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BULLETIN

The Impact of Brexit on Surrender Cooperation between the EU and the United Kingdom

Stefania Kolarz

By negotiating the post-Brexit trade and cooperation agreement (TCA), the EU and the United Kingdom (UK) sought to maintain the effectiveness of cooperation in surrendering persons to criminal proceedings. However, the rules contained in the TCA are a manifestation of the weakening of trust between the participating states. While the procedures will remain swift, simplified extradition will be less frequent and rely on the goodwill of the states to a larger extent.

Need to Develop a New Procedure. The European Arrest Warrant (EAW) was introduced in 2004 in response to the problem of people evading criminal responsibility by exercising EU freedom of movement. The EAW enables extradition between EU Member States on a simplified basis, meaning it partially eliminates the requirement of double criminality (establishing that the act is punishable by the law of both states, the issuing and executing one) and the specialty rule (limitation of the procedure to the acts indicated in the application). According to data from the British National Crime Agency (NCA), based on the EAW, the UK transferred an average of 1,000 people per year (for example, in 2019, most were sent to Poland—241), and received 150.

Brexit meant that the EAW pertained only to proceedings initiated between the UK and EU Member States before the end of the transition period on 31 December 2020. As a result, there was a risk that the basis for the transfer of persons between the EU and the UK would again become an intergovernmental mechanism, namely the European Convention on Extradition, adopted in 1957 by the Council of Europe. Compared to the EAW, the procedure under the Convention is more time-consuming (about a year, compared to 48 days on average under the EAW), complex (conducted through ministries), and costly. Before the EAW, the UK processed fewer than 60 people per year through the Convention procedure. Therefore, the parties before Brexit were looking for a solution that would not reduce the effectiveness of cooperation in this area after the UK left the EU.

Surrender Rules in the TCA. The simplified extradition procedure between the EU and the UK is regulated in the TCA, provisionally applicable from 1 January 2021. It is modelled on the agreement between the EU Member States and Iceland and Norway, and partly on the EAW, for example, the protection against excessive length of proceedings. It is also based on cooperation between courts and, depending on the domestic systems, the prosecutorial offices. Public administration is not involved in the transfer, so the risk of politicisation is reduced and the procedure is faster. The time frame has also been maintained—a decision to surrender should be made within 10 days with the consent of the requested person or 60 days from the moment of arrest, and the surrender itself should take place within the 10 days following the decision. The TCA also provides for implicit consent to prosecution, sentencing, or detention, including for an offence other than that constituting the reason for the surrender, based on reciprocal notifications between the EU and the UK.

Compared to the EAW and the Iceland-Norway model, the TCA extends the rights of the requested person. It provides for their right to contact a consul and to the assistance of a lawyer in the issuing state, who is to assist defence lawyers in the state executing the arrest warrant. Due to the differences between the systems of continental and British common law, this should translate into a better understanding of foreign regulations by the participants of

the proceedings, and thus to an overall improvement of the procedure. It also should indirectly support the exchange of good practices and knowledge, as well as the integration of the defence lawyer community, which is still informal at the EU level (compared, for example, to the cooperation of judges within Eurojust, the EU Agency for Criminal Justice Cooperation).

Potential Difficulties. Although during the period of EU membership it was the UK that conducted selective cooperation in the area of freedom, security, and justice, obstacles to the transfer of persons after Brexit appeared on the side of the EU. So far, nine Member States have raised the incompatibility of surrendering their nationals to non-EU states with the basic principles of their legal orders (Austria and Czechia have made them conditional on the consent of the transferred person). The UK will therefore have to apply for the detention and surrender of their nationals while abroad with the help of Interpol. Its databases will also replace SIS II (Schengen Information System) through which arrest warrants are published, and to which the UK has ceased to have access. This will have a negative impact on the exchange of information because, for EU Member States, notifications from SIS II have priority over those from Interpol and are also more detailed.

Requested persons have already tried to use Brexit to block their surrender, highlighting the increased uncertainty in the rules applied to them by the UK after leaving the EU. However, this allegation was rejected by the CJEU in 2018 due to the continued application by the UK of guarantees resulting from, among others, the implementation of the European Convention on Human Rights into the British legal order. Nevertheless, the TCA extends the possibilities for refusing surrender on the grounds of human rights protection. First, it adds new grounds for such a refusal: reasons to believe on the basis of objective elements that the arrest warrant has been issued for the purpose of prosecuting or punishing a person based on the person's sex, race, religion, ethnic origin, nationality, language, political opinions, or sexual orientation, or that that person's position may be prejudiced for any of those reasons. Second, the TCA explicitly requires the surrender to be proportionate (for the EAW, this is a recommendation). This means an obligation of 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. Protection of personal data is an additional difficulty. Although the currently applicable British law meets EU standards, any change in UK or EU regulations in this regard entail the risk of violating the rights of transferred persons, and, consequently, refusal to cooperate.

The TCA also introduces a requirement to establish double criminality of an act with the possibility of withdrawing this condition on the basis of reciprocity (two states make declarations that they will not use it). This is one of the most important differences from the EAW, in the execution of which the cooperating states automatically criminalised 32 types of acts. Given the potential for divergences in interpreting whether an act is a criminal offence in the issuing and executing states at the same time, and for the variety of statements, this may increase the number of refusals to surrender.

Conclusions and Perspectives. The above solutions may lead to a regular mutual qualitative evaluation of the legal systems of the cooperating states, which previously happened only incidentally. Not only are they a symptom of weakening mutual trust between states, but they will also translate into fewer surrenders. They can also encourage requested persons and their defenders to engage in "forum shopping", that is, presenting their procedural situation in cooperating states in such a way as to lead to the transfer or refusal of it depending on a subjective assessment of what is more beneficial (in terms of the penalty, conditions in prisons, etc.). In addition to the uncertainty of the person being transferred as to the final decision on their extradition, the situation of the victims and witnesses may also deteriorate. Under the principle of *aut dedere aut iudicare*, requiring the state to judge the person whose surrender has been refused, they will be summoned to participate in hearings pending before foreign courts (courts of the state that refused to surrender).

In relations between the EU and the UK, the departure from the principle of mutual recognition, fundamental for the EAW, which puts the legal standards of all cooperating states on an equal footing, is therefore a step backwards. Along with the lack of jurisdiction of the CJEU in the field of TCA, it will prevent further harmonisation of surrenders of persons between the UK and the EU and may diversify the practice of EU Member States in this regard.

Changes in the principles of surrendering persons will also be visible in the cooperation between Poland and the UK. Under the new rules, it will be more difficult to prosecute persons who have committed crimes in Poland and left for the UK. The possibility of surrendering persons to the UK will also be limited because the Polish constitution subjects the extradition of Polish citizens to establishing double criminality of the committed act.

Editors: Sławomir Dębski, Patrycja Sasnal, Rafał Tarnogórski, Sebastian Płóciennik, Justyna Szczudlik, Daniel Szeligowski,
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