

EUROPEAN ARREST WARRANT AND HUMAN RIGHTS OF THE ACCUSED

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Abstract

Extradition is one of the issues that Europe was committed from the outset, so the first convention about this issue was made in 1957 by the Council of Europe. The European arrest warrant was established by an EU framework decision in 2002. With the ratification of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member State, EAW abolished formal extradition between EU Member States and replaced it by a system of surrender. The EAW radically changed existing arrangements of cooperation (however the EU Member States may continue to apply bilateral or multilateral agreements between EU member States). The purpose was to eliminate differences among legal systems in all Member States, when these are contrasting with EU minimum standard. Member States are obligated to implement framework decision into national legislation.

Keywords: European arrest warrant, European Union, Human Rights, Framework Decision.

1. INTRODUCTION

More than seven years have passed since the Council Framework Decision of 13 June 2002 on the European arrest warrant (EAW) and the surrender procedures between Member States (hereinafter 'the Council Framework Decision') entered into operation on 1 January 2004. Available statistics compiled for the years between 2005 and 2009 record 54 689 EAWs issued and 11 630 EAWs executed. During that period between 51 % and 62 % of requested persons consented to their surrender, on average within 14 to 17 days. The average surrender time for those who did not consent was 48 days. This contrasts very favourably with the pre-EAW position of a one-year average for the extradition of requested persons and has undoubtedly reinforced the free movement of persons within the EU by providing a more efficient mechanism to ensure that open borders are not exploited by those seeking to evade justice.

2. EUROPEAN ARREST WARRANT AND HUMAN RIGHTS OF THE ACCUSED

Nevertheless, the past seven years have also shown that, despite its operational success, the EAW system is far from perfect. Member States, European and national parliamentarians, groups from civil society and individual citizens have all expressed some concerns in relation to the operation of the EAW and in particular its effect on fundamental rights. There are also shortcomings in the way some Member States implement the Council Framework Decision.

Since December 2009, as a result of the entry into force of the Lisbon Treaty and the legally binding nature of the Charter of Fundamental Rights, the provisions in the Lisbon Treaty governing legislative instruments in the area of police and judicial cooperation have changed the context in which the EAW operates. In accordance with the Treaty, whenever a pre-Lisbon instrument such as the Council Framework Decision is amended, the Commission's power to take infringement proceedings and the jurisdiction of the European Court of Justice becomes applicable to the amended measure. In addition, any amendment of the Council Framework Decision means that the new rules introduced by the Lisbon Treaty for the adoption of legislative measures in this area will apply. These rules include co-decision between the European Parliament and Council and the possibility of the non-participation of some Member States.

Another important effect of the Lisbon Treaty is that it makes the EU Charter of Fundamental Rights legally binding. Moreover, the EU will sign up as an entity to the European Convention on Human Rights. The Commission has recently adopted a strategy to ensure respect for the EU Charter of Fundamental Rights and this will inform its approach to all new and existing legislative and non-legislative initiatives (including the EAW) as well as the approach of Member States when they are implementing or applying the Council Framework Decision.

An EAW can be issued against person if he or she has been charged with a criminal offence (carrying a maximum sentence of minimum 12 months imprisonment) in a European Union (EU) Member State, and that State wants you to face trial there. It can also be issued if you have been tried and convicted in an EU Member State and that State wants you to serve your prison sentence (where it is a sentence of at least 4 months). An EAW can be issued for a wide range of offences, from involvement in serious organised crime and terrorism to more minor offences like theft. In some cases you can be extradited even if the alleged activity is not a criminal offence in the country considering the extradition request. A person who is the subject of the European arrest warrant is protected both during the execution of the EAW in the country where he or she was arrested, and in the country that is seeking his arrest and extradition. On one hand, on his (non) extradition court decides in two instances, one of which is usually the highest court in the country. Position of the subject is in great deal influenced by the guarantees he has under the law of the State in which he will be extradited. Also, both countries are bound by the bilateral agreements and other multilateral instruments that are ratified and concerning fundamental human rights and freedom. European Commission found that some countries (Denmark, Lithuania, Poland, Portugal) have not have sufficiently defined certain rules of procedure, which can lead to jeopardizing the rights of the accused. As for the protection of the human rights in the EU framework decision, in Chapter 1, under the General Principles, Article 1, paragraph 3 it is said: „ This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.“

EAW - a sharp weapon

The EAW may, under Article 1(1) of Framework Decision 2002/584, apply to two situations. Thus, an EAW may be issued, on the one hand, for the purposes of conducting a criminal prosecution or, on the other hand, for the purposes of executing a custodial sentence or detention order. 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. 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; extradition times in the EU have fallen dramatically. 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. This represents a step-change in the efficiency and effectiveness of justice systems within the EU. Regrettably, a number of difficulties have arisen. Some are partly the result of the success of system, making it an attractive instrument to judicial authorities. In a sense, the EAW is the victim of its own success.

Human rights

Judicial and police cooperation is essential in order to tackle serious cross-border crime, but this should not be done at the expense of basic human rights. Unfortunately, EAWs are being executed despite serious and well-founded human rights concerns. Growing numbers are being extradited under the EAW, only to be held for months in prison, hundreds of miles from home, waiting for trial, often in appalling conditions that make trial preparation impossible. There are two problems concerning human rights and the EAW:

In some States the human rights implications of extradition are not being considered at all prior to surrender being ordered; and

Where States do consider a human rights bar to extradition, that bar is being interpreted in a way which sets it so high it is virtually impossible to meet (even where detailed and recent evidence has been adduced as to the risk of infringement if extradition takes place). Once people have been extradited, they suffer the precise rights infringements they tried to alert the court to at their extradition hearing. Both of these problems stem from an approach to extradition which places mutual recognition above the human rights of the requested person and places blind faith in the issuing State as guarantor of fundamental rights.

Defense rights Persons sought under EAWs are not being provided with legal representation in the issuing State as well as the executing State. The Framework Decision on the EAW specifies that a person sought for extradition must have legal representation in the executing Member State (Article 11 – rights of a requested person). No reference is made to legal representation in the issuing State. This means that most requested persons are represented at the extradition hearing by a lawyer who is not familiar with the law and practice of the issuing State or the conditions pertaining there. In practice, this makes it more difficult to obtain information on key issues about the case, as this information can only be obtained by a lawyer in the issuing jurisdiction. 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, 7 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 on a framework decision enabling mutual recognition of court decisions on supervision, so a person could return to home state while on bail and be supervised there rather than being held in custody.

3. CONCLUSION

Further examination should continue in the appropriate bodies in order to provide practitioners with efficient legal instruments so that, where appropriate, the testimony of suspects can be obtained by means of mutual legal assistance or instruments based on the principle of mutual recognition that would not entail the surrender of the person. However, bearing in mind the differences between the Member States legal systems, in case where undertaking non-legislative measures will not be satisfactory, the Council agreed to reexamine this issue in the future. The core principles underlying the EAW, such as the abolition of double criminality, are unlikely to be changed despite human rights concerns. However, further changes addressing 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. 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. It is essential to the credibility of the EAW that these issues are addressed in order to maintain public confidence. Justice has to use its double-edged sword with circumspection to make sure that it does not hurt itself (Hristov, 2018a, pp.61-67; Hristov, Radulov, Iliev, Andreeva, 2010a; Hristov, 2018b, pp. 183-186; Hristov, Ninov, 2018c, pp.316-323; Hristov, Naplatanova, 2018d, pp. 293-315; Hristov, 2017a, pp. 998-1004, Hristov, Georgiev, 2017b, , pp. 110 -113; Hristov, Georgiev, 2017c, , pp. 114-117; Hristov, Glushkov, 2018e, pp.582-588; Hristov, Glushkov, 2018f, pp. 187-193; Hristov, 2017d, pp. 821-829; Madanski, Georgiev, 2017e, pp. 4-13; Madanski, Georgiev, 2017f, pp. 43-51; Terziev, Madanski, Georgiev, 2017g pp. 748-753; Terziev, Madanski, Georgiev, 2017h pp. 743-747; Terziev, Madanski, Georgiev, 2017i pp. 923-927; Terziev, Madanski, Georgiev, 2017j, pp. 1051- 1055; Terziev, Nichev, Bankov, 2016a, s.189-196; Terziev, Nichev, Bankov, 2016b, s. s.116-134; Terziev, Nichev, Bankov, 2016c, pp.12-21; Terziev, Nichev, Bankov, 2016d, str.119-128; Terziev, Nichev, Bankov, 2016e, str.129-146; Terziev, Nichev, Bankov, 2016e, str.129-146; Terziev, Nichev, Bankov, 2016f, str. 144- 185; Terziev, Nichev, Bankov, 2016f, str. 144-185; Terziev, Nichev, Bankov, 2016g, s.413-422; Terziev, Nichev, Bankov, 2016h, str.177-204; Nichev, 2017k, str. 121-128; Nichev, 2017l, pp. 129-135; Kanev, Terziev. 2017m; Kanev, Terziev, 2017n; Terziev, 2017o; Terziev, 2016i; Terziev, 2017p; Terziev, 2017q; Terziev, Vezieva, Arabska, 2016j; Terziev, Manolov, 2016k; Terziev, Minev, Sotirov, Ivanov, 2016l; Terziev, Kanev, 2017r; Terziev, Madanski, 2017s; Terziev, Madanski, 2017t;

Terziev, Madanski, 2017u; Terziev, Madanski, Kanev, 2017v; Terziev, Madanski, Kanev, 2017w; Terziev, Madanski, Kanev, 2017x; Terziev, Madanski, Kanev, 2017y; Terziev, Madanski, Kanev, 2017z; Terziev, Nichev, 2016m; Terziev, Nichev, 2017).

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