

CRITERIA TO ASSESS WHETHER THERE IS ANY RISK OF A BREACH OF THE REQUESTED PERSON'S FUNDAMENTAL RIGHT TO A FAIR TRIAL IN THE EXECUTION OF A EUROPEAN ARREST WARRANT

A Dutch court requested a preliminary ruling from the Court of Justice of the European Union (the “CJEU”) in relation to the execution, in the Netherlands, of two European arrest warrants (“EAW”) issued by two Polish courts.

The motive of this request was that the Dutch executing judicial authority considered that there was a real risk that the requested persons, if surrendered, would suffer a breach of their fundamental rights right to a fair trial in a tribunal previously established by law due to the Polish judicial appointment system. In this sense, this right aims to ensure that the judicial organisation in a democratic society does not depend on the discretion of the executive branch, but that law emanating from Parliament regulates it.

The CJEU delivered its judgment on 22 February 2022¹, interpreting the third paragraph of Article 1 of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as well as the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union.

1. Background

In April 2021, Polish courts issued two EAWs for two Polish nationals for the respective purposes of executing a custodial sentence and conducting a criminal prosecution. Since the requested persons were in the Netherlands and did not consent to their surrender, the competent Dutch court received the request to execute the EAWs.

In its request for a preliminary ruling in relation to the execution of the EAWs, the executing judicial authority noted that since 2017 there had been general deficiencies affecting the right to a fair trial in Poland. Therefore, the executing judicial authority considered that there was a real risk that the requested persons, if surrendered, would suffer a breach of their fundamental right to a fair trial in a tribunal with judges appointed following a system previously established by law.

Considering those circumstances, the executing judicial authority asked the CJEU whether the two-step examination test² was also applicable where the guarantee of a fair trial in a tribunal previously established by law was at issue.

¹ Judgment of the Court (Grand Chamber) in Joined Cases C-562/22 PPU and C-563/21 PPU.

² See judgment of 17 December 2020, *Openbaar Ministerie (Independence of the issuing judicial authority)*, C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033, paragraphs 54 and 55 and the case-law cited.

2. The CJEU's decision

In its decision, the CJEU held that information on the existence of deficiencies concerning the independence of the judiciary in the requesting Member State is sufficient to refuse to execute an EAW. In these cases, the executing judicial authority would be required to carry out a two-step examination of the case, in order to assess whether there was a real risk of a breach of the fundamental right to a fair trial before a tribunal previously established by law or not. This two-step examination can be summarised as follows:

(i) General assessment

As a first step in that examination, the executing judicial authority must make a general assessment of whether there is a real risk of a breach of the fundamental right to a fair trial.

This assessment aims to determine if the breach of such right specifically relates to a lack of independence of the courts of the requesting Member State or a failure to comply with the requirement for a tribunal established by law, on account of systemic or generalised deficiencies in that Member State.

If the executing judicial authority considers that there is a real risk of a breach of the fundamental right to a fair trial, it cannot refuse to execute an EAW without carrying out the second step of the examination.

(ii) Individual assessment

As a second step, the executing judicial authority must assess whether the deficiencies found in the first step of that examination are likely to materialise if the person concerned is surrendered to the requesting Member State.

This assessment aims also to determine if there is a real risk of that person's fundamental right to a fair trial before a tribunal previously established by law being breached.

In order to carry out this assessment, the executing judicial authority must assess the specific evidence submitted by the person in respect of whom an EAW has been issued, as well as the information furnished by the requesting judicial authority.

In the end, the CJEU concluded that an executing judicial authority may refuse to surrender a person:

- (i) in the context of an EAW issued for the purposes of executing a custodial sentence or detention order, only if that authority finds that, in the particular circumstances of the case, there are substantial grounds for believing that there has been a breach of that person's fundamental right to a fair trial before an independent and impartial tribunal previously established by law, and

- (ii) in the context of an EAW issued for the purposes of conducting a criminal prosecution, only if that authority finds that, in the particular circumstances of the case, the surrender of the requested person would entail a real risk of a breach of their fundamental right to a fair trial before an independent and impartial tribunal previously established by law.

This Legal Briefing was prepared by Jorge Walser, Senior Associate in the White Collar Crime and Investigations practice area.

The information contained in this Legal Briefing is of a general nature and does not constitute legal advice. This document was prepared on 2 March 2022 and Pérez-Llorca does not undertake any commitment whatsoever to update or review its content.

For more information,
please contact:

Adriana de Buerba

White Collar Crime and Investigations Partner
adebuerba@perezllorca.com
T: +34 91 423 67 29

Juan Palomino

White Collar Crime and Investigations Partner
jpalomino@perezllorca.com
T: +34 91 423 20 87