

Hard Brexit Could Put Chinks In UK's Financial Crime Armor

By William Shaw and Najiyah Budaly

Law360, London (March 26, 2019, 7:55 PM GMT) -- This week's Brexit voting deadline could propel Britain out of the European Union without a regulatory safety net in April, a process that would open chinks in the country's defenses against fraud and financial crime that legal experts say may never be closed.

Britain's EU membership allows it to participate in bloc-wide mechanisms that help it request joint investigations, issue EU arrest warrants and extradite its own offenders to face trial in the U.K. The partnership allowed bodies such as the National Crime Agency and Serious Fraud Office to share intelligence seamlessly with their EU counterparts.

Those arrangements are now under threat if Britain exits the bloc without a withdrawal agreement or a transition to a future cooperation framework because of political deadlock in London. The threat of exclusion from EU intel flows has moved the SFO to warn that Britain's loss of access to EU tools will lead to an adverse effect on investigations and prosecutions.

"From the perspective of law enforcement there is simply no benefit from a no-deal scenario," said Shaul Brazil, a partner at BCL Solicitors LLP. "All relevant EU legislation regarding criminal justice cooperation will be removed immediately."

A hard Brexit would send Britain spinning out of the European arrest warrant scheme. Since 2004 this has enabled U.K. law enforcement to seek the arrest of British nationals in the EU for offenses carrying a maximum penalty of at least a year in prison. The process skips the need for cumbersome extradition talks between member states, and has reduced costs and the risks of political interference in the administration of justice.

Between 2017 and 2018 Britain issued 296 warrants, leading to 183 arrests and 181 surrenders, according to data from the NCA. But a hard Brexit would see Britain revert to the 1957 European Convention on Extradition, slowing down the process and potentially lending a helping hand to criminals on the run.

“Extradition requests will need to be transmitted through diplomatic channels rather than directly via national authorities,” said Kevin Roberts, partner at Morrison & Foerster LLP. “Wanted criminals will once again be able to sun themselves on the Costas whilst fighting extradition.”

U.K. agencies like the Bank of England, SFO and Financial Conduct Authority will also lose access to the European Investigation Order scheme, which enables member states to request evidence located in other EU member states. This can prove useful in cases involving money laundering, identify theft and tax fraud.

A hard Brexit also means saying goodbye to Europol, the agency headquartered in The Hague that coordinates member states’ fight against terrorism, cyberattacks and other forms of serious organized crime. Critically, the agency also maintains a criminal information and intelligence database, known as the Europol Information System, that helps member states pool their crime-fighting information.

“The loss of access to Europol signifies the risk of a major drop in international cooperation in fighting cross-border crime,” said Joanna Dimmock, partner at White & Case LLP.

Exiting the EU without a deal could further complicate Britain’s high-profile attempts to clamp down on money laundering. Concerns are already mounting about the allure of London for international criminals and corrupt politicians, and about the government’s ability to track the flow of dirty money.

Parliament’s influential Treasury Committee described the U.K.’s anti-money laundering enforcement as “highly fragmented” earlier this month. Corruption Watch, a U.K. think tank, warned on March 6 that Britain’s weak laws on bribery and fraud are encouraging police to outsource cases against financial institutions to their counterparts in the U.S.

Britain has already adopted Europe’s 4th Anti-Money Laundering Directive and is planning to introduce the fifth version of the legislation. But these regulatory packages are built around the concept that member states will share cross-border information

about the beneficial owners of assets and coordinate on intelligence-sharing and investigations.

“There is a real question mark over whether the U.K. will lose the fight against dirty money by using national solutions to tackle an international problem,” Dimmock said.

U.K. civil servants have been drawing up secondary legislation in advance of a no-deal scenario, including the draft of the so-called Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019. These would include transitional provisions setting out how cases that are already underway by Day One of Brexit are governed, or how Britain should treat data obtained before that date.

A separate statutory instrument, officially called the Criminal Justice (Amendment Etc.) (EU Exit) Regulations 2018, also brings to an end the system of mutual recognition of financial penalties between Britain and the EU. This has enabled Britain to get a fellow member state to enforce a fine handed out in the U.K.

Britain may now seek to arrange similar access to the EU mechanisms that other third countries currently enjoy. Options include trying to secure observer status at Europol, like the U.S., which would provide Britain with some access to European intelligence. The U.K. would still have access to Interpol, the world’s largest police organization, though critics say it is less efficient than the EU mechanisms. But in large part the country may be left dependent on the kindness of strangers.

“The benefits we’ve enjoyed have been the consequence of an agreement we have between us and other members of the union,” said Kingsley Napley LLP partner Alun Milford, a former SFO general counsel. “The U.K. cannot legislate for other people to agree to continue to share information with us.”

--Additional reporting by Christopher Crosby. Editing by Melissa Lipman and Pamela Wilkinson.