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BRIEFING PAPER

Number 07016, 18 April 2017

The European Arrest Warrant

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Summary

The basis of the European Arrest Warrant (the EAW) is the *Council Framework Decision on the European arrest warrant and the surrender procedures between Member States*. The Framework Decision, made in June 2002, superseded the previous extradition arrangements between EU Member States as set out in the Council of Europe's 1957 European Convention on Extradition (the ECE).

The main intention behind the Framework Decision was to speed up the extradition process between Member States. It achieved this by adopting a "system of surrender" between judicial authorities, based on the principle of mutual recognition and trust between Member States. The Framework Decision was implemented in the UK by Parts 1 and 3 of the *Extradition Act 2003*, which came into force on 1 January 2004.

Supporters of the EAW – including the Government and law enforcement authorities – argue that it has streamlined the extradition process within the EU and made it easier to ensure wanted persons are brought to justice.

Opponents have argued that it is used too frequently and favours procedural simplicity over the rights of suspects and defendants. Particular criticisms relate to its disproportionate use for trivial offences, and to difficulties reconciling the "mutual recognition" concept with variable criminal justice standards across Member States.

The Government has attempted to address some of these criticisms, for example by legislating to introduce a new "proportionality test" that the judiciary will need to consider before agreeing to extradite an individual from the UK under an EAW.

In 2014, Parliament voted in favour of the UK remaining within the EAW, rather than adopting some other form of extradition arrangements with Member States.

This paper aims to act as a guide to the numerous reports and reviews that have considered the EAW to date, focusing on areas of controversy around the operation of the EAW in practice and on the opt-out decision. Having set out the background, this paper explores the possible impact of Brexit on the UK's extradition arrangements with the EU. A number of alternative options to the EAW have been identified: reverting to the 1957 European Convention on Extradition; concluding an agreement with the EU; or concluding separate bilateral agreements with each of the 27 Member States. These possibilities are currently the subject of an inquiry by the House of Lords EU Home Affairs Sub-Committee. This paper sets out the pros and cons of each of these alternative options.

1. The Framework Decision

The basis of the European arrest warrant (EAW) is the 2002 Council Framework Decision on the European arrest warrant and the surrender procedures between Member States (the Framework Decision).[1] The Framework Decision superseded the previous extradition arrangements between EU Member States as set out in the Council of Europe's 1957 European Convention on Extradition (the ECE).

The main intention behind the Framework Decision was to speed up the extradition process between Member States:

> The purpose of the European Arrest Warrant (EAW) Framework Decision is to speed up the extradition process between Member States, reducing the potential for administrative delay under previous extradition arrangements. The EAW system has abolished "traditional" extradition procedures between Member States and instead adopts a system of surrender between judicial authorities, based on the principle of mutual recognition and mutual trust between Member States. The EAW removes certain barriers to extradition that existed under previous extradition arrangements – the 1957 Council of Europe Convention (ECE) – including the nationality of those sought and the statute of limitations, where the extradition offence would be time-barred under the law of the requested State.[2]

The 2011 Baker Review into the UK's extradition arrangements set out the key characteristics of the Framework Decision:

> (i) It requires the acceptance of a foreign warrant by national judicial authorities without an inquiry into the facts or circumstances giving rise to the warrant (the principle of mutual recognition);
>
> (ii) It removes executive decision-making from the surrender process, which is now an exclusively judicial procedure between the issuing and executing Member States;
>
> (iii) It dispenses with the double criminality requirement in the case of the 32 categories of offences so long as the offence in question is punishable with at least three years' imprisonment and in conviction cases a sentence of four months' custody has actually been imposed;
>
> (iv) It applies equally to nationals and residents of the executing Member State and thus provides for no exception on the grounds of citizenship;
>
> (v) It simplifies the procedure for extradition and by imposing time limits tries to ensure the process is speedier.[3]

A detailed overview of the background to the Framework Decision is given in Sir Scott Baker's Review of the United Kingdom's Extradition Arrangements, and Library Briefing Paper 1703, The introduction of the European arrest warrant.

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1 Council Framework Decision 2002/584/JHA of 13 June 2002

2 European Scrutiny Committee, The UK's block opt-out of pre-Lisbon criminal law and policing measures, HC 683, 7 November 2013, para 107

3 Rt Hon Sir Scott Baker, A Review of the United Kingdom's Extradition Arrangements, September 2011, para 4.69

2. UK implementation: the Extradition Act 2003

The Baker Review explained the impact of Framework Decisions on Member States:

> Framework Decisions are binding upon the Member States as to the result to be achieved, and national law must be interpreted so far as possible in the light of their wording and purpose; the form and method of implementation are left to the national authorities.[4]

The EAW Framework Decision has been implemented in the UK by Parts 1 and 3 of the Extradition Act 2003, which came into force on 1 January 2004. The EAW provisions of the 2003 Act have been amended a number of times since the legislation was first introduced, most notably by Part 12 the Anti-social Behaviour, Crime and Policing Act 2014. The changes made by the 2014 Act are considered further in section 5 of this Standard Note, as they represent the Government's response to concerns about the operation of the EAW in practice.

The basic procedure for extraditing an individual from the UK to another Member State pursuant to an EAW is set out on the Government website:

> **Extradition request**
>
> Extradition requests from category 1 territories should be made to the National Crime Agency (NCA) or to the Crown Office and Procurator Fiscal Service, if the person is in Scotland.
>
> In urgent cases a 'requested person' (the person a country wants to extradite) can be arrested before the receipt of an extradition request. The EAW must be received in time for a court hearing to be held within 48 hours of the arrest.
>
> **Issuing a certificate**
>
> If the warrant has been issued by a judicial authority in the requesting territory, a certificate can be issued by the UK authority.
>
> The documentation can only be certified if the requirements of section 2 of the 2003 Act are met. If the requested person has been convicted, the documentation must make it clear that the person is 'unlawfully at large' (liable to immediate arrest and detention).
>
> The requested person can then be arrested and brought before a court.
>
> **Initial hearing**
>
> At the initial hearing the District Judge must confirm, on the balance of probabilities:
>
> - the identity of the requested person
> - inform the person about the procedures for consent

[4] Rt Hon Sir Scott Baker, A Review of the United Kingdom's Extradition Arrangements, September 2011, para 4.22

- fix a date for the extradition hearing if the requested person does not to consent to his or her extradition

Extradition hearing

The extradition hearing should normally take place within 21 days of arrest.

If the judge is satisfied that the conduct amounts to an extradition offence, and that none of the bars to extradition apply, he must then decide if the person's extradition is compatible with the convention rights within the meaning of the Human Rights Act 1998.

If compatible, the judge must order the extradition.

Dual criminality test

'Dual criminality' means that for someone to be extradited, their alleged conduct has to be a criminal offence in both the surrendering and the requesting state.

There is a list of 32 categories of offence for which the dual criminality test is not needed. The offence must carry a maximum sentence of at least 3 years in the requesting state.

If the offence isn't covered in this list, it must be an offence in both the surrendering and requesting state. Also, if the conduct was carried out outside the requesting state, it must be an offence in both the issuing and executing states.

Appeals: High Court

An appeal must be lodged within 7 days of an extradition being ordered.

The requested person can appeal to the High Court against their extradition, and the requesting state can appeal against the discharge of someone they have requested extradition for.

Appeals: Supreme Court

A High Court decision can be appealed in the Supreme Court, as long as leave to appeal has been given.

An appeal to the Supreme Court can only be made on a point of law of general public importance and where the High Court decides the point should be considered by the Supreme Court.

Surrender of a requested person

The person should normally be extradited within 10 days of the final court order. This time limit can be extended in exceptional circumstances, and with the agreement of the requesting state.[5]

[5] Gov.uk website, Guidance – Extradition: processes and review [accessed 7 November 2014]

3. Statistical data

Data on the European Arrest Warrant is collected by the National Crime Agency and published on their dedicated European Arrest Warrant statistics page.

There are three core categories in the statistics:[6]

> **Requests**: the number of requests received – this is not necessarily the number of people actually wanted within a given country. For example, some member states issue requests to numerous member states when they do not know where a subject may be. It would be inaccurate to calculate the number of wanted people in Europe by adding together the total number of requests for every member state.
>
> **Arrests**: the number of people identified as being in the country and have been arrested.
>
> **Surrenders**: people arrested on an EAW have the right to appeal against or to contest their extradition. Surrenders is the number of people who – having either failed in their appeal or chosen not to appeal – are extradited.

Please note that request, arrest and surrender figures do not necessarily relate to the same group of people, in the same year, given that processes and timescales can overlap.[7] Only the number of individuals arrested and surrendered in each financial year are presented here.

European Arrest Warrants: Arrests and Surrenders

	Incoming EAWs[b]		Outgoing EAWs[c]	
Year[a]	Arrests	Surrenders	Arrests	Surrenders
2009-10	1,057	772	142	110
2010-11	1,295	1,100	150	130
2011-12	1,394	1,076	148	144
2012-13	1,438	1,057	133	123
2013-14	1,660	1,067	170	140
2014-15	1,586	1,093	161	142
2015-16	2,102	1,271	150	112

Note:
a. Financial year
b. Wanted from the UK - where an individual is wanted by another EU jurisdiction.
c. Wanted by the UK - individuals wanted by the UK and believed to be in another jurisdiction.
Source:
National Crime Agency, European Arrest Warrant Statistics, accessed 12 April 2017

6 National Crime Agency, European Arrest Warrant Statistics, accessed 12 April 2017
7 Ibid.

4. The EAW in practice: benefits and criticisms

Supporters of the EAW argue that it has streamlined the extradition process within the EU and made it easier to ensure wanted persons are brought to justice, although many acknowledge that the EAW could be improved further. Opponents argue that it is used too frequently and favours procedural simplicity over the rights of suspects and defendants.

The Baker Review summarised these two opposing viewpoints on the EAW in the following terms:

> There is a body of opinion that the introduction of the European arrest warrant had been successful (to a greater or lesser degree) and, after some initial uncertainty in relation to its operation many of the problems had been resolved by decisions of the higher courts. Its supporters claim it has become an effective, streamlined and fair mechanism for dealing with the surrender of requested persons to other Member States of the European Union. It is right to point out that many of those who are in favour of the European arrest warrant acknowledge that it is overused by certain Member States in what might be considered to be less serious, or even trivial cases: the criticism is not always that the European arrest warrant operates unfairly, rather it is that it sometimes is used too frequently and that this places a burden on the courts and is costly in terms of time and resources. In particular, there is a complaint that some Member States do not have any system to filter cases and so European arrest warrants are issued automatically with no consideration of whether there is a less coercive method of dealing with the requested person. There is also a body of opinion that the operation of the European arrest warrant is fundamentally flawed and that, while it has no doubt been instrumental in improving the fight against crime and bringing offenders to justice, it operates unfairly and to the disadvantage of requested persons by favouring the free movement of warrants, over the rights of suspects and defendants. Its detractors claim that the European arrest warrant scheme reflects the bias in favour of the prosecuting authorities which permeates the European Union's area of freedom, security and justice. There are also critics who express acute misgivings of the move (as they see it) towards a European super State.[8]

The two sides of the argument are considered further below.

4.1 Benefits of the EAW

The Baker Review concluded that "the European arrest warrant has improved the scheme of surrender between Member States of the European Union and that broadly speaking it operates satisfactorily".[9] It added:

> The fact that the surrender procedure is now effected almost entirely through judicial authorities appears to us to be an entirely positive development. So too is the fact that each Member State

[8] Rt Hon Sir Scott Baker, A Review of the United Kingdom's Extradition Arrangements, September 2011, para 5.5

[9] Ibid, para 1.9

> now surrenders its own nationals and that surrender is now effected far more quickly than was previously the case.[10]

In 2013 the Home Office, the Director of Public Prosecutions, the Association of Chief Police Officers and former Home Secretary Charles Clarke all gave evidence to the Home Affairs Committee in support of the EAW. A summary of their views is set out in the main body of the Committee's subsequent report:

> 8. A key part of the rationale for the EAW was that the free movement of people within the EU required effective extradition arrangements to prevent criminals from evading justice. Various witnesses told us that the EAW had succeeded in increasing the speed and reducing the administrative cost of extraditing EU citizens. The Government's Command Paper states that an extradition under the EAW now takes on average three months, whereas it requires approximately 10 months on average for a non-EU jurisdiction. The Home Secretary and the Director of Public Prosecutions highlighted the example of one of the failed 21 July bombers, Hussain Osman, who was extradited from Italy in less than eight weeks, and was subsequently tried and convicted. The Association of Chief Police Officers (ACPO) cited the case of Jason McKay, who was convicted last year for the manslaughter of his girlfriend, Michelle Creed. He initially went on the run to Poland before handing himself in at Warsaw police station. He was extradited back to the UK and put before a court within four weeks of leaving the country. Earlier this year, one of the UK's most wanted men, Mark Lilley, was arrested and extradited from Spain. He was the 51st fugitive arrested as part of the National Crime Agency's Operation Captura, targeting UK suspects believed to be hiding in Spain, a country which before the advent of the EAW had become a renowned safe haven for British criminals. These examples contrast starkly with the extradition under the previous arrangements of Algerian Rachid Ramda highlighted by former Home Secretary, Charles Clarke. Based in the UK and wanted by the French authorities for his role in the 1995 Paris Metro bombing, his return took 10 years to agree.
>
> 9. In the opt-out debate on 15 July 2013, the Home Secretary told the House that in the last four years the EAW had been used to extradite from the UK 57 suspects for child sex offences, 86 for rape and 105 for murder. In the same period, 63 suspected child sex offenders, 27 suspected rapists and 44 suspected murderers were extradited back to the UK to face charges. She argued that a number of these suspects would probably never have been extradited without the EAW and in cases where they were extradited, the process would almost certainly have taken longer than under the previous arrangements. This reduction in the length of the extradition process arising from the EAW not only benefits victims by ensuring rapid justice, it also works in favour of those people who consent to their extradition who might otherwise have spent many months in pre-trial detention before being extradited, although it is not clear why other extradition processes could not be curtailed by consent.
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> 10. ACPO told us that the UK also benefits from the EAW because it is an attractive destination for criminals. In London, 28 per cent of people arrested are foreign nationals of which half are from the EU. The vast majority of UK surrenders to other EU countries

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[10] Rt Hon Sir Scott Baker, A Review of the United Kingdom's Extradition Arrangements, September 2011, para 5.14

> under the EAW are non-UK citizens — 95 per cent of over 4,000 extraditions in the four years to April 2013. In other words, most outward EAWs concern other Member States seeking their own citizens for crimes committed back home. This is not quite the case for extraditions to the UK, where just over half of the 507 people surrendered were British nationals.
>
> 11. Furthermore, in recent years there has been a marked increase in the internationalisation of crime, facilitated by changes in technology and EU expansion. For example, Europol has highlighted a "travelling criminal gang phenomenon" whereby groups based in Eastern Europe, particularly Romania and Bulgaria, use low-cost airlines to travel abroad to commit offences, returning before they can be caught. The EAW could play an important role in tackling this new form of crime.
>
> 12. Overall, a number of our witnesses supported the UK's continued participation in the EAW. ACPO described it as "an essential weapon", whilst Europol told us it is "a modern, swift, cheap way of dealing with a serious criminal problem in the UK" and "it has transformed the nature of international police co-operation".[11]

4.2 Criticisms of the EAW

The most common criticisms of the EAW relate to its disproportionate use for trivial offences, and to difficulties reconciling the "mutual recognition" concept with differing criminal justice standards across Member States.

Proportionality

One of the main concerns raised with the EAW is that some Member States have used it to request the extradition of individuals for relatively minor crimes, while others (including the UK and Germany) only use the EAW where it is proportionate to do so. Prosecutors in some countries, for example Poland, operate under an "obligation to prosecute" principle, which means they have no discretion in deciding whether to prosecute a particular case. Prosecutors in the UK can exercise discretion when deciding whether to prosecute, and therefore whether to apply for an EAW. The Home Affairs Committee summarised the consequences of this:

> Whereas in the UK prosecutors can exercise discretion in determining whether to apply for an EAW, the authorities in Poland, for example, have no such prosecutorial discretion. Furthermore, in Poland sentencing guidelines are such that it is relatively easy to receive a custodial sentence of four months – the minimum threshold at which an EAW may be requested. This means that a large number of warrants are issued for relatively minor offences. Examples have included extraditions to Poland in connection with exceeding a credit card limit, piglet rustling, and the theft of a wheelbarrow, some wardrobe doors, a small teddy bear, and a pudding.[12]

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11 Home Affairs Committee, Pre-Lisbon Treaty EU police and criminal justice measures: the UK's opt-in decision, HC 615, 31 October 2013, paras 8-12

12 Home Affairs Committee, Pre-Lisbon Treaty EU police and criminal justice measures: the UK's opt-in decision, HC 615, 31 October 2013, para 16

The Home Affairs Committee noted that this disparity leads to the UK receiving disproportionately more warrants than it issues: "Not only does this undermine credibility in the system, it is also costly to the taxpayer."[13]

In its 2011 report into the human rights implications of the UK's extradition policy, the Joint Committee on Human Rights highlighted the lack of any proportionality test in the Framework Decision. It described how the UK nevertheless adopts a proportionality test when deciding whether to issue an EAW:

> An EAW may be issued by any EU country for any offence which has a maximum sentence of longer than one year. Although there is no proportionality test in the Framework Decision, some countries, including the United Kingdom, apply such a test before issuing a request. The lack of a proportionality test in the Framework Decision has been criticised by witnesses because of the large number of requests received by the UK in comparison to requests issued and the human rights implications of the large number of requests for extradition for minor offences.
>
> Existing proportionality tests
>
> 144. When an EAW request is received by the UK, it is certified by the Serious Organised Crime Agency (SOCA). The police locate and arrest the subject of the warrant. Detective Superintendent Murray Duffin of the Metropolitan Police Extradition Unit explained that "no proportionality test is written into the framework or the legislation, so if we receive a request and it is certified and meets all the requirements, it is to be executed." The Director of Public Prosecutions explained that the Crown Prosecution Service also has no discretion to choose whether to execute an EAW request.
>
> 145. We heard from witnesses that when the UK issues an EAW, proportionality is a relevant consideration. Commander Allan Gibson, representing the Association of Chief of Police Officers, told us that when considering whether to proceed with an investigation "we are quite conscious of cost and have to bear in mind what the likely penalty might be at the end of the process. So cost and end product or outcome are relevant considerations." The Crown Prosecution Service explained that the standard public interest test is applied before issuing a request:
>
> > "a prosecution will only follow if the Full Code Test is met: namely that there is sufficient evidence for a realistic prospect of conviction; and it is in the public interest. The CPS applies the Full Code Test when deciding if an extradition request for a person should be prepared and submitted for a person who has yet to be charged with the offence."
>
> 146. We asked the non-governmental organisations what assessment they had made of the UK's use of the EAW for requesting extradition. Catherine Heard told us that Fair Trials International was prepared to help any person who wanted to complain of unfair trial or extradition, but it had not received any cases from people facing an EAW request to return them to the UK. She told us that in the UK "there is a process of deciding if it is in the interests of justice to issue an arrest warrant to another country" and concluded that this filter should be imposed on all

[13] Ibid, para 37

> other countries. Jodie Blackstock of JUSTICE agreed that the UK had issued a much smaller number of requests than many other Member States showing the UK was considering in greater detail whether to issue a European Arrest Warrant.
>
> Commander Gibson told us that some other EU countries "appear to" operate a proportionality test. Catherine Heard agreed that "many countries in practice seem to have a public interest test before they go as far as issuing a warrant."[14]

The Committee went on to note a report by the European Commission:

> The recent report from the European Commission on the implementation of the EAW noted that "confidence in the application of the EAW has been undermined by the systematic issue of EAWs for the surrender of persons sought in respect of often very minor offences." The report concluded that "it is essential that all Member States apply a proportionality test, including those jurisdictions where prosecution is mandatory."[15]

The Commission recommended that a greater degree of uniformity could be achieved by Member States ensuring that practitioners follow the European Handbook on how to issue a European arrest warrant, published by the Council of Europe. This states:

> It is clear that the Framework Decision on the EAW does not include any obligation for an issuing Member State to conduct a proportionality check and that the legislation of the Member States plays a key role in that respect. Notwithstanding that, considering the severe consequences of the execution of an EAW with regard to restrictions on physical freedom and the free movement of the requested person, the competent authorities should, before deciding to issue a warrant consider proportionality by assessing a number of important factors. In particular these will include an assessment of the seriousness of the offence, the possibility of the suspect being detained, and the likely penalty imposed if the person sought is found guilty of the alleged offence. Other factors also include ensuring the effective protection of the public and taking into account the interests of the victims of the offence.
>
> The EAW should not be chosen where the coercive measure that seems proportionate, adequate and applicable to the case in hand is not preventive detention. The warrant should not be issued, for instance, where, although preventive detention is admissible, another non-custodial coercive measure may be chosen – such as providing a statement of identity and place of residence – or one which would imply the immediate release of the person after the first judicial hearing. Furthermore, EAW practitioners may wish to consider and seek advice on the use of alternatives to an EAW.[16]

The Joint Committee on Human Rights concluded:

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14 Joint Committee on Human Rights, The Human Rights Implications of UK Extradition Policy, HL Paper 156, HC 767, 22 June 2011, paras 143-147

15 Joint Committee on Human Rights, The Human Rights Implications of UK Extradition Policy, HL Paper 156, HC 767, 22 June 2011, para 149. For the Commission's report, see Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM(2011) 175,

16 Council of Europe, European Handbook on how to issue a European arrest warrant, 17195/1/10 REV 1, COPEN 275, EJN 72, EUROJUST 139, December 2010, p14

> …a proportionality principle "should be contained within the Framework Decision of the European Arrest Warrant and operate in a similar way to the tests applied by the Police and the CPS before issuing a request. We are not convinced that informal guidelines, bilateral discussions with the authorities of other Member States or a public interest test operated by the authorities in the requested country would be operationally practical or successful in the long-term.[17]

The Baker Review described the lack of a proportionality test as a "consistent and persistent" criticism of the EAW.[18] It concluded:

> The biggest problem arises from the sheer number of arrest warrants issued by certain Member States without any consideration of whether it is appropriate to issue an arrest warrant and if there is a less coercive method of dealing with the requested person. This problem has been recognised by the European Union and the European Commission has accepted that a proportionality requirement is necessary to prevent European arrest warrants being used in cases which do not justify the serious consequences of a European arrest warrant.[19]

It recommended that any future amendments to the Framework Decision, or any future legislative instrument enacted to deal with surrender between Member States of the European Union, should include a proportionality test to be applied in the issuing Member State.[20]

The Government acknowledged that the issue of proportionality is problematic. In its response to the European Scrutiny Committee's 2013 report on EU criminal law and policing measures, it set out developments in Poland aimed at addressing some of these concerns:

> The issue of proportionality in the UK has primarily been associated with the large volume of requests from Poland; while many of these requests are for serious offences, there have been many examples of offences for which extradition is a disproportionate measure. The Polish authorities are aware of Parliament's concerns about this and have provided evidence to the various inquiries into the 2014 opt-out decision on this issue. The large amount of Polish migration to the UK may have played its part in this, together with a highly systematised approach to the issuing of EAWs. However, Poland has taken steps to reduce the number of EAWs that are issued and the overall number of EAWs received from Poland has reduced by approximately 25% in the last few years. In addition Polish legislation is currently being taken through their Parliament and will come into force in July 2015 that is anticipated to make further reductions in the number of EAWs issued to the UK. This legislation will amend section 607b of their Criminal Procedure Code so that an EAW can only be issued if it is in the interests of justice to do so.[21]

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17 Joint Committee on Human Rights, The Human Rights Implications of UK Extradition Policy, HL Paper 156, HC 767, 22 June 2011, para 159

18 Rt Hon Sir Scott Baker, A Review of the United Kingdom's Extradition Arrangements, September 2011, para 5.120

19 Ibid, para 11.1

20 Ibid, para 11.21

21 European Scrutiny Committee, The UK's block opt-out of pre-Lisbon criminal law and policing measures: Government Response to the Committee's Twenty-first Report of Session 2013-14, 16 January 2014, HC 978, p26

In 2014, the Government legislated to introduce a new proportionality test to be exercised by the judicial authorities in the UK when deciding whether to execute an EAW received from another Member State: please see section 5 of this note for further details.

Mutual recognition and variations between Member States

The Home Affairs Committee highlighted evidence from two individuals (Andrew Symeou and Garry Mann) who had been extradited under the EAW. Mr Symeou spent 11 months in pre-charge detention in Greece on suspicion of involvement in the death of a man at a nightclub, despite evidence that the charges were based on witness statements extracted by police violence. He was only allowed to leave the country once he was cleared by the Greek courts in June 2011. Mr Mann was arrested in Portugal during the Euro 2004 football tournament and convicted in less than 24 hours, having been unable to instruct a lawyer and having received poor quality translation. He accepted voluntary deportation but was arrested under an EAW in 2009 and returned to Portugal to serve a prison sentence. The Home Affairs Committee made the following comments on the use of the EAW in cases such as these:

> Although the EAW system has streamlined the extradition process, it has a number of flaws, and its benefits have come at a heavy price for people who have experienced severe injustice as a result of the current arrangements. We heard moving evidence from two such individuals.
>
> (…)
>
> The experiences of Andrew Symeou and Garry Mann are not unique – a number of British citizens have suffered similar injustices. As the Home Secretary said in the debate on 15 July, "when extradition arrangements are wrong, they can have a detrimental effect on our civil liberties". The core of the problem is that the EAW is a mutual co-operation instrument that is based on the principle of mutual recognition. This means that if one Member State makes a decision to extradite an individual to face a trial or serve a sentence, that decision must be respected and applied throughout the EU. Difficulties arise, however, because the justice systems of Member States vary significantly in their practice. One aspect of this is the use of EAWs by some countries at an earlier stage than that at which the UK would apply for one. Whereas the UK will not issue a warrant until it is 'prosecution-ready', some Member States will seek an EAW for questioning to aid a decision on whether to charge, or long before the relevant court is ready to try the individual concerned. This was the case with Andrew Symeou. Furthermore, once charged, non-nationals are often at a disadvantage in obtaining bail because they are seen as a greater flight risk. Andrew Symeou summed it up: "I was extradited because we are European but I was put in prison because I am British". These factors can result in prolonged periods of pre-trial detention. This is particularly concerning given some EU countries have no legal maximum length for such detention.[22]

[22] Home Affairs Committee, Pre-Lisbon Treaty EU police and criminal justice measures: the UK's opt-in decision, HC 615, 31 October 2013, paras 13-15

The Committee went on to highlight evidence regarding differences in standards of justice:

> Not only are there differences in the structure of justice systems between Member States, but also standards of justice vary significantly within those systems. Fair Trials International told us: "there is not a sound basis for mutual trust, not least because basic fair trial rights are not protected adequately in many EU countries". This was one of the underlying problems for both Andrew Symeou and Garry Mann. In the former case it was reflected in the manner in which evidence was collected against him by the Greek police and his subsequent treatment in prison. In the latter case it arose in the form of inadequate arrangements for representation and translation at his trial in Portugal, and because his lawyers lacked sufficient training in how the EAW process operates. The problem is exacerbated by the fact that the EAW is a procedural mechanism that does not require the receiving court to consider a prima facie case before executing a warrant. Dominic Raab MP told us the false assumption of common standards across the EU has deeply undermined faith in the EAW system, not only in the UK, but also among other northern European countries.[23]

Section 21 of the Extradition Act 2003 does set out a "human rights bar", which requires the judge at an extradition hearing to discharge the requested individual if they are of the view that execution of the EAW would result in a breach of that individual's rights under the European Convention on Human Rights.[24] However, there is some concern that the standard of proof needed to satisfy this provision is extremely high, as was set out in evidence to the Home Affairs Committee:

> For example, Fair Trials International told us that in practice "the courts apply principles elaborated by the European Court of Human Rights which impose virtually unachievable evidential and legal hurdles". In Andrew Symeou's case it was argued that his treatment in a Greek prison would breach his Article 3 rights (under the inhuman or degrading treatment provision). However, the judge concluded that there was no sound evidence that he was at risk of being subjected to treatment that would breach Article 3, even though there was evidence that some police do inflict such treatment on those in detention.[25]

The Baker Review, however, reached the conclusion that the section 21 human rights bar "provides appropriate protection against prospective human rights violations":

> The current position may be summarised as follows:
>
> (i) In the absence of any proof to the contrary it must be assumed that a category 1 territory will comply with its obligations under the Convention.
>
> (ii) A defendant is entitled to adduce evidence to displace the assumption.

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23 Ibid, para 19

24 For example the Article 3 right not to be subjected to torture or inhuman or degrading punishment or treatment, or the Article 6 right to a fair trial

25 Home Affairs Committee, Pre-Lisbon Treaty EU police and criminal justice measures: the UK's opt-in decision, HC 615, 31 October 2013, para 21

> (iii) This evidence may include reports prepared by respected organisations or bodies concerning the risk of human rights violations occurring in the category 1 territory.
>
> (iv) It will require clear and cogent evidence to establish that in a particular case the defendant's extradition involves a contravention of his rights.[26]

The Review noted a number of developments at EU level aimed at resolving problems with procedural rights and pre and post-trial detention, including sub-standard prison conditions. It drew attention to what is known as "The Roadmap", which was adopted by the Council of Europe in 2009 in order to strengthen the procedural rights of suspects in criminal proceedings following concerns about the different standards of protection given to suspects in Member States:

> Recital 10 of the Roadmap recognises that considerable progress has been made in the area of judicial and police cooperation on measures that facilitate prosecution and that it is now time to take action to improve the balance between these measures and the protection of procedural rights of the individual.
>
> To this end the Roadmap has identified six priority measures:
>
> (i) the right to interpretation and translation;
>
> (ii) the right to information about rights (known as the Letter of Rights);
>
> (iii) the right to pre-trial legal advice and at-trial legal aid;
>
> (iv) the right of a detainee to communicate with family members, employers and consular authorities;
>
> (v) greater protection for vulnerable suspects;
>
> (vi) the publication of a green paper on pre-trial detention.[27]

The Review also noted a number of measures aimed at improving pre and post-trial detention: for example the European Commission's green paper Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention (2011, COM(2011) 327), the Council Framework Decision on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (2009/829/JHA) and the European Prison Rules 2006.[28]

The Review concluded that working to improve standards across all Member States would help improve the operation of the EAW:

> The scheme is premised on the equivalence of the protections and standards in the criminal justice systems in each Member State. However, the Commission recognises that in some aspects (such as the length and conditions of pre-trial detention) action is required to raise standards. We recommend that the United Kingdom Government work with the European Union and other

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26 Rt Hon Sir Scott Baker, A Review of the United Kingdom's Extradition Arrangements, September 2011, para 11.10

27 Rt Hon Sir Scott Baker, A Review of the United Kingdom's Extradition Arrangements, September 2011, paras 4.89-4.90. For the Roadmap, see Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (2009/C 295/01)

28 Rt Hon Sir Scott Baker, A Review of the United Kingdom's Extradition Arrangements, September 2011, paras 5.82-5.84

> Member States through the Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings and other measures urgently to improve standards. We note that the Joint Committee on Human Rights recommended that the United Kingdom Government should "take the lead in ensuring there is equal protection of rights, in practice as well as in law, across the EU".[29]

For the Joint Committee's findings on the system of mutual recognition, please see paragraphs 131 to 142 of its report The Human Rights Implications of UK Extradition Policy.[30]

[29] Rt Hon Sir Scott Baker, A Review of the United Kingdom's Extradition Arrangements, September 2011, para 11.6

[30] HL Paper 156, HC 767, 22 June 2011

5. The Government's response

Although the Government has repeatedly stated its commitment to the EAW, it has nevertheless acknowledged that there have been problems with it in operation (including the proportionality and mutual recognition difficulties outlined in the previous section of this note). It has therefore made or proposed various changes to the EAW, including a number of amendments to the Extradition Act 2003.

In a statement to the House in July 2013, the then Home Secretary Theresa May set out the measures the Government was proposing to implement in order both to reduce the number of EAWs and to improve the operation of the system in the UK.[31]

> A number of hon. Members have explained how European arrest warrants have been issued disproportionately for very minor offences. I will address this by amending the Anti-social Behaviour, Crime and Policing Bill, which is in Committee, to ensure that an arrest warrant can be refused for minor crimes. This should stop cases such as that of Patrick Connor, who was extradited because he and two friends were found in possession of four counterfeit banknotes.
>
> We will also work with other states to enforce their fines and ensure that in future, where possible, the European investigation order is used instead of the European arrest warrant. This would allow police forces and prosecutors to share evidence and information without requiring the extradition of a suspect at the investigative stage.
>
> Other hon. Members have expressed concerns about lengthy and avoidable pre-trial detention. I will amend our Extradition Act 2003 to ensure that people in the UK can be extradited under the European arrest warrant only when the requesting state has already made a decision to charge and a decision to try, unless that person's presence is required in that jurisdiction for those decisions to be made. Many Members, particularly my hon. Friend the Member for Enfield North (Nick de Bois), will recall the case of Andrew Symeou, who spent 10 months in pre-trial detention, and a further nine months on bail, in Greece, only to be acquitted. The change that I am introducing would have allowed Andrew Symeou to raise, in his extradition hearing, the issue of whether a decision to charge him and a decision to try him had been taken. It would likely have prevented his extradition at the stage he was surrendered—and, quite possibly, altogether. We will also implement the European supervision order to make it easier for people such as Mr Symeou to be bailed back to the UK.
>
> Other hon. Members are concerned about people being extradited for conduct that is not criminal in British law. I will amend our law to make it clear that in cases where part of the conduct took place in the UK, and is not criminal here, the judge must refuse extradition for that conduct. I also intend to make better use of existing safeguards to provide further protections. I will ensure that people who consent to extradition do not lose their right not to be prosecuted for other offences, reducing costs and delays. We propose that the prisoner transfer framework

[31] HC Deb 9 July 2013 c177

> decision be used to its fullest extent, so that UK citizens extradited and convicted can be returned to serve their sentence here.
>
> Where a UK national has been convicted and sentenced abroad, for example in their absence, and is now the subject of a European arrest warrant, we will ask, with their permission, for the warrant to be withdrawn, and will use the prisoner transfer arrangements instead. This change could have prevented the extraditions of Michael Binnington and Luke Atkinson, who were sent to Cyprus only to be returned to the UK six months later.
>
> To prevent other extraditions occurring at all, I intend either to allow the temporary transfer of a consenting person, so that they can be interviewed by the issuing state's authorities, or to allow those authorities to do that through such means as video conferencing while the person is in the UK. Where people are innocent, this should lead to the extradition request being withdrawn. These are all changes that can be made in UK law, and that could have been made by the Opposition during their time in government. Co-operation on cross-border crime is vital, but we must also safeguard the rights of British citizens, and the changes that we propose will do that.[32]

These changes have now been effected by Part 12 of the Anti-social Behaviour, Crime and Policing Act 2014.[33] The associated Explanatory Memorandum provides additional detail.

The change that has attracted most attention is the new proportionality test set out in section 157 of the 2014 Act. This added a new section 21A to the Extradition Act 2003, the key provisions of which provide as follows:

> (1) If the judge is required to proceed under this section (by virtue of section 11), the judge must decide both of the following questions in respect of the extradition of the person ("D") —
>
> (a) whether the extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998;
>
> (b) whether the extradition would be disproportionate.
>
> (2) In deciding whether the extradition would be disproportionate, the judge must take into account the specified matters relating to proportionality (so far as the judge thinks it appropriate to do so); but the judge must not take any other matters into account.
>
> (3) These are the specified matters relating to proportionality —
>
> (a) the seriousness of the conduct alleged to constitute the extradition offence;
>
> (b) the likely penalty that would be imposed if D was found guilty of the extradition offence;
>
> (c) the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of D.

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32 HC Deb 9 July 2013 cc178-9

33 Sections 155-159, 161-167 and 169-173 were brought into force on 21 July 2014. Section 174 was brought into force on 6 October 2014. See the Anti-social Behaviour, Crime and Policing Act 2014 (Commencement No. 4 and Transitional Provisions) Order 2014, SI 2014/1916 and the Anti-social Behaviour, Crime and Policing Act 2014 (Commencement No 6) Order 2014, SI 2014/2454. Sections 160 and 168 have not yet been commenced.

> (4) The judge must order D's discharge if the judge makes one or both of these decisions —
>
> (a) that the extradition would not be compatible with the Convention rights;
>
> (b) that the extradition would be disproportionate.
>
> (5) The judge must order D to be extradited to the category 1 territory in which the warrant was issued if the judge makes both of these decisions —
>
> (a) that the extradition would be compatible with the Convention rights;
>
> (b) that the extradition would not be disproportionate.

This change has been welcomed, although some have suggested that it will have little impact on the number of EAWs the UK receives:

> The majority of our witnesses, including the Director of Public Prosecutions, supported this proposal as a way of reducing the number of EAWs executed for countries such as Poland that do not have prosecutorial discretion. However, Dr Hart-Hoenig, a lawyer operating in Germany, told us this change was not likely to influence the decision by judges in other Member States to continue issuing warrants. This means UK courts may continue to process a large number of EAW requests, albeit granting fewer of them.[34]

Some have also queried whether the measure will stand up to future challenge in the Court of Justice, given that the Framework Decision itself does not include any provision to bar extradition on proportionality grounds. For example, the European Scrutiny Committee said:

> 128. We note that the proposed amendments to the Extradition Act are not exceptions to executing an EAW provided for in the EAW Framework Decision; in other words they have not been agreed at EU level, at least in the form of legislation, however welcome they may be in the UK. Whilst this matters less in the absence of the jurisdiction of the Court of Justice and of the infringement powers of the Commission; it becomes rather more significant were the UK to opt back into the Framework Decision, thereby accepting the powers of those two institutions.
>
> 129. When we questioned the Home Secretary about this, she replied that:
>
> > We have indicated to other member states the amendments that we are intending to put through. We had started some discussions with other member states at an earlier stage as to whether it would be possible to reopen the framework directive on the European Arrest Warrant and perhaps make the changes through that, and we will continue to discuss the overall shape of the European Arrest Warrant directive. However, it became clear that, if we wanted to make some changes within the timescale that we wished to operate, it was easier to do it within our own legislation, but we have alerted other member states to what we are doing within our own legislation.

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[34] Home Affairs Committee, Pre-Lisbon Treaty EU police and criminal justice measures: the UK's opt-in decision, HC 615, 31 October 2013, para 26

> She gave Germany as an example of a Member State which already uses a proportionality test and Ireland which uses a test for ascertaining whether a decision to charge and try the person has been made. She said that the Government believed that these amendments "will not alter our ability to opt back into the framework decision". Asked whether the Commission had been consulted for its opinion, the Minister replied as follows:
>
> > Q76: What has the Commission said about these amendments that you are putting forward when the Bill returns to the House next week?
> >
> > Mrs May: The Commission has not given us any negative view on these amendments.
> >
> > Q77: Your view is based purely upon your own internal legal advice rather than any discussions with the Commission.
> >
> > Mrs May: Obviously, we have our own internal legal advice, but we also have looked at the examples of some other member states.[35]

The Committee called on the Government to explain the legal basis on which it considered the new proportionality test to be consistent with the Framework Decision, should it be challenged before the Court of Justice in future. It also asked whether there was a risk that the Commission might conclude that the amendments meant the UK no longer fulfilled the conditions required for participation in the Framework Decision and so could not rejoin the EAW.

In its response to the Committee, the Government said it believed the new bar was "consistent with the UK's obligations under EU law" given the central role of proportionality in EU law:

> Proportionality is a cornerstone of EU law. Its origins lie in the case law of the European Court of Justice and it is specifically enshrined in Article 5(4) TEU. Moreover, and bearing in mind that in many cases proportionality issues are inextricably linked with fundamental rights, Article 1(3) of the EAW Framework Decision is clear that the Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles. In addition, Article 52(1) of the Charter of Fundamental Rights makes clear that limitations on rights enshrined in the Charter are "subject to the principle of proportionality".[36]

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35 European Scrutiny Committee, The UK's block opt-out of pre-Lisbon criminal law and policing measures, HC 683, 7 November 2013, para 127-129

36 European Scrutiny Committee, The UK's block opt-out of pre-Lisbon criminal law and policing measures: Government Response to the Committee's Twenty-first Report of Session 2013-14, HC 978, 16 January 2014, p31

6. EU police and criminal justice measures

6.1 The opt-out decision

On 24 July 2013 the Prime Minister notified the Presidency of the Council of Europe that the UK wished to opt out of 130 EU police and criminal justice measures. This followed votes by both Houses of Parliament in favour of a resolution to opt out of the measures and to seek to re-join individual measures "where it is in the national interest to do so".[37] For full background on the opt-out decision please see the following:

- Library Standard Note 6268 The UK's 2014 Jurisdiction Decision in EU Police and Criminal Justice Proposals
- Library Standard Note 6930 The UK block opt-out in police and judicial cooperation in criminal matters: recent developments
- Home Affairs Committee, Pre-Lisbon Treaty EU police and criminal justice measures: the UK's opt-in decision, HC 615, 31 October 2013, paras 1-6
- European Scrutiny Committee, The UK's block opt-out of pre-Lisbon criminal law and policing measures, HC 683, 7 November 2013, sections 1 and 2
- European Scrutiny Committee, The UK's 2014 block opt-out decision: summary and update Report, HC 762, 4 November 2014, paras 1-16 and Annex 1

A Government Command Paper published in July 2013 set out a list of 35 measures that the Government proposed to opt back into.[38] A revised Command Paper was published in July 2014, setting out a similar but not identical list of the 35 measures the Government intended to opt back into.[39]

The Framework Decision on the EAW was listed in both Command Papers as a measure the Government wished to opt back into. The July 2014 Paper included an impact assessment on the decision to opt into the EAW, which set out the reasons for the Government's preference to opt in. The impact assessment proceeded on the assumption that if the UK did not seek to re-join the EAW, inbound and outbound extradition arrangements between the UK and other Member States would revert to the 1957 ECE. The Government considered that this would be undesirable for a number of reasons:

- the time taken to execute an inbound extradition would significantly increase, as would the unit cost;

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37 HC Deb 15 July 2013 c770 and HL Deb 23 July 2013 c1232

38 HM Government, Decision pursuant to Article 10 of Protocol 36 to The Treaty on the Functioning of the European Union, Cm 8671, July 2013

39 HM Government, Decision pursuant to Article 10(5) of Protocol 36 to The Treaty on the Functioning of the European Union, Cm 8897, July 2014

- structural and process changes would be required within the Home Office and other operational structures;
- reverting to the ECE could require legislative amendments in some Member States, which would not be in the control of the UK and would involve unclear timescales and costs;
- outbound extradition requests under the ECE would be subject to the ability of other Member States to refuse to extradite their own nationals (either by way of a reservation entered under Article 6 of the ECE or by way of a constitutional bar); and
- the ECE does not allow for extradition for fraud and tax offences.[40]

By contrast, the Government considered that rejoining the EAW would "streamline and improve extradition arrangements", and act as a deterrent for offenders deciding whether to enter the UK.[41]

The Government also set out detailed arguments in support of its position on the EAW in its response to the European Scrutiny Committee's report on the opt-out decision. It described the EAW as "an effective law enforcement tool that makes a significant contribution to the UK's ability to investigate and prosecute serious crime", and added that this view was shared by police and prosecutors. The response also suggested that there could be difficulties extraditing suspects between the Republic of Ireland and the UK if the UK failed to opt back into the EAW:

> Prior to the commencement of the EAW, extradition relations between the UK and Ireland were governed by an administrative system which gave effect to Irish arrest warrants in the UK, and vice versa. The relevant legislation, the Backing of Warrants Act 1965 (UK) and Part III of the Extradition Act 1965 (ROI) have both since been repealed.
>
> Ministers in the Irish Republic and in Northern Ireland have been consistently clear that the EAW has real benefits in swiftly tackling serious cross border criminality. In July 2013, Alan Shatter, Irish Minister for Justice responded to the Government's decision to opt out of all pre-Lisbon criminal justice measures, and said the following:
>
> "It is particularly important that the co-operation between our two jurisdictions in tackling so-called dissident republican activity should not be hindered, and I emphasised the vital role of the European Arrest Warrant in this regard. As such, I very much welcome Ms. May's confirmation that the EAW is among the measures that the UK government will be seeking to opt back into."[42]

The Government went on to conclude that it was preferable to be within the EAW than not, and that the operational problems it had

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40 HM Government, Decision pursuant to Article 10(5) of Protocol 36 to The Treaty on the Functioning of the European Union, Cm 8897, July 2014, pp55-56

41 HM Government, Decision pursuant to Article 10(5) of Protocol 36 to The Treaty on the Functioning of the European Union, Cm 8897, July 2014, pp63-66 and 67-69

42 European Scrutiny Committee, The UK's block opt-out of pre-Lisbon criminal law and policing measures: Government Response to the Committee's Twenty-first Report of Session 2013-14, HC 978, 16 January 2014, pp22-3

presented to date were best dealt with by working together with other Member States:

> It is a fact that many of the problems identified by the Committee would still occur even the UK no longer operated the EAW. In addition, extradition would be more difficult, slower and in some cases impossible. For example, as well as allowing extradition to be barred for own nationals, the ECE allows refusal for tax offences in certain circumstances; and also provides for refusal on statute of limitation grounds (which could allow serious offenders to escape being brought to justice if the statute of limitations had passed).
>
> The Government's view is that in order to find solutions to commonly acknowledged problems, we should work with and challenge the EU institutions for reform of EU law where it is required, and work bilaterally with other Member States to address practical problems.[43]

In a follow-up report, the European Scrutiny Committee pointed out that a return to the 1957 ECE was not the only alternative to the EAW:

> The Impact Assessment only assesses the effect of relying on the 1957 European Convention on Extradition if the UK does not opt back in to the EAW. It does not examine the option of a new UK-EU treaty on extradition, which could omit some of the bars to extradition that exist under the 1957 Convention but include much better safeguards for British citizens than the EAW, such as only requiring extradition for truly serious offences, allowing greater or complete scope for extradition to be blocked where the alleged offence is not a crime under UK law, and allowing British courts to conduct an assessment of the likelihood of a fair trial within a reasonable timeframe in the requesting EU country without the EI Court of Justice able to override their decisions.[44]

The Home Affairs Committee also considered the possibility of the UK negotiating new arrangements with other Member States, should it remain outside the EAW:

> …as Fair Trials International argued, it is likely that "other Member States will continue to wish to engage in effective extradition arrangements with the UK, whether or not we remain a part of the EAW system". In practice this would mean agreeing new bilateral arrangements on a country-by-country basis, or with the EU, given that it has gained legal personality under the Lisbon Treaty. Dominic Raab MP argued that there had been a significant amount of "scaremongering" of the consequences of leaving the EAW, both in terms of the extent to which new arrangements might lead to delays, and the possibility that criminals might go free. He was optimistic that the UK would be able to negotiate enhanced procedures that sat somewhere between the Convention and the EAW.
>
> Former Home Secretary Charles Clarke was sceptical that it would be possible to negotiate new arrangements, noting that one of the reasons why some cases in the past went on for so long was because such bilateral arrangements had not been agreed. Justice

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43 European Scrutiny Committee, The UK's block opt-out of pre-Lisbon criminal law and policing measures: Government Response to the Committee's Twenty-first Report of Session 2013-14, HC 978, 16 January 2014, p27

44 European Scrutiny Committee, The UK's 2014 block opt-out decision: summary and update Report, HC 762, 4 November 2014

> Across Borders also told us it did not believe new bilateral or multilateral arrangements outside the EU framework would be as effective. First, any negotiation would be fraught with difficulty and might not be prioritised by other Member States. If discrepancies occurred between implementing legislation, there would be no formal mechanism to resolve them. Second, the nature of negotiation means that the UK might not secure the arrangements that it wants. Other Member States could refuse to co-operate, or might seek concessions in other areas. Third, EU law may anyway prohibit Member States from agreeing individual arrangements with the UK. Finally, even if the UK were to reach bilateral agreements, differences in procedure might be exploited by criminals and potentially turn the UK into a safe haven for people seeking to evade justice (or at least give rise to the perception of it being so). Some argue that an agreement with the UK and the EU as the two contracting parties could alleviate these problems.[45]

The Committee concluded that it was ultimately for the House to determine the UK's ongoing membership of the EAW, and that given its importance it should be considered separately to the rest of the opt-in package by way of a debate and vote on a discrete motion:

> If the House votes in favour of the UK retaining the EAW, we further recommend that the Government seek agreement with other Member States for reform of the Framework Decision itself as part of the opt-in negotiations. If the House votes against the UK retaining the EAW, we recommend that the Government attempt to negotiate an agreement with the EU on an effective successor regime to safeguard the UK's interests.[46]

6.2 The November 2014 debate

On 10 November 2014, the House of Commons voted to approve the draft Criminal Justice and Data Protection (Protocol No 36) Regulations 2014.[47] The draft regulations did not cover all 35 opt-in measures but only 11 of them which, the Government said, needed "further transposition into domestic law in order to meet the UK's obligations under them".[48] This caused considerable controversy, in particular because the draft regulations did not specifically mention the EAW, so there was uncertainty as to whether a vote on the Regulations would constitute a vote on membership of the EAW mechanism. The Government took the view that the vote would cover the entire package of measures including the EAW, on the basis that they could not be subdivided, and therefore a vote in favour of some of the measures would constitute a vote in favour of all of them.

The House of Lords voted to approve an amended motion on 17 November 2014, which made specific mention of the application to re-

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45 Home Affairs Committee, Pre-Lisbon Treaty EU police and criminal justice measures: the UK's opt-in decision, HC 615, 31 October 2013, paras 23-24

46 Home Affairs Committee, Pre-Lisbon Treaty EU police and criminal justice measures: the UK's opt-in decision, HC 615, 31 October 2013, para 39

47 HC Deb 10 November 2014 cc1223-1270

48 Draft Explanatory Memorandum to the Criminal Justice and Data Protection (Protocol No. 36) Regulations 2014, paragraph 4.4. See also section 4.3 of Library Standard Note 6930 The UK block opt-out in police and judicial cooperation in criminal matters: recent developments.

join all 35 measures.[49] A further Opposition Day debate was tabled on 19 November, at which the House of Commons voted to endorse the Government's formal application to re-join 35 European Union Justice and Home Affairs measures, including the European Arrest Warrant, by 421 votes to 29.[50]

The Prime Minister finally notified the Council of the UK's wish to re-join these 35 measures on 20 November 2014, and on 1 December 2014, decisions were adopted by the European Commission and Council formally approving this application.[51]

49 HL Deb 17 November 2014 cc326-366
50 HC Deb 19 November 2014 cc333-388
51 HC Deb 4 December 2014 c1399

7. The impact of Brexit

7.1 The future options

In a speech delivered in April 2016, the then Home Secretary Theresa May noted that the EAW was one of the measures that "make a positive difference in fighting crime and preventing terrorism".[52] During her last evidence session as Home Secretary in May 2016, Theresa May told the Home Affairs Committee; "if we are not in the European Union, we would almost certainly not have access to the European arrest warrant."[53]

Until the UK's withdrawal from the EU is complete, extradition law will continue to operate in the same way under the provisions of the Extradition Act 2003 in accordance with the EU Framework Decision, which continues to apply to all EU Member States. However, once the UK has withdrawn its membership of the EU, the Framework Decision will cease to apply. The UK's extradition arrangements with the EU will therefore need to be re-negotiated and any consequential amendments will need to be made to the UK's domestic law.[54] In October 2016, David Davis, Secretary of State for Exiting the EU, expressed his aim to keep the UK's existing justice and security arrangements with the EU "at least as strong as they are".[55]

On 24 February 2017, in response to a Parliamentary Question regarding the effect of leaving the EAW system, David Jones, Minister of State for the Department of Exiting the EU responded:

> The safety of the British public is the top priority for the Government. It is in all our interests that we continue our deep cooperation with the EU and its Member States to tackle crime and terrorism.
>
> As the recent White Paper made clear, the Government will look to negotiate the best deal we can with the EU to cooperate in the fight against crime and terrorism. We will seek a strong and close future relationship with the EU, with a focus on operational and practical cross-border cooperation.[56]

On 6 March 2017, the Home Secretary Amber Rudd said:

> I certainly agree with the principle that the European arrest warrant is an effective tool that is essential to the delivery of effective judgment on the murderers, rapists and paedophiles on whom we have managed to seek judgment. It is a priority for us to ensure that we remain part of the arrangement, and I can

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52 Home Secretary's speech on the UK, EU and our place in the world, 25 April 2016, Gov.uk

53 Home Affairs Committee, Oral evidence: The Work of the Home Secretary, 10 May 2016, Q326

54 6 King's Bench Walk (6KBW) College Hill, Brexit Briefing 2, 13 July 2016, p2

55 HC Library Briefing Paper, Brexit – implications for policing and cooperation, p28 For an overview of Government statements regarding Brexit and justice and security cooperation, see pp27-30

56 PQ 65515 [on EAW], 24 February 2017

> reassure Members in all parts of the House that our European partners want to achieve that as well.[57]

There may, however, be some tension between the Government's intention to bring an end to the jurisdiction of the Court of Justice of the European Union (CJEU) and the Government's intention to continue deep cooperation in dealing with crime, terrorism, and criminal justice.[58]

Once the UK has withdrawn from the EU and the Framework Decision ceases to apply, there are three alternative options for future extradition arrangements between the UK and EU Member States.

1 Rely upon the European Convention on Extradition 1957;

2 Conclude an agreement with the EU;

3 Conclude bilateral agreements with EU Member States.[59]

7.2 The European Convention on Extradition

All Member States of the EU have signed and ratified the European Convention on Extradition 1957. In lieu of a newly negotiated agreement, the extradition relationship between the UK and the EU would be governed by the Convention.[60] There are a number of important differences between the provisions of the Convention and the EAW system:

a. Whereas the EAW operates between judicial authorities without executive involvement, conversely, applications for extradition under the Convention would be made through diplomatic channels, requiring the approval of the Secretary of State;[61]

b. Whereas the EAW framework imposes strict time limits at each stage of the process, the Convention does not impose the same time limits;[62]

c. The EAW abolished the exemption that allowed Member States to refuse to extradite their own nationals, based on the concept of EU citizenship. However, Article 6 of the Convention provides that states can refuse an extradition request for one of their own nationals;[63]

d. Whilst most of the existing bars to extradition would remain, the recently introduced bars would cease to apply under the Convention.[64] At present, the *Extradition Act*

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57 HC Deb 6 March 2017, c550

58 Noted by the Chairman of the House of Lords EU Home Affairs Sub-Committee Inquiry, 'Criminal Justice Cooperation with the EU after Brexit: The European Arrest Warrant' in Uncorrected Oral Evidence: 'Brexit: The European arrest warrant', 5 April 2017, p11, Q22. See Government's White Paper, 'The United Kingdom's Exit from and new relationship with the EU', February 2017, para 2.3 for the Government's position on the CJEU

59 HC Library Briefing Paper, Brexit – implications for policing and cooperation, p16

60 6 King's Bench Walk (6KBW) College Hill, Brexit Briefing 2, p4

61 Evidence of the Law Society of Scotland, in HL EU Committee 7th Report, 'Brexit: future EU-UK security and police cooperation', 16 December 2016, para 134

62 Ibid.

63 Ibid.

64 New bars introduced by sections 156 and 157 of the *Anti-Social Behaviour, Crime and Policing Act 2014*, amending the *Extradition Act 2003*

2003 provides for a bar to extradition on the grounds of proportionality (section 21A) and in the absence of a prosecution decision (section 12A);[65]

e. As the domestic courts would no longer be bound by the principles of mutual trust that underpinned the Framework Decision, there may be greater scope to scrutinise the human rights issues in relation to requesting EU Member States.[66]

There is some concern that extradition arrangements under the Convention would be a lengthier and more cumbersome process, and may result in difficulties securing the extradition of EU nationals to the UK. In its evidence to the Justice Committee, the National Crime Agency warned:

> Without the EAW, extraditions will become more complicated and costly, take longer, and be more likely to be refused. There is the added risk of existing [Member States] putting UK requests to the 'bottom of the pile' while they continue to use the EAW with other Member States.[67]

Then Home Secretary, Theresa May, argued in 2014 that the Convention had "one crucial aspect that would cause us problems", namely the length of time that extradition procedures would take which "could undermine public safety."[68]

In his evidence to the House of Lords EU Home Affairs Sub-Committee, Professor Steve Peers stated:

> We can go back to a Council of Europe system, of course. There is a convention there with four protocols and there will be transition literature about how we will do that, but be aware that it will mean not only transitional challenges, which we are getting already, but significantly fewer people extradited, taking significantly longer and quite possibly more expensive in each case.[69]

Further, the Director of Public Prosecutions, Alison Saunders (DPP), described the EAW as "three times faster and four times less expensive" than the alternative options and set out four key problems with reverting to the Convention:

- Firstly, the fact that many Member States have repealed domestic legislation underpinning the Convention since the establishment of the EAW system;
- Secondly, the exemption permitting the refusal of one's own nationals;
- Thirdly, the increased cost; and

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65 For a discussion of this see 6 King's Bench Walk (6KBW) College Hill, Brexit Briefing 2, p5
66 Ibid., p5
67 HC Library Briefing Paper, Brexit – implications for policing and cooperation, p24
68 HC Debate, 10 November 2014, c1236-1237, cited in in HL EU Committee 7th Report 'Brexit: future EU-UK security and police cooperation', 16 December 2016, p34, para 125
69 HL EU Committee 7th Report 'Brexit: future EU-UK security and police cooperation', 16 December 2016, Evidence session 1, 14 September 2016

- Fourthly, the potential for delays.[70]

As such, the House of Lords' Committee concluded in its report of December 2016:

> "[T]he 1957 Council of Europe Convention on Extradition cannot adequately substitute for the European Arrest Warrant. Accordingly, the most promising avenue for the Government to pursue may be to follow the precedent set by Norway and Iceland and seek a bilateral extradition agreement with the EU that mirrors the EAW's provisions as far as possible. The length of time it has taken to implement that agreement—which was signed a decade ago but is still not in force—is, however, a cause for concern. An operational gap between the EAW ceasing to apply and a suitable replacement coming into force would pose an unacceptable risk." [71]

More recently, in an evidence session on 5 April 2017, the House of Lords' Chairman of the EU Home Affairs Sub-Committee noted that:

> [L]egal experts have suggested to us that the convention is now almost of no relevance, through time and legal developments in the individual countries. Although theoretically it sort of looks as if it provides a fallback, the harsh reality is that it probably does not. Therefore, there might be a sort of cliff edge if there is no deal.[72]

7.3 Agreement with the EU

The Norway and Iceland model

In order to avoid the default position of reverting to the Convention, the UK may seek to negotiate an agreement with the EU, akin to the agreements with other third countries such as Norway and Iceland.[73] Both countries began negotiations with the EU in 2001 and concluded an extradition agreement with the EU in 2014, although it is yet to enter into force.[74] The agreement is similar to the EAW, with a uniform arrest warrant and simplified procedure. However, it includes two discretionary bars on extradition: an option for all parties to refuse to extradite their own nationals; and a "political offence" exception.[75] Helen Malcolm QC of the Bar Council noted that "other than that, word for word, it is the same as the EAW and the form at the end of it is worded identically to the EAW form".[76]

In their evidence to the House of Lords EU Committee, both the National Crime Agency (NCA) and Helen Malcolm QC supported this option. The NCA stated that "it would seem to be optimal—second-order optimal—to have a treaty with the EU as opposed to going

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70 HL EU Committee 7th Report 'Brexit: future EU-UK security and police cooperation', 16 December 2016, para 136
71 Ibid., para 141
72 Uncorrected Oral Evidence: 'Brexit: The European arrest warrant', 5 April 2017, p14
73 HL EU Committee 7th Report 'Brexit: future EU-UK security and police cooperation', 16 December 2016 paras 131-133
74 HL EU Committee 7th Report 'Brexit: future EU-UK security and police cooperation', 16 December 2016, para 129
75 Ibid.
76 Ibid.

around and negotiating with 27 Member States",[77] with Helen Malcolm QC concurring for reasons of speed and simplicity.[78]

Potential problems

The main problem that has been identified with this approach is that the negotiation of such an agreement could be a protracted process depending upon the exemptions sought by the UK. As noted by Professor Peers, if the UK were to seek some exceptions from EU laws, "which Norway and Iceland did with extradition and the European Arrest Warrant and which we might want to do as well, it adds to the negotiation".[79]

The Crown Office and Procurator Fiscal Service (the Scottish prosecuting service) also foresees significant delays, noting that while non-EU states had negotiated arrangements very similar to the EAW with the EU, "we see formidable obstacles to a similar arrangement being in place for the UK by 2019/20". They also warned that on their understanding, "a necessary condition of these arrangements is that the non-EU states submit to the jurisdiction of the CJEU to adjudicate upon their operation".[80]

Further, the UK is in a different position to Norway and Iceland as it is not a member of Schengen.[81] Upon signing the agreement with these two countries, the EU Member States explicitly noted that the surrender model is useful for Schengen countries given their privileged partnership with the EU.[82] The UK Government also recognised this in May 2016, stating that "Norway and Iceland's Schengen membership was key to securing even this level of agreement", and that "there is no guarantee that the UK could secure a similar agreement outside the EU given that we are not a member of the Schengen border-free area".[83] As noted by extradition barristers at 6 King's Bench Walk:

> [O]ne of the justifications for the EAW system is the need for an integrated approach to judicial cooperation in the context of the free movement of people. It follows that the extent to which it is considered necessary or desirable to be part of such a system may depend on the extent to which any post-Brexit settlement involves the acceptance of the free movement principle.[84]

A further issue arises in the context of dispute resolution. As the Government has expressed unwillingness to be subject to the jurisdiction of the CJEU, bespoke dispute resolution arrangements will need to be made.[85] Even though decisions of the CJEU may no longer be binding following withdrawal from the EU, these decisions may remain persuasive in any future arbitration proceedings. For example,

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77 HL EU Committee 7th Report, 'Brexit: future EU-UK security and police cooperation', 16 December 2016, paras 131-133
78 Ibid.
79 Ibid.
80 Ibid.
81 HC Library Briefing Paper, Brexit – implications for policing and cooperation, p17
82 Ibid. p.23
83 HL EU Committee 7th Report 'Brexit: future EU-UK security and police cooperation', 16 December 2016, para 130
84 6 King's Bench Walk (6KBW) College Hill, Brexit Briefing 2, p3
85 HC Library Briefing Paper, Brexit – implications for policing and cooperation, p17

although the bespoke agreement between EU and Norway and Iceland is not bound by the CJEU, Article 37 of the agreement provides for a constant review of CJEU case law.[86]

There is some disagreement between the former Presidents of Eurojust as to how an extradition system could operate outside of the jurisdiction of the CJEU.

In his evidence before the EU Home Affairs Sub-Committee on 5 April 2017, Mike Kennedy, former President of Eurojust stated:

> It seems clear from what has been said that there is a desire to extricate the United Kingdom from any influence, and certainly any precedent influence that had to be followed, coming from the European court. If that is the situation and the European court is not to be a final arbiter on any of the instruments of mutual recognition or, indeed, other instruments, it seems very difficult to see how they would operate in practice.[87]

Adopting a different view, Aled Williams, also a former President of Eurojust stated:

> I am not sure that the quite understandable concern expressed about the jurisdiction of the Court of Justice of the European Union is necessarily going to have an impact on practical co-operation, and that is because most criminal justice co-operation in the European Union effectively remains intergovernmental rather than supranational….The fact that you have an intergovernmental approach to co-operation, to a limited extent, mitigates the conflict with the idea of having a supranational court decision on instruments.[88]

Aled Williams further suggested that the only way it would be possible for the UK to maintain the benefits of the EAW would be through greater involvement in Eurojust as a conflict-resolution mechanism, whereby the UK as a third party would position liaison prosecutors at Eurojust.[89] Examples of this are Norway, the United States, and Switzerland, who have representatives at Eurojust, but do not have any involvement in its management, administration or decision-making.[90] Mike Kennedy, conversely, believes it would be difficult to replicate the current system without "some sort of overarching judging authority."[91]

In its December 2016 report, the House of Lords' Committee concluded:

> Although the EU's agreement with Norway and Iceland contains the option of applying the nationality exception in Article 7, it is not self evident that the UK should seek to negotiate an equivalent provision in any future extradition agreement with the EU, bearing in mind the loophole that such an exemption can create. At the same time, it is conceivable that the EU-27 may not be willing to waive the right to refuse to extradite their own

86 Ibid.
87 Uncorrected Oral Evidence: 'Brexit: The European arrest warrant', 5 April 2017, p2
88 Ibid.
89 Ibid., pp2-3
90 Ibid., p7
91 Ibid., p3

> nationals outside the framework of the EAW and without the concept of EU citizenship that underpins it.[92]

7.4 Bilateral agreements

A third option is to negotiate separate bilateral agreements with each EU Member State, as permitted under Article 28(2) of the Extradition Convention. Although this may lead to cumbersome and protracted negotiations with 27 Member States, it has been suggested by extradition barristers at 6 King's Bench Walk that the UK may wish to enter into bespoke arrangements with certain countries with which the UK has a close relationship (e.g. Ireland) or from which it receives a high number of extradition requests (e.g. Poland).[93]

However, in his evidence to the House of Lords EU Home Affairs Sub-Committee on 5 April 2017, Mike Kennedy, former President of Eurojust, posited: "we have a two year deadline. Negotiating within that deadline, particularly there [sic] happen to be 27 bilateral agreements, is akin to impossible."[94]

7.5 The broader package of measures

The European Arrest Warrant does not operate in isolation, but as part of a wider package of measures including the sharing of information and investigative resources between EU Member States.[95]

In her evidence to the House of Lords EU Home Affairs Sub-Committee, Helen Malcolm QC highlighted the operational importance of these interconnected measures:

> As a court user, at the end of an investigation process, I want to see efficient and fair extradition maintained. I want to see the ability to obtain evidence overseas and the ease with which currently we can use it. That is the sort of thing that Eurojust helps with; setting up a video link with a court in Germany so that I can call evidence whether I am prosecuting, defending, or indeed appearing in a judicial capacity. I want to be able to get hold easily of previous convictions of people appearing in front of me in other European states, as we can at the moment. I want to maintain what is called euro-bail, the European supervision order. Having been personally quite involved in that for so many years, I am reluctant to see it go but I also think, more importantly, it mitigates some of the problems with the European arrest warrant, so I want to see that maintained, and, at the end of the process, I want to see asset freezing and asset confiscation with the ease that we can do it at the moment.[96]

This position was supported by Alison Saunders, the Director of Public Prosecutions:

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92 HL EU Committee 7th Report 'Brexit: future EU-UK security and police cooperation', 16 December 2016, para 141

93 6 King's Bench Walk (6KBW) College Hill, Brexit Briefing 2, p6

94 Uncorrected Oral Evidence: 'Brexit: The European arrest warrant', 5 April 2017, p11

95 See HC Library Briefing Paper, Brexit – implications for policing and cooperation for a discussion of the other measures

96 HL EU Committee 7th Report 'Brexit: future EU-UK security and police cooperation', 16 December 2016, Evidence session 1, 14 September 2016

> There is a package of measures that we think are really important. They are not just the obvious ones such as the European arrest warrant, which is absolutely vital and of which we make a great deal of use. It starts right at the beginning; the package around the European arrest warrant works because we also have SIS II—the Schengen information system. That helps us because, when we issue a European arrest warrant, we do not just issue it to a particular country; it can go to all 27. Certainly we have examples of cases when we did not really know exactly which European country an individual was in. The SIS II enabled us to put out a European arrest warrant, find somebody and bring them back very quickly. That package is absolutely vital.[97]

7.6 EU Home Affairs Sub-Committee Inquiry

The House of Lords EU Home Affairs Sub-Committee launched a new inquiry on 24 March 2017: 'Criminal Justice Cooperation with the EU after Brexit: The European Arrest Warrant.' The inquiry follows the Sub-Committee's previous report, 'Brexit: UK-EU security and police cooperation', by examining more closely how the Government's intention to "bring an end to the jurisdiction of the Court of Justice of the European Union in the UK" will affect the UK's ability to sustain "deep cooperation" with the EU and its Member States in the fight against crime and terrorism.

In particular, the Sub-Committee will explore: a specific case study of the options for replacing the EAW after the UK leaves the EU; what the transition to a new arrangement could look like; whether an interim arrangement would be any easier to negotiate than a permanent replacement for the EAW; what a "bespoke" arbitration or dispute resolution mechanism, as envisaged by the Government, could look like in this area. The Committee began taking oral evidence for this inquiry in late March, with the latest evidence taken from the former Presidents of Eurojust, Mike Kennedy and Aled Williams on 5 April 2017.[98]

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97 HL EU Committee 7th Report 'Brexit: future EU-UK security and police cooperation', 16 December 2016, Evidence session 6, 2 November 2016

98 Uncorrected Oral Evidence, 'Brexit: The European arrest warrant', 5 April 2017

BRIEFING PAPER
Number 07016
18 April 2017

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