

EXPLANATORY MEMORANDUM TO
THE PROCEEDS OF CRIME ACT 2002 (INVESTIGATIONS: CODE OF PRACTICE) ORDER 2021

2021 No. 726

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument is made under the Proceeds of Crime Act 2002 (c. 29) (POCA). It brings into force a revised code of practice providing guidance and procedural requirements for the exercise of certain search powers in relation to cash under Chapter 3 of Part 5 of POCA. The revised code is required due to the commencement of outstanding provisions in the Criminal Finances Act 2017 (c. 22) (CFA) in Northern Ireland, which grants additional powers to law enforcement and prosecution agencies in Northern Ireland that are already available to law enforcement and prosecution agencies in England and Wales and Scotland.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This statutory instrument is part of a wider package of secondary legislation required to extend the Criminal Finances Act 2017 to Northern Ireland. It is being laid alongside three other Home Office SIs, and one laid by the Attorney General's Office, with a shared purpose of bringing into force five Codes of Practice, which have been amended to reflect commencement of the new powers in Northern Ireland. Further negative statutory instruments will be laid in due course to ensure relevant elements of the Criminal Finances Act are commenced in Northern Ireland at the same time.

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 The territorial application of the Proceeds of Crime Act 2002 (Investigations: Code of Practice) includes Northern Ireland.

4. Extent and Territorial Application

The Proceeds of Crime Act 2002 (Investigations: Code of Practice) Order 2021

- 4.1 The territorial extent of this instrument is England and Wales and Northern Ireland.
- 4.2 The territorial application of this instrument is England and Wales and Northern Ireland.

5. European Convention on Human Rights

- 5.1 The Minister of State for the Home Department, Baroness Williams of Trafford, has made the following statement regarding Human Rights:

“In my view, the provisions of the following instrument are compatible with the Convention rights: the Proceeds of Crime Act 2002 (Investigations: Code of Practice) Order 2021”

6. Legislative Context

- 6.1 POCA provides powers to confiscate the proceeds of crime. This instrument brings into operation a revised code of practice concerning the use of general asset recovery investigation powers in Chapter 2 of Part 8 of POCA. Equivalent codes can be made by the Scottish Ministers and the Department of Justice in Northern Ireland in respect of the use of these powers by certain law enforcement agencies in those jurisdictions. The Department of Justice in Northern Ireland, the Attorney General and the Advocate General for Northern Ireland will update equivalent codes (for prosecutors) to coincide with the commencement of the relevant provisions of the CFA in Northern Ireland. The Investigations code of practice provides guidance and procedural requirements for the exercise of certain functions as further detailed below.
- 6.2 Part 8 of POCA concerns investigation powers which may be used to support a financial or asset recovery investigation in the United Kingdom. Chapter 2 of Part 8 applies to England and Wales and Northern Ireland, and Chapter 3 applies to Scotland.
- 6.3 The code of practice brought into operation by the Proceeds of Crime Act 2002 (Investigations: Code of Practice) Order 2021 replaces the previous code that came into force in March 2018 (SI 2018/84). The Order brings the new code into force to reflect the introduction of the new powers to Northern Ireland, including removing references to certain powers in the CFA not being available in Northern Ireland.

7. Policy Background

What is being done and why?

- 7.1 Codes of practice are made under POCA to provide guidance to the officers and other persons exercising their functions under that Act, and to establish procedural requirements to ensure that the functions concerned are exercised lawfully, proportionately, consistently and in a focused manner. This code is also of interest to persons who are the subject of the powers.
- 7.2 When the function covered by the code of practice is revised or new functions are created, the existing code must be revised, and a new one made as necessary. The code is therefore being amended in light of the commencement of outstanding provisions of the CFA (which amends POCA) in Northern Ireland. Royal Assent of the CFA took place on 27 April 2017. It could not be commenced in Northern Ireland at the time, but we are now taking action to do so.
- 7.3 The code includes detailed and clear explanation of the powers and the legal requirements that must be met before it is exercised. It sets out guidance on how to consider those legal requirements, on balancing the need for using intrusive powers against the interference with a person’s privacy or possessions, and what further issues should be considered when using the powers. The code requires an officer who

is contemplating using the powers to consider the impact on the community in their use, balanced against the public interest and the benefit the use of the powers would add to the case. The code also contains direct operational guidance or procedural requirements in relation to various aspects of the actual use of the powers, including the time of day at which, and the manner in which, they should be used.

- 7.4 The following paragraphs provide context as to how the powers might be used and the types of cases to which they apply.
- 7.5 Part 8 of POCA provides various investigation powers to help build a case to be taken for either the prosecution of money laundering or for the recovery of the proceeds of crime. The code ensures that investigators will use their powers in a consistent, fair and focused manner. This is particularly important in relation to the execution of search and seizure warrants. The codes ensure that full consideration is given before forced entry and search is used, and that, if used, the power is exercised in a proportionate and transparent manner, with a requirement that a full public record is made.
- 7.6 The code of practice was revised in 2018 in accordance with changes to POCA brought about by the CFA. The CFA introduced a package of measures to strengthen Part 8 as part of the Government's response to money laundering and to increase the use of asset recovery powers. The measures include the introduction of unexplained wealth orders (UWOs) and interim freezing orders, the provision of civil recovery powers for HM Revenue and Customs and the Financial Conduct Authority and increasing the scope and improving access to disclosure orders. A complete list of the changes is available in the explanatory memorandum to the Proceeds of Crime Act (Investigations: Code of Practice) Order 2018 (SI 2018/84).
- 7.7 Sections 1 to 6 of the CFA introduced a new investigative power in Part 8 of POCA: UWOs. UWOs provide certain agencies with a power to apply to the High Court for an order requiring a person who meets certain criteria to explain the origin of assets that appear to be disproportionate to his or her known income. A failure to provide a full and genuine response would give rise to the presumption that the property is recoverable in any subsequent civil recovery action. The UWO power was introduced because there are cases where it may be difficult for law enforcement agencies to satisfy the evidential standard at the outset of an investigation, particularly if all relevant information is outside of the jurisdiction. The revised code specifies which law enforcement agencies can make an application for a UWO, gives detailed guidance on the grounds for an application and the manner in which an application should be made, and specifies operational requirements.
- 7.8 The CFA amended section 357 of POCA to allow applications for disclosure orders in money laundering investigations. A disclosure order is a powerful investigative tool that authorises a law enforcement officer to require anyone that they think has relevant information to an investigation to answer questions, provide information or produce documents. As amended, section 357 also streamlines the process for authorising applications, this function passing from prosecutors to senior appropriate officers in the applicant's own agency. The code of practice has been revised to take account of these changes coming into effect in Northern Ireland.
- 7.9 Other amendments in the CFA to the investigation powers in POCA include extending their availability to SFO officers, an extension of the scope of confiscation investigations to better allow them to support recalculations of the amount available to

satisfy a confiscation order under section 172 of POCA, and the creation of new detained property investigations and frozen funds investigations.

- 7.10 The Proceeds of Crime (Investigations: Code of Practice) Order 2021 will bring the new code into force to reflect the introduction of the new powers to Northern Ireland.

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 / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 A consolidation will not be taking place.

10. Consultation outcome

- 10.1 The four draft revised codes of practice were subject to a nine-week public consultation from 1 December 2020 to 22 January 2021. See the following link for the consultation document: <https://www.gov.uk/government/consultations/draft-codes-of-practice-issued-under-the-proceeds-of-crime-act-2002-amendments-to-codes-to-reflect-the-criminal-finances-act-2017-in-northern-ireland>.
- 10.2 One response from a law enforcement agency highlighted a minor technical drafting error. Amends have been made to reflect that “a Financial Conduct Authority officer” and “an officer of Revenue and Customs” can apply for disclosure orders in relation to civil recovery investigations. This was accidentally omitted last time the codes were amended in 2018, following the introduction of the powers in the CFA.
- 10.3 The contents of the second response, and the remainder of the first, were outside of the scope of the consultation which only sought views on the amendments of the codes in relation to the commencement of the CFA 2017 in Northern Ireland. In order to ensure that such changes are consulted on adequately, such changes will be considered as part of any future amendments to the codes.
- 10.4 The Home Office also invited representations from the Attorney General's Office, Her Majesty's Treasury, the Department of Justice in Northern Ireland, and the Scottish Government on the relevant draft codes of practice to the extent that the Secretary of State was required to do so under POCA. Each organisation has confirmed they are content.

11. Guidance

- 11.1 The code of practice brought into operation by this instrument contain guidance and operational requirements as to the use of the powers to which they relate.

12. Impact

- 12.1 An Impact Assessment has not been prepared for this instrument because 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.
- 12.2 The overall impact of the commencement of the CFA in Northern Ireland has on business, charities or voluntary bodies has been considered and is negligible.

12.3 The impact of the commencement of the CFA in Northern Ireland on the public sector has been considered and is negligible.

13. Regulating small business

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

14. Monitoring and review

14.1 The approach to monitoring of this legislation is that the codes are reviewed whenever issues arise as a matter of their operation in practice, but also where amendments are made to POCA which require a revised or new Code of Practice to be produced.

15. Contact

15.1 Chloe Wootton at the Home Office (email: chloe.wootton@homeoffice.gov.uk) can answer any queries regarding these instruments.

15.2 Maria Hannan, Deputy Director for Criminal Finances and Asset Recovery, at the Home Office can confirm that this Explanatory Memorandum meets the required standard.

15.3 Baroness Williams at the Home Office can confirm that this Explanatory Memorandum meets the required standard.