

THE EUROPEAN ARREST WARRANT. THE ENFORCEMENT OF THE EUROPEAN ARREST WARRANT IN THE UNITED KINGDOM.

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Abstract

The European arrest warrant has replaced the extradition procedure between the Member States of the European Union. Thus, by the introduction of the European arrest warrant, the administrative-judicial procedure was replaced by a purely judicial procedure. This article analyzes the implementation of the Framework Decision no. 2002/584/JHA in the United Kingdom through the Extradition Act 2003 and, more precisely, the enforcement of the European arrest warrant in the United Kingdom, as provided by Part 1 of the Extradition Act 2003. This article presents the steps that need to be followed in the process of the requested person's surrender from the United Kingdom and it analyzes the evolution of the number of European arrest warrants received by the United Kingdom over the years.

Keywords: *European arrest warrant, mutual recognition, implementation and enforcement in the United Kingdom, bars to extradition, criminal procedure.*

1. Introduction

It is undisputable that the extradition procedure represents the most important instrument of international judicial cooperation in criminal matters.

One of the fundamental problems that caused countless discussions at political and legal level between the countries of the world was of course the extradition of their own citizens¹.

This problem was resolved at the level of the European Union by the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States.

The most important modification brought by the introduction of the European arrest warrant has been the transition from a judicial-administrative cooperation to a purely judicial cooperation².

However, this purely judicial cooperation does not entail that the requested state has no option but to extradite its own citizens once a European arrest warrant is issued. It rather leads to a more expedited procedure based on mutual recognition between the member states of the European Union.

The ambition of this article is to review the enforcement of the European arrest warrant in the United Kingdom as provided by the Extradition Act 2003, considering all the amendments brought by the several pieces of legislation enacted since its adoption, 16 years ago.

Further, we shall analyze the evolution of the number of European arrest warrants received by the United Kingdom over the years, as well as the number

of surrenders ordered by the competent courts following the issuance of these European arrest warrants.

2. The European arrest warrant

The Amsterdam Treaty of 1997 represented a starting point for the idea of freedom, security and justice. Later, this idea has been developed in the conclusions of the Tampere European Council, where the Council stated that the principle of mutual recognition of judicial decisions "should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union".

Even though the conclusions of the Tampere European Council were seen as an important step towards the adoption of the European arrest warrant ("EAW") and it was clear that the member states of the European Union (the "Member States") were inclining towards having simplified extradition procedures, it is undisputable that the EAW was speeded up by the 11th of September 2001 terrorist attacks from the United States of America.

Not only did the terrorist attacks strengthen the importance of certain measures in respect to the EU's internal security, but they also put pressure on the European Union's justice, leading to substantial legal actions taken in a short period³.

Thus, on 13th of June 2002, the Council of the European Union adopted Framework Decision 2002/584/JHA on the European Arrest Warrant and the

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¹ Alexandru Boroi, Ion Rusu, Minodora-Ioana Rusu, Treaty of international judicial cooperation in criminal matters, C.H. Beck Publisher, 2016, p 343;

² Rodica Panainte, Considerations on the European Arrest Warrant, Journal of Public Administration, Finance and Law, January 2, 2015, p 163;

³ Laura Maria Stanila, the European arrest warrant. The problem of implementing framework decision 2002/584/JHA in the EU Member States, The Journal of Judicial Sciences, 2007, p 111;

surrender procedures between Member States (the “**Framework Decision**”).

The new system provided by the EAW has replaced since 1 January 2004 the traditional procedures of extradition between Member States, procedures that were no longer adapted to the requirements of a common space of freedom, security and justice, but exposed to crimes, in which national borders are becoming less important in order not to be impediments in the fight against crime⁴.

The EAW is defined as being a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order⁵.

In order to better understand the modifications brought by the introduction of the EAW, we shall relate to a definition given to the extradition procedure in the Romanian doctrine.

Thus, the extradition is the procedure whereby a sovereign state (the requested state) accepts to surrender, at the request of another state (the requesting state), a person located on its territory and who is being prosecuted or sent to trial for a crime or is being sought in order to execute a punishment in the requesting state⁶.

Therefore, it can be observed that the Framework Decision on the one hand uses the term “*surrender*” instead of “*extradition*”, and on the other hand uses the term “*Member State*” when referring to both “*the requesting state*” and “*the requested state*”, as they appeared in the classic extradition procedure.

It is important to mention that, as a general rule, the classic extradition procedure did not allow the extradition of a state’s own citizens, which was only accepted as an exception and under restrictive conditions.

The EAW brought a significant change in what regards the extradition of a state’s own citizens.

Art. 20 par. (1) of the Treaty on the Functioning of the European Union provides that “every person holding the nationality of a Member State shall be a citizen of the Union” and “citizenship of the Union shall be additional to and not replace national citizenship”.

Thus, starting from the idea of European citizenship, the principle of non-extradition of a state’s own citizens was basically waived and it merely became a ground for refusal.

The Member States were given a deadline to take the necessary measures to comply with the provisions of the Framework Decision. However, only 13 Member

States managed to meet the deadline for implementation.

Although in some cases the respective national implementing law fails to fully transpose the Framework Decision 2002/584/JHA on the European arrest warrant, it can be concluded that Member States have largely implemented it properly⁷.

3. Implementation of the Framework Decision in the United Kingdom

The Framework Decision has been implemented in the United Kingdom through the Extradition Act 2003 (the “**Extradition Act**”).

The Extradition Act is divided into five parts:

Part 1 – *Extradition to category 1 territories*

This part deals with extradition to all European Union Member States and it basically corresponds with the requirements of the Framework Decision.

The main features introduced by the EAW in the first part of the Extradition Act are:

- *mutual recognition* – a foreign warrant is accepted without getting into the facts of the case;
- *the dual criminality rule is no longer required for 32 categories of offences* – under the condition that the punishment for the offence is at least three years’ imprisonment;
- *the procedure is now entirely judicial* – the competent authority in the United Kingdom only has to certify that the EAW is properly drafted by the competent authority from the issuing state;
- *no exception on the grounds of citizenship*.

The extradition procedure under Part 1 of the Extradition Act is detailed in the next section.

Part 2 – *Extradition to category 2 territories*

This part deals with the extradition to all other countries with whom the United Kingdom has international extradition arrangements, other than the countries included in part 1.

The extradition of a requested person to these territories entails, besides the information required for the category 1 cases, that the court must be satisfied that the request contains admissible evidence of the offence sufficient to establish a *prima facie* case against the person.

Part 3 – *Extradition to the United Kingdom*

This part deals with requests issued by the competent authorities in the United Kingdom to both European Union Member States as well as all other countries.

Part 4 contains provisions in relation to police powers, while Part 5 contains a number of miscellaneous and general provisions⁸.

⁴ Rodica Panainte, Considerations on the European Arrest Warrant, Journal of Public Administration, Finance and Law, January 2, 2015, p 159;

⁵ Article 1(1) of the Framework Decision 2002/584/JHA on the European arrest warrant;

⁶ Florin Razvan Radu, International judicial cooperation in criminal matters, C.H. Beck Publisher, Bucharest, 2008, p 23;

⁷ Libor Klimek, Mutual Recognition of Judicial Decisions in European Criminal Law, Springer Publisher, 2017, p 673;

⁸ Details regarding these parts of the Extradition Act 2003 can be found in the Explanatory Notes (<https://www.legislation.gov.uk/ukpga/2003/41/notes/contents>) published by the Government of the United Kingdom;

Since its adoption, the Extradition Act has been amended four times, through (i) the Police and Justice Act 2006, (ii) the Policing and Crime Act 2009, (iii) the Crime and Courts Act 2013 and (iv) the Anti-social Behaviour, Crime and Policing Act 2014.

If we were to compare the initial version of the Extradition Act with the version amended through the aforementioned pieces of legislation, we would ascertain that the latter barely resembles the one that was enacted 16 years ago.

As we stated in the introduction part of this article, the most important change brought by the EAW is that the extradition procedure within Europe is entirely judicial, as opposed to a judicial-administrative procedure.

In the United Kingdom, prior to the Extradition Act, after an extradition request was granted by the court, there was still a step that had to be met, namely the approval of the Home Secretary.

So the wanted person who claimed that it was “a fix” could ask the Home Secretary to refuse permission, and if he would not listen, he could attack the Home Secretary’s refusal in the courts by a series of maneuvers which, if played with skill, could delay his removal for many years (and, incidentally, cost the taxpayer a vast amount of money)⁹.

4. The Enforcement of the EAW in the United Kingdom under the Extradition Act – Extradition to category 1 territories

The steps that need to be followed in the process for extradition from the United Kingdom to the category 1 territories are:

1. a EAW is submitted;
2. the certificate is issued;
3. the arrest of the requested person;
4. the initial hearing;
5. the extradition hearing.

The issuance of a European arrest warrant

Pursuant to the provisions of art. 2 par. (1) from the Framework Decision, “a European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months”.

The issuance of the certificate

In the United Kingdom, the National Crime Agency is the designated authority for European arrest warrants, which can only issue a certificate if the

requirements provided under section 2 of the Extradition Act are met.

More precisely, the National Crime Agency may issue a certificate under this section if it believes that the authority which issued the warrant has the function of issuing arrest warrants in the category 1 territories.

The arrest of the requested person

Once the request has been certified, the warrant for the requested person’s arrest is issued. Based on this warrant, the requested person is arrested and he/she must be brought before a District Judge at the Magistrates’ Court for the initial hearing as soon as practicable.

In urgent cases, a requested person can be arrested before the receipt of a EAW. In this case, the EAW must be received in time for a court hearing which must be held within 48 hours of the arrest¹⁰.

The initial hearing

The ‘appropriate judge’ in the UK, according to section 67 (1) EA, is a District Judge (Magistrates’ Courts) designated for that purpose by the Lord Chancellor in England and Wales¹¹. In England, the extradition cases are heard at the Westminster Magistrates’ Court.

The purpose of this hearing is to establish the identity of the arrested person and, more precisely, that the person brought before the District Judge is the person in respect of whom the warrant was issued.

Pursuant to section 7(3), the District Judge is required to take the decision on the requested person’s identity on the balance of probabilities.

Thus, if the District Judge decides the person brought before him is not the person in respect of whom the warrant was issued, then he must order the person’s discharge.

Otherwise, if the District Judge decides the person brought before him is the person in respect of whom the warrant was issued, then he must:

- inform the person about the procedures for consenting to be surrendered to the issuing state;
- fix a date for the extradition hearing if the requested person does not consent to extradition;
- remand the person in custody or on bail.

The extradition hearing should normally begin within 21 days of arrest¹². However, if proceedings in respect of the extradition are adjourned under section 8A or 8B, the permitted period is extended by the number of days for which the proceedings are so adjourned¹³.

Thus, if, before the beginning of the extradition hearing, the District Judge is informed that the person is charged with an offence in the United Kingdom, any further proceedings in respect of the extradition must be adjourned until the prosecution performed in the

⁹ Spencer J.R., Fair trials and the European arrest warrant, *The Cambridge Law Journal*, July 1, 2010, p 227;

¹⁰ Section 6(2) of the Extradition Act 2003;

¹¹ Mar Jimeno-Bulnes, The Enforcement of the European Arrest Warrant: A Comparison Between Spain and the UK, *European Journal of Crime, Criminal Law and Criminal Justice*, August 1, 2007, p 271;

¹² Section 8(4) of the Extradition Act 2003;

¹³ Section 8(4A) of the Extradition Act 2003;

United Kingdom is finalized. However, even this term can be exceeded in case a custodial sentence is imposed in respect of the offence, when the proceedings may be further adjourned until the person is released from custody.

Also, if, before the beginning of the extradition hearing, the District Judge is informed that the person is in custody serving a sentence of imprisonment or another form of detention in the United Kingdom, any further proceedings in respect of the extradition may be adjourned until the person is released from custody.

In case the hearing does not begin on or before the date fixed, and no reasonable cause is shown for the delay, then the judge must order the person's discharge.

In what regards the duration of the initial hearing, in practice, in England and Wales the average period between arrest and first instance surrender decision is 28 days in consented cases, and 65 in non-consented cases¹⁴.

The extradition hearing

In England and Wales, the powers available to the District Judge are (as nearly as possible) the same as those available to a magistrates' court at a summary trial¹⁵.

In the initial stage of the extradition hearing, the District Judge must decide whether the offence specified in the warrant is an extradition offence as defined in section 64 (the requested person was not sentenced for the offence) or section 65 (the requested person was sentenced for the offence).

The conduct specified in the warrant must either (i) meet the *dual criminality test*¹⁶ or (ii) the appropriate issuing authority must indicate that the offence is included within the European framework list.

In the case of framework list offences, the offence in the warrant amounts to an extradition offence if:

- the conduct occurs in the category 1 territory and no part of it occurs in the United Kingdom;
- the conduct falls within the European framework list;
- the conduct is punishable under the law of the category 1 territory with imprisonment or another form of detention for a term of 3 years or a greater punishment.

Thus, it can be observed that in the case of European framework list offences, even though the dual criminality test is not necessary, extradition is only available if no part of the conduct took place in the United Kingdom. Otherwise, no matter how insignificant the conduct performed in the United Kingdom, the dual criminality test becomes mandatory in relation to European framework list offences.

Further, if the District Judge decides that the conduct specified in the EAW does not amount to an extradition offence then he must order the person's discharge. Otherwise, the District Judge must proceed

to consider whether there are any statutory bars to extradition. The bars to extradition are:

- *rule against double jeopardy* – if the requested person was previously either convicted or acquitted for the same conduct specified in the EAW;
- the absence of a prosecution decision;
- *extraneous considerations* – if the EAW was issued for the purpose of prosecuting or punishing the requested person on account of race, religion, nationality, gender, sexual orientation or political opinions;
- *passage of time* – when it appears it would be unjust or oppressive to extradite the requested person due to the passage of time since the alleged conduct described in the EAW;
- *the age of the requested person* – if the requested person would not be criminally liable in the United Kingdom due to his/her age at the time of the alleged conduct described in the EAW;
- *specialty* – there are no arrangements between the United Kingdom and the issuing state that would prevent the prosecution of the requested person for other offences than the one he/she is being extradited for;
- *earlier extradition to the United Kingdom from a category 1 territory or transfer from the International Criminal Court*;
- *human rights concerns* – if the extradition of the requested person would not be compatible with fundamental rights provided by the European Convention on Human Rights;
- *proportionality* – if the extradition of the requested person would be disproportionate in relation to (i) the seriousness of the conduct alleged to constitute the extradition offence, (ii) the likely penalty that would be imposed if the requested person was found guilty of the extradition offence and (iii) the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of the requested person;
- *forum* – if the requested person's extradition would not be in the interests of justice;
- *physical and mental health considerations which would make extradition unjust or oppressive*;
- *no guarantee that the requested person who was convicted in his/her absence will benefit of a retrial*.

Thus, after assessing on the applicability of the bars to extradition, the District Judge must order the person's discharge if any of the bars to extradition do apply.

Otherwise, if none of these bars to extradition apply and the District Judge decides that extradition is both proportionate and compatible, then he must order the extradition of the requested person.

¹⁴ European Arrest Warrants: ensuring an effective defence, a JUSTICE report, London, 2012, available at www.ecba.org;

¹⁵ Within a summary trial, the district judges from the magistrates' court are judges both of law and fact; as opposed to the trial by jury, where the questions of law are decided by the Crown Court judge, while questions of fact are decided by the jury;

¹⁶ The dual criminality test entails that the conduct for which extradition is being requested must constitute a crime both under the law of the category 1 territory and under the law of the relevant part of the United Kingdom;

5. Appeal and surrender following appeal

Appeals may be lodged by either the requested person or the issuing judicial authority with the High Court and, as the case may be, with the Supreme Court.

Where an appeal against an extradition order is unsuccessful or where the issuing judicial authority successfully appeals against a discharge order and the appeal court orders extradition, the person must be extradited within 10 days, starting with the day on which the decision of the relevant court becomes final.

However, if the relevant court which made the appeal decision and the issuing judicial authority agree a later date, extradition must take place in the 10 day period following the agreed date. If the deadlines are not complied with the judge must, on the person's application, order his discharge, unless reasonable cause is shown for the delay.

6. The evolution of the number of EAWs received by the United Kingdom over the years¹⁷

Between 2010 and 2015, the United Kingdom has received 48,766 EAWs. Following these requests, the competent authorities in the United Kingdom have made 9,305 arrests and ordered the surrender of 6,514 persons.

Thus, it can be observed that the competent authorities in the United Kingdom have only ordered the surrender of the requested persons in 13.36 % of the cases.

The number of EAWs received per year between 2010 and 2013 was in the average of 5,500 (4,369 in 2010, 6,512 in 2011, 6,290 in 2012 and 5,522 in 2013). In 2014, the number of EAWs received has more than doubled, from 5,522 in 2013 to 13,460 in 2014, while in 2015 it remained above the 10,000 mark (i.e. 12,613).

In what regards the number of surrenders ordered by the United Kingdom following EAWs issued by the Member States, over the years this number remained in the average of 1,000 per year.

Thus, it can be observed that, even though the number of EAWs has increased, the number of surrenders remained constant.

If we look at the percentages, we see that in 2015 the competent authorities in the United Kingdom ordered the surrender of the requested person in 9.1 % of the cases, as opposed to 24 % in 2010.

The top 3 countries who issued the EAWs received by the United Kingdom between 2010 and 2015 are: Poland (11,638 requests), Germany (7,288 requests) and Romania (5,382 requests).

Thus, only these 3 countries issued almost half of the total number of EAWs received by the United Kingdom during the said period.

However, the number of surrenders to these countries is still rather small: Poland (3,752 surrenders or 32.2 %), Germany (161 surrenders or 2.2 %) and Romania (332 surrenders or 6.17 %).

Conclusion

The European arrest warrant has replaced the extradition procedure between the Member States of the European Union. The judicial-administrative procedure was basically replaced by a purely judicial one, which lead to simplified extradition procedures between the Member States of the European Union.

In this context, although the European arrest warrant entails a simplified extradition procedure, the Extradition Act 2003 provides sufficient safeguards for the citizens of the European Union, so that their fundamental rights are observed. The bars to extradition provided by the Extradition Act 2003, as well as the requested person's possibilities to appeal the decision ruled on his/her extradition show that, although this procedure is a purely judicial one and therefore, a more expedited one, the requested person's extradition is carefully assessed by the competent courts in the United Kingdom and the requested person's right to a defense is observed.

This aspect is confirmed by the fact that, over the years, the percentage of surrenders ordered by the competent courts in the United Kingdom has decreased significantly, although the number of requests has increased.

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¹⁷ The statistics related to the European arrest warrant from 2010 to 2015 can be found on the website of the National Crime Agency – www.nationalcrimeagency.gov.uk;