

United Kingdom Briefing on International Cooperation in Criminal Matters

Mutual legal assistance

The legal basis for mutual legal assistance (MLA)

The UK is committed to assisting investigative, prosecuting and judicial authorities in combating international crime and is able to provide a wide range of MLA. MLA is also a vital tool for pursuing criminal finances, including the investigation and recovery of proceeds of crime that may have been moved and hidden overseas.

The UK is a party of a number of bilateral and multilateral MLA treaties (see this [link](#) for a list of the international agreements that the UK is party to. The UK can provide MLA to any country or territory in the world, whether or not that country is able to assist the UK, and whether or not there is a bilateral or multilateral agreement. However, where an agreement imposes specific conditions or procedure, the UK would expect those to be adhered to.

The UK does not generally require reciprocity but would expect assistance from countries that are parties to relevant bilateral or multilateral agreements with the UK. The UK would also expect reciprocity from countries to which we give assistance without a treaty or an international agreement. Reciprocity is required in all requests for assistance in tax matters.

MLA is always necessary when coercive measures are required:

- To obtain documentary banking material held under a duty of confidentiality such as banking evidence
- To search premises
- To restrain or confiscate assets

The UK is able to provide a large amount of assistance without the need for formal MLA. Police and law enforcement agencies can gather intelligence and evidence in a less formal way, and in many countries' legal systems, information collected by law enforcement agencies is directly admissible as evidence in criminal trials abroad.

MLA may not be appropriate if:

- The material can be obtained voluntarily without assistance from the UK authorities, or via open source information;
- Material can be obtained via law enforcement cooperation because it is only required as intelligence or material obtained in that way is admissible as evidence.

It is also desirable for overseas authorities to obtain intelligence prior to making a formal MLA request which can help improve the quality and make it less likely that a request will be returned to the requesting authority for lack of information.

Requests for restraint and confiscation

The UK Proceeds of Crime Act 2002 (“POCA”) sets out the legislative scheme for the recovery of criminal assets with criminal confiscation being the most commonly used power. Confiscation occurs after a conviction has taken place. Other means of recovering the proceeds of crime which do not require a conviction are provided for in the Act, namely civil recovery, cash seizure and taxation powers. The aim of the asset recovery schemes in POCA is to deny criminals the use of their assets, recover the proceeds of crime and disrupt and deter criminality. Since 2010, over £1.1bn has been recovered under our domestic legislation. The Act also provides for a number of investigative powers, such as search and seizure powers, and powers to apply for production orders and disclosure orders, and allows for the “restraint” or “freezing” of assets to prevent dissipation of assets prior to a confiscation order being made.

All requests for restraint (freezing) and confiscation must come through formal MLA channels and cannot be done through law enforcement cooperation.

The purpose of a request for restraint is to preserve the value of assets located in the UK for final confiscation. Before making a request to restrain assets located in the UK, law enforcement channels should be used to identify and trace assets. As the UK has no central register of bank accounts, the financial intelligence unit network should be used for tracing (also we would urge the use of networks such as CARIN).

MLA can also be used ahead of a request for restraint to obtain evidence of assets in the UK, for example banking evidence.

Requests for restraint and confiscation to the UK require the following:

- Dual criminality
- For restraint, details of the ongoing (note we do not need a concluded investigation) criminal investigation into an acquisitive crime or money laundering case or details of ongoing proceedings in the requesting state for restraint;
- For confiscation, there must be a final order that is not subject to appeal;
- The material facts of the case, including any facts that may have come to light after the domestic restraint order has been made;
- Why there is reasonable cause to believe the defendant or accused named in the request has benefitted from their criminal conduct;
- Why there are reasonable grounds to believe the property may be needed to satisfy an external final order for confiscation which has been or may be made;
- Why the restraint order is necessary, including an explanation that will enable the UK Court to consider whether there is a real risk the identified property will be dissipated if no order is made;
- The 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 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);

- Whether prior assistance in the case (including asset tracing assistance) has been provided and, if so, details of the UK authorities involved, and details of the assistance already received. If assistance has not previously been sought or provided this should be clearly stated;
- Where applicable, details of any court orders already made in the requesting state against the suspect in respect of his or her property and a duly authenticated copy of that order certified by a person in his or her capacity as a judge, magistrate or officer of the relevant court of the requesting state, or by an official of the requesting authority. If no court orders have been made, this should be clearly stated;
- If possible, brief details of all known property held by the suspect outside the UK;
- State clearly that property in the UK must be restrained because there are insufficient property/assets elsewhere. If there are property/assets located elsewhere but these cannot be restrained, this must be clearly stated by the requesting authority;
- State clearly whether or not you object to the UK courts allowing the defendant access to restrained funds for use as living and legal expenses and that you are content for the UK courts to assess what is a reasonable amount.

Without this information a court will be unable to grant an order to effectively restrain assets or register an order to confiscate assets to allow it to be enforced. If the request is accepted, the central authority will decide who will execute a request and will refer it to the relevant executing authority (the Crown Prosecution Service or Serious Fraud Office) accordingly. The executing authority will consider the application before applying to the court to register the external order, in line with the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 and section 447 of the Proceeds of Crime Act 2002.

The executing authority dealing with the request will make the appropriate applications to the Court for the assets to be restrained and will inform the requesting authority as soon as this has been done. A copy of the restraint order must be served upon the suspect and any other person known to be affected by it as soon as is practicable. The UK courts will require an acknowledgement that this has been completed otherwise the UK court may discharge the order. Note – a court may also discharge the order if proceedings are not started or the confiscation order is not registered within a reasonable time.

There are also powers to assist to freeze property in relation to non-conviction based confiscation cases.

Requests for Restraint and Confiscation of Instrumentalities of Crime

“Instrumentalities of crime” covers any property which has been, is or is intended to be used in connection with the commission of an offence. Section 4 of the Criminal Justice (International Co-operation) Act 1990 (Enforcement of Overseas Forfeiture Orders) Order 2005 (‘2005 Forfeiture Order’) enables a UK court to make a restraint order based on an overseas request. Similar requirements are needed to that for restraint and confiscation of assets.

EU Freezing and Confiscation Orders

Requests for freezing and confiscation within the EU are mutual recognition measures made under EU Council Framework Decisions, made through the sending of a certificate to the UK directly to the UK Prosecuting Authority, rather than through the UKCA.

Asset Disposal

Once the assets have been realised they will be disposed of under one of three processes:

- Stolen State asset cases that fall under the provisions of the United Nations Convention Against Corruption (UNCAC) will be returned to the recipient country less reasonable expenses;
- Cases that do not fall under the provisions of UNCAC can be shared with the recipient country if it enters into an asset sharing agreement with the UK. The UK seeks to establish asset sharing agreements wherever possible (under Article 16 of Council Framework Decision 2006/783/JHA there is an asset share of 50:50 in cases involving 10,000 Euros and above);
- If there is no formal agreement with a country or territory, there are administrative arrangements that allow assets to be shared on a case-by-case basis.
- In the absence of any asset sharing agreement the assets will be retained by the UK and disposed of according to domestic law.

Non conviction-based recovery

Part 5 of POCA provides a scheme to reclaim the proceeds of crime through civil proceedings. It permits the recovery of criminal assets where no conviction has been possible, for example because individuals avoided conviction by remaining remote from the commission of the crimes from which they benefited or because they have fled abroad. Civil recovery applications are made in the High Court against property that is or represents property obtained through unlawful conduct. The relevant enforcement authority (that is, the Crown Prosecution Service, the Serious Fraud Office, the National Crime Agency, HM Revenue and Customs and the Financial Conduct Authority) may make an application for a property freezing order to prohibit any person from dealing with the property.

Service of process

Procedural documents may be sent **directly** by the requesting authority to the persons in the UK to whom they relate. The UK strongly encourages direct transmission of procedural documents to persons by post unless this is not legally possible under the domestic law of the requesting authority.

Under Article 5 of the EU Mutual Assistance Convention 2000 (MLAC), EU Member States must send procedural documents directly to the person concerned, unless one

of the reasons in Article 5(2) applies. Failure to do so may result in the request being returned to the requesting authority.

In line with domestic legislation, a request can be sent to the Home Office or Crown Office for the service of procedural documents (e.g. a summons or judgment) issued by a court or authority in the requesting state in relation to criminal proceedings. HMRC is not a central authority for the purpose of the service of documents.

The central authority will serve the documents by post, or personally by hand if requested. Where personal service is specifically requested, the central authority can arrange for the document to be served by the police.

Most requests for service of process via a central authority will be accepted if the requirements set out below are met. There may be other requirements to meet in particular cases, and requesting authorities are therefore urged to provide detailed information including:

- EU Member States must explain why they are unable to serve the document directly;
- Details of any law/procedure in the requesting state which require the service of process to be via a central/judicial authority in the requested state;
- Specific instructions as to whether the documents **must** be served by hand. If no such instruction is provided the documents will be served by post;
- All dates of hearings or other deadlines should be stated clearly within the request;

Establishment and functions of central and other competent authorities dealing with international cooperation requests

Central authorities in the UK have the function of receiving, acceding to, and ensuring the execution of MLA requests. Central authorities also transmit requests out from the UK to on EU Member States. The UKCA also receives and transmits non European Extradition Warrant extradition requests.

Subject to the exceptions below, all formal requests for assistance must be sent to a central authority for consideration. The UK has three central authorities:

- Home Office UK Central Authority ('UKCA) for MLA requests in England, Wales and Northern Ireland;
- Her Majesty's Revenue and Customs ('HMRC') for MLA requests in England, Wales and Northern Ireland relating to tax and fiscal customs matters only, for example, the collection and management of revenue, the payment of tax credits;
- Crown Office for MLA requests in Scotland (including devolved Scottish tax matters).

The following are exceptions to when to using a central authority to receive requests:

- 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.

Requests for the Crown Dependencies and UK Overseas Territories

The Crown Dependencies (Bailiwicks’ of Guernsey and Jersey, and the Isle of Man), and the UK Overseas Territories (Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falklands, Gibraltar, Montserrat, St Helena, Turks and Caicos Islands, and Pitcairn) are not part of the UK.

The Crown Dependencies and the Overseas Territories are wholly responsible for executing requests within their own jurisdictions.

MLA requests for the Crown Dependencies and the Overseas Territories must not be sent to the UK.

MLA requests should usually be sent to the Attorney General of the Crown Dependency or Overseas Territory from where the assistance is required. The contact details for these jurisdictions can be found here.

Requests for intelligence from the Crown Dependencies, Falklands, and St Helena should be submitted via the National Crime Agency (NCA). The other Overseas Territories host Interpol sub-bureaux.

MLA in practice

The UKCA receives over 9,000 requests a year ranging from low level internet frauds to high profile terrorist and anti-corruption cases. The most common type of investigative measure requested is for banking evidence, reflecting the UK’s role as a financial centre, and the fact that criminals utilise the UK banking system to provide a veneer of respectability to their banking transactions.

All requests to the UKCA should be in English. All request should be considered within 30 working days (3 working days in Scotland). The UKCA also has a *de minimis* policy which states that requests may be refused by the Home Office if the request is trivial or disproportionate. This reflects the fact that there are limited resources to execute requests.

The factors that may indicate a *de minimis* request are:

- If there has been a financial loss or gain or damage of less than £1000; or
- The alleged offence was committed more than 10 years ago and there is no or insufficient explanation for the delay in investigation or prosecution.

When considering *de minimis* requests, the following factors are also taken into account:

- Whether there are any aggravating factors;
- Whether a UK prosecuting authority would send a request in similar circumstances;
- Whether the request is for a ‘coercive’ measure;

- Whether there are resource implications for a number of executing authorities.

Scotland and HMRC do not apply a *de minimis* policy.

Risk assessment

Risks are considered by the UKCA at the point of acceding to an MLA request and also before the transmission of evidence. Risk assessments are conducted by prosecutors for outgoing mutual legal assistance and extradition requests.

In practice, the UK will accede to most requests received and in general, there is a presumption that MLA will be provided where all the requirements of the investigative measure have been met. However, the central authorities have a wide discretion when considering whether to accede to a request.

Possible reasons for refusal include:

- The request relates to an investigation or prosecution which is politically motivated;
- The execution of the request would prejudice the sovereignty, security or other essential interests of the UK;
- The execution of the request would prejudice the *ordre public* of the UK (this includes the risk that the death penalty will be imposed for the crime under investigation);
- The request is *de minimis*;
- The request relates to a person who, if proceeded against in the UK for the offence for which assistance is requested, would be entitled to be discharged on the grounds of a previous acquittal or conviction (double jeopardy);
- The request relates to an offence that the UK regards as an offence under military law, which is not also an offence under ordinary criminal law;
- There are substantial grounds for believing that the request has been made for the purpose of investigating, prosecuting or punishing a person on account of his/her race, gender, sexual orientation, religion, nationality, ethnic origin or political opinions or that person's position may be prejudiced for any of those reasons;
- The request is for a coercive or intrusive measure for which the UK requires dual criminality and in respect of which there is no equivalent UK offence.

The UK considers human rights issues in the context of provision of assistance in line with our Government Overseas Security and Justice Assistance guidance.

Challenges

The UK is seeing an ever increasing level of MLA requests, including more complex requests. This reflects the place that the UK holds as a banking and financial centre.

The large number of MLA requests means that we have to handle competing interests of international and domestic stakeholders whilst dealing with a drop in police and prosecutor resources domestically.

In spite of publishing extensive guidelines, requests are often of low quality, missing vital information, or sent to the wrong place.

In common with other central authorities, the UK is facing increased challenges with the large amount of information retained digitally, meaning that it can be difficult to adequately identify and sift relevant material particularly when dealing with material post the execution of a search warrant. Our data protection legislation is also causing some difficulties as we seek to find a solution that allows us to transmit personal data as part of a law enforcement investigation to our overseas partners.

UK extradition law

Extradition in the UK is governed by the Extradition Act 2003 ('the Act'). Part 1 of the Act covers requests from EU Member States; these are made under the European Arrest Warrant, which will remain in place until the UK leaves the EU. Part 2 of the Act covers requests from a non-EU countries.

Normally, an extradition request will be sent to the Home Office UK Central Authority via the diplomatic channel containing the full papers required (a "full order request").

In urgent cases, where for example the subject of the request is about to leave the UK, a request may be made through police channels for a person's arrest in advance of the full papers being sent (a "provisional arrest request"). Where a person is provisionally arrested, they will be brought before the court and the judge will specify the deadline for receipt of the full papers.

Once the full papers are received, and assuming the request meets the requirements of the Act, a certificate will be signed by the Home Office confirming that the request is valid. Once this is done, the certificate and the full request will be sent to Westminster Magistrates' Court. This Court deals with all extradition requests to England and Wales.

The Crown Prosecution Service will represent the requesting state in all court proceedings and will advise on the papers required.

The request will be put before the District Judge who will consider whether to issue an arrest warrant for the person concerned.

Where the person is arrested, he or she is brought before the Court as soon as is practicable. The District Judge must then fix a date for the Extradition Hearing before the Court (unless the requested person chooses to consent to his or her extradition).

The District Judge will also decide whether the person should be remanded in custody or granted bail. The court can impose conditions on the grant of bail such as surrender of passports, specifying a residence and reporting conditions. If there is a fear that the person will flee the jurisdiction it will be necessary to put evidence before the court about the reasons for this concern so that appropriate bail conditions (or remand in custody) may be considered.

At the Extradition Hearing, the District Judge must decide:

- whether the papers include all the documents required under the Act, including particulars of the person; particulars of the offence; in the case of an accused person, a warrant for his arrest; in the case of a person unlawfully at large, a certificate of conviction and sentence (if imposed); and if so,
- whether any of the bars to extradition in the Act apply. These include double jeopardy; extraneous considerations; passage of time; the person's physical or mental condition; or whether the person's extradition would be compatible with

the Convention rights within the meaning of the Human Rights Act 1998. An explanation of some of these terms is in the attached glossary.

If the District Judge decides that the bars to extradition do not apply, the case must be sent to the Secretary of State (in practice, the Home Secretary) for a decision on whether to order extradition. Otherwise, the person must be discharged.

If the case is sent to the Secretary of State, he has to make a decision within two months as to whether to order extradition. He will invite representations from the person as to why they should not be extradited. He will then consider whether extradition is prohibited because:

- the person could face the death penalty. This is an absolute prohibition and may require a written assurance from the requesting state that the death penalty will not be imposed, or will not be carried out, if imposed;
- there are no speciality arrangements with the requesting country. This is to ensure that an extradited person may only be charged with the conduct specified in the extradition request. This speciality arrangement is common in extradition arrangements;
- the person was previously extradited to the UK and the state which previously extradited the person in question does not consent to onward extradition;
- the person was previously transferred to the UK by the International Criminal Court.

If none of the above provides grounds to refuse the request, the Secretary of State must order extradition.

If extradition is ordered, the person has the right of appeal to seek leave to appeal to the High Court against the decisions of the District Judge and the Secretary of State.

If the High Court dismisses the appeal(s), the person may apply for leave to appeal to the Supreme Court. Once domestic appeals are completed it is also possible for the person in question to seek to take their case to the European Court of Human Rights.

Challenges encountered

Grounds for refusal

The Act provides a number of grounds on which extradition may be prohibited: see paragraphs 9 and 11 above for more detail. Assurances may be sought on death penalty and human rights issues – the courts have allowed extradition on the basis of assurances.

Evidentiary requirements

Under the Act, States may be designated so that they are to provide 'information' in support of an extradition request, rather than a full prima facie evidence case. States so designated include all parties to the European Convention plus the United States, Canada, Australia and New Zealand.

Appeals

The Act sets out the appeal process. A person whose extradition is ordered by the Magistrates' Court and the Home Secretary may seek leave to appeal to the High Court. If that is dismissed, they may apply for leave to appeal to the Supreme Court, but only on a point of law of general public importance.

Asylum claims

Under UK law, a person may not be extradited to the State from which they have been granted asylum. A person who has claimed asylum may not be extradited until the asylum claim has been finally determined, including any appeals.

Good practice / other issues

Submitting extradition requests in draft

The UK would recommend that requests for extradition should be submitted in draft to the UK Crown Prosecution Service (CPS) before they are made. This particularly where the requesting State has little or no experience of making requests to the UK. The CPS will advise on whether the requests meet the requirements of UK law, and if not, what further details are needed. This should help to quicken the extradition process once the request is made.

Extradition of own nationals

There is no bar in UK law to the extradition of UK nationals.

Transfer of proceedings

The UK may consider a prosecution in the UK where an extradition request fails. The decision will normally be a matter for the CPS.

Simplified extradition arrangements

The Act allows for a person to consent to extradition at any stage in the process. The Secretary of State still has to order extradition in such cases.

Whether extradition is conditional on a treaty

The Act contains a provision whereby Conventions such as UNCAT may be designated so that, where the UK does not have an extradition treaty with a particular State, extradition may proceed on the basis of the Convention provisions. No Conventions have yet been designated, but the UK may still consider a request from such a State under special extradition arrangements.

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