



Catch me if you can: The European Arrest Warrant and the end of mutual trust

by Camino Mortera-Martinez

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EU countries trust each other less than they used to, making them less willing to co-operate. Brexit, violations of the rule of law and Catalan separatism have put the European Arrest Warrant (EAW), which is founded upon trust, to the test.

Even judges sitting in the Luxembourg-based European Court of Justice (ECJ), one of the EU's most technocratic institutions, cannot escape the heat of European politics these days. A string of recent responses by the court to technical questions about the EAW has highlighted the limits of judicial co-operation in the EU. More crucially, submissions to the court display a lack of trust between member-states that is new and worrying.

The [EAW](#) governs extradition between EU member-states. It is noteworthy because it breaks with the legal tradition of sovereign state control over extradition: in most cases, the EAW mandates the immediate arrest and repatriation of criminals and suspects, so long as the requesting state complies with some basic conditions. There is no other multilateral extradition treaty in the world that allows for this degree of automaticity. The reason is 'mutual recognition': EU member-states are supposed to treat each other's decisions as if they were their own, whether rules governing the sale of alcohol or prosecution. This principle of mutual trust underpins both the EU's internal market and its area of freedom, security and justice (ASFJ). But trust is a rare commodity in the EU these days.

The ECJ [does not issue warrants](#). But it can solve disputes between member-states when they are unhappy or unsure about a decision to extradite somebody. National authorities can ask the Luxembourg court to block or grant a surrender request through a so-called preliminary ruling. Such rulings often require the court to examine obscure paragraphs of the law. It is not often that politics intrudes – precisely because the EAW, by giving more power to the courts than to governments, was designed to avoid political rows between countries over extradition cases. And yet the ECJ has recently had to rule, indirectly, on Brexit and on Poland's alleged attacks on the rule of law. In the coming months, the Luxembourg judges will probably also have to consider Spain's Catalan separatism issue.

Since a [landmark decision](#) in 2016, the court has allowed member-states to deviate from the EAW's very limited grounds for refusal in cases where there is a [serious risk of inhuman treatment](#). (National authorities are not, in principle, free to question whether or not the requesting state complies with fundamental rights standards.) In December 2017, the Commission initiated the 'Article 7 procedure' against Poland because it feared that there was a clear risk to the rule of law [there](#). In July 2018, the ECJ [allowed](#) an Irish court to suspend the extradition of a Polish national because of the deteriorating protection of fundamental rights in Poland. The court's ruling is by no means a blanket prohibition on surrendering people to Poland – judges need to assess each case separately to determine whether an individual's fundamental right to a fair trial is threatened. But the court's decision, which it took very quickly, did not ease tensions between the Polish government and the EU.

Like the Article 7 procedure, Brexit has also forced to the ECJ to consider a new issue: whether a departing member-state that has not yet left should have the same rights and obligations as remaining members – even in cases where those rights and obligations will extend after exiting the club. In September 2018, in a case simply referred to as '[RO](#)', the ECJ was confronted with another extradition question from Ireland, this time on whether an Irish national should be handed over to Britain to serve a sentence that would continue after Brexit. In an equally swift ruling, the court said Ireland could not use the UK's notification of Article 50 as grounds to refuse extradition, as Britain was still an EU member. The court used the same argument again in early 2019 to say that Britain should continue to process asylum seekers according to the EU's 'Dublin regulation' until it formally leaves the bloc.

The case of fugitive Catalan leader Carles Puigdemont has not reached the ECJ yet, but it will raise some interesting questions when it does. Puigdemont fled Spain to Belgium after facing charges related to his actions when [Catalonia declared its independence](#), and was eventually arrested in Germany under an EAW. But a German court ruled that he could be extradited for misuse of public funds, but not on the more serious charge of rebellion. Spain has said it will contest the ruling.

Spain's government lawyers think the EAW system is rewarding criminal behaviour in this case. Twelve members of the regional government that unilaterally declared Catalonia's independence in 2017 are currently on trial in Spain, while five others have found refuge elsewhere in the EU and cannot be extradited. (Two additional members of the government went to Switzerland, where the EAW does not apply.) All 19 were charged with the same offences: rebellion, by breaching the Spanish Constitution and unilaterally declaring a region's independence through violent means; sedition, by forcefully hindering the application of the law; and embezzlement.

Puigdemont and the Spanish Supreme Court judge Pablo Llarena have engaged, as in the titular film, in a game of 'catch me if you can'. In the Hollywood blockbuster, a globe-trotting fraudster repeatedly evades capture by the police. In the jargon, he was merely 'forum shopping' – the technical name for moving jurisdiction in the hope of getting a more favourable court judgment. Puigdemont went to Belgium because he knew the laws and the politics there were more likely to work in his favour. Llarena issued a warrant there, only to withdraw it shortly after, as he did not trust the Belgian courts would send Puigdemont back. The Spanish judge then waited until Puigdemont went to Germany to re-issue the warrant, as he thought that German courts would agree to surrender him. After all, the Spanish offence of rebellion is copied from [the German Criminal Code](#). After the refusal of the German court to surrender Puigdemont for rebellion, Llarena withdrew the warrant altogether.

It is not uncommon for criminal suspects, particularly those wealthy enough to afford a good lawyer, to do a bit of forum shopping. Indeed, combatting such shopping is the very reason that the European Arrest Warrant exists – so that criminals cannot use their free movement rights to find safe havens in the EU. But it is certainly less common for a judge to play cat and mouse because they lacked trust in other European courts.

Spain's government lawyers believe the German court breached EU law because it went too far in applying the so-called double criminality test. Under the EAW, extradition is automatic for a list of 32 offences. For crimes not on that list, like rebellion, sedition and embezzlement, national courts are allowed to decide whether or not the requested person should be surrendered. They do so by applying the double criminality test: if the crime the person is wanted for exists in the requested member-state, extradition should be granted. But the ECJ [has said](#) that, to ensure that the EAW works properly, national courts should not second-guess the requesting state's decision to charge a person, and use the double criminality test as a means to re-litigate the case. They should merely answer one question: if this offence had been committed in my country, would the courts have done something about it? In the mind of the Spanish courts, the answer in Puigdemont's case should have been 'yes': no German court would have allowed anyone to declare the independence of one of the country's *Länder*.

The ECJ will decide whether the Spanish lawyers are right. But taken together, these three cases show that judicial co-operation is being tested in Europe, as mutual trust in each other's national systems wanes. The EAW dates back to 2002, when member-states were more concerned about the threat of international terrorism than they were about each other's domestic shenanigans. But, at a time of conflicting views about a range of issues from [competition rules](#), to migration, to the rule of law, the presumption of mutual trust can no longer be taken for granted.

There is no accurate, up-to-date EU-wide data on how many EAWs member-states issue per year and to which countries. So there is no way of knowing whether countries are now using the EAW less than they used to (although a 2015 European Commission [paper](#) suggested that they are not). The overall number of warrants does not in itself, however, tell us much about mutual trust. A more reliable indicator would be a comparison of data on the origin and destination of warrants and surrenders. A recent quantitative [study](#) using evidence from Ireland and the UK (two EU countries that do compile and publish detailed information on EAWs) shows that member-states tend to surrender more people to countries with higher standards of rule of law or better human rights records. Although all member-states are parties to the European Convention on Human Rights (ECHR), not all apply it equally. This contributes to the perception that some EU countries are less likely than others to uphold the rule of law.

The EU has tried to foster trust between member-states by harmonising criminal procedure standards across the bloc. And yet the EU is still not seen as a level playing field in legal matters: in 2013, the most up-to-date year for which there is relevant data, a majority of EU citizens [thought](#) there were large differences between national judicial systems in terms of quality (58 per cent), efficiency (58 per cent) and independence (52 per cent) – and it is fair to assume these percentages are probably higher now because of rule of law and corruption scandals. Some even [argue](#) that most of the EU's current problems, including Brexit, are the result of an erosion of trust between member-states – including trust in others' ability to apply and enforce decisions fairly.

Today's EU is very different from that of the early 2000s. Most of the EU's landmark projects, from the euro to Schengen, have experienced some sort of crisis within the last ten years. Even the membership of the club is now in question. Several years of tough discussions have left national governments exhausted and wary of each other. Mutual trust is now perhaps more an aspiration than a reality. And trust is the bedrock of any functional extradition system.

There can be no meaningful reform of the EU's judicial co-operation channels until the Brussels institutions acknowledge this trust gap. Member-states like Italy and Germany are tightening their laws so they can have more control over extradition, particularly of their own nationals – the EU's EAW legislation gives EU countries some discretion when they transpose it into their national law. And national courts of otherwise pro-European countries like Spain are becoming noticeably more [critical](#) of the EU. To avoid the erosion of the extradition system, the EU may want to improve trust not only between national governments but, more importantly, between those actually in charge of using the system.

It is important for judges, lawyers and court officials to understand that politicians' rhetoric does not automatically compromise the independence of a country's judiciary or that, sometimes, political theatre for the benefit of the outside world has little to do with the quality and integrity of the work of the courts. To that end, it is good for legal practitioners to meet and learn about each other's systems and legal traditions – the Commission has several programmes to help with that. But it is equally crucial that member-states are able to monitor the status of the rule of law in Europe. The European Commission's attempt at keeping track of the independence, quality, and efficiency of national court systems, through the so-called EU justice scoreboard, has largely failed because many governments saw it as a badly designed way of naming and shaming, and refused to provide accurate and comparable data. A recent Belgian proposal giving a more prominent role to member-states in peer-reviewing each other's legal systems seems to have gathered more support.

One way or another, the EU needs to solve its mutual trust problem. Otherwise, national courts will become more and more critical of the EU. That will be music to the ears of eurosceptic parties and fugitives on the run everywhere in Europe.

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