencies to be present.

## The Luxembourg judges' decision

The ECJ affirmed the question of a possible rejection due to violations of the fair trial principle. The principle of mutual recognition can be compromised in exceptional circumstances. The ECJ referred to recital 13 and Art. 3 para. 4 of Framework Decision 2008/909. Accordingly, the Framework Decision provides that it is not to have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Art. 6 TEU. However, the Luxembourg judges clarified that - as with the European Arrest

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Warrant - a two-step assessment is required: if there are systemic or generalised deficiencies, it must subsequently and additionally be examined whether these errors have had a concrete impact on the judgment at issue (here: Polish judgment imposing the custodial sentence against the Polish national). In other words, there must be substantial grounds that an abstract risk has actually materialised in the present case. In this case, the execution chamber of the Aachen Regional Court could refuse to enforce the sentence due to Poland's violation of the fair trial pursuant to Art. 47 para. 2 CFR and Art. 2 TEU.

The examination should be carried out in the light of the situation prevailing in Poland on the date of the disputed conviction. The Luxembourg judges consider the development of the legal situation after the judgment was issued to be irrelevant. In their opinion, the situation in Poland at the time of the revocation of the suspended sentence is also irrelevant because the revocation is a mere enforcement measure which modifies neither the nature nor the quantum of the sentence.

It is now up to the Aachen Regional Court whether a refusal in the concrete case is justified under the conditions established by the ECJ.

### Put in focus

In its judgment of 9 November 2023 in the *Staatsanwaltschaft Aachen / M.D.* case, the ECJ clarified for the first time that not only the Framework Decision on the European Arrest Warrant (FD EAW), but also the other mutual recognition instruments fostering judicial cooperation implicitly recognise a fundamental rights refusal ground. The ECJ clarified that the vague clause which was copied from Art. 1 para. 3 of FD EAW and pasted into the other framework decisions (here: Art. 3 para. 4 of FD 2008/909) established a sufficient basis for the non-recognition if other EU Member States infringe fundamental rights and values of the EU. Therefore, it did not matter that the FD on the mutual recognition of custodial sentences has no equivalent to Recital 10 FD EAW, as the ECJ stressed.

However, the Luxembourg judges fiercely defend their standpoint that a refusal on grounds of fundamental rights infringements can only be accepted in exceptional circumstances. Therefore, the executing judicial authorities need to carry out the two step test (developed in the 2015 *Aranyosi/Căldăraru* judgment → [eucrim 1/2016, 16](#)). There is no room for a simple individual test, i.e., whether fundamental rights have been infringed solely in the concrete case, without having first approved systemic or generalised deficiencies in the issuing country. This is in line with the ECJ's recent EAW judgment in *Puig Gordi and Others* (→ [eucrim 1/2023, 41-43](#)). As indicated in para. 34 of the present judgment, the ECJ justifies this line of argument by stating that the competent authority of an executing Member State should not get the power to suspend a mutual recognition mechanism by refusing all requests from the issuing Member State on account of its deficiencies. Nonetheless, this approach does not counter criticism that the established test is too narrow in the end and hardly attainable. It does also not clearly answer the question why a moderate application of individual fundamental rights tests would undermine the principle of mutual recognition (see also the [blog post by Johan Callawaert](#) of 5 December 2023).

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