



PROCEEDS OF CRIME: THE NEW REGIME FOR ASSET FREEZING AND CONFISCATION

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Summary

This Article considers the provisions of Title XI of Part Three of the UK-EU Trade and Cooperation Agreement, concerning judicial cooperation on asset freezing and confiscation.

The EU has recently consolidated the patchwork regime which previously applied to requests to enforce freezing and confiscation order between Member States. Title XI is based on that consolidated regime, and is an effective and self-contained code. This is to be welcomed; unlike many other aspects of the judicial cooperation regime, the UK is not in a materially worse situation with respect to the enforcement of freezing and confiscation orders than the EU 27. However, there are some notable difference between the regime which applies between Member States inter se and that which now applies between Member States and UK, as regards a requested state's grounds for refusing enforcement. The grounds for refusal under Title XI are broader, and more nebulous, than those which apply as between Member States.

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Few people doubt that Brexit will make the UK's fight against cross-border organised crime more difficult. Julian King, former European Commissioner for the Security Union, described the UK-EU Trade and Cooperation Agreement as "*a damage limitation exercise because it was about giving up a framework for co-operation which has been built up over the past decade.*"

Several aspects of Part Three of the TCA are of note. Title VII provides for a new regime in place of the European Arrest Warrant Regime, similar to the EU's existing agreement with Norway and Iceland. Title IX provides for the exchange of criminal record information, though this new regime falls considerably short of the Schengen Information System, which was described by the House of Lords European Union Select Committee in 2016 as "*integral to day-to-day policing up and down the country*". Titles V and VI set out the UK's new relationship with Europol and Eurojust, respectively.

This short article focuses specifically on the provisions of Title XI of Part Three, which concerns judicial cooperation on asset freezing and confiscation. The effect of Title XI is to replace the patchwork regime which previously applied to the UK as an EU Member State, and which continues to apply to freezing and confiscation orders received by an executing authority before 31 December 2020. As between the remaining EU Member States, that regime has recently been consolidated in Regulation (EU) 2018/1805 on the mutual recognition of freezing orders and confiscation orders, which came into force on 19 December 2020.

Freezing and confiscation orders are powerful tools, and have been obtained by the SFO in several high-profile cases over the last year. Both forms of order are governed by the Proceeds of Crime Act 2002. Freezing orders are contained in by Part 5, chapter 3 (property freezing orders) and 3B (freezing of bank and building society accounts) and Part 8, chapter

2 (interim freezing order in support an unexplained wealth order). Confiscation orders are contained in Part 2 of POCA.

It is in the nature of serious organised crime that such orders are frequently made against persons or property outside of the jurisdiction. For that reason, the effectiveness of the POCA regime depends in no small part upon the ease and confidence with which they can be enforced abroad. In our view, Title XI sets out a clear and robust self-contained code for the mutual enforcement of freezing and search orders, and is to be welcomed.

Articles 4 of Title XI concerns requests for information on bank accounts. The requesting state must indicate why the information is likely to be of substantial value for the purposes of a criminal investigation, and the basis on which it considers that banks in the requested state are likely to hold relevant accounts. On receipt of such details, the requested state must take necessary steps to determine whether the stated person "*holds or controls*" one or more bank accounts in the requested state, and if so, provide details of those accounts, including the account holder and IBAN number.

Article 5 contains equivalent provisions in respect of banking transactions, in which case the information provided must include "*the particulars of specified bank accounts and of banking operations which have been carried out during a specified period through one or more accounts specified in the request*". Pursuant to Article 6, a requested state must ensure that it is able to monitor future banking operations specified by the requesting state. In respect of each of Articles 4-6, the UK and EU may give notice that these provisions will be extended to accounts held in non-bank financial institutions. Such notice may be made subject to the principle of reciprocity.

Articles 10-12 concern confiscation orders. Article 10(1) imposes an obligation on a requested state to enforce a confiscation order

or submit the request to its competent authorities for the purpose of obtaining a confiscation order, which must be enforced if obtained. Significantly, by Article 10(5) the obligation also extends to confiscation orders relating to the proceeds of crime which are made in civil proceedings. In dealing with the confiscated property, the requesting state must, under Article 12(2), give “*priority consideration to returning the confiscated property to the requesting state so that it can give compensation to the victims or the crime or return such property to their legitimate owners*”.

The most notable difference between Title XI and Regulation 2018/1805 (which applies to EU Member States *inter se*) is the basis on which a requested state may refuse to execute a request. The grounds for refusal are set out in Article 15 of Title XI, and Articles 8-9 of the Regulation. The grounds available under Title XI are broader, and more nebulous, than those which apply under the Regulation:

- Title XI contains a general dual-criminality requirement, although the EU and UK may agree that this condition be disapplied in respect of any serious offences falling within the list in Article 79(4) of Title VII. The Regulation has no dual-criminality requirement in respect of any of the offences in that list (which appear in Article 3(1) of the Regulation), save where the relevant conduct took place in part within the territory of the requested state, and is not unlawful under that state’s law.
- A confiscation order may be refused under Title XI on the grounds that the requested state’s law does not provide for confiscation for that type of offence, or where confiscation may no longer be

imposed or enforced because of a lapse of time. The Regulation only allows for refusal where there is a specific privilege or immunity under the law of the executing State that would prevent the confiscation of the relevant property, and does not allow for refusal based on lapse of time.

- Title XI allows for refusal where the order was rendered in absentia and “*in the opinion of the requested State, the proceedings conducted by the requesting State leading to such decision did not satisfy the minimum rights of defence.*” The Regulation allows for refusal whenever the order was made in absentia, unless the confiscation certificate confirms in prescriptive wording that the defendant was duly summoned and informed of the time and place for the hearing.

It is also worth noting Article 14 of Title XI, which provides that a requested state “*shall not impose imprisonment in default or any other measure restricting the liberty of a person as a result of a request... without the consent of the requesting State*”. There is no equivalent provision in the Regulation.

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