

ILARIA CAPOSSELA*

THE EUROPEAN ARREST WARRANT IN THE POST-BREXIT ERA

ABSTRACT. The present paper aims at analyzing the effects of the European Arrest Warrant (EAW) after the Brexit. In this context, it is necessary to examine the EAW in the European framework and its adoption by the United Kingdom. Over time, the EAW became more used in practice. However, the principles on which the EAW is based, namely that of mutual trust built on the respect of fundamental rights enshrined in the Charter of Fundamental Rights, the free movement of people and the jurisdiction of the European Court of Justice, were put at stake by several countries. The future itself of the EAW is at an impasse due to the withdrawal of the UK from the EU. Thus, the paper tries to assess the possible scenario after the transition period and the future cooperation between the EU and the UK in the field of police and judicial cooperation in criminal matters.

CONTENT. 1. Introduction – 2. The Extradition Act of 2003 and the Brexit transitional period – 3. The future of the EAW after the transitional period: the different alternatives – 3.1. Maintaining the 2003 Extradition Act? – 3.2. The option of a ‘surrender agreement’ – 3.3. The return to the 1957 Council of Europe Convention on Extradition – 3.4. A unilateral measure: the Extradition (Provisional Arrest) Bill – 3.5. The direction of the negotiations between the Parties: the Draft text of the Agreement on the New Partnership with the United Kingdom of 18 March 2020 – 4. Some conclusive remarks

* Law School Graduate, Roma Tre University.

1. Introduction

The European Arrest Warrant (EAW) is a cross-border judicial surrender procedure used to prosecute or execute a custodial sentence or detention order provided by the Council Framework Decision of 2002,¹ to replace the former extradition procedures and to simplify and strengthen the cooperation within the European Union.² The procedure is based on the principle of mutual recognition of judicial decisions between Member States, expressly recognized by Article 82 TFUE.³

As illustrated in the table below, EAW's data for 2015, 2016 and 2017 shows that, as time goes by, the procedure has been used more in practice.⁴

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Issued	6,889	10,883	14,910	15,827	13,891	9,784	10,665	13,142	14,984	16,144	16,636	17,491
Executed EAWs	1,223	2,221	3,078	4,431	4,293	3,153	3,652	3,467	5,535	5,304	5,812	6,317

According to Article 50, paragraph 1, of the Treaty of the European Union⁵ and to the referendum's result of 23 June 2016 on the UK's membership in the EU, the

1 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32002F0584>> (hereinafter 'the 2002 Framework Decision'), Article 1, paragraph 1.

2 European e-Justice Portal, *European Arrest Warrant*, <https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do>.

3 The principle of mutual recognition entails that a Member State can arrest and transfer a person to another Member State on the basis of a request from a judicial authority, valid in the entire territory of the EU, which does not depend on the executive power. The EAW must only respect fundamental rights and fundamental legal principles enshrined in Article 6 of the Treaty on European Union; R. GALULLO, *Ritorno al 1957, Brexit, il Regno Unito cancella il mandato di arresto europeo: verso il caos estradizionali*, *Il Sole 24ore*, 29 February 2020; European e-Justice Portal, *European Arrest Warrant*, <https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do>, last access 12 March 2020; The 2002 Framework Decision, Article 1, paragraph 2; UN Consolidated version of the Treaty on the Functioning of the European Union, 9 May 2008, <https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=uriserv:OJ.C_.2008.115.01.0001.01.ITA&toc=OJ:C:2008:115:TOC#C_2008115IT.01004701>, Article 82.

4 European e-Justice Portal, *European Arrest Warrant*, <https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do>, last access 12 March 2020.

5 EU, Consolidated Version of the Treaty on European Union, 26 October 2012, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012M%2FTXT>>, Article 50, paragraph 1 that states: «[a]ny Member State may decide to withdraw from the Union in accordance with its own constitutional requirements».

Withdrawal Agreement between the United Kingdom and the European Union provides the withdrawal of the UK from the EU (so-called ‘Brexit’).⁶ The fate of the European Arrest Warrant after the withdrawal of the United Kingdom from the European Union is unknown.

To the purpose of analyzing the alternatives of this regulation, the paper firstly introduces the framework provided by the Withdrawal during the transitional period.

Then, it focuses on the core of the discussion: the Brexit event requests to pose questions concerning the EAW’s future. Thus, the options could entail sources already existent or the creation of new agreements. In particular, the Article compares the pros and cons of maintaining the 2003 Extradition Act, adopting a ‘surrender agreement’, returning to the 1957 Council of Europe Convention on Extradition, endorsing a unilateral measure, or ratifying a new agreement. The latter seems to be the road being undertaken thanks to the Draft text of the Agreement on the New Partnership with the United Kingdom of 18 March 2020.

2. The Extradition Act of 2003 and the Brexit transitional period

In the UK, the Extradition Act of 2003⁷ provides two systems of arrest in extradition cases based on the territory that issued the request. Part 1 of the Act is the implementing legislation of the EAW under Council Framework Decision 2002/58/JHA. In this section, the territories are referred as ‘category 1 territories’. Whereas part 2 of the Act provides for extradition to those territories, defined as ‘category 2 territories’, designated under Section 69 of the Act wherewith the UK has formal extradition arrangements.⁸ The statistics of the National Crime Agency show that, before 1 January 2004, date of entry into force of the EAW, the UK extradited less than 60 persons every year. From 2004, the extraditions requests to the United

6 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 31 January 2020, <[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0131\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0131(01))>.

7 Extradition Act 2003, 20 November 2003, <<http://www.legislation.gov.uk/ukpga/2003/41>>.

8 C. COLEMAN, *Extradition (Provisional Arrest) Bill [HL]: Briefing for Lords Stages*, House of Lords Library, 27 January 2020, p. 2.

Kingdom shifted from 1,865 in 2004 to 12,613 in 2015, while the requests from the UK to other Member States increased from 96 to 228 in 2015.⁹

A transition period of 11 months (until 31 December 2020) keeps the UK bound to the European Union law.¹⁰ In accordance with Article 62, paragraph 1, letter b, of the Withdrawal Agreement, the 2002 Framework Decision shall apply when the requested person was arrested before the end of the transition period for the purposes of the execution of a European Arrest Warrant.¹¹ Article 185 provides that each Member State may refuse to surrender its nationals to the UK pursuant to an EAW, in addition to the grounds for non-execution of an EAW referred to in Framework Decision 2002/584/JHA. Within one month from the receipt of the Union's statement, the UK can declare that its executing judicial authorities refuse to surrender its nationals to that Member State.¹² Moreover, some countries' Constitutions deny the extradition outside the EU.¹³

3. The future of the EAW after the transitional period: the different alternatives

From the end of the transition period, the UK will be a non-Schengen third country and will not allow the free movement of persons. The future of the European Arrest Warrant is one of the most problematic issues of the UK's withdrawal from the EU.¹⁴

In the case *Minister for Justice and Equality v. O'Connor*,¹⁵ the Irish Supreme

9 The National Crime Agency is the Supplementary Information Request at the National Entry Bureau of the United Kingdom. Its role is to act as a legal gateway between authorities requesting an arrest and those carrying out an arrest. National Crime Agency, *Historical European Arrest Warrants statistics: Calendar and Financial year totals 2004- May 2016*, 12 June 2018.

10 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.

11 *Ibidem*, Article 62(1)(b).

12 *Ibidem*, Article 185(3).

13 R. GALULLO, *Ritorno al 1957, Brexit, il Regno Unito cancella il mandato di arresto europeo: verso il caos estradizioni*, *Il Sole 24ore*, 29 February 2020; E-justice.europa.eu, *European Arrest Warrant*, <https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do>.

14 DE BERTI JACCHIA, *Mandato di Arresto Europeo ed Estradizione Post-Brexit*, 1 August 2018 <www.dejalexonbrexit.eu/mandato-di-arresto-europeo-ed-estradizione-post-brexit/>.

15 IESC, 30 March 2017, *The Minister for Justice and Equality v. O'Connor*, <<http://www.bailii.org/ie/cases/IESC/2017/S21.html>>. The UK issued an EAW against Thomas Joseph O'Connor for an offence of conspiracy to cheat the public revenue. Based on this EAW's request by the UK, Mr. O'Connor was arrested in

Court had to review the European Arrest Warrant request issued by the UK against Mr. O'Connor for an offence of conspiracy to cheat the public revenue. Mr. O'Connor appealed to the Supreme Court referring to the Brexit's consequences on the execution of an EAW of a sentence that will extend beyond the withdrawal of the UK from the EU. Indeed, the legal framework that will rule most of his time in prison is unknown. Unless a bilateral agreement between the EU and the UK is reached, Mr. O'Connor would not be entitled to the same rights during a part of his imprisonment as he would enjoy at the moment of his surrender. The Irish government, submitting that the Court should decide on the basis on the applicable law and not on the possible legislative changes, failed to seek adequate protections for Mr. O'Connor, as the future of the EAW's is of real concern.¹⁶

In accordance with Article 267 of the TFEU, the Amsterdam District Court referred to the European Court of Justice for a preliminary ruling, investigating the maintenance of EU citizenship and the linked rights of British citizens living in the EU. A ruling of the CJEU in the case of Mr. O'Connor will be relevant to determine the requirements of a future agreement and the fundamental rights applicable to UK extraditions after Brexit. The EU will accept a judicial cooperation agreement with the UK if the latter complies with EU law. The main difficulties for any future partnership will be the same raised in *Minister of Justice and Equality v. Mr. O'Connor*, namely the loss of jurisdiction of the CJEU and the lack of equivalent fundamental rights protections after Brexit.¹⁷

Several options have been hypothesized to overcome these problems.

Ireland and the Irish High Court granted the surrender on 27 July 2017. Then, Mr. O'Connor appealed to the Supreme Court.

16 C. SÁENZ PÉREZ, *Minister for Justice v. O'Connor: A decisive moment for the future of the EAW in the UK*, *European Papers*, Vol. 3, 2018, No 2, pp. 1017-1026 at 1019-1020.

17 *Ibidem*, at 1021-1025.

4. *Maintaining the 2003 Extradition Act?*

As Mr. Michel Barnier¹⁸ affirmed at the 2018 European Union Agency for fundamental Rights in Vienna, the EAW is built on the principle of mutual trust formed mainly by the respect of fundamental rights enshrined in the jurisdiction of the European Court of Justice,¹⁹ the Charter of Fundamental Rights and the free movement of people. Due to the UK's unwillingness to accept these features, the country could not maintain the 2003 Extradition Act and could not take part in the EAW.²⁰

Concerns have been raised due to the gaps in the data collections from 2014 as the figures for EAW requests have included warrants without a UK connection,²¹ and due to the significant costs of an EAW approximated by the UK Government to £20,000, including the detention before the extradition, costs to the police, the Crown Prosecution Service and court and legal aid costs. The Government affirmed that, whether the UK did not participate anymore in EAWs, it would turn back to the 1957 Council of Europe Convention on Extradition.²²

On the other hand, the EAW system, as enshrined in the 2003 Extradition Act, is fundamental in the cooperation system. The National Crime Agency listed the EAW in the top three priorities of the negotiations on UK withdrawal from the EU. Moreover, the Crown Prosecution Service considers the EAW as vital. Lastly, Helen Ball, the Metropolitan Police Service's Senior National Coordinator for Counter-Terrorism

18 Chief negotiator for the 'Task force for the preparation and conduct of the Negotiations with the UK under Article 50 TEU', <https://ec.europa.eu/info/sites/info/files/organisation_charts/organisation-chart-tf50_en.pdf>.

19 DE BERTI JACCHIA, *Mandato di Arresto Europeo ed Estradizione Post-Brexit, DeJalexonbrexit*, 1 August 2018; ECJ 5 February 1963, Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, <<https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A61962CJ0026>>; ECJ 15 July 1964, Case 6/64, *Flaminio Costa v. ENEL*, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61964CJ0006>>; C. MAC PARTHOLÁN, *Arresting Developments: The Post-Brexit Future of European Arrest Warrants*, *The Journal of Criminal Law*, 1-18, 26 December 2019, pp. 2-4.

20 C. MACPARTHOLÁN, *Arresting Developments: The Post-Brexit Future of European Arrest Warrants*, 2019, pp. 2-4.

21 *Ibidem*, pp. 9-10.

22 HM Government, *Decision pursuant to Article 10 of Protocol 36 to the Treaty on the Functioning of the European Union*, Cm 8671, July 2013, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/235912/8671.pdf>, p. 95.

Policing, rated EAW at ‘about an 8’ on a scale of 1 to 10 of relevance in her field.²³

5. The option of a surrender agreement

There has already been a ‘surrender agreement’ between the EU and non-EU countries but in the Schengen zone, namely with Norway and Iceland. The first agreed arrangements were in 2006, but only came into force in November 2019.²⁴ It mirrors for the most parts the EAW and it has an indirect but influential role for the European Court of Justice. However, Article 7 of the Agreement in exam provides an exemption for the extradition based on nationality.²⁵ The Home Affairs Select Committee affirmed that it must be kept in mind the length of time that it took to negotiate the agreement and the difficulties in an eventual replacement agreement of this kind.²⁶

Article 36 of this Agreement establishes a dispute settlement clause that does not refer to the European Court of Justice, but to a dispute settlement mechanism that includes representatives of the governments of the Member States of the European Union, Iceland and Norway. Similar dispute resolution mechanisms have been proposed by the House of Lords’ paper on the future of the EAW, whereas it considers the possibility of incorporating arbitration as a mechanism to settle disputes over the interpretation and application of any future agreement on the EAW.²⁷ On one hand, it could avoid being subjected to the jurisdiction of the European Court of Justice. On

23 C. MACPARTHOLÁN, *Arresting Developments: The Post-Brexit Future of European Arrest Warrants*, 2019, p. 16.

24 The Agreement of 28 June 2006 between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway entered into force on 1 November 2019, OJ L 292, 21 October 2006, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22006A1021%2801%29>> (hereinafter ‘the 2006 Agreement’).

25 J. DAWSON, *Brexit Next Steps: The European Arrest Warrant*, *House of Commons Library*, 20 February 2020.

26 The 2006 Agreement, Article 7 ‘Nationality exception’: «1. Execution may not be refused on the ground that the person claimed is a national of the executing State. 2. Norway and Iceland, on the one hand, and the European Union, on behalf of any of its Member States, on the other hand, may make a declaration to the effect that nationals will not be surrendered or that surrender will be authorised only under certain specified conditions. 3. Where an arrest warrant has been issued by a State having made a declaration as referred to in paragraph 2, or by a State for which such a declaration has been made, any other State may, in the execution of the arrest warrant, apply reciprocity».

27 House of Lords, European Union Committee, *Brexit: Judicial Oversight of the European Arrest Warrant*, *6th Report of Session 2017-19*, 27 July 2017, <<https://publications.parliament.uk/pa/ld201719/ldselect/lddeucom/16/16.pdf>>, paragraphs 5, 27, 31, and 41.

the other hand, most of the expert witnesses consulted by the Home Affairs Committee of the House of Commons underlined that implementing a non-judicial mechanism would be difficult in a field that interferes with the individual's rights and freedoms. The best alternative for the UK would be, thus, the creation of a judicial body with competences to interpret and settle disputes. In any case, the UK Government might compromise in dispute settlement. Theresa May, the former prime Minister, declared that she was ready to make concessions about the acceptance of European Court of Justice's case-law and jurisdiction in order to ensure a UK-EU security deal referring to judicial and police cooperation in criminal matters. However, nowadays this opinion is not followed anymore.²⁸

6. The return to the 1957 Council of Europe Convention on Extradition

In the absence of a compromise, the choice would fall on the 1957 Council of Europe Convention on Extradition. In fact, the 1957 Convention permits the accession of non-EU States as it happened with Israel, South Africa and South Korea, and the UK could become a non-EU Contracting Party. In accordance with Article 28, paragraph 3, of the 1957 Convention on Extradition,²⁹ the UK could make a Proposal of Cooperation based on the EAW and an agreement with the other Contracting Parties. Moreover, Article 9 of the 1977 European Convention on the Suppression of Terrorism states that the Contracting States can conclude bilateral or multilateral agreements to apply the provisions and principles of the Convention in exam.³⁰

However, the application of the 1957 Convention on Extradition would lead to delays, huge costs, and potential political interferences.³¹

28 C. SÁENZ PÉREZ, *Minister for Justice v. O'Connor: A Decisive Moment for the Future of the EAW in the UK*, *European Papers*, Vol. 3, 2018, No 2, pp. 1017-1026, at 1024-1025.

29 European Convention on Extradition, 13 December 1957, <<https://rm.coe.int/1680064587>>, Article 28(3): «Where, as between two or more Contracting Parties, extradition takes place on the basis of a uniform law, the Parties shall be free to regulate their mutual relations in respect of extradition exclusively in accordance with such a system notwithstanding the provisions of this Convention».

30 C. MACPARTHOLÁN, *Arresting Developments: The Post-Brexit Future of European Arrest Warrants*, 2019, pp. 17-18.

31 House of Lords, European Union Committee, *Brexit, the Proposed UK-EU Security Treaty*, 18th Report of

There are some relevant differences between the European Arrest Warrant and the 1957 Convention regarding time limits, the authority issuing the requests and the reasons of denial of a request.³²

Firstly, Article 17 of the EAW provides time limits while the 1957 Convention does not.³³

Secondly, while Article 12, paragraph 1, of the 1957 Convention establishes that «the request shall be in writing and shall be communicated through the diplomatic channel. Other means of communication may be arranged by direct agreement between two or more Parties», the EAW is a transaction between judicial channels.³⁴

Thirdly, the Framework Decision on the EAW does not provide any exception clause allowing a State to refuse surrendering their own nationals and there is no exception for political, military or revenue offences. Instead, Article 6 of the 1957 Convention provides the possibility to refuse an extradition request for their own nationals.³⁵

Furthermore, in order to protect both States' citizens, the Framework Decision provides that crimes and penalties are determined by each States' national laws. In fact, the EAW can be executed for a wide variety of crimes as it does not attempt to

Session 2017-19, 11 July 2018, <<https://publications.parliament.uk/pa/ld201719/ldselect/lddeucom/164/164.pdf>>.

32 R. GALULLO, *Ritorno al 1957, Brexit, il Regno Unito cancella il mandato di arresto europeo: verso il caos estradizionali, il sole 24 ore*, 29 February 2020; European e-Justice Portal, *European Arrest Warrant*, <https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do>.

33 The 2002 Framework Decision, Article 17; The first paragraph of Article 17 establishes that the EAW shall be executed 'as a matter of urgency'. Paragraph 2 affirms that «in cases where the requested person consents to his surrender, the final decision on the execution of the European arrest warrant should be taken within a period of 10 days after consent has been given». The Article carries on affirming that «[i]n other cases, the final decision on the execution of the European arrest warrant should be taken within a period of 60 days after the arrest of the requested person». When the time limited cannot be respected, it must be followed by the executing judicial authority's reason for the delay and consequently the time limits may be extended by a further 30 days. Whether Member States cannot observe the abovementioned time limits, it shall inform Eurojust, providing the reasons for the delay. Repeated delays of Member States in the execution of European Arrest Warrants, shall be referred by the other MS to the Council in order to evaluating the implementation of the Framework Decision at the national level.

34 European Convention on Extradition, 13 December 1957, <<https://rm.coe.int/1680064587>>, Article 12.

35 C. MACPARTHOLÁN, *Arresting Developments: The Post-Brexit Future of European Arrest Warrants*, 2019, at 6 and 17.

harmonise the criminal acts of each Member States and the warrant's offence does not have to correspond to that under the legislation of the other Member States.³⁶

If the 1957 Convention will be applied, both the UK and the other Member States would need to update the national legislation because most of the States repealed the 1957 Convention.³⁷

7. A unilateral measure: the Extradition (Provisional Arrest) Bill

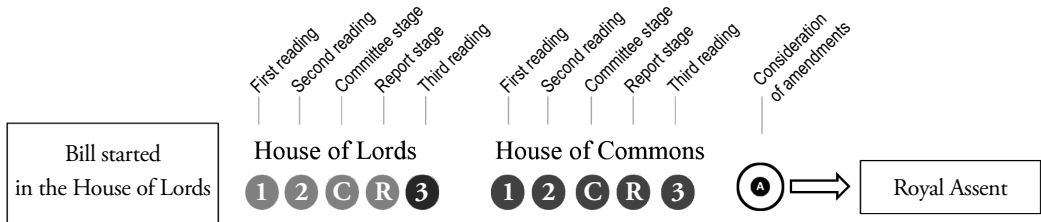
The Extradition (Provisional Arrest) Bill is an act that empowers authorities to arrest, without a warrant, for the purpose of extraditing people for serious offences.³⁸ The 2003 Extradition Act provides that the UK police can immediately arrest someone on the basis of a warrant correctly issued by 'category 1 territories' and certified by the National Crime Agency. On the other hand, the UK police must seek a warrant from a judge before arresting someone from 'category 2 territories'. Applying to a judge for an arrest warrant takes hours and jeopardizes the aim of detaining the individual who might escape or offend again. In light of this, the bill is aimed at creating a power of arrest without warrant in relation to predetermined category 2 territories. When such countries provide a valid extradition request, a designated authority in the UK, namely the National Crime Agency, might issue a certificate. Such certificate would allow a constable, customs officer, or a service police officer to arrest the individual specified without the need to apply to a court. The bill requires the certificate to be given to the arrested individual as soon as practicable and provides that these subjects must be brought before a judge within 24 hours of the time of their arrest. The judge could adjourn proceedings to allow more evidence to be produced. The total period of adjournments cannot be more than 72 hours.³⁹

36 *Ibidem*, pp. 3-4.

37 R. GALULLO, *Ritorno al 1957, Brexit, il Regno Unito cancella il mandato di arresto europeo: verso il caos estradizioni*, 29 February 2020; E-justice.europa.eu, *European Arrest Warrant*, <https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do>.

38 Extradition (Provisional Arrest) Bill [HL] 2019-21, Government bill, Home Office, <<https://services.parliament.uk/bills/2019-21/extraditionprovisionalarrest.html>>.

39 C. COLEMAN, *Extradition (Provisional Arrest) Bill [HL]: Briefing for Lords Stages*, House of Lords Library, 27 January 2020, pp. 1-5.

PROGRESS OF THE BILL⁴⁰

The latest step was the Report Stage of the House of Lords on 23 March 2020, while the next one shall be the third reading in the House of Lords.

In case the UK will no longer have access to the European Arrest Warrant after leaving the EU, the Bill might be amended to apply to EU Member States,⁴¹ or to certain countries specified by the Bill, re-designating category 1 territories as category 2 territories.⁴² In a ‘loss of the EAW’ scenario’, also the European Union Committee within the House of Lords discussed about this modification and affirmed the need to create interim arrangements, even if only unilateral ones. However, keeping in mind that extradition is a reciprocal arrangement, the Committee stated that amending the 2003 Act would not be sufficient.⁴³ In October 2019, the Guardian newspaper reports that Richard Martin, the deputy assistant commissioner of the National Police Chiefs Council, affirmed that the loss of the EAW is one of the police’s main concerns. Moreover, Rebecca Niblock, a criminal litigation partner at Kingsley Napley LLP specialising in extradition, expressed concerns about the bill. In particular, she affirmed

40 Image of the UK parliament website: Home Office, Government Bill, Extradition (Provisional Arrest) Bill [HL] 2019-21, <<https://services.parliament.uk/bills/2019-21/extraditionprovisionalarrest.html>>.

41 Prime Minister’s Office, *The Queen’s Speech 2019*, 19 December 2019, p. 82.

42 C. COLEMAN, *Extradition (Provisional Arrest) Bill [HL]: Briefing for Lords Stages*, House of Lords Library, 27 January 2020, p. 2.

43 House of Lords, European Union Committee, *Brexit: Judicial Oversight of the European Arrest Warrant, 6th Report of Session 2017-19*, 27 July 2017, <<https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/16/16.pdf>>, paragraph 65; C. COLEMAN, *Extradition (Provisional Arrest) Bill [HL]: Briefing for Lords Stages*, House of Lords Library, 27 January 2020, pp. 6-7.

that promoting the Bill as the solution to the problem of arrests from non-EU countries avoids dwelling on the consequences of the loss of the EAW with Brexit.⁴⁴

8. The direction of the negotiations between the Parties: the Draft text of the Agreement on the New Partnership with the United Kingdom of 18 March 2020

Cooperation in criminal matters is required to mirror the UK and UE common interests, the geographical proximity and the challenges to face. Cooperation would be met with an agreement between the UK and EU. The EU's draft negotiating mandate recalled that the arrangements for judicial cooperation will need to bear in mind that the UK will be a non-Schengen third country. Therefore, the UK will not enjoy the same rights of Member States.⁴⁵ Nonetheless, an ambitious cooperation would need commitments that concern the fundamental rights of individuals.⁴⁶

Likewise, the UK Government stated that a pragmatic agreement on law enforcement and judicial cooperation is in the parties' mutual interest. Nonetheless, it affirmed that the EU must not restrict the autonomy and must respect the sovereignty of both parties and the autonomy of the legal orders. It cannot therefore include «any regulatory alignment, any jurisdiction for the CJEU over the UK's laws, or any supranational control in any area».⁴⁷ Moreover, UK will not formally commit to apply the European Convention on Human Rights. If this position is maintained, it will have practical consequences on the cooperation that will remain possible on the basis of

44 R. NIBLOCK, *Changes Proposed by the Extradition (Provisional Arrest) Bill*, *The Law Society Gazette*, 6 November 2019; C. COLEMAN, *Extradition (Provisional Arrest) Bill [HL]: Briefing for Lords Stages*, House of Lords Library, 27 January 2020, p. 7.

45 General Secretariat of the Council of the European Union, *Directives for the negotiation of a new partnership with the United Kingdom of Great Britain and Northern Ireland*, 5870/20 ADD 1 REV 3, UK 3, 25 February 2020, paragraph 117; EU Commission, *Recommendation for a Council Decision authorising the opening of negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland*, Brussels, COM (2020) 35 final, 3 February 2020, paragraphs 112-113.

46 EU Commission, *Negotiations with the UK: Michel Barnier, the European Commission's Chief Negotiator, sets out points of convergence and divergence following the first round of negotiations*, 5 March 2020, <https://ec.europa.eu/commission/presscorner/detail/en/speech_20_402>, p. 3.

47 Prime Minister Boris Johnson, *UK/EU relations: written statement – HCWS86*, 3 February 2020, <<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-02-03/HCWS86/>>.

international agreements but won't be ambitious.⁴⁸ Moreover, any agreement should automatically terminate whether the UK censures the European Convention on Human Rights or the Human Rights Act of 1998, the national act that implements the ECHR.⁴⁹

Part Three, Title I, Chapter Seven of the Draft text of the Agreement on the UE New Partnership with the United Kingdom establishes an extradition system based on a mechanism of surrender pursuant to an arrest of warrant.⁵⁰ Article 3 of the Draft text affirms that «Nothing in this Title shall have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in the European Convention on Human Rights, or, in case of the Union and its Member States, in the Charter of Fundamental Rights». Moreover, Article 136, Part Three, Title I of the Draft specifically lays down that the cooperation of law enforcement and judicial cooperation in criminal matters depends on the UK application of the European Convention on Human Rights, Protocols 1, 6 and 13 thereto, and its implementing Act under the domestic law. Whether the UK repealed the latter sources, this Title shall be disapplied.⁵¹

Article 110 rules the relation to other legal instruments establishing that from the entry into force of the Draft, Chapter 7 will replace the corresponding provisions of the 1957 Convention on Extradition and its additional Protocol, and the European Convention on the Suppression of Terrorism of 27 January 1977, applicable in the field of extradition in relations between the United Kingdom, on the one hand, and Member States, on the other hand (without prejudice to their application in relations between

48 EU Commission, *Negotiations with the UK: Michel Barnier, the European Commission's Chief Negotiator, sets out points of convergence and divergence following the first round of negotiations*, 5 March 2020, <https://ec.europa.eu/commission/presscorner/detail/en/speech_20_402>, p. 3.

49 General Secretariat of the Council of the European Union, *Directives for the negotiation of a new partnership with the United Kingdom of Great Britain and Northern Ireland*, 5870/20 ADD 1 REV 3, UK 3, 25 February 2020, paragraph 118; EU Commission, *Recommendation for a Council Decision authorising the opening of negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland*, Brussels, COM(2020) 35 final, 3 February 2020, paragraphs 112-113.

50 EU Commission, Task Force for Relations with the United Kingdom, *Draft text of the Agreement on the New Partnership with the United Kingdom*, 18 March 2020, <https://ec.europa.eu/info/publications/draft-text-agreement-new-partnership-united-kingdom_it>, Article 76.

51 *Ibidem*, Article 3 and Article 136.

States and third States).⁵²

After the entry into force of this agreement and no later than five years, the Parties shall jointly review the implementation of Chapter 7.⁵³

The Draft contains the same provisions concerning the refusal of the execution of an EAW of the 2002 Framework Decision (such as amnesty, respect to the principle of *ne bis in idem*, the offences are not attributable to the person due to his/her age). In addition, the Draft seems to have a specific consideration to human rights. Contrarily, the Framework Decision does not contain an explicit ground for refusal based on the infringement or risk of infringement of human rights. While some Member States implemented this ground of refusal in the national legislation, others had not. Then, in these countries, judicial authorities do not neglect their mutual recognition obligations by taking fundamental rights concerns into consideration.⁵⁴

Instead, different judgments took human rights into consideration questioning whether the principle of mutual recognition is limited if there is an infringement of the fundamental rights they should respect on the basis of Article 1, paragraph 3, of the Framework Decision.

Firstly, the European Court of Human Rights (ECtHR) in extradition proceedings, such as *Soering v. United Kingdom*, applied the principle that extradition shall be refused where there is a breach of the ECHR.⁵⁵

Secondly, the European Court of Justice, in the joint cases *Pál Aranyosi and Robert Căldăraru*,⁵⁶ ruled that the executing judicial authority must obtain supplementary

52 *Ibidem*, Article 110.

53 *Ibidem*, Article 135.

54 M. DEL MONTE, *Revising the European Arrest Warrant, European Added Value Assessment accompanying the European Parliament's Legislative own-Initiative Report (Rapporteur: Baroness Ludford MEP), European Parliamentary Research Service*, 2014, pp. 15-16.

55 ECtHR, 7 July 1989, 14038/88, *Soering v. The United Kingdom*, <[https://hudoc.echr.coe.int/fre#%22itemid%22:\[%22001-57619%22\]](https://hudoc.echr.coe.int/fre#%22itemid%22:[%22001-57619%22])>, paragraph 91.

56 ECJ 3 March 2016, Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru*, (Requests for a preliminary ruling from the Higher Regional Court, Bremen, Germany), <<http://curia.europa.eu/juris/celex.jsf?celex=62015CC0404&lang1=it&type=TEXT&ancre=>>>, paragraphs 128 at 134, 167, 183.

information when there is evidence of deficiencies of detention conditions in the requesting Member State. If the authority cannot establish the existence of a risk of inhuman or degrading treatment in a reasonable time, it should decide whether to conclude the surrender procedure.⁵⁷ This decision established a process of consolidation of the limits on the execution of the EAW, recognizing the prevalence of the protection of fundamental rights over the principles of mutual recognition.⁵⁸

As a matter of fact, this fulfillment has been implemented in national courts that gave prevalence to the protection of fundamental rights. In the High Court case of *Strzepea v. Poland*,⁵⁹ Mr. Justice Ouseley in the judgment of appeal affirmed that extradition to Poland in 2018 for low-level offences committed years before would be a disproportionate interference with the appellant's right to private and family life enshrined in Article 8 of the European Convention on Human Rights and therefore considered as a violation of Article 14 of the Extradition Act of 2003.⁶⁰

Furthermore, in the *Minister for Justice and Equality v. Celmer* case,⁶¹ the Irish High Court did not allow the surrendering of the accused, Arthur Celmer, to Poland. The ruling was due to the deep concern on the situation of the rule of law in Poland that represents a «clear risk of a serious breach of the values referred to in Article 2 TEU».⁶²

57 C. MACPARTHOLÁN, *Arresting Developments: The Post-Brexit Future of European Arrest Warrants*, 2019, pp. 7-8.

58 G. DE AMICIS, *Il principio del reciproco riconoscimento e la sua attuazione nel diritto interno*, M.R. MARCHETTI, E. SELVAGGI, *La nuova cooperazione giudiziaria penale*, Cedam, 2019, p. 239 et seq.

59 EWHC, 18 July 2018, *Strzepea v. District Court Koszalin, Poland*, <<https://advance-lexis-com.biblio-proxy.uniroma3.it/document/?pdmfid=1516831&crd=51343465-19de-408a-992e-50cc77292dfb&pdodocfullpath=%2Fshared%2Fdocument%2Fcases-uk%2Furn%3AcontentItem%3A5W34-V1R1-FC1F-M0SJ-00000-00&pdcontentcomponentid=184140&pdteaserkey=sr1&pditab=allpods&tecomp=pp79k&earg=sr1&prid=dc27af73-595a-4c07-b078-37db8533f8fb>>, paragraphs 24 and 30.

60 Extradition Act 2003, 20 November 2003, <<http://www.legislation.gov.uk/ukpga/2003/41>>, Article 14: 'Passage of time': «A person's extradition to a category 1 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have – (a) committed the extradition offence (where he is accused of its commission), or (b) become unlawfully at large (where he is alleged to have been convicted of it)».

61 IEHC, 3 December 2018, *The Minister for Justice and Equality v. Celmer*, <http://www.europeanrights.eu/public/sentenze/Irlanda-High_Court-12marzo2018-High_Court.pdf>, paragraphs 46, 77, 97.

62 EU Commission, *Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the Rule of Law in Poland*, 20 December 2017.

In the area of the European criminal law built on mutual trust, all citizens should benefit from the same level of protection and not from different ones based on each national legislation. The Council and the European Parliament negotiated an explicit human rights ground for refusal concerning the European Investigation Order (EIO). Instead, even though the Court of Justice in the joint cases *Pál Aranyosi and Robert Căldăraru* hermeneutically filled the legislative gap,⁶³ such an expressed insertion similar to the EIO is not provided for the EAW. This inclusion would increase consistency between national legislations and coherence of the EU criminal justice.⁶⁴

The Draft text of the Agreement on the UE New Partnership with the United Kingdom seems to have a specific consideration to human rights as it includes refusal «when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons».⁶⁵

The text of the Draft Agreement seems to mirror the Council Framework Decision 2002/584/JHA and could be a great solution to retain the cooperation in the criminal matters.

9. Some conclusive remarks

In the event that the UK will lose access to the EAW, an agreement between the European Union and the United Kingdom would be necessary for both Parties for different reasons.

Firstly, on one hand, the UK is not willing to accept the jurisdiction of the European Court of Justice. In this case, it would be impossible to retain the EAW since

63 V. SACHETTI, *La nozione di autorità giudiziaria nel mandato d'arresto europeo, tra mutuo riconoscimento e tutela dei diritti fondamentali*, I post di AISDUE, I (2019), Sezione 'Note e commenti' n.10, 2 October 2019, pp. 115-116.

64 M. DEL MONTE, *Revising the European Arrest Warrant, European Added Value Assessment accompanying the European Parliament's Legislative own-Initiative Report (Rapporteur: Baroness Ludford MEP)*, European Parliamentary Research Service, 2014, pp. 15-16.

65 *Ibidem*, Article 80, paragraph 1, letter i.

the latter is based on the mutual recognition between Member States formed, *inter alia*, by the binding jurisdiction of the CJEU. Moreover, the UK Government highlighted the significant costs of each EAW that lead to change the system. On the other hand, the requests of the EAW from the UK and to the UK increased in a considerable manner and various point of views highlighted the importance of this instrument. The former Prime Minister Theresa May affirmed that without an agreement and in the absence of the EAW, the UK will be ‘a honeypot for all of Europe’s criminals on the run from justice’.⁶⁶

Secondly, it is difficult to realize a ‘surrender agreement’ in a short time, based on the Norway and Ireland’s experiences that took 13 years until the entrance into force of the agreement.

Moreover, going back to the 1957 Council of Europe Convention on Extradition would cause a regression and would lead to delays, higher costs, and political interferences, although accessing to the 1957 Council of Europe Convention would allow the UK to become a non-EU Contracting Party and then to negotiate agreements with the other Contracting Parties.

Lastly, applying the Extradition (Provisional Arrest) Bill to Member States would imply adopting unilateral measures, which would be incompatible with the bilateral extradition’s context.

Therefore, Chapter 7 of the UE Draft text of the Agreement on the New Partnership with the United Kingdom seems to be the more feasible alternative as it reflects the Council Framework Decision of 2002.

66 T. SHIPMAN, *May warns Tory rebels will make Britain a honeypot for criminals*, *The Times*, 26 October 2014.
