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The Principle of Proportionality and the European Arrest Warrant

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Abstract

The European Arrest Warrant (EAW) is a grossly coercive instrument that was designed for the persecution of serious cross-border crimes. In recent years, however, Member States have increasingly reported cases in which EAWs have not been issued for serious, but rather for harmless and minor offences. This article analyses the reasons behind the disproportionate use of the EAW and outlines measures to alleviate the problem.

Thereby, it claims that in current debates different categories of disproportionate use of EAWs are often lumped together, and only concentrate on the introduction of a (binding) proportionality test, failing to consider other alternative legislative solutions regarding minor crimes, such as the introduction of new comparable and effective alternative measures. These, however, are considered to be crucial for an alleviation of disproportionate warrants.

Key words

European Arrest Warrant; Principle of Proportionality; Alternative Measures to the European Arrest Warrant

Resumen

La orden de detención europea (ODE) es un instrumento extremadamente coercitivo que fue diseñado para la persecución de delitos transfronterizos graves. En años recientes, sin embargo, los Estados miembro han notificado cada vez más casos en los que la ODE no se debía a delitos serios, sino a casos menores e inofensivos. En este artículo se analizan las razones que hay detrás del uso desproporcionado de la orden de detención europea y propone medidas para paliar el problema.

De esta manera, se defiende que el debate actual, frecuentemente agrupan diferentes categorías de uso desproporcionado de la ODE, y sólo se concentran en

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la introducción de un test de proporcionalidad (vinculante), sin tener en cuenta otras soluciones legislativas alternativas, en lo que respecta a delitos menores, como la introducción de nuevas medidas alternativas, comparables y eficaces. Sin embargo, se considera que estas medidas son cruciales para reducir las órdenes de arresto desproporcionadas.

Palabras clave

Orden de Detención Europea; principio de proporcionalidad; medidas alternatives a la Orden de Detención Europea

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The traditional principle of *ultima ratio* in criminal law establishes that criminal law – due to its repressive nature – must only be employed as a last resort and when no other means are available. As criminal sanctions are the "most austere manner in which a State exercises its legal powers over its citizens" (Minkinnen 2006, p. 521) the *ultima ratio* principle should not only be applied when criminalising an act or prosecuting a criminal offence but should also be taken into consideration when enacting criminal procedure rules or cooperation in criminal matters.

In the following, this paper argues that an adequate consideration of the *ultima ratio* principle during the legislative process of the European arrest warrant (EAW) could have prevented the disproportionate use of the EAW for minor crimes that is evident today. The fact that alternative legislative solutions regarding minor crimes were, neither at the outset nor subsequently, sufficiently considered, is presented as the most important factor for disproportionate use of the EAW.

1. Introduction

The Framework Decision on the EAW was adopted ten years ago, on June 13th, 2002 (European Union 2002). Not only did it fundamentally change the European system of legal assistance and extradition proceedings; it also represents the first concrete realisation of the principle of mutual recognition, which, in 1999, the Council of Tampere declared as the "cornerstone of judicial cooperation" in criminal matters (European Council 1999, para. 33). The purpose of the EAW was to replace the conventional, often cumbersome and inefficient, extradition system, and to simplify and make more effective the transfer of wanted persons for the purpose of prosecution or for the enforcement of a custodial sentence (Bubnoff 2005, p. 1). To achieve this end, significant changes to the extradition system were introduced: the political approval process was eliminated; the requirement of dual criminality was limited; strict deadlines were introduced; and a number of bars to extradition were removed. In addition, the numerous extradition treaties that were in effect up until that point were replaced with one single instrument.

Looking at statistics for recent years, it becomes apparent that the EAW has been very successful so far. Between 2005 and 2010, more than 68.000 EAWs have been issued, with the trend rising (European Commission 2011, p. 3, Council of the European Union 2011). Additionally, the extradition process was vastly accelerated. The time to transfer a wanted person under an EAW order averaged a mere 48 days; just 14-17 days when the suspect agrees to surrender (European Commission 2011, p. 3, Council of the European Union 2011). This compared to a previous average duration of one year.

However, upon closer examination one notices that the EAW may in fact be too successful. The EAW is a grossly coercive instrument, involving deprivation of liberty and the extradition of the wanted person to another Member State, a country whose legal system they might not be familiar with or whose language they don't speak. This makes it evident that the EAW was designed for the persecution of serious cross-border crimes and should only be applied to those.[1] As the most intrusive means of international cooperation in criminal matters, the EAW should be the *ultima ratio* of international cooperation.

In recent years, however, Member States have increasingly reported cases in which EAWs have not been issued for serious, but rather for harmless and minor offences. Reports include cases such as the theft of a piglet Council of the European Union 2007), the theft of a bottle of beer (Caldwell 2009, para. 12) or the theft of 10 chickens.[2] The true number of cases involving minor crimes is difficult to determine, for two reasons: firstly, not all court decisions are recorded and

[1] See also Hammarberg (2011), Comissioner for Human Rights, stating that "the overuse of the EAW is a threat to human rights."
[2] *Sandru v Government of Romania*, 28 October 2009, [2009] EWHC 2879 (Admin).

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published, and secondly, there are often attempts at earlier stages – by defence lawyers, prosecutors or consulates – to effect a revocation of a EAW issued for a petty offence. Nonetheless, there are enough cases to cause the European Commission to speak of a "systematic issuing of EAWs for very minor offences" (European Commission 2011, p. 7) and for the Council to declare solving this problem a priority (Council of the European Union 2009).

In the following, this paper will therefore try to analyse the reasons behind the disproportionate use of the EAW and outline measures to alleviate the problem. For a better understanding, however, I will first very briefly recall the background of the EAW and its underlying principle.

2. The Background of the EAW: a shift from mutual legal assistance to mutual recognition

According to the European institutions, the traditional mutual legal assistance mechanism was too slow and cumbersome, and in particular, could not bear up to the increase in cross-border crimes following the abolition of internal border controls in the Schengen Area.[3] With the establishment and realization of the area of freedom, security and justice, a new direction was taken on. The European institutions decided to replace existing international instruments based on mutual legal assistance with new European instruments based on the principle of mutual recognition, simultaneously marking a paradigm shift in international cooperation in criminal justice.

Since the start of the century, several instruments as well as action plans focusing on the implementation of the principle of mutual recognition have been adopted.[4] As mentioned above, the EAW was the first instrument to implement the new principle of mutual recognition. When questioning why such a strong instrument as the EAW has been the first instrument to be adopted, it should be noted that the EAW was adopted rather rapidly and hastily in the aftermath of the 9/11 terrorist attacks (Fichera 2009, p. 73). As Sugman and Jager (2007, p. 254) described it: "Suddenly, in the atmosphere of fear ... politics used the unique opportunity to achieve its goals without a lot of debate." Furthermore, with regard to the problem of disproportionate use of the EAW, one should remember that several of the countries associated with issuing disproportionate warrants, among these Poland, Lithuania and the Czech Republic, did not take part in the discussions as they only entered the EU in 2004.

The main difference between the mutual legal assistance system and the mutual recognition principle lies in the procedure of recognition and the grounds for refusal. Under the principle of mutual recognition, a decision made by a judicial authority in one Member State must be recognised and enforced by judicial authorities in the other Member States, without enquiring into the merits of the decision. The judicial decision from another Member State shall have the same effect and value as a national judicial decision (Bachmaier Winter 2010, p. 581).

Thereby, the system of mutual recognition is based on mutual trust between Member States in their respective criminal justice systems. According to the Commission, this trust "is grounded, in particular, on the shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law." (European Comission 2001). Grounds for refusal are fairly limited and in line with the principle of mutual recognition, the purpose is to completely eliminate them step-by-step (Bachmaier Winter 2010, p. 582). The system assumes this trust to be present in each concrete case.

[3] See e.g. Commission of the European Communities (2000, p. 2).
[4] For many see: European Commission (2001), European Union (2005); Council of the European Union (2003).

However, it is highly questionable whether this trust between Member States actually exists or even whether it would be justified. All European Union states are signatories to the European Convention on Human Rights. However, figures show that just between 2007 and 2010 the European Court of Human Rights found that EU Member States violated Article 6 rights in almost 1700 cases (Heard, Mansell 2011, p. 135). A lack of mutual trust was already recognised by Vice-President Viviane Reding, EU Justice Commissioner, stating "as we move forward, we can no longer assume that this mutual trust already exists, or that it comes naturally. Mutual trust cannot be made by decree. Mutual trust can only be earned and it requires very hard work" (Reding 2010).

These findings are of course concerning, as this trust is the very essential basis for the principle of mutual recognition, which is now enshrined in Article 82 of the Treaty on the Functioning of the European Union and forms the basis for judicial cooperation in criminal matters in the EU.

3. The Disproportionate use of the EAW

When discussing disproportionate use of the EAW, different types of disproportionate use are often lumped together. Sometimes the notion of disproportionate use of EAW concerns cases in which an extradition would be legitimate in itself, however it is deemed too severe for the case at hand and not appropriate in relation to the situation of the defendant. Thus, these cases refer to humanitarian concerns and are often claimed under Article 8 European Convention on Human Rights (ECHR), the right to private and family life, one example being, when there is a certainty that the wanted person would commit suicide if extradited.[5] It has to be noted, however, that the threshold set for Article 8 ECHR is very high and hardly ever met.[6]

Another category of cases where the argument of disproportionate use is applied is when issuing an EAW solely for the purposes of interrogation, such as in the prominent case of Mr. Julian Assange.[7]

Presently however, I would like to restrict my focus on cases in which EAWs have been issued for minor offences. Here too, one has to distinguish two categories.

3.1. Retrospective proportionality

The first category comprises cases of retrospective proportionality. In theses cases, the executing state deems the sentence imposed by the issuing state to be disproportionate in relation to the offence. Different views on appropriate sentences, however, are an expression of the differing criminal policies applied in the individual states, which may vary greatly between the 27 Member States. How strong these differences in views on criminal policy can be, is illuminated by the extradition case of *Sandru v Romania* before the British High Court of Justice, which was based on the conviction of a defendant in Romania to 3 years imprisonment for stealing and killing 10 chickens. In this case Lord Justice Elias noted that "the appropriate sentence is, in part, a function of culture ... It may be, for example, that in this case the Romanian courts treat theft of livestock and its subsequent destruction far more seriously than English courts would typically do. If the sentence is thought to be too high, the answer is to challenge it in Romania."[8]

[5] See *Jansons v Latvia*, Court of Appeal - Administrative Court, 18 March 2009, [2009] EWHC 1845 (Admin).
[6] See Doobay (2010). The cases mentioned by Doobay reveal that cases which make reference to Article 8 ECHR often claim the triviality of an offence alongside humanitarian concerns.
[7] Whether Member States should be able to use EAWs for purposes of investigation is controversial. In favour see e.g. Sugman and Gorkic (2009); against see e.g. The House of Lords/House of Commons Joint Committee on Human Rights (2011, para 168).
[8] *Sandru v Government of Romania*, 28 October 2009, [2009] EWHC 2879 (Admin), para. 15.

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The removal of the requirement of double criminality for the list of 32 offences with the introduction of the EAW falls in the same category.[9] In these cases, the executing state might not recognise the act on which an EAW is based as worthy of criminal prosecution, whereas at the same time, the issuing state considers the same act to be punishable with a custodial sentence for a maximum period of at least three years. This clearly shows that in these cases, both states have different views regarding proportionality and the need to issue an EAW. At the same time, the principle of *ultima ratio* might be invalidated insofar as the executing state, which considers the criminal prosecution of a certain act as disproportionate, is being forced to extradite a person.

The described problem is, however, innate to the principle of mutual recognition. The fundamental principle of the EAW is that Member States should trust their respective criminal justice systems; this includes the assessment of appropriate sentences. As the German Higher Regional Court in Stuttgart previously pointed out, Article 49 (3) of the Charter of Fundamental Rights of the European Union (EU Charter) might represent a limit to this notion, stating that the severity of penalties must not be disproportionate to the criminal offence (Vogel, Spencer 2010, p. 581). The benchmark of Article 49 (3) of the EU Charter, however, is naturally a European, and not a national one.

To counteract the issue of different assessments of the gravity of offences, the only option remaining appears to be, as Viviane Reding (2010) suggested, "to develop, step by step, a system of reliable definitions and proportionate sanctions within which there is coherence and certainty about how different criminal justice systems can work together." Since criminal law represents the centrepiece of national sovereignty, however, harmonisation in regards of which acts should be criminalised and how these should be punished remains exceptionally hard to achieve.

3.2. Prospective proportionality

The second category of cases in which EAWs have been issued for minor offences concerns prospective proportionality cases. Thus, cases in which the extradition and the associated human and financial costs are disproportionate to the offence. An example of such cases is the theft of a bottle of beer.

In order to resolve the issue of disproportionate use of the EAW in such cases, one first has to ask the question why the EAW is applied in such cases in the first place. Therefore, I would like to outline three reasons for such applications, although this surely is not an exhaustive list.

One factor contributing to the prospective disproportionate use of the EAW is the threshold set in Article 2 of the Framework Decision, allowing EAWs to be issued for acts punishable by the law of the issuing Member State with a custodial sentence for a maximum period of at least 12 months or, where a sentence has been passed, for sentences of at least four months. Across all of Europe, theft is an offence that fulfils the requirement of a maximum penalty of at least 12 months. Thus, in principle, as previously described by Prof. Spencer (Vogel, Spencer 2010, p. 581), an EAW "can be issued for any case of theft: whether it is on the scale of the Great Train Robbery, or a piece of minor shoplifting."

A further reason lies in the differing application of proportionality tests throughout the Member States. Certain states, for example Poland, which has issued the most

[9] The principle of double criminality stipulates that the alleged crime for which extradition is being sought must be criminal in both countries. With the introduction of the EAW the double criminality requirement has been removed for a list of 32 offences, listed in Art. 2 (2) FD EAW, as long as they are punishable in the State of issue by a custodial sentence for a maximum period of at least three years (Fichera 2009, p. 84 f.).

EAWs in the past years[10], argue that due to the legality principle they are obliged to prosecute all offences, and therefore cannot make prosecution conditional on a proportionality test. The EAW itself does not stipulate the necessity of a proportionality test to be conducted by the issuing state, nor does it include a ground for refusal based on the seriousness of the offence. In my view, it is furthermore questionable whether Member States can refer to Article 49 (3) of the EU Charter in the cases of prospective disproportionality, since it only applies to the proportionality between offence and penalty. Extradition, however, does not form part of the penalty itself, but is rather merely an enforcement aid.

A third reason is the lack of attractive alternative measures. Recently, it has been argued more and more that the only alternative to issuing an EAW would be to let the offence go unpunished entirely (Vogel, Spencer 2010, p. 582, Davidson 2009). This is probably also how to read the attitude of those countries, which argue that, due to the legality principle they are unable to apply a proportionality test. For if the legality principle automatically leads to the issuing of an EAW, it has to be assumed that the EAW represents the only possibility for prosecution.

4. How can the prospective disproportionate use of the EAW be alleviated?

After a brief examination of why EAWs are applied in cases of minor offences, the question arises of how to solve the problem of the prospective disproportionate use of the EAW.

In the European institutions, the issue of disproportionate warrants has been discussed regularly since 2005. However, from the beginning, discussions about possible solutions concentrated on the introduction of a coherent proportionality test. It has been discussed whether a proportionality test should be mandatory or not, and whether it should be carried out only by the issuing state, or whether the executing state should also be able to refuse extradition on proportionality grounds.

Against this background, the Council revised its 'Handbook on how to issue a European Arrest Warrant' in 2010, which was introduced in 2008 formulating non-binding guidelines with regards to the concrete application of the EAW (Council of the European Union 2010). The Council inserted a chapter on proportionality, introducing a non-binding proportionality check to be conducted by the issuing state. Apart from assessing a number of certain factors, like the seriousness of the offence or the possibility of the suspect being detained, the Council recommends an assessment of alternative measures to an EAW. Namely, the use of less coercive instruments of mutual legal assistance, the use of videoconferencing for suspects and the use of summons.

The amendments made to the handbook on their own, however, will not solve the problem of disproportionate use of the EAW. Firstly, the Council makes it clear that there is no obligation for the issuing Member State to conduct a proportionality check.

Secondly, and more importantly, it is questionable whether the alternative measures listed by the Council constitute real alternatives in practice. If this is not the case, a proportionality test will often be ineffective. A proportionality test at EU level requires that the measure at issue is suitable and necessary for pursuing a legitimate aim. Thereby, the necessity requirement is fulfilled if there are no other, equally suitable but less severe, means for achieving the aim. Moreover, the measure taken has to be reasonable in the stricter sense, meaning that the benefits of the means adopted have to be balanced with the burden imposed on the individual (Asp 2007).

[10] In 2010 Poland (population 38 million) issued 3753 EAWs, compared to Germany (population 82 million) issuing 2096 and the UK (population 62 million) issuing 257. See Fair Trials International (2012, p. 3).

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If, with regards to the issuing of an EAW, no real alternative measures exist, the requirement of necessity will always be deemed given by countries like Poland, which apply the legality principle. At the same time, it is very likely that these countries will also affirm that in 'one common area of justice' the transnational persecution of minor crimes, does not constitute an unbalanced burden on the individual, if the alternative would be to let the offence go unpunished.

Considering the question whether the alternative measures listed by the Council constitute real alternatives in practice, one has to bear in mind that the EAW is one single instrument that can ensure the physical presence of a defendant in a timely manner and with comparably low effort on the part of the issuing state. A major part of the costs of the use of an EAW are carried by the executing state. In addition, the Framework Decision on the EAW needed to be transposed into national law. It is commonly known that judicial authorities are more familiar with national law and more confident in its application than with instruments based on international law (Sotto Maior 2009, p. 218).

Furthermore, considering the shared "commitment to the principles of freedom, democracy, respect for human rights and the rule of law" as claimed by the Commission, one has to assume that no State would regard it as desirable that an instrument as grossly coercive as the EAW routinely be applied to minor offences. However, as the EAW is "systematically" used for minor offences, it has to be assumed that the current alternative measures are significantly less effective and attractive to Member States.

Thus, the discussion and the focus on finding a solution to the proportionality problem should concentrate on the improvement of existing alternative measures, such as the transfer of proceedings or the use of summons and the introduction of new measurements, which allow the transnational prosecution of minor crimes in a less coercive manner.

5. Concluding Remarks

Considering the current discussions about proportionality in the context of the European Investigation Order, there is no doubt that the issue of proportionality in the European instruments based on the principle of mutual recognition will engage the European institutions in the upcoming years. Especially with regards to the EAW, there is a great interest from the Member States in solving this problem, as disproportionate warrants not only lead to disproportionate interference with the rights of the affected individuals, but by now also put a strain on the mutual trust between Member States and therefore endanger and call into question the principle of mutual recognition itself. An additional concern are the Member States' financial interests as every EAW incurs a high cost for the executing state.[11]

To be able to find a solution to the problem of disproportionate use of the EAW, firstly, different categories of disproportionate use have to be distinguished, in particular the cases of prospective and retrospective disproportionality. Regarding the latter, Member States either have to accept the mismatch in criminal policies under the principle of mutual recognition, or harmonise their policies in the affected areas of the law.

Regarding cases concerning prospective disproportionality, discussions amongst academics, practitioners and policy makers up until today have mainly concentrated on the introduction of a (binding) proportionality test and thereby missed to consider other alternative legislative solutions regarding minor crimes, such as the introduction of comparable and effective alternative measures.

[11] At an European Comission Meeting of Experts in November 2009, Michael Peart (Judge in the High Court of Ireland) claimed the average cost of enforcing an EAW to the point of surrender being 25,000 Euro per case (Implementation of the Council Framework Decision of 13 June 2002…).

However, if the EAW is not accompanied by equally effective, and less coercive, measures, there will continue to be a large number of cases, where, despite proportionality tests, the EAW will be applied to minor offences, as many states have the legitimate desire to pursue even minor offences across borders with reasonable effort.

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