

Brexit & the European Arrest Warrant: How Will Change Affect the Interests of Citizens?

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INTRODUCTION

The referendum on the United Kingdom's membership of the European Union, held on 23 June 2016, and the triggering of Article 50 TEU on 29 March 2017 were decisive moments in British and European history. These events have confirmed that the relationship and coordination between the United Kingdom (UK) and the European Union (EU) in various policy areas will be subjected to extensive change in the future. The 'Area of Freedom, Security and Justice' (AFSJ), which forms the backbone of policies regarding immigration, police cooperation and anti-terrorism¹ in the EU, appears unlikely to be exempt from such procedural reconfigurations.² Subsequently, the cooperation between the UK and the EU, regarding various instruments within AFSJ, is likely to change due to the adjustments brought about by Brexit.

The European Arrest Warrant (EAW) represents one component within the structure of AFSJ. At present, it is uncertain whether the UK will be able to continue their participation within the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States ('Framework Decision 2002'), once the withdrawal process under Article 50 TEU is completed.³ The EAW is a key instrument of cooperation among the EU Member States in the enforcement of justice and prosecution of crime and criminals on a cross-border basis. Its possible demise in the post-Brexit relations between the UK and the EU touches upon several sets of citizens' interests. The purpose of this paper is, therefore, to highlight the interests of those involved and to canvas possible policy options for a post-Brexit scenario. These considerations are based largely on the review of contemporary academic commentary, media outlets and policy documents published by both legal practitioners and the UK Government concerning the post-Brexit criminal extradition process.

In particular, the paper focuses on two aspects of the functioning of the EAW that may have important consequences for citizens following Brexit. The first point concentrates on the surrender procedure of accused or convicted persons and specifically provides an assessment of implications for the pre-trial detention stage. The second aspect focuses on extradition conditions and guarantees between the UK and EU Member States.

¹ Sarah Sy, 'An area of freedom, security and justice: general aspects' (*European Parliament*, April 2017) < http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuid=FTU_5.12.1.html > accessed 23 June 2017

² Sergio Carrera, Elspeth Guild & Ngo Chun Luk, 'What does Brexit mean for the EU's Area of Freedom, Security and Justice?' (*Centre for European Policy Studies*, 11 July 2016) < <https://www.ceps.eu/publications/what-does-brexit-mean-eu%E2%80%99s-area-freedom-security-and-justice> > accessed 15 November 2016

³ European Union Committee, *Brexit: Judicial oversight of the European Arrest Warrant*, 18 July 2017, HL 16 2017-19, Page 18, Para 47

This examination is aimed at providing information and guidance for individuals, bodies and organisations working with those citizens who may find themselves affected by such changes. Structurally, the first part of the paper introduces the key elements of the EAW system, highlighting its advantages and disadvantages, and the related citizens' concerns. The second part canvasses post-Brexit options for extradition cooperation between the UK and the EU. Finally, the third part analyses the likely impact of the options on the table for the relevant citizens' concerns.

THE EUROPEAN ARREST WARRANT

The Framework Decision 2002 on the European Arrest Warrant officially came into force on 1 January 2004 and has been adopted by all Member States of the European Union. With regard to the UK, the provisions were transposed into national legislation with Part 1 of the Extradition Act 2003. Part 1 deals with extradition between the UK and "category 1 territories", which includes the Member States of the European Union. The Framework Decision 2002 replaced instruments previously applicable for extraditions between EU Member States with a common surrender system. Previous applicable agreements, such as the European Convention on Extradition 1957 ('Extradition Convention 1957'), have remained in force but have become obsolete in the EU context.⁴

The process under the Framework Decision 2002 is considerably different from classical extradition cooperation between countries. Judicial cooperation replaces the use of diplomatic channels. Also, grounds for refusing extradition have been limited and timeframes have been streamlined. The European Scrutiny Committee (House of Commons select committee that assesses the importance of EU documents) has suggested that the substantial changes to the previous extradition procedure reflect a desire to increase the speed and functionality of the extradition system.⁵ This is to promote effective cooperation in the cross-border prosecution of crimes and counter any opportunities to evade justice that the free movement of persons may provide for criminals.⁶

The Framework Decision 2002 relies on the principle of mutual recognition in criminal matters. The Tampere European Council 1999 recognised mutual recognition of judicial decisions and judgments as the cornerstone

⁴ Gregory Mann, 'The European Arrest Warrant: A short-lived mechanism for extradition?' (2007) 34 SJILC 715

⁵ European Scrutiny Committee, *The UK's block opt-out of pre-Lisbon criminal law and policing measures*, 07 November 2013, HC 683 2013-14, Page 42, Para 107

⁶ Home Affairs Committee, *Pre-Lisbon Treaty EU police and criminal justice measures: the UK's opt-in decision*, 31 October 2013, HC 615 2013-14, Page 5, Point 8

of judicial cooperation in both civil and criminal matters within the European Union.⁷ Mutual recognition requires decisions taken by the judiciary in one Member State to be recognised and enforced by the judicial authority in another Member State.⁸

The EAW is a “judicial decision”⁹ that enables the national judicial authority in one Member State of the European Union to request from their judicial counterpart in another Member State the surrender of an individual for criminal offences. The template warrant is provided for in an Annex to the Framework Decision 2002 and requires a judicial authority to sign and execute it. The warrant may only be issued for the purposes of conducting a criminal prosecution, executing a custodial sentence or a detention order.¹⁰ Hence, judicial authorities are able to request the surrender of an individual both at a pre-trial or post-trial stage.

The request for the surrender of an individual at the pre-trial stage can only be made for those who are accused of committing an act that is punishable by 12-months or more of deprivation of liberty. At the post-trial stage, the individual must have been sentenced to at least 4-months deprivation of liberty.¹¹ So long as these conditions are met, the Framework Decision 2002 imposes an obligation to recognise and automatically execute the warrant throughout the European Union, unless an exception applies.¹² The Framework Decision 2002 provides for both mandatory and optional non-execution grounds.¹³ These include certain internationally recognised justifications such as the age of criminal responsibility and the *ne bis in idem* principle that prevents individuals from being tried or convicted for the same offence twice.

The European Arrest Warrant: Advantages

The changes to the extradition blueprint with the EAW have had a positive impact on the performance of surrender procedures between EU Member States in at least two respects. First, the fact that the European Arrest Warrant must be executed within a strict time limit – the surrender of an individual must be completed

⁷ European Parliament, ‘Tampere European Council 15 and 16 October 1999 Presidency Conclusions’ (*European Parliament*, 27 October 1999) < http://www.europarl.europa.eu/summits/tam_en.htm > accessed 04 January 2017

⁸ EU Commission, ‘Mutual recognition of final decisions in criminal matters’ (Communication) COM (2000) 495 final

⁹ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States [2002] OJ L190/1, Article 1(1)

¹⁰ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States [2002] OJ L190/1, Article 1(1)

¹¹ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States [2002] OJ L190/1, Article 2(1)

¹² Libor Klimek, *European Arrest Warrant*, (Springer, 2014) Page 246

¹³ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States [2002] OJ L190/1, Article 3 & 4

within a 60 day period, which can be extended to 90 days in exceptional circumstances – has ensured added efficiency for surrender procedures. Several authorities have credited the EAW system in this sense.

In 2011, The Human Rights Joint Committee (appointed by both the House of Commons and House of Lords to consider human rights' issues in the UK) recognised that the EAW had successfully reformed the surrendering procedure throughout Europe into a quicker and more streamlined operation.¹⁴ In 2013-14 the UK Government also supported a similar finding. It recognised that the EAW has managed to reduce the procedure to around 3 months rather than approximately 10 months under non-EU jurisdiction.¹⁵

Relatedly, the second positive impact of the European Arrest Warrant has been to reduce the overall time an individual is likely to spend in pre-trial detention due to extensive delays in extradition. The European Commission has determined that the possible pre-trial detention period has been reduced from 1 year to 15 days for those who have consented to their surrender.¹⁶ Alternatively, where an individual does not consent to their surrender, the final decision is made by the executing judicial authority. This has meant that the average time of repatriation for those who did not consent is around 48 days, still a considerably shorter period of time than without the EAW.¹⁷

Moreover, previous extradition instruments, such as the Extradition Convention 1957, allow parties to the convention to refuse an extradition request in respect of one of their own citizens.¹⁸ The Framework Decision 2002 has restricted the possibility for Member States to refuse the surrender of an individual based on their nationality or the status of their residency within the relevant country.¹⁹ This ensures the retrieval of serious suspected offenders who would otherwise have been protected by their nationality. Theresa May, while the Home Secretary in 2014, praised the warrant for this. Without the EAW, individuals such as the Greek national who fled to Greece after committing sexual assaults on a 16-year old girl in Hampshire in 2007 “would still be in Greece today”.²⁰

¹⁴ Joint Committee on Human Rights, *The Human Rights Implications of UK Extradition Policy*, 22 June 2011, HL 156 & HC 767 2010-12, Page 37, Para 130

¹⁵ Home Affairs Committee, *Pre-Lisbon Treaty EU police and criminal justice measures: the UK's opt-in decision*, 31 October 2013, HC 615 2013-14, Page 5, Para 8

¹⁶ EU Commission, 'On the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States' (Communication) COM (2011) 175 final

¹⁷ EU Commission, 'On the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States' (Communication) COM (2011) 175 final

¹⁸ European Convention on Extradition 1957, Article 6

¹⁹ Zsuzsanna Deen-Racsmany & Rob Blekxtoon, 'The Decline of the Nationality Exception in European Extradition?' (2005) 13(3) *European Journal of Crime, Criminal Law and Criminal Justice* 317

²⁰ HC Deb, 10 November 2014, Col 1237

The European Arrest Warrant: Disadvantages

The EAW system has also attracted various critiques, particularly, but not only on the part of members of the UK Government. One critique points to the fact that the EAW is used far too frequently for minor offences and thus places a disproportionate burden on the judiciary of every Member State.²¹ Additionally, more warrants are issued each year than effectively executed²², whilst fundamental rights concerns are raised in conjunction with the EAW. Although the literature suggests that the principle of mutual recognition has facilitated cooperation and enhanced judicial protection of individual rights²³, certain situations suggest that this principle forces a Member State to execute an EAW even to other Member States with poor records of management of their prison system.

The case of Andrew Symeou, a UK national who was surrendered to Greece in 2009 to face charges in connection to the death of a young man, exemplifies such criticism. Due to the principle of mutual recognition, the warrant was automatically processed, with little regard for the prison conditions in Greece at the time or the functionality of the prison system. Consequently, Symeou was detained in appalling prison conditions for 10 months.²⁴ These concerns are relevant today because prison overcrowding and deficiencies in detention systems are still present in various EU Member States. In 2015, the European Court of Human Rights found 27 violations of Article 3 ECHR against Romania²⁵, particularly due to their levels of “overcrowding, inappropriate hygiene and lack of appropriate health care”²⁶ in detention facilities.

These circumstances raise questions as to the capability of the EAW to ensure that the pursuit of an expeditious process is not placed before the concerns for the fair treatment of individuals.²⁷ Consequently, The Human Rights Joint Committee has stipulated that the principle of mutual recognition, which underpins

²¹ Joanna Dawson, Sally Lipscombe & Samantha Godec, *The European Arrest Warrant*, House of Commons Library Briefing Paper, 18 April 2017, Page 8

²² EU Commission, ‘On the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States’ (Communication) COM (2011) 175 final, Annex 1

²³ Joanna Apap & Sergio Carrera, ‘European Arrest Warrant: A good testing ground for mutual recognition in the enlarged EU?’ (*Centre for European Policy Studies*, 01 February 2004) < <https://www.ceps.eu/publications/judicial-cooperation-and-european-arrest-warrant-good-testing-ground-mutual-recognition> > accessed 17 November 2016

²⁴ Andrew Symeou, *Extradited: The European Arrest Warrant and My Fight for Justice from a Greek Prison Cell* (Biteback Publishing, 2015)

²⁵ EIN, ‘The implementation of ECtHR judgments concerning detention conditions in Romania, a political issue’ (*European Implementation Network*, 19 December 2016) < <http://european-implementation.net/ein-voices/2016/12/19/the-implementation-of-ecthr-judgments-concerning-detention-conditions-in-romania-a-political-issue> > accessed 15 March 2017

²⁶ Iacov Stanciu v Romania, No. 35972/05, ECHR 2012, Para 195

²⁷ Written Evidence from The Freedom Association, September 2014, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/extradition-law-committee/extradition-law/written/12532.html>

the EAW, results in a “blind faith”²⁸ in the criminal justice systems of neighbouring EU Member States and leads to instances of injustice. In essence, these considerations advocate for changes to the extradition process in order to avoid exposing citizens to similar circumstances to that of Andrew Symeou.

POST BREXIT: OPTIONS

Once the process for withdrawal under Article 50 TEU is complete, the procedure of extradition for criminal offenders between the UK and the remaining EU Member States is likely to change. The UK may no longer be obliged to uphold obligations and commitments under the Framework Decision 2002. As cross-border crimes and the cross-border movement of criminals will nonetheless continue in the post-Brexit environment, the problem of what type of agreement may replace the EAW scheme has been given much attention in the context of the debates surrounding Brexit. The House of Lords European Union Select Committee²⁹, the EU Home Affairs Sub-Committee³⁰, academics³¹ and other legal³² bodies have identified the following options as potential directions the UK may wish to explore when determining which future agreement is most appropriate in the area of criminal extradition.

Option 1: Framework Decision 2002

In order to continue using the European Arrest Warrant as a judicial tool for the surrender of criminal offenders, the UK and the EU would have to come to an arrangement that would allow for a third country to remain part of the Framework Decision 2002. In March 2017, the Secretary for the Home Department, Amber Rudd, categorised the continued use of the European Arrest Warrant as a “priority”.³³ Nevertheless, no situation exists where a third country has complete access to and use of the European Arrest Warrant and

²⁸ Joint Committee on Human Rights, *The Human Rights Implications of UK Extradition Policy*, 22 June 2011, HL 156 & HC 767 2010-12, Page 37, Para 132

²⁹ European Union Committee, *Brexit: future UK-EU security and police cooperation*, 16 December 2016, HL 77 2016-17

³⁰ EU Home Affairs Sub-Committee, ‘Criminal Justice Cooperation with the EU after Brexit: The European Arrest Warrant inquiry’ (*UK Parliament*, 29 March 2017) < <http://www.parliamentlive.tv/Event/Index/e4b4754a-dd69-4735-ad48-59b574618fd9> > accessed 14 April 2017

³¹ Steven Peers, ‘EU Referendum Brief 5: How would Brexit impact the UK’s involvement in EU policing and criminal law?’ (*EU Law Analysis*, 21 June 2016) < <http://eulawanalysis.blogspot.co.uk/2016/06/eu-referendum-brief-5-how-would-brexit.html> > accessed 15 November 2016

³² Members of 6KBW College Hill, ‘Brexit Briefing No.2 The implications for extradition’ (*6KBW College Hill*, 13 July 2016) < <http://www.6kbw.com/publications/articles/brexit-briefing-no-2> > accessed 20 July 2016

³³ Alison Little & Greg Heffer, ‘Amber Rudd risks Brexit fallout after warning UK MUST remain in EU’s arrest warrant scheme’ (*Daily Express*, 07 March 2017) < <http://www.express.co.uk/news/politics/775804/Amber-Rudd-Brexit-warns-UK-must-remain-EU-arrest-warrant-scheme> > accessed 10 March 2017

even countries with close relations to the European Union, such as Norway and Iceland, have had to conclude a separate agreement in relation to extradition.³⁴

Option 2: European Arrest Warrant Style Agreement

A European Arrest Warrant Style Agreement ('EAW Style Agreement') represents an option that would allow the UK and the EU to ensure the continued surrender of individuals through a system that has largely incorporated parallel provisions to those under the Framework Decision 2002. An EAW Style Agreement could represent a duplication of the current process, yet may also contain certain necessary modifications due to the change in status of the UK from an EU Member State to a third country. In the past, the negotiations between Norway, Iceland and the European Union concerning an extradition agreement have proven to take a significant period of time to finalise. They commenced in 2001 and concluded in 2014. There is no reason to believe that a negotiation between the UK and the EU on this would be any easier. On the contrary, it has been observed that it is inevitable that the negotiators are likely to request desirable exceptions or alterations to the existing procedure.³⁵ Nevertheless, this option is currently regarded by the House of Lords as the most promising avenue to pursue.³⁶

Option 3: The European Convention on Extradition 1957

All current EU Member States have signed and ratified the Extradition Convention 1957. Therefore, the UK could continue cooperating with the Member States in the field of extradition according to the terms of the Extradition Convention 1957. This would create significant changes to the previous process between the UK and EU Member States because this convention does not provide for specific time limits, reverts to the use of diplomatic channels and does not rely on the principle of mutual recognition. The House of Lords has expressed concerns that the convention "cannot adequately substitute for the European Arrest Warrant."³⁷ Furthermore, several EU Member States have repealed provisions implementing the Extradition Convention 1957 to replace these with the European Arrest Warrant scheme. This could lead to complications in the future

³⁴ Council Decision 2014/835 of 27 November 2014 on the conclusion of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway [2014] OJ L343/1

³⁵ Home Affairs Committee, 'EU policing and security issues inquiry' (*UK Parliament*, 06 December 2016) < <http://www.parliamentlive.tv/Event/Index/21939c80-3047-480f-bfac-8d6b3df99239> > accessed 12 December 2016

³⁶ European Union Committee, *Brexit: future UK-EU security and police cooperation*, 16 December 2016, HL 77 2016-17, Page 38, Para 141

³⁷ European Union Committee, *Brexit: future UK-EU security and police cooperation*, 16 December 2016, HL 77 2016-17, Page 45, Para 18

relationship between the UK and relevant EU Member States were the UK to fall back on the terms of this convention. The Republic of Ireland provides an example in this sense.³⁸

Option 4: Separate Bilateral and Multilateral Agreements

This option would allow the UK to negotiate distinct agreements with certain EU Member States and integrate specifically tailored provisions on extradition as a means to address specific concerns on a case by case basis. However, this option may not be pursued because Member States are subjected to limitations in their competence to negotiate and enter into international agreements in areas in which the EU has exercised its competence.³⁹ The cooperation between EU Member States in criminal matters such as extradition is one of these fields. Therefore, since it is clear that an extensive approximation of the provisions relating to the surrender of individuals has taken place under an EU legal instrument, doubt is cast on the feasibility of this option.

Option 5: UK-EU New Security Treaty⁴⁰

The UK Government has published a position paper regarding a future partnership with the EU in the areas of security, law enforcement and criminal justice. The paper is multifaceted and expresses a desire to achieve a degree of cooperation that goes beyond any existing arrangement the EU may have with other third countries. The basis for the future arrangement is founded upon commitments to cooperate across a range of security measures, to avoid any operational gaps for law enforcement agencies and to maintain support against threats of terrorism.⁴¹ It is also stated that this 'Security Treaty' is an "opportunity to build on what has already been achieved through decades of collaboration"⁴² and stresses that it is in the mutual interest of all parties to finalise a new arrangement that would allow for sustained cooperation under the European Arrest Warrant. Nevertheless, the paper contains very little detail on how continued use of this specific legal instrument could be achieved. For the time being, it appears possible that the relationship between the UK and the EU on

³⁸ Written Evidence from The Law Society of Scotland, October 2016, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-home-affairs-subcommittee/brexit-future-ukeu-security-and-policing-cooperation/written/43327.html>

³⁹ Judgment of 31 March 1971, *Commission of the European Communities v Council of the European Communities*, C-22/70, EU:C:1971:32, Para 25 – 30

⁴⁰ Department for Exiting the European Union, 'Security, law enforcement and criminal justice – a future partnership paper' (Gov.UK, 18 September 2017) < <https://www.gov.uk/government/publications/security-law-enforcement-and-criminal-justice-a-future-partnership-paper> > accessed 22 September 2017

⁴¹ Department for Exiting the European Union, 'Security, law enforcement and criminal justice – a future partnership paper' (Gov.UK, 18 September 2017) < <https://www.gov.uk/government/publications/security-law-enforcement-and-criminal-justice-a-future-partnership-paper> > accessed 22 September 2017, Page 4, Para 15

⁴² Department for Exiting the European Union, 'Security, law enforcement and criminal justice – a future partnership paper' (Gov.UK, 18 September 2017) < <https://www.gov.uk/government/publications/security-law-enforcement-and-criminal-justice-a-future-partnership-paper> > accessed 22 September 2017, Page 13, Para 37

security issues may not change significantly following membership withdrawal.⁴³ However, the prospect of this option is a matter to be discussed during upcoming negotiations.

Upon reflection, all the above options pose some difficulties and the expectation of the UK discontinuing with the use of the EAW has raised concerns from various sides. Most concerns focus on the delays that foreseeable alternatives would likely cause in the processing of extradition requests.⁴⁴ Witnesses before the Select Committee on the European Union, such as David Armond (former Deputy Director-General, National Crime Agency), have gone as far as saying that any other form of agreement regarding extradition between the UK and the EU would be suboptimal in comparison to the currently established system.⁴⁵ Simultaneously, the Crown Office and Procurator Fiscal Service (an independent public prosecution service for Scotland) has suggested that Brexit as a whole is likely to hinder the functionality of the surrounding procedure and “put the UK in a retrograde and uncertain position”.⁴⁶

THE INTERESTS OF CITIZENS

The possibility that the UK will rely upon an alternative form of extradition process with the EU following Brexit, and the worries stemming from this possibility, consequently creates concern for a range of citizens’ interests. From a citizen interest perspective, not only is it essential for individuals to avoid facing longer periods of incarceration in pre-trial detention due to stagnation in the system, but it is fundamental that citizens are informed as to whether they are likely to be extradited at all. As a result, this section scrutinises the impact longer pre-trial detention could have for those individuals awaiting extradition and discusses alternatives to this option. Additionally, an assessment on the way in which the nationality of an individual could affect the surrendering process is provided, so as to determine whether EU citizens evading extradition to the UK will be perceived as an impairment to justice or rather viewed as the EU protecting the rights and interests of their citizens.

⁴³ Steve Peers, ‘UK/EU Security Cooperation After Brexit: the UK Government’s Future Partnership Papers’ (*EU Law Analysis*, 25 September 2017) < <http://eulawanalysis.blogspot.co.uk/2017/09/ukey-security-cooperation-after-brexit.html> > accessed 27 September 2017

⁴⁴ Written Evidence from The Law Society of Scotland, October 2016, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-home-affairs-subcommittee/brexit-future-ukey-security-and-policing-cooperation/written/43327.html>

⁴⁵ Written Evidence from David Armond, Deputy Director-General, National Crime Agency, October 2016, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-home-affairs-subcommittee/brexit-future-ukey-security-and-policing-cooperation/oral/41072.html>

⁴⁶ Written Evidence from the Crown Office and Procurator Fiscal Service, December 2016, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-home-affairs-subcommittee/brexit-future-ukey-security-and-policing-cooperation/written/44175.html>

Functionality & Pre-trial Detention

The surrender of individuals is far quicker under the Framework Decision 2002 than under traditional extradition agreements⁴⁷, which means that the average detention time in the surrendering country is lower as a result of the process. According to Alison Saunders (Director of Public Prosecutions at the Crown Prosecution Service), replacing the EAW with a different system could cause delays in extradition.⁴⁸ With respect to citizens, this poses as a problem since the Home Office Committee (House of Commons select committee that examines Home Office policy) has determined that a prolonged extradition process is likely to subsequently correlate with an extended period of pre-trial detention or, for convicted criminal offenders, pre-extradition incarceration.⁴⁹ Under UK domestic law, this is unlikely to cause an issue legally following Brexit because the maximum period of time an individual can be held ranges between 56 and 252 days.⁵⁰ However, this is evidently far longer than the maximum under the EAW process.

The European Court of Justice ('ECJ') has previously ruled, in the context of the EAW, that periods of pre-trial detention extending beyond the deadline for completing the surrender of an individual are acceptable as these will be detracted from the total length of the period of detention to be served in the Member State of surrender.⁵¹ Although certain Member States have difficulty in minimising the length of pre-trial detention, cases appear infrequent and, in fact, most Member States report little difficulty in respecting pre-trial detention time constraints.⁵² The extradition system under the Framework Decision 2002 is, therefore, designed to avoid subjecting individuals to long periods of pre-trial incarceration. By contrast, case law regarding bilateral extradition agreements such as the one between the UK and the US illustrate that the pre-trial detention period is lengthier when a traditional extradition process applies.⁵³

⁴⁷ Written Evidence from The Crown Office and Procurator Fiscal Service, December 2016, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-home-affairs-subcommittee/brexit-future-ukeu-security-and-policing-cooperation/written/44175.html>

⁴⁸ Written Evidence from Alison Saunders, Director of Public Prosecutions at the Crown Prosecution Service November 2016, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-home-affairs-subcommittee/brexit-future-ukeu-security-and-policing-cooperation/oral/42904.html>

⁴⁹ Home Affairs Committee, *Pre-Lisbon Treaty EU police and criminal justice measures: the UK's opt-in decision*, 31 October 2013, HC 615 2013-14, Page 6, Para 9

⁵⁰ Ed Cape & Tom Smith, 'The practice of pre-trial detention in England and Wales: Research Report' (2016) Project Report. University of the West of England Bristol < <http://eprints.uwe.ac.uk/28291/1/Country-Report-England-and-Wales-MASTER-Final-PRINT1.pdf> > accessed 27 September 2017, Page 29

⁵¹ Judgment of 16 July 2015, *Minister for Justice and Equality v Francis Lanigan*, C-237/15, EU:C:2015:475, Para 52

⁵² Jonathan Goldsmith, 'EAW-Rights: Analysis of the implementation and operation of the European Arrest Warrant from the point of view of defence practitioners' (2016) CCBE & European Lawyers Foundation < http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/CRIMINAL_LAW/CRM_projects/EN_CRM_20161117_Study-on-the-European-Arrest-Warrant.pdf > accessed 17 May 2017, Page 32

⁵³ Diane Webber, 'Extradition to the United States: A Long Road to Justice' (2015) Centre for the Response to Radicalisation and Terrorism Policy Paper < <http://henryjacksonsociety.org/wp-content/uploads/2015/05/Extradition-to-the-United-States.pdf> > accessed 24 March 2017, Page 8

Lengthier pre-trial detention periods are particularly concerning in a context where the UK prison system is suffering from a crisis of overcrowding because the prison population has somewhat doubled in the past twenty years to around 85,000 custodial offenders.⁵⁴ This change means certain prison facilities are dilapidated and inadequate⁵⁵, whilst general conditions are referred to as dehumanising.⁵⁶ Moreover, Penal Reform International (an independent NGO that promotes fair responses to criminal justice problems) points out that anyone in pre-trial detention is particularly vulnerable to violence and abuse⁵⁷ and research has also shown that overcrowding dramatically increases the risk of inmate suicide and self-harm.⁵⁸ Recent Ministry of Justice figures show that the prison suicide rate in the UK is at a record high, demonstrating a positive correlation between the two variables.⁵⁹

Nevertheless, alternative measures to imprisonment, such as bail, electronic monitoring and curfew requirements have previously been used by the UK judiciary for those awaiting repatriation to an EU Member State.⁶⁰ These possibilities mean that individuals could avoid facing the risks associated with pre-trial detention, but they could create different concerns for citizens. The Court of Justice for the European Union (CJEU) has formerly ruled that alternatives to detention, such as electronic monitoring do not have the effect of depriving an individual of their liberty and consequently should not be classified as 'detention' within the meaning of Article 26(1) Framework Decision 2002.⁶¹ Therefore, resorting to these alternatives for pre-trial purposes under existing judicial interpretation would mean individuals will be forced to undertake lengthier periods of inconvenient tasks, which will do nothing to reduce their overall sentence in the receiving country.

When reviewing the options available to the UK, the EAW Style Agreement is the most promising option for minimising the concerns explored in this section. Demand for extraditions to EU countries is likely to stay significant, considering that under the EAW regime, the UK surrendered 5,393 suspects to EU Member States

⁵⁴ HLP, 'Prison Watch' (*The Howard League for Penal Reform*, 12 May 2017) < <http://howardleague.org/prisons-information/prison-watch/> > accessed 12 May 2017

⁵⁵ Arianna Silvestri, 'Prison conditions in the United Kingdom' (2013) European Prison Observatory < <https://www.crimeandjustice.org.uk/sites/crimeandjustice.org.uk/files/Prison%20conditions%20in%20the%20UK.pdf> > accessed 11 June 2017

⁵⁶ Jamie Doward, 'Suicide, self-harm, stabbing and riots – prisons reach crisis point' *The Guardian* (London, 12 November 2016)

⁵⁷ Penal Reform International, 'Pre-trial justice – the issue' (PTJ) < <https://www.penalreform.org/priorities/pre-trial-justice/issue/> > accessed 21 June 2017

⁵⁸ Meredith Huey & Thomas McNulty, 'Institutional Conditions and Prison Suicide: Conditional Effects of Deprivation and Overcrowding' (2005) 85(4) SAGE 490, 502

⁵⁹ Alan Travis, 'Prison suicides in England and Wales reach record high' *The Guardian* (London, 26 January 2017)

⁶⁰ Judgment of 28 July 2016, *JZ v Prokuratura Rejonowa Łódź – Śródmieście*, C-294/16, EU:C:2016:610

⁶¹ Judgment of 28 July 2016, *JZ v Prokuratura Rejonowa Łódź – Śródmieście*, C-294/16, EU:C:2016:610, Para 54

between 2010 and 2015.⁶² High demand for extradition is only likely to increase delays in processing requests and aggravate all the potential associated consequences. Therefore, a surrender agreement that contains provisions on time limits, similar to the Framework Decision 2002, may help to limit the length of pre-trial imprisonment for citizens after Brexit. Conversely, the Extradition Convention 1957 presents various issues that would fail to alleviate the considered concerns. The return to the use of diplomatic channels alone creates procedural complications and delays⁶³ and is likely to lead to longer periods of pre-trial confinement.

Nationality & Evading Extradition

The nationality of an individual may become an important factor in a post-Brexit scenario because this condition could mean EU citizens evade extradition to the UK altogether. The potential for such a change will touch upon the interest of citizens for two distinct and opposed reasons. On the one hand, this change will present an obstacle that diminishes the ability of the UK to ensure the effective prosecution of crimes and criminals and therefore is likely to damage citizen interest in upholding justice. On the other hand, this change may be regarded by EU citizens as an opportunity to remain in the territory of the European Union and have a better chance to reintegrate into society after their sentence is complete.

The Centre for European Reform (an independent think-tank focused on the work of the EU) argues that trying to get countries to change their constitutional provisions regarding extradition of nationals following Brexit is the biggest problem facing the future extradition process.⁶⁴ Certain countries such as Germany, Poland and the Czech Republic have all historically excluded extradition of their own nationals on the grounds that this represents a *de facto* stripping of citizenship.⁶⁵ As a result, the UK could have difficulties retrieving offenders, particularly from a country like the Netherlands, which does not extradite its own nationals⁶⁶, even to other

⁶² Ian Bond, Sophia Besch, Agata Gostynńska-jakubowska, Rem Korteweg, Camino Montera-Martinez and Simon Tilford, 'Europe after Brexit Unleashed or undone?' (*Centre For European Research*, 15 April 2016) < <https://www.cer.org.uk/publications/archive/policy-brief/2016/europe-after-brexit-unleashed-or-undone> > accessed 11 December 2016, Page 11

⁶³ Oral Evidence from Andrew Langdon QC, March 2017
<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-home-affairs-subcommittee/brexit-the-european-arrest-warrant/oral/68836.html>

⁶⁴ Camino Mortera-Martinez, 'Arrested Development: Why Brexit Britain Cannot Keep The European Arrest Warrant' (*Centre for European Reform*, 10 July 2017) < <http://www.cer.eu/insights/arrested-development-why-brexit-britain-cannot-keep-european-arrest-warrant> > accessed 24 August 2017

⁶⁵ Damian Chalmers, Gareth Davies & Giorgio Monti, *European Union Law: Text and Materials* (3rd Edition, Cambridge University Press, 2014) Page 649

⁶⁶ Michael Faure & Stefan Ubachs, 'The Netherlands' in Sabine Gless, (eds), *Auslieferungsrecht der Schengen-Vertragsstaaten Neuere Entwicklungen*, Freiburg im Breisgau, 2002, 347-372

EU Member States, without guarantees that the individual will return to serve their custodial sentence in the Netherlands.⁶⁷

Moreover, a recent judgment by the CJEU in *Petruhhin*⁶⁸ might also make it difficult for the UK to retrieve offenders who are found and arrested in EU countries other than their own. The CJEU has suggested that a Member State that receives an extradition request from a third country must inform the Member State of which the citizen in question is a national. The Member State of which the citizen is a national is then able to request that the individual be surrendered to their jurisdiction, rather than the jurisdiction of the third country. In essence, *Petruhhin* increases the chances that EU citizens may escape extradition to the UK in a post-Brexit society because the UK will become a third country and thus the home state of the accused will have the last word on the extradition.⁶⁹

The EAW system has been successful in ensuring that there is a swift administration of justice for cross-border crimes because the process relies on the idea that all EU citizens can be surrendered in any EU Member State and be submitted before the appropriate justice system. Considering that the UK requests the surrender of far more citizens from EU Member States than from third countries, prospective changes may have detrimental effects for the enforcement of justice.⁷⁰ This is discouraging for UK citizens, especially for the victims of criminal offences, because it is undoubtedly in their interest that offenders should be tried and convicted in the UK for offences committed in the UK.

On the other hand, an important feature of extradition within Europe under the European Arrest Warrant is that EU citizens belong to a common space where criminal procedures and sentences are underpinned by EU law and the respect for fundamental rights. It is in the interest of EU citizens to remain in an EU Member State that will continue to uphold mutually accepted provisions on EU citizenship and detention rights, especially after Brexit. The possibility of escaping extradition might consequently be interpreted as protecting the interests of EU citizens who are the subject of a surrender request from the UK. This is because the UK will no

⁶⁷ Zsuzsanna Deen-Racsmány & Rob Blekxtoon, 'The Decline of the Nationality Exception in European Extradition?' (2005) 13(3) European Journal of Crime, Criminal Law and Criminal Justice 317, 347

⁶⁸ Judgment of 06 September 2016, *Aleksei Petruhhin v Latvijas Republikas Ģenerālprokuratūra*, C-182/15, EU:C:2016:630, Para 50

⁶⁹ Martina Menghi & Bernardo Vasconcelos, 'The Court's Decision in the Petruhhin case: EU Citizenship has not been extradited yet' (*Federalismi.it*, 31 May 2017) < <http://www.sipotra.it/wp-content/uploads/2017/06/The-Court%E2%80%99s-Decision-in-the-Petruhhin-case-EU-Citizenship-has-not-been-extradited-yet.pdf> > accessed 24 July 2017, Page 18

⁷⁰ NCA, 'Wanted by the UK: European Arrest Warrant statistics 2009 – May 2016' (*National Crime Agency*, 09 May 2016) < <http://www.nationalcrimeagency.gov.uk/publications/european-arrest-warrant-statistics/wanted-by-the-uk-european-arrest-warrant-statistics/690-wanted-by-the-uk-european-arrest-warrant-statistics-2009-may-2016-calendar-year> > accessed 15 December 2016

longer be obliged to uphold the same obligations, including obligations under the EU Charter of Fundamental Rights.⁷¹

Moreover, the CJEU recognises the importance of a person's chance to reintegrate into a society after their sentence and has encouraged judicial authorities to take this into consideration.⁷² Avoiding extradition to the UK arguably protects an EU citizen's interest to remain in one of the EU Member States where they will continue to feel like an EU citizen and retain this identity, rather than feel like a stranger in a third country. This opportunity may also allow citizens to remain in a country where they are familiar with local culture, language and tradition and possibly have family connections thereby helping their reintegration process.⁷³ As a result, evading extradition to the UK ensures that EU citizens remain in the territory of the EU, continue to feel like EU citizens and benefit from the protection that EU law provides during extradition and throughout.

It is too early to speculate on whether the proposed 'Security Treaty' could avoid turning the nationality of an individual into a decisive factor. At the same time, all other post-Brexit options set out earlier are unlikely to stop this condition becoming pivotal in future extradition decisions between the UK and EU Member States. The surrender agreement between the EU, Norway and Iceland justifies refusal based on citizenship⁷⁴, which means that a comparable EAW Style Agreement could also adhere to a similar position. Some believe that the UK may not necessarily seek to negotiate this equivalent provision⁷⁵, especially because the UK is not reluctant to the extradition of their own citizens because of their nationality.⁷⁶ However, Member States might be more prone to do so for constitutional reasons. Lastly, the Extradition Convention 1957 also contains a provision that enables contracting parties to refuse extradition of their own nationals.⁷⁷ For the UK to fall back on this agreement would mean definitively allowing countries to use citizenship as an excuse to refuse extradition in the future.

⁷¹ HC Deb, 07 September 2017, Vol 628, Col 347

⁷² Judgment of 17 July 2008, *Proceedings concerning the execution of a European arrest warrant issued against Syzmon Kolowski*, C-66/08, EU:C:2008:437, Para 45

⁷³ Celeste Davis, Stephen J Bahr & Carol Ward, 'The process of offender reintegration: Perceptions of what helps prisoners re-enter society' (2013) 13(4) SAGE 446, 452

⁷⁴ Council Decision 2014/835 of 27 November 2014 on the conclusion of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway [2014] OJ L343/1, Article 7

⁷⁵ Joanna Dawson, Sally Lipscombe & Samantha Godec, 'The European Arrest Warrant' House of Commons Library Research Paper, No. 07016, 18 April 2017, Page 32

⁷⁶ Select Committee on Extradition Law, *Extradition: UK law and practice*, 25 February 2015, HL 126 2014-15, Page 50, Para 162

⁷⁷ European Convention on Extradition 1957, Article 6

CONCLUSION

In summary, taking into consideration the evidence and the opinions provided for by practitioners and academics in the field of European criminal law, it is apparent that Brexit poses a threat to the future stability and practice of extradition between the UK and EU Member States. This paper has specifically identified that changes to the administrative framework are likely to destabilise the functionality of the procedure and cause considerable delays, especially because alternative surrender processes will struggle with the volume of extradition in Europe.⁷⁸ At the same time, the guarantee under the European Arrest Warrant that EU Member States will surrender their own nationals to the UK is likely to be lost by withdrawing from the EU. In turn, these problems threaten to encroach on the interests of all citizens, not only those subject to extradition requests, but also those who want to retain an effective and efficient justice system.

Fundamentally, for the protection of citizens' interests and the preservation of cooperation, security and justice throughout Europe, it is vital that the UK pursues an option that minimises change to the current extradition system. According to Guy Verhofstadt (the European Parliament's Brexit coordinator), future cooperation between the UK and the EU cannot continue under the Framework Decision 2002 so long as the UK maintains the desire for jurisdiction on extradition.⁷⁹ This does suggest that Brexit will lead to a change in the legal framework underpinning extradition between the EU and the UK in the future, but does not mean that an effective surrender agreement cannot be reached.

Presently, it is clear that there is a strong interest and intention on behalf of the UK to finalise an agreement with the EU that would avoid substantial changes to the existing process. Although there are multiple barriers to the prospect of achieving the proposed future 'Security Treaty'⁸⁰, it is probable that this option could safeguard effective cooperation in extradition by allowing the UK to remain part of the law enforcement agencies in the European Union. An extension of close cooperation between the UK and the EU Member States, based on existing practices and provisions, would ensure the retention of an operational surrender system throughout Europe. Subsequently, this would assist in minimising the risks that Brexit poses to citizens and would specifically serve to protect the interests of citizens identified in this paper.

⁷⁸ Written Evidence from Steve Peers, Professor at the University of Essex, September 2016, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-home-affairs-subcommittee/brexit-future-ukeu-security-and-policing-cooperation/oral/39000.html>

⁷⁹ Justin Govier, 'Repeal Bill Will Remove the Right to Sue Government' (*IBB Solicitors*, 16 August 2017) < <http://www.ibblaw.co.uk/insights/blog/repeal-bill-will-remove-right-sue-government> > accessed 23 August 2017

⁸⁰ Helen Warrell, 'UK calls for new security treaty with EU after Brexit' *Financial Times* (London, 18 September 2017)

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