
STATUTORY INSTRUMENTS

2017 No. 730

The Criminal Justice (European Investigation Order) Regulations 2017

PART 2

Making or validating a European investigation order in the United Kingdom

CHAPTER 1

General

Interpretation

5.—(1) In this Part—

“European investigation order” means—

- (a) in relation to this Chapter and Chapter 2, an order made or validated under regulation 6 or 7;
- (b) in relation to Chapter 3, an order made under regulation 22;

“executing authority” means an authority of the executing State having competence to recognise a European investigation order and ensure its execution in accordance with the Directive and the procedure applicable in a similar domestic case;

“judicial authority”—

- (a) in relation to England and Wales, means any judge or justice of the peace;
- (b) in relation to Northern Ireland, means any judge;
- (c) in relation to Scotland, means any judge of the High Court or sheriff;

“specified information” means the information required by Article 5 of the Directive to be included on the form set out in Annex A to the Directive.

(2) References in this Part to “the executing State”—

- (a) in relation to a European investigation order made under regulation 6, are to be construed in accordance with regulation 6(2);
- (b) in relation to a European investigation order made or validated under regulation 7, are to be construed in accordance with regulation 7(3);
- (c) in relation to a warrant issued under regulation 20, or to a European investigation order made under regulation 22 pursuant to such a warrant, are to be construed in accordance with regulation 20(1);
- (d) in relation to a warrant issued under regulation 21, or a European investigation order made under regulation 22 pursuant to such a warrant, are to be construed in accordance with regulation 21(1).

(3) For the purposes of this Part, a person transmits a European investigation order to a central authority or executing authority if that person sends the order to such an authority by any means

capable of producing a written record under conditions allowing the authority to establish the order's authenticity.

Power of a judicial authority to make a European investigation order

6.—(1) If it appears to a judicial authority on an application made by a person mentioned in paragraph (3)—

(a) that an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed, and

(b) that proceedings in respect of the offence have been instituted or it is being investigated, the judicial authority may make an order under this regulation.

(2) An order under this regulation is an order specifying one or more investigative measures that are to be carried out in a participating State ("the executing State") for the purpose of obtaining evidence for use either in the investigation or the proceedings in question or both.

(3) An application under this regulation may be made—

(a) in relation to England and Wales and Northern Ireland, by—

(i) a prosecuting authority;

(ii) a constable (but only with the consent of a prosecuting authority);

(b) in relation to Scotland, by the Lord Advocate or a procurator fiscal;

(c) in any case where proceedings have been instituted, by or on behalf of a party to those proceedings.

(4) But an order under this regulation may only be made if it appears to the judicial authority that—

(a) it is necessary and proportionate to make the order for the purposes of the investigation or proceedings in question;

(b) the investigative measures to be specified in the order could lawfully have been ordered or undertaken under the same conditions in a similar domestic case (see regulation 11), and

(c) where the order is for an investigative measure in relation to which specific provision is made in Chapter 2 of this Part, any conditions imposed by virtue of such provision are satisfied.

Power of a designated public prosecutor to make or validate a European investigation order

7.—(1) If it appears to a designated public prosecutor—

(a) that an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed, and

(b) proceedings have been instituted in respect of the offence in question or it is being investigated,

the prosecutor may make an order under this regulation.

(2) A designated public prosecutor in England and Wales and Northern Ireland may, at the request of a designated investigating authority, validate an order under this regulation where it appears to the prosecutor that the conditions in paragraph (1) are satisfied.

(3) An order under this regulation is an order specifying one or more investigative measures to be carried out in a participating State ("the executing State") for the purpose of obtaining evidence for use either in the investigation or the proceedings in question or both.

(4) But an order under this regulation may only be made or validated if it appears to the designated public prosecutor that—

- (a) it is necessary and proportionate to make or validate the order for the purposes of the investigation or proceedings in question;
- (b) the investigative measures to be specified in the order could lawfully have been ordered or undertaken under the same conditions in a similar domestic case (see regulation 11), and
- (c) where the order is for an investigative measure in relation to which specific provision is made in Chapter 2 of this Part, any conditions imposed by virtue of such provision are satisfied.

Form and content of a European investigation order

8. A European investigation order must—

- (a) be in the form set out in Annex A to the Directive;
- (b) contain the specified information;
- (c) contain any further information as may be required under Chapter 2 of this Part;
- (d) be signed by or on behalf of the person making or validating it (the signature may be an electronic one), and
- (e) include a statement certifying that the information given in it is accurate and correct.

Transmission of a European investigation order

9.—(1) Where a judicial authority makes a European investigation order, it must—

- (a) where the application for the order was made by a designated public prosecutor or a prosecutor listed in Part 2 of Schedule 1 (other designated prosecutors), give the order to that prosecutor for transmission to the central authority or to an appropriate executing authority of the executing State;
- (b) where the application for the order was made by a constable with the consent of a such a prosecutor, give the order to that constable;
- (c) in any other case, transmit the order to the central authority or to an appropriate executing authority of the executing State.

(2) A designated public prosecutor must—

- (a) where it makes a European investigation order, transmit the order to the central authority or to an appropriate executing authority of the executing State;
- (b) where it validates a European investigation order on behalf of a designated investigating authority—
 - (i) transmit the order to the central authority or to an appropriate executing authority of the executing State, or
 - (ii) give the order to the designated investigating authority for transmission to the central authority or to an appropriate executing authority of the executing State.

(3) A prosecutor who receives an order under this regulation from a judicial authority must transmit the order to the central authority or to an appropriate executing authority of the executing State.

(4) A constable who receives an order under this regulation from a judicial authority must give it to the prosecutor from whom consent to apply for the order was obtained, for transmission to the central authority or to an appropriate executing authority of the executing State.

(5) A designated investigating authority which receives an order under this regulation from a designated public prosecutor must transmit the order to the central authority or to an appropriate executing authority of the executing State.

(6) A European investigation order transmitted under this regulation must be accompanied by a translation of the order into the language notified by the executing State under Article 33(1)(b) of the Directive (if that language is not English).

Variation or revocation of a European investigation order

10.—(1) The judicial authority or designated public prosecutor that made or validated a European investigation order may vary or revoke it.

(2) But a judicial authority may only vary or revoke an order on the application of a person mentioned below.

(3) The persons are—

- (a) the person who applied for the order;
- (b) in relation to England and Wales and Northern Ireland, a prosecuting authority;
- (c) in relation to Scotland, the Lord Advocate or a procurator fiscal;
- (d) any other person affected by the order.

(4) An application by a constable under this regulation must not be made without the consent of a prosecuting authority.

(5) Where a judicial authority or designated public prosecutor revokes a European investigation order, the central authority or executing authority to which the order was originally transmitted must be informed without delay.

(6) Where a judicial authority or designated public prosecutor varies a European investigation order, the varied order must—

- (a) comply with the requirements of regulation 8 (form and content of a European investigation order), and
- (b) be transmitted to the central authority or appropriate executing authority of the executing State.

(7) A varied order transmitted under this regulation must, where necessary, be accompanied by a translation of the order into the language notified by the executing State under Article 33(1)(b) of the Directive (if that language is not English).

Meaning of “under the same conditions in a similar domestic case”

11.—(1) When deciding for the purposes of regulation 6(4)(b) or 7(4)(b) whether an investigative measure could lawfully have been ordered or undertaken under the same conditions in a similar domestic case, the judicial authority or designated public prosecutor (“the relevant authority”) must consider in particular the following matters.

(2) Where the investigative measure requested is one which would require the issue of a relevant instrument before it could be lawfully carried out in the United Kingdom, the relevant authority must consider whether it could have issued such an instrument taking into account in particular—

- (a) the nature of the evidence to be obtained;
- (b) the purpose for which that evidence is sought (including its relevance to the investigation or proceedings in respect of which the European investigation order is sought);
- (c) the circumstances in which the evidence is held;
- (d) the nature and seriousness of the offence to which the investigation or proceedings relates;

(e) any provision or rule of domestic law applicable to the issuing of such an instrument.

(3) Where the investigative measure requested is one which would require authorisation under any enactment relating to the acquisition and disclosure of data relating to communications, or the carrying out of surveillance, before it could be lawfully carried out in the United Kingdom, the relevant authority must consider whether such authorisation—

(a) has in fact been granted, or

(b) could have been granted, taking into account in particular—

(i) the matters specified in sub-paragraphs (a) to (d) of paragraph (2), and

(ii) the provisions of the enactment applicable to the granting of such authorisation.

(4) Where the investigative measure requested is in connection with, or in the form of, the interception of communications, the relevant authority must consider whether any additional requirements relating to the making of such a request, imposed by any enactment other than these Regulations, have been complied with.

(5) Paragraph (2)(e) does not require the relevant authority to take into account any provision of domestic law imposing a procedural requirement which the judicial authority or designated public prosecutor considers cannot effectively be applied when making a European investigation order for the investigative measure concerned.

(6) For the purposes of this regulation—

“relevant instrument” includes a warrant, order, notice, witness summons, citation or equivalent instrument;

“enactment” means an enactment whenever passed or made and includes—

(i) an enactment contained in subordinate legislation within the meaning of the Interpretation Act 1978⁽¹⁾;

(ii) an enactment contained in, or in an instrument made under, an Act of the Scottish Parliament;

(iii) an enactment contained in, or in an instrument made under, a Measure or Act of the National Assembly for Wales, and

(iv) an enactment contained in, or in an instrument made under, Northern Ireland legislation.

Use of evidence obtained under this Part

12.—(1) This regulation applies to evidence obtained from a participating State pursuant to a European investigation order made or validated under this Chapter.

(2) The evidence obtained—

(a) may be used or disclosed for the purposes of the investigation or proceedings in relation to which the order was made or validated;

(b) may not be used or disclosed for any other purpose, without the consent of the participating State from which it was obtained.

(3) In Scotland, the evidence may be received in evidence without being sworn to by a witness, so far as that may be done without unfairness to either party.

(1) 1978 c. 30.