

In the chaos of Brexit, what about asset recovery?

At the time of writing of this editorial, the uncertainty surrounding Brexit is as great as ever. It is always dangerous to look too closely into crystal balls – it may be that by the time this is published, the Withdrawal Agreement concluded by Theresa May's Government and the European Union will have been approved by the House of Commons and that the United Kingdom will leave the EU at midnight Brussels time on 29 March on the terms that it contains. Maybe. However, at the time of writing, the only persons predicting that with any confidence are members of May's Government itself. Elsewhere, the discussion is: if (some prefer to say "when") the deal is rejected by the British Parliament, what happens then? Will the UK leave on 29 March, as the Prime Minister insists it must, with no deal at all? This is the preferred outcome for a number within the Conservative Party, although not, it increasingly appears, within Parliament as a whole. Will some alternative deal be negotiated? That has consistently been ruled out by the European Union as a body ("this deal is the only deal"), although it would seem likely that membership of the European Economic Area, the so-called "Norway option", would prove acceptable. The position of Labour leader Jeremy Corbyn also in practice amounts to this, since he insists on a permanent customs union and an effective single market and the EU has made it clear that free movement of persons is a non-negotiable (if you will excuse the pun) condition for this. Or will there be a second referendum, the so-called "People's Vote", which as Prime Minister May has explicitly warned, could quite possibly result in no Brexit at all? The judgment of the European Court of Justice that the United Kingdom has the legal power unilaterally to withdraw the Article 50 notice underlines the potential for this, as does the statement by President of the European Parliament Guy Verhofstadt

In all of this, while much has rightly been said about the impact on businesses of the various forms of Brexit, as well as the ongoing rights of UK and EU citizens to live and work in each other's jurisdictions, relatively little has been reported, other than in specialist papers such as those of the Standing Group on Organised Crime, on the impact on the fight against organised and economic crime. Cooperation in this area will be significantly reduced. After all, Prime Minister May has repeatedly emphasised that the entire point of Brexit is "to take back control of our borders, our money and our laws". That may, depending on one's political stance, make sense when it comes to the UK freeing itself from the shackles of EU regulation. And there have been repeated statements to the effect that of course the two sides will seek to continue to share intelligence (although rather less has been said as to how, given that the current arrangements for doing so will cease). The ending of certain specific provisions for legal and judicial cooperation will, however, have a decided impact in another area: asset recovery. Few would see it as beneficial to make it more difficult

to pursue the fruits of a person's crimes and only the most ardent hard Brexiteer would even see it as a reasonable price to pay for "regaining our independence". But Brexit, even under the terms of the Withdrawal Agreement, let alone with no deal at all, will mean precisely this. Indeed, of the options currently under discussion, only a calling off of Brexit (which would mean all arrangements currently functioning under the framework of EU laws and regulations continuing as they do now) would avoid it.

Like many jurisdictions, the United Kingdom has two principal means of depriving criminals of the proceeds of their offences: criminal confiscation and civil recovery. Confiscation is a sentence (or part thereof) imposed by a criminal court. Within the European Union, it may currently be enforced in another Member State through Council Framework Decision 2006/783/JHA on the application of mutual recognition of confiscation orders. Under this, the English (or Scottish or Northern Irish) confiscation order is sent to the competent authority of, say, France or Estonia or Spain, where the funds in question are located. (In the UK, a confiscation order relates solely to a monetary sum, albeit that this may represent the value of other forms of property). The French, Estonian or Spanish authorities then recognise the order ("without further formality" (Article 7) and take the necessary measures to execute it. Only on precise, specified grounds may this be refused; for example, the property must relate to one or more of a list of offences, not just any crime. Under the Withdrawal Agreement, this system will continue to operate in respect of orders received by the authorities of other Member States before the end of the specified transition period, i.e. on or before 30 December 2020 (Article 62), but after that it will cease. In the event of a no deal exit, the Council Framework Decision will simply cease to apply to the UK as of midnight Brussels time on 30 March 2019, 6 weeks from the time of writing, since it refers to confiscation orders from Member States and the UK will no longer be a Member State.

The recognition of civil recovery orders under the current framework is in its way simpler. A civil recovery order is not part of a criminal sentence, nor is it imposed by a criminal court. It carries no implication whatsoever that the holder of the property has ever committed any criminal offence; indeed, in the case of *National Crime Agency v Azam (No.2)* (2014), the High Court made this particularly clear. It is nothing more and nothing less than a civil lawsuit brought by the National Crime Agency before the High Court claiming a legal right to specific property on the basis that that property represents the proceeds of a criminal offence or, alternatively, an act committed abroad which would have been a criminal offence had it been committed in the UK and, further, was a crime in the jurisdiction where it was committed. The result, if the NCA is successful, is an order in the form of a civil judgment.

As such, a civil recovery order may, like any other civil judgment, currently be enforced in any Member State under the terms of the Brussels I Regulation recast. Chapter III of this provides that a judgment of a court of one Member State is to be recognised by any other "without any special procedure being required" (Article 36). Enforcement is similarly straightforward. Although there are circumstances in which it may be refused, these are even more restricted than for confiscation orders: either

a) enforcement would be manifestly contrary to public policy (e.g. enforcement in the UK of a judgment from a Danish court awarding damages for breach of a contract to supply pornographic material), b) a form of enforcement that does not exist in the Member State asked to provide it or c) a serious flaw in the judgment itself.

However, just as with cooperation with regard to confiscation orders, the Withdrawal Agreement provides that the Brussels I Regulation recast, together with its predecessors relating to claims brought before the recast Regulation came into effect, will apply to judgments relating to proceedings instituted before 31 December 2020. Allowing for the time interval between an application for an order being made and that order being granted by the High Court, this means that it will only be possible to enforce civil recovery orders in the remaining 27 EU Member States under the Regulation up to the spring of 2021 at the latest. After that, enforcement will be subject to the existence of bilateral agreements between the UK and the Member State concerned. As things currently stand, the UK only has such bilateral agreements with a small number of Member States: Cyprus and Malta (as it does with most Commonwealth jurisdictions, dating from the British colonial era) plus Austria, Germany, Italy and the Netherlands. Again as with confiscation orders, should the UK leave the EU with no deal at all, it will not be the spring of 2021 when its civil recovery orders will become unenforceable in most of the European Union but 30 March 2019.

For those concerned with the fight against economic crime, this is unfortunate enough. For the United Kingdom, however, the timing could not be more ironic. Less than two years ago, section 1 of the Criminal Finances Act 2017, creating Unexplained Wealth Orders, came into force. (A reminder that Unexplained Wealth Orders function as an additional means of obtaining a civil recovery order.) Likewise section 13 of the 2017 Act, extending the definition of unlawful conduct, the proceeds of which may be the subject of a civil recovery order, to gross violations of human rights committed abroad. The effect of the United Kingdom leaving the European Union, as things currently stand, is that just as new legal provisions aimed at seizing the illicit wealth not only of economic criminals but those who have engaged in the most egregious abuses of political power have come into force, the ability to enforce them before the courts of other European jurisdictions will shortly end. Readers of this journal may well have varying political views on the European Union, but wherever one stands on that, most would agree that such an outcome is far from desirable. As the nature of the UK's relationship with Europe is being debated afresh, we would urge that this issue be included.

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