

# The European arrest warrant

Jago Russell and Alex Tinsley highlight the difficulties of close co-operation

The relaxation of border controls between many European Union (EU) member states from the 1990s onwards facilitated not just holiday making and commerce, but also cross-border illegality. As a result, EU police and prosecutors needed new, simpler ways of cooperating across borders. This posed a dilemma for the member states: how could they achieve this, while respecting the radical differences between their criminal justice systems?

The solution was the concept of 'mutual recognition', according to which the decisions of prosecutors and judges from one EU state would be recognised and acted upon in other EU states, without delay or red tape. The underlying assumption was that, although EU countries have their own laws and procedures, they all comply with the same essential standards and can be trusted to respect basic human rights such as the right to a fair trial.

## The European Arrest Warrant

The flagship mutual recognition measure, the European Arrest Warrant (EAW), was passed in 2002 and brought into force across the EU by 2004. Before this, extradition between member states was carried out in the traditional manner – governments were involved, and the process tended to be slow. This was considered to be out of pace with the increasing mobility of EU citizens, which had resulted in those subject to arrest warrants being increasingly located in other member states.

The EAW promised to solve these problems. Under the EAW regime, if a judge in one EU country requests a suspect or convicted person to be extradited in order to face trial or serve a sentence, the authorities in other EU states must normally

extradite the person, with very little power to say 'no'. The underlying foundation for this is the 'high level of mutual confidence' between member states – the assumption that, albeit very different, their justice systems meet equivalent standards of fairness.

Judges dealing with EAWs across Europe have faithfully adhered to the principle of mutual recognition, ensuring that differences between justice systems do not prevent extradition. Differences in legal culture have, however, given rise to serious concerns about the operation of the EAW system, and the assertion of equivalent protection of human rights in all member states has increasingly revealed itself to be more rhetorical than factual.

## Cosmopolitanism

Courts throughout the EU have sought to ensure that differences between criminal justice systems do not pose an obstacle to the operation of the EAW. For example, in Italy, legislation prevents execution of an EAW where the requesting country's laws do not place a maximum time limit on pre-trial detention. Faced with an EAW from Germany, where no such limit would apply but where detention would be reviewed periodically and with increasing intensity, the Italian Court of Cassation took the view that the law should be broadly interpreted so as also to cover the German system, ensuring continuing cooperation between the two countries (Sezioni Unite, *Ramoci* 30/01/2007). In a similar fashion, the UK's Supreme Court recently held in *Assange* [2012] UKSC 22 that the words 'judicial authority' in the *Extradition Act 2003* (which gives effect to the EAW) were intended to cover public prosecutors, allowing the execution

of EAWs issued in countries where prosecutors, and not judges, have this function.

This 'cosmopolitan' approach has also been used in approaching the question of whether someone is being 'prosecuted', which is a requirement for EAWs issued in respect of suspects as opposed to convicted people. Of course, the point at which a prosecution is considered to start is different according to Europe's many varied justice systems. In England and Wales, for example, this would be when a person has been charged. There is no precise equivalent in countries with an inquisitorial tradition (which includes most EU member states), where a judge is in charge of a preliminary investigation before the case proceeds to trial. This has led to questions about whether EAWs have been issued too early, for the purposes of an investigation rather than prosecution, resulting in prolonged detention of the person before it is decided whether to proceed to trial.

In dealing with these issues the courts have sought to keep proceedings swift and uncomplicated, so they will normally assume that if an EAW states that a person is sought for prosecution, the case has indeed reached that stage. In exceptional cases, they will look at external evidence to assess whether this is actually the case, but at this point the 'cosmopolitan' approach comes into play again: the courts will have regard to the different procedures in other countries, and order extradition if, broadly speaking, a decision has been taken to proceed to trial. Thus the Irish courts have executed EAWs issued by Sweden, where the person must be present in order to be charged, on the basis that there was a clear intention to prosecute (*Olsson* [2011] IESC 1). This approach avoids imposing local approaches to criminal procedure on other countries and facilitates cooperation.

## Proportionality

Differences between member states' legal systems have also led to radically different uses of the

EAW. For instance, whereas in the UK, the Crown Prosecution Service must decide whether it is in the public interest to prosecute, in several Eastern European states prosecutors are obliged to prosecute in every case. The effectiveness of the EAW system has thus been undermined by the use of EAWs in respect of minor offences – theft of a piglet, for instance – which trigger costly extradition procedures in the executing state, and often entail a disproportionate human impact.

Many of these requests come from Poland (4,844 out of a EU-wide total of 15,827 in 2009), prompting calls for restraint from the European Commission. Courts in Germany, and recently in the UK, have begun to weed out the most grossly disproportionate cases, for instance where extradition would deprive young children of their only parent for the sake of a trivial offence committed a long time ago (*F-K* [2012] UKSC 25). However, these decisions also reflect a spirit of international cooperation: the courts assume a very high public interest in honouring extradition agreements, and intervene only in the most extreme cases on the basis that it is for the issuing country to decide whether a particular offence merits prosecution. It is difficult for the courts to infer stronger proportionality safeguards where none are provided in law (Vogel and Spencer, 2010).

### Human rights

Mutual recognition relies on member states having ‘mutual trust’ in each other’s compliance with common international obligations, primarily the European Convention on Human Rights (ECHR). National courts have accepted this theory and generally not entertained the idea that extradition might lead to a breach of a person’s human rights: there is a strong presumption that other member states will comply with the ECHR, in particular Articles 5 and 6 (the rights to liberty and a fair trial), which can be rebutted only where the person can produce a great deal of evidence pointing to a risk of a

very serious violation (Scott Baker, 2011).

This presumption sits awkwardly with the real picture of human rights compliance by EU member states. For instance, between 2007 and 2012, Bulgaria was held to have violated Article 5 of the European Convention on Human Rights (the right to liberty) at the pre-trial stage 37 times, while Greece was held to be in violation of Article 6 (the right to a fair trial) in criminal cases 93 times (Fair Trials International, 2012).

As a result, many EAW cases have given rise to grave human rights concerns. For example, Garry Mann was convicted and sentenced to two years’ imprisonment for involvement in a riot during the Euro 2004 football championship, following a trial described by a British police officer who attended as a ‘farce’, and by a British court as ‘so unfair as to be incompatible with [the] right to a fair trial’. He was allowed to return to the UK but an EAW was later issued. The High Court, while recognising that Mann had been the victim of a ‘serious injustice’, did not second guess Portugal’s compliance with its human rights obligations and ordered his extradition to serve the sentence (*R (Garry Norman Mann) v. The City of Westminster Magistrates’ Court*, [2010] EWHC 48 (Admin)).

### The Roadmap

Such cases have forced policy makers to recognise that mutual recognition must be based on genuine trust, not blind faith. The Lisbon Treaty created a new power for the EU to legislate, ‘to the extent necessary to facilitate mutual recognition’, to adopt minimum rules on ‘the rights of individuals in criminal procedure’ (Article 82(2)). Under this power, the EU has started to pass a series of Directives, each protecting a key aspect of the right to a fair trial.

However, the construction of a real basis for mutual trust remains a long way off. As yet, only two of the Directives envisaged by the Roadmap have been passed (the first on the right to interpretation and translation, the second on access to

information), and the third Directive (on access to a lawyer) is still under negotiation, with some Member States resisting a strong measure. Other promised measures have not been published at all.

The member states have a long, hard task ahead in implementing these legal safeguards effectively, so they give meaningful protection in practice. Ultimately, if they fail to do so, the Court of Justice of the EU could find them in violation of their obligations. Courts asked to extradite people to such countries might, in turn, lack the trust needed to apply the principle of mutual recognition.

### The challenges of the EAW

The EAW is undoubtedly a popular instrument amongst police and prosecutors, having significantly increased the speed of extradition within the EU. It has, though, highlighted the considerable challenges of applying uniform procedures across Europe’s radically different justice systems, which lack common definitions of even basic concepts like ‘prosecution’ or ‘judicial authority’. It has brought into sharp focus different countries’ prosecutorial practices: few, one suspects, foresaw that thousands of EAWs would be issued every year, including for minor crimes. It has also become clear that countries cannot blindly trust their EU partners to comply with basic human rights. Without a sound foundation for mutual trust, it was inevitable that the EAW would result in cases of injustice. ■

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