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Tom Cockroft and Emily Mattin consider the impact of Brexit on extradition proceedings

The European Arrest Warrant

Since 2004 EU Member States seeking the surrender of suspects and convicted individuals from other Member States have been able to take advantage of the European Arrest Warrant (EAW) scheme. The EAW was a radical development underpinned by a relatively simple idea - a judicial order issued by one member state to another is automatically recognised unless limited grounds of refusal apply. Its operation is based on the principle of mutual trust and mutual recognition of the legal systems and judiciaries of fellow member states. The EAW is widely recognised as one of the most successful instruments of judicial cooperation in the EU, replacing the previous lengthy extradition processes that used to exist between Member States.

The EAW was incorporated into the law of England and Wales through the Extradition Act 2003. Those states which were part of the EAW scheme were designated as Part 1 territories. Part 2 meanwhile covered requests processed under a bilateral treaty between the UK and the Requesting State, multilateral conventions, the Council of Europe's 1957 European Convention on Extradition or diplomatic channels.

When an EAW is issued, real-time alerts are transmitted to the law enforcement agencies of all member states through the Schengen Information System ('SIS2' in its latest iteration). Alison Saunders, the former Director of Public Prosecutions, described the EAW as 'three times faster and four times less expensive than the alternatives'. The figures bore this out. In 2018/19 15,540 requests were made under the EAW scheme and 1,412 EAW-related arrests were made.[1]

[1] Briefing paper, House of Commons 'Brexit next steps: The European Arrest Warrant', 20 February 2020

The question is, as the UK and EU pursue their own agendas in justice, security and judicial cooperation, will the UK be able to retain the capabilities it had under the EAW?

The transition period

During Brexit negotiations the EU made it clear that the EAW was introduced to support free movement of people, recognising that criminals could take advantage of the benefits flowing from it. Participation in the EAW scheme was therefore predicated on this ideal. Finding itself unwilling or unable to cross this political red line, the UK sought to agree streamlined extradition arrangements, based on the EU's existing agreements with Iceland and Norway.

As time went on, legal practitioners and commentators grew concerned that in the absence of new bilateral treaties or significant amendments to domestic legislation, the UK faced a cliff-edge and would be forced to revert to the EAW's less effective predecessor, the European Convention on Extradition (ECE). It was feared that this would represent a return to a system that was far more political in nature, subject to less judicial oversight and ultimately reliant on more nebulous diplomatic channels.

Post-Brexit: a new extradition landscape?

Christmas Eve brought some relief for those concerned about the dangers of relying on the ECE. It was announced that the UK and EU had come to a deal, namely the Trade and Co-operation Agreement ("TCA"). Part Three of this agreement governs 'surrender arrangements' between the UK and EU and creates a new extradition warrant, imaginatively named 'Arrest Warrant' (AW).

Much like its name, the AW's provisions closely replicate the position under the EAW scheme. EU member states remain designated as Part 1 territories and concerns that the new extradition regime would be more of a political entity than a legal one do not appear to have materialised. Although the Court of Justice of the European Union has no jurisdiction over this agreement, the 'Specialised Committee on Law Enforcement and

Judicial Cooperation' has been established to oversee it. At the most fundamental level, an AW will remain subject to limited grounds of refusal, strict timescales and will be executed by judicial authorities.

Importantly, as the Divisional Court recently observed in *Polakowski & others v Westminster magistrates' court and others* [2021] EWHC 53 (Admin), in rejecting the applicants' argument that there was no longer any basis in law for their continued detention after 31 December 2020, (i) Article 185 of the UK/EU withdrawal agreement provides that the Framework Decision underlying the EAW scheme has effect from the end of the transition period and without limitation of time – furthermore, the court found, the parties to the withdrawal agreement had agreed that the term 'member state' within the Framework Decision should be read to include the UK.

The new surrender arrangements are broadly a mix of the EAW and the Iceland/Norway agreement. As such, only minor amendments to the Extradition Act 2003 were required, given effect by Part 1 of the European Union (Future Relationship) Act 2020 which came into effect on 31 December 2020.

There are however, a number of subtle departures from the EAW scheme which may prove to have significant implications for the UK's ability to extradite speedily and efficiently in the future.

Dual criminality

The new surrender arrangements have resurrected the requirement for dual criminality in all cases[2] - the offence in question must exist in both states for extradition to be permissible. How much of a hindrance this proves to be will depend on whether the UK and EU continue to develop their criminal laws in broad harmonisation, as we have seen in areas such as Anti-Money Laundering. The UK may find the impact also varies between individual member states, for example, dual criminality is likely to be less of a stumbling block for those countries more closely aligned with the common-law tradition.

[2] Even where the European framework list is ticked: Article Law.Surr.79.2; Article Law.Surr.81.1.

Political offences

Under the new agreement, states can refuse to execute an AW for political offences or an offence 'inspired with political motives'.[3] The UK and Member States can notify the Specialised Committee that this bar will only be applied in relation to specified terrorism offences. This provision closely replicates Article 6 in the Norway/Iceland agreement.[4]

As such, EU countries could in future refuse to extradite suspected terrorists to the UK if their crimes are regarded as political in nature or motive. The sensitivities in this area are borne out by the Norway/Iceland agreement, which took 13 years of negotiations before it was finalised.

Proportionality

As requested by the UK, the surrendering country now has discretion to decide if extradition would be disproportionate to the seriousness of the alleged offence. Interestingly, this is not a feature of the Iceland/Norway agreement. This provision includes the need for states to consider the possibility of less coercive measures 'with a view to avoiding unnecessarily long periods of pre-trial detention'.[5] For the less serious offences, this principle may frustrate UK requests for extradition. Conversely, of course, it is likely to assist those fighting to stay in the UK.

Nationality exception

In one of the most substantial departures from the EAW scheme, Member States will be able to refuse to surrender their own nationals and vice-versa.[6] If a state does refuse to surrender its own national, the TCA requires them to 'consider instituting proceedings against [them] which are commensurate with the subject matter of the arrest warrant, having taken into account the views of the issuing State'.[7] The UK and the EU are required

3 Article Law.Surr.82
4 *Official Journal L 292 , 21/10/2006 P. 0002 - 0019*
5 Art Law Surr 77
6 Article Law Surr 83
7 Article Law.Surr.83.3

to notify the Specialised Committee of declarations to apply the nationality bar. It is anticipated that Germany, Austria and Slovenia will submit declarations as they did under Article 85 of the Withdrawal Agreement.

Furthermore, it seems reasonable to assume that states that have applied this provision in relation to Iceland and Norway will likely do the same with the UK. This may prove important in light of the fact that 16 EU member states do not extradite their nationals to non-EU countries.

Human rights safeguards and diplomatic assurances

The TCA specifies a number of rights for the requested person, including the right to an interpreter, the right to have their state's consular authority notified of their arrest and the right to a lawyer in accordance with domestic law.[8] The EU had requested a right to legal aid but this was not included.

In what has been termed 'the guillotine clause', the European Commission have added a provision to allow the EU to terminate part three of TCA if the UK were to leave the convention or be denounced by the European Court of Human Rights for non-execution of a European Court of Human Rights judgement. [9] The mechanism for suspension is triggered by 'serious and systemic deficiencies' within either the UK or EU concerning the protection of fundamental rights or the rule of law.[10]

The agreement also allows for diplomatic assurances in cases where there are substantial grounds for believing that there is a real risk to the fundamental rights of the requested person.[11] Although this is not a feature of the EAW or the Iceland/Norway agreement, its impact may be minimal as it reflects the UK's longstanding practice of seeking such assurances in cases where there are significant human rights concerns.

[8] Article Law Surr.98
[9] Art Law.Other.137
[10] Article Law.Other.136
[11] Art Law Surr 84

Enforcement

Aside from these legal developments, one of the most important obstacles to the UK retaining an effective extradition regime is a practical one, namely enforcement. The surrender agreement provides for 'cooperation on operational information', to enable the exchange of existing information and intelligence. However, on 1 January this year, the UK automatically forfeited its membership of Europol, Eurojust and the Schengen Information System (SIS2).

The SIS2 database provides alerts in real time to domestic police forces and border authorities on criminal suspects, traffickers, terrorists and missing persons. It is the most widely used database across the Union, previously accessed by the UK around half a billion times each year.[12] Whilst the UK will retain access to the Interpol I-24/7 database, this system does not provide alerts in real time and is not used as regularly by all 27 member states.

Conclusion

Under the EAW, the UK was a part of an extradition regime which enjoyed unprecedented legal and constitutional deference. The new surrender agreement makes no reference to 'mutual trust' or 'mutual recognition' in one another's legal systems. It may be that these concepts are, at least linguistically, reserved only to those states who remain a part of the Union. However, there are indications that this omission is a deliberate reflection of a new relationship that must be forged in the context of extradition.

Notwithstanding the broad similarities between the two regimes, given the departures discussed in this article and the new challenges in enforcement, it remains to be seen how the EU and the UK will be able to retain a model of close and speedy judicial corporation.

[12] https://news.sky.com/story/brexit-britain-will-be-less-secure-without-access-to-shared-data-12172399

It is perhaps apt that in her closing remarks at the end of the Brexit negotiations, European Commission President Ursula von der Leyen quoted T.S. Eliot:

'What we call the beginning is often the end / And to make an end is to make a beginning."

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