

Meijers Committee

standing committee of experts on international immigration,
refugee and criminal law

CM2007 Surrender to Poland suspended. Call for political intervention to protect the rule of law in EU Member States

3 November 2020

Pending a preliminary ruling of the EU Court of Justice, the District Court of Amsterdam has provisionally suspended all surrenders to Poland.¹ Recently also a German court has refused to execute a European arrest warrant from Poland.² It is probably a matter of time until this trend will be joined by courts from other countries too³ and its impact may potentially be extended to other EU Member States where the rule of law is seriously deteriorating. Consequently, a serious decline in rule of law-performance apparently has a direct impact on cross-border cooperation in criminal matters. This prompts the Meijers Committee to once again urge politicians on the national and European level to intervene and to strengthen the pressure on Member States concerned to adhere to binding European values and the rule of law.

To support its call, the Meijers Committee wishes to draw your attention to the following issues as well as to a number of realistic side-effects the aforementioned development may bring.

1. Judges in surrender cases are now compelled to deliver rulings regarding rather politically sensitive issues. Until when can this be demanded of them?

National judges dealing with incoming European arrest warrants may currently have to assess the independence of their colleague judges from another Member State, and decide on the potential consequences of such assessments for surrender proceedings. One may argue that such decisions constitute judicial decisions in purely individual cases, but the truth of the matter is that their impact goes beyond individual surrender cases as they all regard a large and politically sensitive problem. The Meijers Committee recalls that in setting up the European arrest warrant mechanism, it was assumed that such politically sensitive problems would be very unlikely to arise. It was therefore considered timely to replace the traditional extradition system by a system based on mutual recognition and a high level of mutual trust. Now that we observe that surrender judges may nevertheless be held to involve such politically worrying developments in their assessments, the question arises whether it can indeed be demanded of them to carry out such assessments while those who should act – politicians – remain almost silent.

2. The EU Court of Justice can not be the sole responsible for a workable legal solution

True, surrender judges have the option to ask for preliminary judgments of the EU Court of Justice and to seek closer guidance on how to deal with European arrest warrants in cases involving systemic violations of judicial independence. Still, the Meijers Committee is of the opinion that it would be unrealistic to put all hope in the Court of Justice for providing a perfectly workable assessment framework for dealing with such cases. Perhaps superfluously, the Meijers Committee recalls that the

¹ The references are from 31 July 2020, ECLI:NL:RBAMS:2020:3776 and respectively 3 September 2020, ECLI:NL:RBAMS:2020:4328. The corresponding cases before the Court of Justice are C-354/20 PPU and C-412/20 PPU.

² <https://oberlandesgericht-karlsruhe.justiz-bw.de/pb/,Lde/6096769/>.

³ According to this opinion paper, this is already happening: <https://ruleoflaw.pl/the-netherlands-will-extradite-no-one-to-poland-under-european-arrest-warrant/>.

Meijers Committee

standing committee of experts on international immigration,
refugee and criminal law

Court of Justice's mandate in preliminary proceedings is to interpret EU law not only in light of a specific legal instrument (such as the Framework Decision on the European arrest warrant), but also with a view to much broader binding objectives of European integration. In this regard, it must be mentioned that the principle of mutual recognition applies in a variety of policy areas, and rulings of the Court in the area of cross-border criminal justice cooperation may therefore have implications for such other policy areas. It is therefore considered not very likely that the Court will in the shorter term significantly deviate from its current line of case-law on matters of rights protection in surrender proceedings.

3. Large-scale suspension of surrender may hinder the rehabilitation of convicts

The Meijers Committee further wishes to stress that there is more at stake in surrender proceedings than solely whether suspected and convicted persons can decently be transferred to the issuing Member State. True as it may be that executing Member States will currently have to focus on that question (then, systemic attacks on judicial independence are indeed a major problem), it is still a fact that the European arrest warrant mechanism also intends to serve several other interests worthy of consideration and protection. Large-scale suspension of surrender, however justified, bears the risk to seriously compromise those other interests. This particularly holds true for the principle of rehabilitation. After all, the inability to surrender may logically encourage an executing Member State to consider prosecuting the alleged crimes within their own jurisdiction, or to execute the sanctions imposed in the issuing Member State. Such may serve the wish to prevent impunity, but the Meijers Committee underscores that to undergo a sanction in a country where the convict does not reside easily jeopardises his reintegration in society.

4. Long-term suspension creates long-term uncertainty for requested persons

Long-term suspension automatically results in a serious delay of the surrender procedure. In most cases, delayed decisions in surrender proceedings contravene the interest of the requested person. In this regard, the Meijers Committee recalls that the speed with which surrender decisions are being taken constitutes an important feature of the European arrest warrant mechanism (especially if compared to the average length of decision-taking in traditional extradition procedures). This not only benefits law enforcement, but very often also benefits the requested person who fairly quickly obtains clarity on his legal position. This advantage is easily jeopardised under a situation of long-term and large-scale suspension of surrender.

5. Potential impact on reverse surrender I: How appropriate will it be to *issue* European arrest warrants *towards* Member States in which the rule of law is under decline?

The aforementioned concerns become all the more pressing if reciprocity is taken into account and surrender is viewed from the reverse position. If surrender to a certain issuing Member State is deemed inadmissible due to deficiencies in the independence of the issuing state's judiciary, the question arises whether it could nonetheless be justified to demand surrender *from* that same Member State. It must be pointed out that a negative answer to this question has equally dramatic consequences for the effectuation of successful reintegration of convicts who may then be held to undergo their sentence in a country other than their country of residence. Obviously, such dramatic consequences should not be taken as arguments to declare surrender admissible despite fair trial concerns; they rather underscore the need for political action.

6. Potential impact on reverse surrender II: Repercussions for suspending Member States?

Meijers Committee

standing committee of experts on international immigration,
refugee and criminal law

Finally, it can unfortunately not be ruled out that prolonged suspension of surrender may lead to highly undesirable repercussions on the side of the Member State whose European arrest warrants are being suspended. The Netherlands has already been facing troubling signals in that respect – first in the grounds to refuse surrender of a couple in a case of alleged parental abduction⁴ and secondly in a very recent letter from the National Public Prosecutor of Poland in which he orders public prosecutors to deal with Dutch European arrest warrants in a particular manner, i.e. to analyse them very thoroughly on the existence of grounds to refuse surrender to the Netherlands.⁵ It needs no explanation that such an approach compromises both cross-border law enforcement and the application of EU law.

The aforementioned points altogether provides new as well as additional arguments to significantly intensify political intervention in the worrying decline of the *rule of law* in some of our Member States. The Meijers Committee therefore urgently calls on national and EU politicians to intervene now.

⁴ <https://ruleoflaw.pl/district-court-in-warsaw-european-arrest-warrant/>

⁵ <https://ruleoflaw.pl/polands-national-public-prosecutor-is-going-to-war-with-the-netherlands/>