

Extradition to Poland, the Rule of Law and the Amsterdam Extradition Chamber.

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- CJEU Ruling of 17 December 2020, cases C-354/20 PPU and C412/20 PPU (L&P):
 - Answering preliminary questions of the Amsterdam Court of 31 July 2020 in two separate cases on Polish rule of law and EAW obligations
 - The interim judgements in which the preliminary questions were asked, also entailed due to the subject matter, a suspension of all pending Polish EAW cases in the Netherlands (the Amsterdam Court under Dutch law handles all EAW cases)
 - Poland is both in relative and absolute terms the State that issues most EAW's to the Netherlands (about a third of all received EAW's)

- Near immediate refusal of a pending Dutch EAW on questionable grounds
- Order from the Polish National Public Prosecutor to the Regional Prosecutors to scrutinize all Dutch EAW's for possible grounds for refusal
- Retaliatory intent rather probable

- Seemingly political replacement of president of Polish Constitutional Court
- Seemingly politically motivated abrupt lowering of retirement age of judges (repealed after EU intervention)
- New and seemingly politically influenced Disciplinary Chamber
- ‘Muzzle Act’ of February 2020
- Polish Constitutional Court denied primacy of EU law primacy (more recently)

- “March of a thousand gowns”
- Article 7 TEU procedure instigated (Hungary blocks required unanimity)
- Rule of Law-test in EU Budget (appealed to CJEU)
- Many cases at both CJEU and ECtHR (of note: C487/19)
- Euro 1 MLN daily penalty for disciplinary chamber (more recently)

- CJEU Aranyosi and Caldaru, cases C-404/15 and C-659/15 PPU resulted in two step test:
 - 1) Is there convincing evidence of structural or fundamental defects in the detention system of the issuing state?
 - 2) Is there a real risk to the requested individual in this specific case?
- In answering both questions the Court must take into account (additional) information and guarantees provided by the issuing authorities.

CJEU LM, case C-216/18 PPU:

- Very similar two step test required when assessing risk to right to fair trial, including asking the issuing state for (additional) information and guarantees.

CJEU OG and PI, cases C-508/18 and C-82/19 PPU,

- Who is an ‘issuing judicial authority’ in the sense of the EAW Framework Decision?
- Prosecutors who can be indirectly controlled or receive instructions from the executive branch are not judicial authorities

CJEU Ruling of 17 December 2020 in cases L&P, C-354/20 PPU and C412/20 PPU:

- structural or fundamental flaws do not affect all decisions taken by the Polish Courts, and they must still be considered an issuing judicial authority
- a real risk in the specific case must still be determined (but the negative developments in Poland may provide reason to be extra vigilant in the assessment of the second step).

Thus, back to business as usual after 17 December 2020 CJEU ruling, but not for long:

- Irish preliminary questions asked in August 2021 (Minister for Justice and Equality / WO & JL, case C-480/21)
- Similar preliminary questions to Dutch ones, but now focusing on whether Polish courts can still be considered 'established by law':
 - Some judges not validly appointed
 - Not possible to identify before which judges requested person will be tried
 - Not possible to challenge validity of composition of Polish courts

- Dutch asked adjoining preliminary questions on 14 September 2021 in legally complementary cases:
 - 1) An execution EAW concerning a conviction passed after ‘muzzle act’ entered into force
 - 2) A prosecution EAW where the requested person remains in Dutch extradition custody (in hope to receive PPU treatment)

Apparent current approach of Amsterdam Extradition Chamber awaiting CJEU Ruling:

- All Polish prosecution EAW's suspended
- All Polish execution EAW's suspended regarding sentences passed after 'Muzzle Act' entered into force
- Polish execution EAW's regarding sentences passed before 'Muzzle Act' entered into force continue to be handled by the court

- Does International Law provide for a solution to challenges that stem from the obligation of mutual trust between member states, when such trust is no longer fully warranted? Up until this moment, it does not fully seem so.
- Damage control may be the most it can do until politics and finances (cutting EU Subsidies) motivate Poland to ameliorate the position of its judiciary.

**DE ROOS
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Your thoughts?

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