Arrested development: Why Brexit Britain cannot keep the European Arrest Warrant

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The European Arrest Warrant (EAW) has made it easier for the UK to extradite criminals. But once it leaves the EU, Britain will find it almost impossible to negotiate as good an arrangement as the EAW.

In 1998, fearing that the increasing "Europeanisation" of EU criminal law would force Britain's common law system to be more like continental civil law ones, Jack Straw, then Home Secretary, came up with a solution. Why not take some of the principles of mutual recognition of standards which had worked so well in the internal market and extend them to court decisions? This concept became the basis for the European Arrest Warrant.

The EAW, in force since 2004, allows EU countries to issue warrants requesting another member-state to surrender someone within 90 days. The EAW has helped in fighting terrorism: in 2005, Hussain Osman, one of the perpetrators of the failed London attacks on July 21st, was arrested in Italy and surrendered to the UK in under a week. The UK, a net exporter of criminals, has benefitted enormously from the EAW. Since 2010, the UK has extradited 6,514 suspects to other member-states, and got 800 suspects back from other EU countries.

This insight is the third in a three part series, and looks at whether the UK will be able to continue being part of the EU's extradition system and, if not, what could be the alternative.

The EAW, which is open only to EU member-states, is exceptional in three ways. First, under the EAW, member-states should surrender people suspected of one of 32 serious offences (including terrorism, drug trafficking and human smuggling), regardless of whether what they are accused of is also considered a crime in the country where they are located. In most extradition treaties, a country is only obliged to extradite somebody if the crime they are wanted for is also considered a criminal offence under its domestic law (the principle of 'double criminality'). Second, the EAW led to some countries lifting constitutional bans on extraditing their own nationals. Under international rules, a country is not obliged to surrender their own nationals (though some countries do so). The EAW abolished this

ban, and now Germany, for example, can extradite German criminals wanted in the UK. Finally, most extradition treaties contain a 'political exception': a country is not bound to extradite a wanted person if the crime they are wanted for is regarded as a political act, not a criminal offence, in the country where they are located. The EAW does not allow countries to use this political exception to refuse extradition. The EAW has thus made prosecuting European terrorists easier: terrorists from Spain's ETA or Northern Ireland's Provisional IRA can no longer find a haven in France or the Republic of Ireland by claiming that their crimes were political in nature.

After Brexit, EU member-states may agree to replicate some features of the EAW for the UK, like doing away with the principle of double criminality, but others will be almost impossible to maintain, no matter how keen both parties are to do so. The biggest problem would be getting countries to lift constitutional bans on extraditing their own nationals. Before the EAW entered into force, 13 out of the (then) 25 member-states, including Austria, Germany, Italy and Poland, had constitutional restrictions on extraditing their citizens – some prohibited the extradition of their own nationals for all types of crimes whereas others allowed for it but only in certain circumstances. In 2005, the constitutional courts of Cyprus, Germany and Poland suspended the application of the EAW in their territories, as their laws forbade the extradition of their citizens.

These cases triggered constitutional changes all across the EU, so national laws would be in line with the requirements of the EAW. Some EU countries amended their laws to allow extradition of nationals to any country with which an international agreement had been concluded. But others, like Germany and Slovenia, restricted it to EU countries or countries belonging to an international organisation for which an extradition treaty had been signed. If these countries were to allow extradition of their own nationals to the UK, they would need to change their constitutions again. Constitutional changes are not uncommon in Germany (there have been some 50 amendments in the past 15 years), but they require two-thirds majorities in both chambers of parliament. It is not clear that any German government would want to invest political capital in amending the constitution primarily to suit the UK as it leaves the EU. In Slovenia, constitutional change might trigger a referendum, with no guarantee of success.

The EU and the UK may both want to co-operate as closely as possible on crime and security. But it will be harder to find a way to preserve the EAW for the UK than to devise a creative solution to give it access to Europol or to EU databases. No matter how willing both parties are to make concessions, technical obstacles like constitutional changes will not disappear. The British government may want to start looking for alternative solutions. There are three possible scenarios.

First, Britain could seek bilateral extradition agreements with other European countries. But a system of 27 bilateral treaties will necessarily be less efficient than a single, pan-European extradition treaty. Differences between countries are bound to arise, making it easy for criminals to seek safe havens – Spain's 'Costa del Crime', for example, was particularly popular before the arrival of the EAW. Negotiating 27 bilateral treaties will also be long and painful – some non-EU countries, like Canada or the US, that rely on bilateral extradition treaties with European countries, found them hard to negotiate and ultimately less effective than a multilateral treaty.

Second, the UK could fall back on the 1957 European Convention on Extradition, a non-EU treaty which governed extradition in Europe before the EAW entered into force. Britain could negotiate supplementary bilateral agreements with strategic partners such as Poland (from which it receives a

particularly high number of warrants) or Spain (London and Madrid have worked closely to clean up the 'Costa del Crime'). Under the 1957 Convention, however, it took on average 18 months to extradite a suspect. The average time for extraditing a suspect under the EAW is 15 days for uncontested cases, and 48 for contested ones. Extraditions under the Convention were not automatic and could be accelerated or halted depending on the political relationships of the moment. The EAW introduced a system in which extradition decisions are largely independent of political ups and downs. An additional disadvantage of the Convention is that, as the EAW was supposed to replace it completely, some EU member-states may need to enact new laws to re-implement it vis-à-vis the UK.

The third and least damaging option for Britain would be to seek a surrender agreement similar to the one Norway and Iceland have with the EU. The agreement introduces a system for extradition similar to the EAW. But importantly the deal allows any party to choose whether or not to extradite their own nationals, or to trigger the political exception clause (which may be problematic at a time of high terrorist threat in Europe). The Norway/Iceland treaty took a long time to negotiate – five years at government level plus further eight years for the European Parliament and national parliaments to ratify. Though it was concluded in 2006, it is still not in force: there have been problems in amending the national laws of countries including Italy, Germany, the Netherlands and even Iceland itself, which needs to make constitutional amendments. Even if the UK can start negotiating a surrender agreement before it leaves the EU in March 2019, inevitably it will be faced with a gap before the new treaty can enter into force. In that interim period it will have to revert to the inefficient 1957 Convention – the question is how long that interim period would last. Neither the British government nor the EU have an interest in negotiations dragging on for as long as thirteen years, as was the case with the Norway/Iceland agreement.

Apart from time pressure, the biggest problem in negotiating a surrender agreement is likely to be the issue of judicial oversight, given that the UK wants to 'protect its sovereignty' by ending the jurisdiction of the European Court of Justice (ECJ) once it leaves the EU.

The ECJ does not have a role in issuing warrants (the judges in Luxembourg cannot send a British citizen to Bucharest, for example), but it has an important role in reviewing the application of the EAW agreement. For example, a national court could ask the ECJ to rule on whether extraditing somebody to Poland for stealing a bike was in line with the spirit of the EAW. Or they could ask whether sending someone to a prison in Hungary where conditions are poor would be a breach of the EU charter of fundamental rights. Of course, when extradition is based on a bilateral treaty, it is up to the national courts of the countries involved to make these decisions (as was the case in the 70s and 80s with IRA suspects who fled to the US). But it is difficult to see how any extradition agreement between the 27 and a non-EU country could work without having some sort of multilateral court mechanism in place to review extradition decisions.

The Norway/Iceland agreement works around this not by giving a role to the ECJ (the EFTA court, which polices rules in the non-EU members of the European Economic Area, including Norway and Iceland, has no jurisdiction over justice and home affairs), but by saying that both parties should establish a 'mechanism' ensuring that they stay up to date with each other's case law. This mechanism is not yet in place and it is unclear how it would work, who would be part of it, and what would happen if it were asked to rule on issues of criminal procedure and fundamental rights (as only courts can do this). A UK-EU extradition agreement would need to be subjected to judicial oversight. Both parties would need to come up with a creative solution. This could either be a totally new EU-UK court with jurisdiction over

matters of justice and home affairs; or using the ECJ as an advisory rather than a binding court (as Sir Alan Dashwood, a former director of the Council of Ministers' legal service has suggested).

In any case, Theresa May and her government will need to accept that some sort of international court will be needed after Brexit. The British government will also need to come to terms with the fact that the ECJ, by shaping what EU countries are able to do in relation to the EAW, will also influence how any future EU-UK surrender agreement operates. It will in practice be impossible to maintain the red line that after Brexit the ECJ should have no oversight of the UK at all.

After being a champion of European co-operation on extradition for so long, Britain is about to lose access to one of the EU's most effective tools, the EAW. In considering its options, the British government may have to accept that there is a trade off between absolute sovereignty and the likelihood that those who commit crimes in the UK and flee to EU countries will ever face justice. Even eurosceptics might agree that fugitives from the law should not be the main beneficiaries from Brexit.

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