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STATUTORY INSTRUMENTS

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**2017 No. 730**

**The Criminal Justice (European Investigation Order) Regulations 2017**

**PART 3**

**Recognition and execution in the United Kingdom of a European investigation order made in a participating State**

**CHAPTER 4**

Execution of a European investigation order by means of a search warrant etc.

**Search warrants and production orders: nominating a court**

**38.**—(1) This regulation applies if it appears to the central authority that in order to give effect to the European investigation order it will be necessary for a court to issue a warrant or, as the case may be, make a production order under regulation 39.

(2) Where it appears to the central authority that the condition in paragraph (3) is met, it may by notice nominate a court to issue a warrant or make a production order.

(3) The condition is that the conduct in relation to which the European investigation order was issued would, if it had occurred in the relevant part of the United Kingdom, constitute an indictable offence under the law of that part of the United Kingdom.

(4) But the central authority must nominate a court under paragraph (2) where it appears that, in addition, recognition or execution of the European investigation order cannot be refused under regulation 28.

(5) If the Secretary of State nominates a court under this regulation, he or she must—

- (a) send a copy of the European investigation order to that court;
- (b) send a copy of the order to the chief officer of police for the police area in which the evidence is situated, and
- (c) tell the chief officer which court has been nominated.

(6) In relation to Scotland, in this regulation “court” means “sheriff court”.

(7) References to “the nominated court” in regulations 39 to 41 are references to a court nominated under this regulation, or in relation to Scotland, any sheriff at a court nominated under this regulation.

**Search warrants and production orders: giving effect to the European investigation order**

**39.**—(1) Within a period prescribed by rules of court, the nominated court must give effect to the European investigation order by issuing a warrant authorising a constable—

- (a) to enter the premises to which the European investigation order relates and search the premises to the extent reasonably required for the purpose of discovering any evidence to which the order relates, and

(b) to seize and retain any evidence for which that constable is authorised to search.

(2) But in relation to England and Wales and Northern Ireland, so far as the European investigation order relates to excluded material or special procedure material, the court must give effect to the order by making a production order (subject to paragraph (8)).

(3) A production order is an order for the person who appears to the court to be in possession of material to which the order relates to produce it to a constable before the end of the period of seven days beginning with the date on which the order is made, or such longer period as the order may specify.

(4) Before giving effect to the European investigation order, the nominated court must give the chief officer of police or, as the case may be, the procurator fiscal an opportunity to be heard.

(5) The nominated court may refuse to give effect to the European investigation order only if it is of the opinion that one or more of grounds in paragraph (6) apply.

(6) The grounds are that—

- (a) the execution of the European investigation order would be contrary to the principle of *ne bis in idem*;
- (b) there are substantial grounds for believing that executing the European investigation order would be incompatible with any of the Convention rights (within the meaning of the Human Rights Act 1998<sup>(1)</sup>);
- (c) there are substantial grounds for believing that the European investigation order has been issued for the purpose of prosecuting or punishing a person on account of that person's sex, racial or ethnic origin, religion, sexual orientation, nationality, language or political opinions;
- (d) there are substantial grounds for believing that a person's position in relation to the investigation or proceedings to which the European investigation order relates might be prejudiced by reason of that person's sex, racial or ethnic origin, religion, sexual orientation, nationality, language or political opinions.

(7) The nominated court may postpone giving effect to the European investigation order if—

- (a) to do so might prejudice a criminal investigation or criminal proceedings taking place in the United Kingdom, or
- (b) if, under an order made by a court in criminal proceedings in the United Kingdom, the information must not be removed from the United Kingdom.

(8) The nominated court may issue a warrant under paragraph (1) in respect of excluded material or special procedure material only where—

- (a) a person has failed to comply with a production order made in respect of the same material (whether or not the court also deals with the matter as a contempt of court), or
- (b) it appears that one or more of the conditions in paragraph (9) is satisfied.

(9) The conditions are that—

- (a) it is not practicable to communicate with any person entitled to grant entry to the premises;
- (b) it is practicable to communicate with a person entitled to grant entry to the premises but it is not practicable to communicate with any person entitled to grant access to the material;
- (c) the material consists of information which—
  - (i) is subject to a restriction on disclosure or obligation of secrecy under the law of the issuing State, and
  - (ii) is likely to be disclosed in breach of it if a warrant is not issued;

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(1) 1998 c. 42.

(d) the making of a production order may seriously prejudice the investigation or proceedings to which the European investigation order relates.

(10) Section 409 of the Proceeds of Crime Act 2002 (jurisdiction of sheriff) has effect for the purposes of paragraph (1) as if that paragraph were included in Chapter 3 of Part 8 of that Act.

(11) A constable may take away any material produced to him or her under a production order; and the material is to be treated for the purposes of section 21 of the Police and Criminal Evidence Act 1984<sup>(2)</sup> or, as the case may be, Article 23 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (access and copying) as if it has been seized by the constable.

(12) A court in England and Wales or Northern Ireland must not issue a warrant under paragraph (1) in respect of any evidence unless the court has reasonable grounds for believing that it does not consist of or include items subject to legal privilege, excluded material or special procedural material.

(13) A sheriff must not issue a warrant under paragraph (1) in respect of any evidence unless the sheriff has reasonable grounds for believing that it does not consist of items subject to legal privilege.

(14) Paragraph (12) does not prevent a warrant being issued by virtue of paragraph (8) in respect of excluded material or special procedure material.

#### **Evidence seized under a search warrant or production order**

**40.**—(1) A constable must retain any evidence—

- (a) seized by or produced to him or her under regulation 39;
- (b) seized by him or her by virtue of section 50 of the Criminal Justice and Police Act 2001 (additional powers of seizure)<sup>(3)</sup>, in the course of a search authorised by a warrant issued under that regulation,

until it is transferred to the issuing State in accordance with regulation 31 (transfer of evidence to the issuing State).

(2) But in relation to evidence of the type mentioned in paragraph (1)(b), nothing in this regulation or in regulation 30 requires the transfer of that evidence to the issuing State—

- (a) before it has been found, on the completion of any examination required to be made by arrangements under section 53(2) of the Criminal Justice and Police Act 2001, to be property within subsection (3) of that section (property which may be retained after examination), or
- (b) at a time when it constitutes property in respect of which a person is required to ensure that arrangements such as are mentioned in section 61(1) of that Act (duty to secure) are in force.

#### **Power to revoke or vary a search warrant or production order or to authorise the release of evidence seized or produced**

**41.**—(1) On an application by a person mentioned in paragraph (3) or (4), the nominated court may—

- (a) vary or revoke a warrant issued or production order made by it under regulation 39, or
- (b) authorise the release of any evidence retained by a constable under regulation 40(1).

(2) But the nominated court may only exercise its power under paragraph (1) to the extent that—

- (a) it is of the opinion mentioned in regulation 39(5), or

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<sup>(2)</sup> Section 21 was amended by paragraph 3 of Schedule 1 to the Criminal Justice Act 2003 (c. 44).

<sup>(3)</sup> 2001 c. 16.

- (b) it appears to the nominated court that the European investigation order has been withdrawn or no longer has effect in the issuing State.
- (3) In relation to England and Wales and Northern Ireland, the persons are—
  - (a) the chief officer of police to whom a copy of the European investigation order was sent;
  - (b) the constable retaining the evidence under regulation 40(1);
  - (c) any other person affected by the order.
- (4) In relation to Scotland, the persons are—
  - (a) a procurator fiscal;
  - (b) any other person affected by the order.
- (5) When considering an application under this regulation, the nominated court must not entertain any challenge to the substantive reasons in relation to which the European investigation order was issued.