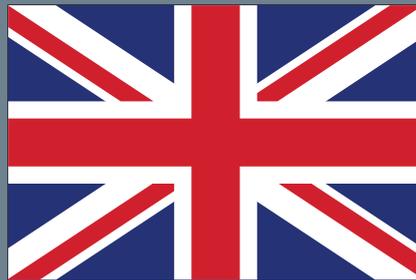




# Judicial cooperation in criminal matters between the European Union and the United Kingdom from 1 January 2021



*Criminal justice across borders*

# EU-UK judicial cooperation in criminal matters from 1 January 2021



Instruments continued to apply in the transition period:

- 2000 MLA Convention and Additional Protocol;
- European Arrest Warrant (FD 2002/584/JHA)
- Freezing property (FD 2003/577/JHA)
- Financial penalties (FD 2005/214/JHA)
- Confiscation orders (FD 2006/783/JHA)
- Taking account of convictions in other MS (FD 2008/675/JHA)
- Transfer of sentenced persons (FD 2008/909/JHA)
- Supervision of alternative measures to provisional detention (FD 2009/829/JHA)
- ECRIS Criminal records (FD 2009/315/JHA)
- European Protection Order (Directive 2011/99/EU)
- European Investigation Order (Directive 2014/41/EU)
- Joint investigation teams (FD 2002/465/JHA)

- Supervision of probation measures and alternative sanctions (FD 2008/947/JHA)

✗ Not applicable since 1 February 2020

✗ EU legal instruments do not apply after 1 January 2021

In case the requests were received by the executing authority (from EU MS or UK) before 1 January 2021, the instruments will continue to be applied

European Arrest Warrant (FD 2002/584/JHA) continues to apply only where received before 1 January 2021 AND the requested person was arrested before 1 January 2021 for the purposes of the execution of an EAW, as well as, in relation to it, Directives on interpretation (2010/64/EU) and on right to information (2012/13/EU)

Trade and Cooperation Agreement (TCA) applicable as of 1 January 2021) regarding:

- Surrender (Articles 76-112, Title VII TCA)
  - Freezing and confiscation (Articles 1-34, Title XI TCA)
- } Self-standing areas regulated by the TCA provisions
- Mutual Legal Assistance (Articles 113-122, Title VIII TCA)
  - Exchange of criminal record information (Articles 120 -128, Title IX TCA)
- } Not self-standing areas regulated by CoE Conventions and supplemented by TCA provisions

Transfer of sentenced persons not mentioned in TCA. Applicable regime is CoE Convention on transfer of sentenced persons of 1983 and its Additional Protocols

Role of Eurojust:

- UK Liaison Prosecutor at Eurojust as of 1 January 2021
- working arrangement to be concluded
- in cases of competing EAWs and arrest warrants, executing judicial authority of a Member State may seek advice of Eurojust
- in urgent cases, any request for mutual assistance as well as spontaneous information may be transmitted via Eurojust
- UK competent authorities shall share passenger name record (PNR) data with Eurojust



## 1. Background and purpose

On 23 June 2016 the United Kingdom voted to leave the EU and on 29 March 2017 the United Kingdom triggered Article 50 of the Treaty on European Union, the withdrawal clause. From that moment on, the EU and the United Kingdom carried out negotiations on a withdrawal agreement (WA), which was agreed upon on 17 October 2019, delaying the date for the United Kingdom to leave the EU until 31 January 2020.

From 1 February 2020 until 31 December 2020 the United Kingdom was in a transition period, as agreed in the WA. During this period the United Kingdom was no longer an EU Member State but remained a member of the single market and the customs union<sup>1</sup>. On 30 December 2020, the EU and the United Kingdom signed a trade and cooperation agreement (TCA)<sup>2</sup>, which became provisionally applicable as of 1 January 2021<sup>3</sup>.

The purpose of this note is to provide a simple, brief and immediate response to the needs of the competent authorities, especially in these first stages, and to highlight the main changes concerning judicial cooperation in criminal matters between the EU and the United Kingdom as of 1 January 2021. The note is to be read in conjunction with any guidelines or instructions that national authorities may provide, and is by no means binding.

The main aim of this note is to inform practitioners of Eurojust's role under the TCA (see Section 2) and the changes and practical implications regarding the legal basis of judicial cooperation measures in criminal matters (see Section 3).

Surrender (see Section 3.1) and freezing and confiscation (see Section 3.4) are self-standing Titles, meaning that these areas are regulated by the provisions in the TCA, while mutual legal assistance (see Section 3.2) and exchange of criminal record information (see Section 3.3) are not self-standing i.e. are regulated by the Council of Europe Conventions and supplemented by the provisions of the TCA. Furthermore, the transfer of sentenced persons, which is not covered by the TCA, is mentioned, including the possible applicable regime as of 1 January 2021 (see Section 3.5.).

## 2. Eurojust's role (Part Three on law enforcement and judicial cooperation in criminal matters, Title VI<sup>4</sup>, Articles LAW.EUROJUST.61–76)

According to Article LAW.EUROJUST.64, the EU and the United Kingdom shall ensure that Eurojust and the competent authorities of the United Kingdom cooperate in the fields of activity set out in Articles 2 and 54 of the Eurojust regulation<sup>5</sup> and Title VI of the TCA. The modalities to implement this title will be regulated through a working arrangement between Eurojust and the UK competent authorities (Article LAW.EUROJUST.75).

1 Article 126 WA.

2 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 (OJ L 444, 31.12.2020, pp. 14–1462). The text published in the Official Journal may contain technical errors and inaccuracies that will be corrected in the coming months – see Notice to the reader OJ L 444, 31.12.2020, p. 1. This might include the numbering of the articles of the TCA.

3 The territorial scope of the TCA is further clarified under Part Seven of the TCA. It should be noted that the TCA does not apply to Gibraltar or to the overseas territories having special relations with the United Kingdom: Anguilla; Bermuda; British Antarctic Territory; British Indian Ocean Territory; British Virgin Islands; Cayman Islands; Falkland Islands; Montserrat; Pitcairn Islands; Saint Helena, Ascension and Tristan da Cunha; South Georgia and the South Sandwich Islands and Turks and Caicos Islands (Article 1(3)(4), Part Seven of the TCA).

4 All titles mentioned in the note refer to Part Three of the TCA on law enforcement and judicial cooperation in criminal matters, unless indicated otherwise.

5 Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA (OJ L 295, 21.11.2018, pp. 138–183), particularly Article 2 on the tasks of Eurojust and Article 54 on requests for cooperation to and from third countries.

As of 1 January 2021, a liaison prosecutor has been seconded to Eurojust and will be assisted by several assistants (Article LAW.EUROJUST.66). This ensures the continuation of the close working relationships with the other national desks at Eurojust. The UK liaison prosecutor may participate in meetings with regard to strategic matters. The UK liaison prosecutor may also participate in and organise meetings with regard to operational matters (Article LAW.EUROJUST.68), i.e. coordination meetings<sup>6</sup>.

Furthermore, Eurojust's role is specified in several provisions throughout Part Three of the TCA. Title III establishes the sharing of passenger name record data with Eurojust (Article LAW.PNR.22). In Title VII concerning surrender, in cases of competing European Arrest Warrants (EAWs) and arrest warrants, the executing judicial authority of a Member State may seek the advice of Eurojust (Article LAW.SURR.94(2)), which can support the decision-making process based on guidelines produced by Eurojust<sup>7</sup> ( ). Finally, in Title VIII concerning mutual legal assistance, it is stated that in urgent cases any request for mutual assistance, as well as spontaneous information, may be transmitted via Eurojust (Article LAW.MUTAS.121).

On the basis of the TCA concluded between the EU and the United Kingdom as a third country, Eurojust can support and strengthen coordination and cooperation between national investigating and prosecuting authorities, by facilitating and coordinating any issue that may arise<sup>8</sup>.

### **3. Changes and practical implications concerning judicial cooperation in criminal matters**

As of 1 January 2021, in principle, EU legal instruments will no longer apply between the EU and the United Kingdom (see infographic for full overview). However, in accordance with Article 62(1) and (2) WA there are certain exceptions for ongoing judicial cooperation proceedings in criminal matters. This provision mentions the EU legal instruments that shall continue to apply between the EU and the United Kingdom if the request was received before the end of the transition period (i.e. 31 December 2020), and if applicable, the specific conditions for the continued application of the EU legal instruments. The TCA became (provisionally) applicable as of 1 January 2021.

As regards transmission of personal data to the United Kingdom, a proper transfer mechanism will be provided by the future adequacy decisions to be adopted under the Law Enforcement Directive and the General Data Protection Directive. In the meantime, an interim 'bridging' solution has been put in place to ensure stability and continuity of data flows, including in this area (see Article FINPROV.10A). During this period, the situation of the United Kingdom will be similar to that of the three European Economic Area European Free Trade Organisation countries (data flows to these countries are not considered international transfers under the General Data Protection Directive or the Law Enforcement Directive because they essentially apply rules identical to those of the EU).

Below, several judicial cooperation instruments are highlighted. For each of the instruments, both the main changes and useful aspects for practitioners are indicated.

As stated in Section 1, the purpose of this overview is without prejudice of further assessment of applicable judicial cooperation instruments in the relations between the United Kingdom and the specific Member States, keeping in mind that Part Three (law enforcement and judicial cooperation in criminal matters) has direct effect. Furthermore, the overview is not exhaustive. It is limited to a selected number of judicial cooperation measures.

<sup>6</sup> Coordination meetings at Eurojust are designed to bring together the judicial and law enforcement authorities of the countries involved, to stimulate and achieve agreement on cooperation between them and/or to coordinate investigations and prosecutions at national level.

<sup>7</sup> Council document 13301/19 of 18 December 2019, Eurojust guidelines for deciding on competing requests for surrender and extradition (revised in 2019).

<sup>8</sup> Article 3(5) Eurojust regulation.

### 3.1. Surrender (Part Three on law enforcement and judicial cooperation in criminal matters, Title VII)

As of 1 January 2021, Articles 76–112 of Part Three, Title VII of the TCA<sup>9</sup> replace, as a self-standing Title, the following instruments in relation to the United Kingdom:

- the Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States (EAW FD)<sup>10</sup>;
- the 1957 Council of Europe Convention on Extradition and its Additional Protocol; and
- the 1977 Council of Europe Convention on the Suppression of Terrorism (as far as extradition is concerned).

**Transitional regime.** The EAW FD continues to govern the execution of EAWs if both of the following conditions are met: (i) the executing authority received the EAW by 31 December 2020 **and** (ii) the requested person was arrested by 31 December 2020<sup>11</sup>. As long as the EAW FD continues to apply, the directives on interpretation (Directive 2010/64/EU) and on the right to information (Directive 2012/13/EU) also continue to apply<sup>12</sup>. If the requested person was not arrested by 31 December 2020, the EAWs will be governed by the TCA (Article 112). The issued EAW will continue to be valid and there is no need to issue a new arrest warrant form under the TCA.

**The new regime.** Articles 76–112 are inspired by the EAW FD and the EU surrender agreement with Norway and Iceland<sup>13</sup>.

- **Judicial authorities** (judges, courts or public prosecutors) issue and execute arrest warrants (Article 78(b)).
- **Time limits.** The TCA mirrors the time limits referred to in the EAW FD and in the EU Surrender Agreement with Norway and Iceland within which the final decision on the execution of the arrest warrant shall be taken and the surrender must be completed (Articles 95 and 101).
- **Limited grounds for non-execution.** The TCA includes all the grounds for non-execution included in the EAW FD (Articles 80–81). In addition, it provides, like the EU Surrender Agreement with Norway and Iceland, a political offence exception (Article 82) and a nationality exception (Article 83). The application of the nationality exception and the political offence exception are subject to a notification of the European Union on behalf of the Member States. The TCA specifies that where a state invokes the nationality exception, that state shall consider instituting proceedings against its own national in relation to the subject matter of the arrest warrant (*aut dedere aut judicare*). The TCA provides also specific provisions concerning victims and witnesses.
- **Fundamental rights.** If there are substantial grounds for believing that there is a real risk to the protection of the fundamental rights of the requested person, the executing judicial authority may require additional guarantees as to the treatment of the requested person after the surrender (Article 84(c)). It may also seek additional information from the issuing authority (Article 93). Moreover, the executing authority may refuse to execute an arrest warrant if there are reasons to believe that an authority had issued a warrant for the purpose of prosecuting or punishing a person on the grounds of the person's sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation (Article 81(1)(h)).

<sup>9</sup> All provisions mentioned in Section 3.1 'Surrender' refer to Part Three, Title VII of the TCA, unless indicated otherwise.

<sup>10</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States.

<sup>11</sup> Article 62(1)(b) WA.

<sup>12</sup> Article 65 WA.

<sup>13</sup> 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 (OJ L 292, 21.10.2006, pp. 2–19). 3



- **Transfer of custodial sentence or detention order subject of the arrest warrant.** Like the EAW FD and the EU Surrender Agreement with Norway and Iceland, the TCA provides, in the case of nationals and residents, for the possibility to have a custodial sentence / detention order transferred for execution (Articles 81(1)(f) and 84(b)). However, unlike those instruments, the TCA specifies that, if the requested person's consent to the transfer of the sentence or detention order is required, the ground for non-execution (Article 81(1)(f)) or the guarantee (Article 84(b)) can only apply after the requested person has consented to the transfer of that sentence or detention order.
- **Content and standardised form.** The content of the arrest warrant required under the TCA mirrors that of the EAW FD and of the EU Surrender Agreement with Norway and Iceland (Article 86). The TCA includes a specific form that judicial authorities must use whenever they issue an arrest warrant based on the TCA (Article 86, ANNEX LAW-5). This form is available in all official EU languages on the European Judicial Network website [here](#).
- **Transmission.** As of 1 January 2021, the United Kingdom no longer has access to the Schengen Information System (SIS). The issuing judicial authority may transmit the arrest warrant directly to the executing judicial authority (Article 87) or may request that Interpol transmit the arrest warrant (Article 88). However, the United Kingdom or the EU, on behalf of a Member State, may notify one or more central authorities responsible for the administrative transmission and receipt of arrest warrants and other official correspondence.
- **Double criminality.** The TCA explicitly mentions a double criminality condition as the general rule (Article 79(2)). However, double criminality does not apply to the 32 'list offences' mentioned under Article 79(5) if the EU made a notification, on behalf of a Member State, that the double criminality condition will not apply (based on reciprocity) and if the offence is punishable in the issuing state by a custodial sentence or detention order for a maximum period of at least 3 years (Article 79(4)). The TCA provides the "list of 32 offences" in Article 79(5) which are similar to those set out in the EAW FD and in the EU Surrender Agreement with Norway and Iceland.
- **Principle of proportionality.** The TCA explicitly mentions that cooperation through the arrest warrant shall be necessary and proportionate (Article 77). Under the TCA, not only the issuing judicial authority, but also the executing judicial authority can check compliance with the principle of proportionality when deciding on the surrender and may request additional information from the issuing authority before taking its decision (Article 93).
- **Multiple requests.** When an executing judicial authority receives multiple requests from different states in relation to the same person, it needs to consider certain criteria when deciding on which request to execute (Article 94). The TCA copies the criteria of the EAW FD and the EU Surrender Agreement with Norway and Iceland, but adds one additional criterion: 'legal obligations of Member States deriving from Union law regarding, in particular, the principles of freedom of movement and non-discrimination on grounds of nationality'. This is linked with the obligation stemming from the relevant case-law of the Court of Justice of the European Union in this field<sup>14</sup>. Similarly to the EAW FD and the EU Surrender Agreement with Norway and Iceland, the TCA explicitly mentions that an executing judicial authority of a Member State may seek the advice of Eurojust when deciding on which request to execute.
- **Rights of the requested person.** The TCA refers to the rights mentioned in the EAW FD and the EU Surrender Agreement with Norway and Iceland (Article 89). In addition, it includes the right to a written translation of the arrest warrant, the duty to inform the requested person on their right to appoint a lawyer in the issuing Member State and the requested person's right to have consular authorities informed.

<sup>14</sup> Judgment of the Court of Justice of 6 September 2016, Petruhhin, C-182/15, and subsequent judgements. See also in this context: Joint Report of Eurojust and the European Judicial Network on the Extradition of EU Citizens to Third Countries, available [here](#).

### 3.2. Mutual Legal Assistance (Part Three on law enforcement and judicial cooperation in criminal matters, Title VIII)

As of 1 January 2021:

- Articles 113–122 of Part Three, Title VIII of the TCA<sup>15</sup> supplement, in relation to the United Kingdom, the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters (1959 Convention) and its two Additional Protocols<sup>16</sup>, without being a self-standing title; and
- The Directive on the European Investigation Order in Criminal Matters (EIO DIR)<sup>17</sup> will no longer apply, in relation to the United Kingdom.

**Transitional regime.** The EIO DIR continues to govern the execution of EIOs that the executing state received by 31 December 2020<sup>18</sup>.

The **new regime** is largely inspired by the EIO DIR.

- **Competent authorities.** The TCA refers back to the definitions in the 1959 Convention and its Additional Protocols (Article 114). The main novelty is that it makes specific reference to including EU bodies within the concept of a competent authority. The EU has notified the European Public Prosecutor Office (EPPO); this notification shall apply once the EPPO has become operational<sup>19</sup>. Whilst allowing direct contact amongst judicial authorities, central authorities can still play an important role as channels of communication.
- **Form.** The Specialised Committee shall establish a form for requests for mutual assistance (Article 115). Authorities must use this form once it is available. Meanwhile, authorities can submit requests without a form but in accordance with the requirements under the 1959 Convention.
- **Conditions for issuing a request for mutual assistance.** The request must be necessary and proportionate and it must be available under the same conditions in a similar domestic case (Article 116).
- **Availability of investigative measure.** The TCA foresees the possibility to have recourse to a different type of investigative measure and includes a list of investigative measures that always have to be available under the law of the requested state (Article 117).
- **Duty to inform.** The competent authority of the requested state must inform the competent authority of the requesting state when the request is incomplete or manifestly incorrect or when it may be appropriate to carry out investigations not initially foreseen (Article 118).
- **Time limits.** The TCA differs slightly from the EIO DIR as the time limit to decide on the execution is 45 days under the TCA (it is 30 days under the EIO DIR). The 90 days to execute the measure remains the same, but the competent authorities can agree on the appropriate timing of an additional extension (Article 120). There is a possibility to agree on shorter time limits and an obligation to inform the competent authority of the requesting state in case of delays. Time limits do not apply for certain minor traffic-related offences (Article 120(6)).

<sup>15</sup> All provisions mentioned in Section 3.2 ‘Mutual legal assistance’ refer to Part Three, Title VIII of the TCA, unless indicated otherwise.

<sup>16</sup> Additional Protocol of 17 March 1978 (first Additional Protocol) and Second Additional Protocol of 8 November 2001 (Second Additional Protocol).

<sup>17</sup> 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 L 130, 1.5.2014, pp. 1–36).

<sup>18</sup> Article 62(1)(l) WA.

<sup>19</sup> Article 120(2) of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (‘the EPPO’) (OJ L 283, 31.10.2017, pp. 1–71).

- **(Spontaneous) exchange of information.** The TCA regulates the exchange of operational information and the use of that information for evidential purposes, including requirements as to the consent from the providing state (Article 1 of Title IV of the TCA).
- **Transmission of requests for mutual assistance.** In addition to the channels under the 1959 Convention and its Additional Protocols, requests can be transmitted directly by UK public prosecutors to Member States' competent authorities only if direct communication is provided for under the provisions of these instruments, and in line with the declarations made by the countries. In urgent cases, any requests for mutual assistance, as well as spontaneous information, can be transmitted via Europol or Eurojust (Article 121).
- **Grounds for refusal.** The TCA refers back to the grounds for refusal provided under the 1959 Convention<sup>20</sup> and its two Additional Protocols, but adds one additional ground, *ne bis in idem* (Article 119).
- **Joint Investigation Teams (JITs).** The TCA clarifies that Union law shall govern the relationship between the EU Member States within the JIT (Article 122). The TCA makes no specific reference to the legal basis for a JIT to be set up between EU Member States and the United Kingdom and therefore, if ratified by the concerned Member State, the Second Additional Protocol to the 1959 Convention could be applicable.

### 3.3. Exchange of criminal record information (Part Three on law enforcement and judicial cooperation in criminal matters, Title IX)

As of 1 January 2021:

- Articles 120 -128 of Title IX of the TCA and its Annex LAW-6 supplement Articles 13 and 22(2) of the 1959 MLA Convention and its Additional Protocols;
- Articles 120 -128 of Title IX of the TCA and its Annex LAW-6 replace Article 22(1) of the 1959 MLA Convention, as supplemented by Article 4 of its first Additional Protocol; and
- Council Framework Decision 2009/315/JHA on the exchange of criminal record information between Member States (FD 2009/315/JHA)<sup>21</sup> and Council Decision 2009/316/JHA establishing ECRIS (ECRIS Decision 2009/316/JHA)<sup>22</sup> do not apply anymore in relation to the UK.

**Transitional regime.** FD 2009/315/JHA continues to govern the execution of the requests received by the central authority by 31 December 2020. As of 1 January 2021, replies to such requests cannot be transmitted through ECRIS<sup>23</sup>.

**New regime.** Title IX and ANNEX LAW-6 are inspired by FD 2009/315/JHA and ECRIS Decision 2009/316/JHA.

- **Notifications.** Article 123 deals with states' obligations to notify each other of convictions handed down in their state against the nationals of other states. It basically mirrors Article 4 of FD 2009/315/JHA, but whereas the Framework Decision states 'as soon as possible', Article 123(2) provides that the central authorities of the states shall communicate such information to each other 'at least once per month'.
- **Replies to requests.** Article 126 provides for the deadline to reply of a maximum of 20 working days from the date the request was received, whereas Article 8 of FD 2009/315/JHA sets out a shorter deadline of a maximum of 10 working days for most requests.

<sup>20</sup> Articles 2, 5 and 11 of the 1959 Convention. It should be noted that some countries had reservations.

<sup>21</sup> Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States (OJ L 93, 7.4.2009, pp. 23-32).

<sup>22</sup> Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA (OJ L 93, 7.4.2009, pp. 33-48).

<sup>23</sup> Article 62(1)(h) WA.



- **Channel of communication.** According to Article 127, the exchange between states of information extracted from the criminal record will take place electronically in accordance with the technical and procedural specifications laid down in ANNEX LAW-6.

### 3.4. Freezing and confiscation (Part Three on law enforcement and judicial cooperation in criminal matters, Title XI)

As of 1 January 2021, Articles 1–34 of Part Three, Title XI of the TCA<sup>24</sup> replace, in relation to the United Kingdom, the following instruments, as a self-standing Title.

- The Framework Decision on the execution in the European Union of orders freezing property or evidence<sup>25</sup> (FD 2003 on Freezing Orders);
- The Framework Decision on the application of the principle of mutual recognition to confiscation orders<sup>26</sup> (FD 2006 on Confiscation Orders);
- The relevant provisions of the EIO DIR; and
- The ‘international cooperation’ chapters of the 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism<sup>27</sup> and the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime<sup>28</sup>. Article 2 TCA replaces the corresponding definitions in Article 1 of the 2005 Convention and Article 1 of the 1990 Convention.

**Transitional regime.** The FD 2003 on freezing orders, the FD on confiscation orders and the EIO DIR continue to govern the execution of such orders that the executing authority received by 31 December 2020<sup>29</sup>.

**The new regime.** Articles 1–34 of Title XI are inspired by the abovementioned Council of Europe conventions and by Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders<sup>30</sup> (Regulation 2018/1805).

- **Objective.** To provide the widest extent possible of cooperation within the framework of proceedings in criminal matters comprising of (i) investigative assistance, (ii) provisional measures and (iii) confiscation.
- **Scope.** Title XI covers in one single chapter the identification, tracing (obligation to assist in the identification and tracing of instrumentalities, proceeds and other property liable to confiscation—Article 3), freezing and confiscation of criminal assets.
- **Request for information on banking transactions.** Unlike under Regulation 2018/1805, the requested state may make the execution of such a request dependent on the same conditions as it applies in respect of requests for search and seizure (Article 5).

<sup>24</sup> All provisions mentioned in Section 3.4 ‘Freezing and confiscation’ refer to Part Three, Title XI of the TCA, unless indicated otherwise.

<sup>25</sup> Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ L 196, 2.8.2003, pp. 45–55).

<sup>26</sup> Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (OJ L 328, 24.11.2006, pp. 59–78).

<sup>27</sup> Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Warsaw, 16 May 2005.

<sup>28</sup> Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Strasbourg, 8 November 1990

<sup>29</sup> Article 62(1)(c),(e) and (l) WA.

<sup>30</sup> Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders (OJ L 303, 28.22.2018, pp. 1–38).

- **Non-bank financial institutions.** The United Kingdom and the EU may each notify the Specialised Committee that the provisions of the TCA for requests for information on bank accounts and safe deposits, requests for information on banking transactions and requests for monitoring banking transactions will be extended to accounts held in non-bank financial institutions. Such notifications may be subject to the principle of reciprocity (Articles 4–6).
- **Spontaneous exchange of information.** There is a specific provision on such information that might assist the receiving state in initiating or carrying out investigations or proceedings or might lead to a request by that state under Title XI (Article 7). Article 31(2) further provides confidentiality requirements.
- **Time limits.** The TCA and Regulation 2018/1805 are almost identical:
  - provisional measures (Article 8(4)): within 96 hours of receiving the request (48 + 48 hours under Regulation 2018/1805);
  - confiscation (Article 10(7)): no later than 45 days after receiving the request.
- **Victims' rights.** As under Regulation 2018/1805, victims' rights to compensation or restitution have priority over the issuing and executing state's interests (Article 12(2)).
- **Imprisonment in default.** The TCA differs from Regulation 2018/1805 as there is a specific provision to the effect that the requested state shall not impose imprisonment in default or any other measure restricting the liberty of a person as a result of a request for confiscation without the consent of the requesting state (Article 14).
- **Grounds for refusal.**
  - **double criminality** can be used as a ground for refusal except for (i) cooperation in terms of identification and tracing of assets (Articles 3–7) that do not involve coercive action, or (ii) where the United Kingdom and the EU have made notifications that, on the basis of reciprocity, the double criminality will not be applied provided that the offence is a listed offence under Article 79(5) of Title VII and punishable by a custodial sentence or detention order for a maximum period of at least 3 years (Article 15(1)(b)(2)).
  - **Lapse of time.** In the TCA there is a specific ground for refusal of a confiscation order for lapse of time (Article 15(5)(c)).
  - **Confiscation not enforceable** in the requesting state, or **still subject to appeals** (Article 15(5)(e)).
  - **In absentia.** If, **in the opinion of the requested state**, proceedings conducted in absentia by the requesting state did not satisfy the minimum rights of defence (Articles 15(5)(f) and 15(6)).
- **Fundamental rights.** Where there are substantial grounds for believing that the execution of a freezing or confiscation order would entail a real risk for the protection of fundamental rights, the requested state shall, before it decides on the execution of the freezing or confiscation order, consult the requesting state and may require any necessary information to be provided (Article 16).



- **Authorities.** The main novelty is that communication relies on central authorities (except in urgent cases). In addition there is a specific reference to the possibility to include an EU body (Article 21) both as competent authority and as central authority. The EU has notified the EPPO and this notification shall apply once the EPPO has become operational<sup>31</sup>.
- **Direct communication.** The central authorities shall communicate directly with one another. In urgent cases, requests or communications under this title may be sent directly by the judicial authorities of the requesting state to judicial authorities of the requested state (Article 22(1)(2)).
- **Standardised forms.** The TCA includes specific forms that judicial authorities must use whenever they issue a freezing/provisional measures request or confiscation request based on the TCA (Article 23, ANNEX LAW-8). These forms are available in all official EU languages on the European Judicial Network website [here](#).
- **Languages.** The United Kingdom and the EU, acting on behalf of any of its Member States, may each notify the Specialised Committee that it requires the translation of any supporting documents into one of the official languages of the requested state or any other language (Article 23(7)).
- **Content of a request.** in addition to the information referred to Article 25(1), any request under Article 10 shall contain:
  - (i) in relation to a **confiscation order**:
    - a certified true copy of the confiscation order made by the court in the requesting state and a statement of the grounds on the basis of which the order was made, if they are not indicated in the order itself,
    - an attestation by the competent authority of the requesting state that the confiscation order is enforceable and not subject to ordinary means of appeal,
    - information as to the extent to which the enforcement of the order is requested, and
    - information as to the necessity of taking any provisional measures;
  - (ii) in relation to a **request for the purpose of obtaining a confiscation order**, a statement of the facts relied upon by the requesting state sufficient to enable the requested state to seek the order under its domestic law;
  - (iii) where third parties have had the opportunity to claim rights, documents demonstrating that this has been the case.
- **Legal remedies.** Each state shall ensure that persons affected by measures under Articles 8–11 have effective legal remedies in order to preserve their rights.

<sup>31</sup> Article 120(2) of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') (OJ L 283, 31.10.2017, pp. 1–71).

### 3.5. Transfer of sentenced persons

The TCA does not cover the transfer of sentenced persons<sup>32</sup>.

As from 1 January 2021, Framework Decision 2008/909/JHA on the transfer of sentenced persons (FD 2008/909/JHA)<sup>33</sup> no longer applies.

**Transitional regime.** FD 2008/909/JHA continues to govern the execution of requests that the executing authority received by 31 December 2020<sup>34</sup>).

**Applicable new regime.** The applicable regime<sup>35</sup> as of 1 January 2021 will be the 1983 Council of Europe Convention on the Transfer of Sentenced Persons<sup>36</sup>, and, where applicable, the 1997 Additional Protocol to the Convention on the Transfer of Sentenced Persons<sup>37</sup> or the Protocol amending the Additional Protocol to the Convention on the Transfer of Sentenced Persons<sup>38</sup>.

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32 With the exception of Articles 81(1)(f) and 84(b) in Title VII (Surrender) of the TCA. See also Section 3.1 'Surrender'.

33 Council Framework Decision 2008/909/JHA of 27 November 2008 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, pp. 27–46).

34 Article 62(1)(f)(i) WA.

35 Only multilateral instruments have been included.

36 [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/112/signatures?p\\_auth=jlM1NEja](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/112/signatures?p_auth=jlM1NEja)

37 [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/167/signatures?p\\_auth=jlM1NEja](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/167/signatures?p_auth=jlM1NEja)

38 <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/222>



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