Twitter Thread by Edward S. Grange



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What does the Trade and Cooperation Agreement mean for the UKs #extradition arrangements with the EU27?

Lets take a quick look

Thread

A reminder of the respective positions of the UK and the EU in their negotiations that the UK Government considered a 'UK WIN'

Government analysis of the deal

Extradition	Fast-track extradition arrangements based on NO/IS Surrender Agreement with further safeguards. Not seeking EAW participation.	Arrangements based on streamlined procedures subject to judicial control and time limits, providing for UK/EU MS surrender of suspected and convicted individuals expeditiously. Possibility to waive double criminality requirement, and to determine applicability for political offences and to own nationals.	**UK WIN** – Secured fast track arrangements in line with NO/IS model. With additional safeguards so that surrender can be refused if someone's fundamental rights are at risk, extradition would be disproportionate, or they are likely to face long periods of pre-trial detention.

As rightly said by @StevePeers, the reality is that the Agreement appears to be closer aligned to the EUs objectives, particularly given the EU wins in relation to dual criminality, ability to determine applicability for political offences and surrender for own nationals. EU WIN?

To begin with, as per previous arrangements, #extradition is referred to throughout as a 'mechanism of surrender'. Unlike the Council Framework Decision on the European Arrest Warrant, the surrender arrangement does not appear to be based on mutual trust and recognition

TITLE VII: SURRENDER

Article LAW.SURR.76: Objective

The objective of this Title is to ensure that the extradition system between the Member States, on the one side, and the United Kingdom, on the other side, is based on a mechanism of surrender pursuant to an arrest warrant in accordance with the terms of this Title.

Despite the UK Governments negotiating position of not seeking participation in the EAW scheme, the Agreement provisions on surrender closely follows the wording of the Framework Decision on the European arrest warrant

Proportionality is a key feature preserving the proportionality bar to extradition that was introduced inserted into the Extradition Act 2003 (Section 21A). The aim is to 'avoid unnecessarily long periods of pre-trial detention'. UK WIN

Article LAW.SURR.77: Principle of proportionality

Cooperation through the arrest warrant shall 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.

The Framework list of 32 offences for which dual criminality is not required is maintained. EU WIN

4. The United Kingdom and the Union, acting on behalf of any of its Member States, may each notify the Specialised Committee on Law Enforcement and Judicial Cooperation that, on the basis of reciprocity, the condition of double criminality referred to in paragraph 2 will not be applied, provided that the offence on which the warrant is based is:

(a) one of the offences listed in paragraph 5, as defined by the law of the issuing State; and

(b) punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years.

5. The offences referred to in paragraph 4 are:

– participation in a criminal organisation;

– terrorism as defined in ANNEX LAW-7;

– trafficking in human beings;

– sexual exploitation of children and child pornography;

– illicit trafficking in narcotic drugs and psychotropic substances;

In a WIN for the EU, the Agreement contains an ability to apply the political offence exception to surrender if notification is given to the Specialised Committee on Law Enforcement and Judicial Cooperation, but not in relation to certain terrorism offences

Article LAW.SURR.82: Political offence exception

1. The execution of an arrest warrant may not be refused on the grounds that the offence may be regarded by the executing State as a political offence, as an offence connected with a political offence or as an offence inspired by political motives.

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2. However, the United Kingdom and the Union, acting on behalf of any of its Member States, may each notify the Specialised Committee on Law Enforcement and Judicial Cooperation that paragraph 1 will be applied only in relation to:

(a) the offences referred to in Articles 1 and 2 of the European Convention on the Suppression of Terrorism;

(b) offences of conspiracy or association to commit one or more of the offences referred to in Articles 1 and 2 of the European Convention on the Suppression of Terrorism, if those offences of conspiracy or association correspond to the description of behaviour referred to in Article LAW.SURR.79(3) [Scope] of this Agreement; and

(c) terrorism as defined in ANNEX LAW-7 to this Agreement.

3. Where an arrest warrant has been issued by a State having made a notification as referred to in paragraph 2 or by a State on behalf of which such a notification has been made, the State executing the arrest warrant may apply reciprocity.

Importantly there is a nationality exception. Surrender can be refused by a Union member if notification is given that they will not surrender own nationals. 16 of the EU27 do not extradite own nationals outside of the Union. EU WIN

Article LAW.SURR.83: Nationality exception

1. The execution of an arrest warrant may not be refused on the grounds that the requested person is a national of the executing State.

2. The United Kingdom, and the Union, acting on behalf of any of its Member States, may each notify the Specialised Committee on Law Enforcement and Judicial Cooperation that that State's own nationals will not be surrendered or that the surrender of their own nationals will be authorised only under certain specified conditions. The notification shall be based on reasons related to the fundamental principles or practice of the domestic legal order of the United Kingdom or the State on behalf of which a notification was made. In such a case, the Union, on behalf of any of its Member States or the United Kingdom, as the case may be, may notify the Specialised Committee on Law Enforcement and Judicial Cooperation within a reasonable time after the receipt of the other Party's notification that the executing judicial authorities of the Member State or the United Kingdom, as the case may be, may refuse to surrender its nationals to that State or that surrender shall be authorised only under certain specified conditions.

3. In circumstances where a State has refused to execute an arrest warrant on the basis that, in the case of the United Kingdom, it has made a notification or, in the case of a Member State, the Union has made a notification on its behalf, as referred to in paragraph 2, that State shall consider instituting proceedings against its own national which are commensurate with the subject matter of the arrest warrant, having taken into account the views of the issuing State. In circumstances where a judicial authority decides not to institute such proceedings, the victim of the offence on which the arrest warrant is based shall be able to receive information on the decision in accordance with the applicable domestic law.

4. Where a State's competent authorities institute proceedings against its own national in accordance with paragraph 3, that State shall ensure that its competent authorities are able to take appropriate measures to assist the victims and witnesses in circumstances where they are residents of another State, particularly with regard to the way in which the proceedings are conducted.

It is unlikely UK will make such a declaration and therefore UK nationals still at peril in the UK from arrest warrants from Union members, even if there is no reciprocity.

The guarantees to be given by the issuing member state are similar to those already given under the EAW. In relation to the transfer of sentence, it is unclear how this will be given effect in he absence of an agreement on the transfer of prison sentences

Article LAW.SURR.84: Guarantees to be given by the issuing State in particular cases

The execution of the arrest warrant by the executing judicial authority may be subject to the following guarantees:

(a) if the offence on which the arrest warrant is based is punishable by a custodial life sentence or a lifetime detention order in the issuing State, the executing State may make the execution of the arrest warrant subject to the condition that the issuing State gives a guarantee deemed sufficient by the executing State that the issuing State will review the penalty or measure imposed, on request or at the latest after 20 years, or will encourage the application of measures of clemency for which the person is entitled to apply under the law or practice of the issuing State, aiming at the non-execution of such penalty or measure;

(b) if a person who is the subject of an arrest warrant for the purposes of prosecution is a national or resident of the executing State, the surrender of that person may be subject to the condition that the person, after being heard, is returned to the executing State in order to serve there the custodial sentence or detention order passed against him or her in the issuing State; if the consent of the requested person to the transfer of the sentence or detention order to the executing State is required, the guarantee that the person be returned to the executing State to serve the person's sentence is subject to the condition that the requested person, after being heard, consents to be returned to the executing State;

(c) if there are substantial grounds for believing that there is a real risk to the protection of the fundamental rights of the requested person, the executing judicial authority 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 Content and Form of the arrest warrant appear similar to the European arrest warrant form. Interestingly, the Agreement asks for 'evidence' rather than 'information' of an enforceable judgment, [domestic] arrest warrant or other judicial decision.

Article LAW.SURR.86: Content and form of the arrest warrant

1. The arrest warrant shall contain the following information set out in accordance with the form contained in ANNEX LAW-5:

(a) the identity and nationality of the requested person;

(b) the name, address, telephone and fax numbers and e-mail address of the issuing judicial authority;

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(c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect that fall within the scope of Article LAW.SURR.79 [Scope];

(d) the nature and legal classification of the offence, particularly in respect of Article LAW.SURR.79 [Scope];

(e) a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person;

(f) the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing State; and

(g) if possible, other consequences of the offence.

This may mean requests for surrender have to be accompanied by a copy of the enforceable decision or [domestic] arrest warrant

The proforma 'arrest warrant' contained in the Annex of the Agreement closely resembles the 'tick box' template used for the European arrest warrant

ANNEX LAW-5: ARREST WARRANT

This warrant has been issued by a competent judicial authority. I request that the person mentioned below be arrested and surrendered for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.[158]

(a)	Information regarding the identity of the requested person:	
	Name:	
	Forename(s):	
	Maiden name, where applicable:	
	Aliases, where applicable:	
	Sex:	
	Nationality:	
	Date of birth:	
	Place of birth:	
	Residence and/or known address:	
	Language(s) which the requested person understands (if known):	
	Distinctive marks/description of the requested person:	
	Photo and fingerprints of the requested person, if they are available and can be transmitted, or contact details of the person to be contacted in order to obtain such information or a DNA profile (where this evidence can be supplied but has not been included)	

(b)	Decision on which the warrant is based:	
1.	Arrest warrant or judicial decision having the same effect:	

As the UK will no longer have access to SISII, the arrest warrant can be circulated and transmitted by @INTERPOL_HQ.

Article LAW.SURR.87: Transmission of an arrest warrant

If the location of the requested person is known, the issuing judicial authority may transmit the arrest warrant directly to the executing judicial authority.

Article LAW.SURR.88: Detailed procedures for transmitting an arrest warrant

1. If the issuing judicial authority does not know which authority is the competent executing judicial authority, it shall make the requisite enquiries, in order to obtain that information from the executing State.

2. The issuing judicial authority may request the International Criminal Police Organisation ("Interpol") to transmit an arrest warrant.

3. The issuing judicial authority may transmit the arrest warrant by any secure means capable of producing written records under conditions allowing the executing State to establish the authenticity of the arrest warrant.

4. All difficulties concerning the transmission or the authenticity of any document needed for the execution of the arrest warrant shall be dealt with by direct contacts between the judicial authorities involved, or, where appropriate, with the involvement of the central authorities of the States.

5. If the authority which receives an arrest warrant is not competent to act upon it, it shall automatically forward the arrest warrant to the competent authority in its State and shall inform the issuing judicial authority accordingly.

As such, expect Paragraph 4 of the Extradition Act (Provisional Arrest) Act 2020 to be brought into force that will insert the Union members into Schedule A1 of countries upon which the UK can 'provisional arrest' individuals sought on an @INTERPOL_HQ Red Notice.

4 In Schedule A1 (as inserted by paragraph 3), at the appropriate places, insert—

"Austria";

"Belgium";

"Bulgaria";

"Croatia";

"Cyprus";

"Czech Republic";

"Denmark";

"Estonia";

"Finland";

"France";

"Germany";

"Greece";

"Hungary";

"Iceland";

"Ireland";

"Italy";

"Latvia";

"Lithuania";

"Luxembourg";

"Malta";

"The Netherlands";

"Norway";

"Poland";

"Portugal";

"Romania";

"Slovakia";

"Slovenia";

"Spain";

"Sweden".

It is unclear whether the giving of 'consent' to surrender will waive an individuals specialty protection. Under the EAW, the giving of consent did not (as a result of amendments to the Extradition Act 2003 in July 2014) result in a waiver of specialty.

Article LAW.SURR.91: Consent to surrender

1. If the arrested person indicates that he or she consents to surrender, that consent and, if appropriate, the express renunciation of entitlement to the speciality rule referred to in Article LAW.SURR.105(2) [Possible prosecution for other offences] must be given before the executing judicial authority, in accordance with the domestic law of the executing State.

Those detained in custody throughout the surrender process will continue to have such periods of detention deducted from any custodial sentence imposed in the issuing state if surrendered.

Article LAW.SURR.104: Deduction of the period of detention served in the executing State

1. The issuing State shall deduct all periods of detention arising from the execution of an arrest warrant from the total period of detention to be served in the issuing State as a result of a custodial sentence or detention order being passed.

2. All information concerning the duration of the detention of the requested person on the basis of the arrest warrant shall be transmitted by the executing judicial authority or the central authority designated under Article LAW.SURR.85 [Recourse to the central authority] to the issuing judicial authority at the time of the surrender.

In the event that the Agreement is suspended or terminated, arrest warrants will continue to apply to those individuals arrested prior to disapplication.

The effect of the Agreement on exiting EAWs is that it applies to those EAWs issued before the end of the transition period (31 December 2020) that have yet to be executed.

Article LAW.SURR.112: Application to existing European arrest warrants

This Title shall apply in respect of European arrest warrants issued in accordance with Council Framework Decision 2002/584/JHA[81] by a State before the end of the transition period where the requested person has not been arrested for the purpose of its execution before the end of the transition period.

Overall, it appears closer to a EU WIN than a UK WIN but is certainly less cumbersome, at first review, than having to rely on the European Convention on Extradition 1957, which would have been the fallback position had an agreement not been reached.

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