

Mutual legal assistance under the EU–UK Trade and Cooperation Agreement¹

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Abstract

This article provides an analysis of the new provisions in the EU-UK Trade and Cooperation Agreement (TCA) that govern Mutual Legal Assistance in criminal matters. While only few provisions of the European Investigation Order are picked up by the TCA, it is mostly based on the Council of Europe's European Mutual Assistance Convention of 1959. An overview on applicable law is provided, after which a closer look is taken at procedural aspects in general as well as specific differences between previously applicable and new provisions. In this respect, two conditions for issuing a request are considered, namely availability in similar domestic cases and proportionality. Grounds for refusal, provisional measures and legal remedies also are highlighted. The authors conclude that the new provisions leave a lot of unanswered questions and that while mutual legal assistance can continue, it will happen at reduced pace.

Keywords

Mutual legal assistance, mutual recognition, EU, UK, Brexit, Trade and Cooperation Agreement, Council of Europe's European Mutual Assistance Convention of 1959, European Investigation Order, issuing a request, executing a request, requested State, requesting State, Arrest Warrant, Joint Investigation Teams

Introduction

On 24 December 2020, the European Union and the United Kingdom of Great Britain and Northern Ireland reached an agreement in principle on the EU–UK Trade and Cooperation Agreement (TCA).

1. Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, [2020] OJ L 444/14, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2020.444.01.0014.01.ENG> accessed 24 February 2021 (TCA). All provisions cited in this piece without further reference belong to the TCA.

As the procedure of Art 218 Treaty on the Functioning of the European Union (TFEU)² needed to be observed, it was not possible to reach a final agreement by 1 January 2021. Therefore, it was decided to apply the TCA on a provisional basis as of 1 January 2021, for a limited period of time until 28 February 2021.³

Albeit provisional, the TCA will be directly applicable in all Member States pursuant to Art 216(2) TFEU.

The Council, acting by the unanimity of all 27 Member States, on 29 December 2020, adopted, by written procedure, a decision authorising the signature of the Agreement and its provisional application as of 1 January 2021.⁴ On the UK side, the Government published the European Union (Future Relationship) Bill⁵ on 29 December. Parliament was recalled on 30 December to approve the legislation. The Bill was rushed through Parliament at incredible speed: it was scheduled to go through all of its Commons and Lords stages before 31 December so that, if passed, it could receive Royal Assent before the end of the transition period.⁶ And, indeed, on 31 December 2020, the European Union (Future Relationship) Act 2020 was passed.⁷

The European Parliament has been asked to give its consent to the TCA.

As a last step, the Council must adopt the decision on the conclusion of the TCA. In the meantime, Member States are requested to speedily submit relevant notifications to the Agreement.

In the following, we shall analyse the new provisions that govern Mutual Legal Assistance (MLA) in criminal matters as of 1 January 2021.⁸

Overview

MLA is dealt with in Title VIII of the TCA. In general, it will now be based on the Council of Europe's (CoE) European Mutual Assistance Convention of 1959 (1959 CoE MLA Convention or 'Mother Convention') and its additional protocols,⁹ as it was prior to the UK adopting the European Investigation Order (EIO). However, the TCA also picks up some of the provisions of the EIO, such as, for example, the principle of proportionality¹⁰ and the possible recourse to an

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2. Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU). Art 218 TFEU regulates the procedure the European Union needs to follow when making agreements with Third Countries.
 3. Cf. also Art FINPROV.11(2).
 4. Cf. Council of the European Union, press release of 29 December 2020, <<https://www.consilium.europa.eu/en/press/press-releases/2020/12/29/eu-uk-trade-and-cooperation-agreement-council-adopts-decision-on-the-signing/>> accessed 24 February 2021.
 5. European Union (Future Relationship) Bill as introduced in the House of Commons on 30 December 2020 (Bill 236), <https://www.gov.uk/government/publications/eu-future-relationship-bill> (last accessed 24 February 2021).
 6. <https://commonslibrary.parliament.uk/research-briefings/cbp-9106-2/> (last accessed 24 February 2021).
 7. <https://www.legislation.gov.uk/ukpga/2020/29/enacted> (last accessed 24 February 2021).
 8. Title VIII of Part III of the TCA.
 9. European Convention on Mutual Assistance in Criminal Matters, CoE [1959] European Treaty Series-No. 30 (1959 CoE MLA Convention); Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, CoE [1978] European Treaty Series-No. 99 (Additional Protocol to the 1959 CoE MLA Convention); Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, CoE [2001] European Treaty Series-No. 182 (Second Additional Protocol to the 1959 CoE MLA Convention). The Convention and its additional protocols referred to as 'CoE MLA system'.
 10. Cf. Art 6 of European Parliament and Council Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters [2014] OJ L 130/1 (EIO Directive).

alternative investigative measure if the requested measure does not exist in the executing state.¹¹

To take into account the change from mutual recognition to classical mutual legal assistance, the terminology has changed from “issuing” and “executing” authority back to “requested State” and “requesting State”.

Applicable law

When it comes to exchanging information on previous convictions, Title IX¹² shall take precedence.¹³ Moreover, with regards to the freezing and confiscation, MLA will be governed by the more specific Title XI.¹⁴ With regards to combatting VAT fraud, a different Chapter regulates this area of law, and provides for some specifics regarding MLA in this area of law.¹⁵

For all other forms of MLA, the 1959 CoE MLA Convention with its Additional Protocols shall be (or remain) the applicable law.¹⁶ In addition, MLA is also regulated in crime-specific Conventions.¹⁷

Additional provisions of this Title are only aimed at ‘supplementing’ the existing regulations. However, where the provisions in the Agreement are more specific, they will supersede the provisions of the CoE MLA system, and, where there are contradictions, the provisions of the Agreement will prevail over those of the CoE MLA system (*lex posterior derogat lex priori*).

In this context, CoE conventions need to be accessed and analysed carefully, including their signatures and ratifications, declarations, reservations, translations into selected languages and their explanatory reports. Unlike the EU, the CoE provides a Treaty Office updating the entire CoE status which is easy to access and updated daily.¹⁸

Procedural Aspects

Unlike the new arrest warrant procedure and the new regulations on freezing and confiscation, for which the Agreement already foresees a form¹⁹, in the case of MLA, the Specialised Committee on

11. Art 10 of the EIO Directive.

12. See Wörner, Bock, Arnell and Davies, in this issue.

13. Art LAW.MUTAS.113(2).

14. See Costa Ramos and Pons, in this issue.

15. Cf. Chapter 5: Customs and trade facilitation as well as the Protocol on administrative cooperation and combating fraud in the field of Value Added Tax and on mutual assistance for the recovery of claims relating to taxes and duties.

16. Art LAW.MUTAS.113(1).

17. For example, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, UN [1988] United Nations Treaty Series, vol. 1582, p. 95; Council of Europe Convention on Cybercrime, CoE [2001] European Treaty Series-No. 185; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, OECD [1997]; United Nations Convention against Transnational Organized Crime, UN [2000] United Nations Treaty Series, vol. 2225, p. 209 (UNTOC); for details, cf. *W. Schomburg, Lagodny, Gleß, Hackner and Einleitung* (introduction), para. 86 ff in: Schomburg/Lagodny/Gleß/Hackner, *Internationale Rechtshilfe in Strafsachen*, 5th edition [2012].

18. This can be found at <<http://conventions.coe.int>> and either go to ‘Full List’ or, in case you know the three digit number of the convention searched, go to ‘Search’ and type this number; for example, in case of MLA: 030. If you require information on the territorial application, go to ‘Declarations’ and you will find, for example, for ‘United Kingdom’, details of the extension to Isle of Man, Jersey and Gibraltar.

19. See ANNEX LAW-5 and ANNEX LAW-8.

Law Enforcement and Judicial Cooperation²⁰ is tasked to establish a standard form for requests. Since the parties agreed to go back to the classic CoE MLA system, picking up only some elements of the EIO, a lot of modifications to the EIO form would have been required in very short time.

It is likely that the standard form will follow the example of the EIO, with all the limitations arising from the new regime. Until this form will be established, requests will be made in the classical way of judicial cooperation and specific diplomatic and police channels, that is, letters rogatory.²¹

The competent authorities are those that are competent under the CoE MLA system and as defined by States in their respective declarations addressed to the Secretary General of the Council of Europe.

In the UK, this is the UK Central Authority.²² In all other Member States, the authorities will generally be again those competent under the CoE MLA system. Art. 4 of the Second Additional Protocol to the 1959 CoE MLA Convention²³ provides a differentiated system of channels of communication, depending on the type of the requested assistance. The Agreement specifies that in those cases where direct transmission is provided for under the respective provisions, requests for mutual assistance may also be transmitted directly by public prosecutors in the United Kingdom to competent authorities of the Member States. This means that in the UK, prosecutors will now be directly competent for the following types of request:²⁴

1. Proceedings brought by the administrative authorities
2. Controlled delivery and covert investigation
3. Temporary transfer of detained persons
4. Copies of convictions.

It is likely that some Member States will make a similar declaration to the 1959 CoE MLA Convention to allow for direct transmission through their public prosecutors as well. In urgent cases, any request for assistance or spontaneous information may also be transmitted through Interpol²⁵ or via Europol or Eurojust.²⁶

As Art 1 of the EIO Directive no longer applies, the request can no longer be made by a suspected or accused person, or by a lawyer on his behalf, but only by the respective competent authority.

Time limits have been amended in the Agreement as follows:

20. On the Committee see S. Schomburg, in this issue.

21. Cf. Art 3 of the 1959 CoE MLA Convention.

22. See <<https://www.gov.uk/guidance/mutual-legal-assistance-mla-requests#requesting-mla-from-the-uk>> last accessed 24 February 2021.

23. Replacing Art 15 of the 1959 CoE MLA Convention.

24. Cf. Art 4 of the 2nd Additional Protocol to the 1959 CoE MLA Convention.

25. Art 4, 2nd AP (amended 15(7) of the 1959 CoE MLA Convention).

26. Art LAW.MUTAS.121(2).

Action	EIO directive	Agreement (UK)
Decision on [recognition and] execution	30 days ²⁷	45 days ²⁸
Execution	90 days ²⁹	90 days ³⁰
Extension of deadline to decide on execution (if within 30 days is not practicable)	30 days ³¹	Upon consultation with requesting State ³²
Extension of deadline to execute (if within 90 days is not practicable)	Upon consultation with requesting State ³³	Upon consultation with requesting State ³⁴
Postponement	Possible	Not provided for
Provisional measures	As soon as possible and, wherever practicable, within 24 h of receipt of the EIO ³⁵	As soon as possible after receipt of the request ³⁶

Certain petty offences or, depending on the jurisdiction, regulatory violations, such as failure to wear a seat belt, are exempted from these time limits.³⁷ It is surprising that such examples are listed at all as they will not meet the proportionality threshold provided for in the Agreement.³⁸ In any event, the list can never be seen as exhaustive, as all other petty offences would also not meet the proportionality threshold. Proportionality will always depend on the specific measure requested via MLA. However, if a coercive measure is concerned, which has significant impact on fundamental rights (e.g., house search or wiretapping), the threshold established for proportionality by the issuing of EAWs or now ‘arrest warrants’ (EU–UK arrest warrants) based on this Agreement can help as guidance, as well as the UK case law on the application of s.21A of the UK Extradition Act 2003.³⁹

Conditions for issuing a request

As for the EIO, the Agreement provides for two conditions for a request for mutual assistance.⁴⁰ These conditions are that

27. Art 12(3) EIO Directive.

28. Art LAW.MUTAS.120(1).

29. Art 12(4) EIO Directive.

30. Art LAW.MUTAS.120(2).

31. Art 12(5) EIO Directive.

32. Art LAW.MUTAS.120(5).

33. Art 12(6) EIO Directive.

34. Art LAW.MUTAS.120(5).

35. Art 32 EIO Directive.

36. Art LAW.MUTAS.120(4). Note that in the context of freezing of assets, special deadlines apply. For details, cf. Costa Ramos and Pons, in this issue.

37. Art LAW.MUTAS.120(6).

38. Art LAW.MUTAS.116.

39. For details, cf. Grange, Keith and Kerridge in this issue.

40. Art LAW.MUTAS.116.

1. the request must be necessary and proportionate for the purpose of the proceedings, and
2. the requested measure would have also been available under the same conditions in a similar domestic case (i.e., of the requested State).

If these conditions are not met, the requested State may consult the requesting State and the requesting State may withdraw or amend its request.

In addition, the obligation to inform about the *execution* of the EIO as provided for in Art 16 of the EIO Directive has been replaced by a mere obligation to inform about the *impossibility to execute* an MLA request or the appropriateness to carry out investigative measures not initially foreseen, in order to enable the competent authority of the requesting State to take further action in the specific case.⁴¹

Non-availability in similar domestic cases

In case the measure requested is not available under the same conditions in the requested State, before denying the request, the requested State shall consider recourse to an alternative measure.⁴²

However, as in the EIO Directive, the measures listed exhaustively in Art LAW.MUTAS.117 (2)(a)–(d) of the Agreement are deemed to be always available so that for these measures no alternative investigative measure can be used. The list is similar to the one in Art 10 of EIO Directive, however, with one important difference: information or evidence which is already in the possession of the executing authority is no longer available on a mandatory basis. So, even if in the context of domestic criminal proceedings regarding other, more serious offences, the executing authority has already obtained telecommunication data of a suspect that may also be requested by another State, this information does not have to be provided if for the offence for which it is being requested it could not be obtained under the law of the requesting State. However, the practical relevance of this difference will be limited, given that the evidence still must be available if it is contained in a database of the police or judicial authorities.⁴³

In a case where the requested investigative measure is not available under the law of the requested State, the requested State will not be able to provide assistance and has to inform the requesting State accordingly.⁴⁴

Proportionality

Before denying the request, the requested State may consider whether it may use an alternative investigative measure that would achieve the same result by less intrusive means than the investigative measure indicated in the request.

However, if such alternative measures are not available, it is unclear what consequences this will have. Given the prominence proportionality plays in the Agreement,⁴⁵ it is likely that a disproportionate request will be dismissed by the UK. (At least) by means of reciprocity, it must be

41. Art LAW.MUTAS.118.

42. Art LAW.MUTAS.117(1).

43. Cf. Art LAW.MUTAS.117(2) (a).

44. Art LAW.MUTAS.117(5).

45. Art LAW.MUTAS.116(1) (a); Art LAW.SURR.77; Art LAW.CONFISC.1(5); cf. also Art LAW.PNR.34(4); Art LAW.PNR.37(2); Art LAW.EUROPOL.53(1); Art AW.GEN.4(1) (d), (e); Art LAW.AML.127(5), (6); Art LAW.AML.130(5); Art INST.35(3); Art INST.36(4).

expected that EU Member States will also declare disproportionate requests as inadmissible. In such cases, they are obliged to inform the requesting State ‘by any means and without undue delay’.⁴⁶

The fact that proportionality is now expressly stipulated as a general requirement of MLA in the Agreement means it will now apply to all sorts of MLA between the UK and EU Member States (e.g., to service of documents) and is no longer limited to requests governed by the EIO.

Grounds for refusal

The exhaustive list of Art 11 of the EIO Directive no longer applies. Instead, the CoE MLA system applies again. Art. 2 of the 1959 CoE MLA Convention provides two optional grounds for refusal, namely, the political and fiscal offence exception (if the request concerns an offence which the requested Party considers a political offence, an offence connected with a political offence or a fiscal offence), and the domestic *ordre public*, that is, if the requested Party considers that execution of the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of its country.⁴⁷

In this context, Art 6 of the Treaty on European Union⁴⁸ should not be underestimated: the ground for refusal based on human rights violations will still be de facto applicable. As the TCA⁴⁹ clarifies that the cooperation in this Part is based on the Parties’ and Member States’ ‘long-standing respect for democracy, the rule of law and the protection of fundamental rights and freedoms of individuals, including as set out in the Universal Declaration of Human Rights and in the European Convention on Human Rights, and on the importance of giving effect to the rights and freedoms in that Convention domestically,’ cooperation shall also be based (and depend) on observing the human rights the respective Party is bound by. This is not limited to the rights guaranteed by the European Convention on Human Rights (ECHR)⁵⁰, but also includes human rights enshrined in other international human rights instruments such as the International Covenant of Civil and Political Rights of 19 December 1966 (ICCPR).⁵¹

For the transfer of detained persons, special optional grounds for refusal are contained in Art 3 of the Second Additional Protocol to the 1959 CoE MLA Convention.⁵² Additional grounds for refusal (mandatory and optional ones) may be contained in the Additional Protocols to the Mother Convention, in bilateral supplemental agreements, or in other crime-specific Conventions,⁵³ always keeping in mind relevant Reservations or Declarations of the concerned Member State(s).

These grounds for refusal are now supplemented in the Agreement by another important, but only optional ground for refusal provided for in the Agreement:⁵⁴ *ne bis in idem*.

46. Art LAW.MUTAS.118.

47. Art 2 of the 1959 CoE MLA Convention.

48. Consolidated version of the Treaty on European Union [2012] OJ C 326/13 (TEU).

49. Art LAW.GEN.3.

50. Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR], CoE [1950] European Treaty Series-No. 005 (ECHR).

51. International Covenant of Civil and Political Rights of 19 December 1966, UN [1966] United Nations Treaty Series, vol. 999, p. 171 (ICCPR).

52. Art 3 of the Second Additional Protocol to the 1959 CoE MLA Convention amends Art 11 of the Mother Convention.

53. For example, the United Nations Single Convention Convention on Narcotic Drugs of 21 March 1961, UN [1961] United Nations Treaty Series, vol. 520, p. 151.

54. Art LAW.MUTAS.119.

Provisional measures

Provisional measures (e.g., freezing of data to preserve evidence) as provided for in the CoE MLA system⁵⁵ can only be lifted after the requesting State has been given the opportunity to present its reasons in favour of continuing the measure. This idea has been adopted from the EIO Directive,⁵⁶ but can also be found in other MLA instruments.⁵⁷

Legal Remedies

One achievement of the EIO Directive was that it obliged Member States to provide for legal remedies against EIOs equivalent to those available at the domestic level. This provision has not been incorporated into the Agreement so that the availability of legal remedies against requests will now again depend largely on the legal situation of each Member State. However, the right to remedy is also enshrined in the fair trial principle of Art 6 of the ECHR and Art. 14(5) ICCPR for convictions and sentences.⁵⁸ As the TCA⁵⁹ at least clarifies that the cooperation in this Part is based on the Parties' and Member States' long-standing respect for democracy, the rule of law and the protection of fundamental rights and freedoms of individuals, including the ECHR, cooperation shall also be based (and depend) on observing the human right to a legal remedy.

Scope of Application

Temporal Application

Art 62 of the Withdrawal Agreement⁶⁰ provided for transitional regulations for *pending cases*:

1. In the United Kingdom, as well as in the Member States in situations involving the United Kingdom, the following acts shall apply as follows: (...)

(a) the Convention, established by the Council in accordance with Article 34 of the Treaty on European Union on Mutual Assistance in Criminal Matters between the Member States of the European Union (46), and the Protocol established by the Council in accordance with Article 34 of the Treaty on European Union to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (47), shall apply in respect of mutual legal assistance requests received under the respective instrument before the end of the transition period by the central authority or judicial authority; (...)

(l) Directive 2014/41/EU (...) shall apply in respect of European Investigation Orders received before the end of the transition period (...).

55. Art 24 of the Second Additional Protocol to the 1959 CoE MLA Convention.

56. Cf. Art 32 of the EIO Directive.

57. For freezing and confiscation, cf. Costa Ramos and Pons in this issue.

58. Art 14(5) reads as follows: Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

59. Art LAW.GEN.3.

60. Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C1 384/1.

This is implemented by Art 185 of the same agreement commencing at the end of the transition period.⁶¹ It is therefore the case that old EIOs will be treated as being under the EIO scheme, however, without recourse to the Court of Justice of the European Union (CJEU). It will be interesting to see how this develops.

Requests incoming after 31 December 2020 will follow the provisions of the Agreement.

Territorial Application

The territorial scope is unclear in part. While the Agreement refers to the CoE MLA system, to which the UK made Declarations extending the scope of Application to other territories, including Bailiwick of Jersey⁶² and Gibraltar⁶³, the Agreement clearly states that it shall not apply to Gibraltar.⁶⁴

It was not possible to resolve this contradiction because an envisaged agreement between the UK and Spain concerning Gibraltar is not yet tabled.

Joint Investigation Teams

Art 62(2) of the Withdrawal Agreement allowed for UK authorities to continue to participate in Joint Investigation Teams (JITs) set up on the basis of EU law⁶⁵ in which they were participating before the end of the transition period. However, the use of the Secure Information Exchange Network Application (SIENA) within the JIT was restricted to 1 year following the transition period.

The TCA⁶⁶ now specifies that the relationship between Member States within the JIT shall still be governed by Union Law, ‘notwithstanding the legal basis referred to in the Agreement on the setting up of the Joint Investigation Team.’ This means that the European legal framework on JITs⁶⁷ will now apply between Member States even for those JITs that previously were set up on the basis of a non-EU law, such as, for example, Art 20 of the Second Additional Protocol to the 1959 CoE MLA Convention or the often forgotten Art 19 of the United Nations Convention against Transnational

61. Polakowski and ors v Westminster Magistrates’ Court and ors [2021] EWHC 53 (Admin).

62. CoE, Reservations and Declarations for Treaty No. 030-European Convention on Mutual Assistance in Criminal Matters, Declaration contained in a letter from the Permanent Representative of the United Kingdom, date 27 June 2008, registered at the Secretariat General on 27 June 2008. The UK made the reservation on behalf of the Bailiwick of Jersey in respect to the Island of Jersey. Cf. https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/030/declarations?p_auth=Zw5YgwEb. (last accessed 24 February 2021)

63. CoE, Reservations and Declarations for Treaty No. 030-European Convention on Mutual Assistance in Criminal Matters, Declaration contained in a letter from the Secretary of State for Foreign and Commonwealth Affairs of the United Kingdom, dated 29 July 2019, registered at the Secretariat General on 31 July 2019, cf. https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/098/declarations?p_auth=2HzTGgSf&_coeconventions_WAR_coeconventionsportlet_enVigueur=false&_coeconventions_WAR_coeconventionsportlet_codeNature=4&_coeconventions_WAR_coeconventionsportlet_searchBy=state&_coeconventions_WAR_coeconventionsportlet_codePays=UK.

64. Art FINPROV.1(3).

65. That is, either on the basis of Art 13 of the Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union [2000] OJ C 197/3, or in accordance with Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams [2002] OJ L 162/1.

66. Art LAW.MUTAS.122.

67. Mainly Art 13 of the Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union [2000] OJ C 197/3 and Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams [2002] OJ L 162/1.

Organized Crime (UNTOC), read in conjunction with its crime-specific protocols.⁶⁸ In this context, ‘Member States’ must be understood as EU Member States, thus excluding the UK.⁶⁹ This interpretation is also confirmed by Art 62(2) of the Withdrawal Agreement which also foresees that information sharing via SIENA (see above) will end by 2022.

However, most JITs are in fact set up under the CoE MLA system according to the Third JIT Evaluation Report:⁷⁰

‘Most JITs involving third States were set up on the basis of Article 20 of the Second Additional Protocol to the 1959 Council of Europe Convention. Article 19 of the UN Convention against Transnational Organized Crime was also used as a legal basis for setting up JITs’.

Therefore, the UK will be able to participate in JITs, but the communication channels are restricted from those previously available, and this may impact upon the effectiveness of new and existing JITs.

Preliminary analysis

The EIO was considered by many practitioners as a great achievement. It reconciled the prosecutor’s need to investigate with the suspects procedural and fundamental rights more specifically and clearly than any previous MLA instrument in Europe had done. The *ordre public* exemption was finally put into EU law, as well as the requirement of proportionality. And, another novelty, the right of the suspect or accused to also apply for an EIO was foreseen, and legal remedies had to be provided for.

Therefore, it is regrettable that the EIO no longer applies to the judicial cooperation with the UK. At the same time, at least the proportionality threshold still applies, and is further stressed by the exception of time limits for petty offences and the possibility to use an alternative investigative measure that would achieve the same result by less intrusive means.

Moreover, the fact that MLA with the UK will now be generally treated as with third states makes the time limits foreseen in the Agreement as highly ambitious, and probably, in most cases, unrealistic. MLA requests will take almost as long as with other third states, whereas within the EU, the EIO has considerably accelerated such requests.

Overall, the new provisions regulating MLA leave a lot of questions open. MLA can still continue but at a much reduced pace. The UK will be less flexible and responsive, and this will hamper investigations in the UK and EU. Starting from the uncertainties about how the future standard form will look like, only practice will answer the obvious question of how ‘old’ MLA requests will be treated, hopefully in a more or less consistent manner. Further, it is yet to be seen

68. United Nations Convention against Transnational Organized Crime, UN [2000], United Nations Treaty Series, vol. 2225, p. 209.

69. Cf. other provisions of the TCA referring to ‘Member States,’ for example, Art 8.3(4): ‘The Parties shall exchange information, regularly and as appropriate, on the respective situations and progress of the Member States and of the United Kingdom (...),’ or note 63: ‘All Member States have ratified the European Social Charter in its original or revised version. For the United Kingdom, the reference to the European Social Charter in paragraph 5 refers to the original 1961 version’, or Art. 9.2 (4): ‘They shall not be persons who are members, officials or other servants of the Union institutions, of the Government of a Member State, of the Government of the United Kingdom’.

70. EUROJUST, JITs Network Secretariat (2020), <https://www.eurojust.europa.eu/sites/default/files/Partners/JITs/2020-03_3rd-JITs-Evaluation-Report_EN.pdf> accessed 24 February 2021.

how the competent authorities will deal with, in their view, disproportionate requests. Whether they are accepted by EU states and implemented quickly or whether the UK's new status will put it to the back of the queue is yet to be determined.

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