Unravelling the implications of the referendum result for corporate crime

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Corporate Crime analysis: Jemma Sherwood-Roberts, associate at Corker Binning, looks into the potential impact of Brexit on corporate crime, outlining the upcoming challenges the UK will face and warning of a potential erosion to the human rights of those suspected of crimes if Brexit comes to pass.

What do you consider will be the overall impact of Brexit for corporate crime lawyers?

The exact impact of Brexit on corporate crime lawyers, as with many areas of law, is difficult to ascertain. However, one thing is certain, once notice of Article 50 of the Treaty on European Union (TEU) is issued, a vast amount of legislation will need to be reviewed and our government will need to consider how much of it should be repealed and re-enacted as new UK domestic law and how much can be discarded. But this will need to be considered at the same time as the exit negotiations are taking place or else there will be considerable scope for legal chaos.

I foresee that some lawyers will be kept busy liaising with the government about these changes in the near future, advising on what the government’s options are and what steps will need to be taken. Of course, this largely depends on the terms of the exit negotiations and whether we can truly extricate ourselves from the EU or whether, for example, we will need to remain subject to some aspects of EU law in order to trade. Nevertheless, it is clear that corporate crime lawyers—and they will not be alone in this—will need to keep a close eye on the changes being made, particularly the terms of the exit negotiations, in order to see what impact this will have in the coming years.

How do you think Brexit will impact the cross border investigation of corporate crime?

Again, it is difficult to say with any certainty what the impact of Brexit will be in this area. Given the fact that a lot of corporate crime has an international element, it will remain in each country’s interest to keep an open dialogue. However, if the UK departs the EU and in doing so withdraws from the EU Directives and legal measures it has signed up to and ratified, then this may impact on how other EU Member States wish to deal with us. This is because these measures were designed to establish a uniform level of protection across the EU Member States, to ensure that they maintain the same high level of standards and protection of rights as each other. This is, for example, one reason that countries such as Turkey have encountered difficulties in joining the EU. If the UK reneges on such measures and the EU has no way of being sure that the UK system will maintain these standards then its Member States may be less willing to deal with us and to bring cross border investigations to our shores. This could have a detrimental impact on our current mutual legal assistance regimes with other EU Member States.

Furthermore, we are also at risk of losing automatic access to Europol and Eurojust. These organisations were set up in order to assist the EU Member States in sharing information and intelligence between law enforcement organisations. This is further complicated by the fact that the current director of Europol is British. Although it would be in everyone’s interest to allow the UK to continue sharing such information for the sake of security, it is not hard to see that, even if the remaining EU Member States agree to UK participation, they might wish to restrict the UK’s involvement. For example, not letting the UK have any input into how those organisations are run, their budgets or their policies.

What impact with this have on European Arrest Warrants (EAWs) and the extradition regime generally?

The Extradition Act 2003 currently provides for EAWs which allow Member States of the EU to use a fast-tracked system when seeking to extradite individuals back to EU countries. These warrants were designed to speed up extradition proceedings (which were taking years in some cases) and to reduce the cost to the courts and governments. Without being a Member State of the EU and consequently not being able to use this system as a default, the UK will need to fall back on alternative means of extradition, by using the Council of Europe Convention on Extradition, negotiating individual treaties with each Member State (which seems unlikely) or negotiating an opt-in arrangement with the EU in order to retain the EAW and other instruments. This may be a challenge in itself, as all remaining Member States would also need to agree.
Another reason for the introduction of the EAW was to stop EU countries refusing to agree to their own citizens being extradited. It may therefore become much harder to bring alleged European-based perpetrators of crime to justice in the UK. In other words, if Brexit goes ahead, we stand to lose the significant law enforcement benefits of being part of the EU.

What impact will leaving the EU have on the financial and trade sanctions regime and the forthcoming changes to the enforcement of sanctions under the Policing and Crime Bill?

The EU has set down a financial and trade sanctions regime that Member States have adopted in order to enforce restrictive sanctions across various other Member States, including asset freezing measures. The EU also has its own autonomous sanction regime that is reviewed at regular intervals to ensure that measures are adjusted as needed. Trade sanctions have been applied, for example, in cases where funding of terrorism or money laundering offences are suspected.

Therefore, unless a suitable replacement sanction regime is put in place, leaving the EU could have a serious impact on the enforceability of such sanctions and the due process rights of those put on the sanctions list. The UK has its own body, the Office of Financial Sanctions Implementation (OFSI), but it is clear from its own website that this body is currently largely reliant on implementing the measures provided by the EU. It would seem that, moving forward, the OFSI will have to take this task into its own hands, but it will need considerably more resources to do this.

The forthcoming changes to the enforcement of sanctions under the Policing and Crime Bill would also need to be reworked because the definitions contained within it refer to the EU financial sanctions regime (on which we will no longer be able to rely) and our obligations under EU law. The legislation would therefore need amending if the UK government wishes to retain the power to impose monetary penalties for a breach of the sanctions or to prosecute individuals and companies for serious sanctions violations.

The sheer amount of change that is required by this one distinct area of law shows the extent of work the government will have to do post-Brexit.

Post-referendum, what are your key concerns and what are the key concerns of your clients?

My biggest concern, in relation to the effect on corporate crime, is the risk to the rights of individuals as suspects, defendants or victims. As I mentioned earlier, the EU has produced procedural safeguards for defendants in criminal cases, which include the disclosure of evidence and access to legal advice. The UK has currently signed up to these safeguards—although notably not to all of them, in particular the recent Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. The exit negotiations will need to address the extent to which the UK will need to remain subject to these EU legal safeguards.

A complete exit from the EU will mean that the UK government will not be governed by any overarching principles, which would require us to adhere to such safeguards. We have already seen the gradual creep of legislation that works against alleged perpetrators of crimes when it comes to terrorist cases and the introduction of wide ranging surveillance powers in the Investigatory Powers Bill, which are still to be further debated. The UK government will be at liberty to do whatever it feels is necessary without regard to EU criminal justice instruments, which will mean that individuals will have no recourse save to our own courts and Parliament. I fear that, as a result, there could be a distinct erosion of human rights in respect of those suspected of crimes.

Do you think there are any issues that may not receive enough attention or consideration in the withdrawal period?

There are so many issues to be considered by the UK government in order to extricate itself from the EU—it is highly likely that numerous issues will not receive sufficient attention in the limited two-year window that the TEU, art 50 exit notice initially provides. I believe, in relation to corporate crime, the biggest risk will be the government rushing the redrafting of legislation stage, which may cause difficulties for those facing criminal investigation or proceedings. There is also concern as to how this will impact our ability to bring those outside the UK to justice. I feel that the importance of this may not be fully appreciated in the busy and fraught exit negotiation process.

Interviewed by Giverny Tattersfield.