

EXPLANATORY MEMORANDUM TO
THE CRIMINAL JUSTICE (EUROPEAN INVESTIGATION ORDER)
REGULATIONS 2017

2017 No. 730

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 The purpose of the Criminal Justice (European Investigation Order) Regulations 2017 (“the Regulations”) is to give effect to Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ L 130, 1.5.2014, p. 1) (“the Directive”).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The Regulations transpose the Directive into UK law. The transposition date for the Directive was 22nd May 2017. The UK’s transposition has been delayed as it was not thought appropriate to make the Regulations in the period immediately before the General Election on 8 June. As at the date the Regulations were made, only nine signatories to the Directive had implemented (Belgium, Estonia, France, Finland, Germany, Hungary, Netherlands, Latvia and Lithuania). The UK has received one request under the Directive. Until the Regulations are transposed, existing Mutual Legal Assistance (MLA) processes will be used to avoid any operational difficulties with the continued provision of mutual legal assistance, which is in line with European Commission advice.
- 3.2 Regulation 59 designates the Directive as an EU Mutual Assistance Instrument for the purposes of section 10 of the Investigatory Powers Act 2016 (not yet in force), enabling the UK to give effect to European investigation orders relating to the interception of telecommunications. This is the first time this provision has been used.

Other matters of interest to the House of Commons

- 3.3 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 The Regulations implement the Directive. The transposition of this Directive follows the UK policy objective of assisting international partners in tackling crime through effective judicial co-operation. It largely relies on existing law enforcement tools such

as search warrants and production orders, which broadly aligns with existing procedures under the Crime (International Cooperation) Act 2003. A Transposition Note has been submitted with this Explanatory Memorandum.

5. Extent and Territorial Application

- 5.1 Unless stated otherwise (see regulations 1, 32 and Schedule 3), this instrument extends and applies throughout the United Kingdom.

6. European Convention on Human Rights

- 6.1 Nick Hurd, Minister of State for Policing and the Fire Service has made the following statement regarding Human Rights:

“In my view, the provisions of the Criminal Justice (European Investigation Order) Regulations 2017 are compatible with the Convention rights.”

7. Policy background

What is being done and why

- 7.1 Around 80% of MLA requests received by the UK are from EU Member States. Applying a streamlined approach to recognising and executing requests is therefore mutually beneficial to the UK and other Member States who are subject to the Directive. The key elements of the Directive include standardising the format in which a request is made; applying the principle of mutual recognition to requests and introducing timeframes for responding to requests. In addition, it prescribes the grounds for refusal, making it easier to anticipate the outcome of requests for assistance.
- 7.2 It is anticipated that a standardised form with mutually recognised grounds for recognition and execution as well as clear timeframes for responding will encourage greater judicial co-operation. During early consultation with prosecutors and investigators it was indicated that a large number of MLA requests they make take significant time to be executed in the executing State; this can act as a deterrent to requests being made. It is envisaged that given the certainty of the timeframes included in the Directive, more UK requests will be made with greater confidence in receiving a response in time for court cases to progress.
- 7.3 For outgoing requests, the policy position has been to align the process for making European Investigation Orders with existing ones as far as possible. Where there is currently no need for court involvement in domestic cases, European Investigation Orders will normally be made or validated by a designated public prosecutor (see Part 1 of Schedule 1); the exceptions to this will be where a request for an Order is made by a defendant or other prosecuting authority who will need to make an application to a court. Where a court would normally be involved in a domestic case (for instance when issuing a search warrant), only a court will be able to make a European investigation order.
- 7.4 Prosecuting authorities that are part of central Government Departments are not designated as public prosecutors for the purposes of the Regulations. Instead these are included in a different category under Part 2 of Schedule 1 (Other Designated Prosecutors). This decision was taken after careful consideration and with reference to recent jurisprudence, which found that judicial validation cannot be carried out by Government Departments as there must be a separation of powers between the

judiciary and the executive. The intention of this second list of prosecutors is not to bring into doubt their independence and it is noted they apply similar standards to the Crown Prosecution Service when considering whether to make a prosecution. Prosecutors in this category will still be able to transmit European Investigation Orders and engage directly with the executing State once they have been made by a court.

- 7.5 Similar to outgoing requests, the policy position for incoming requests is to align the European Investigation Order process with existing ones as far as possible. The Order will be sent to the relevant central authority and acknowledged within seven days. The majority of the European Investigation Order consideration against grounds for refusal will be carried out by the central authority in conjunction with the relevant law enforcement agencies, where appropriate. In cases where the involvement of a court is needed to give effect to the European investigation order, it will then be sent to the court for consideration of double jeopardy and human rights. This process is similar to the one currently applied in European evidence freezing order requests.
- 7.6 Regulation 34 permits a central authority to authorise an issuing state to assist in the execution of a European Investigation Order. Where the executing authority is the police, the central authority will defer the decision whether to authorise the issuing state to assist to the relevant police force.

Consolidation

- 7.7 Not applicable

8. Consultation outcome

- 8.1 As the Regulations relate to the co-operation between public bodies on law enforcement, it was not felt appropriate to carry out a public consultation on these Regulations, however regular consultation was sought from the bodies most affected by the Regulations throughout the development of the Regulations. Specific meetings took place in Edinburgh and Belfast with the respective devolved bodies to ensure their views were reflected. Authorities consulted included the Crown Prosecution Service, Crown Office, police, Serious Fraud Office, HM Courts and Tribunals Service, the judiciary, the Cross Whitehall Prosecutor's Group, HM Revenue and Customs, UK Central Authority, Financial Conduct Authority and the Devolved Administrations.

9. Guidance

- 9.1 As the Regulations relate to co-operation between public authorities on law enforcement matters, no general guidance is being prepared on the Regulations. Public authorities affected have prepared internal guidance on how to operate the Regulations.

10. Impact

- 10.1 There is no impact on business, charities or voluntary bodies.
- 10.2 The impact on the public sector is limited to public authorities involved in the delivery of the criminal justice system and they have been consulted throughout the negotiation and implementation stages. During consultation at the negotiation stage, law enforcement agencies indicated that the deadlines afforded by the European Investigation Order would benefit UK cases. Having clear defined time limits will

allow police and prosecutors to plan their cases and challenge the perception that an MLA request, if made by the UK, will not be answered. These cases will be dealt with in a timelier manner and it is anticipated that there may be an increase in the numbers of requests from the UK to signatory countries to the Directive. Ultimately, this could help in improving conviction rates and achieving justice for British victims of crime.

- 10.3 For similar reasons, it is anticipated that additional requests will be received by the UK from participating Member States, however it is anticipated that this increase in volume will be gradual.
- 10.4 Under the Regulations, requests must be recognised within 30 days unless there is reason to extend it to 60 days. The request must be executed within a further 90 days except where a different period is agreed with the requesting authority. Executing authorities have undertaken a programme of work to clear existing caseloads to enable them to meet these new deadlines.
- 10.5 An Impact Assessment has not been prepared for this instrument as no impact on business is foreseen.

11. Regulating small business

- 11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

- 12.1 This statutory instrument does not amend regulatory provisions which relate to business activity and therefore the duty to include a review provision under the Small Business Enterprise and Employment Act 2015 does not apply. The object of these regulations is to streamline existing mutual legal assistance measures between participating states. Public authorities involved in the delivery of the criminal justice system who will be affected by these regulations will carry out internal monitoring with reference to their management information.

13. Contact

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