

Extradition under the EU–UK Trade and Cooperation Agreement¹

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Abstract

When the EU–UK Trade and Cooperation Agreement (TCA) was reached between the UK and the EU on 24 December 2020, it gave extradition practitioners only a few days to identify what, if anything, would remain from the European Arrest Warrant (EAW) system before it came into force on 1 January 2021. The article starts by setting out how the EAW was implemented in the UK prior to 1 January 2021, before turning to the TCA itself and what it means for extradition or ‘surrender’ between EU member states and the UK. In short, the EAW system no longer applies. The authors set out how the TCA provides a degree of continuity, now under the watchful eye of the UK–EU ‘Specialised Committee on Law Enforcement and Judicial Cooperation’. There are notable departures from the EAW system however, in both practical and legal terms, that open the door to increased scrutiny of extradition requests. The authors explore the impact these changes may have on the future of extradition with the EU27, to or from the UK.

Keywords

Extradition, surrender, brexit, Trade and Cooperation Agreement, European Arrest Warrant

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1. Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other Part, [2020] OJ L 444/14, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L.2020.444.01.0014.01.ENG>> accessed 23 January 2021 (TCA). All provisions cited in this piece without further reference belong to the TCA.
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The UK–EU extradition regime prior to 1 January 2021

Until 31 December 2020, the United Kingdom was a participating Member State in the European Arrest Warrant (EAW) system. This allowed the United Kingdom to both seek extradition and to process extradition requests in line with the EAW Framework Decision.² The Trade and Cooperation Agreement (TCA) sets out the United Kingdom's future extradition arrangements with the EU.

The UK Extradition Act 2003 (the Extradition Act 2003) incorporated parts of the EAW Framework Decision into the UK law. The statute split extradition proceedings into one of two groups. Part 1 proceedings applied to extradition proceedings subject to the EAW system. It set down specific timelines and expectations, streamlined to reflect the framework's emphasis on mutual trust and recognition between Member States³ and supported by a strong body of case law both at national and at European level. Part 2, on the other hand, applies to all other states with which the United Kingdom has extradition arrangements. It is subject to far more cumbersome and lengthy proceedings, requiring closer scrutiny and oversight and involves a level of decision-making by the executive.

However, the United Kingdom when implementing the spirit of the EAW Framework Decision added a number of additional safeguards not present therein and has made further additional amendments to the basis upon which the United Kingdom could refuse to extradite. For instance, section 12A of the Extradition Act 2003 allows the United Kingdom to refuse surrender where there has been no decision to 'charge or try' an individual by the requesting judicial authority. In reality, the concept of 'charge or try' is not one that fits within any one European legal system and is unique in the EAW scheme as the United Kingdom being the only common law jurisdiction. As a result, there have been very few refusals because of this bar. Another example is section 19B of the Extradition Act 2003 – the 'forum' bar – which permits the United Kingdom to refuse surrender where a substantial measure of the conduct takes place in the United Kingdom and that (having considered specified matters) it is not in the interests of justice that extradition should take place. These are not reciprocated by other EAW Member States. The TCA seeks to create a hybrid of the EAW and United Kingdom recent practice.

The United Kingdom officially left the EU on 31 January 2020 after which there was a transition period that lasted until 31 December 2020. Art 4 and Art 126 of the EU–UK Withdrawal Agreement⁴ established that the EAW system remained in operation throughout the transition period albeit by allowing the United Kingdom to be counted as a Member State for the purposes of the transition period. The United Kingdom did not adopt any statutory changes to the way in which it

2. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States [2002] OJ L 190/1, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 [2009] OJ L 81/24 (EAW Framework Decision), consolidated version <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02002F0584-20090328&from=EN>> accessed 23 January 2021 (EAW Framework Decision).

3. *Ibid* Art 1(2).

4. Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C1 384/1, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12019W%2FTXT%2802%29> accessed 23 January 2021 (Withdrawal Agreement).

handled EAW requests during this period. The EAW regime continued to apply to extradition cases where the requested person was arrested prior to 11 p.m. on 31 December 2020.⁵

There was some concern that the intertwining of the Withdrawal Agreement and the TCA has left old EAW cases in a difficult position. Firstly, the transition provisions on their face do not necessarily allow the United Kingdom to continue as a ‘Member State’ for the purposes of the Framework Decision even though the Withdrawal Agreement tries to apply that. However, the parties to the Withdrawal Agreement agreed expressly that the term ‘Member State’ as it appeared in the Framework Decision should be read as if it included the United Kingdom. Secondly, going forward the United Kingdom may end up applying different law to the same issues. Since 1 January 2021, the United Kingdom no longer has membership of the Court of Justice of the European Union (CJEU) and is not bound by its decisions. So as cases progress, the United Kingdom will develop its own law perhaps distinct from the approach of the CJEU and EU Member States. That conundrum is not an easy one to solve.

Which legislation applies going forward

On 24 December 2020, the United Kingdom and the EU reached an agreement, the TCA, setting out the terms by which their relationship on a wide range of issues would be governed. In Title VII, Part 3 of the TCA, is a section entitled ‘Surrender’ which deals with the issue of extradition.

This confirmed that the EAW was now a thing of the past insofar as the EU–UK relationship was concerned. The United Kingdom ceased to apply the Framework Decision. The United Kingdom, in its negotiations, had made clear that it did not want to participate in the EAW but still wanted a fast-track system of extradition in principle based on the Norway and Iceland surrender agreement with the EU.⁶

The TCA was adopted into the UK national law by the European Union (Future Relationship) Act 2020 (EUFRA 2020), which received Royal Assent on 31 December 2020. It came into force at 11 p.m. the very same day.

Section 11 of EUFRA 2020 re-establishes that the 27 EU Member States and Gibraltar⁷ remain Part 1 states under the Extradition Act 2003. Norway and Iceland, previously Part 1 states, were re-designated to Part 2 territories (having become Part 1 territories when the extradition arrangement between themselves and the EU came into force). Sections 12 and 13 of EUFRA 2020 substituted any mention of the EAW Framework Decision in favour of the TCA.⁸ At first glance, the changes to Part 1 of the Extradition Act 2003 appear superficial. However, there are differences between the EAW Framework Decision and the TCA, which could drastically alter the way in which extradition will operate in practice between the United Kingdom and the EU27.

It is too early to say with any certainty how beneficial or not these changes are; however, it is clear that considerable efforts have been made to provide some continuity to what was generally perceived as a system of surrender that was less cumbersome than reliance on the European Convention

5. The Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019, reg. 57 and Art 62(1) (b), 126 of the Withdrawal Agreement.

6. Agreement 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 [2006] OJ L 292/2, <[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22006A1021\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22006A1021(01)&from=EN)> accessed 23 January 2021.

7. Law Enforcement and Security (Amendment) (EU exit) Regulations 2019 reg 55(2).

8. See sections 12–13 European Union (Future Relationship) Act 2020.

on Extradition (CoE) 1957.⁹ On the other hand, there are some clear departures from the EAW regime which may well open the door to a more fractured and varied approach.

TCA extradition

The United Kingdom becomes a third country for extradition to and from the EU. This automatically has practical consequences for the United Kingdom's extradition proceedings since it limits the United Kingdom's access to certain data systems, namely the Schengen Information System II, through which EAW and security information is shared between EU countries. The United Kingdom now has to receive or disseminate extradition arrest warrants bilaterally or through the INTERPOL system. The United Kingdom's third-party status also affects the way that EU member countries can decide to respond to extradition requests from the United Kingdom, opting in or out of certain aspects of the TCA, as will be discussed in below.

Under the EAW regime, the CJEU had oversight and was the ultimate decision maker on how the Framework Decision should be implemented by Member States. The TCA has rejected the CJEU in this capacity, instead creating a 'Specialised Committee on Law Enforcement and Judicial Cooperation'¹⁰ that has the authority to, amongst other things, 'monitor and review the implementation and ensure the proper functioning of this Agreement or any supplementing agreement'.¹¹ The Specialised Committee will be made up of 'representatives of each party' who must have the appropriate expertise relevant to the issue in question.¹² This Committee is effectively an Arbitration Committee and is no substitute for judicial oversight and control, nor independence and impartiality.

Nevertheless, while the TCA marks a clear departure from EU judicial mechanisms, the TCA is just as clear that adherence to the European Convention on Human Rights (ECHR)¹³ is nothing less than mandatory.¹⁴ As such, the rulings of the European Court of Human Rights (ECtHR) still very much apply.

The Framework Decision was based on 'mutual trust and cooperation'. The TCA does not use such language, instead stating at Art LAW.GEN.3:

The cooperation provided for in this Part is based on the Parties' and Member States' longstanding 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.

There is also a commitment to the ECHR although, as considered in the chapter on Human Rights, there are worrying potential derogations available in the future.

9. European Convention on Extradition, CoE [1957] European Treaty Series – No. 24 (CoE 1957 Extradition Convention).
 10. Art INST.2(1) (r) and Art LAW.SURR.85. See S. Schomburg, in this issue.
 11. Art INST.2(4) (a).
 12. Art INST.2(5).
 13. Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR], CoE [1950] European Treaty Series – No. 005 (ECHR).
 14. Art LAW.GEN.3(2).

Still an EAW?

It is evident, when looking at the TCA's provisions on extradition, that in great part, it seeks to provide a level of continuity regarding extradition proceedings between EU Member States and the United Kingdom.

Warrant

The uniformity provided to extradition requests between EU Member States under the EAW regime was greatly assisted by the use of the 'Form A' which essentially squeezed the extradition request into a tick box exercise.

The EAW has been replaced with the simply named 'arrest warrant'. The content and form of the new arrest warrant as set out and contained at Annex Law-5: Arrest Warrant in the TCA¹⁵ mirrors the content and form of an EAW as set out in the EAW Framework Decision¹⁶ and the Extradition Act 2003.¹⁷

Those who appreciated 'Form A' will no doubt be relieved to see that it has been replaced in the TCA by the form at Annex Law-5: Arrest Warrant, containing many of the same headings, including a list of offences where dual criminality is assumed. However, the dual criminality issue is not in fact fully settled because as yet it seems there has been no agreement to implement the Framework List clause in the TCA. Therefore, at the moment dual criminality will have to be proved in all cases except those offences falling within Article LAW.SURR.79(3) (a) and (b).

Timelines

Art LAW.SURR.95 of the TCA and Art 17 of the EAW Framework Decision both establish that where a requested person consents to their surrender, the final decision on executing the extradition request shall take place within 10 days after consent was given. In other cases, the final decision on executing the extradition request will be within a period of 60 days from the requested person's arrest. Reasons must be provided to the requesting country where there is any delay.

Rights of the requested person

Art LAW.SURR.89 of the TCA and Art 11 of the Framework Decision both confirm a requested person's right to a lawyer and interpreter/translator. The TCA expands on the EAW Framework Decision somewhat by including the right to consular services, as well as the right to a lawyer in the issuing state. The right to a lawyer in the requesting state is a welcome addition to the protections available to requested persons, albeit it is not clear how an individual can exercise that right and how such representation will be funded.

Mandatory and optional grounds for non-execution of the arrest warrant

Art LAW.SURR.80 of the TCA and Art 3 of the of the EAW Framework Decision are identical, upholding the mandatory refusal of extradition requests where the offence is covered by amnesty in

15. Art LAW.SURR.86.

16. Art 8 EAW Framework Decision.

17. Section 2 Extradition Act 2003.

the executing state, where there is double jeopardy, or the requested person is under the age of criminal responsibility in the executing state.

The first part of Art LAW.SURR.81 of the TCA is identical to Art 4 of the Framework Decision. The additions towards the end of Art LAW.SURR.81 of the TCA merely incorporate features that can be found in other sections of the Framework Decision such as decisions taken in absentia and decisions motivated to prosecute people on the grounds of a certain protected characteristic (sex, race, religion, etc.).

Political offences

The EAW Framework Decision had no specific political offence exception that would allow extradition to be barred in cases where the conduct amounted to a political offence. Art LAW.SURR 82 of the TCA introduces a political offence exception. It establishes as a starting point that extradition cannot be refused on the grounds that the executing state views the conduct as a political offence. However, it allows the state to notify the Specialised Committee that this approach is limited to certain specified offences, mostly terrorism related.

The idea of having a bar to extradition where there are suspicions that the request is politically motivated is not a particularly novel addition within the UK–EU extradition regime. The EAW Framework Decision at point 12 identifies ‘political opinions’ as one of the protected characteristics that can be a bar to extradition where there are reasons to believe that the extradition request is motivated to prosecute or punish the person for their political beliefs.

The political offence exception is different to the extraneous considerations bar to be found in the Extradition Act 2003 or the test under section 1 of the Refugee Convention 1951.¹⁸ Political offence relates to offences that are political in character – the best example of this in international law is Art 1(f) of the Refugee Convention. These offences tend to be overtly political – incitement to riot, exceeding executive powers and election fraud – as opposed to politically motivated requests that often take the form of fabricated charges of fraud but do not on their face look political. This exception would cover very few cases, for instance, the request for surrender of some leading Catalan nationalists would probably have fallen under this ground. It is an important new safeguard, albeit one that will be relied upon in very few cases.

Some new additions: A departure from mutual recognition and trust

Principle of proportionality

The Framework Decision contained no requirement that the extradition request be proportionate. As such, the new ‘Principle of Proportionality’ at Art LAW.SURR.77 is a marked addition. It is notable that this is the second Article in the Surrender section of the TCA, emphasising the importance it holds within this new extradition arrangement. It also appears to replace the principle of mutual recognition found in Art 1 of the EAW Framework Decision.

Art LAW.SURR.77 is a call for ‘necessary and proportionate’ cooperation between the states involved. It highlights that the following must be considered:

‘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

18. Convention Relating to the Status of Refugees of 28 July 1951, UN [1951], United Nations Treaty Series, 189, 137 (Refugee Convention 1951).

than the surrender of the requested person particularly with a view to avoiding unnecessarily long periods of pre-trial detention’.

An example of its application is provided at Art LAW.SURR.93, when considering the time limits within which to make the surrender decision, or if further information is required to guide the final decision on surrender. Unfortunately, there is (not yet) a place foreseen in the new EU–UK Arrest Form to address this explicit optional ground to refuse surrender. However, given the clear and explicit importance of this principle under the TCA, the issuing authorities should document somewhere in the extradition request their reasoned decision that the extradition request indeed meets the proportionality threshold.

While the principle of proportionality is new to the formal UK–EU extradition relationship, it was identified as a working principle in the Commission handbook on issuing and executing an EAW (EAW Handbook),¹⁹ although in a limited form. The Handbook recommends that issuing Member States should be alive to the proportionality of their request. However, it is also clear that the EAW does not give the executing state a duty to assess the proportionality of the issuing state’s EAW because this would undermine the principle of mutual trust and recognition. Any concerns about the proportionality by the executing state should be ‘exceptional’.²⁰ Here lies an important difference to the surrender procedure under the TCA: It is now a must, between all remaining Member States of the EU, when in doubt or when so asked by another Member State, to give reasons why the requested measure is proportionate.

The United Kingdom on the other hand, in 2014, adopted the concept of proportionality into the Extradition Act 2003 through the implementation of section 21A. This section introduced a bar to extradition if it would be disproportionate to extradite by taking into account (a) the seriousness of the conduct alleged to constitute the extradition offence, (b) the likely penalty that would be imposed if the requested person was found guilty of the extradition offence’ and (c) the possibility of less coercive measures being taken against the requested person.

Interestingly, the TCA’s principle of proportionality has taken the approach found in the EAW Handbook and in the Extradition Act 2003 and extended it so that proportionality is now a consideration ‘throughout’ the extradition or surrender process.²¹ There is no longer the assumption that mutual trust and recognition applies in this area, instead encouraging communication between the parties where proportionality concerns are live.

End of dual criminality assumptions?

Art LAW.SURR.79 of the TCA and Art 2 of the EAW Framework Decision contain the same list of offences that avoid the executing state having to consider whether the offence in question is subject to dual or ‘double criminality’. The only minor addition is that bribery has been added to the corruption category. These offences must be subject to a maximum sentence of at least 3 years imprisonment in the issuing states.

However, under the TCA, there is no longer an assumption of dual criminality for offences falling within Article LAW.SURR.79(3) (a) and (b). In addition, the exemption of dual criminality

19. Commission Notice, *Handbook on how to issue and execute a European arrest warrant* (2017/C 335/01) 6 October 2017.

20. *Ibid* Part II, 5.7.

21. UK and EU Joint Political Declaration on Title VII [Surrender] Of Part Three [Law Enforcement and Judicial Cooperation in Criminal Matters] [2000] OJ L 444/1475, < <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L:2020:444:FULL&from=EN>> accessed 23 January 2021.

control now only applies in cases where both the issuing and the executing State have made a Notification under Art LAW.SURR.79(4) to the Specialised Committee to formalise reciprocity on this issue. This need for a Notification is confirmed in the new arrest warrant form,²² warning that the tick box list of offences only needs to be filled in where a Notification has been provided. The United Kingdom has, to date, given no such notification.

In terms of the UK law, section 12 of EUFRA 2020²³ amended the Extradition Act 2003 to delete references to the assumptions of dual criminality established in the European framework. It was not replaced by anything that might suggest assumptions around dual criminality. As such, the starting point will be to assume that dual criminality must be proved in every case. It will be interesting to see how this plays out in practice and whether it will affect the good faith that previously existed between the United Kingdom and other EU Member States in this area.

Nationality

The Framework Decision only gave special status to nationals and residents of the executing state where the executing state took it upon itself to allow the subject to serve their sentence in the home country.²⁴ The TCA retains this power²⁵ and has added a new 'Nationality Exception'.²⁶

The starting point for the 'Nationality Exception' in the TCA is that the warrant should be executed regardless of the subject being a national of the executing state. However, it also provides an opt-out clause whereby any Member State can notify the Specialised Committee that their own nationals will not be surrendered to the United Kingdom (or vice versa). The agreement states that where a Member State does not extradite its own nationals, it should consider bringing domestic proceedings in relation to the criminal matters or explain why it cannot (principle of *aut dedere aut judicare*).

This is likely to be a real issue where the United Kingdom is the issuing country, particularly since this is not an uncommon position for countries to hold in relation to extradition requests from outside of the EU – Germany,²⁷ Austria and Slovenia were quick to notify the General Secretariat of the EU that they refused to surrender their own nationals to the United Kingdom even under the EAW system during the transition period.²⁸ 16 of the 27 EU States do not extradite their own nationals outside of the EU. This is a further area that may undermine the culture of mutual cooperation and trust between the United Kingdom and other EU Member States.

Assurances

Art 5 of the EAW Framework Decision already allowed guarantees or assurances to be obtained from requesting countries where the subject was tried or sentenced in absentia; if there were concerns about whole life sentences being imposed; or in order to request the return of the subject to serve their sentence if they were a national of the executing state. Art LAW.SURR.84 of the TCA

22. TCA, Annex Law: Arrest Warrant.

23. Subsection (5) has now been omitted from Sections 64 and 65 of the Extradition Act 2003.

24. EAW Framework Decision Art 4(6).

25. Art LAW.SURR.81(1) (f).

26. Art LAW.SURR.83.

27. For Germany it was and is mandatory to bring such a notification according to Art 16 (2) of the Basic Law of 1949, the German Constitution. An English version is https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html.

28. Declaration by the European Union [2020] OJ L29/188, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_2020.029.01.0188.01.ENG> accessed 23 January 2021.

adds a further ground for assurance where there are ‘substantial grounds to believe that there is a real risk to the protection of the fundamental rights of the requested person’. In such cases, the executing state can request a guarantee regarding the subject’s treatment before it makes the decision about executing the warrant. This incorporates the reasoning of the CJEU in *Aranyosi*²⁹ and the ECtHR in *Othman*.³⁰ Therefore, for the first time, this case law on the ‘real risk’ test and assurances will be incorporated into an agreement rather than the case law.

This is a significant expansion that further underlines the importance of compliance with the ECHR by providing a procedural mechanism to facilitate ECHR compliance. The United Kingdom already makes regular use of the ability to seek assurances or further information from issuing states where there are concerns about ECHR compliance, usually over prison conditions, so this probably will not mark a significant change. The question is, will increased use of assurances lead the new extradition system down the route of more bilateral cooperation or will it lead to increased suspicion and lack of trust between the parties to the TCA?

Conclusion

Whilst the UK government announced on 24 December 2020 that its analysis of the deal in relation to extradition was a ‘UK win’, the TCA appears to be closer aligned to the EU’s negotiating position. The United Kingdom sought fast-track extradition arrangements based on the Norway and Iceland surrender agreement with the EU³¹ rather than the EAW Framework Decision. In addition, they sought further safeguards to ensure that surrender can be refused if someone’s fundamental rights were at risk, extradition would be disproportionate or if they were likely to face long periods of pretrial detention. On the other hand, the EU sought extradition arrangements based on streamlined surrenders subject to judicial oversight with the possibility to waive dual criminality and to determine the applicability of political offences and to consider not extraditing own nationals.

Instead of scoring points to determine ‘who won’ the UK government should seek to ensure that its law enforcement agencies are not further hampered in their ability to investigate and prosecute cross border criminality as a consequence of its departure from the EU.

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29. Case C-404/15 and C-659/15 PPU, *Pál Aranyosi e Robert Căldăraru* [2016] ECLI:EU:C:2016:198.

30. *Othman (Abu Qatada) v United Kingdom*, App No 8139/09 (ECtHR, 17 January 2012).

31. Agreement 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 [2006] OJ L 292/2, <[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22006A1021\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22006A1021(01)&from=EN)> accessed 23 January 2021.