

The impact of Brexit on cross-border investigations

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As Brexit reverberates across Europe (and beyond) and the resultant domestic political turmoil continues, Fountain Court Chambers commercial crime team analyses the impact of the decision to leave the European Union on cross-border investigations. The article below provides insight from Sir Francis Jacobs KCMG QC, advocate general at the European Court of Justice for over 17 years; Richard Lissack QC; Bankim Thanki QC; Tim Dutton CBE QC; Nick Medcroft; Tamara Oppenheimer; Robin Barclay; Eleanor Davison and Philip Ahlquist. It looks at the impact of the UK leaving the European Union on legal professional privilege, money laundering, market abuse, mutual legal assistance, the European Arrest Warrant and sanctions.

The process will be challenging: when the *Financial Times* predicted the need for “holding and saving legislation for at least a political generation” as a consequence of Brexit it was probably correct. But, as we will explain, we expect the UK to be able to overcome the problems Brexit poses to the cross-border enforcement issues under consideration in this article.

Our analysis is premised on four certainties:

First, that EU law is intertwined with UK law: both through legislation that has direct legal effect in the UK (eg EU regulations) by reason of our being part of the EU; and also through national UK legislation enacted to give practical effect to EU directives.

Second, that EU legislation with direct effect will cease to have effect when the UK leaves the EU. However, corresponding new laws (temporary or permanent) will probably have to be passed by the UK parliament to prevent or address the problems created by sweeping away part of our legislation at a stroke.

Third, that national legislation enacted to comply with EU directives will all remain UK law unless and until the UK government repeals it.

Fourth, that the UK is party to a suite of EU treaties, conventions, memoranda of understanding, protocols, policies and indeed law enforcement agencies – and from some there may be total withdrawal, from others partial withdrawal, and from yet others either no withdrawal or a rejoining as a non-EU state. This will depend on negotiation and political will.

Whilst at first blush this may not seem a promising place from which to try and predict the future legal landscape, and while navigating a way through will not be easy, a way across this uncharted land must, and we expect will, be found.

Legal professional privilege

Brexit is laced with irony so far as legal professional privilege is concerned. For it was primarily the influence of English law which led to the recognition of the existence of legal professional privilege in EU law, specifically in the context of competition law investigations. The key decision was *AM&S Europe Ltd v Commission of the European Communities* [1983] QB 878. Taking its lead from the magisterial survey of the relevant laws of member states by Advocate-General Slynn, the ECJ concluded, at [21]-[22]:

“... there are to be found in the national laws of the member states common criteria inasmuch as those laws protect, in similar circumstances, the confidentiality of written communications between lawyer and client provided that, on the one hand, such communications are made for the purposes and in the interests of the client's rights of defence and, on the other hand, they emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment.”

Viewed in that context, Regulation No. 17 must be interpreted as protecting, in its turn, the confidentiality of written communications between lawyer and client subject to those two conditions, and thus incorporating such elements of that protection as are common to the laws of the member states.”

The obligation to respect the confidentiality of communications between lawyer and client had been strongly disputed by the Commission in that case. The judgment was seen as a landmark because Regulation No. 17/62 did not itself provide for legal professional privilege and privilege in the form asserted by *AM&S* did not exist, as the advocate-general had noted, in the laws of all of the member states at the time.

From an English law perspective, there were two oddities in the legal privilege sanctioned by the ECJ. The first is adverted to in the passage quoted above, namely that the privilege only applied to “independent lawyers”: legal advice given by in-house counsel did not qualify for privilege under EU law (contrary to English domestic law). Attempts by the European Parliament to extend privilege to in-house counsel have effectively been ignored by the commission and the *AM&S* approach has recently been re-affirmed by the ECJ in *Akzo Nobel v Commission, Case C-550/07 P*. The second is that the privilege only applied to “any lawyer entitled to practise his profession in one of the Member States, regardless of the Member State in which the client lives” (*AM&S*, [25]). The privilege protected under EU law does not therefore apply to lawyers qualified in non-EU countries. The commission indicated that it was prepared to extend the privilege to independent lawyers from outside the EU through reciprocal bilateral agreements, but no progress has ever been made in this regard. Once Brexit is complete, the United Kingdom will in principle become a non-EU country and – subject to any new arrangements agreed between the EU and the UK (whether transitional or otherwise) – communications with any UK-qualified lawyer will in theory no longer attract privilege under EU law. Whether the UK lawyer is external or in-house will be nothing to the point.

Mutual legal assistance and the European Arrest Warrant

In a globalised world, mutual legal assistance (MLA) and the European Arrest Warrant (EAW) have become vital tools in cross-border investigations and the success of subsequent criminal prosecutions. With Teresa May's incumbency and her pledge to make Brexit a reality, the implications for cross-border crime fighting must be carefully considered.

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MLA gives a means of co-operation, via letters of request, between states seeking assistance with matters including the service of summonses, judgments and other procedural documents, the freezing, obtaining and transmission of evidence (including witness statements on oath, documentary and banking evidence), the exercise of search and seizure powers, the temporary transfer of prisoners, with their consent and assistance in the investigation of the proceeds of crime and in the freezing and confiscation of assets.

The seven EU agreements, a mix of conventions and framework decisions, underpinning mutual legal assistance were give effect in the UK by The Crime (International Co-operation) Act 2003 (CICA). Part 1 of CICA 2003 contains the main provisions dealing with MLA in criminal cases. Under the provisions of CICA, the UK is required to provide assistance to any requesting state or territory. The Home Office UK Central Authority (UKCA) deals with MLA requests in England, Wales and Northern Ireland, processing requests to the appropriate agency to deal with them. Her Majesty's Revenue & Customs (HMRC) deals with MLA requests in England, Wales and Northern Ireland relating to tax and fiscal customs matters only.

For issues that do not require a formal letter of request, enforcement agencies can engage in police co-operation on a country-to-country basis using the relevant data-sharing agreement or memorandum of understanding, a process that should be untouched by Brexit. The UK International Crime Bureau (UKICB) is the international division of the UK's National Crime Agency (NCA) and facilitates access to international law enforcement through Interpol and Europol.

One area in which some rethinking will doubtless be required, is the UK's relationship to the various bodies the European Union has established to assist with the processing of MLA requests, such as Europol and Eurojust. Both bodies draw from the expertise of member states in the form of a representative and close co-operation. Europol carries out 18,000 cross-border investigations per year into cybercrime, human trafficking and terrorism. Whether the UK can retain a seat at the table once Brexit occurs is not certain in relation to Eurojust. However, in respect of Europol, the UK could develop a partnership in the way that other non-EU states, such as the USA, Canada, Australia and Norway have done.

The UK has recent experience of developing bilateral treaties in relation to MLA with the Foreign and Commonwealth Office publishing a treaty on mutual legal assistance between the UK and China in criminal matters, which became effective in January 2016.

The basis of the The European Arrest Warrant is the 2002 Council Framework Decision 2002/584/JHA, which was implemented into UK law by Parts 1 and 3 of the Extradition Act 2003 (EA 2003). Unless repealed, the EA 2003 will remain in force; however, it is important to contemplate if and how the UK could remain part of the European Arrest Warrant system when it is no longer a member state of the European Union.

There is a joint benefit to both the EU and the UK of a mutual arrest warrant system, and it sits independently from the issues of free movement and single market access that will be politically difficult issues to negotiate.

It is perhaps an opportunity for legislators in the UK to revisit the extradition arrangements of this country. The EAW itself has been the subject of considerable criticism on grounds of proportionality and because some UK citizens have been subject to long periods of pre-charge detention in poor prison conditions and then faced trial in member states with different procedural safeguards to our own.

As noted in a House of Commons briefing paper dated 2 June 2015, when the issue of whether the UK should opt back into the EAW was last considered in 2014, the European Scrutiny Committee pointed out that an alternative to the EAW was a "new UK-EU treaty on extradition which... could include much better safeguards for British citizens than the EAW, such as only requiring extradition for truly serious offences, allowing greater or complete scope for extradition to be blocked where the alleged offence is not a crime under UK law, and allowing British courts to conduct an assessment of the likelihood of a fair trial within a reasonable time-frame in the requesting EU country without the Court of Justice being able to override their decisions."

In practical terms, this could mean either building new bilateral arrangements with each country or with the EU itself, as it has legal personality under the Lisbon Treaty. While the UK would not wish to become a safe haven for those seeking to evade justice, there may be an opportunity to create extradition arrangements that are more closely allied to British principles of a fair trial and natural justice.

Importantly, both MLA and the European Arrest Warrant presuppose a special relationship between partners in the European Union. Mutual co-operation is the foundation of these measures and it is difficult to conceive that Brexit would not require a renegotiation of the relationship between Britain and other member states. How our European partners will approach such a reworking remains unknown. It is perhaps the loss of political goodwill which is the real risk to effective cross-border enforcement.

Money laundering

The impact of Brexit on anti-money laundering (AML) rules in the UK will depend heavily on how the withdrawal from the European Union is achieved. While the technical legal impact of withdrawing from the EU would be to undermine much of the existing AML regime in its current form, it is very unlikely that the UK would not ensure that proper measures are put in place to maintain an AML regime.

The UK's domestic law on AML is based firmly on the foundations of EU law. For example, the Money Laundering Regulations 2007, central to the UK's current regime, and (2005/60/EC), as such were made by the Treasury pursuant to its power under section 2(2) of the European Communities Act 1972, along with powers conferred under the Financial Services and Markets Act 2000.

However, the UK is part of the Financial Action Task Force (FATF) which has established an international AML regime applicable to all of its members. The European Commission is a member of FATF and the EU's AML regime is built on the standards set down by FATF. The UK's membership of FATF is not dependent on its membership of the EU, and so it should be expected that a similar regime, based on FATF's standards, will be implemented in the UK on a freestanding legal basis.

As an EU member state, the UK is required to implement the Fourth AML Directive (2015/849/EU) no later than 26 June 2017. On 5 July 2016, the European Commission proposed a number of amendments including bringing forward the transposition date to 1 January 2017. It would be open to a new UK government to decide to implement the recent FATF standards differently from the approach taken by the EU as a whole. To do so would breach the UK's obligations as a member state if it remains a member state on the date of implementation of the directive, but an impending withdrawal from the EU might make the political and legal consequences of non-compliance tolerable. The UK's position as a member of FATF means that it will need to retain a strong AML regime, but it is conceivable that there might be a move to use measures which are less onerous on businesses than those used by the EU regime, especially if the UK looks to operate competitively on the edge of the single market.

Market abuse

Brexit may have a significant effect on banking and financial services in the UK. With the City of London viewed by many as a bridge to the European single market, the London Stock Exchange considered one of the prime global listing platforms and the UK financial markets seen as some of the most trustworthy anywhere in the world, it is vital that the new UK regulatory regime maintains corporate and investor confidence for UK plc to stand any chance of maintaining its market share.

A key issue in this is how an independent UK will approach market abuse. Historically, the UK has led European efforts to combat market abuse but, as the new EU Market Abuse Regulation No. 596/2014 (MAR) demonstrates, a substantial amount of its law in this area is firmly anchored in the EU.

Whether the UK chooses EEA membership, bilateral agreements or a customs union in the future, the realities of globalisation will in all likelihood demand that our new laws comply with MAR and other EU legislation

to enable many of the banks, companies and investors we have come to depend upon uninterrupted access to the European market under the principle of equivalence.

Consistent with the view put forward by the EU referendum Remain campaign, the powerful influence the UK had on shaping MAR and its predecessor, the EU Market Abuse Directive No. 2003/6/EC (MAD), must also be recognised and fully understood.

Prior to MAD's introduction in July 2005, market abuse had been introduced by the UK as a civil offence in 2001 under s118 of the Financial Services and Markets Act 2000. Embracing insider dealing and market manipulation, the offence filled a perceived gap in combating fraud in UK financial markets. In an effort to reduce regulatory arbitrage, MAD rolled out the initiative to all EU member states. By introducing a clearer and broader set of parameters for market abuse throughout the continent, MAR could be seen as a simple refinement of the UK project with the result that, as an architect of the European regime, it is inconceivable that the UK would introduce any lesser standards in the future.

Given the risk of losing business to Paris or Frankfurt and the cost and burden of firms' compliance with MAR, MiFID (Markets in Financial Instruments Directive) 2 and MiFIR before Brexit occurs (if it occurs) in 2018, it would seem most unwise for UK plc to change the current regime prior to Brexit or in its immediate aftermath. Although the current UK regime will need replacing or amending, prudence suggests this will be little more than a tinkering.

Sanctions after Brexit: a vision of the future

Brexit leads to considerable uncertainty over future UK sanctions policy. Economic sanctions are a powerful foreign policy and national security tool. Their use by the EU has increased hugely in recent years and the UK has been one of the most influential players in driving this approach. For example, the UK pushed for and obtained robust EU sanctions on Russia following the Ukraine crisis.

The UK will now need to reassess its sanctions regimes as it will no longer be bound by the EU's collective rules. The day after the EU referendum, the House of Commons Foreign Affairs Committee issued a statement urging the Foreign & Commonwealth Office (the FCO) to "be equipped to reassert its leading role in foreign policy-making so that Britain can take its place on the world stage". Set out below is a vision of the future.

First, UN sanctions (that is to say, those agreed at the United Nations Security Council) must and will continue to be implemented and enforced by the UK.

Second, the UK will be required to continue to give effect to the landmark Iran nuclear deal (the Joint Comprehensive Plan of Action). The Iran deal will be unaffected by Brexit, since it was agreed by the UNSC and the UK is a UNSC signatory in addition to the EU.

Third, the UK will continue to deploy its own domestic sanctions powers in relation to terrorist asset freezing and its panoply of enforcement tools, including deferred prosecution agreements, serious crime prevention orders and supervision by the FCA.

Fourth, the UK will need to consider its approach to autonomous EU sanctions. The FCO will be responsible for this. One option is for the UK to adopt what has been described as a "policy mirroring approach" (a method currently used by Switzerland and Norway) and continue to align itself with EU sanctions regimes. Another option is to implement its own autonomous sanctions regimes. In addition, where the UK has introduced domestic regulations providing for penalties for breach of sanctions (eg, Syria (European Union Financial Sanctions) Regulations 2012), these will need to be amended since they refer to EU instruments to which the UK will not be a party.

Finally, as regards enforcement, the Office of Financial Sanctions Enforcement (OFSI), the UK's new regulatory authority which opened in March this year, will continue to operate – possibly with increased powers as part of any new autonomous sanctions regime.