
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.

CHAPTER 2

Additional requirements for certain investigative measures

Interpretation and relationship to Chapter 1

13.—(1) This Chapter makes provision for certain types of investigative measures which may be specified in a European investigation order.

(2) The conditions and requirements imposed by this Chapter apply in addition to the conditions and requirements imposed by Chapter 1.

(3) For the purposes of this Chapter, a European investigation order is issued when it is made by a judicial authority, or made or validated by a designated public prosecutor, and references in this Chapter to “the issuing authority” are to be construed accordingly.

Hearing a person by videoconference or telephone

14.—(1) This regulation applies if a European investigation order is to be issued under this Part—

- (a) where a person is in the territory of a participating State and has to be heard as a witness, expert, suspect or accused person in proceedings in the United Kingdom, for that person to be heard in those proceedings by videoconference or other audiovisual transmission;
- (b) where a person is in the territory of a participating State and has to be heard as a witness or expert in proceedings in the United Kingdom, for that person to be heard in those proceedings by telephone conference.

(2) A European investigation order may only be issued for the purpose mentioned in paragraph (1) (b) where the issuing authority is satisfied that it is not appropriate or not possible for the person to be heard to appear in the United Kingdom in person, and only after having examined other suitable means.

Banking and other financial information

15.—(1) This regulation applies if a European investigation order is to be issued under this Part—

- (a) in order to determine whether any person holds or controls one or more accounts, of whatever nature, in any financial institution located in the territory of a participating State and if so, to obtain all the details of the identified accounts, or
- (b) in order to obtain the details of accounts specified in the order in any financial institution specified in the order and of banking operations which have been carried out during a defined period through one or more of those accounts, including the details of any sending or recipient account.

(2) A European investigation order issued for the purpose mentioned in paragraph (1)(a) must—

- (a) include the reasons why the issuing authority considers that the requested information is likely to be of substantial value for the purposes of the investigation or proceedings to which the order relates;
- (b) include the grounds on which the issuing authority believes that financial institutions in the territory of the participating State hold the account and, to the extent the information is available, specify the institutions concerned; and
- (c) include any further information the issuing authority considers may facilitate its execution.

(3) A European investigation order issued for the purpose mentioned in paragraph (1)(b) must include the reasons why the issuing authority considers the requested information to be relevant for the purposes of the investigation or proceedings to which the order relates.

Investigative measures requiring the gathering of evidence in real time, continuously and over a certain period of time

16.—(1) This regulation applies if a European investigation order is to be issued under this Part for the purpose of carrying out an investigative measure requiring the gathering of evidence in real time, continuously and over a certain period of time.

(2) Investigative measures of the type described in paragraph (1) include—

- (a) the monitoring of banking or other financial operations being carried out through one or more accounts specified in the order;
- (b) controlled deliveries on the territory of a participating State.

(3) A European investigation order issued for the purpose of carrying out an investigative measure of the type described in paragraph (1) must include the reasons why the issuing authority considers that requested information to be relevant for the purposes of the investigation or proceedings to which the order relates.

Covert investigations

17.—(1) This regulation applies if a European investigation order is to be issued under this Part for the purpose of requesting the assistance of a participating State in the conduct of investigations into crime by officers acting covertly (including under false identity).

(2) A European investigation order issued for the purpose mentioned in paragraph (1) must include the reasons why the issuing authority considers that the requested assistance is likely to be relevant for the purposes of the investigation or proceedings to which the order relates.

Provisional measures

18.—(1) This regulation applies if a European investigation order is to be issued under this Part for the purpose of provisionally preventing the destruction, transformation, removal, transfer or disposal of an item in the territory of a participating State that may be used as evidence in relation to the investigation or proceedings to which the order relates.

(2) A European investigation order issued for the purpose mentioned in paragraph (1) must—

- (a) specify whether the item is to be transferred to the issuing authority or whether it is to remain in the participating State;
- (b) where the item is to remain in the participating State, specify—
 - (i) the date of lifting of the provisional measure referred to in paragraph (1), or
 - (ii) the estimated date of the submission of a request for the item or material to be transferred to the issuing authority.

Interception of telecommunications where technical assistance is needed

19.—(1) This regulation applies if a European investigation order is to be issued under this Part for the interception of telecommunications in a participating State from which technical assistance is needed.

(2) Where it appears to the issuing authority that more than one participating State is in a position to provide the necessary technical assistance for the interception of the same telecommunications, the European investigation order must be sent only to one participating State.

(3) Where—

- (a) paragraph (2) applies, and

(b) it appears to the issuing authority that the subject of the interception is or will be located in one of the participating States able to provide the necessary technical assistance, the European investigation order must be sent to that State.

- (4) A European investigation order issued for the purpose mentioned in paragraph (1) must—
- (a) contain information for the purpose of identifying the subject of the interception;
 - (b) specify the desired duration of the interception;
 - (c) contain sufficient technical data, in particular the target identifier, to ensure that the order can be executed, and
 - (d) indicate the reasons why the issuing authority considers the requested information to be relevant for the purposes of the investigation or proceedings to which the order relates.

CHAPTER 3

Making a European investigation order for the temporary transfer of a prisoner

Temporary transfer of UK prisoner to a participating State for the purpose of UK investigation

20.—(1) The Secretary of State may issue a warrant for a prisoner to be transferred to a participating State (“the executing State”) where the presence of the prisoner on the territory of that State is required for the purpose of gathering evidence there in connection with a criminal investigation or criminal proceedings in the United Kingdom.

- (2) A warrant may be issued in respect of a prisoner under paragraph (1) only if—
- (a) the requirement in paragraph (3) is met, and
 - (b) it appears to the Secretary of State that it is necessary and proportionate for the prisoner to be transferred to the executing State for the purpose mentioned in paragraph (1).
- (3) The requirement is that—
- (a) the prisoner, or
 - (b) in the circumstances mentioned in paragraph (4), a person appearing to the Secretary of State to be an appropriate person to act on the prisoner’s behalf,

has made a written statement consenting to the transfer for the purpose mentioned in paragraph (1).

(4) The circumstances are those in which it appears to the Secretary of State to be inappropriate for the prisoner to act on his or her own behalf, by reason of his or her physical or mental condition or age.

- (5) A warrant under this section authorises—
- (a) the taking of the prisoner to a place in the United Kingdom and delivery of that prisoner at a place of departure from the United Kingdom into the custody of a person representing the appropriate authority of the executing State, and
 - (b) the bringing of the prisoner back to the United Kingdom and that prisoner’s transfer in custody to the place where the prisoner is liable to be detained pursuant to the sentence or order to which the prisoner is subject.

(6) Subsections (4) to (8) of section 5 of the 1990 Act (transfer of UK prisoner to give evidence or assist investigation overseas)⁽²⁾ have effect in relation to a warrant issued under this regulation as they have effect in relation to a warrant issued under that section.

(7) A warrant issued under this regulation must be forwarded to a judicial authority or designated public prosecutor for consideration under regulation 22.

(2) Section 5 was amended by paragraph 87 of Schedule 13 to the Merchant Shipping Act 1995 (c. 21).

(8) In relation to a transfer from Scotland—

- (a) references in this regulation to the Secretary of State are to be read as references to the Scottish Ministers;
- (b) the reference in paragraph (7) to “a judicial authority or designated public prosecutor” is to be read as a reference to the Lord Advocate.

Temporary transfer of EU prisoner to the UK for the purpose of UK investigation or proceedings

21.—(1) The Secretary of State may issue a warrant for an EU prisoner to be transferred to the United Kingdom from a participating State (“the executing State”) for the purpose of—

- (a) giving evidence in criminal proceedings, or
- (b) assisting in the investigation of an offence.

(2) A warrant may be issued in respect of an EU prisoner under paragraph (1) only if the conditions in each of paragraphs (3) to (5) are satisfied.

(3) The condition is that, where the EU prisoner is to be transferred for the purpose mentioned in paragraph (1)(a), a witness order has been made, or a witness summons or citation issued, in criminal proceedings in the United Kingdom in respect of the EU prisoner.

(4) The condition is that it appears to the Secretary of State that the EU prisoner consents, or is likely to consent, to being transferred for the purpose mentioned in paragraph (1)(a), or as the case may be, paragraph (1)(b).

(5) The condition is that it appears to the Secretary of State to be necessary and proportionate for the EU prisoner to be transferred to the United Kingdom for the purpose mentioned in paragraph (1)(a) or, as the case may be, paragraph (1)(b).

(6) A warrant under this regulation authorises—

- (a) the bringing of the EU prisoner to the United Kingdom,
- (b) the taking of the EU prisoner to, and detention in custody at, any place or places in the United Kingdom specified in the warrant,
- (c) the returning of the EU prisoner to the executing State.

(7) Subsections (4) to (8) of section 5 of the 1990 Act (transfer of UK prisoner to give evidence or assist investigation overseas) have effect in relation to a warrant issued under this regulation as they have effect in relation to a warrant issued under that section.

(8) A person is not subject to the Immigration Act 1971(3) in respect of that person’s entry into or presence in the United Kingdom pursuant to a warrant under this regulation; but if the warrant ceases to have effect while that person is still in the United Kingdom—

- (a) that person is to be treated for the purposes of that Act as having then illegally entered the United Kingdom, and
- (b) the provisions of Schedule 2 to that Act have effect accordingly except that paragraph 20(1) (liability of carrier for expenses of custody etc. of illegal entrant) does not have effect in relation to directions for the person’s removal given by virtue of this sub-paragraph.

(9) A warrant issued under this regulation must be forwarded to a judicial authority or designated public prosecutor for consideration under regulation 22.

(10) In relation to a transfer from Scotland—

- (a) references in this regulation to the Secretary of State are to be read as references to the Scottish Ministers;

(3) 1971 c. 77.

- (b) the reference in paragraph (9) to “a judicial authority or designated public prosecutor” is to be read as a reference to the Lord Advocate.

European investigation order for the temporary transfer of a prisoner

22.—(1) This regulation applies—

- (a) in relation to England and Wales and Northern Ireland, where a judicial authority or designated public prosecutor receives from the Secretary of State a warrant issued under regulation 20 or 21;
- (b) in relation to Scotland, where the Lord Advocate receives from the Scottish Ministers a warrant issued under regulation 20 or 21.

(2) If satisfied that—

- (a) in relation to a warrant issued under regulation 20, it is necessary and proportionate for the prisoner to be present in the territory of the participating State for the purpose mentioned in paragraph (1) of that regulation;
- (b) in relation to a warrant issued under regulation 21, it is necessary and proportionate for the EU prisoner to be present in the United Kingdom for the purpose mentioned in paragraph (1)(a) or, as the case may be, paragraph (1)(b) of that regulation,

the judicial authority or designated public prosecutor (or, in Scotland, the Lord Advocate) must make an order for the transfer of the prisoner or the EU prisoner.

(3) An order under this regulation must—

- (a) be in the form set out in Annex A to the Directive;
- (b) contain the specified information;
- (c) be signed by or on behalf of the person who made it (the signature may be an electronic one), and
- (d) include a statement certifying that the information given in it is accurate and correct.

(4) An order made under this regulation—

- (a) in England and Wales or Northern Ireland must be given to the Secretary of State for transmission to the central authority or appropriate executing authority of the executing State;
- (b) in Scotland must be transmitted by the Lord Advocate to the central authority or appropriate executing authority of the executing State.

(5) A European investigation order transmitted under this regulation must be accompanied by a translation of the order into an appropriate language of the executing State (if that language is not English), in accordance with any notification made by that State under Article 33(1)(b) of the Directive.

Restrictions on prosecution and detention for other matters

23.—(1) This regulation applies where an EU prisoner (“the transferred person”) is transferred to the United Kingdom pursuant to a European investigation order made under regulation 22.

(2) Whilst in the United Kingdom, the transferred person must not be prosecuted or detained or subjected to any other restriction of personal liberty in relation to conduct which—

- (a) occurred before the person’s departure from the executing State, and
- (b) was not specified in the European investigation order.

(3) Paragraph (2) ceases to apply if the transferred person is released from custody whilst in the United Kingdom, and—

(i) having been informed that his or her presence in the United Kingdom is no longer required, remains here after the expiry of the relevant period, or

(ii) having left, returns.

(4) The relevant period is 15 days beginning with the day after the transferred person is informed that his or her presence in the United Kingdom is no longer required or, if later, the day after the transferred person is released from custody.

Time spent by UK prisoner in custody overseas

24.—(1) This regulation applies where a prisoner (“P”) is transferred to the executing State pursuant to a European investigation order made under regulation 22.

(2) Any period of time spent in custody outside the United Kingdom pursuant to the European investigation order must be treated for all purposes as if P had spent that period in custody in the place in the United Kingdom where P is liable to be detained pursuant to the sentence or order to which P is subject.

(3) Where P is serving a sentence and, prior to being returned to the United Kingdom, ceases to be in custody at a time when P is liable to be detained pursuant to the sentence or order to which P is subject, P must be deemed for all purposes to be unlawfully at large.