CRIMINAL LAW BRIEFING

Cross-border law enforcement after Brexit: partnering in crime

The approach of the UK and the EU to cross-border law enforcement and co-operation in criminal judicial matters after Brexit is set out in the EU-UK trade and co-operation agreement (TCA) and is incorporated into UK law through the European Union (Future Relationship) Act 2020 (*see News brief "Future UK-EU relationship: the end of the beginning", www.practicallaw.com/w-029-3475*).

At the heart of the TCA is a clear desire for the UK to maintain the closest possible working relationship with the EU, given the UK's loss of direct access to certain sources of information and initiatives. Instead of falling back on the often inefficient and cumbersome pre-EU framework for mutual legal assistance (MLA) in criminal investigations and extradition, as would have happened in the event of a no-deal Brexit, the TCA attempts to strike a balance between maintaining the essence of EU legal developments and recognising the end of the UK's involvement as an EU member state. This appears to have been achieved in an overall successful manner, with sophisticated investigative tools or their equivalents remaining available and the UK's ongoing commitment to flagship international anti-money laundering (AML) efforts continuing undisturbed.

Access to material

EU law enforcement agencies rely on the smooth and timely exchange of information through a number of information-sharing initiatives, such as the Schengen Information System (SIS II), and harmonised legal tools, including European investigation orders (EIOs), which allow for the streamlined cross-border collection of documents and witness evidence. Although member states have not implemented these mechanisms uniformly, they still represent a vast improvement on the pre-EU MLA system, which chiefly relied on obtaining assistance through diplomatic channels.

New streamlined MLA route. While EIOs are no longer available to UK agencies probing misconduct in the EU or to European investigators looking to gather evidence in the UK, their loss may be felt more in name than in practice. The TCA seeks to streamline the old, cumbersome MLA route while preserving the greatest advantages of the EIO system, including by:

- Maintaining a tight timeframe for compliance, compared to the MLA route which operates without compulsory deadlines.
- Allowing requests to continue to be made on an agency-to-agency basis with direct judicial supervision, as opposed to the MLA system of states having to liaise indirectly through governmental departments.

While some teething problems may be expected, the TCA gives agencies broad powers to obtain one-off binding requests for documents, records of witness interrogations by the police and formal court testimony from abroad. The new system continues to allow the cross-border use of covert surveillance and intelligence gathering.

White-collar crime. The UK no longer has real-time access to SIS II, the EU's largest database for the exchange of live information on suspects, fugitives and missing persons. The loss of SIS II, together with an increased timeframe for the UK receiving information on convictions through the EU's criminal records sharing system, ECRIS, will be keenly felt by domestic law enforcement agencies, such as the police, that would ordinarily rely on continuous data feeds. This issue is further exacerbated by the only realistic alternative, Interpol's information systems, not quite being fully fit for purpose as not all member states upload information to Interpol in a uniform manner and Interpol reports are not automatically available on UK police databases.

Delays with receiving information from foreign agencies are more likely to affect data-heavy investigations into cross-border drugs offences, people trafficking, and art and vehicle theft, rather than sophisticated white-collar crime probes, although money laundering reports may also be affected by a delay in data transmission. On the other hand, the UK's access to other important databases, such as fingerprint and DNA databases, remains unfettered. The UK has also retained its ability to participate in bespoke information-sharing arrangements with other agencies that would be more likely to target complex fraud.

Overseas enforcement agencies. Although the UK has lost its previous status within Europol, the EU's law enforcement agency, and Eurojust, a hub agency that co-ordinates criminal law enforcement within the EU, the TCA allows the UK to continue its involvement in these organisations to the extent that it can do so from outside of the EU. This is undoubtedly useful at a time when Eurojust is looking to expand its co-operation remit to third countries, including Brazil, Columbia, Israel and Turkey. The UK can also carry on its long-standing practice of seconding international liaison officers to member states' police forces.

For corporate criminal investigations, the TCA preserves the UK's right to take part in joint investigation teams (JITs). JITs allow overseas law enforcement agencies to work together on a particular cross-border investigation and co-ordinate their investigative strategies. JITs help authorities where a national instrument, such as the French blocking statute, would otherwise prohibit the transfer of data overseas and where agencies are looking to prosecute companies and individuals concurrently but in different jurisdictions.

Impact on corporate investigations. Brexit may not have a substantial impact on the ability of regulators to conduct cross-border investigations. This is especially the case where EU systems that never functioned seamlessly in the first place, such as EIOs, have now been replaced with fairly similar new tools. In fact, the Serious Fraud Office (SFO) may be looking to make more use of instruments that rely on the co-operation of other jurisdictions, both within the EU and beyond, given the Supreme Court's decision in *R (on the application of KBR Inc) v The Director of the Serious Fraud Office* that the SFO does not hold extraterritorial powers to obtain material held abroad by overseas persons and the criticism it has faced for its approach to foreign agencies (*[2021] UKSC 2; see News brief "Power to compel production of*

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documents: reining in the SFO's reach", www.practicallaw.com/w-029-7722).

Access to persons under investigation

Before Brexit, UK and EU agencies would rely on EIOs to obtain testimony from witnesses and third parties. European arrest warrants (EAWs) were used where an individual was sought for the trial of a criminal offence or to serve a prison sentence in relation to an existing conviction. Unlike extradition arrangements between the UK and non-EU third countries, EAWs relied on the principle of mutual recognition. In practical terms, this meant that extradition requests were circulated directly between national law enforcement agencies without executive scrutiny, arrests were carried out promptly and it was assumed that extradition could take place as a matter of principle, subject to certain procedural safeguards.

EAWs are no longer available for suspects that are located in the UK and sought by EU agencies, or suspects that are located in the EU and sought by UK agencies. However, they have been replaced with a system that is largely comparable and should function in a similar manner. For wanted persons located in the UK, their procedural rights and grounds for resisting extradition to the EU are largely unaffected, although they no longer have recourse to seeking a remedy from the Court of Justice of the EU if their domestic challenge fails. However, there are a few technical differences that, while seeming minor at first glance, may affect the ability of the UK authorities to successfully get suspects from the EU.

Firstly, member states are no longer obliged to extradite their citizens to the UK, whereas the UK has placed no such bar on its citizens' extradition to the EU. Most notably, Germany has indicated that it would apply this exemption for all German citizens sought by the UK, unlike when Germany is asked to execute an EAW.

Secondly, for certain serious offences, including fraud and money laundering, EAWs did not require the requesting state to prove that the alleged conduct would also amount to a criminal offence in the requested state. While it is expected that the double criminality requirement will also be waived for an almost identical list of serious offences by the parties under the TCA, this is yet to be confirmed. The TCA has explicitly broadened the definition of fraud to include bribery; however, similarly to the EAW scheme, complex market manipulation offences continue to fall outside the scope of the double criminality presumption. This has already proved fatal to the SFO's ability to extradite various suspects under the old EAW regime from Germany and France in its Euro Interbank Offered Rate (EURIBOR) probe. This was due to the alleged offences not falling within the EU double criminality exception list, and Germany and France not considering the particular conduct to be criminal under their domestic laws. This ultimately led to the collapse of the SFO's investigation (*www.sfo.gov.uk/cases/euribor/*).

In terms of the practical impact of the changes, anecdotal evidence suggests that the volume of extradition requests made under the new system is significantly lower than the figures from a year ago, although the COVID-19 pandemic could have played a significant part in this decrease.

UK sanctions framework

Since leaving the EU, the UK has implemented its own autonomous sanctions framework under the Sanctions and Anti-Money Laundering Act 2018 (*www.practicallaw.com/w-015-4502*). This confers broad powers on the government to introduce sanctions either on the back of an existing international obligation, such as a UN obligation, or to pursue its own foreign policy objectives. Although EU sanctions legislation no longer applies directly in the UK, some of it has been retained. For example, the EU Blocking Regulation (*2271/96/EU*), which protects persons against, and counteracts the extraterritorial impact of, US sanctions concerning Iran and Cuba, forms part of the retained EU law that applies in the UK by virtue of the European Union (Withdrawal) Act 2018.

AML landscape after Brexit

Brexit has had no significant bearing on the UK's direction of travel in relation to its efforts to increase the scrutiny of beneficial ownership of corporate structures and promote a culture of AML compliance (*see box "UK sanctions framework"*). The TCA replaces the EU regime for mutually recognising freezing and confiscation orders with an analogous new scheme, which allows European and UK authorities to make streamlined requests for these domestic orders to be recognised and enforced. Companies with operations in the EU, which continue to remain subject to the existing EU regime, should take note that the EU regime has undergone significant changes under the Regulation on the mutual recognition of freezing orders and confiscation orders (*2018/1805/EU*), which applied from 19 December 2020.

In addition, both the UK and the EU have expressed their continued commitment to making best endeavours to apply various international standards. The TCA refers expressly to the Financial Action Task Force's standards, among others. As expected, the UK and the EU have also agreed to adhere to standards equivalent to those that the UK had previously signed up to under the Fifth Anti-Money Laundering Directive (*2018/843/EU*), including the maintenance of beneficial ownership registries and the exchange of related information. Specifically, the TCA obliges the EU and the UK to determine common standards for the details to be kept on both companies' and trusts' ultimate beneficiaries, as well as allowing members of the public with legitimate interests to access this information. The UK is also pushing ahead with its existing plans to widen the net on beneficial ownership registries, including all UK overseas territories implementing their own public beneficial ownership registers by the end of 2023, and ongoing plans to introduce legislation aimed at registering foreign entities' beneficial ownership of UK properties.

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