

Fair Trial Concerns: German Court Suspends Execution of Polish EAW

Thomas Wahl

News

With its [decision of 17 February 2020](#), the Higher Regional Court (HRC) of Karlsruhe, Germany set aside an extradition arrest warrant against a Polish national who was to be surrendered to Poland via an EAW issued for the purpose of criminal prosecution. The court argued that a fair trial for the requested person is not guaranteed in Poland following recent reforms that had an impact on the disciplinary regime of the judiciary in Poland.

Background:

The court in Karlsruhe refers to the CJEU's judgment of 25 July 2018 in *Celmer* ([Case C-216/18 PPU](#) – also dubbed “LM”), in which the judges in Luxembourg concluded that the executing authority can refrain from giving effect to an EAW under certain circumstances on the grounds that the right to a fair trial will not be respected in the issuing EU Member State (see details in [eucrim 2/2018](#), pp. 104-105).

Decision of the HRC:

The court in Karlsruhe extensively dealt with the recent reforms in Poland, which further restrict the independence of judges by introducing, *inter alia*, new rules on the disciplinary regime to the Polish judiciary. This “muzzle law” came into force on 14 February 2020 (for details, consult the recent news on the rule-of-law situation in Poland in the category “Foundations>Fundamental Rights”). The court also took into account recent developments against the Polish reform at the EU level. It paid particular attention to the CJEU's judgment of 19 November 2019, in which doubts were raised as to the independence and impartiality of the new Disciplinary Chamber at the Polish Supreme Court (see details in [eucrim 3/2019](#), pp. 155-156). It also took into consideration other (pending) infringement actions against the reform that had been referred to the CJEU by the European Commission.

Since the defendant put forward material supporting the assertion that there are systemic deficiencies in the rule of law in Poland, the HRC examined the real risk of breach of the fundamental right to a fair trial – the second step required by the CJEU in the *Celmer* judgment. As this real risk could not be excluded, the HRC sent a catalogue with comprehensive questions to the Polish Ministry of Justice asking for further clarifications on the new muzzle law and its impact on the concrete criminal proceedings, including possible disciplinary measures against the deciding judges. At the same time, the HRC set aside the extradition arrest warrant in Germany – following the current developments in Poland in respect of the judicial reform – because a “high probability” exists that extradition would be inadmissible (at least) at the moment.

Put in Focus:

AUTHOR

Thomas Wahl

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

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The HRC of Karlsruhe rendered a landmark decision. It is the first time that a court in an EU Member State denied extradition because of possible fair trial infringements in another EU country. Until now, courts in Europe consistently refused to accept non-extradition, following the judicial reforms in Poland that started in 2015, because the hurdles set by the CJEU in *Celmer* could not be overcome. Nearly all cases failed because the courts were not convinced that the requested person would run a real risk of fair trial infringement in Poland. The HRC of Karlsruhe justifies its change in view because the recent muzzle law has shown that the person concerned could run this real risk. It is no longer an abstract danger, because the new disciplinary regime has repercussions on the entire judiciary, including on judges at the competent criminal courts of first instance. However, the HRC of Karlsruhe stresses that the extradition procedure in Germany is not yet finished; a final decision on the case rests on the reply to the catalogue of questions by the Polish authorities.

The decision of the HRC also demonstrates that the judiciary in other EU Member States cannot assess fair trial issues at the level of the European Arrest Warrant without looking at other developments in judicial reform, in particular concrete CJEU case law following infringement proceedings against the reform. The question is also whether the CJEU's case law on the EAW, on the one hand, and on the judicial reform in Poland, on the other, is consistent.

In the present context, the following statement of the Parliamentary Assembly of the Council of Europe is worth reading:

“The Assembly notes that the concerns about the independence of the Polish judiciary and justice system, as well as Poland's adherence to the rule of law, directly affect Europe as a whole. The questions about the independence of the justice system and the respect for the rule of law are therefore not to be considered as internal issues for Poland. The Assembly calls upon all Council of Europe member states to ensure that the courts under their jurisdiction ascertain in all relevant criminal cases – including with regard to European Arrest Warrants – as well as in relevant civil cases, whether fair legal proceedings in Poland, as meant by Article 6 of the European Convention for Human Rights, can be guaranteed for the defendants” (No. 11 of the adopted [resolution of 28 January 2020](#)).

The reference number of the HRC's decision (*Beschluss*) of 17 February 2020 is: Ausl 301 AR 156/19. See also [the press release](#) by the Oberlandesgericht Karlsruhe and the summary by [Anna Oehmichen](#) in “beck-aktuell” (both in German). A first analysis in English has been provided by Maximilian Steinbeis on [Verfassungsblog.de](#).

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