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Post-Brexit UK / EU extradition arrangements: business as usual?

On 24 December 2020, the UK and the EU agreed the terms of the Trade and Cooperation Agreement (the "**TCA**"). Contained in the TCA is the agreement reached between the 27 EU Member States (the "**EU 27**") and the UK on extradition. These new extradition arrangements replace the Framework Decision 2002/584 JHA on the European Arrest Warrant (the "**EAW Framework**") as the basis for extradition requests between the UK and the EU 27. However, many of the EAW Framework's key features remain. The question therefore arises: despite the significant changes to relations with the EU 27, rung in by the end of the transition period, will extradition between the UK and EU remain a case of "business as usual"?

The new legal framework

Title VII Part 3 of the TCA governs the UK's new extradition arrangements with the EU 27. The new arrangements have been implemented domestically through the European Union (Future Relationship) Act 2020, which came into force at 11pm on 31 December 2020 (the "**2020 Act**"), which in turn amends the Extradition Act 2003 (the "**2003 Act**").

It is worth noting that for anyone arrested (or provisionally arrested) in the UK before 11pm on 31 December 2020, the extradition process will continue to follow the old arrangements – i.e. the EAW Framework and the 2003 Act in its unamended form. This was confirmed in the recent decision of the Divisional Court in *Polakowski v Westminster Magistrates' Court Divisional Court [2021] EWHC 53 (Admin)*, in which five applicants, which included a hedge fund employee whose extradition is sought in connection with the Cum-Ex tax fraud investigation, were unsuccessful in challenging the legal basis for their surrender. If an EAW was issued, but no arrest was made, before 11pm on 31 December 2020, it will constitute a valid arrest warrant under the new arrangements.

Legal continuity

Government guidance published last month described the UK's new extradition arrangements with the EU 27 as "*providing for the continuation of a warrant-based system…modelled on the processes the EU has had with Norway and Iceland*." Given Iceland and Norway's processes with the EU largely mirror the provisions of the EAW Framework it is unsurprising to find there are more similarities than differences between Part 3 of the TCA and the EAW Framework. Indeed, much of the architecture of the EAW Framework remains, and a significant amount of the wording in Part 3 of the TCA is almost identical to that contained in the EAW Framework.

In the UK's domestic legislation, the EU 27 are designated Part 1 Territories under the new arrangements (by virtue of the 2020 Act), meaning Part 1 of the 2003 Act continues to govern extradition to the EU 27. Key features of Part 1 of the 2003 Act, in keeping with the EAW Framework, are the limited political and intergovernmental involvement in the extradition process and the relatively short time limits in which certain decisions and actions should be taken. This is in contrast to Part 2 of the 2003 Act, which governs extradition to countries outside of the UK with which the UK has general extradition arrangements, which provides for greater (albeit still limited) involvement of the Secretary of State and a more protracted process. The TCA's mirroring of the EAW Framework means that such features of Part 1 of the 2003 Act shall remain and few amendments have needed to be made to the 2003 Act so far.

Whilst this legal continuity will be welcomed by many, there are, however, some notable differences, including some which also distinguish the new arrangements from those the EU holds with Iceland and Norway. How meaningful these divergences will prove to be will only become apparent in the fullness of time and as case law develops.

Key changes

Access to the Second Generation Schengen Information System ("SIS II")

From a practical perspective, perhaps the most significant departure from the EAW Framework is the UK no longer having access to SIS II. SIS II is a real-time database of alerts used by authorities in the EU 27, Norway, Iceland, Switzerland and Liechtenstein to share and act on information on certain categories of people and objects, including persons wanted for arrest and extradition. UK law enforcement, who have relied significantly on SIS II, conducting approximately 600 million searches on the system in 2019, will now have to rely on information shared through Interpol red notices. The extent to which countries uploading information onto SIS II also make use of the Interpol route (which is not consistently used by all of the EU 27), and the speed with which they do so, will have a significant bearing on the full impact of the UK's loss of access to SIS II. Nonetheless, in the short term, at the very least, the UK finds itself worse off as regards cross-border information sharing.

Oversight

Whereas the Court of Justice of the European Union had jurisdiction over the arrangements governed by the EAW Framework, a "Specialised Committee on Law Enforcement and Judicial Cooperation" will oversee the functioning of the new arrangements under the TCA, including dispute resolution. The TCA provides that the Committee will continue to have regard to case law on the EAW Framework.

Proportionality

In a departure from both the EAW Framework and the EU's arrangements with Iceland and Norway, the TCA establishes a principle of proportionality: "*Cooperation through the arrest warrant must now be "necessary and proportionate taking into account the rights of the requested person and the interests of the victims, and having regard to the seriousness of the act, the likely penalty that would be imposed and the possibility of a State taking measures less coercive than the surrender of the requested person particularly with a view to avoiding unnecessarily long periods of pre-trial detention*."

This is not entirely surprising given the EAW Framework has frequently been criticised for the absence of such a principle, albeit the European Arrest Warrant Handbook on how to issue and execute a European arrest warrant does state that EU Member States should adopt a proportionality test when considering whether to issue a warrant. This test though is not mandatory and the UK previously sought to address concerns over the disproportionate use of EAWs by some EU Member States by amending the 2003 Act in 2014 to include a proportionality bar at section 21A. Some however did not think this went far enough, with the proportionality bar only applying to extradition requests concerning individuals accused of an offence, and not requests concerning individuals who have already been convicted. Such critics will therefore be pleased to see that the overarching principle of proportionality under the new arrangements applies to both accusation and conviction cases.

Dual criminality

Under the EAW Framework, the requirement of dual criminality was not applicable to conduct that fell within a list of certain offences. In respect of extradition requests made to the UK, this *mandatory* waiver of dual criminality was contained within sections 64 and 65 of Part 1 of the 2003 Act. These sections also required the conduct to occur in an EU Member State and no part of it to occur in the UK for the waiver to apply to such requests.

The new arrangements under the TCA however provide for an *optional* waiver of dual criminality in respect of a new list of offences identical to that previously set out in the EAW Framework save for the addition of bribery and the unlawful seizure of spacecraft. The relevant parts of sections 64 and 65 of the 2003 Act have been repealed by section 12 of the 2020 Act accordingly. As a result, the present starting point is that dual criminality will be required in nearly all cases (see below), albeit the lasting impact of this change will ultimately be shaped by whether the UK or any of the EU 27 opt in to the waiver. If so, the 2003 Act will likely need amending again.

With wording very similar to that contained in the EU's arrangements with Norway and Iceland, the TCA provides that dual criminality will not apply in relation in cases involving group liability for offences concerning terrorism, drug trafficking or serious offences of violence.

Political offence exception

The new arrangements establish a political offence exemption. Whilst the starting point is that the execution of an arrest warrant may not be refused on the basis that the offence may be regarded by the State executing the warrant as a political offence, the UK and the EU 27 have the option to limit the applicability of this rule to categorised terrorism offences.

This is distinct from section 13 of the 2003 Act (which reflects recital 12 of the EAW Framework), which provides that extradition shall be barred in

circumstances where it appears that an issued warrant has actually been issued for the purpose of prosecuting or punishing a person for their political *opinions*.

Nationality exception

The TCA introduces an optional nationality bar to extradition – enabling the UK or any of the EU 27 to notify the Special Committee on Law Enforcement and Judicial Cooperation that they will not extradite their own nationals. Under the transitional provisions of the UK-EU Withdrawal Agreement, only Germany, Austria and Slovenia elected to engage this right, and it remains to be seen whether they, and indeed other, EU Member States will now opt in to this new exception under the TCA. The UK opted not to do so under the transitional provisions and there has been no indication that the UK will adopt a different approach under the TCA.

Should the UK or any of the EU 27 opt in to the nationality exception and subsequently refuse to execute an arrest warrant on that basis, they are obliged to consider instituting proceedings against their own national which are commensurate with the subject matter of the arrest warrant, having taken into account the views of the State requesting extradition.

Rights of requested persons and diplomatic assurances and guarantees

The TCA maintains, and builds on, the provisions contained in the EAW Framework as regards the guarantees that may be sought from States seeking extradition prior to the execution of any arrest warrant. Article 84(c) of the TCA, for example, is a new provision which states that if there are substantial grounds for believing that there is a real risk to the protection of the fundamental rights the requested person, the judicial authority in the State executing the arrest warrant may require, as appropriate, additional guarantees as to the treatment of the requested person after the person's surrender before it decides whether to execute the arrest warrant.

The TCA also establishes further rights of requested persons. For example, requested persons now have the right to have their State's consular authorities notified of their arrest and are also entitled to a copy of the arrest warrant translated into their native language, or any other language which the requested person speaks or understands, if they do not speak or understand the language of the arrest warrant.

Mutual recognition

It is noteworthy that Title VII Part 3 of the TCA does not include the principle of mutual recognition based on mutual trust that underpins the EAW Framework. Had it done so, it is questionable whether several of the new provisions introduced in the TCA, such as the political offence and nationality exceptions could have been included, given they are arguably inconsistent this underlying principle. Nonetheless, it remains to be seen whether the UK will be willing to depart from this principle in practice given the UK's longstanding confidence and trust in EU Member States' legal systems. Furthermore, Part 3 of the TCA does contain a general article which states: "*The cooperation provided for in this Part is based on the Parties' and Member States' long-standing respect for democracy, the rule of law and the protection of fundamental rights and freedoms of individuals, including as set out in the Universal Declaration of Human Rights and in the European Convention on Human Rights, and on the importance of giving effect to the rights and freedoms in that Convention domestically*."

Trouble ahead in the UK's fight against financial crime?

From a practical perspective, the UK's loss of access to SIS II will likely be significant in the short-term at the very least. From a legal perspective, the extent to which one could characterise the new arrangements as "business as usual" will largely hang on the UK and EU 27's approach to several of the new opt-in provisions.

As regards the UK's financial crime regime, the nationality exception, in particular, may prove to be the most significant divergence from the previous arrangements from a legal standpoint. As set out above, whilst there has been no indication that the UK will seek to prevent the extradition of its own nationals, Germany, Austria and Slovenia are likely to do so, and others may follow suit. France, for example, does not extradite its own nationals to countries outside of the EU because it has extraterritorial jurisdiction to prosecute crimes committed by or against its own nationals abroad.

This will likely present issues for UK prosecuting authorities, such as the SFO, in cross-border investigations should the subjects of such investigations be nationals of any countries opting in to the exception. Indeed, despite it being common for the victims of financial crime to be in one country with the perpetrators based elsewhere, the UK authorities may find themselves in a position where they are unable to prosecute individuals who are out of their reach and have caused harm to UK businesses and individuals. Close cooperation between the UK authorities and their EU counterparts will be key to overcoming such issues. With this in mind, the UK's departure from Europol

and Eurojust, along with the UK no longer being able to issue European Investigation Orders to the EU 27 or, as mentioned above, access SIS II, is unfortunate. The TCA does however provide for the UK and EU agencies to continue to set up Joint Investigation Teams, which have wielded success to date. In this respect, UK authorities will continue to work closely with their EU counterparts and, together, will need to give careful consideration as to how to manage investigations going forwards.

Nonetheless, there is still the risk of the UK authorities deploying considerable resources into investigations only for the subjects to escape prosecution in the UK by fleeing to their home countries. This would be a somewhat bitter pill to swallow even if the authorities in the country refusing extradition elected to institute proceedings against the individual. It would also weaken the reputation of a UK authority such as the SFO, which prides itself on being a global enforcement agency, and potentially drive a wedge between the UK authorities and their EU counterparts. Whether such issues comes to pass will very much be determined by EU Member States' approach to the new arrangements and, for now, it is a case of wait and see.

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