



STREAM Case Note

L and P

17 December 2020

Abstract

On 17 December 2020, the Grand Chamber of the Court of Justice of the European Union delivered its judgment in [Joined Cases *L and P*, C-354/20 PPU and C-412/20 PPU](#). The decision originated from two requests for preliminary rulings made by the District Court of Amsterdam (Netherlands), in proceedings related to the execution of two EAWs issued by Polish courts. The judgment concerns the requirement of independence of the “issuing judicial authority” and the right to a fair trial under Article 47(2) of the Charter.

First, the Court of Justice reaffirmed that, while the concept of “issuing judicial authority” may include judges, courts, public prosecutors, or other authorities participating in the administration of justice, all these authorities must act independently when issuing an EAW. However, the Court found that the executing judicial authority cannot deny the status of “issuing judicial authority” to the court which issued the EAW, based only on the existence of systemic or generalised deficiencies regarding the judiciary in the issuing Member State.

Secondly, the judgment sets out that the executing judicial authority must always carry out a two-step test to decide whether to refuse surrender, on the ground that the requested person will run a real risk of a violation of the right to a fair trial if surrendered in the issuing Member State. Step 1 is to find the existence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State, based on objective, reliable, specific, and properly updated evidence. Step 2 is to verify *specifically and precisely* the circumstances related to the requested person, their personal situation, the nature of the offence, and the factual context in which the EAW was issued.

Keywords:

Independence of the “issuing judicial authority”; Refusal to surrender a person subject to a European Arrest Warrant only in “exceptional circumstances”; Right of access to an independent and impartial tribunal; Systemic or generalised deficiencies; Real risk of a violation of the right to a fair trial; Two-step test; rule of law; effective judicial protection; Article 47 of the Charter; Article 1(3) of the European Arrest Warrant Framework Decision; Article 6(1) of the European Arrest Warrant Framework Decision.



Authors: Mrs. Armanda Xhaferri, under the supervision of Dr. Marco Stefan. This note has been funded by the European Union’s Justice Programme (2014- 2020). The content of this note is the result of the authors’ research and is their sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

Background

The District Court of Amsterdam made a request for a preliminary ruling to the Court of Justice of the European Union concerning two European Arrest Warrants (EAWs) issued by Polish courts, against *L* for prosecution purposes, and against *P* for sentencing purposes.¹ The District Court referred to several developments in Poland, which cast doubt on the independence of the judiciary in that Member State.² It questioned whether in view of Articles 1(3) and 6(1) of [Framework Decision on the European Arrest Warrant](#) (EAWFD), and Article 47(2) of the [Charter of Fundamental Rights](#) (the Charter), the executing judicial authority may refuse to surrender a person subject to an EAW issued by a court of a Member State in which there are systemic or generalised deficiencies regarding the independence of the judiciary.³

This judgment follows up on the decisions taken by the Court of Justice in two previous cases, concerning the concept of “issuing judicial authority” ([OG and PI](#)) and the right to a fair trial ([LM](#)).

In the [OG and PI judgment](#), the Court held that, in order to be considered “issuing judicial authority” within the meaning of Article 6(1) FD EAW, the authorities of a Member State must give assurances that they act independently while performing their responsibilities to issue an EAW.⁴ This ruling was reconfirmed by the Court in the judgment under analysis.⁵

In the [LM judgment](#) the Court ruled that, in view of Article 1(3) of the EAWFD, the executing judicial authority must follow a two-step examination to determine whether the requested person will run a real risk of a violation of his(her) fundamental right to a fair trial guaranteed by Article 47(2) Charter, if surrendered in the issuing Member State.⁶ In the *first step*, the executing judicial authority must determine whether there is objective, reliable, specific, and properly updated material, that indicates the existence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State.⁷ In the *second step*, the executing judicial authority must assess, specifically and precisely, the individual circumstances related to the requested person, such as, his(her) personal situation, the nature of the offence for which he(he) is being prosecuted, and the factual context in which the EAW was issued.⁸

In the judgment under analysis, the Court reinstated that the executing judicial authority must carry out the two-step examination, before deciding to refuse the execution of the EAW on the ground that the right to a fair trial of the requested person might be violated if surrendered in the issuing Member State.

Summary of the Judgment

The two legal issues raised in this case relate to the interpretation of Articles 6(1) and 1(3) of the EAWFD. The first legal issue is whether the executing judicial authority may deny the status of “issuing judicial authority” to the court which issued the EAW exclusively based on the evidence of systemic or generalised deficiencies related to the independence of the judiciary in the issuing Member State. The second legal issue is whether such evidence may be sufficient for the executing judicial authority to

¹ Judgment of the Court of Justice of the European Union of 17 December 2020, *L and P* (C-354/20 PPU and C-412/20 PPU) EU:C:2020:1033, paragraph 2.

² *L and P*, paragraphs 14 – 15.

³ *L and P*, paragraphs 21 and 25.

⁴ Judgment of the Court of Justice of the European Union of 27 May 2019, *OG and PI* (C-508/18) EU:C:2019:456, paragraph 74.

⁵ *L and P*, paragraph 38.

⁶ Judgment of the Court of Justice of the European Union of 25 July 2018, *LM* (C-216/18 PPU) EU:C:2018:586, paragraphs 60 and 79.

⁷ *LM*, paragraph 61.

⁸ *LM*, paragraphs 74 to 77.

conclude that the requested person will run a real risk of his(her) fundamental right to a fair trial enshrined in Article 47(2) Charter being violated, if surrendered to the issuing Member State.⁹

With regard to the first legal issue, the Court of Justice found that an executing judicial authority cannot deny the status of “issuing judicial authority” within the meaning of Article 6(1) of the EAWFD to all judges or courts of the issuing Member State, on the sole ground that there is evidence of systemic or generalised deficiencies concerning the independence of the judiciary in that Member State.¹⁰

According to the Court, the existence of such systemic or generalised deficiencies does not necessarily affect every decision taken by the courts of that Member State.¹¹ Otherwise, the limitations on the principles of mutual trust and mutual recognition would be extended beyond the “exceptional circumstances”, and thus, the application of those principles in respect of all the EAWs issued by the courts of that Member State would be excluded.¹²

In that regard, the Court recalled its settled case-law ([Opinion 2/13](#); [OG and PI](#)) that the principles of mutual trust and mutual recognition between Member States are of fundamental importance in the Area of Freedom, Security and Justice¹³, and in particular, in the system established by the EAWFD.¹⁴ Based on these principles, Member States are required, as a general rule, to execute any EAW issued in accordance with the provisions of the EAWFD.¹⁵ Accordingly, the executing judicial authority may refuse the execution of a EAW only on the grounds exhaustively listed in Articles 3, 4 and 4a of EAWFD, or it can make the execution subject only to one of the conditions exhaustively laid down in Article 5 of the EAWFD.¹⁶

In addition, the Court noted that an extension of systemic or generalised deficiencies to all courts of a Member State would practically deny them the possibility to utilise the preliminary ruling mechanism under Article 267 TFEU.¹⁷

Referring to the [OG and PI judgment](#), the Court restated that the concept of “issuing judicial authority” within the meaning of Article 6(1) of the EAWFD may include not only judges or courts, but also other authorities that participate in the administration of criminal justice in a Member State.¹⁸ Additionally, those authorities must meet the requirement of independence, meaning that they act independently while taking the decision to issue an EAW.¹⁹ According to the Court, the principle of independence, which is inherent to the concept of “issuing judicial authority”, primarily refers to the guarantees provided by the legal order of the issuing Member State. The principle of independence requires that, based on the statutory rules and the institutional framework of that Member State, the issuing judicial authority does not face the risk of being subject to an instruction in a specific case from the executive, while adopting the decision to issue the EAW.²⁰

In the [OG and PI judgment](#), the Court concluded that the public prosecutor’s offices in Germany did not fall within the concept of “issuing judicial authority”, because they were legally subordinated to the executive, and the latter could give directions or instructions to public prosecutors in specific cases, also when issuing an EAW.²¹ However, the Court made a distinction between *OG and PI case*, where the independence of public prosecutors was not guaranteed due to domestic statutory rules and the

⁹ *L and P*, paragraph 33.

¹⁰ *L and P*, paragraph 41.

¹¹ *L and P*, paragraph 42.

¹² *L and P*, paragraph 43.

¹³ *L and P*, paragraph 35.

¹⁴ *L and P*, paragraph 36.

¹⁵ *L and P*, paragraph 36.

¹⁶ *L and P*, paragraphs 5 and 37.

¹⁷ *L and P*, paragraph 44.

¹⁸ *L and P*, paragraph 46.

¹⁹ *L and P*, paragraphs 38 and 47.

²⁰ *L and P*, paragraph 47.

²¹ *OG and PI*, paragraph 88; *L and P*, paragraph 48

institutional framework, and the case under analysis, where the matter concerns the existence of systemic or generalised deficiencies.²²

According to the Court, under EU law courts are required to be independent. This requirement precludes the possibility that courts may be subject to a hierarchical constraint or subordinated to any other body, or that they may take orders or instructions from any source whatsoever.²³ Therefore, the Court stated that the reasoning in the [OG and PI judgment](#) cannot bring to the conclusion that the existence of such systemic or generalised deficiencies may be sufficient for the executing judicial authority to exclude all the courts of the issuing Member State from the concept of “issuing judicial authority”.²⁴

Regarding the second legal issue, the Court held that, the executing judicial authority must always carry out the two-step test set out in the [LM judgment](#), when there are concerns that the fundamental right to a fair trial of the requested person may be breached, if surrendered to the issuing Member State, and consequently, refuse the execution of the EAW.²⁵

The Court ruled out the possibility that the executing judicial authority may reach a conclusion based only on there being evidence of systemic or generalised deficiencies (the first step), without carrying out a verification of the person’s situation and related circumstances (second step).²⁶ On the contrary, if the assessment would be based only on the first step, by leaving out the second step, this would practically lead to a suspension of the implementation of the EAW mechanism in relation to the issuing Member State.²⁷ In other words, this would lead to an automatic refusal to execute all the EAWs issued by that Member State.²⁸

The Court recalled that the implementation of the EAW mechanism may be suspended²⁹ only if the European Council adopts a decision pursuant to Article 7(2) of the [Treaty on European Union](#) (TEU), determining the existence of a serious and persistent breach by a Member State of the principles set out in Article 2 TEU, including that of the rule of law.³⁰ Following such decision, according to Article 7(3) TEU, the Council may decide to suspend the application of the FD EAW in respect of that Member State.³¹ As previously envisaged in the *LM* judgment, it is only after such procedure that the executing judicial authority would be required to automatically refuse the execution of any EAW issued by the Member State concerned, without having to carry out any specific assessment of the person’s situation.³²

Another argument given by the Court refers to the objective of the EAW mechanism in combating the impunity of the requested persons.³³ In case the refusal to execute an EAW would be justified only by the existence of systemic or generalised deficiencies of the judiciary’s independence in the issuing Member State, the risk of impunity through persons fleeing from justice would increase.³⁴

Analysis

First, in the judgment under analysis, the Court reaffirmed its settled case-law that, on the basis of the principles of mutual trust and mutual recognition, the executing judicial authorities are allowed to refuse the execution of an EAW only in “exceptional circumstances” and these exceptions must be interpreted

²² *L and P*, paragraph 48.

²³ *L and P*, paragraph 49.

²⁴ *L and P*, paragraph 50.

²⁵ *L and P*, paragraphs 52 – 53.

²⁶ *L and P*, paragraph 69.

²⁷ *L and P*, paragraph 59.

²⁸ *L and P*, paragraph 59.

²⁹ Recital 10 of Council (2002), Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002.

³⁰ *L and P*, paragraph 57.

³¹ *L and P*, paragraphs 57 – 58.

³² *L and P*, paragraph 58; *LM*, paragraph 72.

³³ *L and P*, paragraph 62.

³⁴ *L and P*, paragraphs 63 – 64.

strictly.³⁵ According to the Court, these principles do not permit executing judicial authorities to treat systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State as covering *all* the courts of that Member State.

Secondly, the Court reaffirmed that the requirement of independence is inherent to the concept of the “issuing judicial authority” as set out in the [OG and PI judgment](#). However, the Court distinguished that case in which the public prosecutors could receive instructions from the executive from the case under analysis, stating that courts may not be subject to a hierarchical constraint or subordinated to any other body and may not take orders or instructions from any source whatsoever.³⁶

Consequently, the judgment under analysis indicates that, the lack of independence of the issuing judicial authority can be deduced from the analysis of statutory rules and the institutional framework in that Member State, but not from evidence on systemic or generalised deficiencies of the judicial system.

Third, the Court reconfirmed the need for a judicial examination to be carried out by the executing judicial authority on a case-by-case basis, in order to establish in the light of both systemic/generalised deficiencies and the specific circumstances, whether there is a real risk that the right to a fair trial of the requested person might be violated, if surrendered in the issuing Member State.

The main argument of the Court is that it is only for the EU political and legislating institutions, namely the European Council and the Council of the EU, following the procedure under Article 7 TEU, to determine a serious and persistent breach of the rule of law principle and consequently, suspend the application of the FD EAW in respect of that Member State.³⁷

The confirmation of the two-step examination reinstates the crucial role that executing judicial authorities play in upholding the principles of mutual trust and mutual recognition on which the EAWFD is founded, and at the same time, verifying, where necessary, that fundamental rights are preserved.

Nevertheless, it also means that the hurdles faced in practice by the executing judicial authorities and the defence of the persons concerned, following the [LM judgment](#), to prove in individual cases the risk of the right to a fair trial being violated, still remain.

But at the same time the importance of the EAW is reaffirmed, because a general non-execution of it would increase the risk of impunity of persons and this would inevitably undermine the role of the EAW in combatting cross-border crime.

³⁵ *L and P*, paragraph 37.

³⁶ *L and P*, paragraphs 48 – 49.

³⁷ *L and P*, paragraphs 57 – 58.