

# **CRIME (INTERNATIONAL CO-OPERATION) ACT 2003**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### **Part 1: Mutual Assistance in Criminal Matters**

#### *Chapter 2: Mutual Provision of Evidence*

#### *Section 7: Requests for assistance in obtaining evidence abroad*

36. Sections 7 to 9 deal with requests to obtain evidence from abroad in relation to a prosecution or investigation taking place in the UK. These provisions develop and expand on section 3 of the 1990 Act, which they replace.
37. Section 7 sets out the authorities which may make requests for assistance, in which circumstances, and the form in which requests may be made. The judicial authorities which may request assistance under this section, (provided it appears that an offence has been committed or there are reasonable grounds for suspecting this, and proceedings or an investigation are underway), are any judge, and a justice of the peace (in England and Wales), a sheriff (in Scotland) and a resident magistrate (in Northern Ireland). A prosecuting authority which has been designated by an order made by the Secretary of State - (or, in Scotland, the Lord Advocate or a procurator fiscal) - may also request assistance if the conditions set out in subsection (5) are satisfied. This arrangement is not new: designated prosecuting authorities were able to issue requests under the 1990 Act. The assistance which may be requested is to obtain evidence located outside the UK for use in a domestic criminal proceeding or investigation.
38. Subsection (7) requires that any outgoing requests for information about banking transactions made to participating countries under Article 2 of the 2001 Protocol must clearly state the relevance of the evidence to the investigation. This is in line with the conditions set out in the 2001 Protocol.

#### *Section 8: Sending requests for assistance*

39. This section makes provision for the transmission of UK requests to overseas authorities. It enables requests made under section 7 to be sent directly from the requesting authority in the UK to the relevant overseas authority, rather than via the central authorities of the two countries. This is a new arrangement. Under existing powers, direct transmission is possible only in cases of urgency. Direct transmission is a key tenet of the MLAC, which these provisions implement and, in general, where a request is destined for the EU it will in future be sent directly to the appropriate overseas authority from the UK authority making the request.
40. As there will be situations where direct transmission is not possible, for example where the particular executing authority is not known, where direct transmission is not permitted under the MLAC, or where the requested state is outside the EU,

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subsection (2) retains the option of indirect transmission via the Secretary of State (or the Lord Advocate in Scotland).

41. Subsection (3) implements Article 6(4) of the MLAC, and permits urgent requests to be submitted via Interpol or any other body able to receive it under any provisions adopted under the Treaty on European Union. This will permit, for example, EU Member States to make a request to their national member of Eurojust, a body established by Council Decision under Part VI of the Treaty on European Union with a view to reinforcing the fight in Member States against serious crime.

***Section 9: Use of evidence obtained***

42. This section ensures that evidence obtained from an overseas authority may be used only for the purposes for which it was requested (unless the consent of the requested overseas authority has been obtained), and is subject to the same provisions on the admissibility of evidence as evidence obtained under normal domestic arrangements. This section replicates sections 3(7) to 3(9) of the 1990 Act.

***Section 10: Domestic freezing orders***

43. This section provides for the issuing of domestic freezing orders, in accordance with the 2003 Framework Decision. The section deals with orders to freeze evidence only. Schedule 4 to the Act deals with orders to freeze terrorist assets, but orders to freeze property are not otherwise covered by this Act. A domestic freezing order is defined for the purposes of this section as an order for protecting evidence which is in a participating country (explained in paragraph 18) pending the transfer of the evidence to the UK.
44. The section specifies the circumstances in which a judicial authority (as defined in subsection (5)) may make a freezing order. For a domestic freezing order to be made, it should appear to the judicial authority that proceedings in respect of an offence covered by the 2003 Framework Decision have been instituted or such an offence is being investigated, that there are reasonable grounds to believe there is evidence in a participating country which satisfies the requirements of this section (including, for example, that the evidence is likely to be of substantial value to criminal proceedings or an investigation in the UK), and that a request has been (or will be) made to the authority for the evidence to be sent to the UK.

***Section 11: Sending freezing orders***

45. This section provides that freezing orders must be sent via the Secretary of State (or, in Scotland, the Lord Advocate). This is in contrast to the general direct transmission provision in section 8.
46. This is necessary because freezing orders based on the concept of mutual recognition under the 2003 Framework Decision are completely new, and will be unfamiliar to those issuing and receiving them in terms of format, conditions and procedural requirements. Transmission via the central authority will enable the orders to be checked and monitored, to ensure that they comply with the requirements of the 2003 Framework Decision, and to ensure that they are responded to by the overseas authority in the appropriate manner. Under the terms of the 2003 Framework Decision the UK is allowed to require transmission via the central authority.
47. The section provides that freezing orders must be accompanied by a certificate, and lists requirements relating to the certificate. This is in accordance with Article 9 of the 2003 Framework Decision. Subsection (3) requires the judicial authority to send the order to the Secretary of State within 14 days of it being made. Whilst we expect that such orders will be transmitted without delay, the time limit has been included to ensure that they are not held up for lengthy periods.

***Section 12: Variation or revocation of freezing orders***

48. This section provides that a judicial authority which makes a freezing order under section 10 may vary or revoke it on application by the persons mentioned in this section.

***Section 13: Requests for assistance from overseas authorities***

49. This section deals with handling incoming requests for assistance with obtaining evidence located in the UK.
50. Subsection (1) provides that, if the conditions set out in section 14 are satisfied, arrangements may be made for evidence to be obtained, or for an application for a warrant to be made in response to a request for assistance.
51. Subsection (2) sets out the authorities competent to make requests for mutual legal assistance. These are courts, prosecuting authorities and other authorities which have the function of making such requests - (examining magistrates, for example). Subsection (3) also provides for requests to be received from Interpol and from bodies or persons competent to make requests pursuant to agreements adopted under the Treaty on European Union. Eurojust is an example of such a body.
52. The section makes provision for requests to be received by “territorial authorities”. These are defined in section 28(9). This enables transmission to the Secretary of State, or (for Scotland) the Lord Advocate.
53. Article 6 of the MLAC envisages direct transmission of most requests, but direct transmission is difficult to apply in our domestic system where jurisdiction is based largely on function rather than geography, and where the same authorities are not necessarily competent to both issue and execute letters of request. Misdirection of requests sent directly to the wrong authority would create delays, defeating the purpose of direct transmission which is to speed up the process. The UK therefore has a special provision in the MLAC enabling it to opt out of the direct transmission requirement.
54. **Section 27** of the Act enables the Treasury by order to provide for certain functions conferred on the Secretary of State or on a constable to be exercisable by HM Customs and Excise, and for the Secretary of State by order to provide for certain functions conferred on him or on a constable to be exercisable by other persons prescribed by order. This will facilitate more extensive direct transmission in the future.

***Section 14: Powers to arrange for evidence to be obtained***

55. This section sets out the conditions which need to be satisfied before a court may be nominated to receive evidence under section 15. Subsection (1) sets out the types of court proceedings, or investigations, in connection with which evidence may be obtained for an overseas authority. In line with the requirements of Article 3 of the MLAC and Article 49(c) of the Schengen Convention, subsection (1)(b) provides that assistance may be provided in connection with administrative proceedings or an investigation into an act which is punishable in such proceedings. In some EU Member States offences such as driving infractions are classified neither as criminal nor civil proceedings, but as administrative proceedings. In the UK, there is no precise parallel to these proceedings, but legislation is needed to allow assistance to be provided to other participating countries in relation to this type of proceedings. Subsection (1)(c) provides that assistance may be provided in connection with clemency proceedings or an appeal during the judicial phase of administrative proceedings. Both clemency proceedings and administrative proceedings are defined in section 51(1). The Schengen Convention also requires assistance to be given in relation to civil proceedings joined to criminal proceedings, where a final decision has not yet been reached in the criminal proceedings. The definition of “criminal proceedings” in section 51(1) therefore allows for assistance to be provided in these cases.

56. Subsection (2) of section 14 limits the provision of assistance within subsections (1) (a) or (b) to when an offence has been committed or there are reasonable grounds for suspecting this, and when proceedings have been instituted or an investigation is being carried out. An offence for these purposes includes an act punishable in administrative proceedings. Subsection (3) provides that a certificate from the overseas authority confirming these matters is to be regarded as conclusive. In the vast majority of cases this certificate is not required. The letter of request will itself contain sufficient information for the territorial authority to be satisfied as to the matters in subsections (1) and (2). However, the certificate can be useful in particularly complex cases to set out exactly what matters are being investigated when this is not clear from the request itself.
57. Subsection (4) sets out the circumstances in which requests relating to fiscal offences may be accepted. If there is no agreement between the UK and the requesting country, and it is not a member of the Commonwealth, such requests shall be subject to a requirement of dual criminality – (that is, that the conduct, if it occurred in a part of the UK, would also constitute an offence under the law of that part of the UK). This follows existing practice.

### ***Section 15: Nominating a court etc. to receive evidence***

58. This section provides for a court to be nominated to receive evidence under section 14 above, and covers proceedings currently governed by section 4 of the 1990 Act.
59. The powers to nominate a court are conferred on the Secretary of State in England, Wales and Northern Ireland and on the Lord Advocate in Scotland. Where it appears that the request relates to an offence involving serious or complex fraud, the request may be referred to the Director of the Serious Fraud Office, or, in Scotland, a direction may be made applying the powers of investigation of a nominated officer under Part IV of the Criminal Law (Consolidation) (Scotland) Act 1995.
60. [Schedule 1](#) makes further provision in relation to proceedings of a court nominated to receive evidence.

### ***Section 16: Extension of statutory search powers***

61. Subsection (1) replicates section 7(1) of the 1990 Act, which it replaces. Subsection (3) applies the provision to Northern Ireland. As with the provision in the 1990 Act, the section enables the appropriate authorities in England, Wales and Northern Ireland to apply for and execute a search warrant or a production order in response to an overseas request, in the same circumstances as would be possible in relation to a domestic case – (that is when the conduct in question would be a serious arrestable offence if committed here).
62. Subsection (2)(b) provides that such a search warrant or production order may also be applied for and executed without an overseas request if the constable who makes the application is a member of an international joint investigation team (as defined in subsection (5)). Subsection (4)(b) provides similarly for Northern Ireland. These provisions implement Article 13(7) of the MLAC which contemplates investigative measures being undertaken without such a request by seconded members of a joint investigation team in relation to the team's investigations overseas. The constable making the application for the warrant or order would have personal knowledge of the joint investigation as he would in making such an application in a domestic investigation.

### ***Section 17: Warrants in England and Wales or Northern Ireland***

63. This section replicates section 7(2) of the 1990 Act, which it replaces. It enables search warrants to be issued if the conditions in subsection (3) are satisfied. These conditions are that criminal proceedings overseas have been instituted or a person has been arrested in the course of a criminal investigation, the alleged criminal conduct would constitute

an arrestable offence if it occurred in England and Wales or Northern Ireland, and there are reasonable grounds to suspect that there is evidence relating to the offence on premises here. This section enables the search of premises occupied or controlled by the suspect only.

### ***Section 18: Warrants in Scotland***

64. This section is the Scottish equivalent to sections 16 and 17 and it serves the same purpose as those sections do in relation to England, Wales and Northern Ireland, consistent with Scottish procedure for search warrants. It replaces and largely replicates sections 8(1) and (2) of the 1990 Act, with the exception of inclusion of a reference to section 134 of the Criminal Procedure (Scotland) Act 1995. It gives a sheriff the same power to issue a warrant authorising entry, search and seizure by a constable or customs officer, as he would have under section 134 of the Criminal Procedure (Scotland) Act 1995. Before issuing such a warrant the sheriff must be satisfied that an offence under the law of a country outside the UK has been committed and that the conduct would have constituted an offence punishable by imprisonment if it had occurred in Scotland. In Scotland, with regard to joint investigation teams, the application for a search warrant will be made by the procurator fiscal on behalf of the team.

### ***Section 19: Seized evidence***

65. This section deals with the treatment of any evidence that is seized under the procedures set out in sections 16 to 18. Article 6 of the MLAC requires the evidence to be sent directly to the court or authority which requested it. This is a departure from existing procedure established by the 1990 Act. It will speed up the provision of evidence by cutting out any central authority involvement once the evidence has been obtained. However, there will be circumstances when evidence may not be returned directly, (for example, when a country that is not party to the MLAC requires evidence to be returned via the central authority), and subsection (1) therefore provides that evidence may be sent directly to the requesting authority, or via the Secretary of State (or, in Scotland, the Lord Advocate). Subsection (3) provides that this section does not apply to evidence obtained by virtue of sections 16(2)(b) or (4)(b) or 18(2)(b) in an international joint investigation.

### ***Section 20: Overseas freezing orders***

66. This section implements one of the key measures set out in the 2003 Framework Decision: the requirement to execute an overseas order to freeze evidence for its subsequent use in any proceedings or investigation in a participating country, where the order is made by a court or other authority in that country. The UK is already able to consider requests for mutual legal assistance in similar circumstances, but the 2003 Framework Decision is based on the principle of mutual recognition, and requires the UK to recognise the validity of an overseas order from a participating country, subject to certain conditions, rather than consider it as a request for mutual legal assistance.
67. Subsection (2) defines an overseas freezing order.
68. The section sets out the authorities competent to make overseas freezing orders, and the conditions for executing the order. Provided that the other requirements are met, the UK is obliged to execute orders relating to offences listed in the 2003 Framework Decision. The offences are defined in section 28(5) and (6) as an offence described in Article 3(2) of the 2003 Framework Decision or an offence prescribed (or of a description prescribed) by order.
69. Overseas freezing orders must be accompanied by a certificate. Article 9 of the 2003 Framework Decision requires provision of a certificate, which must follow a standard format containing the details required in order that the receiving authority can execute the order. These will include, for example, details of the issuing authority, the person and offence under investigation, and the evidence sought.

70. Frozen evidence is not automatically provided to the overseas authority that issued the order. It must issue a mutual legal assistance request, either simultaneously with the order, or at a later stage, in order for the evidence to be transmitted. This is provided for in section 24.

***Section 21: Considering the order***

71. This section sets out the procedure when an overseas freezing order is received in the UK.
72. Providing the conditions in section 20 are met, the territorial authority (defined in section 28 as the Secretary of State in England and Wales and Northern Ireland, and the Lord Advocate in Scotland) must refer the order to a court for execution. There is no discretion at this stage.
73. The section provides for rules of court to set time limits for the court to consider the order and sets out the grounds on which the court may decide to refuse to execute an order. The grounds are if execution of the order would be incompatible with the Convention rights (as defined in the Human Rights Act 1998) and where the principle of double jeopardy is infringed – (that is where the person to whom the order relates would be entitled to be discharged under any rule of law in the participating country or the UK relating to previous acquittal or conviction).

***Section 22: Giving effect to the order***

74. This section sets out how an overseas freezing order will be executed in practical terms. This will be done by issuing a domestic search warrant or production order. The procedures largely follow those provided for under the Police and Criminal Evidence Act 1984 (“PACE”). However, the warrants or orders will not be issued under PACE. They will be free-standing warrants or orders that will be issued in relation to the offences covered by the 2003 Framework Decision. PACE does not apply in Scotland which has its own search warrant procedure.

***Section 23: Postponed effect***

75. This section sets out circumstances (covered in Article 7 of the 2003 Framework Decision) in which UK authorities may postpone giving effect to freezing orders. If the decision is taken to postpone acting on a freezing order, the requesting country will be informed accordingly. If the grounds for postponement cease, the order will then be given effect to under section 22.

***Section 24: Evidence seized under the order***

76. This section provides that evidence which has been subject to a freezing order must be retained by the constable until the territorial authority gives him instructions either to send the evidence to the requesting authority or to release it. If the territorial authority has received a request from the overseas authority for the evidence to be sent, it may require a constable to send the evidence to the overseas authority. Otherwise, the territorial authority must order the release of the evidence under section 25(4).

***Section 25: Release of evidence held under the order***

77. Under this section, the court may, in response to an application made by one of the persons listed in subsection (2), authorise the release of evidence by the constable. This would enable the persons mentioned in subsections (2)(a) and (2)(b) to apply for the release of the evidence seized in the event that the overseas freezing order were withdrawn, or if one of the conditions for non-execution in section 21 were met.
78. It would also enable a third party affected by the order, for example the person whose property had been seized, to challenge the execution of the order on the grounds listed in

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subsection (1). Substantial reasons for issuing the overseas freezing order can, however, be challenged only in the country which issued the order.

***Section 26: Powers under warrants***

79. This section relates to issuing warrants in relation both to mutual legal assistance requests under section 17 and overseas freezing orders under section 22.
80. In line with PACE, subsection (1) prevents a warrant being issued if items sought are subject to legal privilege, excluded material or special procedure material (as defined in PACE under section 28(3)). Excluded or special procedure material must be obtained by issuing a less intrusive production order. Warrants in respect of such material can be sought only if a production order has been obtained and has failed to produce the evidence sought.
81. Subsection (3) makes an amendment to the Criminal Justice and Police Act 2001, providing that the additional powers of seizure in that Act will apply to seizure of evidence relevant to overseas offences or investigations under these provisions.

***Section 27: Exercise of powers by others***

82. This section provides for certain functions conferred on the Secretary of State or on a constable to be conferred upon others. This is in recognition of the MLAC requirement for direct transmission of requests. Currently, the authorities which deal with many requests for assistance, such as HM Customs and Excise, do not have the power to nominate courts or to apply for warrants in order to execute mutual legal assistance requests, and have to rely on the Secretary of State to nominate a court or issue a direction to make an application for a warrant.
83. Therefore, this section contains an order-making power to provide that certain functions conferred on the Secretary of State or a constable may be exercisable by customs officers or persons acting under their direction. The practical effect of this power is that it would enable requests to be sent directly to HM Customs and Excise and fully executed by them, without recourse to the Secretary of State, in circumstances where a court nomination or application for a warrant is required, and will implement the principle of direct transmission more fully.
84. Subsection (2) provides for the Secretary of State to confer similar powers on prescribed persons in the future. This could apply either to authorities that already execute requests, or be extended to other authorities that may take on a role in the execution of mutual legal assistance requests.

***Section 28: Interpretation of Chapter 2***

85. This section defines the terms used in Chapter 2.
86. Subsection (5) defines “a listed offence” as an offence described in Article 3(2) of the 2003 Framework Decision, or as an offence prescribed, or of a description prescribed, by an order made by the Secretary of State. The latter provision is necessary to cater for two circumstances: firstly, if the list of offences in the 2003 Framework Decision is added to by the European Council of Ministers. Secondly, it reflects the fact that under the 2003 Framework Decision freezing orders can be executed in respect of offences other than those listed but with the executing state able, if it wishes, to apply a dual criminality requirement. Subsection (6) therefore provides that any order which the Secretary of State makes (or, in relation to Scotland, the Scottish Ministers) in respect of a prescribed offence may require that the conduct involved must if it occurred in a part of the UK constitute an offence in that part.