

## SCHEDULES

### SCHEDULE 8

#### CRYPTOASSETS: CONFISCATION ORDERS

#### PART 2

#### SCOTLAND

##### *Introductory*

- 19 Part 3 of the Proceeds of Crime Act 2002 (confiscation: Scotland) is amended as follows.

##### *Seizure of property*

- 20 In section 127B (conditions for exercise of seizure powers)—
- (a) in subsection (2), omit paragraph (b);
  - (b) in subsection (3), omit paragraph (b).
- 21 (1) Section 127C (power to seize property) is amended as follows.
- (2) In subsection (2), after “not” insert “under subsection (1)”.
  - (3) After subsection (5) insert—
    - “(5A) On being satisfied as mentioned in section 127B(1) an appropriate officer may seize any free property if the officer has reasonable grounds for suspecting that it is a cryptoasset-related item.
    - (5B) A “cryptoasset-related item” is an item of property that is, or that contains or gives access to information that is, likely to assist in the seizure under subsection (1) of any cryptoasset.
    - (5C) The circumstances in which a cryptoasset is “seized” for the purposes of subsection (1) include circumstances in which it is transferred into a crypto wallet controlled by the appropriate officer.
    - (5D) If an appropriate officer is lawfully on any premises, the officer may, for the purpose of—
      - (a) determining whether any property is a cryptoasset-related item, or
      - (b) enabling or facilitating the seizure under subsection (1) of any cryptoasset,require any information which is stored in any electronic form and accessible from the premises to be produced in a form in which it can be taken away and in which it is visible and legible, or from which it can readily be produced in a visible and legible form.

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(5E) But subsection (5D) does not authorise an appropriate officer to require a person to produce any items subject to legal privilege (as defined in section 412).

(5F) Where an appropriate officer has seized a cryptoasset-related item under subsection (5A), they may use any information obtained from it for the purpose of—

- (a) identifying or gaining access to a crypto wallet, and
- (b) by doing so, enabling or facilitating the seizure under subsection (1) of any cryptoassets.”

22 In section 127Q (release of property), in subsection (3)(b), at the end insert “or (5A)”.

*Detention and release of property*

23 In section 127K (further detention pending making of restraint order), after subsection (4) insert—

“(5) Exempt property seized under section 127C(5A) may be detained under subsections (2) and (3) only with the approval of a senior officer.

(6) In subsection (5)—

“exempt property” has the meaning given in section 127C(4) (reading references there to the accused as references to the person by whom the property is held);

“senior officer” has the meaning given in section 127G(3) (and for this purpose, the powers under subsections (2) and (3) to detain property are to be treated as exercised by the appropriate officer who seized the property).”

24 In section 127L (further detention pending variation of restraint order), after subsection (3) insert—

“(4) Exempt property seized under section 127C(5A) may be detained under subsections (2) and (3) only with the approval of a senior officer.

(5) In subsection (4)—

“exempt property” has the meaning given in section 127C(4) (reading references there to the accused as references to the person by whom the property is held);

“senior officer” has the meaning given in section 127G(3) (and for this purpose, the powers under subsections (2) and (3) to detain property are to be treated as exercised by the appropriate officer who seized the property).”

25 (1) Section 127M (further detention in other cases) is amended as follows.

(2) In subsection (2)(b), omit “(within the meaning of section 127C(4))”.

(3) After subsection (2) insert—

“(2A) The sheriff may by order extend the period for which the property may be detained under section 127J if satisfied that—

- (a) any of the conditions in section 127B is met (reading references in that section to the officer as references to the sheriff),

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- (b) the property is free property, and
- (c) there are reasonable grounds for suspecting that the property is a cryptoasset-related item.

(2B) An order under subsection (2A) may not be made in respect of exempt property unless the sheriff is satisfied that the person applying for the order is working diligently and expeditiously—

- (a) to determine whether the property is a cryptoasset-related item, or
- (b) if it has already been determined to be such an item, to seize any related cryptoassets under section 127C(1).

(2C) An order under subsection (2A) may not extend the period for which the property may be detained beyond the period of—

- (a) six months beginning with the date of the order, or
- (b) in the case of exempt property, 14 days beginning with that date.

This does not prevent the period from being further extended by another order under this section.

(2D) The period of 14 days referred to in subsection (2C)(b) is to be calculated in accordance with section 127H(7) (reading the reference there to 48 hours as a reference to 14 days).”

(4) In subsection (6), after “section” insert “—

“exempt property” has the meaning given in section 127C(4) (reading references there to the accused as references to the person by whom the property is held);”.

26 In section 127Q (release of property), after subsection (5) insert—

“(6) If a cryptoasset-related item which has been released is not claimed within the period of a year beginning with the date on which it was released, the appropriate officer may—

- (a) retain the item and deal with it as they see fit,
- (b) dispose of the item, or
- (c) destroy the item.

(7) The powers in subsection (6) may be exercised only—

- (a) where the appropriate officer has taken reasonable steps to notify—
  - (i) the person from whom the item was seized, and
  - (ii) any other persons who the appropriate officer has reasonable grounds to believe have an interest in the item, that the item has been released, and
- (b) with the approval of a senior officer.

(8) “Senior officer” in subsection (7)(b) has the meaning given in section 127G(3).

(9) Any proceeds of a disposal of the item are to be paid into the Scottish Consolidated Fund.”

*Property held by persons subject to confiscation orders: destruction, realisation etc*

27 (1) Section 128 (enforcement administrators) is amended as follows.

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- (2) In subsection (6), at the end insert—
- “(d) so far as the property consists of cryptoassets, power to destroy the property.”
- (3) In subsection (11)(a), for “or (c)” substitute “, (c) or (d)”.
- (4) After subsection (13) insert—
- “(13A) The court may confer the power mentioned in subsection (6)(d) only where—
- (a) it is not reasonably practicable to realise the cryptoassets in question, or
- (b) there are reasonable grounds to believe that the realisation of the cryptoassets would be contrary to the public interest, having regard in particular to how likely it is that the entry of the cryptoassets into general circulation would facilitate criminal conduct by any person.
- (13B) An order conferring that power—
- (a) must set out the court’s assessment of the market value of the cryptoassets to which it relates;
- (b) may confer power to destroy the cryptoassets only to the extent that their market value, as set out in the order, is less than or equal to the amount remaining to be paid under the confiscation order.
- (13C) If the administrator destroys any cryptoassets in the exercise of that power, the accused is to be treated as having paid, towards satisfaction of the confiscation order, an amount equal to the market value, as set out in the order, of the cryptoassets which have been destroyed.”
- 28 (1) Section 131ZA (seized money) is amended as follows.
- (2) In subsection (1)(b), for “bank or building society” substitute “relevant financial institution”.
- (3) In subsection (7), for “bank or building society” substitute “relevant financial institution”.
- (4) In subsection (9)—
- (a) in paragraph (a) of the definition of “appropriate person”, for the words from “a bank” to the end substitute “a relevant financial institution, the relevant financial institution”;
- (b) at the appropriate places insert—
- ““electronic money institution” has the same meaning as in the Electronic Money Regulations 2011 (S.I. 2011/99) (see regulation 2 of those Regulations);”;
- ““payment institution” means an authorised payment institution or a small payment institution (each as defined in regulation 2 of the Payment Services Regulations 2017 (S.I. 2017/752));”;
- ““relevant financial institution” means a bank, a building society, an electronic money institution or a payment institution;”.
- (5) For the heading substitute “Money”.
- 29 After section 131ZA insert—

### **“131ZB Cryptoassets**

- (1) This section applies to cryptoassets which—
  - (a) are held by a person, and
  - (b) are held in a crypto wallet administered by a UK-connected cryptoasset service provider,but only so far as the cryptoassets are free property.
- (2) Subsection (3) applies if—
  - (a) a confiscation order is made against a person holding cryptoassets to which this section applies, and
  - (b) an administrator has not been appointed under section 128 in relation to the cryptoassets.
- (3) The sheriff may order the UK-connected cryptoasset service provider which administers the crypto wallet in which the cryptoassets are held—
  - (a) to realise the cryptoassets, or a portion of the cryptoassets having a specified value,
  - (b) to pay the proceeds of that realisation to the appropriate clerk of court on account of, and up to a maximum of, the amount payable under the confiscation order, and
  - (c) to the extent that the proceeds of the realisation exceed the amount payable under the confiscation order, to pay the excess to an appropriate officer identified in the order.
- (4) In subsection (3)—

“appropriate clerk of court” means the sheriff clerk of the sheriff court responsible for enforcing the confiscation order under section 211 of the Procedure Act as applied by section 118(1);

“appropriate officer” has the same meaning as in section 120A.
- (5) An order under subsection (3) may be made—
  - (a) on the application of the prosecutor, or
  - (b) by the sheriff of the sheriff’s own accord.
- (6) Where a UK-connected cryptoasset service provider—
  - (a) is required by an order under subsection (3) to realise a portion of cryptoassets having a specified value, but
  - (b) on realising cryptoassets under the order, obtains proceeds of an amount which differs from that value,it does not fail to comply with the order solely because of that difference in value, provided that it took reasonable steps to obtain proceeds equal to the value specified.

### **131ZC Meaning of “UK-connected cryptoasset service provider”**

- (1) “UK-connected cryptoasset service provider” in section 131ZB means a cryptoasset service provider which—
  - (a) is acting in the course of business carried on by it in the United Kingdom,

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- (b) has terms and conditions with the persons to whom it provides services which provide for a legal dispute to be litigated in the courts of a part of the United Kingdom,
  - (c) holds in the United Kingdom any data relating to the persons to whom it provides services, or
  - (d) meets the condition in subsection (2).
- (2) The condition in this subsection is that—
- (a) the cryptoasset service provider has its registered office or, if it does not have one, its head office in the United Kingdom, and
  - (b) the day-to-day management of the provider’s business is the responsibility of that office or another establishment maintained by it in the United Kingdom.
- (3) “Cryptoasset service provider” in subsections (1) and (2) includes a cryptoasset exchange provider and a custodian wallet provider; and for this purpose—
- “cryptoasset exchange provider” means a firm or sole practitioner who by way of business provides one or more of the following services, including where the firm or sole practitioner does so as creator or issuer of any of the cryptoassets involved—
- (a) exchanging, or arranging or making arrangements with a view to the exchange of, cryptoassets for money or money for cryptoassets;
  - (b) exchanging, or arranging or making arrangements with a view to the exchange of, one cryptoasset for another;
  - (c) operating a machine which utilises automated processes to exchange cryptoassets for money or money for cryptoassets;
- “custodian wallet provider” means a firm or sole practitioner who by way of business provides services to safeguard, or to safeguard and administer—
- (a) cryptoassets on behalf of its customers, or
  - (b) private cryptographic keys on behalf of its customers in order to hold, store and transfer cryptoassets.
- (4) In the definition of “cryptoasset exchange provider” in subsection (3), “cryptoasset” includes a right to, or interest in, a cryptoasset.
- (5) The Secretary of State may by regulations amend the definitions in subsection (3) (including by amending subsection (4)).
- (6) The Secretary of State must consult the Scottish Ministers before making regulations under subsection (5).”

30 After section 131A insert—

**“131AA Destruction of seized cryptoassets**

- (1) This section applies to cryptoassets which are held by a person and which have been seized by an appropriate officer under a relevant seizure power.
- (2) The sheriff may by order authorise an appropriate officer to destroy the cryptoassets if—

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- (a) a confiscation order is made against the person by whom the cryptoassets are held,
  - (b) an administrator has not been appointed under section 128 in relation to the cryptoassets, and
  - (c) either—
    - (i) it is not reasonably practicable to realise the cryptoassets, or
    - (ii) there are reasonable grounds to believe that the realisation of the cryptoassets would be contrary to the public interest, having regard in particular to how likely it is that the entry of the cryptoassets into general circulation would facilitate criminal conduct by any person.
- (3) An order under this section may be made—
- (a) on the application of the prosecutor, or
  - (b) by the sheriff of the sheriff’s own accord.
- (4) An order under this section—
- (a) must set out the sheriff’s assessment of the market value of the cryptoassets to which it relates;
  - (b) may authorise the destruction of cryptoassets only to the extent that their market value, as set out in the order, is less than or equal to the amount remaining to be paid under the confiscation order.
- (5) Before making an order under this section, the sheriff must give persons who hold interests in the cryptoassets a reasonable opportunity to make representations to it.
- (6) If cryptoassets held by a person are destroyed following an order under this section, the person is to be treated as having paid, towards satisfaction of the confiscation order, an amount equal to the market value, as set out in the order, of the cryptoassets which have been destroyed.
- (7) In this section “appropriate officer” and “relevant seizure power” have the same meaning as in section 120A.”
- 31 (1) Section 131C (sections 131A and 131B: appeals) is amended as follows.
- (2) In subsection (1), for “131A” substitute “131A(3)”.
  - (3) After subsection (1) insert—
    - “(1A) If a sheriff decides not to make an order under section 131ZB(3) or 131AA(2), the prosecutor may appeal to the Court of Session.”
  - (4) In subsection (2), for “131A” substitute “131ZB(3), 131A(3) or 131AA(2)”.
  - (5) In subsection (3), for “131A(2)(a)” substitute “131ZB(2)(a), 131A(2)(a) or 131AA(2)(a) (as applicable)”.
  - (6) In the heading, for “131A and” substitute “131ZB to”.
- 32 In section 131D (proceeds of realisation), in subsection (1)(b), after “section” insert “131ZB or”.
- 33 For the italic heading before section 131ZA, substitute “Enforcement: money, cryptoassets and personal property”.

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- 34 Omit the italic heading before section 131A.
- 35 In section 132 (powers of court and administrator etc), after subsection (2) insert—
- “(2A) Subsection (2)(a) does not apply to—
- (a) the power conferred on a court by paragraph (d) of section 128(6) (which enables the court to give an administrator the power to destroy cryptoassets),
  - (b) a power conferred on an administrator by virtue of that paragraph, or
  - (c) the power conferred on the sheriff by section 131AA (power to order destruction of cryptoassets).”

*Interpretation and miscellaneous provision*

- 36 After section 150 insert—

**“150A Cryptoassets etc**

- (1) “Cryptoasset” means a cryptographically secured digital representation of value or contractual rights that uses a form of distributed ledger technology and can be transferred, stored or traded electronically.
- (2) “Crypto wallet” means—
  - (a) software,
  - (b) hardware,
  - (c) a physical item, or
  - (d) any combination of the things mentioned in paragraphs (a) to (c),
which is used to store the cryptographic private key that allows cryptoassets to be accessed.
- (3) “Cryptoasset-related item” has the meaning given in section 127C(5B).
- (4) The circumstances in which a cryptoasset is taken to be “destroyed” include circumstances where it is—
  - (a) disposed of,
  - (b) transferred, or
  - (c) otherwise dealt with,
in such a way as to ensure, or to make it virtually certain, that it will not be the subject of any further transactions or be dealt with again in any other way.
- (5) The Secretary of State may by regulations amend the definitions of “cryptoasset” and “crypto wallet” in this section.
- (6) The Secretary of State must consult the Scottish Ministers before making regulations under subsection (5).”