

A GUIDE TO THE CRIMINAL PROCEDURE (AMENDMENT NO 3) RULES 2017 (S.I. 2017/755)

Where to find the new Rules

The Criminal Procedure (Amendment No. 3) Rules 2017 are at this address:

<http://www.legislation.gov.uk/ukSI/2017/755/contents/made>

When the Rules come into force, the changes they make will appear at this address, too:

<http://www.justice.gov.uk/courts/procedure-rules/criminal/rulesmenu-2015>

What the new Rules are for

The new Rules amend the Criminal Procedure Rules 2015. They:

(a) include new rules about—

- explanations for the defendant in the Crown Court, in Part 3 of the Criminal Procedure Rules (Case management)
- applications for European investigation orders that are to be acted on in other participating states, in Parts 18 and 47 of the Rules (respectively, Measures to assist a witness or the defendant to give evidence; and Investigation orders and warrants)
- dealing with European investigation orders that have been issued in other states, in Part 49 of the Rules (International co-operation)

(b) make changes to the rules about—

- when offences may and may not be tried together in the Crown Court (Part 3)
- service of documents in extradition appeal cases (Part 4: Service of documents)
- orders for the release of money held by banks, etc. where a confiscation order has been made (Part 33: Confiscation and related proceedings)
- applications for investigation orders under the Terrorism Act 2000 and under the Proceeds of Crime Act 2002 (Part 47)

(c) make a few other miscellaneous additions and alterations.

When the new rules come into force

The rules about European investigation orders come into force on Thursday 10 August 2017. The other rules come into force on Monday 2 October 2017.

What is in the new Rules

Explanations for the defendant in the Crown Court

Following a discussion of the rate of absence of defendants from trial in magistrates' courts and in the Crown Court the Rule Committee concluded that some of the practice now followed in the Crown Court when a defendant is absent without giving a good, or any, reason for that absence potentially is unfair to co-defendants, and confusing for the jury. The Committee decided to require explanations of the potential consequences of absence (namely, trial in absence; directions to the jury; sanctions for breach of bail) so as to make those clear to the defendant and to allow the court justly to impose those consequences if appropriate.

Rule 4(a) of these Amendment Rules amends rule 3.13 of the Criminal Procedure Rules to require the Crown Court at the plea and trial preparation hearing, which is the principal pre-trial case management hearing in the Crown Court, to ensure that explanations have been given to the defendant about potential credit for a guilty plea and about the potential consequences of failing to attend the trial.

Consequences of trying together offences that should be tried separately

Until last year the Criminal Procedure Rules had prohibited the inclusion of more than one alleged offence in a single Crown Court indictment (the formal list of allegations against the defendant) unless those offences all were founded on the same facts or formed or were a part of a series of offences of the same or a similar character; and the common law was understood to require that the consequence of breach of that particular procedural requirement would be the annulment of the entire trial. With effect from 3 October 2016 the Criminal Procedure (Amendment No. 2) Rules 2016, S.I. 2016/705, removed that procedural requirement and in its place changed rule 3.21 of the Criminal Procedure Rules to require the Crown Court to exercise its power to order separate trials of offences that did not meet those criteria. The Explanatory Memorandum published with those Amendment Rules explained:¹

“the new rules abolish the current requirement that restricts the types of offence which an indictment validly may include, and they replace that requirement with one which restricts the types of offence which may be tried at the same time: the objective being to ensure that a trial is fair while abolishing the present antique and formalistic means of achieving that”.

In the case of *R v Williams* [2017] EWCA Crim 281, [2017] 4 W.L.R. 93,² in which the defendant’s trial had taken place before the rule was changed, the Court of Appeal in its judgment drew attention to the rule change and invited the Rule Committee to clarify its effect, as far as that can be done in procedure rules. The Committee decided to add a note to rule 3.21 to draw attention to the powers of the Court of Appeal to quash a conviction that is unsafe – for example, because the trial was unfair – and in an appropriate case to order a re-trial. Rule 4(b) of these Amendment Rules does that.

Service of documents in extradition appeal cases

Part 4 of the Criminal Procedure Rules contains the rules about how documents are to be formally delivered (‘served’) in the cases to which the Rules apply, and about when documents are to be taken as having been served, depending on the method of ‘service’ used. At present, documents served by electronic means (most often by email, or by uploading to a website to which only the parties have access) count as delivered on that same day if the day is a usual working day (a ‘business day’) and if service takes place by 2.30pm – so as to give the recipient enough time to consider the document and respond before the next business day. Representatives of lawyers who practise regularly in extradition appeal cases asked the Rule Committee to change the rules to provide that electronic service would occur the same business day if it took place by 4.30pm instead; the particular circumstances of such cases making it desirable to allow the sender that extra 2 hours, and not unfair to the recipient of a document served up to 2 hours later. Having consulted regular representatives of the parties in such cases, both defence lawyers and the Crown Prosecution Service, the Committee agreed to make that change.

Rule 5 of these Amendment Rules amends rule 4.11 of the Criminal Procedure Rules to allow the service of documents by electronic means in extradition appeal cases to have effect on the same business day if those documents are sent by 4.30pm instead of by 2.30pm. The rule change makes no difference to the statutory time limits for giving notice of an extradition appeal.

Rules to supplement European investigation orders

The Criminal Justice (European Investigation Order) Regulations 2017, S.I. 2017/730, give effect in the United Kingdom to Directive 2014/41/EU of the European Parliament and of the Council regarding the European Investigation Order in criminal matters. Under regulation 6 of those Regulations a court in the UK can make an order specifying one or more ‘investigative measures’ that are to be carried out in a State listed in Schedule 2 to the Regulations (a

¹ The Memorandum is available at: <http://www.legislation.gov.uk/ukxi/2016/705/memorandum/contents>. See paragraph 7.6.

² The judgment is available at: <http://www.bailii.org/ew/cases/EWCA/Crim/2017/281.html>.

‘participating State’). One such measure is hearing for the purposes of proceedings in the UK, by live video or, potentially, audio link (described in the Regulations as ‘videoconference or other audio visual transmission’ and as ‘telephone conference’ respectively), a witness who is in that participating State. Other such measures include the issue by a court in the UK of a search warrant, or of a production or similar order, for the purpose of obtaining evidence in a participating State for use in a criminal investigation or criminal proceedings here. In relation to orders made in other participating States, regulations 35 to 45 of the 2017 Regulations require those orders to be submitted to a UK court before they can be given effect in this jurisdiction.

The amendments made by rule 7 and rule 10(a), (u) and (w) of these Amendment Rules to Parts 18 and 47 of the Criminal Procedure Rules govern applications for ‘outbound’ orders. The amendments made by rule 12 of these Rules to Part 49 the Criminal Procedure Rules govern the procedure on the judicial consideration of ‘inbound’ orders. All the rule amendments follow closely the provisions of the Regulations and set out the procedure to be followed.

Rules to supplement the Criminal Finances Act 2017

Rule 9 and rule 10(b) to (n), (v) and (x) of these Amendment Rules amend rules in Parts 33 and 47 of the Criminal Procedure Rules to accommodate statutory amendments made by the Criminal Finances Act 2017 to the Terrorism Act 2000 and to the Proceeds of Crime Act 2002. The rules reflect the introduction by the Criminal Finances Act of new types of investigation into proceeds of crime, and provide for applications by investigators for the Crown Court to extend the ‘moratorium period’ under the new section 336A of the Proceeds of Crime Act.

Section 67 of the Proceeds of Crime Act (Seized money) now will allow money seized by investigators to be applied towards payment of a confiscation order. Rule 33.24 of the Criminal Procedure Rules is amended to allow for the new scope of applications under that section.

Under sections 335 and 336 of the Proceeds of Crime Act a moratorium period is the period of 31 days starting with the day on which consent to the doing of an act is refused by a constable, a customs officer or the Director General of the National Crime Agency. The act to which those sections refer is one that would be an offence under section 327, 328 or 329 of the Act (money laundering offences) but for the making of a disclosure within the meaning of section 338 to such an officer in relation to that act. On the expiry of the moratorium period the person who made the disclosure will be treated as having the relevant officer’s consent to the doing of the act and so will commit no offence by doing it. Under new section 336A of the Act the Crown Court may extend a moratorium period by up to another 31 days beginning with the day after the day on which the period otherwise would end.

New Criminal Procedure Rules 47.62 to 47.65 provide for applications by investigators for the Crown Court to extend the moratorium period under that new power. Rule 47.63(3) and rule 47.64(2) require notice of an application to be given in every case unless the applicant can satisfy the court of one of the exceptional circumstances listed in the first of those rules.

Other amendments

Rules 4(c), 6, 8, 10(o) to (t) and 11 of these Rules correct and bring up to date the references that appear in each of the corrected Criminal Procedure Rules.

Criminal Procedure Rule Committee secretariat
24 July 2017