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The Practitioner's Guide to Global Investigations

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United Kingdom and the United States

Fourth Edition

Editors

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Individuals in Cross-Border Investigations or Proceedings: The UK Perspective

Richard Sallybanks, Ami Amin and Jonathan Flynn¹

17.1 Introduction

In any cross-border investigation, invariably suspects will either be located in different jurisdictions, or subject to investigation by authorities from different jurisdictions, or both.

This chapter looks at the key issues that can arise when acting for an individual who is present in the United Kingdom and subject to a criminal investigation or proceedings here or in one or more overseas jurisdictions.²

17.2 Cross-border co-operation

See Chapter 9
on co-operating
with authorities

There are various ways in which the United Kingdom might co-operate with overseas agencies or regulators when investigating or prosecuting an individual, ranging from informal ‘intelligence sharing’ to mutual legal assistance (MLA).

In the United Kingdom, the framework governing MLA requests is contained, primarily, in the Crime (International Co-operation) Act 2003 (CICA), Part 1 of which deals with criminal cases. Under CICA, an MLA request can only be made if it appears to the investigating authority that an offence has been committed (or there are reasonable grounds to suspect that an offence has been committed), and proceedings have been initiated or an investigation has begun.³ MLA requests

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2 Whereas England and Wales have a common legal system, there are certain substantive and procedural differences in the Scottish and Northern Irish systems. This chapter focuses on the English and Welsh legal system.

3 Section 7, Crime (International Co-operation) Act 2003.

are made to the UK Central Authority (UKCA)⁴ through a formal international letter of request, known as a *commission rogatoire* in civil law jurisdictions. The UK Home Office has published detailed guidance on how authorities outside the United Kingdom can make such requests.⁵ MLA requests will only be considered appropriate, however, when the request is for evidence (and not intelligence).⁶

Where overseas police and other law enforcement agencies request assistance directly from a UK law enforcement agency, a formal MLA request is not required. A number of UK law enforcement agencies⁷ can receive direct requests, and often this form of co-operation is governed by data sharing agreements or memoranda of understanding.

In some instances, cross-border co-operation may extend to the establishment of a joint investigation team (JIT) between investigating agencies in more than one country.⁸ The establishment of a JIT is another means by which information or evidence gathered in one country can be shared with another without the need for MLA.

Practical issues

17.3

Asset freezing and restraint

17.3.1

During a cross-border investigation, an overseas authority may seek to freeze or restrain an individual's assets in the United Kingdom. The Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (the 2005 Order) sets out the provisions for the United Kingdom to respond to and co-operate with other countries in freezing and confiscating assets.⁹ Under section 444(1)(a) of the Proceeds of Crime Act 2002 (POCA), property in the United Kingdom can be frozen in accordance with an external request relating to proceedings for the recovery of criminal proceeds.¹⁰

In the first instance, external requests will be addressed to the Secretary of State for the Home Department (SSH/D), who will in turn refer the matter to the relevant UK authority.¹¹ The relevant authority will then apply to the Crown Court

4 The UKCA is the Home Office department responsible for receiving, acceding to and ensuring the execution of MLA requests in England, Wales and Northern Ireland. Her Majesty's Revenue and Customs (HMRC) is responsible for MLA requests in England, Wales and Northern Ireland relating to tax and fiscal customs matters. The Crown Office is responsible for MLA requests in Scotland, including devolved Scottish matters.

5 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/415038/MLA_Guidelines_2015.pdf.

6 Section 7(2), Crime (International Co-operation) Act 2003.

7 These are: the UK Liaison Bureau at Europol via the National Crime Agency; Interpol via the National Crime Agency; UK Visas & Immigration; HMRC; Police Services; Financial Intelligence Units; Asset Recovery Offices.

8 Sections 103 and 104 of the Police Reform Act 2002.

9 The Order is made in exercise of the powers conferred under section 444 and 459(2) POCA.

10 An external request is a request by an overseas authority to prohibit dealing with property identified in the request. Section 447(1) POCA.

11 The relevant authority will be the Director of the National Crime Agency or the Director of Public Prosecutions and, in respect of offences involving serious or complex fraud, the Director of the

for the assets to be restrained. For the Crown Court to give effect to an external request: the property in England and Wales must be identified; a criminal investigation or proceedings relating to the relevant offence must have commenced in the requesting state; and there must be reasonable cause to believe that the alleged offender has benefited from his or her criminal conduct.¹² Furthermore, under section 447(8) of POCA, the criminal conduct must meet the dual criminality requirement, in that it must also amount to an offence in the United Kingdom, or would do so if it occurred there.

Where the Crown Court is satisfied that these conditions are met, it may make a restraint order prohibiting a person from dealing with the property identified in the external request, subject to certain exceptions.¹³ A restraint order must be served on the suspect and any other person affected by it, and the UK courts will require confirmation this has been done. Failure to do so could result in the order being discharged.

Where a restraint order is obtained, it is likely that any banks or financial institutions to which the individual is connected will be served with a copy of the order in order to freeze any assets (ensuring that they remain available for confiscation).

The provisions of the 2005 Order correspond to provisions in Parts 2 to 4 and Part 5 of POCA (excluding Chapter 3), applicable to UK investigations. As with Parts 2 to 4 of POCA, section 444 enables restraint orders to be granted from the outset of a criminal investigation.

17.3.2 Account monitoring orders

CICA implements the 2001 Protocol to the Convention on Mutual Assistance in Criminal Matters (the 2001 Protocol), which creates obligations for participating countries to respond to requests from overseas authorities for assistance locating bank accounts or to provide banking information relating to criminal investigations.¹⁴ Account monitoring orders under CICA only apply to an investigation by a 'participating country' into serious criminal conduct.¹⁵

Account monitoring procedures were first introduced in the United Kingdom under POCA. However, separate provisions have been created under CICA to ensure that the United Kingdom can meet the requirements of the 2001 Protocol, which has a wider scope than POCA.

Where the SSHD receives a request from the relevant overseas authority, he or she may direct a senior police officer to apply, or arrange for a constable to apply, for an account monitoring order.¹⁶ A judge can make an account monitor-

Serious Fraud Office (article 6, the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005).

12 Article 7, The Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005.

13 *Ibid.*, article 8.

14 Sections 36 to 42, Crime (International Co-operation) Act 2003.

15 The request must be from an EU Member State, Iceland, Japan, Switzerland or the United States.

16 Section 35, Crime (International Co-operation) Act 2003. An account monitoring order is an order made by a judge to enable transactions on a particular account to be monitored for a specified period.

ing order where he or she is satisfied that there is an investigation into criminal conduct in the country in question and the order is sought for the purposes of that investigation.¹⁷ Applications can be made, without notice, to a judge in chambers.¹⁸ The court may discharge or vary an account monitoring order, but not on an application by the account holder.¹⁹

An account monitoring order can also be requested under Part 5 of the Proceeds of Crime (External Investigations) Order 2014 for the purposes of a criminal investigation²⁰ or criminal proceedings.²¹ The request must demonstrate reasonable grounds for believing that the account information requested is of substantial value to the overseas investigation, and that it is in the public interest for it to be provided.²²

Under POCA, account monitoring orders may be made for up to 90 days and the same restrictions apply to requests under the 2001 Protocol. Arrangements will be made between the relevant authorities case by case.²³

Asset tracing

17.3.3

All asset tracing should be conducted via law enforcement co-operation through financial intelligence units. The United Kingdom has no central record for bank accounts. Therefore, any information should be sought via police co-operation before an MLA request is made.

In the United Kingdom, property or a sum of money is recoverable if it has been specified in an external order.²⁴ However, if the property (including money) specified in the external order has been disposed of, it is only recoverable if it is held by a person into whose hands it may be followed.²⁵

Under the 2005 Order, any property deemed to represent the original recoverable property is also recoverable.²⁶ If a person disposes of recoverable property that represents the original property, the property may be followed into the hands of the person who obtains it (and it continues to represent the original property).²⁷

17 Section 36, Crime (International Co-operation) Act 2003.

18 Ibid.

19 Ibid.

20 Provided that the investigation falls within a confiscation investigation or a civil recovery investigation.

21 Part 8, POCA.

22 Article 30, Proceeds of Crime (External Investigations) Order 2014.

23 Article 3(4) of the 2001 Protocol to the Convention on Mutual Assistance in Criminal Matters.

24 Article 202, the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005.

25 Ibid.

26 Ibid., Article 203.

27 Ibid.

17.3.4 Confiscation and forfeiture

Under the 2005 Order, property within the United Kingdom may be subject to confiscation proceedings following the receipt of an external order.²⁸

Upon receipt of an authenticated external order, the SSHD may refer it to the relevant UK authority to process.²⁹ Only the relevant Director (as defined in article 18 of the 2005 Order) may then make an application to the Crown Court to give effect to it.³⁰ The Crown Court must decide to give effect to an external order by registering it where certain conditions are met. Those conditions are that (1) the external order was made following a conviction of the person named in the order, and no appeal is outstanding, (2) the external order is in force and there is no appeal outstanding in respect of it, (3) giving effect to the order would not be incompatible with the Convention rights³¹ of the individual concerned, and (4) the property is not subject to charges under the provisions set out in article 21(6) of the 2005 Order.³²

Where the Crown Court decides to give effect to an external order, it must register it and provide for notice of the registration to be given to any person affected by it,³³ who may apply to vary the property to which it applies.³⁴

Under article 26 of the 2005 Order, the amount ordered to be paid is due on the date notice is given to the affected person. The Crown Court has discretion to allow for more time to pay.³⁵ Where the external order specifies a sum of money in another currency, the sterling equivalent in accordance with the exchange rate prevailing at the end of the working day immediately preceding the day of registration of that order will be sought.³⁶

17.3.5 Interviews

See Chapter 15 on representing individuals in interviews

An individual suspected of criminal activity who is resident or temporarily present in the United Kingdom and whom the UK authorities wish to question will be interviewed 'under caution'. This is usually done voluntarily unless it is

28 An external order is made by an overseas court where property is found, or believed to have been obtained, as a result of, or in connection with, criminal conduct. Section 447(2)(b) POCA.

29 The relevant authority will be the Director of the National Crime Agency or the Director of Public Prosecutions, and, in respect of offences involving serious or complex fraud, the Director of the Serious Fraud Office (article 18, the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005).

30 Article 20, the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005.

31 Rights under the European Convention on Human Rights.

32 The fourth condition is that the specified property must not be subject to a charge under: (a) section 9 of the Drug Trafficking Offences Act 1986(2); (b) section 78 of the Criminal Justice Act 1988(3); (c) article 14 of the Criminal Justice (Confiscation) (Northern Ireland) Order 1990(4); (d) section 27 of the Drug Trafficking Act 1994(5); (e) article 32 of the Proceeds of Crime (Northern Ireland) Order 1996(6) (article 21, the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005).

33 *Ibid.*, article 22.

34 *Ibid.*, article 22.

35 *Ibid.*, article 26.

36 *Ibid.*, article 25.

considered necessary to arrest the individual and there are legitimate reasons for doing so, such as a reasonable belief that, unless placed under arrest, the suspect will abscond from the jurisdiction or will somehow attempt to improperly interfere with the investigation.³⁷

Either way, the interview will be conducted in accordance with the procedures laid down in the Police and Criminal Evidence Act 1984 (PACE) and the accompanying Code C. The suspect has a number of rights, including the right to have a lawyer present.³⁸ A lawyer is defined as a UK solicitor holding a current practising certificate or an accredited or probationary representative.³⁹ This means that the suspect cannot be represented during the interview by an overseas lawyer. However, the suspect may have an approved interpreter present if he or she does not speak, or has only limited, English.⁴⁰

The question of whether the interview is admissible in proceedings in any other jurisdiction will depend on the laws of that country. This means that, in cross-border investigations, serious consideration must be given by all the suspect's legal advisers prior to any interview in the United Kingdom as to whether his or her answers (or silence) may be admissible in any other investigating jurisdiction and, if so, the resulting potential benefits or disadvantages of the strategy adopted.

When a suspect is resident in the United Kingdom, but is wanted for questioning by an overseas authority, the individual (or his or her legal advisers) may be approached with a request that the suspect travel to the country of the requesting authority for interview voluntarily.

In the absence of any such request, or if it is refused, the requesting authority may be able to gain evidence from the suspect in the United Kingdom through MLA. In brief, an overseas authority can request that a statement be taken from the suspect on a voluntary basis. Alternatively, where the evidence needs to be taken on oath or where the suspect refuses to co-operate, the request can be for the suspect to be compelled to attend court for questioning.

Once before the court, the suspect can then be questioned under oath (although an oath need not be administered if this is allowed under the laws of the requesting state). The suspect retains the right against self-incrimination and may refuse to answer any question.

If a suspect consents to giving the overseas authority a statement voluntarily, or answers questions in court, this is likely to be admissible in any future proceedings in the requesting jurisdiction (subject to the applicable law in that jurisdiction). Again, the question of whether statements are also admissible in proceedings in any other jurisdiction will depend on local laws, and serious consideration must be given by all the suspect's lawyers of the implications.

37 Section 24 and Code G Police and Criminal Evidence Act 1984 (PACE).

38 Paragraph 6, Code C PACE.

39 Paragraph 6.12, Code C PACE.

40 Paragraph 13, Code C PACE.

Often the requesting state seeks to obtain evidence from an individual who is not a suspect, but who is a witness, in the investigation. In such situations, the same MLA procedures can be used to obtain evidence.

However, if it is believed that the non-suspect individual will be unco-operative or unwilling to assist in any circumstances other than by compulsion, and assuming that the investigation is into a serious or complex fraud of the type that would fall under the remit of the Serious Fraud Office (SFO), a MLA request can be made to direct the SFO to obtain such evidence from the individual using its compulsory section 2 powers.⁴¹ Answers obtained via this process are not generally admissible as evidence against the interviewee in criminal proceedings,⁴² although they will inform the rest of the investigation.

Before granting the request, the requesting authority will be expected to provide an undertaking that any statement, or the contents of any interview, made by an individual pursuant to a compulsory section 2 notice will not be used in evidence against that person in any subsequent prosecution.⁴³

17.3.6 Search and seizure

Under section 16 of CICA, an overseas authority can request the search or seizure of property in the United Kingdom. However, a request will not be granted automatically, even in circumstances where a search warrant has been issued in the requesting country.

See Section
17.3.7

In the first instance, the UK authorities may choose to implement the request less invasively, such as by seeking the production of documents. Moreover, even if the UK authorities accede to the request they do not have the power to grant the search warrant themselves, but must apply to a UK court.

Under section 17 of CICA, a court in England, Wales or Northern Ireland⁴⁴ may only issue a warrant at the request of an overseas authority where they are satisfied that the following three conditions are met: first, that criminal proceedings have been instituted, or a person has been arrested during the course of a criminal investigation, outside the United Kingdom; second, that the offence at issue would constitute an indictable offence in England or Wales (or an arrestable offence in Northern Ireland); and third, that there are reasonable grounds to suspect that the premises in question are occupied or controlled by that person and contain evidence relating to the offence.⁴⁵

An application for a search warrant must be supported by a written document, known as an information, setting out the factual basis on which the warrant is sought. Since search warrant applications are made *ex parte*, the officer making the

41 Section 2 of the Criminal Justice Act 1987 (CJA). The Financial Conduct Authority has a similar power under section 171 of the Financial Services and Markets Act 2000 (FSMA).

42 Answers given in compelled interviews will, however, be admissible against the interviewee in most types of non-criminal proceedings.

43 *Saunders v. The United Kingdom* [1996] ECHR 65, para. 68 in particular.

44 Different conditions apply to warrants issued in Scotland (see section 18 CICA).

45 Section 17(3) CICA.

application must furnish the court with the full facts at their disposal (including those that militate against the granting of a warrant).⁴⁶

Where a warrant is granted under section 17 of CICA, an officer from the executing UK authority may enter the property to seize and retain evidence relating to the offence. All search warrants executed in the United Kingdom must comply with the requirements of PACE and Code B.⁴⁷ This includes a requirement to provide the occupier of the premises with a copy of the warrant.

Where evidence is seized under CICA, either the original or a copy will be sent via the UKCA to the court in the territory that requested the seizure.⁴⁸ However, further considerations will apply in the event that the material seized is subject to legal professional privilege or constitutes 'special procedure material'.⁴⁹

In this regard, it is worth noting that an individual may hold privileged material belonging not only to themselves, but also to their current or former employer (such as legal advice given to the company or material generated during the course of an internal investigation).⁵⁰ In the event of seizure of such material, the company that has the benefit of the privilege may itself wish to make representations to the authority receiving the material.

See Chapter 35
on privilege

Production of documents

17.3.7

In cross-border investigations involving financial crime, the most common mechanism to compel individuals to produce information, whether by answering questions in interview or by producing documents, is through the SFO's powers under section 2 of the Criminal Justice Act 1987 (CJA).⁵¹

See Chapter 11
on production of
information to
authorities

The territorial scope of the SFO's powers under section 2 is not defined by the CJA. However, in the recent case of *R (KBR Inc) v. Serious Fraud Office*,⁵² it was determined that section 2 powers can, in certain circumstances,⁵³ have extra-territorial effect (circumventing the requirements of MLA).⁵⁴ Accordingly, consideration should be given early in any cross-border investigation to what documents

46 *R (Energy Financing Team) v. Bow Street Magistrates' Court* [2006] 1 WLR 1317.

47 Section 15(6) PACE specifies what a warrant should contain.

48 Section 9 CICA.

49 Special procedure material includes journalistic material, or material acquired or created in the course of any trade, business, profession or other occupation, which is held subject to a duty of confidentiality (section 14 PACE 1984).

50 The recent decision in *The Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation* [2018] EWCA Civ 2006 has broadened the scope of material that might arguably be subject to legal professional privilege.

51 Equivalent powers under Part XI of the Financial Services and Markets Act 2000 in respect of FCA investigations and section 62 of the Serious Organised Crime and Police Act 2005 in respect of National Crime Agency, HMRC and police investigations into 'specified offences'.

52 [2018] EWHC 2012 (Admin).

53 The notice was challenged on jurisdictional grounds. However, the High Court ruled that there was a 'sufficient connection' between KBR Inc and the UK.

54 On 8 April 2019, the UK Supreme Court granted KBR Inc leave to appeal the decision, although the basis of the appeal is not known.

an individual has in his or her possession (whether in hard copy or electronically) and where they are held.

In addition, under section 20 of CICA, a participating country⁵⁵ may request a freezing order in relation to evidence (this does not extend to property or money). Requests would be made to the Home Office and must relate to a listed offence.⁵⁶ Once evidence has been frozen it must be retained until instructions have been received to transfer that evidence to the requesting state, or to release it.⁵⁷

In the future, the Crime (Overseas Production Orders) Act 2019 (COPOA)⁵⁸ will enable an ‘appropriate officer’⁵⁹ to apply to the Crown Court for an overseas production order⁶⁰ requiring a person based in a country outside the United Kingdom that is party to, or participates in, a ‘designated international co-operation arrangement’ to produce or give access to ‘electronic data’⁶¹ regardless of where it is stored. At present, no designated agreements are in place, meaning certain operative parts of COPOA are not yet in force. However, the United Kingdom is in the process of negotiating a designated agreement with the United States pursuant to the US Clarifying Lawful Overseas Use of Data Act 2018.

17.4

Extradition

In cross-border criminal investigations, suspects are often resident outside the jurisdiction conducting the investigation.⁶² As such, a critical question will be whether, and how, they may be subjected to extradition.

The answer lies in the legislation of, and arrangements between, the requesting and requested states.

The UK position is governed by the EU Framework Decision⁶³ and its obligations are implemented through the Extradition Act 2003 (the 2003 Act).

55 One of the EU Member States, Iceland, Japan, Switzerland and the United States.

56 Article 3, Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence.

57 Section 24 CICA.

58 COPOA received royal assent on 12 February 2019.

59 The ‘appropriate officers’ include a constable, an officer of HMRC, a member of the SFO and a person appointed by the Financial Conduct Authority (section 2(1)(a) COPOA).

60 The requirements of which the Crown Court judge must be satisfied before granting an overseas production order are set out in section 4 COPOA.

61 ‘Electronic data’ is broadly defined as ‘any data stored electronically’, although OPOs cannot require the production of material that is protected by legal professional privilege, or personal confidential records relating, for example, to an individual’s physical or mental health (section 3 COPOA).

62 The focus of this chapter is on extradition from the United Kingdom. However, individuals wanted by overseas authorities may be the subject of an Interpol red notice. Red notices can be issued on the basis that the individual is sought for prosecution or to serve a sentence. Once issued, a red notice alerts police and border officials around the world, and therefore affected individuals may encounter difficulties when travelling internationally, even if they are not subject to an investigation or arrest warrant in the jurisdiction they are travelling from or to. For more information see: <https://www.interpol.int/INTERPOL-expertise/Notices/Red-Notices>.

63 2002/584/JHA.

The 2003 Act is divided into two parts. Part 1 applies to requests made by ‘category 1 territories’ (EU countries and Gibraltar) through the European arrest warrant (EAW) procedure.⁶⁴ Part 2 applies to requests made by ‘category 2 territories’, namely those other countries with which the United Kingdom has extradition relations.⁶⁵

It is not yet clear what impact the United Kingdom’s decision to leave the European Union will have, but it is likely that legislators will be revisiting this sometimes controversial area of law.

Extradition from the UK – category 1 territories: the EAW

17.4.1

The EAW is a fast-track procedure that allows the requesting state to secure the return of a requested person quickly and effectively.

The National Crime Agency certifies the EAW on receipt from the requesting state before liaising with the Crown Prosecution Service (CPS) for advice on the validity and content of the request.

The requesting state must identify the offence of which the requested person is accused and confirm that the EAW is issued with a view to his or her arrest and extradition for the purpose of prosecution or, where the requested person has been convicted, for the purpose of being sentenced or to serve a sentence already passed. The information must include details such as the requested person’s identity and particulars of the alleged offence or conviction. Failure to comply with these requirements invalidates the EAW.⁶⁶

Following the certification of the EAW, a warrant for the requested person’s arrest is issued. On arrest, the individual will initially be taken to a police station and held there under the provisions of PACE and the accompanying Code C. The individual has various rights, including the right to have someone informed of the arrest, the right to free independent legal advice, and the right to consult privately with a solicitor. A formal custody record will be opened, detailing key aspects of the detention, but the individual will not be interviewed as it is not the role of the police to investigate the offence. However, given the significance of identification to the extradition process, fingerprints, non-intimate samples and photographs may be obtained from the individual in accordance with PACE Code D.⁶⁷

Following the requested person’s arrest and initial detention, he or she must be brought before a court⁶⁸ ‘as soon as practicable’ for an initial hearing and fixing of the extradition hearing within the next 21 days.⁶⁹ Depending on the day and time of the arrest, this requirement can mean that the individual spends only hours in

⁶⁴ Extradition Act 2003 (Designation of Part 1 Territories) Order (SI 2003/3333).

⁶⁵ Extradition Act 2003 (Designation of Part 2 Territories) Order (SI 2003/3334).

⁶⁶ Section 2, the 2003 Act.

⁶⁷ Sections 166 to 168, the 2003 Act.

⁶⁸ In England and Wales, cases are heard at Westminster Magistrates’ Court; in Scotland, cases are heard at the Edinburgh Sheriff Court; and in Northern Ireland, cases are heard by designated county courts or resident magistrates.

⁶⁹ Sections 3 and 4, the 2003 Act.

police detention before being brought before the court although, if arrested at the weekend, it can mean spending up to two nights in police custody.

At the extradition hearing, the judge must be satisfied that the alleged conduct constitutes an extraditable offence⁷⁰ and that no bar to extradition applies. If the judge orders extradition, and in the absence of any appeal, the requested person must be extradited within 10 days of the order, or later if agreed with the requesting state.

Either party may appeal the judge's decision to the High Court.⁷¹ Thereafter, an appeal may be made to the Supreme Court if the matter concerns a point of law of general public importance.⁷²

17.4.2 Extradition from the UK – category 2 territories

Part 2 of the 2003 Act provides for the extradition to those non-EAW territories with which the United Kingdom has bilateral or multilateral extradition treaties.⁷³

Such territories are usually required to provide *prima facie* evidence of the case against the requested person unless they are signatories to the European Convention on Extradition,⁷⁴ or the United States, New Zealand, Australia or Canada.

Requests must be certified by the Home Secretary as being valid before being sent to the appropriate judge.⁷⁵ The judge then considers whether there are reasonable grounds to issue an arrest warrant,⁷⁶ which include that the evidence produced would justify the issue of a warrant for the individual's arrest if it were a domestic case.⁷⁷

Once an arrest warrant has been issued and executed, the requested person must be brought before the magistrates' court as soon as practicable. Unless the requested person consents to extradition, the court will fix a date for the extradition hearing, usually within the next two months, and decide whether to grant bail.

At the extradition hearing, the judge must first consider the sufficiency of the extradition request and supporting documentation. If the documents do not meet the requirements set out in section 78(2) of the 2003 Act, the judge must discharge the person whose extradition is sought (the requested person).⁷⁸ Where the judge is satisfied that the requirements have been met, he or she will then go on to consider whether the person before the court is the requested person, the

70 Sections 64 and 65, the 2003 Act.

71 Sections 26 to 29, the 2003 Act.

72 Section 32, the 2003 Act.

73 A list of category 2 territories is provided here: <https://www.gov.uk/guidance/extradition-processes-and-review>.

74 http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/024/signatures?p_auth=4WJ8nibX.

75 Sections 69 and 70, the 2003 Act.

76 Sections 137 and 138, the 2003 Act.

77 Section 71, the 2003 Act.

78 Section 78, the 2003 Act.

offences specified are extraditable and copies of the documents have been served on the person.⁷⁹

In cases where *prima facie* evidence must be provided, the judge must then decide if the evidence supporting the request is 'sufficient to make a case'. This is the same test that applies in domestic UK criminal proceedings in determining whether a criminal prosecution should be allowed to continue.

If the judge is satisfied that all the conditions have been met, and that no bars to extradition exist, the matter is referred to the SSHD for his or her decision whether to extradite. Representations may be made by the requested person to the SSHD for consideration when deciding whether to extradite. See Section 17.4.4

The judge's decision to refer may be appealed within 14 days of the date of the decision and thereafter appeals may be lodged with the High Court or, if appropriate, the Supreme Court.

Extradition from the UK – other territories 17.4.3

For countries that are neither category 1 nor category 2 territories, section 194 of the 2003 Act allows the SSHD to certify that 'special extradition' arrangements have been made between the United Kingdom and that country for the extradition of a person.

These special arrangements must comply with the 2003 Act's Part 2 procedures, and the procedure is then as for a category 2 territory.

In addition, a territory party to an international convention to which the United Kingdom is also a party may, under section 193 of the 2003 Act, be designated a territory to which Part 2 of the 2003 Act applies.⁸⁰

Bars to extradition 17.4.4

Under the 2003 Act a properly issued extradition request will be honoured, unless one of the bars to extradition applies.

Sections 11 and 79 of the 2003 Act set out specific bars to extradition for Part 1 and Part 2 requests respectively. These include but are not limited to the rule against double jeopardy, extraneous considerations and the passage of time.

In addition to the specific bars, there are a number of general bars as detailed below.

The human rights bar 17.4.4.1

Under sections 21, 21A (Part 1 cases) and 87 (Part 2 cases) the judge must determine 'whether extradition would be compatible with the [requested person's] Convention rights' within the meaning of the Human Rights Act 1998.⁸¹

⁷⁹ Ibid.

⁸⁰ SI 2005 No. 46, the Extradition Act 2003 (Parties to International Conventions) Order 2005: provides that a state will only be designated a category 2 territory in this way in relation to conduct to which the convention applies, e.g., drug trafficking offences in contravention of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

⁸¹ Sections 21(1), 21A(1)(a) (Part 1 cases) and 87(1) (Part 2 cases), the 2003 Act.

A request may be refused where it is shown that there are substantial grounds to believe that the requested person, if extradited, faces a ‘real risk of exposure to inhuman or degrading treatment or punishment’⁸² contrary to Article 3 of the European Convention on Human Rights (ECHR) (for example, in relation to prison conditions in the requesting state); or that the interference with the private and family lives of the requested person, and members of his or her family, contrary to Article 8 of the ECHR, outweighs the public interest in extradition.⁸³ Arguments under Article 5 of the ECHR (the right to liberty and security)⁸⁴ and Article 6 of the ECHR (right to a fair trial)⁸⁵ can also be invoked under the human rights bar.

17.4.4.2 The proportionality bar

This bar applies to EAW cases only.⁸⁶ When considering a request, the judge may consider the seriousness of the alleged conduct, the likely penalty to be imposed and whether there are alternatives to extradition.

17.4.4.3 The forum bar

The forum bar provides that extradition may be barred if it would not be in the interests of justice.⁸⁷ This will be considered where the nature of the criminal conduct means that the alleged offence could potentially be prosecuted in more than one country, and is particularly relevant to parallel or cross-border investigations. It was introduced into the 2003 Act by the Crime and Courts Act 2013 as a result of concern in particular in the context of extraditions to the United States and has been in force as a bar to extradition since October 2013.

Extradition would not be in the interests of justice if the judge decides that a substantial measure of the criminal activity took place in the United Kingdom and, having regard to ‘specified matters’, the judge decides extradition should not take place.⁸⁸ The specified matters include consideration of where most of the loss or harm occurred or was intended to occur; the interests of any victims; any belief of a prosecutor that the United Kingdom is not the most appropriate jurisdiction in which to prosecute; desirability and practicability of all prosecutions relating to the extradition offence taking place in one jurisdiction; and the requested person’s connections with the United Kingdom.

82 *Soering v. United Kingdom* (1989) 11 EHRR 439.

83 *HH v. Deputy Prosecutor of the Italian Republic, Genoa* (2012) 3 WLR 90 – summarised conclusions of Baroness Hale re: case law interpreting Article 8.

84 *Shankaran v. India* (2014) EWHC 957 (Admin).

85 *Vincent Brown aka Vincent Bajinja, et al. v. The Government of Rwanda, The Secretary of State for the Home Department* (2009) EWHC 770 (Admin).

86 Section 21A, the 2003 Act.

87 Sections 19B (Part 1 cases) and 83A (Part 2 cases), the 2003 Act; not in force in Scotland.

88 Section 19B(2), the 2003 Act.

The forum bar was successfully invoked in two recent cases concerning extradition to the United States (*Love* and *Scott*).⁸⁹ Attempts to appeal these decisions were unsuccessful in both cases.

Settlement considerations

17.5

The scope for an individual to settle cross-border investigations or proceedings is in practice limited and will realistically arise either in circumstances where the individual can obtain an immunity from prosecution or where his or her co-operation in one jurisdiction (whether or not involving a guilty plea) effectively resolves the investigations in other jurisdictions.

Sections 71 to 75 of the Serious Organised Crime and Police Act 2005 (SOCPA) set out the statutory framework in which an individual may enter into such an agreement with a UK prosecutor.⁹⁰

Under section 71, a designated prosecutor⁹¹ may grant a suspect immunity from prosecution subject to certain conditions. These conditions invariably require a suspect's full co-operation with the prosecuting authority in the United Kingdom (and, in the context of cross-border investigations, with all relevant overseas authorities). The section 71 notice, which is prepared in writing, also specifies the offences for which the individual cannot be prosecuted. If, however, the conditions of the notice are breached, the immunity will ordinarily be revoked.

Whereas section 71 grants immunity from prosecution, section 73 requires an individual to plead guilty to the offence, but enables the court to take into consideration the assistance the individual has provided to the authorities. This will often result in a substantial reduction in sentence.⁹² For this reason a section 73 agreement is often referred to as a 'co-operating defendant' agreement and, in practice, in cross-border investigations will require the individual to co-operate not only with the UK authorities (which can extend to giving evidence, if required, in any UK proceedings against other suspects) but also with overseas investigating authorities.

Therefore, when advising an individual in a cross-border investigation about the possibility of either form of SOCPA agreement, it will be necessary simultaneously to engage with the other investigating authorities so that, for example, a resolution in the United Kingdom through a section 73 agreement will be reflected by equivalent action by the other investigating authorities (such as a non-prosecution agreement in the United States).

Note also that during parallel and cross-border investigations and proceedings a corporate entity will sometimes commence settlement discussions with the authorities (be they regulators or criminal enforcement agencies).

89 *Love v. Government of the United States and another* [2018] EWHC 172 (Admin) and *Scott v. Government of the United States of America* [2018] EWHC 2021 (Admin).

90 In this context, the UK refers to England, Wales and Northern Ireland.

91 Defined by section 71(4) of SOCPA as a prosecutor from the CPS, HMRC, SFO or the DPP of Northern Ireland.

92 *R v. Dougall* [2010] EWCA Crim 1048.

Within the United Kingdom, such discussions are most likely to be with the SFO or the FCA, or both, and, as regards criminal investigations, they are most likely to be centred on the possibility of the authorities agreeing to a deferred prosecution agreement (DPA).⁹³

A DPA can only be concluded between the authority (usually the SFO) and the suspect corporate entity; there is no provision for an individual to enter into a DPA. The use to which the authority can put the information it obtains during the DPA negotiations in criminal proceedings against others, including individuals employed by the corporate entity, is unrestricted.⁹⁴ This means that an employee suspect is at great risk of having his or her position seriously compromised, including a heightened risk of criminal prosecution, as a result of the co-operation the employer must demonstrate as a prerequisite to being invited by the authority to enter into DPA negotiations.

If a corporate with which the client is connected enters into a DPA, the client may be named in the statement of facts. The current state of the law is unsatisfactory in that a third party does not have to be notified that he or she may be so named. Further, the terms of a DPA and the supporting statement of facts cannot be altered or modified once approved by the court.⁹⁵

If there are extant criminal proceedings against individuals, or the possibility of such proceedings, protection will be put in place to seek to avoid the risk of the DPA causing prejudice to the individuals facing those proceedings. This will be either by anonymising the name of the entity entering into the DPA and the individuals referred to in the statement of facts⁹⁶ or by imposing reporting restrictions on the publication of the statement of facts until the conclusion of the associated proceedings.

In all likelihood, the corporate entity will enter (and conclude) settlement negotiations with the authorities without the knowledge of the individuals involved, let alone their input. In trying to put itself into a position where it can reach a DPA, the corporate entity will be anxious to demonstrate its co-operation with the authority, an obligation under the joint SFO and CPS Code of Practice,⁹⁷ and that it has severed its links with those individuals responsible for the misconduct. To allow those individuals to participate in the negotiations, or to be seen to be seeking to protect their position, would be likely to prejudice the position of the corporate entity in the eyes of the authority.

93 Schedule 17, Crime and Courts Act 2013.

94 Paragraph 13(6), Schedule 17, Crime and Courts Act 2013.

95 *SFO v. Tesco Stores Limited* [2019] EW Misc 1 (Crown C), para. 4.

96 For example the DPA in *SFO v. XYZ Limited* (U20150856).

97 Paragraph 2.8.2(i), DPA Code of Practice, Crime and Courts Act 2013.

Reputational considerations

Throughout any parallel or cross-border investigation or proceeding, those representing an individual must always consider the potential impact on their client's reputation. Reputation may include the client's professional reputation among his or her peers or wider public reputation, particularly if the client is a well-known figure. Matters are further complicated because the individual may have a low profile in one jurisdiction, but a high profile in another, or, despite having a low media profile, may have become embroiled in a high-profile investigation.

An associated issue that can often arise in practice is when the details surrounding the criminal investigation or proceedings are in the public domain and the individual is included in a due diligence database, such as World Check or World Compliance. Entry in these databases, which are largely based on open source (and sometimes unreliable) material, can have a profound effect on an individual's ability to access financial services.

As regards criminal investigations, the case of *Richard v. The BBC* affirmed that, as a starting point, a suspect should not be named by the press.⁹⁸ Although this position had already, in effect, been adopted following the Leveson Inquiry in 2012 and the College of Policing's Guidance on the Relationships with the Media in 2013, it was the first time that the UK courts had ruled on the issue.⁹⁹

Although this is undoubtedly a positive step for suspect anonymity in the United Kingdom, there is an obvious caveat in the context of cross-border investigations; namely, that since different jurisdictions have different rules on publishing a suspect's identity, an individual who avoids having their details published by the UK press may nevertheless find themselves named overseas. Furthermore, different considerations will apply where, for example, an individual is charged in a criminal investigation or, in the context of FCA proceedings, 'identified' in corporate decision notices.¹⁰⁰

Recently in the United Kingdom, reputation management has been seen as a distinct professional discipline, with a number of lawyers specialising in the field. They often work together with, rather than in competition with, those from the more traditional public relations firms and consultancies. In any event, those acting for individuals who have reputational considerations, but who lack their own specialised in-house resource, are best advised to turn to one or more of these specialists at as early a stage as possible and integrate them into the client's team of professional advisers. Only through mutual work as part of an integrated team can properly informed consideration be given on the key issues of whether the client's reputation is at risk and, if so, how it can be best protected without adversely affecting his or her position in the ongoing investigation or proceedings.

98 *Richard v. The British Broadcasting Corporation (BBC) & Anor* [2018] EWHC 1837 (Ch), paras. 248-251.

99 *Ibid.*, para. 234.

100 *Financial Conduct Authority v. Macris* [2017] UKSC 19.

Appendix 1

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Richard Sallybanks has been a partner at BCL since 1999 and specialises in complex business crime and regulatory defence work.

Richard has been involved in numerous SFO, FCA, HMRC and CMA investigations and prosecutions, together with associated restraint and confiscation proceedings. His recent SFO experience includes the Alstom, Barclays Qatar and Tesco investigations (acting for senior individuals under suspicion), as well as acting for Robert Tchenguiz in the SFO's Kaupthing Bank investigation (including the successful judicial review challenge to SFO search warrants). Richard has acted in a number of FCA criminal and regulatory investigations for brokers, traders and senior executives, including in relation to allegations of insider dealing and market abuse. He is experienced in cartel investigations, both domestic investigations conducted by the CMA and cross-border antitrust investigations (including those conducted by the US DOJ). Richard is also experienced in the international mutual legal assistance regime, and in leading and co-ordinating teams of lawyers in multi-jurisdictional investigations.

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