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Extradition: Back to the Future (with no flux capacitor)

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In the likely scenario of a "no-deal" Brexit, the UK's extradition arrangements will be going 'Back to the Future'. The UK will cease its participation in the European Arrest Warrant ("EAW") regime and revert to the 1959 European Convention on Extradition ("ECE 1959"). This is expected to create substantial legal and political hurdles to the continued EU- UK cooperation on extradition. Most notably Germany has already declared it will stop extraditing its nationals to the UK post-Brexit.

The current extradition regime in the UK is governed by the Extradition Act 2003 ("EA 2003") where territories with whom the UK shares an extradition relationship are defined as either Part 1 (European Arrest Warrant) or Part 2 (other territories). The UK Government has confirmed that on Brexit day the UK will leave the European Arrest Warrant scheme.

On 15 January 2019, the Government published the draft Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019, which makes arrangements on a variety of criminal law issues should the UK leave the EU on 29 March 2019 without securing a transitional agreement or a permanent deal.

Amongst other things (e.g. the UK's loss of Europol and Eurojust membership), the regulations make provision for amending the EA 2003 so that after Brexit, all extradition requests to and from EU states will once again be regulated by the ECE 1959. This draft legislative amendment raises concerns about an increase in cost, processing time and political influence on the extradition process. It also poses potentially unresolvable issues for several EU countries which have either repealed legislation implementing the ECE 1959 or have historically refused to extradite their own nationals outside of the EAW regime.

Legal and political consequences

EAWs were devised to ensure the timely and cost-efficient extradition of individuals between member states, to allow them to face prosecution for a crime they were accused of, or to serve a prison sentence following a conviction. EAWs were also designed to free the extradition process of much political influence. Leaving the EAW regime may bring significant unwelcome changes to the administration of extraditions:

- **Potential increase in delay, cost and political influence**: The average time needed to process an EAW ("**Part 1**") request is roughly 3 months. A "Part 2" request costs four times as much and takes an average of 10 months to be addressed.[1] The difference arises from the fact that the EAW extradition process is purported to be a purely judicial one, whilst "Part 2" extraditions are dealt with through diplomatic channels that often involve protracted negotiations and thus higher costs.

1 https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/77/77.pdf

- **"Own nationals" exception – the comeback?** Article 6 ECE allows parties to the convention to refuse to extradite their own nationals – a bar to extradition that the EAW regime had dispensed with as between EU states. The UK never traditionally availed itself of this exception, but for many EU countries this poses a significant constitutional issue. To extradite their own citizens outside of the EU, various states including Germany, France, the Czech Republic, the Netherlands, Slovenia and Slovakia would have to amend their constitutions. Germany has already confirmed it will not do so and will not extradite its own nationals to the UK after Brexit. Others, such as Poland, Greece and several of the Scandinavian countries have historically refused to extradite their nationals, and may continue to decline doing so outside of the EAW framework and the independent adjudication guaranteed by the ECJ. Finally, some countries (e.g. Ireland), have repealed their national laws implementing the ECE 1959. They, too, may have to pass legislation to permit extradition to and from the UK post-Brexit.

- **Bars to extradition and human rights**. The vast majority of bars to extradition are available under the EA 2003 for "Part 1" and "Part 2" territories, including whether allowing extradition may violate the human rights of the requested individual.[2] However, although the considerations in law are the same, their practical application may differ. This is because EAW ("Part 1") requests benefitted from a near irrebuttable presumption of compliance with ECHR rights based on the principle of mutual trust. Post-Brexit, it is likely that the presumption will continue to apply. It is as yet unclear whether there will be increased scope over time for UK and other European courts to scrutinize human rights violations and refuse extradition on this basis.

- **"Dual criminality" and "*prima facie* case*"***. "Part 2" requests are subject to a "dual-criminality" condition, i.e. the conduct over which the individual is sought must be a criminal offence in both the requested and the requiring state. The EAW system had removed this requirement in respect of certain categories of offences.[3] It is unclear whether dual criminality will be required under the ECE 1959 in respect of former "Part 1" territories. Separately, proving a "prima facie case" was not a condition for EAW cases and is not strictly required under the ECE 1959. However, Article 13 ECE 1959 allows the requested state to ask "supplementary information" about the circumstances of the case. Depending on the level of detail required and how frequently this proviso is invoked, extraditions to EU states may be delayed.

Conclusion

There is widespread consensus among extradition practitioners that the ECE 1959 cannot adequately substitute the system of EAWs. The goodwill built since 2004 between the UK and the EU may mitigate, to an extent, the risk of returning to the high levels of cost, delay and political influence which characterised the extradition processes of the past. Given time, it may be possible to reach a surrender agreement with the EU, or with individual EU countries through bilateral treaties, which could in part or in full replicate EAWs.

However, in the short term, it may not be possible to persuade EU countries that changing their internal policies or constitutions to accommodate the UK is worth the political effort required. In addition, any new extradition arrangements with the UK will presumably require extensive negotiations: Iceland and Norway's surrender agreement with the EU took 13 years to negotiate and was concluded in 2014. It is not yet in force.

The UK is seeking to time travel without the magic of a flux capacitator; will its extradition arrangements with the EU even get off the ground?

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2 There are a few exceptions: for example, absence of a prosecution decision (s.12A EA 2003) and proportionality (s. 21A EA 2003) will no longer apply.

3 The "European Framework List" of offences under Schedule 2 EA 2003.

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