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### BREXIT BRIEFING NO. 2

#### The implications for extradition.

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This series of briefing papers explores issues arising for consideration in domestic criminal law and practice as the Government embarks on re-framing the terms of our relations with the EU.

This second paper examines the impact of the decision to withdraw from the EU on the UK's current extradition arrangements, in particular the European Arrest Warrant ("EAW") system. The focus of the paper is on the legal consequences that will follow from a decision to trigger the process of withdrawal under Article 50 of the Treaty on European Union, and possible alternatives to the current system of extradition that could be adopted in any post-EU legal system.

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#### THE CONTEXT

The source of the UK's extradition obligations in international law are the bi-lateral and multilateral extradition treaties and agreements to which the UK is a party. Within the European Union, extradition is governed by the EU Framework Decision on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) (the "Framework Decision"). The UK's international law extradition obligations are implemented in domestic law through the Extradition Act 2003 ("the 2003 Act").

The 2003 Act is made up of two parts:

- (i) Part 1 gives effect to the UK's obligations under the Framework Decision and applies to states designated by the Secretary of State as "category 1 territories". It involves a streamlined system of surrender between EU Member States (and Gibraltar) based on the mutual recognition of arrest warrants and judicial decisions.
- (ii) Part 2 of the 2003 Act governs extradition with states designated as "category 2 territories", which in practice is currently any non-EU state with whom the UK has extradition relations.

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## THE IMPACT OF BREXIT

Until the Article 50 process is completed, the UK will remain a member of the European Union and the provisions of the Framework Decision will continue to apply. It follows that, in the short term at least, there will be no change to the way extradition law operates under the 2003 Act.

However, as a measure of secondary EU law, the Framework Decision applies only to EU Member States. The inevitable consequence of the completion of the Article 50 process, and the termination of the UK's membership of the EU, will be that the UK's rights and obligations under the Framework Decision will lapse. The result is that there will need to be at least some modification to the terms of the UK's extradition relationship with the EU and consequential amendments to the relevant provisions of domestic law.

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## POST-BREXIT OPTIONS

Three main options for the UK's extradition relationship with the EU arise for consideration post-Brexit:

1. Renegotiating an EAW style agreement with the EU
2. Reliance on the European Convention on Extradition
3. Negotiating separate bi-lateral agreements with some or all of the remaining 27 Member States

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## OPTION 1: AN EAW STYLE SYSTEM

One option is for the UK to renegotiate its extradition arrangements with the EU to maintain a streamlined system of surrender that mirrors, or is similar to, the EAW system. Such an arrangement between Iceland and Norway and the EU was agreed in principle in 2006 and, following 13 years of negotiation, was finally approved by the EU in 2014. It has not yet entered into force.

However, there are a number of factors that may affect the willingness and/or ability of the UK to adopt this course of action.

**First**, both Iceland and Norway are members of the European Free Trade Association ("EFTA") and the Schengen *acquis* (the EU's border-free zone) placing them in a position closely aligned to the EU without actually being members. The willingness of the EU to negotiate a similar arrangement with the UK may depend on

the outcome of the Article 50 negotiations, and in particular whether or not the UK becomes a member of EFTA or, alternatively, adopts a more arm's-length position.

**Second**, notwithstanding the close relationship between both Norway and Iceland and the EU, the surrender agreement took five years to negotiate and eight years later is still not in force. It follows that it may not be possible for the UK to renegotiate its extradition arrangements with the EU within the two-year period provided for by Article 50. If this is the case then some kind of transitional provision will be required to ensure that the UK retains an effective extradition relationship with the EU.

**Third**, there may be limited political will to re-enter an EAW style relationship with the EU. The EAW system has been the subject of criticism, in particular in relation to the extradition of British nationals and its use to seek extradition for comparatively minor offences. It may be possible for the particular terms of any agreement reached to address some of these concerns.<sup>1</sup> However, given that much of the criticism of the EAW procedure focussed on its summary nature, it is unlikely that these concerns could be comprehensively addressed while retaining the scheme's core features.

**Finally**, one of the justifications for the EAW system is the need for an integrated approach to judicial cooperation in the context of the free movement of people. It follows that the extent to which it is considered necessary or desirable to be part of such a system may depend on the extent to which any post-Brexit settlement involves the acceptance of the free movement principle.

However, notwithstanding the above considerations, an EAW-style agreement remains a significant option. It is important to note that (unlike Norway and Iceland) the UK will be negotiating as a current member of the EAW system whose extradition processes are already in harmony with those of the EU. A potentially important factor may be that the Norway/Iceland agreement does not provide for the CJEU to have jurisdiction over disputes, and instead provides for a harmonisation of approach through the "constant review" of case-law (Article 37 of the Agreement) which may make this a more attractive option for the UK Government.

#### *Impact on domestic law*

If an Iceland/Norway style surrender agreement could be negotiated and brought into force by the end of the Article 50 process, this could be given effect in domestic law by amending Part 1 of the 2003 Act to reflect any differences between the new agreement and the existing EAW procedures. It would also be necessary to enact transitional arrangements to cover EAWs issued under the present system.

However, as noted above, if no agreement has been reached by the end of the Article 50 period, an interim solution would be required to ensure that the UK's ability to extradite to and from all 27 Member States is not compromised. The most likely such arrangement would be Option 2 set out below.

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<sup>1</sup> For example the surrender agreement between the EU and Norway and Iceland places no obligation on the state parties to extradite their own nationals. It also allows state parties to require assurances that extraditees will be entitled to a re-trial following a trial in absentia, a protection removed from the EAW scheme by Council Framework Decision 2009/299/JHA.

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## OPTION 2: THE EUROPEAN CONVENTION ON EXTRADITION

Both the United Kingdom and the 27 other EU Member States have signed and ratified the European Convention on Extradition 1957 (the “ECE”). It follows that the default position if the UK chooses not to negotiate new extradition arrangements with the EU, either collectively or individually, would be for extradition between the UK and the remaining Member States to be based on the ECE.

The main consequence of adopting this course would be that the UK would no longer have access to the expedited warrant-based surrender arrangements that operate under the Framework Decision. As a result, extradition to EU would to be conducted under the procedures of Part 2 of the 2003 Act. The main procedural differences would be as follows:

**The process would no longer be a purely judicial one.** Extradition requests would have to be made through diplomatic channels, and the Secretary of State would be required to make an initial decision regarding certification. The final decision on surrender would also lie with the Secretary of State. It is likely that these additional procedures would add to the overall length of EU extradition proceedings, as is the case in relation to the existing arrangements with non-EU signatories to the ECE.

**The ‘dual criminality’<sup>2</sup> requirement would apply to all offences and all territories.** A controversial aspect of the EAW system was the abolition of the dual criminality requirement in relation to 32 categories of offences (the so called ‘Framework List’). By contrast the ECE takes a conventional approach to dual criminality, requiring proof that the conduct in respect of which extradition is sought is criminal in both the requesting and the executing jurisdictions. This change is unlikely to result in a material difference in practice. In his 2011 review of the UK’s extradition arrangements, Sir Scott Baker noted that the review panel had not been made aware of any “*difficulties arising in practice from the abolition of the double criminality rule*”. The reason for this is likely to have been that there were very few cases in practice in which extradition was sought for conduct that was not also criminal in the United Kingdom. Indeed, there is only one reported case of extradition being ordered in relation to a Framework List offence which, at the time that the conduct occurred, was not a crime in England and Wales.<sup>3</sup>

**There would still be no requirement to prove a *prima facie* case.** Although there has been criticism of the EAW system on the basis that it does not require the requesting judicial authority to prove a *prima facie* case,<sup>4</sup> it is to be noted that reverting to ECE would not result in the reintroduction of such a test.

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<sup>2</sup> Dual criminality is the principle of extradition law by which extradition may only be sought and granted for conduct which is criminal in both the requesting and executing jurisdictions.

<sup>3</sup> *Jama v Senior Public Prosecutor, Gera, Germany* [2013] EWHC 3276 (Admin). The conduct in the EAW concerned the drug ‘khat’, which has since been criminalised in England and Wales.

<sup>4</sup> Shami Chakrabati, “*It’s not just Eurosceptics who think the European Arrest Warrant is rotten*”, *The Guardian*, 10 November 2014: <https://www.theguardian.com/commentisfree/2014/nov/10/eurosceptics-think-european-arrest-warrant-rotten>.

**Most of the bars to extradition would remain.** However, there would be some differences. For example, some bars (death penalty, speciality, earlier extradition or transfer, and deferral) would be considered by the Secretary of State following the extradition hearing rather than, as currently happens in Part 1 cases, by the judge at the extradition hearing.

**The newly introduced bars to extradition in s.12A (absence of a prosecution decision) and s.21A (proportionality) would no longer apply.** It is difficult at this stage to predict the impact of this development. It may be that the more formal and time-consuming process under the ECE would result in a reduction in the number of EU extradition requests issued for minor offences, or in relation to prosecutions that were not at an advanced stage, thus reducing the need for such bars. However, the absence of a proportionality bar in Part 2 cases is already controversial and, in relation to s.12A, in at least some European jurisdictions, certain formal stages of the process (such as charge and a prosecution decision) cannot take place while the suspect is abroad. This would suggest that these issues are likely to continue to be contentious. It would remain open to the Government to legislate for proportionality and/or prosecutorial decision bars in Part 2 cases should that be considered necessary.

**Human rights considerations.** While the human rights provision in Part 2 (s.87 of the 2003 Act) is in the same terms as its Part 1 equivalent (s.21), the courts would no longer be bound to apply the principles of mutual trust that underpin the Framework Decision. This may not make a significant difference to the approach of the domestic courts given that all 27 EU Member States are signatories to the ECHR, and the principle of mutual trust is a variant of the principles of good faith and reciprocity that apply in the case of all extradition requests. However, there have been cases in which the UK courts have expressed real discomfort as to the fairness of proceedings in other EU states (for example the case of Gary Mann)<sup>5</sup>. It may be that, post-Brexit, domestic courts will have greater opportunity to scrutinise human rights issues in relation to EU extradition requests than was previously the case.

**The jurisdiction of the European Court of Justice ('CJEU').** The CJEU has only had jurisdiction over the UK in relation to the Framework Decision since 1 December 2014. There has yet to be a CJEU reference in relation to a UK extradition matter, although it is possible that one could be made and considered prior to the conclusion of the Article 50 process. Once that process is complete it seems likely that UK courts might still consider extradition decisions of the CJEU to be of persuasive value, at least in relation to matters of policy such as the benefits of co-operation between states, even though such decisions would no longer bind the UK courts.

**EU states would be entitled to refuse to extradite their own nationals.** This is provided for by Article 6 of the ECE. This would have no impact on UK extradition proceedings (unless the UK also chose to adopt such a bar), but may well impact on the ability of domestic prosecutors to secure the extradition of EU nationals from their state of nationality to face trial in the UK. A notable example of a current prosecution that would be affected by such a bar is the SFO prosecution of the German national Deutsche Bank Euribor traders, Andreas Hauschild, Joerg Vogt,

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<sup>5</sup> *R (Mann) v Westminster Magistrates' Court* [2010] EWHC 48 (Admin).

Ardalan Gharagozlo and Kai-Uwe Kappauf, whose extradition is currently being sought from Germany.

**The numbers of extradition requests and length of proceedings may change.**

The introduction of the EAW system had a significant impact on the increase in extradition requests processed by the UK courts. In 2002 the total number of persons surrendered was 52, of which 39 were to EU Member States (or states that are now EU Member States).<sup>6</sup> By the year 2013-2014 the number of surrenders to EU Member States had risen to 1067, and the number of surrenders to non-EU states had risen less markedly to 31.<sup>7</sup> While extradition to non-EAW countries takes an average of 10 months to complete, extradition under the EAW system takes an average of three months to complete.<sup>8</sup> It is therefore likely that a move to a non-EAW extradition arrangement will result in extradition to and from the EU taking longer than it does under the present system.

*Impact on domestic law*

In terms of domestic law, Option 2 is the most straightforward. It would require the repeal of Part 1 of the 2003 Act, and the re-designation of the 27 EU Member States as category 2 territories with the result that Part 2 of the 2003 Act would apply to them.<sup>9</sup>

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### OPTION 3: BILATERAL EXTRADITION AGREEMENTS

It is open to the UK to negotiate separate bi-lateral extradition agreements with individual EU states. The UK Government may not be attracted to renegotiating its individual extradition relationships with all 27 EU states, not least because they have each ratified the ECE, and extradition forms only one small part of the complex legal arrangements that will fall to be renegotiated as part of the Article 50 process.

There are however some states with which the UK has an especially close relationship (such as Ireland), or from which it receives particularly high numbers of extradition requests (such as Poland), with which the UK may choose to negotiate a bespoke arrangement. For example, prior to the 2003 Act, England and Ireland operated a system of 'backing of warrants' (not wholly dissimilar to the expedited surrender procedure under the EAW system) which was governed not by Treaty but by reciprocal primary legislation in both countries. Importantly, Article 28(2) of the ECE specifically allows state parties to enter into supplementary bi-lateral arrangements. This could mean that, in due course, the UK enters into simpler

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<sup>6</sup> Freedom of Information Response, 11 June 2007, *Extradition requests from foreign countries, placed in the Library of the House following a written answer from Joan Ryan to Mike Hancock on 2 May 2007 (Official report: Column 1679W)*.

<sup>7</sup> House of Lords, Select Committee on Extradition law, 2<sup>nd</sup> Report of Session 2014-2015, *Extradition: UK law and practice*, Oral and Written Evidence, *Post-Legislative Assessment of the Extradition Act 2003*, submission by the Home Office (EXL0001), Annex B.

<sup>8</sup> See House of Commons Home Affairs Committee, *Pre-Lisbon Treaty EU police and criminal justice measures: the UK's opt-in decision*, dated 31 October 2013, at paragraph 8.

<sup>9</sup> Separate arrangements would be needed for Gibraltar.

arrangements with some countries but introduces further safeguards in relation to others.

#### *Impact on domestic law*

The nature and extent of the changes to domestic law required by any bi-lateral extradition treaties, or other arrangements negotiated with individual EU Member States, will depend on the nature of those arrangements. All that can confidently be predicted at this stage is that some amendment to the 2003 Act would be necessary were this to occur.

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## SOME PRACTICAL IMPLICATIONS

**Transitional arrangements.** The transitional provisions arising from the post-Brexit extradition arrangements with the EU are likely to be complex, although much will depend on the precise nature of the political settlement. There has already been media speculation as to what will become of extant EAWs that have not yet been executed, such as that in the high profile case of Julian Assange. However, unless specific provision is made for existing EAWs, the effect of s.16 of the Interpretation Act 1978 would appear to be that they would continue to be enforceable.

**Schengen II.** The second generation Schengen Information System ('Schengen II') is a state-of-the-art IT system used by EU Member States and members of the Schengen *acquis* to share information for law enforcement, immigration and border control purposes. In the extradition context, SIS II is used for the transmission of EAWs. When introduced into the UK in 2015, the Government stated that it gave the UK access to 37,000 EAWs and 43,000 national and public security alerts.<sup>10</sup> At this stage it is unclear whether or not the UK will retain access to SIS II. Even if it does, unless the UK has negotiated an EAW style extradition arrangement with the EU the likely result of either no longer being part of the EAW system and/or no longer having access to SIS II will be a significant reduction in the number of European extradition requests received by the UK.

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## CONCLUSION

Until the Article 50 process is completed, there is unlikely to be any change to the UK's extradition arrangements with the EU Member States. What happens thereafter will depend on the outcome of those negotiations. If no new arrangements have been agreed during this period, it is likely that our extradition arrangements will be governed by the ECE and EU Member States will be re-designated as Part 2 territories under the 2003 Act.

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<sup>10</sup> Explanatory Memorandum (unnumbered), 13 February 2015, *Council Implementing Decision on the putting into effect the provisions of the Schengen Acquis on data protection and on the provisional putting into effect of parts of the provisions of the Schengen Acquis on the Schengen Information System for the United Kingdom of Great Britain and Northern Ireland.*

In the longer term the UK may choose to enter into an EAW style system similar to the agreement reached with Iceland and Norway, or negotiate specific arrangements with individual EU Member States. All that can be said with certainty is that the future is unclear.

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