

## EXPLANATORY MEMORANDUM TO

### THE PROCEEDS OF CRIME ACT 2002 (EXTERNAL INVESTIGATIONS AND EXTERNAL ORDERS AND REQUESTS) (AMENDMENT) ORDER 2021

2021 No. 638

#### 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 This Order in Council amends the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (S.I. 2005/3181), the Proceeds of Crime Act 2002 (External Investigations) Order 2013 (S.I. 2013/2605) and the Proceeds of Crime Act 2002 (External Investigations) Order 2014 (S.I. 2014/1893) (the “principal Orders in Council”). It is made under sections 444, 445 and 459 of the Proceeds of Crime Act 2002 (“POCA”). In particular, these sections allow Orders in Council to 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. These sections also allow Orders in Council to 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.
- 2.2 This Order in Council is necessary due to the commencement of provisions of POCA inserted by the Criminal Finances Act 2017 (“CFA”) in Northern Ireland. The CFA 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 existing POCA powers. This Order in Council updates the principal Orders in Council in light of a number of those amendments now being brought into force in Northern Ireland, so that equivalent powers are made available in Northern Ireland to provide assistance to overseas courts and authorities. Equivalent provision was made for England and Wales and Scotland by the Proceeds of Crime Act 2002 (External Investigations and External Orders and Requests) (Amendment) Order 2018 (S.I. 2018/1078) (the “2018 Order”).

#### 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.

#### **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, 445 and 459 of POCA. This Order in Council makes further amendments to the principal Orders in Council as a result of certain provisions of the CFA being brought into force in Northern Ireland.

##### *Amendments to the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005*

- 6.2 Section 444 of POCA provides that an Order 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 sale 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)). 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 Proceeds of Crime Act 2002 (External Requests and Orders) Order (S.I. 2005/3181) (“the 2005 Order”) made provision for the use of powers corresponding to certain 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 Order to reflect the amendments made to POCA by the CFA which are being brought into force in Northern Ireland.

##### *Listed assets seizure and forfeiture powers*

- 6.5 Section 15 of the CFA inserted 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 property such as artistic works and precious metal or stones.
- 6.6 Equivalent provisions for England and Wales and Scotland were added to the 2005 Order in 2018 following the commencement of the new powers in those jurisdictions. This Order in Council will now make the provisions available for Northern Ireland. For the purposes of this Order in Council, the procedure is confined to the recovery of the proceeds of crime, and not assets which are intended for use in unlawful conduct.

##### *Account freezing and forfeiture powers*

- 6.7 Section 16 of the CFA inserted Chapter 3B of Part 5 of POCA, containing new freezing and forfeiture powers with regard to money held in bank and building society accounts.<sup>1</sup> These powers make provision for the freezing and forfeiture of money in

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<sup>1</sup> Schedule 12 to the Financial Services Act 2021 has amended Chapter 3B of Part 5 of POCA to provide for the freezing and forfeiture of money held in “relevant financial institution” accounts.

accounts which contain the proceeds of unlawful conduct, or funds which are intended for use in unlawful conduct.

- 6.8 Equivalent provisions for England and Wales and Scotland were added to the 2005 Order in 2018, following the commencement of the new powers in those jurisdictions. This Order in Council will now make the provisions available for Northern Ireland. For the purposes of this Order in Council, the procedure is confined to the recovery of the proceeds of crime, and not money which is intended for use in unlawful conduct. 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.

*Extension of powers to the Financial Conduct Authority and HM Revenue and Customs*

- 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 (General interpretation) 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 The 2005 Order was amended by the 2018 Order to make similar provision within the procedure for external requests and orders, by extending the provisions relating to the civil power to freeze and recover property in Parts 4A and 5 of the 2005 Order to the FCA and HMRC. This Order in Council now makes these provisions available in Northern Ireland.

*Extension of powers to the Serious Fraud Office*

- 6.11 Section 17 and Schedule 1 to the CFA extended access to various enforcement powers in POCA to members of staff of the Serious Fraud Office (SFO), including powers of seizure of property subject to restraint. The 2005 Order was amended by the 2018 Order to provide that SFO officers are able to assist in the freezing and recovery of property in England and Wales using both the existing powers and those powers that were added by the 2018 Order. This Order in Council provides that the SFO will have the same powers in Northern Ireland.

*Amendments to the Proceeds of Crime Act 2002 (External Investigations) Order 2013 and the Proceeds of Crime Act 2002 (External Investigations) Order 2014*

- 6.12 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 as 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.
- 6.13 The Proceeds of Crime Act 2002 (External Investigations) Order 2013 (“the 2013 Order”) and the Proceeds of Crime Act 2002 (External Investigations) Order 2014

(“the 2014 Order”) were amended in 2018 to reflect the amendments made by the CFA to the investigation powers in Part 8 of POCA in relation to England, Wales and Scotland. This Order in Council makes the amendments equivalent to those made by the CFA to the investigation powers in Part 8 of POCA available in Northern Ireland.

Unexplained Wealth Orders and Interim Freezing Orders

- 6.14 Sections 1 to 6 of the CFA inserted the unexplained wealth order (“UWO”) and the supporting interim freezing order (“IFO”) into Part 8 of POCA. 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”), specifically foreign politicians, 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.
- 6.15 The 2013 Order was amended in 2018 to make provision for UWOs and IFOs in England and Wales and Scotland in relation to external investigations. This Order in Council allows for the use of both UWOs and IFOs in Northern Ireland in relation to external investigations. The 2018 Order made provision for the use of UWOs and IFOs under the 2014 Order in relation to England and Wales. This Order in Council will make the same provisions in the 2014 Order for Northern Ireland, so that UWOs and IFOs will be available in both criminal and civil investigations (in relation to external investigation requests) in Northern Ireland. 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).

Extension of powers to the Financial Conduct Authority and HM Revenue and Customs

- 6.16 This Order in Council amends the 2013 Order so that the civil investigation powers are available to the FCA and HMRC in Northern Ireland, as they are domestically.

Extension of powers to the Serious Fraud Office

- 6.17 The CFA extension of powers in POCA to members of staff of the Serious Fraud Office (see paragraph 6.11 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 and makes equivalent provision in the 2013 Order and 2014 Order.

Minor corrections

- 6.18 Articles 23(a) and (b), 24, 45, 51, 55 and 57 make minor corrections to the relevant Orders. In accordance with paragraph 4.7.6 of Statutory Instrument Practice, the SI Registrar has been consulted on the free issue procedure. It has been decided not to apply the procedure for free issue in respect of any of the relevant Orders in view of the minor nature those corrections.

## **7. Policy background**

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

- 7.1 The CFA was introduced to significantly improve the United Kingdom's ability to tackle money laundering, corruption, tax evasion and terrorist financing. It introduced measures to enhance the United Kingdom's ability to investigate the proceeds of crime, strengthen the Suspicious Activity Report regime (the regime for making disclosures to the National Crime Agency under Part 7 of POCA), 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.
- 7.2 The CFA introduced new powers and made a number of amendments to the equivalent domestic schemes in POCA, as set out above. The key additions that the CFA introduced included listed asset seizure and forfeiture, account freezing and forfeiture and UWOs.
- 7.3 This Order in Council makes provision for their use where Northern Ireland is providing assistance in international cases. While the CFA made a number of amendments to POCA, the commencement of the CFA in Northern Ireland requires consequential amendments to the principle Orders in Council so that the cooperation, enforcement and investigation regimes can continue to function effectively in relation to the new powers available in Northern Ireland.
- 7.4 The principal Orders in Council (listed in paragraph 2.1 and 2.2) are amended by this Order in Council to include these new powers. This will ensure 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 United Kingdom.

## **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 A consolidation is not taking place.

## **10. Consultation outcome**

- 10.1 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 issued by the Secretary of State, the Department of Justice in Northern Ireland and the Attorney General and Advocate General for Northern Ireland (see sections 377, 377ZA and 377A of POCA) will apply to the use of the relevant powers under the principal Orders in Council. An update is also made to the 2014 Order in relation to those Codes. These Orders make provision corresponding to amended provisions in Parts 2, 3, 4 and 8 of POCA. Investigators, prosecutors, judges and legal representatives will be familiar with the provisions. New draft Codes of

Practice under sections 377 and 377A were laid before Parliament on 22 March 2021 and, if approved, will come into force on 28 June 2021.

- 11.2 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 as we have considered the overall impact of commencing the CFA in Northern Ireland, rather than preparing separate assessments for each statutory instrument in this package.

## **13. Regulating small business**

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

## **14. Monitoring & review**

- 14.1 In conjunction with key stakeholders, the Home Office will monitor the use of this legislative change in its early stages. The approach to monitoring of this instrument thereafter will involve consideration of the effectiveness and suitability of its provisions in the event that issues arise as a matter of their operation in practice. This instrument will not be subject to formal review.

## **15. Contact**

- 15.1 Chloe Wootton at the Home Office can be contacted with any queries regarding the instrument (email: [chloe.wootton@homeoffice.gov.uk](mailto:chloe.wootton@homeoffice.gov.uk)).
- 15.2 Maria Hannan at the Home Office can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Baroness Williams of Trafford at the Home Office can confirm that this Explanatory Memorandum meets the required standard.