Conference on the European Arrest Warrant

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Introduction

It has become something of a cliché to say that fundamental rights are the real victim of terrorism. But as with all clichés there's, of course, some truth to it. The European Arrest Warrant is in a way a product of this cliché.

Back in 1999, at the Tampere European Council, the principle of mutual recognition was embraced as the "cornerstone of judicial-cooperation." The Council's Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters provided in its preamble, that "Mutual recognition is designed to strengthen cooperation between Member States *but also to enhance the protection of fundamental rights*". The Programme listed 24 specific measures, one of which was the European Arrest Warrant. It was meant to have a double aim: quickening the process of surrender and offering better safeguards to suspects. This was January 2001.

Then came September 2001. When the Commission presented its proposal on the European Arrest Warrant soon after 9/11, something essential was missing there. Something fundamental.

Under the cloak of "tough on terror", the focus had entirely shifted to facilitating the surrender of suspects, without making any mention of procedural safeguards for the rights of defendants. That rendered the European Arrest Warrant effectively cripple.

At the time, it was hard to imagine how Member States could surrender their own nationals to countries with entirely different criminal procedures, different languages, different traditions, without checking whether the rights of their nationals were guaranteed abroad? The differences between the criminal legal systems were simply to big to ignore.

On top of this came the abrogation from double criminality. People could be surrendered to other countries for offences which were not punishable in their home State. Or punishable by very different penalties.

Yet the Council and the Commission, possessed by the post-9/11 fever, wanted to push the European Arrest warrant, despite its flaws, through the European Parliament.

Although my political group was favourable to the idea of making the process of extradition in Europe less political, less arbitrary, and more judicial, we were not prepared to adopt hurry-scurry an instrument with such far-reaching consequences for civil liberties.

Since the justification for the extremely quick adoption was the threat of terrorism, we felt that we might just as well limit the scope of the EAW only to terrorist offences. Moreover, as far as we were concerned, the development of procedural safeguards was a condition *sine qua non* for the adoption of the EAW.

Yet, despite our resistance, the European Parliament gave its blessing to the Arrest Warrant.

Procedural safeguards

We didn't give up that easily though. In April 2002 we organised a public hearing on "Procedural safeguards for suspects and defendants in criminal proceedings", for which a number of reputable legal practitioners and law professors were invited. The aim of the hearing was to get an idea of what kind of procedural safeguards were needed to complement, or rather to complete, the European Arrest Warrant.

The results were baffling. It took the Dutch criminal lawyer, Cees Korvinus, 20 minutes to present the list of safeguards which in his opinion were indispensable when the Arrest Warrant entered into force. He suggested safeguards for each phase of the criminal process: from investigation to the execution of the final sentence. The required safeguards ranged from the right to privacy, access to the lawyer of one's choice and all the information pertaining to the case.

Françoise Tulkens, a judge at the European Court of Human Rights, stressed that the great number of judgments condemning States for violations of the Convention on Human Rights, hardly had an impact on the daily workings of justice in the Member States. In her opinion there was definitely a need for further approximation of safeguards on the European level.

Stephen Jacobi, from Fair Trials Abroad, an NGO that defends the rights of foreign suspects all over the world, put a special emphasis on the right to translation and information, by pointing out that no court in Europe employs interpreters. For example, the plane spotters in Greece in November 2001, were kept completely in the dark as to the charges against them for weeks on end due to language problems, so that it was impossible for the defence to assess whether their detention was lawful.

All of this finally led the European Commission to present its Green Paper on procedural rights in criminal proceedings in February 2003. The European Parliament adopted a recommendation on the Green Paper, which contained the following elements:

● The importance for Member States of increasing confidence and faith in each other's legal system

● a demand to the Commission to include a provision guaranteeing non-regression in order to encourage Member States to apply higher national standards.

● that legal assistance should be available (and should be free of charge if the suspect or defendant have insufficient means to pay for it) from the moment they are charged with an offence.

● that a defence lawyer should be present each time the suspect or defendant is questioned.

● that all documents which the suspect needs to understand the purpose of a trial should be translated. All professional practitioners involved in criminal proceedings should receive training in working with and through an interpreter.

● that attention should be drawn to the vulnerability of all suspects and defendants from the point of arrest and their initial questioning.

And something I was particularly proud to suggest:

● a Letter of Rights which should be readily comprehensible and written in a language that the suspect can understand.

Also the final proposal for the framework decision on procedural rights, which contained many of our recommendations, was very much welcomed by the Parliament, despite the fact that the Commission had chosen for a prudent step-by-step approach, in order to make it more palatable for the Council.

As rapporteur, I attempted to broaden the scope a little bit by including the right to medical assistance. I also felt that it was necessary to clarify key terms, such as “as soon as possible”, in order make it less arbitrary.

Interestingly enough the main bone of contention in the Parliament was a recital (which one usually skips). Recital 8 of the proposal wanted to exclude terror-suspects from benefiting from the minimum safeguards. In my opinion, that completely hollowed out the meaning of the word ‘minimum’, but we didn’t manage to convince the Christian-Democrats of that. So at the end, a compromise was reached to specify that even terror-suspects had to be treated in accordance with the European Convention on Human Rights.

So we adopted the text. And as it goes with most opinions of the European Parliament, if they’re lucky enough not to end up in the dustbin right away, the Council had one look at it, thanked us for it and then put it aside.

They have been talking about the framework decision ever since, with no palpable result. As quickly as the European Arrest Warrant has been adopted, as slow has been the fate of the framework decision.

The drawback for most States is the costs attached to the granting of the rights. The provision of a lawyer and interpreter throughout the entire proceedings, can be a costly business.

There are some who find it redundant next to the European Convention on Human Rights.

Yet others are particularly attached to certain aspects of their legal system. In case of the Netherlands, for example, an attorney is not allowed to be present during the police interrogation, whereas in other countries this is no problem whatsoever. So the Netherlands is one of the countries that blocks full access to a lawyer throughout the criminal proceedings.

The Austrian presidency has *tried* to make something of it. Its most recent proposal, however, considerably reduces the scope of rights. Even so, it is highly questionable whether the text will be adopted anytime soon, if ever.

Evaluation of EAW

Last year February the European Arrest Warrant was evaluated by the Commission, though regrettably not all Member States had provided information.

Although the evaluation showed that the number of surrenders had indeed increased and that the process had become less arbitrary, it's quite clear that a lot still needs to happen to improve mutual trust.

Most of you might be familiar with the various constitutional problems that the Arrest Warrant encountered, notably in Germany and in Poland. It is hardly surprising that a number of these difficulties have arisen in relation to the key issue of fundamental rights.

Not all Member States have chosen to subject the execution of the EAW to the three specific guarantees provided for in the Framework Decision. Where they have done so, some Member States still require extra conditions. And in practice, authorities still continue to require assurances that are not provided in the Decision, or are refusing surrender even if assurances have been given.

Particularly illustrative in this context is a judgment by an Italian court in Bolzano, which impeded surrender of an Italian national to Austria, because it feared that the rights of the accused would not be optimally guaranteed in a foreign court. The handicaps mentioned by the court included language barriers and unfamiliarity with the criminal proceedings.

A danger lurking around the corner is that non-uniform application of the Framework Decision could lead to discrimination against persons arrested on basis of the EAW, depending on whether or not the courts in the State of execution checked the EAW's compliance with fundamental rights.

In its evaluation the Commission writes, and now bear with me: "Contrary to what certain Member States have done, the Council did not intend to make the general condition of respect for fundamental rights a ground for refusal in the event of infringement. A judicial authority is, of course, always entitled to refuse to execute an arrest warrant, if it finds that the proceedings have been vitiated by infringement of Article 6 of the Treaty on European Union and the constitutional principles common to the Member States. However, in a system based on mutual trust, such a situation should remain exceptional."

The Commission is in fact saying: the system is based on mutual trust, so you should trust. It is basically reproaching the courts for being too suspicious.

Trust, however, is not something you can impose. It is something to be earned. Just like respect, by the way.

It seems to me that the adoption of elementary procedural guarantees is an essential step to building that trust. I believe that Roger Smith will go deeper into the issue of mutual trust.

Passerelle

One thing that I still want to address is what it would take for the Council to finally reach an agreement on the framework decision.

With the risk of sounding pessimistic, I believe that the chances of getting a set of rights that actually mean something, is well nigh impossible when 25 states have to agree with every word.

I think it would be highly desirable to activate the so-called *passerelle clause in Article 42 of the TEU* in order subject both the framework decision on procedural rights as well as the Arrest Warrant to the co-decision procedure.

The passerelle clause enables the transfer of certain justice-and-home - affairs-issues from the third pillar to the first pillar. This would make the voting procedure considerably easier (QMV in stead of unanimity). However, it is imperative that the European Court of Justice will also get a say in the matter. That would ensure a more uniform application of the instruments and rights.