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The European Arrest Warrant

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Introduction

The European Arrest Warrant (EAW) was created in 2004 to ensure direct enforcement by a judge in one Member State of a warrant for arrest issued by the judicial authority of another Member State. An EAW may be issued for any offence punishable by the law of the issuing state with a maximum sentence of 12 months or more, or, where the person has already been sentenced, provided it is a sentence of at least four months imprisonment.

Since 1 January 2004, when the EAW scheme came into force, the average time taken to extradite a suspect who objects to extradition has fallen from around a year to 48 days. In the case of those who consent to extradition (the majority in most years), the average period until extradition is 14-17 days. The value of the EAW was illustrated by the rapid extradition of a suspect (Hussain Osman) wanted in connection with the attempted 21 July 2005 London bombings from Italy in September 2005; he was subsequently sentenced to a minimum term of imprisonment of 40 years.

While widely regarded as a successful innovation, there have been problems with some aspects of the EAW and these have been the subject of on-going discussions between the European Commission and the Council of Ministers. As part of these discussions, the European Commission published a review of the EAW in April 2011. This paper looks at the background to the creation of the EAW, its operation in practice and how some of the concerns raised are being addressed.

Background

Extradition law traditionally imposed a requirement of 'double criminality', *i.e.* that the requested state need not render the accused unless the offence with which he was charged in the requesting state was also an offence in the country where the accused person was living. The EU's framework decision on the EAW does not do this but instead lists a range of 32 serious offences, including terrorism and connected offences, illicit trafficking in drugs or weapons, corruption and fraud, murder, kidnapping and hostage-taking. For offences in these categories, as defined by the law of the country issuing the arrest warrant, the requirement of double criminality is abolished if they are punishable by imprisonment for at least three years. For criminal offences other than those specifically listed in the EU Framework Decision, the double criminality rule still applies.

Safeguards for the Accused

The Decision contains a number of safeguards for the accused. It states that it respects fundamental rights and observes the principles of liberty, democracy and respect for human rights and fundamental freedoms recognised by Article 6 of the Treaty on European Union.

The Decision allows a Member State to refuse to surrender a person on the grounds of gender, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation. Moreover, the Decision does not "prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media".

The Decision requires the requested state to keep the accused informed of the EAW and the proceedings flowing from it; the person should also have the right to be assisted by a lawyer and, if necessary, an interpreter according to the national laws of the Member State. Unless he or she consents to being surrendered, the accused is entitled to be heard by the executing judicial authority.

The EAW in Practice

The EAW had three aims: to reduce the time taken to extradite a person from one EU Member State to another; secondly, by establishing this facility, to make it more difficult for suspects and convicted persons to evade justice; and thirdly, to balance the right of free movement within the EU with proper safeguards to reduce abuses of that privilege. There is no doubt that the EAW has been extremely effective; as the statistics quoted earlier demonstrate, extradition times in the EU have fallen from around a year to 48 days – far less where the suspect consents. This represents a step-change in the efficiency and effectiveness of justice systems within the EU.

The introduction of the EAW has not only speeded up extradition times, it has enabled long-standing fugitives from justice to be brought before the courts. For example, for many years a large number of people wanted in the UK lived in Spain; dozens of those fugitives have been returned to the UK since the EAW came into force. The UK issued 220 EAWs in 2009 of which 80 were successfully executed.

Between the legislation coming into force and the end of 2009, 54,689 arrest warrants were issued and 11,630 were executed. Most EAWs (85 per cent) are issued through the Schengen Information System (SIS), a computerised system used by members of the Schengen area. The UK, along with the Republic of Ireland, Cyprus and Romania, does not have access to the SIS as the UK is not a Schengen country.

In the United Kingdom the EAW was incorporated in our law through the Extradition Act 2003. The EAW from another Member State is processed in the UK by the Serious Organised Crime Agency (in Scotland, the Crown Office). If the person is traced and arrested, they are brought before a district judge in a magistrates' court where the judge fixes a date for the extradition hearing within 21 days of the arrest.

The arrested person must be informed by the court of the contents of the arrest warrant and of the consent procedure so that they can consent to the extradition request or oppose it. The person is then remanded in custody or bailed. At the extradition hearing later, the judge determines whether the offence is one for which a person can be extradited and if so, he then considers whether there any statutory bars to extradition. The 2003 Act provides for several such potential bars, including the person's age if they were under the age of criminal responsibility when the alleged offence was committed and the passage of time

since the alleged offence or crime (if the person was convicted and then evaded punishment). If there is no bar to extradition on these grounds, the judge will then consider other factors, including whether the extradition would be compatible with human rights law, the mental or physical condition of the person and whether the person is already serving a sentence in the UK.

Once the decision to extradite has been taken, the person will have the right of appeal to the High Court but only on limited grounds. If the warrant is discharged by the courts, the requesting state has a right of appeal against that decision.

There are potentially complicating factors in EAW cases, such as more than one Member State seeking to extradite a person or the person whose extradition is sought applying for asylum, but although the Act makes provision for these situations, they are rare.

Problems with the EAW

With seven years' experience of the EAW, it is now possible to identify problems with its operation in practice. Most of these relate to questions around proportionality and the treatment of those who are the subject of the warrants but there are also issues that result from Member States having implemented the framework decision in different ways.

Proportionality

The framework decision was meant to ensure that persons were not extradited for minor offences – hence there were minimum prison sentence terms included in the decision. The concern behind the EAW was that people accused of very serious crimes could not be easily extradited. An unintended consequence of the EAW is that issuing countries can use it to pursue people for relatively minor offences; some Member States (notably Poland) have been doing so. The problem arises because the legislation of the issuing country allows for a punishment that meets the terms of the EAW framework decision but the actual offence committed is a minor one. This raises a number of issues, including the resource burden on the receiving state and the effects on the lives of individuals of their being extradited for minor offences.

The Council has agreed that issuing states should apply a proportionality test before issuing an EAW and the EAW handbook used by judicial authorities has been amended accordingly. The handbook says that in considering whether issuing an EAW is proportional, Member States should consider the seriousness of the offence, the possibility of the suspect being detained and the likely penalty if the suspect is convicted. It explicitly says that “the warrant should not be issued, for instance, where, although preventive detention is admissible, another non-custodial coercive measure may be chosen”. The handbook recommends video conferencing for the questioning of suspects.

In practice, Member States (such as the UK) have been applying a proportionality test to the EAWs they receive – something which is not explicitly permitted under the framework decision. This approach, while entirely understandable given that the UK received over 4,000 EAWs in the last year, is not a long-term solution to the problem. If the amending of advice does not prove effective, the EU legislation itself may have to be changed; the Joint

Select Committee on Human Rights at Westminster has called for the British Government to seek to have the framework decision rewritten in this way.¹

Rights of the person sought

Varying judicial standards across the EU have led to concern amongst lawyers and human rights groups that some of those extradited under the EAW process have been treated unfairly. There have been complaints of persons being sought with an EAW on the basis of scanty evidence, of long periods of pre-trial detention and individuals not receiving basic assistance to enable them to make their case, such as access to a lawyer in private. Currently, a person can take the issue to the European Court of Human Rights if the ECHR has been breached but they can only do this after the alleged breach has occurred and when all domestic legal avenues have been exhausted.

The Council agreed in 2009, as part of the EU's wider work on improving co-operation in the fields of crime and justice, that there should be common standards in the EU on the basic rights of accused persons. A right to translation and interpretation has been agreed and a measure to require those arrested to be told their rights is being considered by the Parliament. The Commission has published proposals to require legal advice to be available to all those arrested, to enable them to inform a family member or employer of their arrest and if abroad, to allow them to inform their home country's embassy or consulate of their detention and receive consular visits. Work is underway on the issue of pre-trial detention but Member States have already agreed a framework decision enabling mutual recognition of court decisions on supervision, so a person could return to their home state while on bail and be supervised there rather than being held in custody.

Future Developments

The European Arrest Warrant has been successful in reducing delays in extradition within the EU and thus reduced the chances of offenders being able to misuse free movement within the EU in order to escape justice. But a number of difficulties have arisen, some, such as the issuing of EAWs for minor offences, are partly the result of the success of system, making it an attractive instrument to judicial authorities.

The Commission and the Council are now pursuing the concerns expressed. Provided Member States are willing to work together to improve the EAW system, it can continue to be an important tool in the fight against crime in Europe. But it is essential to the credibility of the EAW that these issues are addressed in order to maintain public confidence. The core principles underlying the EAW, such as the abolition of double criminality, are unlikely to be changed despite human rights concerns. But further changes to address the issue of proportionality are a serious possibility and the EU will continue its programme to ensure that there are common basic rights for accused persons across the EU.

The Lisbon Treaty incorporated the legislation and case law concerning justice and home affairs into the *acquis* of the EU. This means that the European Commission has the right to propose legislation in this field and that the European Court of Justice has jurisdiction over

¹ See Joint Committee on Human Rights, *Fifteenth Report of Session 2010-12: The Human Rights Implications of UK Extradition Policy*, HL 156; HC 767, 22 June 2011

justice and home affairs (JHA) legislation. The Treaty provided for a transitional period of up to five years before this would apply to JHA legislation adopted *before* the Treaty of Lisbon came into force. As the United Kingdom had the ability to opt-in to some JHA legislation and to opt-out of other such legislation before the Lisbon Treaty, it has to decide by 1 June 2014 whether to accept the involvement of the Court and the Commission in those parts of JHA law that it participated in before the Treaty came into force. The relevant legislation includes that relating to the European arrest warrant. If the UK decides not to accept the jurisdiction of the Court and the involvement of the Commission, then it will no longer be party to the EAW. This question of past legislation does not affect the UK's ability under current EU law to opt-in if it wishes to any new JHA legislation (except that relating to the Schengen area).

July 2011



Senior European Experts

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