

**Extradition to the EU-27 under the UK/EU Trade & Cooperation Agreement:
similarities and ten key differences**
Stefan Hyman & Jonathan Swain



This article has been amended to reflect the updated domestic legislative position as of 31 December 2020

Introduction

On Christmas Eve, the UK and EU concluded a draft [EU-UK Trade and Cooperation Agreement \(“TCA”\)](#). Prior to its implementation, both the UK and EU parliaments must ratify it. The UK Parliament will consider the TCA on [30th December 2020](#). Given that the EU Parliament will not convene before the new year, the European Commissioner is likely to give provisional application to the TCA under Art. 25 of the [Vienna Convention on the Law of Treaties 1969](#). Barring the unexpected, the TCA is envisaged to enter into force on 1st January 2021.

Part III of the TCA (“PIII”), which is entitled “*Law Enforcement and Judicial Cooperation in Criminal Matters*”, seeks to replace several mechanisms from the European Union’s “*Area of Freedom, Security and Justice*”, as defined [Title V of the Treaty on the Functioning on the European Union \(“TFEU”\)](#). Despite securing a general opt-out to Title V TFEU, successive UK Governments have elected to participate in certain measures, including [Council Framework Decision 2002/584/JHA](#) (“the EAW FD”) which established the European arrest warrant (“EAW”).

Throughout the Transition Period, which expires at 23:00 GMT on 31st December 2020, in accordance with Art. 4 of the [EU/UK Withdrawal Agreement](#), the UK is subject to the same rights and obligations under Union law as if it were a Member State. Pursuant to Art. 62(1)(b) of the Withdrawal Agreement, where a requested person is arrested on an EAW in the UK *prior* to the end of Transition Period, irrespective of *when* the surrender decision is *actually* taken or the requested person is removed from the jurisdiction, proceedings are governed by the EAW FD.

From 23:01 GMT on 31st December 2020, all criminal cooperation measures to which the UK had opted in will no longer be available for its use. The bilateral measures established in PIII are designed to ‘kick in’ immediately to avoid a legislative vacuum. Art. 134(1) requires any Member State or the UK, to the extent which it is feasible, to make any required notification (see below)

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before the TCA enters into force (or within two months of approval). The extent to which this hope becomes reality remains to be seen.

From a domestic standpoint, the cumulative effect of the [European Union \(Future Relationship\) Act 2020](#) (“EU(FR)A”), which received Royal Assent on 31 December 2020, the [Law Enforcement and Security \(Amendment\) \(EU exit\) Regulations 2019](#) as [subsequently amended](#), is that on “exit day” (i.e., *immediately* at the end of the Transition Period) the EU27 and Gibraltar will now remain as Part 1 territories, and Norway and Iceland revert to being Part 2 territories.

Bilateral Cooperation Tools

PIII establishes the following tools:

- Exchange of DNA, fingerprints and vehicle registration data (Title II).
- Transfer and processing of passenger name record data (Title III).
- Cooperation on operational information (Title IV).
- Cooperation with Europol, the EU Agency for Law Enforcement Cooperation (Title V).
- Cooperation with Eurojust, the EU Agency for Criminal Justice Cooperation (Title VI).
- Surrender (Title VII).
- Mutual legal assistance (Title VIII).
- Exchange of criminal record information (Title XI).
- Anti-money laundering and counter-terrorism financing measures (Title X).
- Asset freezing and confiscation (Title XI).

Whilst many of the above are analogous to previous legislative instruments adopted under Title V TFEU, each tool is different in terms of composition and operation. A full analysis of these falls outside the scope of this article. There are also some notable absences from the TCA: for instance, there is no mechanism to replace the [Framework Decision](#) in which sentenced persons can apply to transfer a custodial term between one Member State and another. Nor is there a [mechanism](#) through which (pre-trial) bail conditions can be enforced in another’s territory.

As [we foresaw](#), perhaps the greatest loss is the UK access to the [SIS II system](#). This is a database in which police and judicial alerts are shared between Member States and Norway, Iceland, Switzerland and Lichtenstein. Art. 26-31 create alerts for EAWs and other extradition requests. Until the end of the year, if (say) police detain a person in a routine traffic stop in England, when officers enter the person’s details on the Police National Computer (PNC), if he/she is subject to an EAW, a SIS II alert would be generated *in real-time* and an arrest on the EAW may take place immediately. Originally, the UK negotiating team [had sought access to a real-time SIS II equivalent](#). Its case was not assisted by EU Commission’s [poor ‘school report’ on the UK’s use of SIS II](#), which was delivered in March 2020. Nevertheless, Art. 65 of the SIS II Regulation provides that data cannot be shared with third countries. Notwithstanding the [brave face](#) which the UK Government has placed on its loss, it is clear that disconnection from SIS II, [on the same day as](#)

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[which the last of the EU27 plugs in](#), will have a [profound impact](#) on UK's law enforcement capabilities.

Oversight

Absent the Court of Justice of the European Union ("CJEU"), a Specialised Committee on Law Enforcement and Judicial Cooperation ("SC-LEJC"), comprised of UK and EU officials, will oversee the operation and implementation of the PIII measures (Art. 2(h)). The parties expressly affirm that cooperation is subject to fundamental rights instruments including the [European Convention on Human Rights 1950 \("ECHR"\)](#) (Art. 3). Should the UK (or any of the EU27) denounce the ECHR or Protocols 1, 6 or 13 thereto, all criminal cooperation under the TCA will halt (Art. 136(2)).

Surrender

Title VII creates a familiar mechanism in which an issuing judicial authority issues an "*arrest warrant*" ("AW") seeking the surrender of a requested person for purposes of conducting a prosecution (accusation) or executing a custodial sentence/detention (conviction) which an executing judicial authority recognises and executes subject to defined exceptions (although, interestingly, the obligation to execute prescribed in Art. 1(2) EAW FD is not reproduced).

The contents, structure and language closely mirror the EAW FD: its scope is the same (Art. 79), the grounds for mandatory and optional refusal of execution are identical (Art. 80/81), as are the trial in absence provisions (Art. 81(i)), the role of central authorities (Art. 85), content and form (Art. 86), surrender hearings (Art. 92), speciality (Art. 105) and subsequent extradition (Art. 106). For ease of reference, we provide a table of equivalent provisions, below. Nevertheless, the text is peppered with importance differences, some of which we signpost in this article.

For purposes of continuity, Art. 112 PIII helpfully provides that an EAW issued before the end of the Transition Period, *but executed afterwards*, will be 'recognised' by each party as an AW and, accordingly, processed under the TCA. Nevertheless, the TCA *does not* address whether the EU27 will *have* to issue an EAW and an AW *after* 31st December 2020. If so, and considering the [Norway/Iceland Surrender Agreement 2006](#), the EU27 may find themselves in a bizarre position where they would have to issue three separate arrest warrants of sorts, almost identical in form and contents, where they wished to search the length and breadth of the continent for a requested person.

We believe that will turn on the domestic law of the *issuing* state and whether it requires the issuing judicial authority to issue an AW directed towards the UK in a separate form, and is something to which we will return in later posts.

Turning to the text itself, a number of differences are of note:

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1. The “European Framework List” of categories of offences which do require double (dual) criminality under Art. 2(2) EAW FD is replicated in Art. 79(5) PIII. However, whereas under the EAW FD Member States are *obliged* to rely on the “*European Framework List*” where (correctly) endorsed, PIII permits the EU27/the UK to *opt into* the “*European Framework List*”. As set out further below, the UK has chosen not to permit reliance on endorsement of the list and will now require dual criminality to be established in all cases.
2. PIII establishes a political offence exception (Art. 82 PIII), something not found in the EAW FD, but older extradition agreements, such as the [European Convention on Extradition 1957 \(“ECE”\)](#) (Art. 3). Nevertheless, this is narrowly defined: “*a political offence [...] an offence connected with a political offence or as an offence inspired by political motives*”. In UK law at least, a similar (albeit not identical) prohibition against extradition is already found in s. 13 EA. As such, it is likely to have greater impact in the EU27.
3. PIII creates a nationality exception (Art. 83). Once again, this exception was absent from the EAW FD, but is found in older extradition agreements (see Art. 6 ECE, for instance). Although Art. 83(1) sets out the principle that an executing judicial authority may not refuse to surrender its own national, Art. 83(2) allows a Member State or the UK to notify the SC-LEJC of an intention to refuse surrender of its own nationals or to render surrender subject to specific conditions. Following the UK’s withdrawal from the EU, [three Member States \(Germany, Austria and Slovenia\)](#) notified the General Secretariat of the EU that they would refuse to surrender their own nationals under the EAW FD during the Transition Period. It is likely that these Member States will renew this notification going forward together, potentially, with others. As a matter of course, the UK does *not* refuse to extradite its own nationals. Therefore, this is likely to only impact on *import* extradition. Art. 83(3) and (4) create a requirement that where a party refuses to surrender its own national, it must consider whether he/she can be prosecuted for an offence of commensurate seriousness under domestic law. It remains to be seen what impact, in practical terms, this obligation conveys.
4. In terms of language, Art. 86(2) PIII requires that an AW be translated into an official language of the executing state. Together with the loss of SIS II, this is likely to herald an end of the familiar practice in which the NCA certify EAWs on the basis of a “Form A”, which contains a summary of the EAW (as permitted pursuant to Art. 9(3) EAW FD and s. 212 EA), with many Member States only providing a translation in English following notification of arrest.
5. Arts. 87 and 88 PIII establish various methods of transmitting the AW, the preferred one being secure transfer between judicial authorities. Under Art. 88(1), where “*the issuing judicial authority does not know which authority is the competent executing judicial authority, it shall make the requisite enquiries from the executing state*”. This, however, presumes that the issuing state knows in which country the requested person is located.

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If not, and in absence of access to SIS II, Art. 88(2) gives power to Interpol to facilitate transmission. The provisions are purposely designed to be flexible. Art. 88(3) provides that the issuing judicial authority “*may transmit the arrest warrant by any secure means capable of producing written records*”.

6. Reflecting the right enshrined in Art. 5 of [Directive \(EU\) 2016/1919](#) (which the UK never transposed into domestic law), Art. 89(4) provides that a requested person has the right to be assisted by a lawyer in both the executing the issuing state. The provision applies equally to accusation and conviction AWs. Given that the provision expressly provides that the requested person “*shall be informed*” of the right, we presume that in England the appropriate judge will provide this ‘information’ when the requested person first appears before Westminster Magistrates’ Court at the initial hearing. That says nothing of how access will actually be facilitated in practice, however. Of interest, Art. 89(2) furnishes the executing state with an obligation to provide the requested person with the AW in a language which he/she understands. Presently, (for example) if a Romanian national is arrested in England on an EAW issued by a German executing authority, neither the EAW FD nor the EA requires that the EAW be translated into Romanian. However, PIII *does*. In practical terms, it is unclear whether this obligation will be placed upon the executing judicial authority or the representatives of the issuing judicial authority (the CPS Extradition Unit in England and Wales) and at exactly what stage the translation must be provided.
7. Of particular interest to requested persons and extradition practitioners alike will be the principle of proportionality established in Art. 77 PIII. This appears at the very beginning of the surrender provisions indicating, perhaps, a principle of general application. Art. 77 provides that cooperation should be “*necessary and proportionate, taking into account the rights of the requested person and the interests of victims, having regard to the seriousness of the act, the likely penalty that would be imposed and the possibility of [...] less coercive measures*”. The language will be familiar as it is near identical to that in the proportionality bar prescribed in s. 21A EA ([an invention of UK extradition law](#) which does not derive from the EAW FD). Nevertheless, the concept is broader than the bar since it applies to both accusation and conviction AWs. It *could* be argued that the provision establishes a basis of refusal of surrender when it can be shown that it is neither necessary nor proportionate; alternatively, it may provide a legal basis for an executing judicial authority to enquire of an issuing judicial authority as to the proportionality of issuance. Interestingly, under “*Surrender decision*” (Art. 93), the parties (again) place “*particular*” emphasis on proportionality. It remains to be seen whether the UK Government will amend primary legislation to give effect to this principle or whether the concept will be developed by the common law.
8. Despite the UK’s attempts to introduce a ‘trial readiness’ bar into the surrender agreement, no doubt rooted ‘charge and try’ bar that [the UK unilaterally introduced in](#)

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[2014](#), no such article appears in PIII. Instead, oblique reference is found Art. 77 PIII to a material consideration of proportionality being *“avoiding unnecessarily long periods of pre-trial detention”*. It remains to be seen whether the UK Government will repeal s. 12A EA, something which, no doubt, will be of great relief across the continent as we have discussed before. If so, even if the requested person could make a case that a decision had *not* been made either try or to charge him/her and his/her absence is *not* the sole reason why, extradition could not be prevented where the offending is serious or where the issuing state guarantees that it will not remand a requested person in custody.

9. In addition to the principles allowing the provision of supplementary information (Art. 93 PIII), a further provision is made for transmission of *“additional guarantees”* where *“there are substantial grounds for believing that there is a real risk”* of an ECHR violation (Art. 84(c)). This is perhaps a nod to recent CJEU jurisprudence, for instance [Aranyosi](#) and [Dorobantu](#) in relation to prison conditions or [LM](#) and [L and P](#) concerning judicial independence, which provide a framework for providing guarantees/diplomatic assurances within the context of proceedings under the EAW FD.
10. Art. 94 PIII establishes principles where a requested person is subject to more than one EAW or AW. In contrast to Art. 16 EAW FD, the EU27 are invited to consider *“legal obligations of Member States deriving from Union law regarding, in particular, the principles of freedom of movement and non-discrimination on the grounds of nationality”*. Where an executing judicial authority in the EU27 receives an EAW and AW, this may provide a basis for them to prefer surrender to another Member State rather than to the UK.

In this article we have briefly touched upon the new criminal cooperation measures between the EU and UK, with a particular focus on extradition. Over the coming weeks and months, we will analyse the implementation of PIII and keep you informed of what will be the greatest change to UK extradition law since passage of the Extradition Act 2003. Only time will tell whether the law enforcement authorities and courts in issuing and executing states can adapt to ensure the continuity of the agile and effective measures to which we have become accustomed.

The Position as of 31 December 2020

Since the initial publication of this article on the new criminal cooperation measures between the EU27 and the UK (on 28 December 2020), there have been several developments in the field of extradition which will have effect from exit day for practitioners. Where appropriate, the article has been updated to reflect that.

1. The Government has made consequential amendments to the Extradition Act 2003 (“EA”) through the [European Union \(Future Relationship\) Act 2020](#) (“EU(FR)A”), which received Royal Assent on 31 December 2020. This has the following effects:

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- Pursuant to s. 11 of the EU(FR)A designates the EU27 as Category 1 territories from 23:01 on 31st December 2020. The original designation instrument, [The Extradition Act 2003 \(Designation of Part 1 Territories Order\) 2003 \(S.I. 2003/3333\)](#), will receive a *new* schedule (Sch. 1A) containing the EU27 (note: the link above will redirect to the legislation as on 30th December 2020, which will *not* contain the new schedule).
- Requires dual criminality in *all* cases. S. 12 of the EU(FR)A removes the “*European Framework*” list as a method for proving an ‘extradition offence’ under s. 10(2) of the EA. Therefore, dual criminality *will* be a requirement for all new arrests. s. 64(5) (not sentenced) and s. 65(5) (sentenced) of the EA are repealed and the deeming provisions (s. 64(2) and s. 65(2)) altered to remove reference to the subsections. Nevertheless, the “*European Framework*” list, which will be renamed “*Trade and Cooperation Agreement*”, remains defined in s. 215 EA and Sch. 2 thereto (which a couple of additions). This is because issuing judicial authorities *in the UK* may still rely on these provisions when making requests to the EU27 (if the relevant Member State makes a designation under [Art. 79\(4\) of Title VII to Part 3](#)).
- It does not make any amendments to the ‘charge and try’ bar (s. 12A) or the ‘proportionality’ bar (s. 21A). The statutory provisions remain the same leaving any ‘reorientation’ to the common law.

It is notable that the [passage of the bill](#) was not without criticism, across party lines, about the security implications of the TCA and, in particular, loss of access to SIS II.

The readiness of the UK's domestic provisions says nothing of the corresponding position in the EU27, as we have identified above.

2. In terms of proportionality, the EU and the UK published a [joint political declaration](#) concerning Arts. 77 and 93 of Title VII of Part 3 (criminal cooperation). At first blush, this suggests that Art. 77 requires the executing judicial authority (domestically being Westminster Magistrates’ Court) to seek the view of the issuing judicial authority in the requesting state, presumably via the provision in Art. 93(2), on proportionality where it considers execution of the arrest warrant to be disproportionate. However, the Declaration also makes plain that the executing state is entitled “to consider proportionality and the possible duration of pre-trial detention” when determining whether to surrender in accordance with domestic laws. We will return to the consequence and effect of this provision in a later post.
3. Our attention has been drawn to [The Law Enforcement and Security \(Separation Issues etc.\) \(EU exit\) Regulations 2020 \(S.I. 2020/1408\)](#), which amend [The Law Enforcement](#)

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[Security \(Amendment \(EU Exit\) Regulations 2019 \(S.I. 2019/742\)](#), one of *at least three* statutory instruments concerning security cooperation at the end of the implementation period. [Reg. 25](#) adds Iceland and Norway to the designation of territories under Part 2 of the EA. Accordingly, Norway and Iceland will (again) be Part 2 territories from 23:01 on 31st December 2020. We have amended the article accordingly.

4. On 1st January 2021, the [Extradition Act \(Provisional Arrest\) Act 2020](#) comes into force through [The Extradition \(Provisional Arrest\) Act 2020 \(Commencement No. 1\) Regulations 2020 \(S.I. 2020/1652\)](#). We have discussed these provisions elsewhere. Given the conclusion of the TCA, the only countries designated for what will be s. 74A of the EA are Australia, Canada, Iceland, Lichtenstein, New Zealand, Norway, Switzerland and the United States of America.

Over the weeks that come, we will be carefully monitoring the volume of arrests under the EA to assess the impact of the loss of the SIS II system.

Table of Equivalents

EAW Framework Decision 2002	Heading	EU/UK TCA 2020	Heading
Art. 1	Definition of EAW	Art. 78(a)	Definitions
Art. 2	Scope	Art. 79	Scope
Art. 3	Grounds for mandatory non-execution	Art. 80	Grounds for mandatory non-execution
Art. 4	Grounds for optional non-execution	Art. 81	Other grounds for non-execution
Art. 4a	Decisions rendered following a trial at which the person did not appear in person	Art. 81(i)	Other grounds for non-execution
--	--	Art. 82	Political offence exception
--	--	Art. 83	Nationality exception
Art. 5(2), (3)	Guarantees to be given by the issuing Member State in particular cases	Art. 84	Guarantees to be given by the issuing State in particular cases
Art. 6	Determination of the competent judicial authorities	Art. 78(b), (c), (d)	Definitions
Art. 7	Recourse to the central authority	Art. 85	Recourse to the central authority

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Art. 8	Content and form of the European arrest warrant	Art. 86	Content and form of the arrest warrant
Art. 9	Transmission of a European arrest warrant	Art. 87	Transmission of an arrest warrant
Art. 10	Detailed procedures for transmitting a European arrest warrant	Art. 88	Detailed procedures for transmitting an arrest warrant
Art. 11	Rights of a requested person	Art. 89	Rights of a requested person
Art. 12	Keeping the person in detention	Art. 90	Keeping the person in detention
Art. 13	Consent to surrender	Art. 91	Consent to surrender
Art. 14	Hearing of the requested person	Art. 92	Hearing of the requested person
Art. 15	Surrender decision	Art. 93	Surrender decision
Art. 16	Decision in the event of multiple requests	Art. 94	Decision in the event of multiple requests
Art. 17	Time limits and procedures for the decision to execute the European arrest warrant	Art. 95	Time limits and procedures for the decision to execute the arrest warrant
Art. 18	Situation pending the decision	Art. 96	Situation pending the decision
Art. 19	Hearing the person pending the decision	Art. 97	Hearing the person pending the decision
Art. 20	Privileges and immunities	Art. 98	Privileges and immunities
Art. 21	Competing international obligations	Art. 99	Competing international obligations
Art. 22	Notification of the decision	Art. 100	Notification of the decision
Art. 23	Time limits for surrender of the person	Art. 101	Time limits for surrender of the person
Art. 24	Postponed or conditional surrender	Art. 102	Postponed or conditional surrender
Art. 25	Transit	Art. 103	Transit
Art. 26	Deduction of the period of detention served in the executing Member State	Art. 104	Deduction of the period of detention served in the executing State
Art. 27	Possible prosecution for other offences	Art. 105	Possible prosecution for other offences

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Art. 28	Surrender or subsequent extradition	Art. 106	Surrender or subsequent extradition
Art. 29	Handing over of property	Art. 107	Handing over of property
Art. 30	Expenses	Art. 108	Expenses
Art. 31	Relation to other legal instruments	Art. 109	Relation to other legal instruments
--	--	Art. 110	Review of notifications
Art. 32	Transitional provisions	Art. 112	Application to existing European arrest warrants
Art. 33(2)	Application to Gibraltar	--	--