

## EXPLANATORY MEMORANDUM TO

### THE PROCEEDS OF CRIME ACT 2002 (EXTERNAL INVESTIGATIONS AND EXTERNAL ORDERS AND REQUESTS) (AMENDMENT) ORDER 2018

2018 No. 1078

#### 1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

#### 2. Purpose of the instrument

- 2.1 The Criminal Finances Act 2017 (CFA) made a number of amendments and introduced new powers to the Proceeds of Crime Act (POCA). These powers are available in domestic cases. They can, by way of Orders in Council, be made available to provide assistance in overseas cases where evidence, or a person or property is in the United Kingdom.
- 2.2 This Order in Council and those which it amends are made under Part 11 of POCA. In particular, Part 11 provides that Orders in Council may make provision for cooperation with other countries in the enforcement of orders relating to recovering the proceeds of crime and the freezing of property which is suspected to be the proceeds of crime. Part 11 also provides that Orders in Council may make provision for co-operation with other countries in investigations to determine whether property was obtained as a result of criminal conduct (or the extent or whereabouts of such property) and whether a money laundering offence has been committed.
- 2.3 This Order in Council is necessary following amendments made to the domestic provisions in POCA, earlier in 2018, by the CFA. The amendments to POCA provided for the introduction of new powers in respect of the investigation, freezing and recovery of the proceeds of crime. The CFA also amended the scope of other existing POCA powers. This Order in Council updates the principal Orders in Council made under Part 11 of POCA in light of those amendments, so that equivalent powers are made available to provide assistance to overseas courts and authorities.

#### 3. Matters of special interest to Parliament

##### *Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 None.

##### *Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)*

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

#### 4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the United Kingdom.
- 4.2 The territorial application of this instrument is the United Kingdom.

4.3 Article 2 of this Order in Council sets out the extent of each provision. With the exception of articles 1 to 4 and 27, this Order in Council does not extend to Northern Ireland. Chapter 2 of Part 2 extends to England and Wales and Chapter 3 extends to Scotland. Part 3 of this Order in Council extends to England and Wales. Part 4 of this Order in Council extends to England and Wales and Scotland, except for articles 23 and 24 (which extend to England and Wales), articles 25 and 26 (which extend to Scotland) and article 27 (which extends to the United Kingdom).

## **5. European Convention on Human Rights**

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## **6. Legislative Context**

6.1 This Order in Council is made under sections 444 and 445 of POCA.

6.2 Section 444 of POCA provides that Orders in Council can make provision for a prohibition on dealing with property in the United Kingdom which is subject to an external request, and for the realisation of property for the purpose of giving effect to an external order. Section 447 defines “external request” as a request by an overseas authority to prohibit dealing with relevant property (see section 447(1)). This essentially means that the property is effectively frozen, although remains in the hands of the owner; so, for example, they are prevented from selling the property. An “external order” means an order which is made by an overseas court where property is found or believed to have been obtained as a result of or in connection with criminal conduct (see section 447(2)(a)).

6.3 The effect of an Order in Council made under section 444 of POCA is that a freezing order can be made in relation to property which may be needed to satisfy overseas orders in relation to the recovery of the proceeds of crime, and that any final orders for the recovery of criminal property can be enforced by the realisation of property in any part of the United Kingdom. The Proceeds of Crime Act 2002 (External Requests and Orders) Order (S.I. 2005/3181) (“the 2005 recovery Order”) made such provision corresponding to the domestic provisions in Parts 2, 3 and 4 (confiscation in England and Wales, Scotland and Northern Ireland respectively) and Part 5 (civil recovery) of POCA.

6.4 This Order in Council amends the 2005 recovery Order to reflect the amendments made to POCA by the CFA which are set out in the following paragraphs.

6.5 Section 15 of the CFA inserted a new Chapter 3A into Part 5 of POCA, containing a new forfeiture power with regard to certain personal (or moveable) property, otherwise known as “listed assets”. Listed assets are defined in section 303B of POCA, and include such property such as artistic works and precious metal or stones. Listed assets may be seized under section 303J of POCA if there are reasonable grounds to suspect that the property is recoverable or intended for use in unlawful conduct, and the value of the asset is over the minimum threshold of £1,000. The procedure for the forfeiture of listed assets is based on existing legislation governing cash forfeiture in Chapter 3 of Part 5 of POCA. In summary, the powers allow officers to search for, seize and detain listed assets which are reasonably suspected to be the proceeds of crime, or which are intended for use in unlawful conduct, and ultimately to apply for their forfeiture.

- 6.6 Equivalent provisions are added to the 2005 recovery Order by article 30 of this Order in Council. For the purposes of this Order in Council, the definition of an “external order” in section 447 of POCA (see above) means that the provisions can only apply to the recovery of property which is the proceeds of crime. The domestic limb, allowing property which is intended for use in unlawful conduct, is therefore not included, as it is outside the scope of an “external order” which can only relate to the derivation of the property. The provisions introduced by article 30 will only be available in response to an external order, and not an external request, as the forfeiture procedure does not involve the making of an order which prevents dealing with property. Instead, where an external request is received in respect of a listed asset, this can be dealt with under the existing provisions in the 2005 recovery Order relating to prohibition orders, which are orders preventing any person from dealing with the relevant property.
- 6.7 Section 16 of the CFA inserted (as Chapter 3B of Part 5 of POCA) a new forfeiture power concerning money held in bank and building society accounts. These powers make provision for the freezing and forfeiture of money in accounts which contain the proceeds of unlawful conduct (i.e. criminality), or funds which are intended for use in unlawful conduct. These provisions build on and partly mirror the existing cash seizure and forfeiture powers in Chapter 3 of Part 5 of POCA.
- 6.8 Equivalent provisions are added to the 2005 recovery Order by article 31 of this Order in Council. For the purposes of this Order in Council, as with “listed assets” cases (see paragraph 6.5 above) the procedure is confined to the recovery of the proceeds of crime, and not money which is intended for use in unlawful conduct. Also, within the domestic provisions, in England and Wales an administrative forfeiture procedure applies, meaning that officers are able to forfeit money in the accounts by giving a forfeiture notice which, if there are no objections, results in the forfeiture of the funds without a court order. This is not provided for in this Order in Council, as in the international context it is preferable that all cases be considered by a court.
- 6.9 Sections 18, 19 and 20 of the CFA extend various civil recovery powers to the Financial Conduct Authority (FCA) and HM Revenue and Customs (HMRC), including listing them within the definition of an “enforcement authority” within section 316 of POCA, as well as their inclusion within the definitions of appropriate and senior appropriate officers for the purposes of civil recovery investigations under Part 8 of POCA (see paragraph 6.21 below). Section 18 of the CFA also specifically removes the restrictions on the use of some powers by HMRC.
- 6.10 Article 29 of this Order in Council makes similar provision within the procedure for external requests and orders, as it extends the provisions relating to the civil power to freeze and recover property in Parts 4A and 5 of the 2005 recovery Order to the FCA and HMRC.
- 6.11 Section 23 of the Serious Crime Act 2015 provided for the appointment of receivers in Scotland to manage property subject to a prohibitory property order in domestic civil recovery proceedings. This was an amendment to the civil recovery provisions in Part 5 of POCA. This mirrored the amendment to POCA already made elsewhere in the UK by section 83 of the Serious Crime Act 2007. Similar provisions were included in the 2005 recovery Order in respect of England, Wales and Northern Ireland in 2013. Article 25 of this Order in Council makes corresponding amendments to the 2005 recovery Order in relation to Scotland, to allow the court to appoint receivers to manage property subject to a prohibition order further to an external request. Article

26 makes further amendments in relation to Scotland to allow the court to appoint a receiver to manage property which is subject to a prohibitory property order (a prohibitory property order under the 2005 recovery Order can only be obtained in response to an external order).

- 6.12 Section 17 of, and Schedule 1 to, the CFA extended, to members of staff of the Serious Fraud Office, access to various enforcement powers in POCA, including powers of seizure of property subject to restraint. The 2005 recovery Order has been amended to provide that SFO officers will also be able to assist in the freezing and recovery of property using both the existing powers and those being introduced by this Order in Council.
- 6.13 Section 445 of POCA provides that Orders in Council can make provision for orders and warrants, equivalent to those available for domestic investigations under Part 8 of POCA, to be obtained for the purpose of assisting with an “external investigation”. “External investigation” is defined in section 447(3) of POCA, and means an investigation by an overseas authority into whether property has been obtained as a result of or in connection with criminal conduct, or the extent or whereabouts of such property, or an investigation into whether a money laundering offence has been committed.
- 6.14 The Proceeds of Crime Act 2002 (External Investigations) Order 2013 (S.I. 2013/2605) (“the 2013 civil investigation Order”) made provisions for courts and judges in the civil jurisdiction to make orders and warrants equivalent to the investigation powers in Part 8 of POCA for external investigation requests. Article 3 of the 2013 civil investigation Order provides that the powers in that Order are available only where there is no criminal investigation or proceedings in the requesting country.
- 6.15 The Proceeds of Crime Act 2002 (External Investigations) Order 2014 (S.I. 2014/1893) (“the 2014 criminal investigation Order”), which extends to England and Wales and Northern Ireland, made provision for courts in the criminal jurisdiction to make orders and warrants equivalent to the investigation powers in Part 8 of POCA. Article 3 of the 2014 criminal investigation Order provides that the powers in that Order are available only where there is a criminal investigation or proceedings in the requesting country.
- 6.16 This Order in Council amends both the 2013 civil investigation Order and the 2014 criminal investigation Order to reflect the amendments made by the CFA to the investigation powers in Part 8 of POCA which are set out in the following paragraphs.
- 6.17 Sections 1 to 6 of the CFA inserted into Part 8 of POCA the new *unexplained wealth order* (UWO) and the supporting *interim freezing order* (IFO). A UWO is an investigation order that requires a person who is suspected of involvement in or association with serious criminality to explain the origin of assets that appear to be disproportionate to their known income. It also allows for this power to be applied to Politically Exposed Persons (PEPs), meaning foreign politicians or officials or those associated with them, as defined in section 362B of POCA. An IFO supports a UWO by freezing the property subject to a UWO in order to prevent its dissipation.
- 6.18 Parts 2 and 3 of this Order in Council amend the 2013 civil investigation Order to include both a UWO and IFO. Articles 7 to 9 make these provisions for England and Wales, and articles 13 to 15 make provision for Scotland. The UWO will therefore be available to assist in an overseas request to investigate property, where the person who holds that property is in those territories.

- 6.19 UWOs and IFOs are also included in the 2014 criminal investigation Order, as provided for in articles 20 and 21 of this Order in Council, and so will be available in both criminal and civil investigations (in relation to external investigation requests) in England and Wales. Although UWOs are obtained in a civil court (the High Court) and contain provisions meaning that non-compliance has implications for subsequent civil recovery proceedings (see sections 362C(2) and 396C(2)), the domestic provisions also clearly envisage circumstances where a UWO may lead to criminal investigation or proceedings (see, for example, section 362K(11) which foresees there may be cases where a restraint order in a criminal confiscation case may follow). It should be noted that there is a restriction on the use of a statement provided in response to a UWO in criminal proceedings against the person who made the statement (see section 362F of POCA).
- 6.20 The position in Scotland is different because of the clear division between the Scottish Ministers, who have civil law functions, and the Lord Advocate and Procurator Fiscal who have criminal law functions. As a consequence of this division of functions, and the practical consideration that UWOs are obtained in the civil court (Court of Session) on application by the Scottish Ministers, the Scottish Order in Council relating to investigations in relation to the criminal jurisdiction is not amended to include the UWO (this is the Proceeds of Crime Act 2002 (External Investigations)(Scotland) Order 2015 (S.I. 2015/206)).
- 6.21 In relation to the extension of civil recovery powers to the FCA and HMRC, articles 5 and 9 to 11 of this Order in Council amend the 2013 civil investigation Order so the civil investigation powers are available to the FCA and HMRC in England and Wales, as they are domestically. The FCA and HMRC do not carry out these functions domestically in Scotland, so no equivalent amendment is needed.
- 6.22 The CFA extension of powers in POCA to members of staff of the Serious Fraud Office (see paragraph 6.12 above) also included various investigation powers. The previous Orders in Council have been amended to provide that SFO officers will also be able to assist in investigations. Article 17 of this Order in Council makes equivalent provision in the 2014 criminal investigation Order.
- 6.23 In addition to making various minor and technical amendments to the scope of the 2014 criminal investigation Order to support the provisions described above, article 18 of this Order in Council deletes the provision in the 2014 criminal investigation Order which stated that the powers in that Order were not available in a money laundering investigation (see article 18(b)). The specialised financial investigation powers in that Order will now be available to assist in the investigation of money laundering offences.

## **7. Policy background**

### *What is being done and why?*

- 7.1 The CFA was introduced to significantly improve the UK's ability to tackle money laundering, corruption, tax evasion and terrorist financing. It introduced measures to enhance the UK's ability to investigate the proceeds of crime, strengthen the Suspicious Activity Report regime, and improve our capability to recover the proceeds of crime, alongside measures to combat the financing of terrorism and to prevent the facilitation of tax evasion. The CFA was commenced domestically in

2017-2018, and the amendments made to the Orders in Council allow for their use where the UK is providing assistance in international cases.

- 7.2 The Orders in Council that are being amended provide the mechanism for international cooperation through mutual legal assistance in investigating, freezing and recovering the proceeds of crime. The 2005 recovery Order allows courts across the United Kingdom to make freezing orders and to give effect to confiscation orders made by overseas countries (both criminal and civil orders) as if they were orders of the court in the United Kingdom. It contains equivalent provisions to those in Parts 2 to 5 of POCA.
- 7.3 The 2013 civil investigation Order and the 2014 criminal investigation Order establish a range of investigatory powers which are available to assist with external investigations, and which correspond to the domestic provisions in Part 8 of POCA. These are investigation powers into the proceeds of crime. These powers include search and seizure warrants, disclosure orders and production orders among other powers.
- 7.4 The CFA made a number of amendments and introduced new powers to the equivalent domestic schemes in POCA, as set out above. The principal Orders in Council listed above are updated by this Order in Council to include these new powers. This therefore ensures that the United Kingdom can provide the widest and most effective possible assistance to other countries where evidence, people or property of interest in their cases are in the UK.
- 7.5 Most significantly, for the purposes of the 2005 recovery Order, these include the introduction of two new civil powers to enable the forfeiture of monies stored in bank and building society accounts and the forfeiture of items of personal property, such as precious metals and artistic works. For the purposes of external investigations, the 2013 civil investigation Order and the 2014 criminal investigation Order are amended to include UWOs and to allow officers of the Serious Fraud Office to have direct access to investigation powers under the 2014 criminal investigation Order. Other minor and technical amendments are also made in support of these main provisions.

## **8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union**

- 8.1 This instrument does not relate to withdrawal from the European Union.

## **9. Consolidation**

- 9.1 This instrument makes further amendments to principal Orders in Council, each of which contains a distinct set of procedures for particular purposes. It is not intended to consolidate at this time.

## **10. Consultation outcome**

- 10.1 This Order in Council was developed in consultation with the Scottish Government, although there is no formal requirement to consult. As the Order in Council makes amendments to the cooperation powers which are equivalent to those already made by the CFA to POCA, they are essentially consequential and technical; no public consultation has therefore been carried out.

## **11. Guidance**

- 11.1 The Codes of Practice that apply to the equivalent powers in POCA in a domestic context shall apply to the use of the relevant powers under this Order in Council.
- 11.2 The Order makes provision corresponding to amended provisions in Parts 2, 5 and 8 of POCA. Investigators, prosecutors, judges and legal representatives will be familiar with the provisions, albeit in a domestic context.
- 11.3 The United Kingdom's MLA (mutual legal assistance) Guidance is publicly available and provides advice to other countries on how to obtain evidence or freeze and confiscate property in the UK. This will be updated to address the new powers introduced by this Order in Council.

## **12. Impact**

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument because the provisions they introduce are equivalent to domestic powers in POCA. Businesses should already be familiar with these powers, and it is not anticipated that this instrument will lead to a significant further impact upon businesses.

## **13. Regulating small business**

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

## **14. Monitoring & review**

- 14.1 The approach to monitoring of this legislation is that mutual legal assistance requests from overseas will be made through the Secretary of State. The Home Office will therefore be able to closely monitor the number of these cases and the standard of these requests with the burden they place on investigators, prosecutors, the courts and respondents to the orders made by the courts.
- 14.2 These Regulations do not include a statutory review clause.

## **15. Contact**

- 15.1 Stephen Goadby at the Home Office can be contacted with any queries regarding the instrument (Telephone: 020 7035 1559 or email: [stephen.goadby@homeoffice.x.gsi.gov.uk](mailto:stephen.goadby@homeoffice.x.gsi.gov.uk)).
- 15.2 Owen Rowland at the Home Office can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Ben Wallace at the Home Office can confirm that this Explanatory Memorandum meets the required standard.