A7

MUTUAL LEGAL ASSISTANCE IN CASES OF FRAUD

A. Introduction

A.7.01 This chapter examines the means by which the UK assists and seeks the assistance of foreign states[1] in the investigation and prosecution of fraud and related offences.[2]

1 In this chapter the term 'foreign state' includes the Channel Islands, the Isle of Man, and British Overseas Territories, which are responsible themselves for providing mutual assistance in response to requests from other countries.

2 But note that the Crime (International Co-operation) Act 2003 (CICA) also permits the UK to provide assistance in relation to administrative proceedings and clemency proceedings in foreign states. There are also statutory powers enabling foreign states to seek assistance in relation to financial and regulatory matters under the Companies Act 1989 and the Financial Services and Markets Act 2000. Part 1 of the Regulation of Investigatory Powers Act 2000 contains provisions relating to mutual assistance in the interception of communications. There are also a range of provisions for the exchange of information in tax matters, see eg the European Administrative Co-operation (Taxation) Regulations 2012, SI 2012/3062.

A.7.02 The two principal pieces of legislation[1] in this field are:

- the Crime (International Co-operation) Act 2003 (CICA 2003). CICA 2003 contains provisions allowing the UK to seek and provide assistance in a number of ways, including the provision of evidence and information; the service of process, the enforcement of foreign driving disqualifications, and other related matters.[2] CICA 2003 repealed the Criminal Justice (International Cooperation) Act 1990 however ss 5, 6, 9, and 10 of the 1990 Act remain in force;
- the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (the POCA Order)[3] enables the UK to restrain assets at the request of foreign states and also to enforce external confiscation orders.[4]

1 The enforcement of foreign judgments in civil proceedings is outside the scope of this work. For a recent analysis of the provisions concerning enforcement of foreign orders in insolvency proceedings, and the Foreign Judgments (Reciprocal Enforcement) Act 1933 and s 426 of the Insolvency Act 1986, see *New Cap Reinsurance Corporation Ltd (in liquidation) v Grant* [2012] Ch 538, CA.

2 The provisions of CICA 2003 relating to service of process and driving disqualifications are not covered in this chapter. For further details, see C Nicholls, C Montgomery and JB Knowles, *The Law of Extradition and Mutual Assistance* (3rd edn, 2013), chs 22 and 23.

3 SI 2005/3181, made under POCA.

4 Part 3 of the Criminal Justice (International Co-operation) Act 1990 (Enforcement of Overseas Forfeiture Orders) Order 2005 (SI 2005/3180) contains similar powers enabling forfeiture of the instrumentalities of crime at the request of foreign states, as to which see generally *Malabu Oil and Gas Ltd v Director of Public Prosecutions* [2016] Lloyd's Rep FC 108.

(a) Relationship between international agreements on mutual assistance and domestic legislation

A.7.03 The development of mutual assistance legislation in the UK has primarily been driven by mutual legal assistance treaties and other international agreements. These instruments had the effect of requiring the UK to adapt its laws so as to enable it to honour its international obligations. It is thus convenient to consider these agreements first before describing the domestic legislation.

A.7.04 However, unlike in respect of extradition, it should be noted at the outset that the domestic mutual assistance scheme does not require the existence of a treaty as a pre-condition for the granting of mutual assistance. The UK is able, in general, to offer assistance to any state whether or not that country is able to reciprocally assist the UK, and whether or not there is a bilateral or multilateral agreement in place.[1]

[1] *Mutual Legal Assistance Guidelines for the United Kingdom* (12th edn, Home Office, March 2015), p 5.

A.7.05 Mutual legal assistance treaties therefore have a dual role to play in the mutual assistance process. First, they can be used as an aid to the interpretation of relevant legislation.[1] In particular, parts of the CICA 2003 give effect to international agreements and framework decisions, and these domestic provisions fall to be interpreted in light of the international instrument to which they give effect.[2] Secondly, the Secretary of State and the court must take into account treaty provisions when considering the extent to which assistance should be granted under the CICA 2003 or other legislation.[3]

[1] *Atlan*, Unreported, 10 June 1996 (CA); see also *Enander v Governor of Her Majesty's Prison Brixton* [2005] EWHC 3036 (Admin), paras 29–30.
[2] *Dabas v High Court of Madrid* [2007] 2 AC 31; *Pupino* [2006] QB 83, ECJ. The difficulty identified in *Assange v Swedish Prosecution Authority* [2012] 2 AC 471, paras 201–221, so far as pre-Treaty of Lisbon EU instruments enacted under Title VI TEU are concerned, has since been solved: *Cretu v Local Court of Suceava, Romania* [2016] 1 WLR 3344; *Goluchowski v Poland* [2016] 1 WLR 2665, para 46.
[3] *R v Secretary of State ex p Fininvest Spa* [1997] 1 WLR 743, 758. See also *R v I* [2008] EWCA Crim 3062.

(b) International developments

A.7.06 Among the most important multilateral conventions and agreements in relation to mutual assistance ratified by the UK are the Council of Europe's Convention on Mutual Assistance in Criminal Matters 1959[1] (the 'European Convention on Mutual Assistance in Criminal Matters') and its First and Second Additional Protocols;[2] the Council of Europe's Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990;[3] and the Commonwealth Scheme (the 'Harare Scheme').[4]

[1] ETS No 30.
[2] ETS No 99 and ETS No 182. The second Additional Protocol came into force in the UK on 1 October 2010.
[3] ETS No 141. There is also a Council of Europe Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No 198), which the UK ratified in 2015.
[4] Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth, Commonwealth Secretariat, London, LMN (86) 13. See the updated scheme, Revised Scheme Relating to Mutual Legal Assistance in Criminal Matters within the Commonwealth, including amendments made by Law Ministers in April 1990, November 2002, October 2005 and July 2011 <http://thecommonwealth.org/sites/default/files/key_reform_pdfs/P15370_14_ROL_Model_Leg_Mutual_Legal_Asstnce.pdf>. The UK has also ratified the UN Convention against Transnational Organised Crime 2000 and the UN Convention Against Corruption 2003.

A.7.07 There have also been a number of important developments at EU level, including the Schengen Convention,[1] the EU Convention on Mutual Assistance in Criminal Matters and its Protocol,[2] and most recently the development of mutual recognition initiatives to facilitate speedier mutual legal assistance. However, the referendum on the United

Kingdom's membership of the European Union, held on 23 June 2016, led to a decision to withdraw from EU membership. Notice of intention to leave the EU ('Brexit') was served under Art 50 TEU on 29 March 2017. Withdrawal was due to take effect on 29 March 2019 but at the date of writing had been postponed. Consequently, the UK's continued participation in EU mutual recognition instruments remains the subject of significant uncertainty (see para A.7.17).[3]

[1] OJ L 239, 22.09.2000, p 19.
[2] OJ C 197, 12.07.2000, p 3 and OJ C 326, 21.11.2001.
[3] See, eg, the House of Lords, European Union Committee, 'Brexit: Judicial Oversight of the European Arrest Warrant', 6th Report of Session 2017–19.

A.7.08 The UK is also a signatory to a number of bilateral mutual legal assistance treaties.[1] Among these are the Mutual Legal Assistance Treaty with the US, which entered into force on 12 February 1996. The Foreign Office maintains a list of all bilateral agreements.[2]

[1] Often referred to as an 'MLAT'.
[2] See <http://www.fco.gov.uk/en/publications-and-documents/treaties/lists-treaties/bilateral-mutual-legal>.

(i) European Convention on Mutual Assistance in Criminal Matters

A.7.09 One of the first international instruments to respond to the effects of cross-border criminal activity was the European Convention on Mutual Assistance in Criminal Matters.[1] Although this opened for signature in 1959, it was not ratified by the UK until 1991 when the Criminal Justice (International Cooperation) Act 1990 came into force. Art 3(1) of the Convention provides that:

> The requested Party shall execute in the manner provided for by its law any letters rogatory relating to a criminal matter and addressed to it by the judicial authorities of the requesting Party for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents.

[1] ETS No 30. See generally, D McClean, International Cooperation in Civil and Criminal Matters (2012), p 170.

A.7.10 The Additional Protocol to the Convention, which opened for signature in 1978, contains provisions intended to relax the Convention's restrictions on assistance in relation to fiscal offences. The Second Additional Protocol facilitates the exchange or disclosure of information by broadening the range of situations in which mutual assistance may be requested and by making the provision of assistance easier, quicker and more flexible. This includes the creation of joint investigation teams (JIT).[1]

[1] Article 20.

A.7.11 The European Convention on Mutual Assistance in Criminal Matters was an important achievement for its time in its recognition of the necessity for specific instruments for cooperation in evidence gathering. However, like all new instruments, it had limitations. Perhaps the most notable was that the Convention was designed to operate amongst states of like legal tradition, namely the civil law states of Europe, and it was geared towards legal systems where criminal prosecutions were under the control of an investigating judge.

(ii) Commonwealth Scheme Relating to Mutual Assistance in Criminal Matters 1986

A.7.12 The Commonwealth Scheme was adopted by Commonwealth Law Ministers in Harare, Zimbabwe, in August 1986[1] and has been amended since in 2002, 2005, and 2011. It is not treaty-based and depends for its effective operation on the passage by all members of the Commonwealth of domestic legislation, including legislation to enable the exercise of powers and functions by their law enforcement and curial bodies on behalf of other Commonwealth countries.

[1] Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth, Commonwealth Secretariat, London, LMN (86) 13. See generally, D McClean, *International Cooperation in Civil and Criminal Matters* (2012), p 177 and the Office of Civil and Criminal Justice Reform, *Commonwealth Schemes for International Cooperation in Criminal Matters*, Commonwealth Secretariat (2017). The most recent version of the Scheme can be found at <http://thecommonwealth.org/sites/default/files/key_reform_pdfs/P15370_14_ROL_Model_Leg_Mutual_Legal_Asstnce.pdf>.

A.7.13 The Commonwealth Scheme provides for a wider range of assistance than its Council of Europe counterpart and recognises the common law independence of the police in conducting investigations, as well as a non-judicial prosecutor exercising a prosecutorial discretion. The types of assistance envisaged by the Scheme include:

- obtaining and taking of evidence;
- making available records and other documents;
- facilitating the appearance of witnesses (including persons in custody) provided such persons consent;
- interception of telecommunications and postal items;
- covert electronic surveillance;
- the use of live video links in the course of investigations and judicial procedures;
- asset recovery; and
- issuing of process for compulsory measures including search and seizure.

(iii) United Nations Convention against Corruption[1]

A.7.14 The Convention was adopted by the General Assembly by resolution 58/4 of 31 October 2003.

[1] See <http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf >.

A.7.15 The principal aim of the Convention is to prevent corruption from occurring. The Convention requires countries to establish criminal and other offences to cover a wide range of acts of corruption, if these are not already crimes under domestic law. Chapter IV of the Convention deals with international cooperation consequent to that. Countries agreed to cooperate with one another in every aspect of the fight against corruption, including prevention, investigation, and the prosecution of offenders. Countries are bound by the Convention to render specific forms of mutual legal assistance in gathering and transferring evidence for use in court, and to extradite offenders. Countries are also

required to undertake measures which will support the tracing, freezing, seizure, and confiscation of the proceeds of corruption.[1]

1 See generally C Nicholls et al, *Corruption and Misuse of Public Office* (3rd edn, 2017).

(c) EU developments

A.7.16 In October 1999 at Tampere, the European Council adopted a legislative approach called mutual recognition as the cornerstone of judicial cooperation in the EU. This followed the institutional changes brought about by the Treaty of Amsterdam.[1] Mutual recognition presents a significant departure from existing mutual assistance procedures.[2] The traditional 'request principle' for mutual assistance entails requests being addressed from executive to executive through their national ministries. Such requests could be refused on a wide variety of domestic discretionary principles including specialty,[3] double criminality,[4] the political offence exception[5] and the bar on extraditing nationals.[6] However, this made outcomes slow, cumbersome, and often unreliable. Mutual recognition has been embraced to change this by leaving decision-making predominantly with the judiciary. Under mutual recognition, judicial decisions by one EU state can be implemented in another with limited grounds for refusal and without any real consideration of the processes by which these decisions were reached.[7] This inevitably impacts on the individual by permitting their direct exposure to other European criminal justice systems.

1 1997 OJ C/340/1.
2 See Mackarel, 'Surrendering' the Fugitive—The European Arrest Warrant and the United Kingdom', JoCL 71 (362) 2007.
3 The specialty principle generally acts as a bar on an extradited person being prosecuted for anything other than the offence for which s/he was extradited.
4 This is the principle that extradition or mutual assistance will be refused for acts that are not also defined as crimes in the jurisdiction dealing with the request.
5 This exception is a general bar on the extradition of alleged offenders who are sought for political activity and is aimed at preventing persecution.
6 This bar has its basis in the link between allegiance and protection between state and its nationals, the right of a state to prosecute and punish its own nationals, and in a distrust of other criminal justice systems.
7 Peers, 'Mutual Recognition and Criminal Law: Has the Council got it wrong?' CMLR 41:5-36 (2004), p.10.

A.7.16A The mutual recognition agenda sought to revolutionise mutual legal assistance within the EU as legal instruments progressively replaced traditional mutual legal assistance conventions. To date there have been a number of EU initiatives in the area of criminal mutual assistance that have had an important impact on the UK's domestic legislation, including CICA 2003.

A.7.17 However, the legal situation has recently become complicated. Protocol 36 of the Treaty of Lisbon permitted the UK Government to decide by 31 May 2014 whether it intended to continue to be bound by unamended, pre-Lisbon EU police and criminal justice (PCJ) measures. This allowed the UK to withdraw from these measures before they became subject to the jurisdiction of the Court of Justice of the European Union and the European Commission's enforcement powers. Under Art 10(4) of Protocol 36, the UK indicated it

was withdrawing from all such measures with effect from 1 December 2014. It then set out its intention to opt back into 35 selected measures. The measures included many mutual recognition instruments and a number of other key instruments (eg legislation establishing Europol and Eurojust and legislation on joint investigation teams and criminal records). Twenty-nine measures, including Europol, Eurojust, and joint investigation teams were eventually re-joined. For a while, therefore, normality was resumed.[1] However, the UK's subsequent decision to withdraw from the EU leaves numerous issues pertaining to the future status of these instruments to be addressed within the exit negotiations.[2] The UK Government has identified 'cooperating in the fight against crime and terrorism' as one of its twelve guiding principles in the 'Brexit' negotiations.[3] But there is no guarantee as yet that an effective legal framework for mutual recognition of judgments can be maintained, there being no precedents for many of the arrangements which need to be put in place. [4] A significant potential stumbling block is the role of the Court of Justice of the EU (CJEU). As taking 'control of our own laws' was a core motivator behind the decision to leave the EU, any CJEU jurisdiction in relation to UK cooperation arrangements will remain highly contentious.[5] Possible alternative models of cooperation may potentially be found in the extradition agreement negotiated by Iceland and Norway with the EU.[6] This requires the parties to 'keep under review' the development of the case law of the CJEU and the domestic courts of Iceland and Norway. Agreement on these issues is yet to be reached.

[1] The whole episode also served to resolve the legal problems identified in *Assange v Swedish Prosecution Authority* [2012] 2 WLR 1275AC 471, paras 201–221: see above, n 9.

[2] For general discussion on these issues, see V Mitsilegas, 'European Criminal Law without the United Kingdom? The Triple Paradox of Brexit' (2018) NJECL, 8(4), 437–38 and R Davidson, 'Brexit and Criminal Justice: The Future of the UK's Cooperation Relationship with the EU' [2017] Crim L R 5.

[3] HM Government, 'The United Kingdom's Exit From, and New Partnership with, the European Union' (February 2017), Cm 9417.

[4] See the House of Lords, European Union Committee, 'Brexit: Future UK–EU Security and Police Cooperation', 7th Report of Session 2016–17, HL Paper 77, para 87.

[5] See 'Theresa May's Brexit Speech in Full', *The Telegraph*, 17 January 2017.

[6] Council Decision 2014/835 of 27 November 2014 on the conclusion of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway [2014] OJ L343/1.

A.7.18 The UK Government has noted that, following the UK's withdrawal from the EU, the UK will be a 'third country' (external country) in its dealings with the Union. It has suggested:

> One option for future EU–UK cooperation in this area would be to limit cooperation to those areas where a precedent for cooperation between the EU and third countries already exists. While this would be one possible approach, it would result in a limited patchwork of cooperation falling well short of current capabilities. It would also fall short of current channels used to assess the strategic threats facing European countries—threats that will still be shared after the UK withdraws from the EU.A piecemeal approach to future UK–EU cooperation would therefore have more limited value, and would risk creating operational gaps for both the UK and for its European partners, increasing the risk for citizens across Europe.[1]

At the time of writing, the future of mutual legal assistance in the criminal sphere between the UK and the EU remains extremely uncertain. With that caveat, we outline in s (i) below the EU mutual legal assistance scheme in which the UK participates, as it currently stands.

[1] HM Government, 'Security, Law Enforcement and Criminal Justice: A Future Partnership', 18 September 2017, para 35.

(i) The Schengen Convention[1]

A.7.19 France, Germany, Belgium, Luxembourg, and the Netherlands agreed on 14 June 1985 to sign an agreement on the gradual abolition of checks at their common borders. This became known as the Schengen Agreement, after the name of the town in Luxembourg where it was signed.

[1] See generally, D McClean, *International Cooperation in Civil and Criminal Matters* (2012), p 157.

A.7.20 The Convention Implementing the Schengen Convention was signed in June 1990 and came into effect in March 1995.[1] By that time, other EU Member States had joined the initial signatories of this inter-governmental agreement, which was signed outside the EU framework because of a lack of agreement in relation to competence in the areas of border control. The Convention has 142 articles providing measures for creating a common area of justice and security, following abolition of common borders. Its key aims are to facilitate free movement within participating states; to improve police cooperation; to extend the provision of mutual legal assistance between signatory states; and to improve access to the Schengen Information System (SIS).

[1] OJ L 239, 22.09.2000, p 19.

A.7.21 The SIS was set up to allow police forces and consular agents from the Schengen countries to access data on specific individuals (ie criminals wanted for arrest or extradition, missing persons, third-country nationals to be refused entry, etc) and on goods which have been lost or stolen. The data related to persons may include data on: persons wanted for arrest for extradition purposes; aliens for whom an alert has been issued for the purposes of refusing entry; and missing persons or on persons needing temporary police protection, among other things. A second technical version of this system (SIS II) entered into operation on 9 April 2013. It has enhanced functionalities, such as the possibility to use biometrics, new types of alerts, the possibility to link different alerts (such as an alert on a person and a vehicle) and a facility for direct queries on the system. It also ensures stronger data protection.[1] It is a database of 'real-time' alerts about individuals and objects of interest to EU law enforcement agencies.[2] Each participating country has a SIRENE (Supplementary Information Request at the National Entry) Bureau, to provide supplementary information and coordinate activities. The UK connected to SIS II in April 2015.[3]At the time of writing most information about persons of interest to law enforcement within the EU are dealt with by SIS II. The most likely replacement for the system when and if the UK leaves the SIS is the Interpol system of notifications.

[1] See the Council Decision of 18 February 2008 on the trials for the second generation Schengen Information System (SIS II) OJ L 57, 1.3.2008.
[2] House of Lords, European Union Committee, 'Brexit: Future UK–EU Security and Police Cooperation', 7th Report of Session 2016–17, HL Paper 77, para 87.
[3] See House of Lords European Union Committee, 'Brexit: Future UK–EU Security and Police Cooperation', 7th Report, session 2016–17, para 8.

A.7.22 The 1985 Schengen Agreement and the Convention implementing it, and the decisions and declarations adopted by the Schengen bodies are known collectively as the Schengen *acquis*. The texts are available on the Europa website.[1] They were made part of the *acquis communautaire*[2] by Protocol 2 to the Treaty of Amsterdam.[3] Requests from the UK to participate in some aspects of the Schengen *acquis* (the police and judicial cooperation elements—the UK does not participate in the frontier control elements) led to two Council Decisions (Council Decision 2000/365/EC[4] and Council Decision 2004/926/EC[5]).

[1] See <http://ec.europa.eu/justice/criminal/law/index_en.htm>.
[2] This is the entirety of legislation, legal acts and court decisions which constitute the body of EU law.
[3] Protocol No 2, Treaty on European Union, integrating the Schengen acquis into the framework of the European Union, OJ L 340, 10 November 1997.
[4] OJ L 31, 1.6.2000.
[5] OJ L 395/70, 31.12.2004.

A.7.23 Protocol 19 to the Treaty on the Functioning of the European Union (TFEU) integrated the Schengen *acquis* into the framework of the European Union.[1] Art 4 to Protocol 19 provides that the UK may request to take part in some or all provisions of the Schengen *acquis*. Art 5 of Protocol 19 provides that the UK is deemed to opt in to measures building on parts of the *acquis* in which it participates unless, within three months of the publication of the proposal or initiative, it notifies the Council that it does not wish to take part in the measure—'an opt-out'. If the UK does not opt out within that three-month period, it is automatically bound. If the UK opts out, the Commission and Council can decide to eject the UK from all or part of the rest of Schengen to the extent considered necessary if such non-participation seriously affects the practical operability of the system but the Protocol states explicitly that it must seek to retain the UK's widest possible participation.[2]

[1] OJ C 326, 26.10.2012.
[2] See <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/206474/Final_opt-in_webpage_update.pdf>.

A.7.24 Key provisions of the Schengen Convention that are implemented by the UK through CICA 2003 include:

- the continuation of surveillance by law enforcement officers if the subject crosses into another Member State (so-called 'hot surveillance');[1]
- the extended provision of mutual legal assistance to include, in addition to ordinary criminal proceedings, clemency proceedings and administrative proceedings;[2]
- the sending of procedural documents directly by post rather than via central authorities;[3]
- the designation of a supervisory authority to carry out independent supervision of national data files from the SIS.[4]

[1] Article 40.
[2] Article 49.

3 Article 52.
4 Article 114.

A.7.25 Access to the SIS after withdrawal from the EU will be a complex issue for Brexit negotiations. There is no precedent for providing such access to a country which is neither a Member State nor a Schengen country. Any future agreement on UK access will doubtless require the UK to continue to apply standards consistent with EU data protection legislation. There is equally no precedent on which the UK could rely to argue for continued access to SIS II.[1]

1 See evidence of Security Commissioner Julian King to the House of Commons Home Affairs Committee, 28 February 2017, according to which outside of non-EU Schengen countries there are no precedents for third countries accessing those information-sharing platforms (Q92).

(ii) Convention on Mutual Assistance in Criminal Matters between EU Member States and its Protocol

A.7.26 On 29 May 2000 the EU Council of Ministers adopted the Convention on Mutual Assistance in Criminal Matters.[1] The Convention did not enter force until 2005. Art 1 of the Convention explains that its purpose is to supplement the provisions between Member States of inter alia the the Council of Europe's 1959 Convention on Mutual Assistance in Criminal Matters and its Additional Protocol, and the mutual assistance provisions of the Schengen Convention. The EU Convention does not affect the application of more favourable provisions in bilateral or multilateral agreements between Member States or criminal mutual assistance arrangements agreed[2] on the basis of uniform legislation or other special arrangements.

1 OJ 197, 12.07.2000, p 3. See Explanatory Report on the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 379, 29.12.2000, p 7.
2 As provided for in the Council of Europe's European Convention on Mutual Assistance in Criminal Matters, Art 26(4).

A.7.27 Thus the EU Convention aims to encourage and modernise cooperation between judicial, police, and customs authorities within the EU as well as with Norway and Iceland by supplementing provisions in existing legal instruments and facilitating their application. The state receiving a request must in principle comply with the formalities and procedures initiated by the requesting state.

A.7.28 Forms of assistance provided for by the Convention include:

- the handing over of objects that have been stolen or obtained by other criminal means and that are found in another Member State;
- hearings by video or telephone;
- the setting up of a joint investigation team by two or more EU Member States for a specific purpose and for a limited period of time, as well as joint covert investigations;
- requests for the interception of telecommunications.

A.7.29 The 2001 Protocol to the EU Convention[1] deals with requests for banking information and is implemented by Chapter 4 of Part 1 of CICA 2003.

1 OJ C 326, 21.11.2001, p 1. See Explanatory Report to the Protocol to the 2000 Convention on mutual assistance in criminal matters between the Member States of the European Union, OJ C 257, 24.10.2002, p 1.

A.7.30 The European Investigation Order Directive has effectively superseded many of the Convention's provisions (at para **A.7.36** below). However, as noted above (para **A.7.17**), once the withdrawal process under Art 50 (including any transitional period) is complete, some EU law measures, including the EU Convention on Mutual Assistance in Criminal Matters and the European Investigation Order Directive, will be terminated unless UK third-country access is successfully negotiated. The EU allows third-state participation in some of its mutual legal assistance arrangements.[1] An alternative to negotiating third-state access to the network of existing MLA agreements would be a UK–EU MLA treaty.[2] Again, the role of the CJEU would be highly contentious.

1 See, eg, Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol thereto [2000] OJ L26.

2 See R Davidson, 'Brexit and Criminal Justice: The Future of the UK's Cooperation Relationship with the EU' [2017] Crim L R 5, 387.

(iii) Council Framework Decision on the execution in the EU of orders freezing property or evidence[1]

A.7.31 After the Framework Decision on the European Arrest Warrant, the European Council first extended the mutual recognition principle to mutual legal assistance matters with the Framework Decision on pre-trial orders freezing property or evidence. This was adopted by the EU Council of Ministers on 22 July 2003 on an initiative by Belgium, France, and Sweden. Its purpose is to establish the rules under which a Member State is to recognise and execute in its territory a freezing order issued by a judicial authority of another Member State in the framework of criminal proceedings.

1 2003/577/JHA, 22 July 2003; OJ L 196, 2.08.2003.

A.7.32 A 'freezing order' means any measure taken by a judicial authority in a Member State to prevent the destruction, transformation, displacement, etc of property. The evidence to which the Framework Decision applies includes objects, documents, or data which could be produced as evidence in criminal proceedings.

A.7.33 The Framework Decision (2003/577/JHA) was given effect to in Part 1 of CICA 2003[1] and by the Crime and Courts Act 2013 (which replaces the Serious Organised Crime & Police Act 2005). However, the scheme remained restricted to the freezing phase, such that a freezing order still needed to be accompanied by a separate MLA request for the subsequent transfer of the evidence to the issuing state. Because of this need to resort to co-existing MLA arrangements in any event, the 2003 scheme was seldom used in practice.

[1] CICA 2003, ss 10–12 and ss 20–27. CICA 2003 also gives effect to the EU Mutual Assistance Convention 2000 (12 July 2000) (the Convention established by the Council in accordance with Art 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union (OJ C 197, 12/07/2000 p 0003-0023)) and the Protocol to the 2000 Convention (21 November 2001) (the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (OJ C 326, 21/11/2001 p0001-0008)). CICA 2003 also implements other EU legislation, including the Convention 98/C 216/01 on Driving Disqualifications (as to which, see also S.I. 3010 of 2008; The Mutual Recognition of Driving Disqualifications (Great Britain and Ireland) Regulations 2008).

A.7.34 A Regulation on the Mutual Recognition of Freezing and Confiscation Orders has been proposed to replace and further develop this existing mutual recognition framework (the 2003 Framework Decision and the Council Framework Decision (2006/783/JHA) on the application of the principle of mutual recognition to confiscation orders).[1] The proposed Regulation aims to create 'a uniform and more effective legal instrument to improve cross-border asset recovery'. [2] It is intended to resolve the issues caused by the implementation of existing instruments. The draft Regulation covers a wider range of confiscation such as non-conviction-based confiscation (including some preventative confiscation). It also standardizes procedures to improve efficiency. On 8 December 2017, the Council agreed a general approach on the proposal.[3] The UK has indicated it wishes to opt in but this initiative, like other mutual recognition instruments, will be affected when and if the UK withdraws from the EU.

[1] Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders, OJ L 328, 24.11.2006.
[2] Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders—General approach, Council Document 15104/17, 8 December 2017.
[3] ibid.

(iv) The Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters

A.7.35 In late 2008, the Framework Decision on the European Evidence Warrant (EEW) was finalised. The main purpose of the proposal was to consolidate the disparate schemes and to accelerate and simplify the process of gathering and transmitting evidence in criminal cases with a cross-border element. A simple form was to be sent between Member States' authorities, including an order from the 'issuing state' (the state which sends the form) for the 'executing state' to carry out certain activities. The EEW extended the mutual recognition principle of the European Arrest Warrant to the transfer of limited types of 'object[s], documents and data' among Member States in criminal proceedings.[1] However, the EEW remained flawed as an effective cross-border instrument. It was only applicable to evidence already in existence and therefore restricted the spectrum of judicial cooperation in criminal matters with respect to such evidence. Because of its limited scope, competent authorities were free to use the new regime or to use co-existing MLA procedures in any case applicable to evidence falling outside of the scope of the EEW. The EEW specifically excluded 'real time' evidence such as the interviewing or taking of statements from suspects, witnesses or victims, the interception of communications, the taking of DNA or bodily samples, evidence gathered as a result of ongoing monitoring or surveillance, or

evidence that required analysis to be conducted.[2] The EEW took eight years to come into being and its difficult history highlights the problems of pursuing prosecution initiatives in this area. Even before it could be implemented it was overtaken by a new proposal for a Directive on the European Investigation Order (EIO). The EIO has now effectively replaced the EEW.

1 The EEW is limited to obtaining those 'object[s], documents and data' from another member state that are already in existence—Art 1(1). See J.R. Spencer, 'The Problems of Trans-border Evidence and European Initiatives to Resolve Them', *Cambridge Yearbook of European Legal Studies*, Vol. 9, Oxford: Hart Publishing, 2007, pp 477, 478.
2 Article 4(2).

(v) The European Investigation Order

A.7.36 As noted, almost as soon after the EEW had been agreed, the EU's Stockholm Programme on the Area of Freedom Security and Justice issued a commitment to replace the EEW with a proposal for a 'comprehensive' instrument for the transfer of all forms of evidence.[1] The Stockholm Programme referred to the existing mutual legal assistance system as 'fragmented', complaining that the present arrangements permitted access to only limited categories of evidence with a large number of grounds for refusal.[2] As a result, a comprehensive mutual recognition initiative has now been produced—the European Investigation Order (EIO).[3]

1 European Council, Stockholm Programme—An open and secure Europe serving and protecting citizens, OJ C 115/01, 4.5.2010.; see also the European Commission, Communication on delivering an Area of Freedom, Security and Justice for Europe's citizens: Action plan implementing the Stockholm Programme, COM(2010) 171, Brussels, 2010(a), para. 3.1.1.
2 European Commission, 'Making it easier to obtain evidence in criminal matters from one Member State to another and ensuring its admissibility', Memo/09/497, Brussels, 11 November 2009(a).
3 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L130/1, 1.5.2014.

A.7.37 The EIO Directive provides for a Member State to 'have one or several specific investigative measure(s) carried out in another Member State to obtain evidence'. The key elements of the Directive include a standardized format for requests; the application of the principle of mutual recognition to requests, together with timeframes for responding to requests. It also prescribes the grounds for refusal (eg Art 11(1)(f) of the Directive permits a refusal to execute an EIO on human rights grounds). Amongst other investigative measures, the Directive enables the Executing State to:

- temporarily transfer persons held in custody for further investigation;
- summon witnesses to court to provide evidence by video conference at a hearing;
- transfer evidence already in the possession of the Executing State; and
- undertake certain covert investigations and intercept telecommunications.

The Directive does not apply to Schengen cross-border surveillance by police officers under the Schengen Convention, or to the setting up of joint investigation teams and the gathering of evidence within such a team.

A.7.38 The EIO replaces the EEW and most other mutual legal assistance measures with a scheme applicable to all investigative measures and is intended to be the sole legal instrument regulating the exchange of evidence and mutual legal assistance between EU Member States. The scheme differs from the old framework in two crucial respects: first, it removes some of the key protections attached to substantive provisions; and second, it operates by way of mutual recognition.[1] Member States had until 22 May 2017 to implement the Directive into domestic law. The UK opted into the Directive under Protocol 21 of the TFEU and transposed it via the Criminal Justice (European Investigation Order) Regulations 2017[2] with effect from 31 July 2017. (The UK General Election accounted for the delay in transposition.) The Explanatory Memorandum to the Regulations explains: 'It [the Directive] largely relies on existing law enforcement tools such as search warrants and production orders, which broadly aligns with existing procedures under the Crime (International Cooperation) Act 2003.'[3] It also explains that, where there is currently no need for court involvement in domestic cases, EIOs will normally be made or validated by a designated public prosecutor (see Part 1 of Schedule 1); there are exceptions to this where a request for an Order is made by a defendant or other prosecuting authority who will need to make an application to a court. Where a court would normally be involved in a domestic case (for instance when issuing a search warrant), only a court will be able to make a European investigation order.

1 Sayers, 'The European Investigation Order: Travelling without a "roadmap"'. June 2011, CEPS Liberty and Security in Europe <http://www.ceps.be/book/european-investigation-order-travelling-without-%E2%80%98roadmap%E2%80%99>; S. Peers, 'The Proposed European Investigation Order', Statewatch Analysis–Update, November, Statewatch, London, 2010(b) http://www.statewatch.org/analyses/no-112-eu-eio-update.pdf.

2 SI 2017/730.

3 Explanatory Memorandum, para 4.1 <http://www.legislation.gov.uk/uksi/2017/730/pdfs/uksiem_20170730_en.pdf>.

(vi) Other mutual recognition initiatives

A.7.39 Other mutual recognition initiatives have been produced to accelerate mutual legal assistance within the EU. They include a Framework Decision 2006/783/JHA on confiscation orders (noted briefly above at para A.7.34) which applies the principle of mutual recognition to confiscation orders issued by a criminal court for the purpose of facilitating their enforcement in other EU Member States.[1] The Framework Decision follows the usual pattern of mutual recognition initiatives and applies to all offences in relation to which confiscation orders can be issued. Part 2 of the Criminal Justice and Data Protection (Protocol No. 36) Regulations 2014 (SI 2014/3141) as amended by the Criminal Justice and Data Protection (Protocol No. 36) (Amendment) Regulations 2014 (SI 2014/3191) (the 2014 Regulations) gives effect to this Framework Decision (to the extent that it had not already been transposed by the Crime (International Co-operation) Act 2003). As noted, the proposed Regulation on the Mutual Recognition of Freezing and Confiscation Orders will replace this instrument.

1 Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders, OJ L 328, 24.11.2006—as amended by Framework Decision 2009/299/JHA in respect of decisions rendered in absentia. A new Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union was agreed (Directive 2014/42/EU on the

freezing and confiscation of instrumentalities and proceeds of crime in the EU, replacing certain provisions of the above-mentioned Council framework decisions, OJ L 127, 29.4.2014) but the UK did not opt in to it under Protocol 21 to the TFEU.

A.7.40 There are also Framework Decisions on the mutual recognition of custodial penalties,[1] alternative sentences,[2] as well as decisions on pre-trial bail (the European Supervision Order)[3] A mutual recognition Framework Decision on financial penalties has also been implemented.[4] On the other hand, the Framework Decision on the mutual recognition of alternative sentences was not included in the list of measures subject to the 2014 opt-in.[5]

1 Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L 327, 5.12.2008 – as amended by Framework Decision 2009/299/JHA in respect of decisions rendered in absentia.

2 Framework Decision (2008/947/JHA) on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L 337/102, 16.12.2008. For Scotland, provision is made for implementation by s 27 of the Criminal Justice & Licencing (Scotland) Act 2010).

3 Framework Decision (2009/829/JHA) on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ L 294/20, 11.11.2009.

4 Framework Decision (2005/214/JHA) on the application of the principle of mutual recognition of financial penalties, OJ L 76/16, 22.3.2005 – as amended by Framework Decision 2009/299/JHA in respect of decisions rendered in absentia. 2005/214/JHA was implemented in England & Wales by the Criminal Justice & Immigration Act 2008, ss 80–92, which came into force 1 October 2009 and as amended by Sch 3 of SI 2014/3141 and in Scotland by the Mutual Recognition of Criminal Financial Penalties in the European Union (Scotland) Order 2009 which came into force 12 October 2009. As to the application of 2005/214/JHA, see eg *Criminal Proceedings Concerning Balaz* [2014] RTR 61, ECJ.

5 HM Government, 'Decision Pursuant to Article 10(5) of Protocol 36 to The Treaty on the Functioning of the European Union', July 2014, Cm 8897. See also the Table of Measures, September 2014 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/369066/Protocol_36_measures_october.pdf>.

(vii) Council Framework Decision 2001/413/JHA of 28 May 2001 on Combating Fraud and Counterfeiting Non-cash Means of Payment[1]

A.7.41 The aim of this Framework Decision is to ensure that all fraud involving non-cash means of payment is recognized as a criminal offence punishable by effective sanctions in all Member States, and that mechanisms are put in place for cooperation between Member States and between public and private departments or agencies to prosecute these offences efficiently.

1 OJ L 140, 2.06.2001, p 1.

A.7.42 The Framework Decision requires Member States to criminalize the misuse of specified 'payment instruments'.[1] Misuse includes theft, counterfeiting, receiving, fraudulent use, and possession. The UK's existing criminal law implements most of the Framework Decision, but ss 88 and 89 of CICA 2003 provide full compliance by incorporating the provisions of Art 2. The UK has not, however, opted back into this Framework Decision (see para A.7.17 above).

1 Article 2.

(viii) Agreement on Mutual Legal Assistance between the EU and the USA

A.7.43 On 20 September 2001, in the aftermath of the terrorist attacks in the USA, the EU's Justice and Home Affairs Council called for the adoption of measures aimed at enhancing cooperation in criminal matters including mutual assistance arrangements between the EU and the USA.

A.7.44 The Agreement on Mutual Legal Assistance between the EU and the USA was signed on 25 June 2003[1] and entered into force on 1st February 2010.[2] It establishes a common framework for cooperation alongside existing bilateral agreements between the USA and individual Member States.

[1] OJ L 181, 19.07.2003, p 34, referred to in this s as 'the Agreement'. Cf the Agreement on Extradition between the EU and the USA, OJ L181, 19.07.2003, p 27.

[2] <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=5441&back=5461>.

A.7.45 Although initial impetus for the Agreement was the events of 11 September 2001, it goes further than addressing mutual legal assistance merely in relation in relation to terrorism and organized crime.[1]

[1] See, eg, Art 4(4)(a).

A.7.46 In summary, the Agreement gives USA law enforcement authorities access to bank accounts throughout the EU (and vice versa) in the context of investigations into serious crimes, including terrorism, organized crime, and financial crime. It is intended to improve practical cooperation by reducing delays in mutual legal assistance. It also allows for the creation of joint investigative teams and the possibility of videoconferencing. It also contains extensive provisions in relation to data protection and the provision of evidence and information.

A.7.47 A recent Agreement between the United States and the European Union on the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offences[1] applies privacy protections to data that is exchanged between law enforcement agencies in the EU and the USA. Those safeguards include limitations on data use, prior consent from EU authorities before any onward transfer of data, a requirement to define data retention periods, and citizens' rights to access and correct data held about them. The EU–USA umbrella agreement entered into force on 1 February 2017. The data protection umbrella agreement is separate from the EU–USA privacy shield that facilitates the transfer of personal data from the EU to the USA by businesses.[2] Once the UK ceases to be a member of the EU, the EU–USA umbrella agreement will not apply to it.

[1] OJ L 336/3–13, 5.12.2016. In terms of standards within the EU, see the new EU General Data Protection Regulation 2016/679, OJ L 119, 4.5.2016, which comes into force on 25 May 2018.

[2] European Commission, EU–US Privacy Shield, <https://ec.europa.eu/info/law/law-topic/data-protection/data-transfers-outside-eu/eu-us-privacy-shield_en#relatedlinks>.

A.7.48 The EU–USA MLA Agreement applies to all offences irrespective of when they were committed and, in particular, whether they were committed before or after the Agreement entered into force.[1] The Agreement only applies to requests for assistance made after its entry into force. However, Arts 6 and 7 (video conferencing and expedition) apply to requests pending in a requested state at the time the Agreement enters into force.[2]

1 Article 12(1).
2 Article 12(2).

A.7.49 Art 3 provides that the EU and the USA shall ensure that the provisions of the Agreement are applied in relation to bilateral mutual legal assistance treaties between the Member States and the USA, in force at the time of the entry into force of the Agreement. In particular:

- Art 4 is to be applied to provide for identification of financial accounts and transactions in addition to any authority already provided under bilateral treaty provisions;
- Art 5 is to be applied to authorize the formation and activities of joint investigative teams in addition to any authority already provided under bilateral treaty provisions;
- Art 6 is to be applied to authorize the taking of testimony of a person located in the requested state by use of video technology, in addition to any authority already provided under bilateral treaty provisions;
- Art 7 shall be applied to provide for the use of expedited means of communication in addition to any authority already provided under bilateral treaty provisions;
- Art 8 shall be applied to authorize the providing of mutual legal assistance to the administrative authorities concerned, in addition to any authority already provided under bilateral treaty provisions;
- Art 9 shall, subject to Art 9(4) and (5), be applied in place of, or in the absence of bilateral treaty provisions governing limitations on use of information or evidence provided to the requesting state, and governing the conditioning or refusal of assistance on data protection grounds;
- Art 10 shall be applied in the absence of bilateral treaty provisions pertaining to the circumstances under which a requesting state may seek the confidentiality of its request.

A.7.50 Under Art 4(a) and (b) a request for assistance may be made to identify whether a person identified in the request and suspected of, or charged with, a criminal offence holds bank accounts in the requested country's territory; to identify information regarding natural or legal persons convicted of or otherwise involved in a criminal offence; to identify information in the possession of non-bank financial institutions; or to identify financial transactions unrelated to accounts.

A.7.51 Despite its title, the scope of information covered in the Agreement is broader than offences relating to terrorism and organized crime, and could cover a wide range of information about legitimate everyday transactions of innocent third parties.[1] The term 'otherwise involved in a criminal offence' in Art 4 does not specify whether a person must be under criminal investigation before information about him can be transmitted. For example, an innocent third party who is the victim of money laundering without their knowledge could

be described as 'involved in a criminal offence' and his account transaction information transmitted for the purpose of a US request.[2]

1 Session 2002–2003, 38th Report of the House of Lords Select Committee on the European Union, HL Paper 153.

2 In Parliament the Minister of State indicated that the Government would require 'some assurance that there was an actual investigation going on': see the Session 2002–2003, 38th Report of the House of Lords Select Committee on the European Union, HL Paper 153.

A.7.52 Art 5 provides for joint investigative teams from the US and a Member State. These can be established and operated for the purpose of facilitating criminal investigations or prosecutions involving one or more Member State and the USA. The procedure under which the team is to operate, such as its composition, duration, location, organization, functions, purpose, and terms of participation, are to be agreed between the competent authorities responsible for the investigation or prosecution of criminal offences, as determined by the respective states concerned.

A.7.53 Art 6 of the Agreement requires parties to enable the use of video technology for taking the testimony of a witness in proceedings for which mutual legal assistance is available. The cost of establishing and servicing the transmission is borne by the requesting state.

A.7.54 Although the EU agreements have now entered into force, existing Members States' procedures will have to be amended to remove any inconsistencies between existing domestic legislation and/or bilateral treaties and these new multi-lateral agreements. Post Brexit, the UK will have to negotiate such agreements individually.

(d) UK mutual assistance legislation in outline

(i) Crime (International Co-operation) Act 2003

A.7.55 Part 1 of CICA 2003 largely replaces the UK's mutual legal assistance legislation, previously contained in Part 1 of the Criminal Justice (International Co-operation) Act 1990, although s 5 and s 6 remain in force.

A.7.56 The structure of CICA 2003 is as follows.

- **Part 1**: 'Mutual Assistance in Criminal Matters': this part re-enacts the mutual assistance provisions of the Criminal Justice (International Co-operation) Act 1990. It also implements the mutual legal assistance provisions of the Schengen Convention;[1] the EU Convention on Mutual Assistance in Criminal Matters 2000;[2] and the evidence-freezing provisions of the Council Framework Decision 2003/577/JHA of 22 July 2003.[3] Chapter 4 of Part 1 also implements the 2001 Protocol to the EU Convention on Mutual Assistance in Criminal Matters[4] which creates obligations for participating countries to respond to requests for assistance with locating banking accounts and to provide banking information relating to criminal investigations.
- **Part 2**: 'Terrorist Acts and Threats: Jurisdiction': this part implements the Framework Decision on Combating Terrorism, including the provisions relating to extra-territorial jurisdiction in respect of listed offences, in ss 52 and 53.

- **Part 3**: 'Road Traffic': this part contains new provisions implementing the Convention on Driving Disqualifications (ss 54–75) and to provide for the mutual recognition of driving disqualifications within the UK (ss 76–79).
- **Part 4**: Contains miscellaneous provisions.

1 See para A.7.19.
2 See para A.7.26.
3 See para A.7.31.
4 See para A.7.26.

(1) Commencement

A.7.57 Different parts of CICA 2003 have come into force at different times, and parts of it are not yet in force.[1] The Crime (International Co-operation) Act 2003 (Savings) Order 2004[2] contains detailed savings and transitional provisions.

1 See Crime (International Co-operation) Act 2003 (Commencement No 1) Order 2004 (SI 2004/786); Crime (International Co-operation) Act 2003 (Commencement No 2) Order 2004 (SI 2004/2624); Crime (International Co-operation) Act 2003 (Commencement No 3) Order 2006 (SI 2006/2811); Crime (International Co-operation) Act 2003 (Commencement No 4) Order 2008 (SI 2008/3009); Crime (International Co-operation) Act 2003 (Commencement No 5) Order 2009 (SI 2009/2605); Crime (International Co-operation) Act 2003 (Commencement No. 6) Order 2014 (SI 2014/3192).
2 SI 2004/787.

(ii) Proceeds of Crime 2002 (External Requests and Orders) Order 2005[1]

A.7.58 The POCA Order is made under the Proceeds of Crime Act 2002 (POCA). It enables the UK to restrain assets at the request of foreign states and also to enforce external confiscation orders. It also provides the machinery whereby foreign states can utilize civil restraint powers akin to those contained in Part 5 of POCA.[2]

1 SI 2005/3181, as amended by the Proceeds of Crime Act 2002 (External Requests and Orders) (Amendment) Order 2008 (SI 2008/302).The Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (England and Wales) (Appeals under Pt 2) Order 2012, SI 2012/138 makes provisions corresponding to provisions (subject to specified modifications) in the Criminal Appeal Act 1968, which sets out the procedure to be followed for general domestic criminal appeals.
2 The absence of any extraterritorial reach in Pt 5 of POCA was considered and affirmed by the Supreme Court in *Perry v Serious Organised Crime Agency* [2013] 1 AC 182. As a result, Pt 2 of Sch 18 to the Crime and Courts Act 2013 amends Chapter 2 of Pt 5 of the POCA by inserting new ss 282B–F into POCA. The new provisions facilitate the enforcement outside the UK of orders made under Chapter 2 of Pt 5 of POCA and the transmission of requests for evidence held outside the UK. These new provisions are modelled on existing mutual legal assistance provisions in Chapter 2 of Pt 1 of the Crime (International Co-operation) Act 2003 and s 74 of POCA.

A.7.59 The POCA Order is considered in detail in para A.7.613.

(e) The UK Central Authority

A.7.60 The term 'central authority' refers to the government department within a jurisdiction that acts as a central point for the transmission of incoming and outgoing requests for mutual legal assistance in criminal matters and also the product of those requests.

A.7.61 Responsibility for mutual assistance in criminal matters in England and Wales lies with the Secretary of State for the Home Department. His functions under the legislation are in practice exercised by the UK Central Authority. The address of the UK Central Authority is:

United Kingdom Central Authority
International Criminality Unit
Home Office
3rd Floor, Seacole Building
2 Marsham Street
London
SW1P 4DF
Tel: +44 207 035 4040
Fax: +44 207 035 6985
Email: UKCA-ILOR@homeoffice.gsi.gov.uk

A.7.62 The UK Central Authority's role in the mutual legal assistance process includes:

- ensuring that requests for legal assistance conform with the requirements of law in the relevant part of the UK and the UK's international obligations;
- ensuring that execution of requests is not inappropriate on public policy grounds (for example, requests involving double jeopardy will not be executed);
- deciding how requests might most appropriately be executed (for example, some requests asking for search and seizure of evidence may be executed effectively by a witness producing the evidence to a court);
- maintaining confidentiality of requests where necessary;
- ensuring, so far as possible, that assistance is provided within an appropriate time scale (for example, taking account of trial dates);
- drawing to the attention of the courts, the police, and other UK authorities or agencies requests for evidence to be obtained in the presence of foreign law enforcement officers, prosecutors, or defence lawyers;
- seeking requesting authorities' agreement to meet extraordinary costs of executing requests and for services such as interpreters or stenographers or for duplication of documents (ordinarily, the UK authorities, in accordance with established international practice will meet costs, with the exception of TV/video link evidence);
- transmitting evidence received to the requesting authorities when it is not returned directly (and checking whether any part of the request remains outstanding).

A.7.63–100 The UK Central Authority also publishes the Mutual Legal Assistance Guidelines for the United Kingdom (12th edn, Home Office, March 2015) (the MLA Guidelines).[1] The MLA Guidelines are an essential source of information for anyone wishing to seek mutual legal assistance from the UK, and any person in the UK seeking assistance from a foreign state.

[1] Available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/269208/MLA_Guidelines_2014.pdf>.

A.7.101 The UK Central Authority does not have responsibility for judicial cooperation with Scotland, the Channel Islands, the Isle of Man, or the British Overseas Territories. Relevant contact points for these countries and territories are listed in the MLA Guidelines.

(f) The Serious Fraud Office

A.7.102 S 1(1) of the Criminal Justice Act 1987 constituted a Serious Fraud Office (SFO) for England, Wales, and Northern Ireland. S 1(3) empowers the Director of the SFO to investigate 'any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud'.

A.7.103 The SFO's address is:

2–4 Cockspur Street
London
SW1Y 5BS
Tel: 020 7239 7272
Fax: 020 7084 4700

A.7.104 The SFO has a unit devoted to handling incoming international requests for mutual legal assistance. The SFO may assist foreign authorities in cases of serious or complex fraud[1] using its investigative powers under s 2 of the Criminal Justice Act 1987.[2] The SFO may also provide assistance in restraint and confiscation matters under the POCA Order.[3] To receive this kind of help, the overseas authority must first make the request for assistance to the UK Central Authority. If the UK Central Authority refers the case to the SFO it is for the SFO to examine the request in detail to judge whether it can assist.

1 See Chapter A.1.
2 See ibid.
3 See ibid.

A.7.105 The SFO's MLA Unit can be contacted on telephone: +44 (0)20 7239 7380; fax: +44 (0)20 7833 5442; and email: mla@sfo.gsi.gov.uk.

(g) HM Revenue and Customs

A.7.106 HM Customs and Excise merged with the Inland Revenue on 18 April 2005 to form one new government department: HM Revenue and Customs (HMRC).

A.7.107 Since 21 November 2013, MLA requests concerning direct tax (eg income tax, corporation tax, capital gains tax, National Insurance contributions), in addition to indirect tax (eg VAT on goods and services), evasion of duties (excise fraud) and importation and exportation offences may now be sent directly to HMRC for execution.[1]

1 Crime (International Co-operation) Act 2003 (Exercise of Functions) Order 2013, SI 2013/2733, which removed the previous restriction (see para 14 of Sch 52 to the Commissioners for Revenue & Customs Act 2008; repealed by s 97 of the Criminal Justice and Immigration Act 2008) on the CICA 2003 applying to direct matters.

The relevant contact details are: **A.7.108**

Criminal Law Advisory Team
HM Revenue and Customs Solicitor's Office
Room 2/74
100 Parliament Street
London
SW1A 2BQ
Tel: +44 (0)20 7147 0433
mla@hmrc.gsi.gov.uk

(h) UK Border Agency (UKBA)

The UKBA is responsible for the detection and prosecution of cross border crime in the UK. The UKBA deal with a high number of MLA requests as well as Mutual Administrative Assistance requests for intelligence. MLA requests to UKBA must be sent via the UK Central Authority. The UKBA can receive intelligence requests directly, but only from countries with which they have a data sharing agreement or memorandum of understanding. **A.7.109**

UK Border Force Mutual Assistance Team
WG2 Customs House
Lower Thames Street
London
EC3R 6EE
Tel: +44 (0)870 785 7419/7699
Fax: +44 (0)870 785 3029

(i) The National Crime Agency

Not all mutual cooperation in the investigation of crime requires the involvement of the UK Central Authority. Although requests which require the UK to provide formal legal assistance in the form of search warrants, etc, must in general be sent to the UK Central Authority for processing in accordance with the CICA 2003 or other legislation,[1] where more informal investigative assistance is required then the authorities of the foreign state may approach the UK directly via Interpol with a request to provide assistance. **A.7.110**

[1] But note the power of HMRC to process requests directly pursuant to Crime (International Co-operation) Act 2003 (Exercise of Functions) Order 2013, SI 2013/2733.

The Serious Organised Crime and Police Act 2005 (SOCPA) created new law enforcement powers and established a new agency, the Serious Organised Crime Agency (SOCA).[1] SOCA commenced work on 1 April 2006 and replaced the National Criminal Intelligence Service and the National Crime Squad.[2] It also took over the investigative work formerly undertaken by the Revenue and Customs in so far as it relates to revenue fraud, subject to the agreement of the Commissioners for Her Majesty's Revenue and Customs.[3] **A.7.111**

1 SOCPA, s 1(1).
2 SOCPA, s 1(3); NCIS and NCS (Abolition) Order 2006 (SI 2006/540). In April 2008 the Assets Recovery Agency was merged with SOCA. See Serious Crime Act 2007, s 74.
3 SOCPA, s 2(4).

A.7.112 SOCA was abolished by Part 1 of the Crime and Courts Act 2013 (ss 1-16) and replaced by the National Crime Agency (NCA), under the direction of a director general.

A.7.113 The NCA (previously SOCA) has an important role to play in mutual assistance matters. It is the UK National Central Bureau of Interpol and the UK Liaison Bureau for Europol. It has primary responsibility for processing requests for investigative help from overseas. S 8(3)-8(4) of the Crime and Courts Act 2013 provides that:

> The Director General may provide assistance to-
>
> (a) a government in a country or territory outside the British Islands, or
> (b) another overseas body exercising functions of a public nature in a country or territory outside the United Islands
>
> if the government, or the body, requests assistance to be provided
>
> If such a request if made, the Director General may provide such assistance as the Director General considers appropriate in all the circumstances.[1]

1 Note, however, s 8(5), which provides that s 8(3) does not apply to any request for assistance which could be made under s 13 CICA 2003 (requests by overseas authorities to obtain evidence), unless the NCA has functions under that s in relation to the request by virtue of an order under s 27(2) (general power of Secretary of State to delegate his functions to a designated body).

A.7.114 All formal requests for assistance must be sent to a central authority for consideration. However, the MLA Guidelines confirm that this is subject to the following exceptions:

- EU Freezing Orders for property must be sent to the relevant UK prosecuting authority for the purposes of recognition and execution (except 'property related to terrorism offences or investigations', which must be sent to a central authority);
- EU Confiscation Orders must be sent to the relevant UK prosecuting authority for the purposes of recognition and execution.[1]

1 MLA Guidelines, pp 4–5.

(j) Letters of request and *commissions rogatoires*

A.7.115 The terms 'letter of request' and 'letters rogatory' (or *commission rogatoires*) both refer to the formal document sent from one state to another in order to seek mutual legal assistance. Strictly speaking, a *commission rogatoires* is a document issued by a judicial authority of one state to a foreign judicial authority seeking its assistance in a specified manner; however in the UK the two terms have acquired a virtually synonymous meaning.[1] Although the term 'letters rogatory' is used in Chapter II of the European Convention on Mutual Assistance in Criminal Matters 1959,[2] later instruments simply refer to a 'request' or 'letter of request', and those are the terms which will be used in this chapter. A Letter of Request is the formal written document by which MLA is requested in England and Wales; in French, it is called a *commission rogatoire*, a term widely understood internationally. There is no requirement

that either of these expressions be used; the Crime (International Co-operation) Act 2003 speaks only of requests for assistance in obtaining evidence abroad.[3]

1 D McClean, *International Cooperation in Civil and Criminal Matters* (2012), 176.
2 ETS No 030.
3 S 7.

B. UK Requests to Foreign States for Assistance

A.7.116 This s examines the means by which UK prosecuting authorities and criminal defendants can seek the assistance of foreign authorities in relation to criminal investigations and proceedings in the UK.[1] The majority of the relevant powers are contained in Part 1 of CICA 2003. Sections 7 to 9 deal with requests to obtain evidence from abroad in relation to a prosecution or investigation taking place in the UK.

1 Mutual Legal Assistance can also be of relevance in the context of disclosure in ongoing domestic criminal proceedings. As to the nature and extent of the Crown's obligation to initiate MLA procedures so as to fulfill its duty, under the CPIA 1996 and the Attorney General's Disclosure Guidelines, to undertake all reasonable lines of inquiry, see *R v Flook* [2010] 1 Cr App R 30.

(a) Persons able to request assistance

(i) Requests by a judicial authority on the application of a prosecuting authority or the defendant

A.7.117 Both prosecutors and defendants may apply to a court that it makes a request to a foreign state for assistance. CICA 2003, s 7(1) provides that if it appears to a judicial authority[1] in the UK on an application made by a person mentioned in s 7(3) that an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed, and that proceedings in respect of the offence have been instituted or that the offence is being investigated, the judicial authority may request assistance under s 7. The assistance that may be requested is assistance in obtaining outside the UK any evidence specified in the request for use in the proceedings or investigation (s 7(2)).

1 CICA 2003, s 7(4) defines judicial authority, in relation to England and Wales, to be any judge or Justice of the Peace (JP).

A.7.118 S 7(3) provides that the application may be made in relation to England and Wales and Northern Ireland, by a prosecuting authority,[1] and, where proceedings have been instituted, by the person charged in those proceedings.[2]

1 In relation to Scotland, by the Lord Advocate or a procurator fiscal (s 7(3)(b)).
2 In relation to confidentiality, the UK Central Authority does not disclose letters of request to the prosecution. However, the possibility that the foreign authority will do so, or will supply any evidence gathered pursuant to the request to the prosecution, cannot be ruled out. Defence letters of request should always make clear that the material sought is confidential to the defence.

A.7.119 Prosecuting agencies are also able to make requests for assistance directly to the foreign state if they have been designated in an order by the Secretary of State. S 7(5) provides that in relation to England and Wales or Northern Ireland, a designated prosecuting authority may itself request assistance under s 7 if it appears to the authority that an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed, and the authority has instituted proceedings in respect of the offence in question or it is being investigated.

A.7.120 The following prosecuting authorities have been designated in the Crime (International Co-operation) Act 2003 (Designation of Prosecuting Authorities) Order 2004[1] for the purposes of s 7, and are thus able to make requests for assistance directly to foreign authorities:

> The Attorney General for England and Wales; the Attorney General for Northern Ireland; the Financial Conduct Authority; the Bank of England; the Prudential Regulation Authority; the Director of Public Prosecutions and any Crown Prosecutor; the Director of Public Prosecutions for Northern Ireland; the Director of the Serious Fraud Office and any person designated under s 1(7) of the Criminal Justice Act 1987; the Environment Agency; the Secretary of State for Business, Energy and Industrial Strategy; the Secretary of State for Health; the Secretary of State for Transport and the Secretary of State for Work and Pensions.[2]

1 SI 2004/1034, as amended by SI 2004/1747; SI 2005/1130; SI 2009/2748; SI 2012/146,SI 2013/472 and SI 2016/992.

2 The Public Bodies (Merger of the Director of Public Prosecutions and the Director of Revenue and Customs Prosecutions) Order 2014, SI 2014/834, Sch 3, para 15 (27 March 2014) removed the Revenue and Customs following the Public Bodies Act 2011. The Secretaries of State for Business, Energy and Industrial Strategy, for International Trade and for Exiting the European Union and the Transfer of Functions (Education and Skills) Order 2016, SI 2016/992 Sch 1(2) para 29 (9 November 2016) amended the name of the Secretary of State for Business, Energy and Industrial Strategy.

A.7.121 S 7(7) provides that if a request for assistance under s 7 is made in reliance on Art 2 of the 2001 Protocol[1] to the EU Convention on Mutual Assistance in Criminal Matters[2] (requests for information on banking transactions) in connection with the investigation of an offence, the request must state the grounds on which the person making the request considers the evidence specified in it to be relevant for the purposes of the investigation.[3]

1 OJ C 326, 21.11.2001. Art 2(1) provides: 'On request by the requesting State, the requested State shall provide 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, including the particulars of any sending or recipient account.'

2 OJ C 197, 12.07.2000, p 3.

3 Cf Art 2(4) of the 2001 Protocol.

(b) Meaning of 'evidence'

A.7.122 CICA 2003, s 7(2) refers to the request being for 'evidence … for use in the proceedings or investigation'. S 51(1) provides that 'evidence' includes 'information in any form and articles, and giving evidence includes answering a question or producing any information or article'. Thus the request for assistance need not be for admissible evidence.

(c) Procedure for obtaining a letter of request from a judicial authority

A.7.123 The application for a letter of request should be made to the court seized of the matter. Therefore, once the case has been committed, transferred, or sent to the Crown Court the application should be made to that court.

A.7.124 The application should contain particulars of the offence which it is alleged has been committed or the grounds upon which it is suspected that an offence has been committed; a statement of whether proceedings in respect of the offence have been instituted or the offence is being investigated; and particulars of the assistance requested in the form of a draft letter of request. The common law duty of candour and disclosure attaching to an applicant for a domestic search warrant is not applicable, even in modified form, to an authority requesting assistance by way of a letter of request under s 7 (*R (Unaenergy Group Holding Pte Ltd) v Director of the Serious Fraud Office* [2017] 1 WLR 3302).

A.7.125 There are no general statutory provisions prescribing the contents of a letter of request;[1] however, in order to be effective, the letter must be as specific as possible about the circumstances of the case and the assistance required. The requested state will almost certainly know little about the case save what is contained in the letter of request and it is therefore necessary to explain as much about the case as possible and to indicate precisely what assistance is required. S 2 of the MLA Guidelines contain detailed guidance on what should be included in a letter of request.

[1] However, Art 14 of the European Convention on Mutual Assistance provides that every request must contain details of: (i) the authority making the request; (ii) the object of and the reason for the request; (iii) where possible, the identity and nationality of the person concerned; (iv) the name and address of the person to be served; (v) the offence involved and a summary of the facts. The content of some requests for specialized assistance are prescribed in CICA 2003, see eg s 43(6).

(d) Transmission of the request under the Crime (International Co-operation) Act 2003, section 8[1]

A.7.126 CICA 2003, s 8(1) provides that a request for assistance under s 7 may be sent directly to a court exercising jurisdiction in the place where the evidence is situated or to any authority recognized by the government of the country in question as the appropriate authority for receiving requests of that kind.[2]

[1] CICA 2003, s 8 implements Art 6 of the EU Convention on Mutual Assistance in Criminal Matters. This provides that requests for mutual assistance may be transmitted directly between judicial authorities of Member States concerned, rather than through central authorities. Art 6(2) allows for transmission via central authorities to continue in specific cases, and Art 6(3) allows for the UK and Ireland to continue to route requests through a central authority.

[2] Under the Criminal Justice (International Co-operation) Act 1990 direct transmission was only permissible in urgent cases.

A.7.127 Rule 49.3 of the Criminal Procedure Rules 2015[1] provides that where a request for assistance under s 7 is made by a justice of the peace or a judge exercising the jurisdiction of the Crown Court, and is sent in accordance with s 8(1), the justices' clerk or the Crown Court officer must send a copy of the letter of request to the Secretary of State as soon as practicable after the request has been made.

1 SI 2015/1490, in force 5 October 2015.

A.7.128 S 8(2) provides that if it is a request by a judicial authority or a designated prosecuting authority it may be sent to the Secretary of State[1] for forwarding to the court or authority mentioned in s 8(1). Indirect transmission via the Secretary of State[2] under s 8(2) is necessary if the requested country is not a Member State, if the executing authority is unknown, or if Art 6(8) of the EU Convention on Mutual Assistance requires transmission via the central authority.[3] Art 6(8) requires that certain types of request for assistance, including requests for the temporary transfer of prisoners and notices of information from judicial records,[4] be made through Members States' central authorities.

1 In Scotland, the Lord Advocate.
2 In practice, the UK Central Authority.
3 See the Explanatory Notes to CICA 2003, para 40.
4 Cf European Convention on Mutual Assistance in Criminal Matters, Art 22.

A.7.129 S 8(3) implements Art 6(4) of the EU Convention on Mutual Assistance and provides that in cases of urgency, a request for assistance may be sent to the International Criminal Police Organisation (Interpol),[1] or any body or person competent to receive it under any provisions adopted under the Treaty on European Union, for forwarding to any court or authority mentioned in s 8(1).[2]

1 The NCA is the UK's National Bureau of Interpol.
2 Ie, Eurojust, established under Title VI of the Treaty on European Union.

(e) Execution of the request and transmission of the evidence to the UK

A.7.130 Once the letter has been transmitted, responsibility for its execution lies with the relevant authorities in the requested state.[1] Mutual legal assistance treaties place obligations on signatories to comply with requests for assistance. Art 1 of the European Convention on Mutual Assistance requires signatories to provide 'the widest measure of mutual assistance', and Art 3 requires signatories to execute any letter of request 'in the manner provided for by its law'.[2]

1 See generally *R v I* [2008] EWCA Crim 3062.
2 Para 5(1) of the Harare Scheme provides that the requested country shall 'take all reasonable steps to ensure that the request is complied with expeditiously'.

A.7.131 Mutual assistance treaties generally provide discretionary grounds for refusing to provide assistance. For example, Art 2 of the European Convention on Mutual Assistance in Criminal Matters permits a requested state to refuse assistance if the request concerns an offence which it considers to be a political offence, an offence connected with a political

offence,[1] or a fiscal offence; or where execution of the request is likely to prejudice the sovereignty, security, *ordre public*, or other essential interests of the requested state.

[1] *R v Secretary of State for the Home Department ex p Fininvest Spa* [1997] 1 WLR 743, 758–64.

A.7.132 Where assistance is refused then mutual assistance treaties generally require reasons to be given.[1] Art 4(3) of the EU Convention on Mutual Assistance in Criminal Matters provides that if the request cannot, or cannot fully, be executed in accordance with the requirements set by the requesting Member State, the authorities of the requested Member State must inform the requesting Member State and indicate the conditions under which it might be possible to execute the request.

[1] Eg European Convention on Mutual Assistance, Art 19; EU Convention on Mutual Assistance, Art 4(3); Commonwealth Scheme, para 5(2)(b).

(f) Permitted use, admissibility, and return of the evidence

(i) Restrictions on collateral use

A.7.133 CICA 2003, s 9, applies to evidence obtained pursuant to a request for assistance under s 7. S 9(2) limits the use to which the evidence can be put in the UK. The evidence may not, without the consent of the 'appropriate overseas authority', be used for any purpose other than that specified in the request.[1] The appropriate overseas authority means the authority recognized by the government of the country in question as the appropriate authority for receiving requests of the kind in question (s 9(6)).

[1] This rule is analogous to the specialty rule in extradition law.. For a discussion of the relevant principles see *R v I* [2008] EWCA Crim 3062. See also *XYZ v Revenue and Customs Comrs* [2010] EWHC 1645 (Ch), *Megantic v HMRC* [2011] STC 1000, and *Crown Prosecution Service v Gohil* [2013] Fam 276.

A.7.134 The effect of this provision is to render inadmissible in evidence material obtained under s 7 in any criminal investigations or proceedings other than those materials explicitly specified in the letter of request.[1] S 9 also renders evidence so obtained inadmissible in civil proceedings.[2] The prohibition on onward use also includes onward disclosure.[3] The prohibition continues notwithstanding that evidence is adduced in open court in the United Kingdom.[4] However, once the materials are adduced in open court, s 9 does permit the information so adduced to be used by others as a springboard for conducting independent enquiries with a view to obtaining evidence.[5]

[1] *Gooch* [1999] 1 Cr App R (S) 283. It is not, however, necessary for evidence to be obtained pursuant to a mutual legal assistance request in order for it to be admissible in proceedings in the UK. The Crime (International Cooperation) Act 2003 (and related international agreements) are enabling in their nature; in other words, they simply provide a mechanism through which the UK is able formally to seek assistance. They do not operate to preclude countries from providing material on other bases, nor is there any bar to the UK authorities seeking evidence via less formal means: see, eg, *R v Redmond* [2009] 1 Cr App R 25 at para 25 in particular. See, to similar effect, *R (Akarcay) v Chief Constable of West Yorkshire* [2017] EWHC 159 (Admin).

[2] Authority to the contrary (*BOC Ltd and another v Instrument Technology Ltd and others* [2002] QB 537) was held in *Crown Prosecution Service v Gohil* [2013] Fam 276 to have been decided per incuriam.

[3] *Crown Prosecution Service v Gohil* [2013] Fam 276, para 38.

[4] *Gooch* [1999] 1 Cr App R (S) 283; *Crown Prosecution Service v Gohil* [2013] Fam 276 para 40.

[5] *Crown Prosecution Service v Gohil* [2013] Fam 276, para 41.

(ii) Admissibility

A.7.135 The fact that evidence has been obtained pursuant to a request under CICA 2003, s 7 does not per se render it automatically admissible at that trial; the normal rules of evidence continue to apply. Therefore, hearsay evidence will be inadmissible unless one of the common law exceptions to the hearsay rule is applicable[1] or the hearsay provisions in the Criminal Justice Act 2003 apply.[2] S 117 of the 2003 Act governs the admissibility of statements made in business documents. If a statement was obtained pursuant to a request for assistance under s 7 of CICA 2003 (or, inter alia, under Part 2 of the Criminal Justice (European Investigation Order) Regulations 2017) then by virtue of s 117(4)(b) the conditions in s 117(5) do not need to be satisfied.

1 For example, see *Radak* [1999] 1 Cr App R 187.
2 See Chapter C.2.

(iii) Return of evidence to the requested state

A.7.136 When the evidence is no longer required for that purpose specified in the request (or for any other purpose for which such consent has been obtained), it must be returned to the appropriate overseas authority, unless that authority indicates that it need not be returned (s 9(3)).[1]

1 Cf European Convention on Mutual Assistance in Criminal Matters, Art 6(2); the Harare Scheme, para 31(3).

(g) Hearing witnesses abroad by television link

A.7.137 An alternative to requiring a witness to travel from abroad is the use of television links.[1] Outgoing requests from the UK are currently covered by the provisions contained in s 32 of the Criminal Justice Act 1988, which allow the use of video links in UK domestic proceedings in limited circumstances. S 32(1)(a) provides that, with the leave of the court, a person other than the accused may give evidence through a live television link in proceedings to which s 32(1A) applies if the witness is outside the UK. Telephone evidence is not permissible.[2] These proceedings are trials on indictment; appeals to the Court of Appeal (Criminal Division); hearings of references under s 9 of the Criminal Appeal Act 1995; proceedings in youth courts; appeals to the Crown Court arising out of such proceedings; hearings of references under s 11 of the Criminal Appeal Act 1995 so arising and, from 22 July 2013, proceedings under the Extradition Act 2003.

1 See for example Art 10(1) of the EU Convention on Mutual Assistance in Criminal Matters. This general provision is subject to the limitations and restrictions in Art 10(2)–(8).
2 *R v Diane (Hammala)* [2010] 2 Cr App R 1, CA. Cf. ss 31–31 of CICA which permits television and telephone links for a witness based in the United Kingdom giving evidence in foreign proceedings. See further below at paras 7.426 *et seq*. See also Art 11(1) of the EU Convention on Mutual Assistance in Criminal Matters 2000 in relation to witnesses and experts.

A.7.138 S 29(1) of the Crime (International Co-operation) Act 2003 provides that the Secretary of State may by order provide for s 32(1A) of the Criminal Justice Act 1988 (proceedings in which evidence may be given through television link) to apply to any further description of criminal proceedings, or to all criminal proceedings. Thus, the s makes provision for the Secretary of State to extend the use of television links to other types of proceeding.[1]

1 See the Evidence Through Television Links (England and Wales) Order 2013, SI 2013/1598, extending the application of s 32(1A) to proceedings under the Extradition Act 2003.

A.7.139 Where such evidence is given under oath the evidence is treated for the purposes of s 1 of the Perjury Act 1911 as if it had been given in the proceedings in the UK.[1]

1 Criminal Justice Act 1988, s 32(3); *Forsyth (Elizabeth)* [1997] 2 Cr App R 299.

(h) Requests to foreign states to freeze evidence[1]

A.7.140 The paras that follow examine CICA 2003, ss 10–12, which provide for the making, transmission, and varying of domestic freezing orders made in the UK and sent abroad for execution.[2] These sections implement the Council Framework Decision on the execution in the EU of orders freezing property or evidence (referred to in this s as the Freezing Framework Decision).[3]

1 In force from 19.10.09, SI 2009/2605.
2 By CICA 2003, s 51(1), 'evidence' includes 'information in any form and articles, and giving evidence includes answering a question or producing any information or article'.
3 2003/577/JHA, 22 July 2003; OJ L 196, 2.08.2003.

A.7.141 A domestic freezing order is an order for protecting evidence[1] which is in a 'participating country' pending its transfer to the UK (s 10(2)). A participating country is Denmark or the Republic of Ireland and any other country designated by an order made by the Secretary of State or, in relation to Scotland, the Scottish Ministers (s 51(2)).[2]

1 Sch 4 to CICA 2003 deals with orders to freeze terrorist assets, but orders to freeze property are not otherwise covered by the Act.
2 For proceedings in England, Wales, and Northern Ireland, under s 51(2)(b), following ratification of the Second Additional Protocol of the European Convention on Mutual Legal Assistance in Criminal Matters: Austria, Belgium, Croatia, France, Germany, Greece, Italy, Luxembourg, Netherlands, Portugal, Spain, and Sweden are designated for the purposes of ss 4 and 4B of CICA 2003 (SI 2017/730). Albania, Bosnia and Herzegovina, Cyprus, the Czech Republic, Estonia, the Former Yugoslav Republic of Macedonia, Hungary, Israel, Latvia, Lithuania, Malta, Montenegro, Poland, Serbia, Slovakia, and Slovenia are designated for the purposes of ss 4, 4B, 31, 47, and 48 of, and para 15 of Sch 2 to, CICA 2003 (SI 2009/613; SI 2010/36). Bulgaria, Romania, and Switzerland are designated for the purposes of ss 4, 4B, 31, 32, 35, 43, 44, 45, 47, and 48 of, and para 15 of Sch 2 to, CICA 2003 (SI 2009/613; SI 2009/1764; SI 2010/36). Iceland and Norway are designated for the purposes of ss 31, 32, 35, 43, 44, 45, 47, and 48 of, and para 15 of Sch 2 to, CICA 2003 (SI 2009/1764). Japan and the USA are designated for the purposes of ss 32, 35, 43, 44, and 45 of CICA 2003 (SI 2008/2156; SI 2011/229). Armenia, Chile, and Ukraine are designated as participating countries for the purposes of ss 31, 47, and 48 of, and para 15 of Sch 2 to, CICA 2003 (SI 2013/296). For proceedings in Scotland, designation orders in respect of all of the above countries are in force (SI 2008/264; SI 2009/106; SI 2009/206; SI/2009/441; and SI 2011/7).

A.7.142 Sched 4 to CICA 2003 contains amendments to Sched 4 to the Terrorism Act 2000 which provide for mutual recognition of freezing orders in relation to terrorist property which gives further effect to Council Framework Decision 2003/577/JHA of 22 July 2003 in respect of terrorist investigations.[1]

[1] See generally above at para A.7.31.

(i) Conditions for issuing a domestic freezing order

A.7.143 Under s 10(2), a domestic freezing order is an order for protecting evidence which is in the participating country pending its transfer to the United Kingdom. If it appears to a judicial authority in the UK,[1] on an application made by a person mentioned in CICA 2003, s 10(4), that proceedings in respect of a listed offence[2] have been instituted or such an offence is being investigated; that there are reasonable grounds to believe that there is evidence in a participating country which satisfies the requirements of s 10(3); and that a request has been made, or will be made, under s 7 for the evidence to be sent to the authority making the request, the judicial authority may make a domestic freezing order in respect of the evidence.

[1] The judicial authorities are, in relation to England and Wales, any judge or JP; in relation to Scotland, any judge of the High Court or sheriff; in relation to Northern Ireland, any judge or resident magistrate (s 10(5)).

[2] A listed offence means an offence described in Art 3(2) of the Freezing Framework Decision, or an offence prescribed or of a description prescribed by an order made by the Secretary of State (s 28(5)).

A.7.144 S 10(4) provides that the application may be made in relation to England and Wales and Northern Ireland, by a constable,[1] and in relation to Scotland, by the Lord Advocate or a procurator fiscal.

[1] CICA 2003, s 27(1)(b) provides that the Treasury may make an order in relation to England and Wales and Northern Ireland for any function conferred on a constable under various provisions including s 10 to be exercisable instead in prescribed circumstances by an officer of Revenue and Customs or a person acting under his direction. The Crime (International Co-operation) Act 2003 (Exercise of Functions) Order 2013, SI 2013/2733 has been made under s 27.

A.7.145 The requirements of s 10(3) are that the evidence is on premises specified in the application in the participating country; that it is likely to be of substantial value (whether by itself or together with other evidence) to the proceedings or investigation; that it is likely to be admissible in evidence at a trial for the offence; and that it does not consist of or include items subject to legal privilege.

A.7.146 S 10 does not prejudice the generality of the power to make a request for assistance under s 7 (s 10(6)).

(ii) Transmission of the domestic freezing order

A.7.147 CICA 2003, s 11 is headed 'Sending freezing orders'. A domestic freezing order made in England and Wales or Northern Ireland must be sent by the judicial authority which made it within 14 days[1] to the Secretary of State[2] for forwarding to a court exercising jurisdiction in the place where the evidence is situated, or any authority recognized by the government of the country in question as the appropriate authority for receiving orders of that kind (s 11(1)).

1 CICA 2003, s 11(3).
2 In Scotland, the order must be sent to the Lord Advocate (s 10(2)).

A.7.148–200 The order must be accompanied by a certificate giving the specified information and, unless the certificate indicates when the judicial authority expects such a request to be made, by a request under s 7 for the evidence to be sent to the authority making the request (s 11(4)).

A.7.201 S 28(7) defines 'specified information' to be any information required to be given by the form of certificate annexed to the relevant Framework Decision, or any information prescribed by an order made by the Secretary of State. The Annex to the Council Framework Decision specifies a standard form for the certificate. It includes details of the judicial authority issuing the freezing order, the transmitting central authority and the executing authority; a precise description of the location of the evidence; details of the person suspected of having committed the offence; the action to be taken by the executing state after the freezing order has been executed; a summary of the grounds for issuing the order and the facts; and identification of the category which the offence falls into and a statement that is punishable by custodial sentence for at least three years.

A.7.202 The certificate must include a translation of it into an appropriate language of the participating country (if that language is not English) (s 11(5)). The certificate must be signed by or on behalf of the judicial authority who made the order and must include a statement as to the accuracy of the information given in it (s 11(6)). The signature may be an electronic signature.

(iii) Amending or revoking a freezing order

A.7.203 S 12 provides that the judicial authority that made a domestic freezing order may vary or revoke it on an application by the person who applied for the order; in relation to England and Wales and Northern Ireland, a prosecuting authority; in relation to Scotland, the Lord Advocate; and any other person affected by the order.

(i) Requests for foreign bank information[1]

A.7.204 Chapter 4 of Part 1 of CICA 2003 deals with disclosure of banking information in connection with criminal investigations. It implements the 2001 Protocol to the EU Convention on Mutual Assistance in Criminal Matters.[2] Requests for bank transaction information can generally relate to one of two things: (i) foreign bank account information, or (ii) the monitoring of banking transactions. This section examines how, and when, requests for overseas banking information can be made by the UK to foreign countries.

1 There are separate powers available to the Director General of the NCA under POCA in relation to confiscation investigations.

2 OJ C 326, 21.11.2001, p 1. See also the Explanatory Report to the Protocol to the 2000 Convention on mutual assistance in criminal matters between the Member States of the European Union, OJ C 257, 24.10.2002, p 1.

(i) Requests for information about a person's bank account (Crime (International Co-operation) Act 2003, section 43)

A.7.205 CICA 2003, s 43 sets out the circumstances in which a request for information about an individual's bank account can be made to a foreign state.

A.7.206 S 43(1) provides that if it appears to a judicial authority[1] in the UK, on an application made by a prosecuting authority, that a person is subject to an investigation in the UK into serious criminal conduct;[2] that the person holds, or may hold, an account at a bank which is situated in a participating country;[3] and the information which the applicant seeks to obtain is likely to be of substantial value for the purposes of the investigation, the judicial authority may request assistance under this section.

1 The judicial authorities are, in relation to England and Wales, any judge or JP; in relation to Scotland, any sheriff; in relation to Northern Ireland, any judge or resident magistrate (s 43(2)).

2 'Serious criminal conduct' is defined by CICA 2003, s 46(3) to be conduct which constitutes an offence to which Art 1(3) of the 2001 Protocol applies, or an offence specified in an order made by the Secretary of State, or, in relation to Scotland, the Scottish Ministers for the purpose of giving effect to any decision of the Council of the European Union under Art 1(6).

3 For the meaning of 'participating country' see CICA 2003, s 51(2).

A.7.207 If it appears to a prosecuting authority mentioned in s 43(4) that the conditions in s 43(1)(a) to (c) are met, the authority may itself request assistance under s 43. The prosecuting authorities mentioned in s 43(4) are in relation to England and Wales and Northern Ireland, a prosecuting authority designated by an order made by the Secretary of State, and in relation to Scotland, the Lord Advocate or a procurator fiscal.

A.7.208 The assistance that may be requested under s 43 is any assistance in obtaining from a participating country one or more of the following (s 43(5)):

- information as to whether the person in question holds any accounts at any banks situated in the participating country;
- details of any such accounts;
- details of transactions carried out in any period specified in the request in respect of any such accounts.

A.7.209 S 43(6) provides that a request for assistance under s 43 must state the grounds on which the authority making the request thinks that the person in question may hold any account at a bank which is situated in a participating country and (if possible) specify the bank or banks in question; state the grounds on which the authority making the request considers that the information sought to be obtained is likely to be of substantial value for the purposes of the investigation, and include any information which may facilitate compliance with the request.

A.7.210 For the purposes of s 43, a person holds an account if the account is in his name or is held for his benefit, or he has a power of attorney in respect of the account (s 43(7)).

(ii) Monitoring banking transactions (Crime (International Co-operation) Act 2003, section 44)

A.7.211 CICA 2003, s 44 governs requests for the monitoring of banking transactions. It implements Art 3 of the 2001 Protocol for the purpose of outgoing requests from the UK to other participating countries to monitor transactions conducted on a specified account or accounts.

A.7.212 S 44(1) provides that if it appears to a judicial authority[1] in the UK on an application made by a prosecuting authority, that the information which the applicant seeks to obtain is relevant to an investigation in the UK into criminal conduct, the judicial authority may request assistance (CICA 2003, s 44).

[1] The judicial authorities are, in relation to England and Wales, any judge or JP; in relation to Scotland, any sheriff; in relation to Northern Ireland, any judge or resident magistrate (CICA 2003, s 44(2)).

A.7.213 S 44(3) and s 44(4) are identical to s 43(3) and s 43(4) and permit designated prosecuting authorities to make requests for assistance directly.

A.7.214 The assistance that may be requested under s 44 is any assistance in obtaining from a participating country details of transactions to be carried out in any period specified in the request in respect of any accounts at banks situated in that country.

(iii) Sending requests under the Crime (International Co-operation) Act 2003, sections 43 and 44

A.7.215 Requests for assistance under CICA 2003, ss 43 or 44[1] are to be sent to the Secretary of State for forwarding to a court specified in the request and exercising jurisdiction in the place where the information is to be obtained, or to any authority recognized by the participating country in question as the appropriate authority for receiving requests for assistance of the kind to which this s applies (s 45(1)). In cases of urgency the request may be sent directly to the court (s 45(2)).

[1] Other than Scottish requests: see CICA 2003, s 45(3) and (4).

C. Requests by Foreign States to the UK for Assistance in Providing Evidence

(a) Introduction

A.7.216 This section considers the relevant principles where the assistance requested from the UK involves the provision of evidence and information, including banking information. Provisions relating to restraint, confiscation, and forfeiture are considered later in this chapter.[1]

[1] See para A.7.612.

(b) Requests from foreign states for assistance in obtaining evidence

A.7.217 This section examines the methods by which the UK grants assistance in obtaining evidence for use in criminal proceedings or investigations abroad.[1] The scheme for compelling evidence for use outside the jurisdiction is exclusively statutory under CICA 2003. Therefore, where *Norwich Pharmacal* proceedings were brought to obtain evidence (as distinct from information[2]) for use overseas in criminal proceedings, it was held *in R (Omar) v Secretary of State for Foreign and Commonwealth Affairs*[3] that the UK courts have no jurisdiction to order the provision of such evidence. The CICA 2003 regime accords ministerial discretion, the confinement of requests to foreign courts and prosecuting authorities, national security[4] and Crown servant exemptions a paramountcy which the common law remedy does not. The differences are so substantial that Parliament could not have intended that the common law remedy should survive the introduction of CICA 2003. Had *Norwich Pharmacal* proceedings been permissible in principle, s 13(2) CICA 2003 would have required either the foreign prosecutor or the court to make an application to the UK. No request having been made to the foreign court, no foreign court had asked the UK to assist. It is an integral part of the CICA 2003 statutory scheme that assistance is sought by the requesting court.[5] To permit the proceedings to proceed without a request from a foreign court would evade this principal requirement of the CICA 2003 statutory regime. In deciding whether to make a request to the UK, the foreign court would have to consider the submissions of the foreign government as a party to its proceedings; which process should not be circumvented. In any event, the Court also held that it would not be in the interests of comity to entertain the application when a deliberate decision had been made not to make an application in the foreign court and the fairness of the foreign court had not been called into question.

[1] The UK can also provide assistance in relation to administrative and clemency proceedings, which are defined in CICA 2003, s 51(1). These are not covered in this chapter.
[2] Although the Court of Appeal held that the distinction was immaterial: [2014] QB 112, para 12.
[3] [2013] EWCA Civ 118.
[4] See, eg, *Al Fawwaz v Secretary of State for the Home Department* [2015] EWHC 468 (Admin).
[5] See para A.7.222.

A.7.218 The principal provisions are contained in Chapter 2 of Part 1 of CICA 2003. Processing such a request for assistance under CICA[1] involves essentially three stages:

- assessment of the request and determination of the most appropriate method of giving effect to it;
- execution of the request;
- transmission of the evidence.

[1] It should be noted that there exists legal authority for intelligence sharing outside the CICA regime in s 1(5) of the Crime and Courts Act 2013 (previously s 3 of the Serious Organised Crime and Police Act 2005 and previously s 2 of the Police Act 1997). Therefore, the voluntary provision of intelligence to foreign law enforcement agencies does not offend CICA, nor the Human Rights Act, even where that information is subsequently used to seek extradition from the United Kingdom: *H v Lord Advocate* 2011 SCL 978.

(i) Incoming requests for assistance: initial steps

A.7.219 CICA 2003, s 13 provides that where a request for assistance in obtaining evidence in a part of the UK is received by the 'territorial authority' for that part of the UK, the authority may:

- if the conditions in s 14 are met, arrange for the evidence to be obtained under s 15, or
- direct that a search warrant be applied for under or by virtue of ss 16 or 17.[1]

[1] Or, in relation to evidence in Scotland, s 18.

A.7.220 S 28(9) defines the 'territorial authority' in relation to evidence in England and Wales or Northern Ireland as the Secretary of State, and in relation to Scotland as being the Lord Advocate.[1]

[1] Although the EU Convention on Mutual Assistance in Criminal Matters allows for direct transmission of requests (see Art 6(3)) the Explanatory Notes to CICA 2003, para 53, explain why the UK decided to opt out of direct transmission for incoming requests: '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.'

A.7.221 S 27(1)(a) states that the Treasury may by order provide, in relation to England and Wales or Northern Ireland, that the territorial authority's functions under various sections of CICA 2003, including ss 13–15, are to be exercisable instead in prescribed circumstances by the Commissioners of Customs and Excise. In exercise of this power the Treasury has made the Crime (International Co-operation) Act 2003 (Exercise of Functions) Order 2013.[1]

[1] SI 2013/2733.

(1) The overseas authorities which may request assistance

A.7.222 S 13(2) provides that the request for assistance may be made only by a court exercising criminal jurisdiction, or a prosecuting authority, in a country outside the UK; any other authority in such a country which appears to the territorial authority to have the function of making such requests for assistance;[1] or any international authority mentioned in s

13(3), namely, the International Criminal Police Organisation (Interpol) or any other body or person competent to make a request of the kind to which this s applies under any provisions adopted under the Treaty on European Union (ie Eurojust).[2] For the purposes of s 13(2)(a), a 'prosecuting authority' does not mean a prosecuting authority with the requisite authority to transmit a request for assistance. An entity either is or is not a 'prosecuting authority'. If it is, it does not cease to be a 'prosecuting authority' because of a challenge (successful or otherwise) to its competence in issuing any particular request for assistance. A prosecutor which lacked authority under the law of the requesting state to issue the letter or request remained a prosecuting authority for the purposes of s 13(2) CICA 2003.[3] However, as discussed below,[4] 'obvious unlawfulness' under the law of the requesting state remains a matter relevant to the exercise of the Secretary of State's discretion.

1 eg, examining magistrates, see Government Explanatory Notes to CICA 2003, para 51.
2 Government Explanatory Notes to CICA 2003, para 51.
3 *JP Morgan Chase Bank National Association v Director of the Serious Fraud Office* [2012] Lloyd's Rep FC 655, para 56.
4 See para A.7.225; *JP Morgan Chase Bank National Association v Director of the Serious Fraud Office* [2012] Lloyd's Rep FC 655, para 66.

(2) The decision whether or not to grant assistance: general

A.7.223 In all cases the territorial authority must be satisfied that the request for assistance can properly be described as a request for obtaining 'evidence' and thus that it falls within CICA 2003, s 13(1). However having regard to the broad definition of evidence in s 51(1) it is unlikely that a request for assistance will fail for this reason.[1] The Secretary of State must, however, satisfy himself that a request is not ambiguous or lacking in precision.[2]

1 Cf *R v Secretary of State for the Home Department ex p Fininvest Spa* [1997] 1 WLR 743, 753; *JP Morgan Chase Bank National Association v Director of the Serious Fraud Office* [2012] Lloyd's Rep FC 655, para 29. Concerns were expressed during the debates on the Crime (International Co-operation) Bill about the risk of 'fishing expeditions' which might arise as a result of the absence of statutory provisions limiting the use that requesting states can make of evidence supplied to them under ss 14 to 19 of the Act (unlike s 9, which restricts the use that can be made in the UK of requested evidence to the purpose specified purpose): see HL Deb 25 February 2003, col 166.
2 *R (Hafner) v Secretary of State for the Home Department* [2007] 1 WLR 150, para 33.

A.7.224 The territorial authority must then determine whether the statutory conditions in CICA 2003 for the grant of assistance are satisfied. If they are, the authority must then decide whether it is appropriate for the UK to grant assistance. The territorial authority has a discretion whether to grant assistance. In exercising this discretion the territorial authority must take into account any relevant treaty grounds for refusing assistance.[1] A decision whether or not to grant assistance is amenable to judicial review.[2]

1 *R v Secretary of State for the Home Department ex p Fininvest Spa* [1997] 1 WLR 743, 758.
2 *R (Hafner) v Secretary of State for the Home Department* [2007] 1 WLR 150, para 28. It is not however for the High Court to assume or arrogate to itself the role of decision maker. It is *only* for the High Court to intervene if, on well-recognised grounds, relief by way of judicial review should be granted: *JP Morgan Chase Bank National Association v Director of the Serious Fraud Office* [2012] Lloyd's Rep FC 655, para 55.

A.7.225 Thus the fact that statutory conditions for the grant of assistance are satisfied does not necessarily compel the territorial authority to grant assistance. The grant of assistance is an exercise of the power of the State. The UK executing authority has a discretion whether to grant assistance.[1] There may be rare cases where it is not appropriate to do so.[2] The ambit of the discretion is, however, informed by the policy of mutual assistance underlying CICA 2003, together with the reality of what the Secretary of State is equipped and resourced to do.[3] As the High Court has observed, the process is not a trial; it leads only to the transmission of evidence to the requesting state where, if it is to be used, one can assume that the criminal defendant will have the opportunity of answering it. Secondly, such requests are made by friendly, foreign countries with which the UK has treaty or similar obligations of mutual cooperation. The expectation is therefore that the UK will comply with the request unless there are 'compelling reasons' for not doing so and will do so as quickly as possible. Any requirement of procedural fairness must be fashioned with those considerations firmly in mind.[4] The mere fact that evidence obtained under a letter of request would be made available to third parties in the requesting state is not of itself a compelling reason.[5] Neither is mere delay, proportionality, or asserted futility.[6] Relevant 'compelling reasons' do include,[7] but are however not limited to those instances enumerated in the applicable Convention.[8] Other considerations include whether the requesting state has acted in good faith in the interests of justice,[9] and whether there are particular factors making assistance inappropriate, for example, if a person affected by the request has already been tried for the alleged offence.[10] It would also generally be wrong for the Secretary of State to exercise the discretion in favour of answering a request when it was 'obviously unlawful' in the sense that it was undisputed or incapable of being properly disputed that the request was made unlawfully according to the law of the requesting state. It will however only be possible to establish this where there exists no, or no room for proper, dispute as to the unlawfulness in question on the evidence. Otherwise, it is not the function of the Secretary of State to determine genuine and live rival contentions of foreign law.[11]

1 These principles are not limited to assistance granted under s 13. *Ismail v Secretary of State for the Home Department* [2016] 1 WLR 2814, SC concerned a request for assistance in serving an overseas judgment, pursuant to s 1 CICA 2003.

2 In *R v Central Criminal Court ex p Propend Finance Property Limited* [1996] 2 Cr App R 26, 33.

3 *JP Morgan Chase Bank National Association v Director of the Serious Fraud Office* [2012] Lloyd's Rep FC 655, paras 49–52. See *Ismail v Secretary of State for the Home Department* [2016] 1 WLR 2814, SC, in the context of a request for assistance in serving an overseas judgment, pursuant to s 1 CICA 2003

4 *R (Abacha) v Secretary of State for the Home Department* [2001] EWHC 787 (Admin), para 17; *JP Morgan Chase Bank National Association v Director of the Serious Fraud Office* [2012] Lloyd's Rep FC 655, para 51. However, see *Ismail v Secretary of State for the Home Department* 2016] 1 WLR 2814, para 26, In the context of a request for assistance in serving an overseas judgment, pursuant to s 1 CICA 2003, the Act provides a power and not an obligation to effect service of foreign process and it was therefore contemplated that there would be circumstances in which service would not be appropriate.

5 *JP Morgan Chase Bank National Association v Director of the Serious Fraud Office* [2012] Lloyd's Rep FC 655, para 58.

6 *JP Morgan Chase Bank National Association v Director of the Serious Fraud Office* [2012] Lloyd's Rep FC 655, para 59.

7 *R v Secretary of State for the Home Department ex p Fininvest Spa* [1997] 1 WLR 743.

8 *JP Morgan Chase Bank National Association v Director of the Serious Fraud Office* [2012] Lloyd's Rep FC 655, para 53.

9 Inferences of bad faith will not be drawn lightly: *JP Morgan Chase Bank National Association v Director of the Serious Fraud Office* [2012] Lloyd's Rep FC 655, para 60. It is not however necessary for a defendant to prove bad faith: ibid, para 53.

10 *R (Abacha) v Secretary of State for the Home Department* [2001] EWHC 787 Admin. In *R v Bow Street Magistrates Court ex p Zardari*, Unreported, 29 April 1998 (CO/1593/98) the applicant alleged that material had come to light since the court was nominated under s 4(2) which showed that the Government of Pakistan had lied in the letter of request. Latham J held that although the court had no jurisdiction to decline to give effect to the request on the grounds of abuse of process, this was material which the Secretary of State should take into account before making a nomination. Further, if the material only came to light after a nomination had been made, he held it was arguable that the Secretary of State had the power to retract a nomination.

11 *JP Morgan Chase Bank National Association v Director of the Serious Fraud Office* [2012] Lloyd's Rep FC 655, paras 53, 63–70, 72. See also *Malabu Oil and Gas Ltd v Director of Public Prosecutions* [2016] Lloyd's Rep FC 108.

A.7.226 In taking the decision whether to grant assistance the territorial authority is under a duty to act lawfully, rationally, and in a procedurally fair way. In particular, the territorial authority is a public authority for the purposes of s 6(1) of the Human Rights Act 1998 and so must act compatibly with the Convention rights of any person likely to be affected by the grant of assistance. A grant of assistance may, for example, involve the infringement of a person's privacy rights under Art 8(1)[1] and so need to be justified under Art 8(2). It may also raise issues about the fairness of any trial in the requesting state, in cases of past or prospective flagrant denial of justice.[2] Accordingly, the territorial authority is required to assess the circumstances of each request to ensure that the measures it authorizes are both necessary and proportionate. However, ordinarily and *a fortiori* where the requesting country is party to the ECHR, any Art 6 or Art 8 concerns are best left for resolution in the courts of the requesting state.[3] In *Ismail v Secretary of State for the Home Department*,[4] the Supreme Court considered the extent of the Secretary of State's discretion when serving a foreign judgment under the Crime (International Co-operation) Act 2003, s 1. It concluded that service of a judgment was not the same as enforcement of it. The Supreme Court held that, in circumstances where service would not have a direct and material impact on the recipient, the Secretary of State was not under an obligation to investigate any consequences of it. However, the court also noted that there may be cases where service of a judgment would engage Art 6 ECHR, necessitating further investigation.

1 *R (Abacha) v Secretary of State for the Home Department* [2001] EWHC 787 Admin. See *Ismail v Secretary of State for the Home Department* [2016] 1 WLR 2814, SC, in the context of a request for assistance in serving an overseas judgment, pursuant to s 1 CICA 2003.

2 *Government of United States of America v Montgomery (No 2)* [2004] 1 WLR 2241. The Act of State doctrine does not prevent an investigation or adjudication upon the conduct of the judiciary of a foreign state: *Yukos Capital Sarl v OJSC Rosneft Oil Co (No. 2)* [2014] QB 458, paras 86-90. See *Ismail v Secretary of State for the Home Department* [2016] 1 WLR 2814, SC, in the context of a request for assistance in serving an overseas judgment, pursuant to s 1 CICA 2003.

3 *JP Morgan Chase Bank National Association v Director of the Serious Fraud Office* [2012] Lloyd's Rep FC 655, para 54.

4 [2016] 1 WLR 2814, SC.

A.7.227 The territorial authority is not bound to give effect to whole of the request, nor is it required to grant the form of assistance requested by the foreign state.[1] Equally, once the letter has been referred to a prosecuting agency for execution it is not confined to seeking only those documents specified in the request.[2] That said, a flawed decision to act upon the whole of

a request cannot be saved by a 'blue pencil' test removing only the parts of the request to which the flawed reasoning attached.[3]

1 *R v Central Criminal Court ex p Propend Finance Property Ltd* [1996] 2 Cr App R 26, 35–6.
2 *R (Energy Financing Team Limited) v Director of the Serious Fraud Office* [2006] 1 WLR 1316, para 24.
3 *JP Morgan Chase Bank National Association v Director of the Serious Fraud Office* [2012] Lloyd's Rep FC 655, para 71.

A.7.228 A person affected by a decision to grant assistance can challenge it by way of judicial review and, if appropriate, the court can order a stay pending the hearing.[1]

1 *R (Hafner) v Secretary of State* [2007] 1 WLR 150, para 26.

(3) Disclosure of the letter of request

A.7.229 The UK Central Authority treats letters of request confidentially in accordance with relevant treaty provisions and general international practice.[1] The UK Central Authority will not disclose the existence or content of letters of request outside government departments or agencies or the courts or enforcement agencies in the UK. Requests are not shown or copied to any witness or other person, nor is any witness informed of the identity of any other witness. In the event that confidentiality requirements make execution of a request difficult or impossible, the UK Central Authority consults the requesting authorities. It will normally be the case that the requesting authority will be given the opportunity to withdraw the request before disclosure to third parties is made. [2]

1 See, eg, para 32 of the Commonwealth Scheme. Art 7 of the Treaty between the Government of Great Britain and Northern Ireland and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters 1994 is headed 'Confidentiality and Limitations on Use' and begins: 'The requested party shall, upon request, keep confidential any information which might indicate that a request has been made or responded to. If the request cannot be executed without breaching confidentiality, the requested party shall so inform the requesting party which shall then determine the extent to which it wishes the request to be executed.'
2 MLA Guidelines, p 6.

A.7.230 The wishes of the requesting state cannot be relied upon to keep a request confidential if to do so would result in unfairness. The fact that the requesting state may have an expectation that the request will be kept confidential cannot outweigh the territorial authority's duty to act fairly.[1] The courts have found that the starting point is that letters of request are confidential and, as a matter of principle, are not disclosed to the court or to a party affected, but that the principles of fairness might require information about the nature of the criminal investigation be provided.[2] Thus, a person affected by a letter of request may be entitled to know the gist of the letter in order that he can take advice as to whether to comply with any process resulting from it.[3]

1 *R v Secretary of State for the Home Department ex p Zadari*, Unreported, 11 March 1998, CO/345/98.
2 *National Crime Agency v Abacha* [2016] 1 WL. 4375, CA; *R (River East Supplies Ltd) v Nottingham Crown Court* [2017] 4 WLR 135 (Admin), paras 28–29, 36–37.
3 *R (Evans) v Director of the Serious Fraud Office* [2003] 1 WLR 299, paras 11–12; *R (Energy Financing Team Limited) v Director of the Serious Fraud Office* [2006] WLR 1316, para 17; *R (Hafner) v Secretary of State for the Home Department* [2007] 1 WLR 150, para 34.

A.7.231 There is no statutory right to make representations either upon receipt of a request or at the transmission stage,[1] and the UK Central Authority does not generally invite representations from parties potentially affected by a request. Nevertheless, in some cases fairness may require that a party affected should be permitted to make representations either as to why assistance should not be given or evidence should not be transmitted.[2]

1 Cf the rights given to the suspect under the Extradition Act 2003.
2 *R (Abacha) v Secretary of State for the Home Department* [2001] EWHC 787 (Admin).

(ii) Proceedings before a nominated court

(1) Conditions for granting assistance under the Crime (International Co-operation) Act 2003, section 15

A.7.232 CICA 2003, s 15 allows a nominated court to take the evidence of a witness on oath. By s 14(1), the territorial authority may arrange for the evidence to be taken under s 15 if the request for assistance in obtaining evidence received under s 13 is made inter alia in connection with criminal proceedings and criminal investigations being carried on outside the UK.

A.7.233 In respect of requests falling within s 14(1)(a) the territorial authority may only arrange for the evidence to be obtained where it is satisfied that an offence[1] under the law of the country has been committed, or that there are reasonable grounds for suspecting that such an offence has been committed, and that proceedings in respect of the offence has been instituted in that country, or that an investigation into the offence is being carried on there (s 14(2)). In respect of these matters the territorial authority is to regard a certificate issued by the appropriate authority in the country as conclusive (s 14(3)).[2]

1 An offence includes an act punishable in administrative proceedings.
2 Cf *R (Abacha) v Secretary of State for the Home Department* [2001] EWHC Admin 787, para 23.

A.7.234 S 14(4) contains an additional requirement where the request appears to relate to a fiscal offence.[1] A fiscal offence is one connected with taxes, duties, customs, or exchange.[2] S 14(4) provides that if it appears to the territorial authority that the request for assistance relates to a fiscal offence in respect of which proceedings have not yet been instituted, the authority may not arrange for the evidence to be obtained under s 15 unless the request is from a country which is a member of the Commonwealth, or is made pursuant to a treaty to which the UK is a party, or the authority is satisfied that if the conduct constituting the offence were to occur in a part of the UK, it would constitute an offence in that part.[3]

1 Art 2(a) of the European Convention on Mutual Assistance in Criminal Matters permits assistance to be refused if the request relates to a fiscal offence. Article 1 of the Additional Protocol provides that signatories would not exercise the right provided for in Art 2(a) to refuse assistance solely on the ground that the request concerns an offence which the requested Party considers a fiscal offence. The UK ratified the Additional Protocol in 1991.
2 *R v Chief Metropolitan Stipendiary Magistrate ex p. Secretary of State for the Home Department* [1988] 1 WLR 1204.
3 *R v Secretary of State for the Home Department ex p a Private Family Trust*, Unreported, 13 November 1998 (CO/4164/98).

(2) The hearing

A.7.235 If the territorial authority nominates a court under s 15 a notice of nomination is sent to the court.[1] Schedule 1 to CICA 2003 is headed 'Proceedings of a Nominated Court under s 15' and contains detailed provisions concerning these proceedings.

1 By convention, the court nominated is that at which the Chief Magistrate sits. Until 2011, that was the 'City of Westminster' magistrates court in Horseferry Road. Following its closure, the Chief Magistrates' court is now the 'Westminster' magistrates' court in Marylebone Road. The court's address is 181 Marylebone Road, London NW1 5BR; tel: 020 3126 3010; fax: 020 3126 3011.

A.7.236 Para 1 of Schedule 1 provides that the nominated court shall have the like powers for securing the attendance of a witness for the purpose of the proceedings as it has for the purpose of other proceedings before it. The court can therefore issue a witness summons to secure the witnesses' attendance in precisely the same manner as in domestic matters.[1]

1 Domestic powers include Magistrates' Courts Act 1980, s 97 (magistrates' courts); Criminal Procedure (Attendance of Witnesses) Act 1965 s 2, (Crown Court).

A.7.237 Para 3 of Schedule 1 empowers the court to administer oaths in the normal manner.

A.7.238 The procedure is governed by Part 49 of the Criminal Procedure Rules 2015.[1] Rule 49.4 provides that a court nominated under s 15(1) may determine who may appear or take part in the proceedings under Schedule 1 before the court and whether a party to the proceedings is entitled to be legally represented; and may direct that the public be excluded from those proceedings if it thinks it necessary to do so in the interests of justice. Generally, the requesting state and the witness are entitled to be represented, and, if he has notice of the nomination, the defendant in the foreign proceedings may also be represented. The provisions of ss13-15 have been held to be compatible with the Human Rights Act 1998. In particular, the ability of the UK court to withhold notification of the process from the suspect in the interests of an ongoing investigation does not offend Art 8 of the European Convention on Human Rights.[2]

1 2015/1490, in force 5 October 2015.
2 *Calder v Frame* 2007 JC 4

A.7.239 Rule 49.5 provides that where a court is nominated under s 15(1) the justices' clerk or Crown Court officer shall enter in an overseas record details of the request in respect of which the notice under s 15(1) was given; the date on which, and place at which, the proceedings under Schedule 1 took place; the name of any witness who gave evidence at the proceedings in question; the name of any person who took part in the proceedings as a legal representative or an interpreter; whether a witness was required to give evidence on oath or (by virtue of s 5 of the Oaths Act 1978) after making a solemn affirmation; and whether the opportunity to cross-examine any witness was refused. As to the keeping of an overseas record, see rule 49.9.

A.7.240 The nominated court's task under s 15(1) is 'to receive any evidence to which the request relates which appears to the court to be appropriate for the purpose of giving effect to the request'.[1] This may entitle the court to receive evidence beyond the scope of that sought in the request if it is necessary to do so fully to give effect to it.[2] Because its jurisdiction and function are prescribed by statute, the court has no jurisdiction to inquire into whether the proceedings are an abuse of process, for example, because the requested state has acted in bad faith.[3] A court nominated under s 15 must, when considering evidence, have regard to the rights conferred by Art8(1) of the European Convention on Human Rights. It is for the nominated court to decide upon the appropriate procedure where a decision has to be made as to whether an interference with the right under Art 8(1) is justified under Art 8(2). In so doing the court must consider whether to give notice of the application to and to hear submissions from any person whose Article 8 rights will be or may be infringed by giving effect to the application.[4]

1 Evidence is not necessarily restricted to direct evidence for use at trial; *R v Secretary of State for the Home Department ex p Fininvest SpA* [1997] 1 WLR 743. See above at para A.7.223.
2 *R (Energy Financing Team Limited) v Director of the Serious Fraud Office* [2006] 1 WLR 1316, para 24.
3 *R v Bow Street Magistrates Court ex p Zardari*, Unreported, 29 April 1998 (CO/1593/98). Query, however, whether this decision survives the Human Rights Act. In extradition proceedings, for instance, Art 5 ECHR implies a jurisdiction to consider bad faith (*R (Kashamu) v Governor of Brixton Prison* [2002] QB 887) and abuse of process (*R (Birmingham) v Director of the Serious Fraud Office* [2007] QB 727).
4 *R (Hafner) v City of Westminster Magistrates Court* [2009] 1 WLR 1005, para 25.

A.7.241 A letter of request seeking to have evidence taken on oath should state precisely what evidence is required. The MLA Guidelines prescribes what such a request should contain.[1]

1 MLA Guidelines, p 19.

A.7.242 Where the requesting state is unrepresented at the hearing the questions will be asked by the magistrate or the legal adviser and the answers recorded in a deposition. If the requesting state is represented then cross-examination is permitted. It should be remembered, however, that the process envisaged by sections 14 and 15 is not a trial but a process of gathering evidence, and the court is undertaking an investigatory rather than an adjudicatory function.[1]

1 *R v Secretary of State for the Home Department ex p Zardari*, Unreported, 11 March 1998 (CO/6345/98) per Lord Bingham CJ.

A.7.243 Para 5(1) of Sched 1 provides that a person cannot be compelled to give any evidence which he could not be compelled to give in criminal proceedings in the part of the UK in which the nominated court exercises jurisdiction (para 5(1)(a)), or subject to para 5(2), in criminal proceedings in the country from which the request for the evidence has come (para 5(1)(b)).

A.7.244 Para 5(2) provides that para 5(1)(b) does not apply unless the claim of the person questioned to be exempt from giving the evidence is conceded by the court or authority which made the request. Where the person's claim is not conceded, he may be required to give the evidence to which the claim relates (subject to the other provisions of this para);

but the evidence may not be forwarded to the court or authority which requested it if a court in the country in question, on the matter being referred to it, upholds the claim (para 5(3)).

A.7.245 Thus para 5 of Sch 1 applies the domestic rules regarding compellability of witnesses and the privilege against self-incrimination to proceedings before the nominated court under s 15(1). Para 5(1)(a) makes clear that in considering whether the privilege applies, the court must transpose the foreign proceedings to the UK and consider the question of whether, if the foreign proceedings were English domestic criminal proceedings, and the foreign offence an English domestic offence, the witness would be entitled to refuse to answer.[1] Para 5(1)(b) also allows a witness to claim the benefit of any equivalent rules in the requesting state to give evidence.[2]

1 *R v Bow Street Magistrates Court ex p King*, unreported, 8 October 1997 (CO/3489/97).
2 MLA Guidelines, pp 19–20, require any relevant privilege to be specifically noted in the request.

A.7.246 If, on the other hand, the claim is not conceded then para 5(3) provides that the witness can be compelled to give evidence but that the evidence will not be transmitted if the claim to be exempt is upheld by the foreign court, tribunal, or authority upon the matter being referred to it.

A.7.247 Witnesses and those required to attend to produce documents in proceedings before a nominated court are entitled to rely on their common law privilege against self-incrimination.[1] This privilege permits a witness in criminal proceedings to refuse to answer questions which might tend to incriminate him or her by exposing him to proceedings for a criminal offence, for forfeiture, or for the recovery of a penalty.[2] The judge must be satisfied from the circumstances that there is reasonable ground to apprehend danger to the witness from his being compelled to answer.[3] If objection is overruled and the witness gives evidence, the accused cannot afterwards object.[4]

1 MLA Guidelines, p 18.
2 *Rio Tinto Zinc Corpn v Westinghouse Electric Corpn* [1978] AC 547; *Blunt v Park Lane Hotel* [1942] 2 KB 253.
3 *Boyes* (1861) 1 B & S 311 (witness pardoned for offence; possibility of impeachment too remote to afford privilege); *Rio Tinto Zinc Corpn v Westinghouse Electric Corporation* [1978] AC 547; *Den Norske Bank ASA v Antonatos* [1999] QB 271.
4 *Kinglake* (1870) 11 Cox 499.

A.7.248 A witness may also refuse to produce documentary evidence or give oral testimony on the ground that the information sought is privileged. In respect of documents he is protected from giving oral evidence as to their content, or as to his knowledge or belief founded on them.

A.7.249 A person cannot be compelled to give any evidence if his doing so would be prejudicial to the security of the UK (para 5(4)). A certificate signed by or on behalf of the Secretary of State or, where the court is in Scotland, the Lord Advocate, to the effect that it would be so prejudicial for that person to do so is conclusive evidence of that fact (para5(5)). A person cannot be compelled to give any evidence in his capacity as an officer or servant of the Crown (para 5(6)). Para 5(4) and (6) is without prejudice to the generality of para 5(1). The

prohibition on compelling evidence from an officer of the Crown in Schedule 1, para 5(6) limits all other provisions in the 2003 Act[1] and cannot be circumvented by an application for *Norwich Pharmacal* equitable relief.[2]

[1] *Re Pan American World Airways Inc's Application* [1992] QB 854; *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2012] EWHC 1737 (Admin).
[2] *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2012] EWHC 1737 (Admin), paras 67–72.

A.7.250–300 No order for costs can be made (para 8).

(3) Forwarding the evidence to the foreign state

A.7.301 This is dealt with below.[1]

[1] See para A.7.417.

(iii) Referring a request to the Serious Fraud Office under the Crime (International Co-operation) Act 2003, section 15(2)

A.7.302 CICA 2003, s 15(2) permits the Secretary of State to refer a letter of request to the Director of the SFO[1] as an alternative to nominating a court under s 15(1) where the offence to which the request relates appears to the Secretary of State to be an offence involving serious or complex fraud and the conditions in s 14(2)(a) and (b) are satisfied.[2] It is then for the Director (provided he accepts the case) to obtain any evidence to which the request relates which appears to him to be appropriate for the purpose of giving effect to the request.

[1] For Scotland, see s 15(3).
[2] Also, the condition in s 14(4), if the offence appears to be a fiscal offence.

A.7.303 The phrase 'serious or complex fraud' is not defined in either CICA 2003 or the Criminal Justice Act 1987. Whether or not a fraud is serious is a question of fact. In deciding what cases to adopt, the SFO has stated that: 'the Director will take into account all the circumstances of the case and consider: whether the apparent criminality undermines UK Plc commercial or financial interests in general and in the City of London in particular; whether the actual or potential financial loss involved is high; whether actual or potential economic harm is significant; whether there is a significant public interest element; and whether there is new species of fraud'.[1]

[1] See <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols>.

A.7.304 Where a case has been referred to the Director of the SFO under s 15(2) he may use his investigatory powers under s 2 of the Criminal Justice Act 1987. S 2(1) of that Act provides that the powers of the Director under s 2 shall be exercisable but only for the purposes of an investigation under s 1 or, on a request made by an authority entitled to make such a request, in any case in which it appears to him that there is good reason to do so for the purpose of investigating the affairs, or any aspect of the affairs, of any person. By s 2(1A)(b), the Secretary of State acting under s 15(2) of CICA 2003 is an authority entitled to make such a request.

A.7.305 If a request is sent to the Director under s 15(2) by the Secretary of State the Director is entitled to decline to give effect to it if, upon examination, it does not concern serious or complex fraud. S 2(1B) of the Criminal Justice Act 1987 provides that the Director shall not exercise his powers on a request from the Secretary of State acting in response to a request received from an overseas authority within s 2(1A)(b) unless it appears to the Director on reasonable grounds that the offence in respect of which he has been requested to obtain evidence involves serious or complex fraud. If the Director decides this condition is not satisfied then he will return the letter of request to the Secretary of State for execution by alternative means.

(1) The Serious Fraud Office's powers under section 2 of the Criminal Justice Act 1987

A.7.306 As an investigating authority, the SFO may conduct voluntary interviews and interviews under caution in the normal manner. However, the SFO also has a range of coercive powers at its disposal under s 2 of the Criminal Justice Act 1987 in relation to interviews and the production of documents. They are coercive in the sense that a person who fails to answer questions or produce documents as required is liable to be prosecuted for a criminal offence under s 2(13), (14), or (16).

A.7.307 In summary the SFO's coercive powers are as follows:[1]

- s 2(2) allows the SFO to require any person to answer any relevant questions or otherwise furnish information with respect to any matter relevant to the investigation, including questions about confidential matters; however, s 2(9) entitles the person interviewed to refuse to answer on the grounds of legal professional privilege;
- s 2(3) allows the SFO to require any person to produce to it any relevant documents,[2] including confidential documents, but not including documents subject to legal professional privilege.[3] It can also require the person producing them to provide an explanation[4] of them;
- where the SFO considers that to require a person to produce relevant documents would be likely to result in them being destroyed, hidden, or moved from the jurisdiction, so as to frustrate any criminal investigation, s 2(4) allows it to apply to a court for a warrant to search that person's premises and seize the documents. Before granting a search warrant, s 2(4)(a) requires the JP to be satisfied either that the person concerned has failed to comply with a notice under s 2(3), that it is not practicable to serve such a notice, or that service would jeopardise the investigation.

1 See Chapter A.2 for more detail.
2 *Hamilton v Naviede* [1995] 2 AC 75.
3 Criminal Justice Act 1987, s 2(9).
4 For the meaning of 'explanation' in the similarly worded s 447(5)(a)(ii) of the Companies Act 1985 see *Attorney-General's Reference (No 2) of 1998* [2000] QB 412. S 447 has since been amended by the Companies (Audit, Investigations and Community Enterprise) Act 2004, Pt 1, s 21 to remove the requirement to provide an explanation. This is replaced in s 447(2) and (3) with a broader power for the Secretary of State to direct the company to produce documents or provide information.

A.7.308 S 2(13) makes it an offence for a person to fail to comply without reasonable excuse with a requirement imposed on him under s 2.[1] S 2(14) makes it an offence knowingly or recklessly to make a false statement in purported compliance with a requirement made under s 2. S 2(16) makes it an offence to destroy or conceal, etc, documents which the person knows or suspects are relevant to an investigation. These offences are punishable by fines and imprisonment.

1 *R v Metropolitan Stipendiary Magistrate ex p Serious Fraud Office* [1995] COD 77.

(2) Interviews under the Criminal Justice Act 1987, section 2(2)

A.7.309 These are commonly referred to as 's 2 interviews' and are an important tool in the hands of the SFO. The power which they give the SFO is draconian.[1]

1 *R v Director of the Serious Fraud Office ex p Johnson* [1993] COD 58.

A.7.310 The interview may be carried out by SFO investigators. If representatives of the foreign state have requested to be present then this is usually allowed; however they will not be permitted to conduct the interview or to take part in it.[1] However, they may consult with the SFO in relation to the interview. The interviewee is entitled to be legally represented during the interview, which is conducted in private and tape recorded.

1 Unless the Director has exercised his powers to designate a foreign investigator under s 2(11) of the Criminal Justice Act 1987.

A.7.311 Prior to conducting a s 2 interview the SFO are not under a common law duty of disclosure, although some disclosure may be necessary in some cases.[1]

1 *R v Serious Fraud Office ex p Maxwell (Kevin)* The Times, 9 October 1992.

A.7.312 In *Marlwood Commercial Inc v Kozeny*[1] the Court of Appeal dealt with an application made by a party to civil proceedings for permission to disclose to the SFO (in compliance with a notice given under s 2 of the Criminal Justice Act 1987 made as a result of a request pursuant to the Criminal Justice (International Co-operation) Act 1990), documents disclosed by another party pursuant to its obligations in the civil proceedings and which had been brought to England for that purpose. It was held that s 3(3) of the Criminal Justice Act 1987 did not override rule 31.22 of the Civil Procedure Rules. However the court held that the public interest in the investigation or prosecution of a specific offence of serious or complex fraud took precedence over the merely general concern of the courts to control the collateral use of compulsorily disclosed documents. In the absence of other factors, the court's discretion should, as a matter of principle, *prima facie* be exercised in favour of compliance with a notice under s 2(3) of the 1987 Act; by itself the additional factor that the documents had been brought within the jurisdiction for the purposes of disclosure by a foreign litigant himself brought compulsorily before the English court should not be regarded as a reasonable excuse for non-compliance with the notice; and the courts should be prepared to grant permission under CPR 31.22 for their collateral use in production to the Director of the SFO.

1 [2005] 1 WLR 104.

A.7.313 An interviewee does not have to disclose information which would be protected by legal professional privilege in proceedings in the High Court.[1]

1 Criminal Justice Act 1987 s 2(9); *R v Cox and Railton* (1884) 14 QBD 153; *R v Central Criminal Court ex p Francis and Francis (a firm)* [1989] AC 346.

(3) Notices under the Criminal Justice Act 1987, section 2(3)

A.7.314 A s 2(3) notice is an order issued by the SFO which requires the person named (who may be the person under investigation or another person) to produce to the SFO any specified documents[1] which appear to the SFO to relate to any matter relevant to the investigation or any documents of a specified description which appear to him so to relate.[2] If the documents are produced the SFO can take copies or extracts from them,[3] or require the person producing them to provide an explanation of them.[4] If the documents are not produced the SFO can require the person to state where they are.[5] A failure without reasonable excuse to comply with a requirement issued under s 2(3) is an offence, as is intentionally or recklessly making a false statement.[6]

1 As defined in Criminal Justice Act 1987 s 2(18). The SFO can require the documents to be produced in legible form if they are held electronically.
2 Criminal Justice Act 1987, s 2(3).
3 ibid, s 2(3)(a)(i).
4 ibid, s 2(3)(a)(ii).
5 ibid, s 2(3)(b).
6 ibid, s 2(13) and (14).

A.7.315 S 2(3) notices are subject to the same requirements as to width and specificity as search warrants.[1] The specified documents, or the category of documents specified, must 'relate to any matter relevant to the investigation'.[2] A notice which fails to satisfy this criterion will be unlawful and liable to be quashed on judicial review. Two factors in particular may result in a notice being unlawful. First, the notice may be so widely drawn that it includes documents or categories of documents which on any view could not be relevant to an inquiry.[3] Secondly, where the category of documents is specified by reference to a time period, the period may be wholly disproportionate to the period of the alleged offence.[4]

1 Search warrants are considered below at para A.7.317.
2 Criminal Justice Act 1987, s 2(3).
3 *R v Secretary of State for the Home Department ex p Fininvest Spa* [1997] 1 WLR 743, 753 (although relief was refused as a matter of discretion); cf *R v Central Criminal Court ex p AJD Holdings Ltd* [1992] Crim L R 669; *R v Southampton Crown Court ex p J & P* [1993] Crim LR 962.
4 *R v Southampton Crown Court ex p J & P* [1993] Crim LR 962; *Williams v Summerfield* [1972] 2 QB 512; *R v Nottingham Justices ex p Lynn* (1984) 79 Cr App R 238.

A.7.316 Under s 3, the SFO may pass on information gleaned through interviews and through the disclosure of documents in certain specified situations.[1] A party to whom the SFO has disclosed documents during a criminal investigation may be able to rely on those documents in civil proceedings.[2]

1 The situations listed in s 3(5) in which the SFO may disclose information to third parties on a confidential basis are not exhaustive, and disclosure pursuant to a court order in civil proceedings is not prohibited by s 3(5): *Tchenguiz v Director of the SFO* [2014] 1 WLR 1476.

2 *Standard Life Assurance Ltd & anr v Topland Co Ltd & ors* [2011] 1 WLR 2162. But no such disclosure or use may be made of materials obtained pursuant to a mutual legal assistance request made by the United Kingdom: *Crown Prosecution Service v Gohil* [2013] Fam 276.

(4) Search warrants under the Criminal Justice Act 1987, section 2(4)

A.7.317 In this s the law relating to search warrants under CJA 1987, s 2(4) is analysed. Many of these principles are applicable to search warrants in general, including those issued under Part 2 and Schedule 1 of the Police and Criminal Evidence Act 1984 (PACE). These latter warrants are considered below.[1]

1 Pursuant to the recommendation in *R (Rawlinson and Hunter Trustees) v Central Criminal Court* [2013] 1 WLR 1364, applications for s 2 CJA 1987 search warrants are now governed by Pt 47, s 7 of the Criminal Procedure Rules 2015 (rr 47.29–47.33; SI 2015/1490, in force 5 October 2015) and the forms issued thereunder by the Lord Chief Justice.

A.7.318 S 2(4) provides that on information[1] laid on oath by a member of the SFO, a JP,[2] if satisfied, in relation to any documents, that there are reasonable grounds for believing that either a person has failed to comply with a s 2(3) notice; that it is not practicable to serve a s 2(3) notice in relation to them; or that the service of such a notice in relation to them might seriously prejudice the investigation; and there are reasonable grounds for believing that there are such documents on the premises specified in the information, he may issue a warrant as is mentioned in s 2(5).

1 The person affected by the warrant is generally entitled to sight of the information in order that he can take advice as to its legality (*R (Energy Financing Team Limited) v Director of the Serious Fraud Office* [2006] 1 WLR 1316, para 24(10)). Authorities possess no right to unilaterally redact that letter or Information (*R (S, F & L) v Chief Constable of the British Transport Police* [2014] 1 WLR 1647, paras 109–115); and, in the event that they wish to withhold any of its contents from the person affected, they must apply for a PII order (*Commissioner of Police for the Metropolis v Bangs* [2014] EWHC 546 (Admin)). The same applies to the transcript of the warrant application (*R (Golfrate Property Management Ltd) v Southwark Crown Court* [2014] 2 Cr App R 12, paras 15–18). Mere potential for embarrassment is no ground for non-disclosure (*Canadian Broadcasting Corporation v The Queen* (2014) 305 CCC (3d) 1).

2 In Scotland, a sheriff. In England and Wales, applications are invariably made to a Crown Court judge: *R (Rawlinson and Hunter Trustees) v Central Criminal Court* [2013] 1 WLR 1364, para 80.

A.7.319 A warrant under s 2(5) is a warrant authorising any constable to enter (using such force as is reasonably necessary for the purpose) and search the premises, and to take possession of any documents[1] appearing to be documents of the description specified in the information or to take in relation to such documents any other steps which may appear to be necessary for preserving them and preventing interference with them.

1 As defined in CJA 1987, s 2(19). Where the documents are held in electronic form then the constable can require them to be produced in legible form: PACE, s 20.

A.7.320 Unless it is not practicable in the circumstances, a constable executing a warrant issued under s 2(4) shall be accompanied by an 'appropriate person'. Where an appropriate person accompanies a constable, he may exercise the powers conferred by s 2(5) but only in the company, and under the supervision, of the constable (s 2(6A)). An 'appropriate person'

means a member of the SFO or some person who is not a member of that Office but whom the Director has authorized to accompany the constable (s 2(7)).

A.7.321 The issue of a search warrant is a serious matter. In addition to the duty to place before the court all the material necessary to the grant of a warrant,[1] there is a duty of candour upon the SFO; there must be full and complete disclosure to the judge, including disclosure of anything that might militate against the grant.[2] Misrepresentation or non-disclosure in either the information or the oral evidence to the judge will invalidate any warrant obtained where the errors or omissions might well (not would in fact) have made a difference to the decision to grant the warrant.[3] The current practice under s 2(4) of not placing the underlying material before the judge[4] means that the duty of candour is even more important than usual; there is a very heavy duty placed on the SFO to ensure that what is put before the judge is clear and comprehensive so that the judge can rely on it and form his judgment on the basis of a presentation in which he has complete trust and confidence as to its accuracy and completeness. Cases in the financial markets investigated by the SFO are likely to require the judge to be familiar with the commercial and market background. That background must be set out in the written presentation to the judge. The transactions must then be explained in a coherent and analytical manner. The allegations of reasonable suspicion must then be set out. What is alleged must be verified by persons expert in the market or accounting practices whose independent advice has been expressly sought. A record of that verification should be retained by the SFO. Not only must the case for reasonable suspicion be put, but the matters that might undermine that case must be enumerated. The skill and experience required to prepare a presentation of that kind cannot be underestimated.[5]

1 *R (Redknapp) v Commissioner of the City of London Police* [2009] 1 WLR 209.

2 *Re Stanford* [2010] 1 WLR 941, para 191; *R (Rawlinson and Hunter Trustees) v Central Criminal Court* [2013] 1 WLR 1364, paras 81–2; *G v Commissioner of Police of the Metropolis* [2011] EWHC 3331 (Admin); *R (Dulai) v Chelmsford Magistrates' Court* [2013] 1 WLR 220; *R v Zing*a [2013] Lloyd's Rep. FC 102, para 15; *R (AB & CD) v Huddersfield Magistrates' Court* [2015] 1 WLR 4737, paras 11–20; *R (Golfrate Property Management Ltd) v Southwark Crown Court* [2014] 2 Cr App R 12, paras 22–28; *R (Mills) v Sussex Police* [2015] 1 WLR 2199, paras 38–40. This includes issues of law: *R (Vuciterni) v Brent Magistrates' Court* (2012) 176 JP 705.

3 *R (Mills) v Sussex Police* [2015] 1 WLR 2199, paras 47–64; overturning *R (Rawlinson and Hunter Trustees) v Central Criminal Court* [2013] 1 WLR 1364, paras 171–179 and *R (Goode) v Nottingham Crown Court* [2014] ACD 6.

4 A practice which should be considered by a body such as the Criminal Procedure Rule Committee or an ad hoc body established for that purpose: *R (Rawlinson and Hunter Trustees) v Central Criminal Court* [2013] 1 WLR 1364, para 90. But the practice has been approved: *R (Newcastle United Football Club) v Commissioner of HM Revenue and Customs* [2017] 4 WLR 187.

5 *R (Rawlinson and Hunter Trustees) v Central Criminal Court* [2013] 1 WLR 1364, paras 87–88, 92–93.

A.7.322 The duties upon the judge are no less onerous. A judge to whom an application for a warrant is made must therefore be scrupulously careful to ensure that all the relevant statutory conditions are satisfied. It is not sufficient that the judge considers that the information and evidence presented is reasonable. The judge must personally be satisfied that there is before the judge sufficient material on which it is proper to grant the warrant, including grounds for reasonable suspicion.[1] In particular, he must give reasons for his decision to issue a warrant and must state his reasons for being satisfied as to the conditions in s 2(4)(a).[2]

1 *Williams v Summerfield* [1972] QB 512, 518; *R (Bright) v Central Criminal Court* [2001] 1 WLR 662, 667; *R (Rawlinson and Hunter Trustees) v Central Criminal Court* [2013] 1 WLR 1364, paras 83–85, 89.

2 *R v Central Criminal Court ex p Propend Finance Property Ltd*, [1996] 2 Cr App R 26; *R v Lewes Crown Court ex p Nigel Weller & Co*, unreported, 12 May 1999 (CO/2890/98); *Energy Financing Team Ltd and others v Director of SFO* [2006] 1 WLR 1316; *R (Rawlinson and Hunter Trustees) v Central Criminal Court* [2013] 1 WLR 1364, paras 89, 202–208. Although failure to do so will rarely be fatal to the legality of the warrant: *Brookfield Aviation International Ltd v Guildford Crown Court* [2015] EWHC 3465 (Admin); *R (Newcastle United Football Club) v Commissioner of HM Revenue and Customs* [2017] 4 WLR 187.

A.7.323 Warrants issued under s 2(4) are subject to the safeguards contained in ss 15 and 16 of PACE.[1] These are considered below.[2]

1 PACE, s 15(1).

2 See para A.7.422.

A.7.324 Items which a constable has reasonable grounds to believe are subject to legal professional privilege may not be seized under any circumstances.[1] Problems may arise, however, where items subject to legal professional privilege are contained within a large number of other documents which can lawfully be seized. In such a case, the 'seize-and-sift' powers of Part 2 of the Criminal Justice and Police Act 2001 contain provisions allowing all the material to be seized for later examination and return of the privileged material.[2] The practice then is for the documents to be examined by independent counsel[3] to determine which items, if any, are privileged in accordance with the procedure in Part 2.[4]

1 CICA 2003, s 26; PACE, s 19(6); *R v Chesterfield Justices ex p Bramley* [2000] QB 576; *R (Rawlinson and Hunter Trustees) v Central Criminal Court* [2013] 1 WLR 1364, paras 258 *et seq*.

2 *R (A) v Central Criminal Court* [2017] 1 WLR 3567.

3 *R v Middlesex Guildlhall Crown Court ex p Tamosius* [2000] 1 WLR 453; *R (Faisaltex Ltd) v Preston Crown Court* [2009] 1 WLR 1687 . An employee of the SFO is not independent: *R (Rawlinson and Hunter Trustees) v Central Criminal Court* [2013] 1 WLR 1364, paras 264–267.

4 See also the amendments to Sch 1 to the Criminal Justice and Police Act 2001, made by s 26(3) CICA 2003; cf *R v Customs and Excise Commissioners ex p Popely* [1999] STC 1016.

A.7.325 A search warrant which is excessively wide is liable to be quashed.[1] Limitations are required by Art 8 of the European Convention on Human Rights - respect for private and family life.[2] The warrant must specify, so far as practicable, the items to be sought.[3] There is no legal requirement to specify individual documents in the warrant, but, it is good practice to do so, to the extent practicable.[4] A s 2 warrant is much simpler and wider than one under s 8 of PACE which requires the material to be likely to be 'relevant evidence'. The warrant must only specify items that are relevant to the specific investigation and the specific offence being investigated.[5] Where categories of documents to be seized are defined by reference to a time period, the period must bear some reasonable relationship of proportionality to the period relevant to the alleged offence.

1 *R v Central Criminal Court ex p AJD Holdings Ltd* [1992] Crim LR 669. The particularity required will depend upon the breadth of the investigation in issue, and the question of where the balance lies in an individual case will rarely be answered by reference to prior authority. A broad scope of an investigation may require a correspondingly broad power of search: *R (Glenn & Co (Essex)) v Revenue & Customs Commissioners* [2012] 1 Cr App R 22. For examples of unlawfully broad warrants, see *R (Anand) v Her Majesty's Revenue & Customs* [2012] EWHC 2989 (Admin); *R (Hoque) v City of London Magistrates' Court* [2013] EWHC 725 (Admin); *R (Golfrate Property Management Ltd) v Southwark Crown Court* [[2014] 2 Cr App R 12, paras 129–134. Cf. *R (AB & CD) v Huddersfield Magistrates' Court* [2015] 1

WLR 4737, paras 20–28; *R (on the application of Chatwani) v National Crime Agency* [2015] EWHC 1283 (Admin), paras 105–129; *Re O'Neill's Application for Judicial Review* [2017] NIQB 37. paras 32–36, 39–41.

2 So, eg, the making of a video record of a search, not being one expressly authorised by the terms of the warrant, may violate Art 8: *R (AB & CD) v Huddersfield Magistrates' Court* [2015] 1 WLR 4737, paras 37–39. Article 8 might also, eg, require a radical overhaul of the way in which computer-related searches are authorized and executed (see the Supreme Court of Canada in *R v Vu* (2014) 302 CCC (3d) 427).

3 PACE, s 15(6)(b). *R (Faisaltex Ltd) v Preston Crown Court* [2009] 1 WLR 1687, para 58; *Lees v Solihull Magistrates' Court* [2013] EWHC 3779 (Admin); *R (Sweeney) Westminster Magistrates' Court* [2014] EWHC 2068 (Admin). A telephone, for instance, is capable of being the subject of a warrant even if not everything in it will be relevant: *R (A) v Central Criminal Court* [2017] 1 WLR 3567.

4 *R v Thames Magistrates, Customs and Excise ex p Da Costa* [2002] Crim LR 504; *R (Kent Pharmaceuticals Ltd) v Director of Serious Fraud Office and others* [2005] 1 WLR 1302.

5 *R v Central Criminal Court ex p AJD Holdings Ltd* [1992] Crim LR 669.

A.7.326 An unlawful seizure may not be saved by a repeat 'here and now' notice under s 2 of the 1987 Act.[1] It follows that, although a request from a foreign country may be widely framed, once the Secretary of State has made a reference under s 15(2) of CICA 2003, the SFO has the responsibility for ensuring that any search warrant under s 2(5) is sufficiently narrowly focused to ensure that it does not amount to an unlawful fishing expedition. However, equally, the warrant need not be confined to the material sought in the letter of request.[2]

1 Likewise, PACE, s 19 may not be used to re-seize property at a police station and commute what had been an unlawful seizure into a lawful seizure: *R (Cook) v Serious Organised Crime Agency* [2011] 1 WLR 144. Rather, the procedure in s 59 of the Criminal Justice and Police Act 2001 must be followed: *R (Rawlinson and Hunter Trustees) v Central Criminal Court* [2013] 1 WLR 1364, paras 274–281. The provisions of s 59 apply equally to MLA cases: *Van der Pijl v Secretary of State for the Home Department* [2014] EWHC 281 (Admin). Depending upon the nature of the defect in the search, it may be appropriate to suspend any order for return of the seized property pending application under s 59 for the notional re-issuance of the warrant with the defect remedied: see *Van der Pijl v The Crown Court at Kingston* [2013] 1 WLR 3706, paras 85–88; *R (Mills) v Sussex Police* [2015] 1 WLR 2199, para 54. For the principles to be applied on such an application, see *R (El Kurd) v Winchester Crown Court* [2012] Crim LR 138; *R (Windsor) v Bristol Crown Court* [2011] EWHC 1899 (Admin); *R (Dulai) v Chelmsford Magistrates' Court* [2013] 1 WLR 220; *R (Panesar) v Central Criminal Court* [2015] 4 All ER 754, paras 34–38, 48. The procedure for an application under s 59 is now contained in Crim PR 47, s 4 (47.35–47.40). Applications under s 59 ought to be made on notice: *Van der Pijl v The Crown Court at Kingston* [2013] 1 WLR 3706, para 84. Unlawfully seized material that has already been passed to the foreign state may be the subject of a 'best endeavours' order to persuade the foreign state to return them: *Van der Pijl v The Crown Court at Kingston* [2013] 1 WLR 3706, para 89. Non-compliance with the time limits applicable to s 59 applications will not necessarily be fatal: *R (Malik) v Manchester and Salford Magistrates' Court* [2017] EWHC 2901 (Admin).

2 *R (Energy Financing Team Limited) v Director of the Serious Fraud Office* [2006] 1 WLR 1316, para 24 at (4).

(5) Privilege against self-incrimination in mutual assistance proceedings

A.7.327 Whilst a person giving evidence before a nominated court is entitled to rely on his common law privilege against self-incrimination,[1] evidence obtained from a suspect by the SFO under s 2 of the Criminal Justice Act 1987 overrides the privilege.[2] A suspect is not entitled to refuse to answer on the grounds that it might incriminate him. It follows that, but for the restrictions on use contained in s 2(8), its use against the suspect at his trial in the UK would violate his right to a fair trial under Article 6 of the ECHR.[3] As a result, it is common

practice for those involved in s 2 interviews to require precedent undertakings from the requesting state to prevent end use in any subsequent prosecution.

1 Para 5 of Sch 1 to CICA 2003.
2 *R v Director of the Serious Fraud Office ex p Smith* [1993] AC 1.
3 *Lyons* [2003] 1 AC 976; *Brown v Stott (Procurator Fiscal, Dunfermline)* [2003] 2 AC 681; *R v Hertfordshire County Council ex p Green Environmental Industries Ltd* [2000] 2 AC 412.

(iv) Use of general search warrants to give assistance to a foreign state

A.7.328 S 13(1)(b) of CICA 2003 provides that where a request for assistance in obtaining evidence is received in a part of the UK the territorial authority may direct that a search warrant be applied for under or by virtue of ss 16 or 17.[1]

1 Or, in relation to evidence in Scotland, s 18.

A.7.329 Art 3 of the Crime (International Cooperation) Act 2013 (Exercise of Functions) Order 2013[1] provides that the Commissioners of Customs and Excise may exercise the function under s 13 of directing that a search warrant be applied for under or by virtue of ss 16 or 17 where a request for assistance has been made wholly or mainly in connection with a relevant offence.[2]

1 SI 2013/2733. These functions were initially exercised the Commission for Customs and Excise and then transferred to the HMRC and then the Borders, Citizenship and Immigration Act 2009 transferred customs functions to a new agency—the UK Border Agency. The Crime (International Co-operation) Act 2003 (Exercise of Functions) Order 2009 SI 2009/3021 now permits the powers conferred on a constable to be used, in certain circumstances by a general customs official or by a customs revenue officials of the UK Border Agency.
2 Defined in Art 2.

A.7.330 S 16 provides for the extension of the statutory search powers in Part 2 of the PACE to cover overseas conduct. S 17 provides a free-standing power for a JP to grant a search warrant. In both cases, the question of whether material is likely to be relevant and of substantial value falls to be assessed on a necessarily more circumscribed basis than if the warrant were being sought in aid of a domestic prosecution or investigation. International MLA instruments operate on the basis of a high level of mutual trust between signatory states and mini-trials to determine the degree of relevance of materials to a future trial in another state is not consistent with that principle. In general, assertions of relevance in an MLA request will be sufficient to trigger the UK's duty to obtain and submit the materials.[1] Continuity evidence is capable of passing the test for relevance and materiality.

1 *Van der Pijl v Secretary of State for the Home Department* [2014] EWHC 281 (Admin).

A.7.331 Although s 16 and the provisions of PACE refer to 'constables', the Crime (International Co-operation) Act 2003 (Exercise of Functions) Order 2013,[1] Article 3, provides that any function conferred on a constable by virtue of s 16 in relation to a warrant or order under s 8 of, or Schedule 1 to the PACE may be exercised by a customs officer instead where the Commissioners have given a direction under s 13, or by an officer of Revenue and Customs for the purposes of an investigation relating wholly or mainly to a relevant offence[2] by an international joint investigation team of which he is a member.[3]

1 SI 2013/2733, made under s 27(1).
2 Defined in Art 2 of the Order.
3 An 'international joint investigation team' has the meaning given by s 88(7) of the Police Act 1996.

A.7.332 In order to understand the operation of s 16 it is first necessary to consider the powers in Part 2 of PACE.

(1) Warrants under section 8 of the Police and Criminal Evidence Act 1984

A.7.333 S 8(1) of PACE permits a JP to issue a search warrant where there are reasonable grounds for believing:[1]

(i) an indictable offence has been committed;
(ii) there is material on the premises mentioned in s 8(1A) which is likely to be of substantial value to the investigation and likely to be relevant evidence;[2]
(iii) the material does not consist of or include items subject to legal professional privilege,[3] excluded material,[4] or special procedure material;[5] and
(iv) any of the conditions in s 8(3) is satisfied in relation to each set of premises specified in the application.[6]

1 Application of a different test will lead to the quashing of the warrant: *R (Global Cash & Carry Ltd.) v Birmingham Magistrates' Court* [2013] EWHC 528 (Admin); *R (S, F & L) v Chief Constable of the British Transport Police* [2014] 1 WLR 1647, para 61. Pursuant to the recommendation in *R (Rawlinson and Hunter Trustees) v Central Criminal Court* [2013] 1 WLR 1364, applications for s 8 PACE search warrants are now governed by Pt 47, s 3 of the Criminal Procedure Rules 2015 (rr 47.24–47.28) and the forms issued thereunder by the Lord Chief Justice.
2 That is, anything that would be admissible in evidence at a trial for the offence: PACE, s 8(2). This is an additional requirement where the vehicle for seeking mutual legal assistance is the 1984 Act. In choosing under CICA 2003, s 13 to direct a request to the police, rather than another body such as the SFO, this additional requirement is engaged. However, it is not the case that a request must expressly address this requirement in order for an ensuing PACE search warrant to be lawful; the condition may be satisfied by inferences drawn from the content of the request: see *Van der Pijl v The Crown Court at Kingston* [2013] 1 WLR 3706.
3 As defined in s 10 of PACE: see *R v Central Criminal Court ex p Francis and Francis (a firm)* [1989] AC 346; *R v Guildhall Magistrates' Court ex p Primlaks Holdings (Panama) Inc* [1990] 1 QB 261.
4 As defined in s 11 of PACE.
5 As defined in s 14 of PACE. But note that excluded material and special procedure material may lawfully be seized under s 8(2) where the 'sifting' powers in Pt 2 of the Criminal Justice and Police Act 2001 (CJPA 2001) may be utilised. S 59 provides for a statutory procedure by which a claimant who asserts that material has been improperly seized using these powers may seek a court order for its return. In *R (Hoque) v City of London Magistrates' Court* [2013] EWHC 725 (Admin), where a s 8 PACE search warrant was held to be unlawful on the basis that it failed to identify the materials sought with sufficient particularity, pursuant to which the original exhibits would be returned, determination of whether the applicant (HMRC) were nonetheless entitled to retain copies of the seized documents for the purpose of continuing criminal proceedings fell to be determined under s 59 CJPA 2001. The position may have been different had the warrants been obtained in the absence of reasonable grounds to suspect that an offence had been committed, or if copies had been made in contravention of a court order, or if the court issuing the warrant had been misled.
6 It is not a condition precedent to the grant of a warrant under s 8 that other methods of obtaining the material have been tried without success or not been tried because they were bound to fail: *R v Billericay Justices ex p Frank Harris (Coaches) Limited* [1991] Crim LR 472.

A.7.334 The premises mentioned in s 8(1A) are one or more sets of premises specified in the application (in which case the application is for a 'specific premises warrant'); or any premises occupied or controlled by a person specified in the application, including such sets of premises as are so specified (in which case the application is for an 'all premises warrant').

A.7.335 S 8(1B) provides that if the application is for an all premises warrant, the JP must also be satisfied that because of the particulars of the offence referred to in s 8(1)(a), there are reasonable grounds for believing that it is necessary to search premises occupied or controlled by the person in question which are not specified in the application in order to find the material referred to in para 8(1)(b); and that it is not reasonably practicable to specify in the application all the premises which he occupies or controls and which might need to be searched.

A.7.336 The conditions in s 8(3) are that it is not practicable to communicate with any person entitled to grant entry to the premises; that it is practicable to communicate with a person entitled to grant entry to the premises but it is not practicable to communicate with any person entitled to grant access to the evidence; that entry to the premises will not be granted unless a warrant is produced; and that the purpose of a search may be frustrated or seriously prejudiced unless a constable arriving at the premises can secure immediate entry to them.[1]

[1] The relevant provision of s 8(3) relied on by the applicant for the warrant must be specified in the application: *Redknapp v Metropolitan Police Commissioner* [2008] EWHC Admin 1177.

A.7.337 Where a warrant is issued, s 8(2) permits a constable to seize and retain anything for which a search has been authorized under s 8(1).

A.7.338 S 8 warrants are the most common type of search warrant,[1] nevertheless the courts have repeatedly emphasized that a JP to whom application is made under s 8 must be careful to ensure that the applicant is entitled to the warrant. He must be personally satisfied on the material before him that the conditions are satisfied. He is not entitled simply to accept the assertion of the applicant for the warrant.[2]

[1] *R v Guildhall Magistrates Court ex p Primlaks Holdings (Panama) Limited* [1990] 1 QB 261, 272–3.
[2] See *R (Faisaltex Ltd) v Preston Crown Court* [2009] 1 WLR 1687; *(Redknapp v Metropolitan Police Commissioner* [2008] EWHC Admin 1177; *R (on the application of C) v The Chief Constable of 'A' Police* [2006] EWHC 2352 (Admin).

(2) Production orders and warrants under section 9 of, and Schedule 1 to, the Police and Criminal Evidence Act 1984

A.7.339 Where a constable wishes to obtain excluded material or special procedure material[1] then PACE, s 9 provides that an application to a judge under Schedule 1 of PACE may be made.[2] Schedule 1 permits a judge to issue production orders and search warrants for material which cannot be obtained using a s 8 warrant.[3]

[1] In *R v Preston Crown Court ex p McGrath*, The Times, 27th October 1992, the Divisional Court held that where the material the subject of the application is mixed in that it consists of special procedure material and other material, all of the material can be the subject of a special procedure order under Sch 1. Mann

LJ said that Parliament could not have intended sequential applications under Sch 1 and s 8; see also *R v Snaresbrook Crown Court ex p Director of Public Prosecutions* (1988) 86 Cr App R 227.

2 The judge has discretion to hear an application for access to excluded material or special procedure material under Sch 1 in chambers: *R v Central Criminal Court ex p Director of Public Prosecutions*, The Times, 1 April 1988.

3 *Redknapp v Metropolitan Police Commissioner* [2008] EWHC Admin 1177.

A.7.340 The provisions of Schedule 1 are complicated and have been the subject of a considerable number of cases. The case law emphasizes the heavy responsibility on those applying for such orders and on judges considering applications under Schedule 1.[1]

1 *R v Lewes Crown Court ex p Hill* (1991) 93 Cr App R 60, 65. See also *R (S, F & L) v Chief Constable of the British Transport Police* [2014] 1 WLR 1647 which gives guidance on the proper procedure to be used in applications to search premises or homes of practising lawyers. See also *R (AB & CD) v Huddersfield Magistrates' Court* [2014] EWHC 1089 (Admin).

A.7.341 The applicant is under a duty to make full disclosure when applying under Schedule 1.[1] In particular, it is the duty of the applicant to set out, either in the notice itself or in further documentation, a description of all that is sought to be produced.[2] The judge must also give reasons for making an order or granting a warrant under Schedule 1.[3]

1 *R v Lewes Crown Court ex p Hill* (1991) 93 Cr App R 60, 69; *R v Acton Crown Court ex p Layton* [1993] Crim LR 458; *R (S, F & L) v Chief Constable of the British Transport Police* [2014] 1 WLR 1647.

2 *R v Central Criminal Court ex p Adegbesan* 84 Cr App R 219; *R v Inner London Crown Court ex p Baines and Baines (a Firm)* [1988] QB 579.

3 *R v Central Criminal Court ex p Propend Finance Property Ltd* [1996] 2 Cr App R 26; *R v Lewes Crown Court ex p Nigel Weller & Co. (a firm)*, 12 May 1999 (CO/2890/98); *R (S, F & L) v Chief Constable of the British Transport Police* [2014] 1 WLR 1647.

A.7.342 Para 4 of Schedule 1 permits[1] a judge to issue a production order provided that either of the sets of access conditions in para 2 is satisfied. A production order requires the person to whom it is addressed to produce the material to a constable for him to take away or give him access to it within seven days from the date of the order (para 4). An application for a production order must be made *inter partes*[2] and a notice served on the person concerned under para 7.[3] Where such a notice has been served the person must not destroy, alter, or dispose of the material without the leave of the judge or a constable (para 11).

1 Even where the access conditions are satisfied the judge retains a discretion whether or not to make an order or issue a warrant under para 12: *R (Bright) v Central Criminal Court* [2000] 1 WLR 662, 678. However once a judge has concluded under para (2)(a)(i) of Sch 1 that a serious offence has been committed, it is inconsistent to refuse an application for access to material by finding under para 2(c) that it is not in the public interest that access should be given: *R v Crown Court at Northampton ex p Director of Public Prosecutions* 93 Cr App R 376.

2 See the discussion in *R (BSkyB) v The Commissioner of Police of the Metropolis* [2014] AC 885, SC. Such proceedings do not permit of closed procedures (paras 30–31) other than PII applications (para 32). Cf general search warrant proceedings (*Haralambous v Crown Court at St Albans* [2018] UKSC 1).

3 There is, however, no requirement to give notice of the proceedings to the accused or suspected person. Para 7 of Sch 1 applies as between the applicant and the person or institution in whose custody special procedure material is believed to be held: *R v Crown Court at Leicester ex p Director of Public Prosecutions* 86 Cr App R 254.

A.7.343 Para 12 permits a circuit judge to issue a search warrant where (i) either of the sets of access conditions in paras 2 or 3 and the conditions in para 14 are fulfilled in relation to each set of premises specified in the application;[1] or (ii) the access conditions in para 3 are fulfilled and an order under para 4 has not been complied with.[2]

1 PACE, Sch 1, para 12(a).
2 ibid, para 12(b).

A.7.344 The warrant authorizes a constable to enter and search the premises or (as the case may be) all the premises occupied or controlled by the person referred to in para 2(a)(ii) or 3(a), including such sets of premises as are specified in the application (an 'all premises warrant').

A.7.345 The power to allow access to excluded and special procedure material under a search warrant is a draconian power which should only be used as a last resort where no other method of obtaining the material is available.[1]

1 *R v Southwark Crown Court ex p Bowles* [1998] AC 641, 649. In *R v Central Criminal Court ex p AJD Holdings* [1992] Crim LR 669, Nolan LJ observed that the scheme of Sch 1 is that applications should normally be made *inter partes* save for certain exceptions. The fact that a solicitor is under investigation does not of itself justify intruding *ex p* into his affairs and those of his clients. All the circumstances must be considered, including the seriousness of the matter being investigated, evidence already available to the police, and the extent to which the solicitor already knows of the interest in his affairs such as might cause him to destroy or interfere with documents; cf *R v Maidstone Crown Court, ex p Waitt* [1988] Crim L R 384 (*ex parte* applications should never become a matter of common form); *R v Leeds Crown Court ex p Switalski* [1991] COD 199 where the court said that where a search was to be made of solicitors' premises one would expect the application to be *inter partes*, but not where the firm itself was under investigation.

A.7.346 In *R v Central Criminal Court ex p AJD Holdings*[1] the court said that it was important before any search warrant was applied for that careful consideration was given to what material it is hoped a search might reveal, so as to be clear to anyone subsequently considering the lawfulness of the warrant. The application should make clear that the material sought related to the crime under investigation. A written note should be made of anything said in support of the application beyond what was set out in the written application. There should be careful briefing of the officers who were to execute the search, including how material to be searched for might be thought to relate to the crime under investigation. The warrant was quashed because it permitted the officers to search for material which could not have been relevant to their investigation. The court also quashed the warrants on two other grounds, namely that they wrongly included material subject to legal privilege, and that in any event they should have been applied for *inter partes*.

1 [1992] Crim LR 669.

A.7.347 A number of decisions have emphasized that it is not sufficient for a constable simply to assert that the access conditions had been met. The judge should not make an order unless personally satisfied after a full inquiry[1] that one or other of the sets of access conditions is fulfilled.[2]

1 ibid.
2 *R (Bright) v Central Criminal Court* [2000] 1 WLR 662, 677; *R v Crown Court at Lewes ex p Hill* (1991) 93 Cr App R 60; *R v Guildhall Magistrates Court ex p Primlaks Holdings (Panama) Inc* [1990] 1 QB 261,

272; *R v Southampton Crown Court ex p J & P* [1993] Crim LR 962; *R (BskyB) v Chelmsford Crown Court* [2012] EWHC 1295 (Admin), paras 13–19.

A.7.348–400

Search warrants issued under Part 2 and Schedule 1 are subject to the protections in ss 15 and 16 of PACE. These protections are designed to protect the person whose premises are being searched and are stringent in their effect.[1] A failure to comply with any of the requirements of either s 15 or s 16 may, depending upon the nature of the breach, render the entry, search, and seizure unlawful, and render the SFO and the relevant police force liable to an action for damages even where officers follow Home Office guidance.[2]

1 *R v Central Criminal Court ex p AJD Holdings Ltd* [1992] Crim LR 669.

2 *R v Chief Constable of Warwickshire ex p Fitzpatrick* [1999] 1 WLR 564, 574; *R v Chief Constable of Lancashire ex p Parker* [1993] QB 577, 584. *Bhatti v Croydon Magistrates* [2010] EWHC 522 (Admin). But see, more recently, *R (Glenn & Co (Essex) Ltd) v HM Commissioner for Revenue & Customs* [2012] 1 Cr App 22; *R (Hicks) v Commissioner of Police of the Metropolis* [2012] EWHC 1947 (Admin), paras 244–247.

A.7.401

S 15 requires the warrant to contain essential information such as the name of the person to whom it is directed,[1] the articles sought,[2] the offences to which the warrant relates,[3] the person who applies for it, the name of the enactment under which is was issued, the address of the premises to be searched, and the date on which it is issued.[4] It is not permissible to look outside the four corners of the warrant to determine its validity.[5] The warrant must also authorize entry on one occasion only unless it specifies that it authorizes multiple entries.[6] If it specifies that it authorizes multiple entries, it must also specify whether the number of entries authorized is unlimited, or limited to a specified maximum.[7] No premises may be entered or searched for the second or any subsequent time under a warrant which authorizes multiple entries unless a police officer of at least the rank of inspector has in writing authorized that entry to those premises.[8]

1 Mere reference to 'the suspects' is too vague to satisfy s 15(6): *Van der Pijl v The Crown Court at Kingston* [2013] 1 WLR 3706.

2 *R v Central Criminal Court ex p AJD Holdings Ltd* [1992] Crim LR 669. The particularity required will depend upon the breadth of the investigation in issue, and the question of where the balance lies in an individual case will rarely be answered by reference to prior authority. A broad scope of an investigation may require a correspondingly broad power of search: *R (Glenn & Co (Essex)) v Revenue & Customs Commissioners* [2012] 1 Cr App R 22. For examples of unlawfully broad warrants, see *R (Anand) v Her Majesty's Revenue & Customs* [2012] EWHC 2989 (Admin); *R (Hoque) v City of London Magistrates' Court* [2013] EWHC 725 (Admin).

3 *R (Energy Financing Team) v Director of the SFO* [2006] 1 WLR 1316; *Power-Hynes v Norwich Magistrates' Court* [2009] EWHC 1512 (Admin). Authority to the contrary (*R (Fitzpatrick) v Chief Constable of Warwickshire* [1999] 1 WLR 564) has not been followed; *R (Anand) v HMRC* [2012] EWHC 2989 (Admin).

4 PACE, s 15(6). Specification in a schedule which is not provided to the occupier will lead to the warrant being quashed: *R (Global Cash & Carry Ltd.) v Birmingham Magistrates' Court* [2013] EWHC 528 (Admin),

5 *R (Energy Financing Team) v Director of the SFO* [2006] 1 WLR 1316; *Power-Hynes v Norwich Magistrates' Court* [2009] EWHC 1512 (Admin); *R (Anand) v HMRC* [2012] EWHC 2989 (Admin); *Van der Pijl v The Crown Court at Kingston* [2013] 1 WLR 3706, paras 51–67. Authority to the contrary (*R (Fitzpatrick) v Chief Constable of Warwickshire* [1999] 1 WLR 564) has not been followed. Cf. the approach in *R (Ahmed) v York Magistrates' Court* [2012] EWHC 3636 (Admin).

6 ibid, s 15(5).

7 ibid, s 15(5A).

8 ibid, s 16(3B).

A.7.402 S 16 contains procedural requirements for the conduct of searches.[1] Persons named on the warrant may accompany the constable.[2] A person so authorized has the same powers as the constable whom he accompanies in respect of the execution of the warrant, and the seizure of anything to which the warrant relates.[3] However, he may exercise those powers only in the company, and under the supervision, of a constable.[4]

1 See also Code B, issued under s 66 of PACE.
2 PACE, s 16(2). If a person not named on the warrant accompanies the constable in the execution of the warrant then the entry, search, and seizure will be unlawful: *Gross v Southwark Crown Court* [1999] QB 538 (presence of American investigator not named on the warrant unlawful). Therefore, if foreign investigators wish to be present then this must be made clear in the request and they should be named on the warrant.
3 ibid, s 16(2A).
4 ibid, s 16(2B).

A.7.403 The entry and search must take place within one month of the date of the warrant,[1] and must take place at a reasonable hour unless the constable executing it considers that this would frustrate the purpose of the search.[2] The constable must identify himself to the occupier (or other person present), produce the warrant, and supply him with a copy of it.[3] If no one is present then a copy of the warrant must be left at the premises.[4] S 16(8) provides that the search must be a search to the extent required for the purpose for which the warrant was issued.[5] It follows that if items are seized which fall outside the terms of the warrant then their seizure will be unlawful unless the items seized can properly be described as *de minimis*[6] or unless their seizure is permitted by s 19.[7]

1 ibid, s 16(3).
2 ibid, s 16(4).
3 ibid, s 16(5) and 16(6).
4 ibid, s 16(7).
5 The dominant purpose for execution (although not necessarily the timing of the execution) must be that for which the power of search has been conferred: *R v Southwark Crown Court ex p Bowles* [1998] AC 641; *R (Pearce) v Metropolitan Police Commissioner* [2013] EWCA Civ 866.
6 *R v Chief Constable of Warwickshire ex p Fitzpatrick* [1999] 1 WLR 564, 575; *R v Southwark Crown Court ex p Sorsky Defries* [1996] Crim LR 195; but cf *R v Chesterfield Justices ex p Bramley* [2000] QB 576 at 588 where these decisions were doubted on this point. Part 2 of the Criminal Justice and Police Act 2001 contains provisions allowing all the material to be seized for later examination and return of the privileged material to address the issues raised by *Bramley* – see *R (on the application of El Kurd) v Winchester Crown Court & anr* [2012] Crim LR 138.
7 The trial judgment of Poole J in *International Paper Converters v Chief Constable of the City of London Police* [2004] EWHC 957 (QB), paras 57–61, reviews the relationship between ss 16 and 19 PACE and concludes that a search that extends beyond the terms of the warrant and engages s 19 is not, by virtue of that, rendered unlawful by s 16(8). Having entered premises, the officers may search and seize pursuant to a warrant or may seize pursuant to their powers under s 19 of the Act. A search under the warrant is limited to the extent required for the purpose for which the warrant was issued. But an officer engaged in a search under a warrant may seize under s 19 if he has reasonable grounds for believing that an item has been obtained in consequence of the commission of an offence or if it is evidence in relation to an offence he is investigating or of any other offence. Even if items outside the warrant or s 19 are removed, that does not render the whole search unlawful. It is unlawful only in respect of those items. See also generally *R (Hicks) v Commissioner of Police of the Metropolis* [2012] EWHC 1947 (Admin), paras 228–243.

A.7.404 Once a circuit judge has made an *ex parte* order issuing a warrant pursuant to Schedule 1, para 12, he has no power to review or rescind the order, even if it can be shown that he made it on an erroneous basis, having been given inaccurate or incomplete information.[1] Instead, the aggrieved party must apply directly for judicial review.[2] In *Barclays Bank plc (Trading as Barclaycard) v Taylor*[3] the Court of Appeal held that, irrespective of whether a notice under Schedule 1 of PACE is defective, an access order once made, being valid on its face, is fully effective until set aside by due process; and that since a banker's duty of confidentiality to his client is qualified by the exception of disclosure under compulsion of law, a bank which complies with an access order is not thereby in breach of its duty to its client.[4] The same principles apply to search warrants generally.[5]

1 Whether under s 59 of the Criminal Justice and Police Act 2001 (*R (Goode) v Nottingham Crown Court* [2013] EWHC 1726 (Admin), para 51; *R (Chaudhary) v Bristol Crown* Court [2016] 1 WLR 631); or otherwise (*R v Liverpool Crown Court ex p Wimpey plc* [1991] COD 370).

2 *R (Goode) v Nottingham Crown Court* [2013] EWHC 1726 (Admin), para 51; Lees v Solihull Magistrates' Court [2013] EWHC 3779 (Admin), para 56; *Haralambous v St Albans Crown Court* [2018] UKSC 1, para 10.

3 [1989] 1 WLR 1066.

4 The court went on to say that since such an order could not be made by consent and the responsibility for deciding whether the access conditions were satisfied rested with the judge making the order, and since the public interest in assisting the police investigation of crime might be frustrated if the account holder knew of the application, it is not necessary for the purpose of giving business efficacy to the banker–client relationship to imply an obligation that the bank, in the absence of special circumstances known only to itself, should either oppose or probe the application or supporting evidence, or that it should inform its client of the application.

5 A warrant is 'valid unless and until it is quashed. Until quashed it remains a lawful authority and justification for any entry or seizure if such is in accordance with its terms': *AC v Nottingham Magistrates' Court* [2013] EWHC 3790 (Admin), para 25, citing *R (Goode) v Nottingham Crown Court* [2013] EWHC 1728 (Admin), para 52 and *McGrath v Chief Constable of the Royal Ulster Constabulary* [2001] 2 AC 731.

A.7.405 In *R (Bright) v Central Criminal Court* [2000] 1 WLR 662 the Divisional Court held that where the first set of access conditions in Schedule 1 is found to be fulfilled, the fact that compliance with the order by the person ordered to make production may involve him in incriminating himself is not per se a reason for not making an order.

(3) Use of the powers in Part 2 of the Police and Criminal Evidence Act 1984 following a request for mutual assistance

A.7.406 Having considered their domestic effect, the use of the Part 2 procedures in the mutual assistance context can now be examined. In summary, the territorial authority may under CICA 2003, s 13(1)(b) direct that a search warrant or production order[1] be applied for under s 16 of the Act.[2] S 16 provides that search warrants under Part 2 of PACE may be issued in respect of overseas criminal conduct provided that the condition of dual criminality is satisfied.

1 S 13(1)(b) in fact refers only to warrants and not orders. That was a legislative oversight and s 13(1)(b) should be read as if it did include power to direct that a production order should be applied for under PACE 1984, Sch 1: *R (Secretary of State for the Home Department) v Southwark Crown Court* [2014] 1 WLR 2529.

2 Note, however, that the question of whether material is likely to be relevant and of substantial value is to be assessed on a necessarily more circumscribed basis than if the warrant were being sought in aid of a

domestic prosecution or investigation. International MLA instruments operate on the basis of a high level of mutual trust between signatory states, and mini-trials to determine the degree of relevance of materials to a future trial in another state are not consistent with that principle. In general, assertions of relevance in an MLA request will be sufficient to trigger the UK's duty to obtain and submit the materials: *Van der Pijl v Secretary of State for the Home Department* [2014] EWHC 281 (Admin). Continuity evidence is capable of passing the test for relevance and materiality.

A.7.407 S 16(1) of the CICA 2003 provides that Part 2 of PACE is to have effect as if references to indictable offences in s 8 of and Schedule 1 to the Act included any conduct which constitutes an offence under the law of a country outside the UK, and would, if it occurred in England and Wales, constitute an indictable offence.[1]

[1] See CICA 2003 s 16(3) in relation to Northern Ireland. As with extradition, that dual criminality assessment requires an essentially factual rather than legal comparison, and does not require precise correlation of the elements of the respective offences. Where, therefore, on a fraud allegation, the equivalent German offence required no showing of dishonesty, but allegations of dishonesty ran through the factual allegations, the requirement was satisfied: *Brookfield Aviation International Ltd v Guildford Crown Court* [2015] EWHC 3465 (Admin).

A.7.408 But an application for a warrant or order by virtue of s 16(1) may be made only in pursuance of a direction given under s 13 (s 16(2)(a)), or if it is an application for a warrant or order under s 8 of, or Schedule 1 to, the Police and Criminal Evidence Act by a constable for the purposes of an investigation by an international joint investigation team of which he is a member (s 16(2)(b)).

A.7.409 An 'international joint investigation team' has the meaning given by s 88(7) of the Police Act 1996.[1] Thus, where the application has been made by the member of such a team, a direction by the Secretary of State need not have been given. S 16(2)(b) thus allows joint investigation teams to investigate cases of serious criminal activity with links to one or more Member State[2] in the UK.

[1] ie, any investigation team formed in accordance with any Framework Decision on joint investigation teams OJ L162/1, 20.6.02; the EU Convention on Mutual Assistance in Criminal Matters and its Protocol; or any international agreement to which the UK is a party and which is specified for the purposes of this s in an order made by the Secretary of State.

[2] This provision implements Art 13 of the EU Convention on Mutual Assistance in Criminal Matters (entitled 'Joint investigation teams'). Their purpose is to carry out joint investigations into crimes with cross-border elements, with a view to improving and speeding up the investigation of such crimes.

(4) Warrants under section 17 of the Crime (International Co-operation) Act 2003

A.7.410 S 17(1) of CICA 2003 provides that a JP may issue a warrant under s 17 if he is satisfied, on an application made by a constable, that criminal proceedings have been instituted against a person in a country outside the UK, or a person has been arrested in the course of a criminal investigation carried on there; the conduct constituting the offence which is the subject of the proceedings or investigation would, if it occurred in England and Wales constitute an indictable offence;[1] or there are reasonable grounds for suspecting that there is on premises in England and Wales[2] occupied or controlled by that person evidence relating to the offence.[3]

1 In Northern Ireland, an arrestable offence.
2 Or Northern Ireland.
3 As under s 16, assessment of relevance will be addressed primarily by reference to the content of, and assertions within, the MLA request: *Van der Pijl v Secretary of State for the Home Department* [2014] EWHC 281 (Admin).

A.7.411 A warrant under s 17 may authorize a constable to enter the premises in question and search the premises to the extent reasonably required for the purpose of discovering any evidence relating to the offence, and to seize and retain any evidence for which he is authorized to search.

A.7.412 By virtue of s 26(1) a court in England and Wales or Northern Ireland, or a JP, may not issue a warrant under s 17 in respect of any evidence unless the court or justice has reasonable grounds for believing that it does not consist of or include items subject to legal privilege.

A.7.413 A warrant issued under s 17 is subject to the safeguards in ss 15 and 16 of PACE. An application for a warrant under s 17(1) may be made only in pursuance of a direction given under s 13.

A.7.414 Article 10 of the Crime (International Co-operation) Act 2003 (Exercise of Functions) Order 2013[1] provides that any function conferred on a constable under s 17 may be exercised by an officer of Revenue and Customs where the Commissioners have given a direction under s 13 that an application be made for a search warrant.

1 SI 2013/2733.

(5) Giving the direction under the Crime (International Co-operation) Act 2003, section 13

A.7.415 Where the Secretary of State has made a direction under CICA 2003, s 13(1)(b) following a request for mutual assistance, one of four[1] forms of application may be made by either a constable or an officer of Revenue and Customs under ss 16–17:[2]

- an application for a search warrant under s 8 of PACE;
- an application for a production order under Schedule 1 of PACE;[3]
- an application for a search warrant under Schedule 1 of PACE, in each case, with the term indictable offence being read as including any conduct which is an offence under the law of a country or territory outside the UK and would constitute such an offence if it had occurred in the UK; or
- an application for a warrant under s 17.

1 *R v Central Criminal Court ex p Propend Finance Property Ltd* [1996] 2 Cr App R 26, 32.
2 Crime (International Co-operation) Act 2003 (Exercise of Functions) Order 2013 (SI 2013/2773).
3 S 13(1)(b) in fact refers only to warrants and not orders. That was a legislative oversight and s 13(1)(b) should be read as if it did include power to direct that a production order should be applied for under PACE 1984, Sch 1: *R (Secretary of State for the Home Department) v Southwark Crown Court* [2014] 1 WLR 2529.

A.7.416 In *R v Central Criminal Court ex p Propend Finance Property Ltd* [1996] 2 Cr App R 26 the Divisional Court considered whether the Secretary of State was required under the equivalent provision to s 16 in the Criminal Justice (International Co-operation) Act 1990 to specify in his direction what form of warrant or order should be obtained Laws J held that it should have done so, and that the failure to do so rendered the warrants unlawful:

> In our judgment, the Secretary of State has not only the responsibility of deciding whether assistance should be given to the requesting state; in our view he must also decide what assistance should so be given. S 7(4) authorizes only a unitary direction, specifying a particular form of application … It was submitted to us by [counsel for the Secretary of State] that the police possess an experience and expertise in the administration of the PACE procedures which the Secretary of State does not share. But he has specific responsibilities under the Act of 1984 to oversee certain processes by the police: see s 66. So that submission does not, in our judgment, assist the Secretary of State.[1]

[1] This passage was, however, doubted by Brooke LJ in an *obiter dicta* in *R v Southwark Crown Court ex p Gross*, Unreported, 24 July 1998 (CO 1759/98). He preferred a construction of s 7 which permitted the Secretary of State to leave it to the police to decide whether a production order or search warrant under Sch 1 of PACE should be obtained.

(v) Transmission of the evidence

A.7.417 Once the request has been executed and the evidence been obtained either in proceedings under CICA 2003, s 15 before a nominated court, by the SFO, or using the powers in s 16 and 17, the evidence may be transmitted to the requesting state either directly or indirectly.

A.7.418 In relation to proceedings before a nominated court, para 6(1) of Schedule 1 of the CICA 2003 provides that the evidence received by the court is to be given to the court or authority that made the request or to the territorial authority for forwarding to the court or authority that made the request. So far as may be necessary in order to comply with the request where the evidence consists of a document, the original or a copy is to be provided, and where it consists of any other article, the article itself, or a description, photograph, or other representation of it, is to be provided (para 6(2)).

A.7.419 By s 2(8A) of the Criminal Justice Act 1987, any evidence obtained by the Director for use by an overseas authority must be given to the overseas authority which requested it, or given to the Secretary of State for forwarding to that overseas authority. If the Director makes a direct transmission he will normally require the provision of an undertaking that the document or other information obtained will not be used other than in criminal prosecutions arising from the investigation set out in this letter of request, without the prior consent of the Secretary of State for the Home Department.

A.7.420 S 19(1) of CICA 2003 allows any evidence seized under ss 16–18 to be sent directly by a constable to the requesting court or authority, unless the requesting territory is not a party to the EU Convention on Mutual Legal Assistance on Criminal Matters, in which case the evidence will be sent to the territorial authority for forwarding to the requesting court or authority.[1]

[1] See Government Explanatory Notes to CICA 2003, para 65.

A.7.421 Art 11 of the Crime (International Co-operation) Act 2003 (Exercise of Functions) Order 2013[1] provides that any function conferred under s 19 on a constable in England and Wales or Northern Ireland must be exercised by an officer of Revenue and Customs instead of a constable where the evidence has been seized by an officer of Revenue and Customs under a search warrant or production order issued by virtue of s 16, or a search warrant issued under s 17. Art7 provides that the Commissioners may exercise the function under s 19 of forwarding evidence to the court or authority which made a request for assistance where that evidence has been obtained by an officer of Revenue and Customs under or by virtue of the 2013 Orders.

[1] SI 2013/2733.

A.7.422 Whilst the point is not free from doubt, it would appear that the Secretary of State or other territorial authority retains a discretion to transmit the evidence and that it could decline to do so if it would not be appropriate. Specifically, the Secretary of State is bound to act in accordance with the obligations of the Human Rights Act. Whilst in the absence of any objection from the persons affected the Secretary of State is entitled to forward the material received from the executing authority to the requesting state, where an objection is raised the Secretary of State should not forward the material until the question has been resolved.[1]

[1] *Gross v Southwark Crown Court*, Unreported, 24 July 1998 (CO/1759/98).

A.7.423 The representatives of the foreign state are permitted to have some limited access to the documentation prior to its transmission for bona fide purposes connected with the execution of the request, and no unlawful transmission takes place if they are merely permitted to see the documents or to take notes about them.[1]

[1] *R v Secretary of State for the Home Department ex p Fininvest Spa* [1997] 1 WLR 743, 757–8; *R v Central Criminal Court ex p Propend Property Ltd* [1996] 2 Cr App R 26, 32–3; *R v Southwark Crown Court ex p Sorsky Defries* [1996] COD 117.

(1) Use of the evidence in the requesting state

A.7.424 CICA 2003 does not on its face limit the use of the evidence to the reasons it is needed as listed in the request. However, once the evidence has been transmitted to the requesting state it is not free to use it as it wishes. Before transmission takes place, the UK Central Authority generally requires the requesting authority to provide an undertaking that the evidence will only be used for the purposes for which assistance was granted, that is, that no document or other information obtained will be used other than in the criminal prosecutions arising from the investigation set out in the letter of request without the prior consent of the Secretary of State.[1]

[1] Para 32(3) of the Harare Scheme contains a specific restriction to this effect. Some countries, eg Switzerland, have entered reservations to Art 2(b) of the European Convention on Mutual Assistance 1959 requiring such an undertaking before assistance will be given. The UK did not enter a reservation but does require an undertaking; cf CICA 2003, s 9 which provides a statutory limitation in respect of evidence obtained from abroad for use in the UK. See, generally, the discussion of the genesis of s 9 in *Crown Prosecution Service v Gohil* [2013] Fam 276.

A.7.425 This form of undertaking provides a form of 'specialty protection' analogous to that which exists for extradition defendants.

(vi) Hearing evidence from the UK by television or telephone link

A.7.426 Sections 30 and 31 of CICA 2003 introduce new measures to allow evidence of witnesses (not defendants) to be taken in the UK and transmitted by television or telephone to criminal proceedings being conducted abroad.

(1) Television links

A.7.427 S 30 applies where the Secretary of State receives a request from an authority mentioned in s 30(2) ('the external authority'), for a person in the UK to give evidence through a live television link in criminal proceedings before a court in a country outside the UK. For these purposes, criminal proceedings include any proceedings on an appeal before a court against a decision in administrative proceedings.

A.7.428 The authority referred to in s 30(2) is the authority in that country which appears to the Secretary of State to have the function of making requests of the kind to which this s applies.

A.7.429 Unless he considers it inappropriate to do so, the Secretary of State must by notice in writing nominate a court in the UK where the witness may be heard in the proceedings in question through a live television link (s 30(3)).

A.7.430 By s 30(4) anything done by the witness in the presence of the nominated court which, if it were done in proceedings before the court would constitute contempt of court, is to be treated for that purpose as done in proceedings before the court. Any statement made on oath by a witness giving evidence in pursuance of s 30 is to be treated for the purposes of s 1 of the Perjury Act 1911 as made in proceedings before the nominated court.

A.7.431 Part 1 of Schedule 2 (evidence given by television link) contains detailed provisions concerning evidence by television link. Subject to s 30(4) and (5) and the provisions of that Schedule, evidence given pursuant to this s is not to be treated for any purpose as evidence given in proceedings in the UK.

(2) Telephone links

A.7.432 S 31 applies where the Secretary of State receives a request, from an authority mentioned in s 31(2) ('the external authority') in a participating country, for a witness in the UK to give evidence by telephone in criminal proceedings before a court in that country. Criminal proceedings include any proceedings on an appeal before a court against a decision in administrative proceedings.

A.7.433 The authority mentioned in s 31(2) is the authority in that country which appears to the Secretary of State to have the function of making requests of the kind to which this s applies.

A.7.434 A request under s 31(1) must specify the court in the participating country; give the name and address of the witness; and state that the witness is willing to give evidence by telephone in the proceedings before that court (s 31(3)).

A.7.435 By s 31(4), unless he considers it inappropriate to do so, the Secretary of State must by notice in writing nominate a court in the UK where the witness may be heard in the proceedings in question by telephone.

A.7.436 Anything done by the witness in the presence of the nominated court which, if it were done in proceedings before the court would constitute contempt of court, is to be treated for that purpose as done in proceedings before the court. Any statement made on oath by a witness giving evidence in pursuance of this s is to be treated for the purposes of s 1 of the Perjury Act 1911 as made in proceedings before the nominated court (s 31(5)).

A.7.437 Part 2 of Schedule 2 contains detailed provisions concerning telephone link evidence.

A.7.438 Subject to s 31(5) and (6) and the provisions of Schedule 2, evidence given in pursuance of s 31 is not to be treated for any purpose as evidence given in proceedings in the UK.

(3) Overseas requests to freeze evidence in the UK

A.7.439 This section examines the way in which overseas orders to freeze evidence located in the UK can be received and executed in the UK. CICA 2003, ss 20–27 give effect to the principle of mutual recognition of overseas freezing orders, and implements in part the Framework Decision Council Framework Decision on the execution in the EU of orders freezing property or evidence (referred to in this s as the Freezing Framework Decision).[1]

[1] 2003/577/JHA, 22 July 2003; OJ L 196, 2.08.2003. See para 66 of the Explanatory Notes to CICA 2003. See generally *A v Director of Public Prosecutions* [2017] 1 WLR 713, CA: a challenge to the substantive reasons for making an overseas restraint order may only be made in the courts of the requesting state and is not justiciable in the UK courts.

A.7.440 Schedule 4 of CICA 2003 contains amendments to Schedule 4 of the Terrorism Act 2000 which provide for mutual recognition of freezing orders in relation to terrorist property.

(vii) Receiving an overseas freezing order

A.7.441 S 20 of CICA 2003 sets out the conditions that must be met before the territorial authority in the UK, namely the Secretary of State or the Lord Advocate, sends the overseas freezing order to a court to be considered for execution under s 21.

A.7.442 S 20(1) provides that s 21 applies where an overseas freezing order made by a court or authority in a 'participating country'[1] is received from the court or authority which made or confirmed the order by the territorial authority for the part of the UK in which the evidence to which the order relates is situated.

1 By CICA 2003, s 51(2), a participating country means Denmark or the Republic of Ireland and any other country designated by an order made by the Secretary of State or, in relation to Scotland, the Scottish Ministers. Existing Orders made under s 51(2) are set out at n 156. paraparaparaparapara

A.7.443 An overseas freezing order is an order for protecting, pending its transfer to the participating country, evidence which is in the UK, and may be used in any proceedings or investigation in the participating country, and in respect of which the following requirements are met.

- the order must have been made by a court exercising criminal jurisdiction in the country; a prosecuting authority in the country; or any other authority in the country which appears to the territorial authority to have the function of making such orders (s 20(3));[1]
- the order must relate to criminal proceedings instituted in the participating country in respect of a listed offence,[2] or a criminal investigation being carried on there into such an offence (s 20(4));
- the order must be accompanied by a certificate which gives the specified information;[3] but a certificate may be treated as giving any specified information which is not given in it if the territorial authority has the information in question. References in Chapter 2 of Part 1 of CICA 2003 to an overseas freezing order include its accompanying certificate (s 20(5));
- the certificate must be signed by or on behalf of the court or authority which made or confirmed the order; include a statement as to the accuracy of the information given in it; if it is not in English, include a translation of it into English (or, if appropriate, Welsh) (s 20(6));
- the order must be accompanied by a request for the evidence to be sent to a court or authority mentioned in s 13(2), unless the certificate indicates when such a request is expected to be made (s 20(7)).

1 In relation to clause 20(3)(c) of the Bill (now CICA 2003, s 20(3)(c)) the Attorney-General said during the Committee stage in the House of Lords (see HL Deb 23 January 2003, GC84 and 85): '… the purpose of Clause 20(3)(c) is to cover all judicial authorities in other EU countries. I say "other EU countries" because that is the limit on the application of this provision. EU judicial authorities are designated under the 1959 Council of Europe convention, so they are clearly identified … For many years, we have been able to execute requests for mutual legal assistance, including for search and seizure, by authorities of this type. S 7(4)(b) of the 1990 Act includes that type of person. That is re-enacted by Clause 13(2)(b) of the Bill. So the provision merely applies to the new concept of the freezing order the same approach that has already been adopted in relation to mutual legal assistance. It has not caused any difficulties in practice. It must be available for the enforcement of overseas freezing orders.'

2 A listed offence means an offence described in Art 3(2) of the Council Framework Decision, or an offence prescribed or of a description prescribed by an order made by the Secretary of State (s 28(5)).

3 By s 28(7), this is any information required to be given by the form of certificate annexed to the Council Framework Decision, or any information prescribed by an order made by the Secretary of State. The standard form of certificate annexed to the Council Framework Decision includes: details of the issuing judicial authority; details of the authority competent to enforce the freezing order in the issuing state; details of the central authority responsible for transmission and reception of the freezing order (UK and Ireland only); details about the freezing order itself (date, purpose, executing procedure, for example); information about the evidence subject to the overseas freezing order (a precise description of the

property and its last known location); details about the identity of the natural or legal person suspected of the offence (or convicted thereof); details as to whether the executing state should confiscate, secure and/or transfer the evidence to the issuing state; a description of the relevant grounds for the freezing order; and a summary of facts as known to the issuing judicial authority as well as the legal remedies against the freezing order for interested parties, including bona fide third parties, available in the issuing state.

(viii) Nominating a court

A.7.444 S 21(1)(a) of CICA 2003 provides that if the conditions of s 20 are met the territorial authority must nominate a court in England and Wales or (as the case may be) Northern Ireland to give effect to the overseas freezing order; send a copy of the overseas freezing order to the nominated court and to the chief officer of police for the area in which the evidence is situated; and tell the chief officer which court has been nominated.

A.7.445 The nominated court is to consider the overseas freezing order on its own initiative within a period prescribed by rules of court (s 21(3)). Before giving effect to the overseas freezing order, the nominated court must give the chief officer of police an opportunity to be heard (s 21(4)).

A.7.446 The court may decide not to give effect to the overseas freezing order only if, in its opinion, one of the following conditions is met (s 21(4)). The first condition is that, if the person whose conduct is in question were charged in the participating country with the offence to which the overseas freezing order relates or in the UK with a corresponding offence, he would be entitled to be discharged under any rule of law relating to previous acquittal or conviction (s 21(6)). The second condition is that giving effect to the overseas freezing order would be incompatible with any of the Convention rights within the meaning of the Human Rights Act 1998 (s 21(7)).

(ix) Giving effect to the overseas freezing order

A.7.447 S 22 of CICA 2003 provides the mechanism whereby the nominated court gives effect to the overseas freezing order.

A.7.448 S 22(1) provides that the nominated court is to give effect to the overseas freezing order by issuing a warrant authorizing a constable to enter the premises to which the overseas freezing order relates and search the premises to the extent reasonably required for the purpose of discovering any evidence to which the order relates, and to seize and retain any evidence for which he is authorized to search. But, in relation to England and Wales and Northern Ireland, so far as the overseas freezing order relates to excluded material or special procedure material[1] the court is to give effect to the order by making a production order (s 22(2)).

[1] As defined in CICA 2003, s 28(3).

A.7.449 S 26(1) provides that the court may not issue a warrant under s 22 in respect of any evidence unless the court has reasonable grounds for believing that it does not consist of or include items subject to legal privilege, excluded material, or special procedure material. S 26(1) does not prevent a warrant under s 22(5) being issued for special procedure material or excluded material.

A.7.450–500 A production order is an order for the person who appears to the court to be in possession of the material to produce it to a constable before the end of the period of seven days beginning with the date of the production order or such longer period as the production order may specify. The constable may take away any material produced to him under a production order; and the material is to be treated for the purposes of s 21 of PACE as if it had been seized by the constable (s 22(3)).

A.7.501 If a person fails to comply with a production order, the court may (whether or not it deals with the matter as a contempt of court) issue a warrant under s 22(1) in respect of the material to which the production order relates (s 22(5)).

A.7.502 S 23 provides that the nominated court may postpone giving effect to an overseas freezing order in respect of any evidence in order to avoid prejudicing a criminal investigation which is taking place in the UK or, if under an order made by a court in criminal proceedings in the UK, the evidence may not be removed from the UK.

(x) Evidence seized under the order

A.7.503 S 24(1) of CICA 2003 provides that any evidence seized by or produced to the constable under s 22 is to be retained by him until he is given a notice under s 24(2) or authorized to release it under s 25(2).

A.7.504 By s 24(2), if the overseas freezing order was accompanied by a request for the evidence to be sent to a court or authority mentioned in s 13(2), or the territorial authority subsequently receives such a request, the territorial authority may by notice require the constable to send the evidence to the court or authority that made the request.

(xi) Release of evidence held under the order

A.7.505 On an application made by a person mentioned in CICA 2003, s 25(1), the nominated court may authorize the release of any evidence retained by a constable under s 24 if, in its opinion the condition in s 21(6) or (7) is met (double jeopardy and human rights), or the overseas freezing order has ceased to have effect in the participating country.

A.7.506 In relation to England and Wales and Northern Ireland, the persons who may make such an application are the chief officer of police to whom a copy of the order was sent, the constable, or any other person affected by the order (s 25(2)).

A.7.507 If the territorial authority decides not to give a notice under s 24(2) in respect of any evidence retained by a constable under that section, the authority must give the constable a notice authorising him to release the evidence (s 25(4)).

(c) Requests for UK bank transaction information

A.7.508 Chapter 4 of Part 1 of CICA 2003 provides for the disclosure of banking information in connection with criminal investigations in EU Member States or other designated states.[1] Chapter 4 implements the 2001 Protocol to the EU Convention on Mutual Assistance in Criminal Matters.[2] The purpose of the Protocol is to tackle serious crime, in particular economic crime and money laundering. Countries participating in the 2001 Protocol are obliged to identify, provide information about, and monitor bank accounts at the request of other participating countries, subject to certain restrictions and conditions which are explained in more detail below. The 2001 Protocol obliges participating countries to establish mechanisms whereby they can provide the stipulated information. The manner in which they do so is left to individual participating countries.

1 CICA 2003, ss 37–41 apply to Scotland. CICA 2003, ss 32–36 came into force on 1 November 2006: Crime (International Co-operation) Act 2003 (Commencement No 3) Order 2006 (SI 2006/2811).

2 OJ C 326, 21.11.2001, 1. See also the Explanatory report to the Protocol to the 2000 Convention on mutual assistance in criminal matters between the Member States of the European Union, OJ C 257, 24.10.2002, p 1.

(i) Request for customer information from a UK financial institution

(1) Receipt of request

A.7.509 CICA 2003, s 32 applies where the Secretary of State receives a request from an authority mentioned in s 32(2) for customer information to be obtained in relation to a person who appears to him to be subject to an investigation in a participating country[1] into serious criminal conduct.

1 A participating country means Denmark or the Republic of Ireland, and any other country designated by an order made by the Secretary of State or, in relation to Scotland, the Scottish Ministers: CICA 2003, s 51(2). Existing Orders made under s 51(2) are set out at n 156.

A.7.510 The authority mentioned in s 32(2) is the authority in a participating country which appears to the Secretary of State to have the function of making requests of the kind to which this s applies.

A.7.511 After receiving a request the Secretary of State may direct a senior police officer[1] to apply, or arrange for a constable to apply, for a customer information order; or direct a senior customs officer[2] to apply, or arrange for a customs officer to apply, for such an order (s 32(3)).[3] During the debate on the Crime (International Co-operation) Bill the Minister said:

> One of the matters that the Secretary of State will take into account will be whether the request contains the information specified in Article 1 of the protocol, in particular the conditions in Article 1(4). That includes, for example, the requirement that the requesting authority state why it is considered that the requested information is likely to be of substantial value to the investigation. If that information is not given, refusal may follow. The test is the same as one of the tests under domestic law in PACE.[4] We are confident, therefore, that we will not be allowing fishing expeditions.

1 ie, a police officer who is not below the rank of superintendent: CICA 2003, s 46(1).

2 ie, a customs officer who is not below the grade designated by the Commissioners of Customs and Excise as equivalent to the rank of superintendent: CICA 2003, s 46(1).

3 HL Deb 27 January 2003, cc 128GC.

4 The question of whether material is likely to be relevant and of substantial value is to be assessed on a necessarily more circumscribed basis than if the warrant were being sought in aid of a domestic prosecution or investigation. International MLA instruments operate on the basis of a high level of mutual trust between signatory states, and mini-trials to determine the degree of relevance of materials to a future trial in another state are not consistent with that principle. In general, assertions of relevance in an MLA request will be sufficient to trigger the UK's duty to obtain and submit the materials: *Van der Pijl v Secretary of State for the Home Department* [2014] EWHC 281 (Admin). Continuity evidence is capable of passing the test for relevance and materiality.

A.7.512 S 32(4) defines a customer information order to be an order made by a judge[1] that a financial institution[2] specified in the application for the order must, on being required to do so by notice in writing given by the applicant for the order, provide any such customer information as it has relating to the person specified in the application.

1 ie in England and Wales, a judge entitled to exercise the jurisdiction of the Crown Court: CICA 2003, s 46(5)(a).

2 CICA 2003, s 46(4) defines a 'financial institution' to be a person who is carrying on business in the regulated sector, and in relation to a customer information order or an account monitoring order, includes a person who was carrying on business in the regulated sector at a time which is the time to which any requirement for him to provide information under the order is to relate. 'Business in the regulated sector' is to be interpreted in accordance with Sch 9 to POCA.

A.7.513 A financial institution which is required to provide information under a customer information order must provide the information to the applicant for the order in such manner, and at or by such time, as the applicant requires (s 32(5)). A customer information order has effect in spite of any restriction on the disclosure of information (however imposed) (s 32(7)). Thus a financial institution may lawfully disclose information under a customer information order in spite of the duty of confidentiality it owes to the account holder.

A.7.514 'Customer information' is defined in s 32(6) by reference to the definition of that term in POCA. S 32(6) of CICA 2003 provides that s 364 of POCA (meaning of customer information), except s 364(2)(f) and (3)(i), has effect for the purposes of s 32 as if it were included in Chapter 2 of Part 8 of POCA. S 364(1) provides that 'customer information', in relation to a person and a financial institution, is information whether the person holds, or has held, an account or accounts or any safe deposit box at the financial institution (whether solely or jointly with another) and (if so) information as to the matters specified in s 364(2) if the person is an individual; and the matters specified in s 364(3) if the person is a company or limited liability partnership or a similar body incorporated or otherwise established outside the UK.

A.7.515 Customer information obtained in pursuance of a customer information order is to be given to the Secretary of State and sent by him to the authority which made the request (s 32(8)).

A.7.516 It is an offence for a financial institution to fail to comply with a customer information order. S 34(1) provides that a financial institution is guilty of an offence if without reasonable excuse it fails to comply with a requirement imposed on it under a customer information order. A financial institution guilty of an offence under s 34(1) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

A.7.517 A financial institution is also guilty of an offence if, in purported compliance with a customer information order, it makes a statement which it knows to be false or misleading in a material particular, or recklessly makes a statement which is false or misleading in a material particular. A financial institution guilty of an offence under s 34(3) is liable, on summary conviction, to a fine not exceeding the statutory maximum, or on conviction on indictment, to a fine.

(2) Making, varying, and discharging a customer information order

A.7.518 A judge may make a customer information order, on an application made to him pursuant to a direction under s 32(3), if he is satisfied that the person specified in the application is subject to an investigation in the country in question; the investigation concerns conduct which is serious criminal conduct;[1] the conduct constitutes an offence in England and Wales or (as the case may be) Northern Ireland, or would do were it to occur there; and the order is sought for the purposes of the investigation (s 33(1)).

1 CICA 2003, s 46(3) provides that serious criminal conduct means conduct which constitutes an offence to which Art 1(3) of the 2001 Protocol applies, or an offence specified in an order made by the Secretary of State or, in relation to Scotland, the Scottish Ministers for the purpose of giving effect to any decision of the Council of the EU under Art 1(6). Article 1(3) of the Protocol includes inter alia offences which are punishable by a maximum term of imprisonment of at least four years in the requesting Member State and two years in the requested state.

A.7.519 The application may be made *ex parte* to a judge in chambers (s 33(2)). The application may specify: all financial institutions; a description, or particular descriptions, of financial institutions; or a particular financial institution or particular financial institutions (s 33(3)).

A.7.520 The court may discharge or vary a customer information order on an application made by the person who applied for the order, a senior police officer, a constable authorized by a senior police officer to make the application, a senior customs officer, or a customs officer authorized by a senior customs officer to make the application (s 33(4)).

(ii) Requests to the UK to monitor bank accounts

A.7.521 Sections 35 and 36 implement Art 3 of the 2001 Protocol in relation to incoming requests for account monitoring orders. Art 3 provides for requests to be made for a specified bank account to be monitored during a specified period of time. Such a request might be made subsequent to an Art 1 request for bank details or in cases where the investigator already has the details of the relevant account. Account monitoring procedures were introduced in the UK under the Proceeds of Crime Act 2002,[1] but separate provision is required in this Act to ensure that the UK can respond to all requests that meet the requirements of the 2001 Protocol, which has a wider scope than POCA.

1 See POCA, s 370.

(1) Request for an account monitoring order

A.7.522 S 35 of CICA 2003 applies where the Secretary of State receives a request from an authority mentioned in s 35(2) for account information to be obtained in relation to an investigation in a participating country[1] into criminal conduct.

1 A participating country means Denmark or the Republic of Ireland and any other country designated by an order made by the Secretary of State or, in relation to Scotland, the Scottish Ministers.: CICA 2003, s 51(2). For existing Orders made under s 51(2), see n 156.

A.7.523 The authority referred to in s 35(2) is the authority in that country which appears to the Secretary of State to have the function of making requests of the kind to which this s applies.

A.7.524 The Secretary of State may direct a senior police officer[1] to apply, or arrange for a constable to apply, for an account monitoring order; or direct a senior customs officer[2] to apply, or arrange for a customs officer to apply, for such an order.

1 ie, a police officer who is not below the rank of superintendent: CICA 2003, s 46(1).
2 ie, a customs officer who is not below the grade designated by the Commissioners of Customs and Excise as equivalent to the rank of superintendent: CICA 2003, s 46(1).

A.7.525 An account monitoring order is an order made by a judge that a financial institution[1] specified in the application for the order must, for the period stated in the order,[2] provide account information of the description specified in the order to the applicant in the manner, and at or by the time or times, stated in the order (s 35(4)). An account monitoring order has effect in spite of any restriction on the disclosure of information (however imposed) and so overrides the institution's duties of confidentiality (s 35(6)).

1 CICA 2003, s 46(4) defines a 'financial institution' to be a person who is carrying on business in the regulated sector, and in relation to a customer information order or an account monitoring order, includes a person who was carrying on business in the regulated sector at a time which is the time to which any requirement for him to provide information under the order is to relate. 'Business in the regulated sector' is to be interpreted in accordance with Sch 9 to POCA.
2 In relation to this period the Government's Explanatory Notes to CICA 2003, para 98 comment: 'Article 3(3) of the 2001 Protocol provides that the order shall be made with due regard for the national law of the requested Member State. Under the Proceeds of Crime Act 2002, account monitoring orders may be made for a period of up to 90 days and the same restriction will apply to requests under the 2001

Protocol. No limit is stated because the arrangements will be made between the relevant authorities on a case by case basis, as provided for in article 3(4) of the 2001 Protocol.'

A.7.526 Account information is information relating to an account or accounts held at the financial institution specified in the application by the person so specified (whether solely or jointly with another) (s 35(5)).

A.7.527 Account information obtained in pursuance of an account monitoring order is to be given to the Secretary of State and sent by him to the authority which made the request (s 35(7)).

(2) Making, varying, or discharging account monitoring orders

A.7.528 CICA 2003, S 36(1) provides that a judge may make an account monitoring order, on an application made to him in pursuance of a direction under s 35(3), if he is satisfied that there is an investigation in the country in question into criminal conduct, and the order is sought for the purposes of the investigation.

A.7.529 The application may be made *ex parte* to a judge in chambers (s 36(2)).

A.7.530 The application may specify information relating to all accounts held by the person specified in the application for the order at the financial institution so specified; a particular description, or particular descriptions, of accounts so held; or a particular account, or particular accounts, so held (s 36(3)).

A.7.531 The court may discharge or vary an account monitoring order on an application made by the person who applied for the order; a senior police officer, a constable authorized by a senior police officer to make the application, a senior customs officer, or a customs officer authorized by a senior customs officer to make the application (s 36(4)).

A.7.532 Account monitoring orders have effect as if they were orders of the court (s 36(5)).

(3) The offence of disclosure in relation to customer information orders and account monitoring orders

A.7.533 In order to be effective it is obvious that customer information orders and account monitoring orders must remain confidential. S 42 of CICA 2003 makes it an offence for a financial institution or its employees to disclose information about these orders.

A.7.534 S 42 applies where a financial institution is specified in a customer information order or account monitoring order made in any part of the UK, or the Secretary of State or the Lord Advocate receives a request under s 13 for evidence to be obtained from a financial institution in connection with the investigation of an offence in reliance on Article 2 (requests for information on banking transactions) of the 2001 Protocol.

A.7.535 If the institution, or an employee of the institution, discloses any of the following information, the institution or (as the case may be) the employee is guilty of an offence (s 42(2)). That information is that the request to obtain customer information or account information, or the request mentioned in s 42(1)(b), has been received; that the investigation to which the request relates is being carried out; or that, in pursuance of the request, information has been given to the authority which made the request.

A.7.536 An institution guilty of an offence under s 42 is liable on summary conviction to a fine not exceeding the statutory maximum, and on conviction on indictment to a fine.

A.7.537 Any other person guilty of an offence under this s is liable on summary conviction to imprisonment for a term not exceeding six months, or to a fine not exceeding the statutory maximum, or to both, and on conviction on indictment to imprisonment for a term not exceeding five years, or to a fine, or to both.

D. Mutual Legal Assistance in Relation to Restraint and Confiscation

(a) Introduction

A.7.538 The statutory provisions analysed in this section give effect to the UK's international obligations to assist other states in relation to restraint and confiscation of the proceeds of crime.[1] Specific powers relating to the gathering of evidence for use in confiscation matters are also considered in this section.[2] General powers relating to the gathering of evidence and information including banking information have been considered above in the context of mutual assistance in the provision of evidence.[3]

[1] See in particular the European Convention on Laundering, Search Seizure and Confiscation of the Proceeds of Crime (CETS 141; European Convention on Mutual Assistance in Criminal Matters (CETS 30); the EU Convention on Mutual Assistance in Criminal Matters (2000/C197/01) and the Council Framework Decision of 26 June 2001 on Money Laundering, the Identification, Tracing, Freezing, Seizing and Confiscation of Instrumentalities and the Proceeds of Crime (OJ 2001 L182/1).

[2] See paras A.7.608 and A.7.714.

[3] A number of general powers for requesting evidence from overseas are contained in Chapter 2 of Pt 1 of CICA 2003. Sections 43–45 of CICA 2003 permit UK judicial authorities to make requests for banking information to foreign states at the request of designated prosecuting authorities in cases of serious criminal conduct.

A.7.539 The relevant statutory provisions are contained in both primary and secondary legislation. Part 2 of POCA contains provisions which allow requests for assistance to be made to foreign states by prosecutors in connection with restraint and confiscation.[1] Part 11 of POCA is entitled 'Co-operation' and contains enabling provisions for the making of subordinate legislation for the freezing and realization of the proceeds of crime at the request of foreign states,[2] and for the enforcement of orders in the different parts of the UK.[3]

1 The Asset Recovery Agency's functions were transferred to SOCA in April 2008: see Serious Crime Act 2007, s 74. SOCA's functions were transferred to the NCA in 2013: see Crime and Courts Act 2013.
2 POCA 2002, s 444. SOCA's functions under s 444 were transferred to the NCA in 2013: see Crime and Courts Act 2013, Sch 8, para 149.
3 POCA 2002, s 443.

A.7.540 Three orders have been made using the powers in Part 11 of POCA that are of particular relevance to this section:

- in relation to requests from foreign states, the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005[1] (referred to in this chapter as the POCA Order) came into force on 1 January 2006;
- within the different parts of the UK, the relevant orders are the Proceeds of Crime Act 2002 (Enforcement in different parts of the United Kingdom) Order 2002[2] and the Proceeds of Crime Act 2002 (Investigations in different parts of the United Kingdom) Order 2003.[3]

1 SI 2005/3181, as amended by the Proceeds of Crime Act 2002 (External Requests and Orders) (Amendment) Order 2008 (SI 2008/302).
2 SI 2002/3133.
3 SI 2003/425, as amended by Proceeds of Crime Act 2002 (Investigations in Different Parts of the United Kingdom) (Amendment) Order 2008 (SI 2008/298).

(b) Requests by the UK for assistance in relation to restraint and confiscation

A.7.541 This section considers the powers available to prosecuting authorities in the UK to seek the assistance of foreign states in relation to restraint and confiscation orders made in the UK.

(i) Requests by the UK for assistance in restraining property abroad and enforcing confiscation orders

A.7.542 The confiscation provisions of Parts 2–4 of POCA 2002 apply to all of the defendant's property wherever it happens to be situated.[1] It follows that assistance may be required from foreign states in order to preserve the defendant's property to prevent it from being dissipated prior to confiscation.[2] The High Court can also order the defendant to repatriate his assets held abroad,[3] and assistance from foreign states may also be needed in order to facilitate this process.

1 POCA 2002, s 84(1).
2 *Perry v Serious Organised Crime Agency* [2013] 1 AC 182, paras 38, 72, 116. The risk of dissipation may be inferred from the nature of the offence alleged: see *VTB Capital plc v Nutrietek International Corp* [2012] 2 Lloyd's Rep 313, paras 176–178; *AkcinÉ BendrovÉ Bankas Snoras (In Bankruptcy) v Antonov* [2013] EWHC 131 (Comm), paras 65–67.
3 *Director of Public Prosecutions v Scarlett* [2000] 1 WLR 515.

A.7.543 Where the UK requires assistance from a foreign state then a letter of request may be sent under CICA 2003, s 7. In addition, a prosecutor may make a request for assistance under POCA, s 74 (or in the case of Scotland, s 141 and Northern Ireland, s 222).[1] Assistance in investigations often also takes place informally between police forces via Interpol.[2] No authority is required under English law for a person to request information from another

person anywhere in the world.[3] The extent to which the foreign state will be able to provide the assistance sought will depend upon its domestic law.

1 *Perry v Serious Organised Crime Agency* [2013] 1 AC 182, paras 38, 72, 116.
2 *R (Akarcay) v Chief Constable of West Yorkshire* [2017] EWHC 159 (Admin).
3 *Perry v Serious Organised Crime Agency* [2013] 1 AC 182, para 94.

A.7.544 Part 2 of POCA is entitled 'Confiscation: England and Wales'. S 74 is entitled 'Enforcement abroad' and sets out the conditions which must be satisfied before a request for assistance in the freezing and realization of property abroad may be made by authorities in England and Wales to jurisdictions outside the UK. It applies if: any of the conditions in s 40 is satisfied; the prosecutor believes that realisable property is situated in a country or territory outside the UK (the receiving country); and the prosecutor sends a 'request for assistance' to the Secretary of State with a view to it being forwarded under s 74.

A.7.545 In a case where no confiscation order has been made, a request for assistance is a request to the government of the receiving country to secure that any person is prohibited from dealing with realisable property (s 74(2)). In a case where a confiscation order has been made and has not been satisfied, discharged, or quashed, a request for assistance is a request to the government of the receiving country to secure that any person is prohibited from dealing with realizable property; that realizable property is realized; and that the proceeds are applied in accordance with the law of the receiving country (s 74(3)).

A.7.546 S 74(4) provides that no request for assistance may be made for the purposes of s 74 in a case where a confiscation order has been made and has been satisfied, discharged, or quashed.

A.7.547 If the Secretary of State believes it is appropriate to do so then, under s 74(5), he may forward the request for assistance to the government of the receiving country.

A.7.548 If property is realized in pursuance of a request under s 74(3) the amount ordered to be paid under the confiscation order must be taken to be reduced by an amount equal to the proceeds of realization. A certificate purporting to be issued by or on behalf of the requested government is admissible as evidence of the facts it states if it states: that property has been realized in pursuance of a request under s 74(3); the date of realization; and the proceeds of realization (see s 74(7)).

(1) The conditions in the Police and Criminal Evidence Act 1984, section 40

A.7.549 S 40 of POCA 2002 sets out the conditions which need to be satisfied before a restraint order can be made by the Crown Court. If any of these conditions is satisfied then the prosecutor may seek the assistance of a foreign state under POCA, s 74. S 40(1) provides that the Crown Court may exercise the powers conferred by s 41 if any of the following conditions is satisfied.

A.7.550–600 The first condition is that a criminal investigation has been started in England and Wales with regard to an offence, and there are reasonable grounds to suspect that the alleged offender has benefited from his criminal conduct (s 40(2), as amended).

A.7.601 The second condition is that proceedings for an offence have been started in England and Wales and not concluded, and there is reasonable cause to believe that the defendant has benefited from his criminal conduct (s 40(3)). The second condition is not satisfied if the court believes that there has been undue delay in continuing the proceedings, or the prosecutor does not intend to proceed (s 40(7)).

A.7.602 The third condition is that an application by the prosecutor has been made under ss 19, 20, 27, or 28 and not concluded, or the court believes that such an application is to be made, and there is reasonable cause to believe that the defendant has benefited from his criminal conduct (s 40(4)).

A.7.603 The fourth condition is that an application by the prosecutor has been made under s 21 and not concluded, or the court believes that such an application is to be made, and there is reasonable cause to believe that the court will decide under that s that the amount found under the new calculation of the defendant's benefit exceeds the relevant amount (as defined in that section) (s 40(5)).

A.7.604 The fifth condition is that an application by the prosecutor has been made under s 22 and not concluded, or the court believes that such an application is to be made, and there is reasonable cause to believe that the court will decide under that s that the amount found under the new calculation of the available amount exceeds the relevant amount (as defined in that section) (s 40(6)).

A.7.605 If an application mentioned in the third, fourth, or fifth condition has been made the condition is not satisfied if the court believes that there has been undue delay in continuing the application, or the prosecutor does not intend to proceed (s 40(8)).

(2) Temporal limitations in respect of requests for assistance

A.7.606 Art 5 of the Proceeds of Crime Act 2002 (Commencement No 5, Transitional Provisions, Savings and Amendment) Order 2003[1] provides that s 41 (restraint orders) and s 74 (enforcement abroad) of POCA shall not have effect where the powers in those sections would otherwise be exercisable by virtue of a condition in s 40(2) or s 40(3) of POCA being satisfied, and the offence mentioned in s 40(2)(a) or s 40(3)(a), as the case may be, was committed before 24 March 2003.

[1] SI 2003/333.

(3) Contents of the request

A.7.607 Letters of request for the restraint of property should include, *inter alia*, the following information:[1]

- name, address, nationality, date and place of birth and present location of the suspect(s) or defendants whose criminal conduct has given rise to anticipated confiscation or forfeiture proceedings;

- details of the ongoing (not concluded) criminal investigation into an acquisitive crime or money laundering or proceedings in the requesting state;
- the material facts of the case—including any defence or explanation put forward by the defendant/suspect, any facts that have come to light after the restraint order was made. This will enable the court to decide whether to maintain or discharge the restraint order;
- confirmation that there is reasonable cause to believe that the defendant/accused named in the request has benefited (by obtaining money or other property) from his criminal conduct;
- an explanation as to why there are reasonable grounds to believe that the property may be needed to satisfy an external order which has been or which may be made;
- details of why the order is necessary—including an explanation that will enable the court to consider whether there is a real risk that the identified property will be dissipated if no order is made;
- details of the property to be restrained in the UK, the persons holding it and the link between the suspect and the property (this is important if the property to be restrained is held in the name of a third party such as a company or another person;
- where applicable, details of any court orders already made in the UK against the defendant in respect of his or her property. If any court order has been made a duly authenticated copy should be included with the request.

[1] MLA Guidelines, p 31.

(ii) Requests for assistance in evidence gathering in connection with potential restraint and confiscation

A.7.608–611 S 7 of CICA 2003 allows prosecuting authorities to seek the assistance of foreign states in connection with the provision of evidence. Requests to foreign states for banking information may also be made under CICA 2003, ss 43 and 44.

(c) Foreign requests to the UK for assistance with restraint and confiscation

(i) Introduction

A.7.612 The UK can provide assistance in enforcing foreign forfeiture and confiscation orders in respect of assets held in the UK. The UK is also able to restrain assets at the request of foreign states.

A.7.613 Prior to the coming into force of the POCA Order, foreign requests for assistance in restraint and confiscation matters were dealt with by different statutory regimes depending upon whether the request related to a drugs offence or a non-drugs offence.[1] The POCA Order simplifies the law by providing a single scheme for the enforcement of foreign confiscation orders and the provision of assistance in obtaining restraint orders.

[1] Drug Trafficking Act 1994 (Designated Countries and Territories) Order 1996, SI 1996/2880; Criminal Justice Act 1988 (Designated Countries and Territories) Order 1991, SI 1991/2873.

A.7.614 Whereas under the previous statutory regimes applications for restraint orders at the request of foreign states and the enforcement or overseas confiscation orders were made to the High Court, under the POCA Order the application is made to the Crown Court.

(ii) Commencement and temporal scope of the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005

A.7.615 The POCA Order came into force on 1 January 2006. From that date, requests to the UK for assistance in restraint and confiscation matters have been dealt with according to its terms.[1]

[1] See *Perry v Serious Organised Crime Agency* [2013] 1 AC 182, paras 58–64, 134–135.

A.7.616 Art 8 of the POCA Order provides that the Crown Court may make a restraint order if either of the conditions in Art 7 is satisfied. Art 7(4) of the POCA Order provides that in determining whether these conditions are satisfied, the court must have regard to the definitions in s 447(1), (4)–(8), and (11) of POCA. S 447(8) of POCA defines 'criminal conduct' to include conduct that is criminal in the UK and conduct which would be criminal if it had been committed in the UK.

A.7.617 It follows that the Crown Court can make a restraint order under the POCA Order at the request of a foreign state provided that the conduct alleged would have been criminal in the UK at the time it was committed. Unlike in the case of domestic restraint and confiscation orders made under Part 2 of POCA, the POCA Order is not restricted to offences committed after 24 March 2003, or after the date it came into force, because it does not contain any equivalent of Arts 3 and 5 of the Proceeds of Crime Act 2002 (Commencement No. 5, Transitional Provisions, Savings and Amendment) Order 2003,[1] and s 447(7) of POCA does not restrict the meaning of 'criminal conduct' to conduct occurring after any particular date.

[1] SI 2003/333.

A.7.618 Thus, the UK can grant assistance and the court can make a restraint order in relation to an offence whenever it was committed.[1] The application is usually made without notice although there is an obligation to make material disclosure.[2]

[1] Cf *Government of the United States of America v Montgomery* [2001] 1 WLR 196, para 30, in relation to the Criminal Justice Act 1988 (Designated Countries and Territories) Order 1991, SI 1991/2873.

[2] *Director of the SFO v A* [2007] EWCA Crim 1927; *AkcinĖ BendrovĖ Bankas Snoras (In Bankruptcy) v Antonov* [2013] EWHC 131 (Comm), paras 50–55. As to the consequences of material non-disclosure, see paras 61–64.

(iii) Definitions

A.7.619 The POCA Order uses the following terms:

- *External request*: this is a request by an overseas authority to prohibit dealing with relevant property which is identified in the request.[1]
- *Relevant property*: property is relevant property if there are reasonable grounds to believe that it may be needed to satisfy an external order which has been or which may be made.[2]
- *External order*: this is an order which is made by an overseas court where property is found or believed to have been obtained as a result of or in connection with criminal conduct, and is for the recovery of specified property or a specified sum of money.[3]

1 POCA Order, Art 2 and POCA 2002, s 447(1).
2 POCA Order, Art 55 and POCA 2002, s 447(7).
3 POCA Order, Art 2 and POCA 2002, s 447(2).

(iv) Reference of an external request by the Secretary of State

A.7.620 Art 6(1) of the POCA Order provides that except where Art 6(2) applies, the Secretary of State may refer an external request in connection with criminal investigations or proceedings in the country from which the request was made and concerning relevant property in England or Wales to the DPP[1] to process it.

1 The Public Bodies (Merger of the Director of Public Prosecutions and the Director of Revenue and Customs Prosecutions) Order 2014, SI 2014/834, Sch 3, para 15 (27 March 2014) removed the Revenue and Customs following the Public Bodies Act 2011.

A.7.621 Art 6(2) deals with cases of serious or complex fraud. Where it appears to the Secretary of State that the request is made in connection with criminal investigations or proceedings which relate to an offence involving serious or complex fraud, and concerns relevant property in England or Wales, then the Secretary of State may refer the request to the Director of the SFO to process it.[1]

1 POCA Order, Art 6(3).

A.7.622 In the POCA Order 'the relevant Director' means the Director to whom an external request is referred under Art 6(1) or 6(3). By Art 6(5) the relevant Director may ask the overseas authority which made the request for such further information as may be necessary to determine whether the request is likely to satisfy either of the conditions in Art 7. A request under Art 6(5) may include a request for statements which may be used as evidence.

A.7.623 Where a request concerns relevant property which is in Scotland or Northern Ireland as well as England or Wales, so much of the request as concerns such property is to be dealt with under Part 3 or 4 of the POCA Order, respectively.

(v) The Crown Courts power to make a restraint order at the request of a foreign state

A.7.624 The Crown Court's powers to make a restraint order pursuant to an external request are contained in Chapter 1 of Part 2 of the POCA Order. Art 8 provides that the Crown Court may make a restraint order if either condition in Art 7 is satisfied.

A.7.625 Art 7(4) provides that in determining whether the conditions in Art 7 are satisfied and whether the request is an external request within the meaning of POCA, the court must have regard to the definitions in s 447(1), (4)–(8), and (11). Evidence must not be excluded in restraint proceedings on the grounds that it is hearsay evidence.[1]

1 ibid, Art 13.

A.7.626 The definitions in s 447(1), (4)–(8), and (11) of POCA are as follows:

- S 447(1) provides that an external request is a request by an overseas authority to prohibit dealing with relevant property which is identified in the request.[1]
- S 447(4)–(8) provides as follows. Property is all property, wherever situated,[2] and includes money; all forms of property, real or personal, heritable or moveable; things in action and other intangible or incorporeal property (s 447(4)). Property is obtained by a person if he obtains an interest in it (s 447(5)). References to an interest, in relation to property other than land, include references to a right (including a right to possession) (s 447(6)). Property is relevant property if there are reasonable grounds to believe that it may be needed to satisfy an external order which has been or which may be made (s 447(7)). Criminal conduct is conduct which constitutes an offence in any part of the UK, or would constitute an offence in any part of the UK if it occurred there (s 447(8)).
- S 447(11) provides that an overseas authority is an authority which has responsibility in a country or territory outside the UK for making a request to an authority in another country or territory (including the UK) to prohibit dealing with relevant property; for carrying out an investigation into whether property has been obtained as a result of or in connection with criminal conduct; or for carrying out an investigation into whether a money laundering offence has been committed.

[1] The Proceeds of Crime Act 2002 (External Requests and Orders) (Amendment) Order 2013/2604 (in force 11 November 2013) makes provision for the obtaining by an 'enforcement authority' (as to which see Art 141R) to obtain from the High Court (in England, Wales, or Northern Ireland) or the Court of Session (in Scotland) a prohibition order to prevent dealing with relevant property in the UK which is the subject of an external request, within the meaning of s 447(1) of POCA. The provisions (new Pts 4A and 4B inserted into the External Requests Order 2005) correspond (subject to specified modifications) to the civil recovery provisions in POCA. Overseas requests that are criminal in nature will continue to be dealt with through the provisions in the CICA 2003.

[2] In the context of the POCA Order, this means wherever situated in the UK: *King v Serious Fraud Office* [2009] 1 WLR 718, paras 36–38, HL. This applies to Pt 5 of the POCA Order concerning civil recovery freezing orders as well as Pts 2–4 concerning confiscation: *Perry v Serious Organised Crime Agency* [2013] 1 AC 182, paras 63, 135.

(1) The Article 7 conditions

A.7.627 Art 8 of the POCA Order provides that the Crown Court may make a restraint order if either condition in Art 7 is satisfied.

A.7.628 The first condition in Art 7 is that relevant property in England and Wales[1] is identified in the external request; a criminal investigation has been started in the country from which the external request was made with regard to an offence; and there is reasonable cause to believe that the alleged offender named in the request has benefited from his criminal conduct.

[1] For property situated in Scotland or Northern Ireland, Pts 3–4 of the POCA Order contain corresponding provisions. The order may only extend to property situated in the UK: *King v Serious Fraud Office* [2009] 1 WLR 718, paras 36–38, HL.

A.7.629 The second condition in Art 7 is that relevant properly in England and Wales[1] is identified in the external request; proceedings for an offence have been started in the country from which the external request was made and not concluded; and there is reasonable cause to believe that the defendant named in the request has benefited from his criminal conduct.

[1] ibid.

(2) Procedure

A.7.630 The procedure for applying for a restraint order is set out in Rule 33.12 and Rules 33.51–33.55 of the Criminal Procedure Rules 2015.[1] The application must be in writing and be supported by a witness statement which must give the grounds for the application; give full details of the realisable property in respect of which the applicant is seeking the order and specify the person holding that realisable property; and give the grounds for, and full details of, any application for an ancillary order under Art 8(4) for the purposes of ensuring that the restraint order is effective.

1 SI 2015/1490, in force 5 October 2015.

A.7.631 The court is required to have regard to the legislative steer contained in Art 46 which requires it to have regard to the need to preserve the value for the time being of realisable property or specified property so that it can be made available for satisfying an external order. No account is to be taken of any obligation of a defendant or a recipient of a tainted gift if the obligation conflicts with the object of satisfying any external order against the defendant that has been or may be registered under Art 22.

A.7.632 However the court's powers must be exercised with a view to allowing a person other than the defendant or a recipient of a tainted gift to retain or recover the value of any interest held by him. In the case of realisable property or specified property held by a recipient of a tainted gift, the powers must be exercised with a view to realising no more than the value for the time being of the gift.

A.7.633 An application to discharge or vary a restraint order may be made under Art 9. Arts 10 and 11 provide a right of appeal to the Court of Appeal and the Supreme Court against a refusal to grant a restraint order, an order made under Art 8(4), and a decision made on an application to vary or discharge the order under Art 9(2). Through oversight, the POCA Order was not originally amended by the Constitutional Reform Act 2005 so as to substitute Supreme Court for House of Lords. That was remedied in 2011[1] and the Supreme Court held in *Stanford International Bank Ltd. (acting by its joint liquidators) v Director of the Serious Fraud Office*[2] that appeals lie to the Supreme Court in respect of Court of Appeal decisions made prior to the commencement of the 2011 Order (6 June 2011).

1 The Constitutional Reform Act 2005 (Consequential Amendments) Order 2011, SI 2011/1242.
2 *Stanford International Bank Ltd. (acting by its joint liquidators) v Director of the Serious Fraud Office* [2012] UKSC 3.

A.7.634 Unlike conventional POCA restraint orders, [1] under Art 11 to the POCA Order there also existed no requirement of leave or certification for appeals to the Supreme Court. Thus there existed an absolute, unqualified right of appeal to the Supreme Court against the making of an external restraint order. That too was remedied, as from 29 February 2012, by the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (England and Wales) (Appeals under Part 2) Order 2012, SI 2012/138 which makes detailed provision for such appeals, corresponding in general terms to the Criminal Appeal Act 1968 and imposes, amongst other things, certification and leave requirements in respect of appeals concerning external restraint orders.[2] However, the 2012 Order does not have retroactive

effect and the pre-2012 Order position remains for all Court of Appeal decisions made prior to 29 February 2012.[3]

[1] S44 POCA; as to which, see the Proceeds of Crime Act 2002 (Appeals under Pt 2) Order 2003; SI 2003/82.

[2] Similar provision is now made for all POCA Pt 2 cases by the amendments made to the Proceeds of Crime Act 2002 (Appeals under Pt 2) Order 2003 (SI 2003/82) by the Proceeds of Crime Act 2002 (Appeals under Pt 2) (Amendment) Order 2013 (SI 2013/24).

[3] Rule 42.10 of the Criminal Procedure Rules 2015 (SI 2015/1490), in force 5 October 2015, does not purport to impose an obligation to obtain leave to appeal from the Court of Appeal: it simply provides the manner in which any obligation to seek leave takes effect. It cannot be read as imposing an obligation, particularly having regard to the requirement in rule 33.12 that the rules are to apply 'with the necessary modifications'. In any event, the power to make rules is procedural. It could not validly be exercised so as to impose a restriction on a previously unrestricted right of appeal; *Stanford International Bank Ltd. (acting by its joint liquidators) v Director of the Serious Fraud Office* [2012] UKSC 3.

A.7.635 By Art 12, if a restraint order is in force, a constable or a relevant officer of Revenue and Customs may seize any property which is specified in it to prevent its removal from England and Wales. Any property so seized must be dealt with in accordance with the court's directions.

A.7.636 The court may appoint a management receiver under Art 15 who may then exercise the powers specified in Art 16 in relation to property specified in the order.

(vi) The Crown Courts' power to enforce an external order

A.7.637 The Crown Court's power to enforce an external order is contained in Chapter 2 of Part 2 of the POCA Order. There are three principal stages in the enforcement of such an order:

- reference to the Director of the appropriate prosecution agency by the Secretary of State;
- application by the relevant Director to the Crown Court for the registration of the order;
- enforcement of the order by the relevant Director. Art 27 also allows for the appointment of an enforcement receiver to manage the property and to realize it in satisfaction of the confiscation order in accordance with Art 28.

A.7.638 The first step in the enforcement of an external order following its receipt from a foreign state is its referral to the Director of Public Prosecutions. Art 18(1) provides that, except where Art 18(2) applies (cases of serious and complex fraud), the Secretary of State may refer an external order arising from a criminal conviction in the country from which the order was sent and concerning relevant property in England and Wales[1] to the DPP.[2] In a case falling under Art 18(2) the order may be referred to the Director of the SFO.[3]

[1] By Art 18(5), where an order concerns relevant property which is in Scotland or Northern Ireland as well as England or Wales, so much of the request as concerns such properly shall be dealt with under Pt 3 or 4 of the POCA Order 2005, respectively.

[2] POCA Order, Art 18(1). The Public Bodies (Merger of the Director of Public Prosecutions and the Director of Revenue and Customs Prosecutions) Order 2014, SI 2014/834, Sch 3, para 15 (27 March 2014) removed the Revenue and Customs following the Public Bodies Act 2011.

[3] For the powers of the SFO and the meaning of 'serious and complex fraud' see Chapter A.1.

A.7.639 Following a reference by the Secretary of State, the relevant Director may apply to the Crown Court to give effect to the external order under Art 20(1). The request may be *ex parte* to a judge in chambers and must include a request that the relevant Director be appointed as the enforcement authority for the order.

(1) Conditions for giving effect to an external order

A.7.640 By Art 21 of the POCA Order, the Crown Court must decide to give effect to the external order by registering it where all of the following conditions are satisfied.

A.7.641 The first condition is that the external order was made consequent on the conviction of the person named in the order and no appeal is outstanding in respect of that conviction.

A.7.642 The second condition is that the external order is in force and no appeal is outstanding in respect of it.

A.7.643 The third condition is that giving effect to the external order would not be incompatible with the Convention rights (within the meaning of the Human Rights Act 1998) of any person affected by it.[1] In *Government of the United States of America v Montgomery (No 2)*[2] the House of Lords considered whether the enforcement of an external order would violate the defendants' Convention rights. Their Lordships held that it could do so, but only in an exceptional case where there would be a flagrant denial of justice[3] (which was not the case on the facts).

1 *Government of the United States of America v Montgomery (No 2)* [2004] 1 WLR 2241.
2 [2004] 1 WLR 2241, para 24.
3 On the meaning of this phrase see *Othman v United Kingdom* (2012) 55 EHRR 1.

A.7.644 The fourth condition applies only in respect of an external order which authorizes the confiscation of property other than money that is specified in the order. In such a case, the specified property must not be subject to a charge under the legislation specified in Art 21(6).

A.7.645 In determining whether the order is an external order within the meaning of the POCA the court must have regard to the definitions in s 447(2), (4), (5), (6), (8), and (10).[1]

1 POCA Order, Art 21(7).

A.7.646 By Art 22, where the Crown Court decides to give effect to an external order it must register the order in that court; provide for the notice of the registration to be given to any person affected by it; and appoint the relevant Director as the enforcement authority for the order.

A.7.647 The Crown Court may cancel the registration of the external order, or vary the property to which it applies, on an application by the relevant Director or any person affected by it if or to the extent that the court is of the opinion that any of the conditions in Art 21 are not satisfied.[1] The court must cancel the registration of the external order on such an application if it appears that the order has been satisfied by payment of the amount due

(where the order is for the payment of a sum of money), or the property has been surrendered (where the order is for the recovery of specified property), or by any other means.[2]

[1] ibid, Art 22(3).
[2] ibid, Art 22(4).

A.7.648 Arts 23 and 24 provide a right of appeal to the Court of Appeal and the Supreme Court[1] against a refusal to register an external confiscation order or a refusal to cancel or vary it.

[1] So far as appeal to the Supreme Court under Art 24 is concerned, the relevant amendments were made by the Constitutional Reform Act 2005 (Consequential Amendments) Order 2011 (SI 2011/1242); as to the effect of which, see *Stanford International Bank Ltd (acting by its joint liquidators) v Director of the Serious Fraud Office* [2012] UKSC 3, discussed above at para A.7.633.

A.7.649 Art 26 contains provisions for the time within which money specified in the external order must be paid.

(vii) Orders which may be made in addition to and in aid of restraint orders and external orders

A.7.650–700 By Art 8(4) of the POCA Order the Crown Court may make such orders as it believes are appropriate for the purpose of ensuring the restraint order is effective.[1] Examples of such orders that have been granted in domestic restraint cases include:

- a disclosure order requiring the defendant to swear an affidavit as to the whereabouts of his assets;[2]
- an order for cross-examination on the defendant's disclosure affidavit.[3] This power should only be used in exceptional circumstances where there are justifiable concerns over whether the defendant has given full disclosure of his assets.[4] The only legitimate purpose of the cross-examination is to establish the extent of a defendant's assets, and hence would be unnecessary if sufficient assets are known about to meet the claim;[5]
- an order requiring the defendant to repatriate his assets;[6]
- an order for the delivery up of the defendant's passport.[7]

[1] Cf POCA 2002, s 41(7).
[2] *Re O (Disclosure Order)* [1991] 2 QB 520. Article 8(4) can only apply to assets within England and Wales: *King v Serious Fraud Office* [2009] 1 WLR 718, para 39, HL. The same is true of the corresponding provisions in Pts 3–4 of the POCA Order concerning Scotland and Northern Ireland. For a discussion of the general principles applicable where a defendant fears that compulsory disclosure of assets may be utilised by the foreign investigator in violation of his Art 6 right not to incriminate himself, see *AkcinĖ BendrovĖ Bankas Snoras (In Bankruptcy) v Antonov* [2013] EWHC 131 (Comm), paras 73–77. There is no right to withhold disclosure of assets on the basis of a risk of incrimination in relation to actual or threatened criminal proceedings abroad. In such a case, the court instead has a discretion as to whether to grant protection against the risk of incrimination.
[3] *A J Bekhor & Co Ltd v Bilton* [1981] QB 923.
[4] *Den Norske Bank ASA v Antonatos* [1999] QB 271.
[5] *Great Future International Ltd v Sealand Housing Corporation* [2001] CPLR 293.
[6] *Director of Public Prosecutions v Scarlett* [2000] 1 WLR 515. This was a repatriation order made in ordinary domestic criminal proceedings; however, the reasoning is equally applicable to restraint proceedings brought at the instance of a foreign state.
[7] *Bayer AG v Winter* [1986] 1 WLR 497; *B v B* [1997] 3 All ER 258.

A.7.701 The extent to which these orders can properly be made in respect of restraint orders made at the request of a foreign state remains to be considered.[1] Some are more likely to be appropriate than others.

[1] *See King v Serious Fraud Office* [2008] EWCA Crim 530.

A.7.702 As already noted, the Crown Court may also appoint a management receiver in aid of a restraint order under Art 15 of the POCA Order. The receiver may exercise the powers in Art 16, which include the power to take possession of the property; the power to manage or otherwise deal with it; the power to start, carry on, or defend legal proceedings in connection with the property; and the power to realise the property to meet the receiver's expenses.

A.7.703 Rule 33.56 of the Criminal Procedure Rules 2015[1] contains rules relating to the appointment of management or enforcement receivers. Chapter 3 of Part 2 of the POCA Order contains procedural provisions concerning receivers.

[1] SI 2015/1490, in force 5 October 2015.

(viii) Confiscation orders which may be made by a UK court[1]

A.7.704–705 Art 27 contains provisions allowing for the appointment of enforcement receivers by the Crown Court on the application of the relevant Director where (in the case of a monetary external order, ie an external order requiring payment of a sum of money) the time specified under Art 26 has expired. An enforcement receiver appointed under Art 27 has the powers contained in Arts 28 and 29.

[1] POCA Order, Arts 27–29, 33–34, 37–38 and Ch 3 of Pt 2.

A.7.706 Chapter 3 of Part 2 contains procedural provisions concerning receivers.

(ix) The procedure for enforcing foreign orders in the UK

A.7.707 Where a designated country wishes to enforce an external order in the UK the appropriate authority seeking assistance should send a letter of request including the order to the UK Central Authority. Requests for the enforcement of an external order should include the original order or a duly authenticated copy of it, and evidence showing that the confiscation order is in force and that neither the order nor any conviction to which it may relate is subject to appeal. The request ideally should also indicate that all or a certain amount of the sum payable under the order remains unpaid in the territory of the requesting state or that other property recoverable under the order remains unrecovered there.[1]

[1] MLA Guidelines, p 36.

A.7.708 Once a letter of request containing the relevant information has been received by the UK Central Authority, and the Secretary of State has decided that it is appropriate to provide assistance, the letter is sent to the Director of an appropriate prosecuting authority who will act on behalf of the designated state in proceedings in the UK.[1]

1 See para A.7.620.

A.7.709 The procedure for obtaining a restraint order in the Crown Court and for enforcing an external order is contained in Rule 33.12 of the Criminal Procedure Rules 2015.[1] Rule 33.12 provides that the rules in Parts 33 and 42 apply with the necessary modifications to proceedings under the POCA Order in the same way that they apply to corresponding proceedings under Part 2 of POCA.[2] Rule 33.12 contains a useful table showing how provisions of the 2005 Order correspond to provisions of the 2002 Act.

1 SI 2015/1490, in force 5 October 2015.
2 See T Moloney and D Atkinson, *Blackstone's Guide to the Criminal Procedure Rules 2010* (2010).

(x) Remitting confiscated property to the requesting state

A.7.710 Property (or its equivalent in money) recovered under a foreign confiscation or forfeiture order in the UK is not automatically transmitted to the foreign enforcement authority or state. Property (or its equivalent in money) recovered under a foreign confiscation order is placed in the UK Government's Consolidated Fund.[1] There is no legal power which enables the UK court to remit the property to a foreign state or other recipient. Forfeited property, in England and Wales, is disposed of at the direction of the High Court, which must give persons holding any interest in the property in question a 'reasonable opportunity' to make representations to the court.

1 In the same way, where the UK seeks the assistance of a foreign state in enforcing a domestic confiscation order under POCA, s 74, any property recovered in the foreign state falls to be dealt with under that state's law and is not automatically remitted to the UK: POCA, s 74(3).

A.7.711 The UK has entered into agreements with Canada[1] and the US[2] to determine the ultimate destination of property or sums of money confiscated (in the UK, as defined by UK law) or forfeited (in Canada or the US). These agreements permit the UK to share property (or an equivalent amount of money) confiscated in the UK with the requesting state.

1 Agreement between the Government of the United Kingdom and the Government of Canada Regarding the Sharing of Forfeited or Confiscated Assets or their Equivalent Funds, signed in London on 21 February 2001, Treaty Series 028/2001, CM 5180. The Agreement provides for the sharing of assets forfeited in Canada or confiscated in the UK. An exchange of Notes between the United Kingdom and Canada to Extend the Agreement Regarding the Sharing of Forfeited or Confiscated Assets or their Equivalent Funds was signed on 21 January 2003.
2 Agreement between the Government of the United Kingdom and the Government of the United States of America Regarding the Sharing of Forfeited or Confiscated Assets or their Equivalent Funds, signed in Washington on 31st March 2003 and ratified by the UK on that date.

A.7.712 Some international criminal conventions also contain provisions relating to the return of confiscated property to the requesting state.[1]

1 See, eg, Art 57(2) of the United Nations Convention Against Corruption: <http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf>.

A.7.713 Where there is no such agreement the foreign state must request the remittance of property or sums of money on a diplomatic basis. If the requesting state is one which itself would remit property or sums of money, which it recovers in its own procedures, this is likely to give rise to a diplomatic expectation of reciprocal remittance from the UK. Where it is the case that remittance is requested by a foreign state on the basis that the property and or money would, if remitted, be returned to a victim or paid as compensation to a victim of crime, the request for remittance has more force still. The UK Central Authority deals with these requests and may agree to remit a portion of funds recovered (after itself obtaining the approval of the Treasury). All other funds recovered are paid to the Consolidated Fund and are not remitted to other states or persons.

(d) Foreign requests for assistance in gathering evidence in relation to confiscation

(i) Investigations using powers in the Crime (International Co-operation) Act 2003

A.7.714 The methods by which assistance may be provided by the UK to foreign states in relation to evidence gathering have been summarized in earlier chapters. These powers are available for use in relation to restraint and confiscation investigations. In summary, the powers available under CICA 2003 and other statutes include:

- search and seizure warrants: warrants authorising an appropriate person to enter and search specified premises and to seize and retain any material found there which is likely to be of substantial value to the civil recovery investigation;[1]
- production orders: orders requiring a specified person appearing to be in possession or control of material to produce it to an appropriate officer for him to take away, or requiring a specified person to give an appropriate officer access to the material;[2]
- voluntary and compulsory interviews;[3]
- proceedings before a nominated court;[4]
- customer information orders: orders requiring financial institutions to provide certain information in relation to a specified customer of the institution;[5]
- account monitoring orders: orders requiring financial institutions to provide certain account information in relation to an account held by the financial institution.[6]

1 CICA 2003, ss 13(1)(b), 16, and 17; CICA 2003, s 15(2); and Criminal Justice Act 1987, s 2(4).
2 CICA 2003, ss 13(1)(b), 16, and 17; CICA 2003, s 15(2); and Criminal Justice Act 1987, s 2(3). S 13(1)(b) in fact refers only to warrants and not orders. That was a legislative oversight and s 13(1)(b) should be read as if it did include power to direct that a production order should be applied for under Sch 1 to PACE 1984: *R (Secretary of State for the Home Department) v Southwark Crown Court* [2014] 1 WLR 2529.
3 CICA 2003, s 15(2) and Criminal Justice Act 1987, s 2(2).
4 CICA 2003, s 15 and Sch 1.
5 CICA 2003, s 32.
6 CICA 2003, ss 35 and 36.

(ii) Investigations using powers in the Proceeds of Crime Act 2002

A.7.715 Prior to the enactment of POCA 2002 there were different statutory provisions dealing with investigations in drugs and non-drugs cases.[1] However, the investigatory powers contained in POCA apply to 'criminal conduct' and 'unlawful conduct' generally, and these expressions include any conduct that constitutes an offence or is unlawful in any part of the UK, or would constitute an offence or be unlawful in any part of the UK if it occurred there.[2]

1 Criminal Justice Act 1988, ss 93I, 93H (non-drugs); Drug Trafficking Act 1994, ss 55 and 56 (drugs): see generally *R v Crown Court at Southwark ex p Bowles* [1998] AC 641.
2 POCA, ss 241(2), 413(1), s 447(8).

A.7.716 Part 8 of POCA is entitled 'Investigations' and Chapter 2 contains an extensive range of investigatory powers including search warrants and production orders for use in tracing the proceeds of crime and money laundering investigations in England and Wales. S 445(1) provides that Her Majesty may by Order in Council make provision to enable orders equivalent to those under Part 8 to be made, and warrants equivalent to those under Part 8 to be issued, for the purposes of an 'external investigation', and make provision creating offences in relation to external investigations which are equivalent to offences created by Part 8 and s 435B.

A.7.717 An 'external investigation' is defined in s 447(3) to be an investigation by an overseas authority into whether property has been obtained as a result of or in connection with criminal conduct; the extent or whereabouts of property obtained as a result of or in connection with criminal conduct; or whether a money laundering offence has been committed.

A.7.718 Two Orders have been made thus far: the Proceeds of Crime Act 2002 (External Investigations) Order 2013[1] (re civil recovery investigations) and the Proceeds of Crime Act 2002 (External Investigations) Order 2014 (other investigations).[2] Both Orders make provisions to assist external investigations by way of orders and warrants from the court. Neither Order encompasses external money laundering investigations.[3]

1 The Proceeds of Crime Act 2002 (External Investigations) Order 2013, SI 2013/2605 (in force 11 November 2013) makes provision to assist an external investigation, within the meaning of s 447(3) of POCA, by obtaining orders and warrants from the court. The provisions correspond (subject to specified modifications) to the civil recovery investigation provisions in Pt 8 of POCA. Overseas requests to investigate that are criminal in nature will continue to be dealt with through the provisions in the CICA 2003. Article 35 applies the domestic codes of practice that govern POCA, Pt 8 (see SI 2018/84 and SI 2018/93) to external civil recovery investigations.
2 The Proceeds of Crime Act 2002 (External Investigations) Order 2014, SI 2014/1893 complements SI 2013/2605 and makes further provision to assist an external investigation, within the meaning of s 447(3) of POCA, by obtaining orders and warrants from the court. The provisions again correspond (subject to specified modifications) to confiscation investigation provisions in Pt 8 of POCA. Article 35 applies the domestic codes of practice that govern POCA, Pt 8 (see SI 2018/84 and SI 2018/93) to external investigations.
3 SI 2013/2605, Art 3(5); SI 2014/1893, Art 3(4).

E. Mutual Enforcement within the UK

A.7.719 S 443 of POCA contains enabling provisions which allow Orders in Council to be made to allow for the mutual enforcement of restraint and confiscation in the different parts of the UK.

A.7.720 The Proceeds of Crime Act 2002 (Enforcement in different parts of the United Kingdom) Order 2002[1] has been made under s 443. This makes provision for orders relating to restraint and receivership made under POCA made in one part of the UK to be enforced in another part. Part I is introductory and contains an extensive set of definitions. Part II deals with the enforcement of Scottish and Northern Ireland orders in England and Wales. Part III deals with the enforcement of English or Welsh orders and Northern Ireland orders in Scotland. Part IV deals with the enforcement of English or Welsh orders and Scottish orders in Northern Ireland.

[1] SI 2002/3133.

A.7.721 The Proceeds of Crime Act 2002 (Investigations in different parts of the United Kingdom) Order 2003[1] has also been made, under s 443(1)(d) and (e), (3) and (4) and 459(2) of POCA.

[1] SI 2003/425 as amended by SI 2008/298, SI 2015/925, SI 2016/291, SI 2016/498, and SI 2017/1280.