

CRIME (INTERNATIONAL CO-OPERATION) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 4: Miscellaneous

Section 83: Foreign Surveillance Operations

150. Article 40 of the Schengen Convention provides that police officers keeping a person under surveillance in their own country because he is suspected of having committed an extraditable offence may require neighbouring Schengen countries to assist in keeping the person under surveillance if he crosses the border into their territory. In the vast majority of cases such assistance will be requested in advance and, when the surveillance enters the UK, our own officers will take over the surveillance. These UK officers will need to be properly authorised to conduct such surveillance under the Regulation of Investigatory Powers Act 2000 (“RIPA”) and the Regulation of Investigatory Powers (Scotland) Act 2000. However, on occasions it will not be possible for a request to be made sufficiently far in advance for a UK team to take over the surveillance at the point of entry to the UK. This section implements Article 40(2) of the Schengen Convention, which covers such cases by making provision for a foreign surveillance operation, which was initiated in one participating country but which has had to travel unexpectedly to another participating country, to continue lawfully to keep an individual under surveillance for a period of up to five hours. To legislate for this change, this section amends RIPA by introducing a new section (Section 76A Foreign surveillance operations) to allow police or customs officers from other Member States to continue surveillance on UK territory for this period.
151. At present, UK police officers are not allowed to follow suspects across the border into the territory of another Schengen state (and vice versa foreign officers may not travel into the UK to conduct similar activities). Instead they are expected to contact the police authorities of that state, and arrange for them to take over the surveillance operation. However, in practice police officers are not always immediately available to take over the operation, and this can result in losing the suspect. The provisions set out in this section are meant to avoid this occurrence.
152. This section applies in the circumstances set out in subsection (1)(a), (b) and (c). Subsection (1)(a) provides that before crossing the border the surveillance must be lawful in the country in which it is being carried out. In addition the surveillance must be “relevant surveillance”. Subsection (2) defines this as being surveillance which would fall within the definition of directed or intrusive surveillance in RIPA, therefore being covert surveillance of which the target is unaware. In addition the target of the surveillance is suspected of having committed a relevant crime.
153. Subsection (3) provides that a relevant crime is one that falls within Article 40(7) of the Schengen Convention, namely; murder, manslaughter, rape, arson, forgery of money, aggravated burglary and robbery and receiving stolen goods, extortion, kidnapping and

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hostage taking, trafficking in human beings, illicit trafficking in narcotic drugs and psychotropic substances, breach of laws on arms and explosives, wilful damage through the use of explosives, illicit transportation of toxic and hazardous waste. Subsection (3) (b) sets out that a relevant crime can also be a crime as defined in other international agreements, which contain provisions on cross-border surveillance, specified by the Secretary of State by order.

154. Subsection (1)(b) provides that the surveillance can only be carried out in the UK. Subsection (1)(c) provides that the circumstances must be such that it is not reasonably practicable for UK officers (as defined in subsection (11)) to take over the surveillance when the suspect arrives in the UK under a normal RIPA authorisation (or its Scottish equivalent).
155. The purpose of subsection (4) is to provide that urgent cross border surveillance will be lawful under RIPA if certain conditions are complied with. Two key conditions from Article 40 have been placed on the face of the Act. The first refers to subsection (6) that implements the requirement in Article 40(2) for foreign officers to contact the authorities of the state into which they have entered immediately upon crossing the border and to submit a formal request for assistance. The second in subsection (4) (b) implements the condition in Article 40(3) that prohibits the officers from entering private homes or places. The Secretary of State is also given an order-making power to specify, if needed, other appropriate conditions for the conduct of foreign officers should their surveillance operation unexpectedly cross into the UK. Failure to comply with any such conditions would mean that the surveillance would not be lawful under this new section. Subsection (4) also provides that no surveillance is lawful by virtue of this subsection, even if all the other conditions covered by the section are satisfied, if the foreign officer subsequently seeks to stop and question the person under surveillance in the United Kingdom in relation to the relevant crime. This is in line with Article 40(3)(f) which provides that the officers conducting the surveillance may neither challenge nor arrest the person. Although it is most unlikely that a foreign officer would ever stop and question the person under surveillance, this unequivocal declaration in the subsection makes clear that such conduct would be unacceptable.
156. Subsection (5) provides that foreign police officers carrying out such surveillance operations are not subject to civil liabilities in relation to conduct which is incidental to surveillance which is lawful. Incidental conduct is considered to be conduct that is inextricably associated with surveillance to the extent that it is effectively unavoidable if the surveillance, which would have to be lawful, is to continue. Incidental conduct covers an extremely narrow set of circumstances, for example trespass. The same protection is given to UK officers by section 27(2) of RIPA in respect of UK officers who conduct surveillance authorised under RIPA.
157. Subsection (7) establishes that this type of unaccompanied surveillance should not last for more than five hours. The five hour period will allow officers to continue surveillance, whilst providing time for officers in the destination country to be mobilised. If resources are available to mobilise a UK surveillance team within the five-hour period, a joint operation will be established, with the UK officers taking over the surveillance and the foreign officers adopting observer status at the point of hand-over. If the UK has not taken over the operation by the time the five hour period has elapsed then the foreign officers will no longer have lawful authority to continue and will be expected to cease the surveillance.
158. Subsection (8) and (10) set out further restrictions on the operation of such teams. Subsection (8) permits the Secretary of State to designate persons within UK law enforcement with the power to terminate surveillance operations of this kind taking place in the UK, fulfilling the requirements of Article 40(2) of the Schengen Convention. The decision to terminate might be taken because UK officers have taken over the surveillance or because the surveillance was considered inappropriate.

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159. Taking account of devolved responsibilities, the wording of this and the other order-making powers in section 76A provide for a single order to be made to cover the whole of the UK, subject to the consent of Scottish Ministers.
160. Subsection (11) includes a definition of UK officer which is relevant to subsection (1).