

EXPLANATORY MEMORANDUM TO

THE PROCEEDS OF CRIME ACT 2002 (EXTERNAL INVESTIGATIONS AND EXTERNAL ORDERS AND REQUESTS) (AMENDMENT) ORDER 2024

2024 No. 1127

1. Introduction

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

2. Declaration

- 2.1 Dan Jarvis, Minister for Security at the Home Office confirms that this Explanatory Memorandum meets the required standard.
- 2.2 Tom Bell, Deputy Director for the Criminal Finances and Asset Recovery Unit at the Home Office confirms that this Explanatory Memorandum meets the required standard.

3. Contact

- 3.1 Amelia Smith at Home Office and the Criminal Finances and Asset Recovery Unit: HOConfiscationTeam@homeoffice.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

- 4.1 The Proceeds of Crime Act 2002 (“POCA”) is the primary framework for recovering assets connected with criminal conduct. The purpose of this Order in Council is to provide the same level of international co-operation in investigating, freezing and recovering the proceeds of crime, as is available in domestic cases, for unexplained wealth orders (UWOs) and cryptoasset investigations. These provisions provide for proceeds of crime located in the United Kingdom to be subject to investigation or proceedings where the request to exercise the powers has come from an overseas jurisdiction.

Where does the legislation extend to, and apply?

- 4.2 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is the United Kingdom except that articles 6 and 7 extend to England and Wales; articles 8, 9, 18 and 19 extend to Scotland; and articles 10 and 11 extend to Northern Ireland.
- 4.3 The territorial application of this instrument (that is, where the instrument produces a practical effect) is the United Kingdom, except that articles 6 and 7 apply to England and Wales; articles 8, 9, 18 and 19 apply to Scotland; and articles 10 and 11 apply to Northern Ireland.

5. Policy Context

What is being done and why?

- 5.1 Criminals are finding new ways to launder their proceeds of crime and the Home Office must stay abreast to how the funds created through criminality are stored and hidden. Two recent Acts have reformed how the proceeds of crime can be investigated and subsequently seized:

Unexplained Wealth Orders

- 5.2 UWOs are investigatory orders issued by the High Court or Court of Session that require a respondent to explain the nature and interest in a property worth over £50,000 and how it was obtained. The Economic Crime (Transparency and Enforcement) Act 2022 (EC(TE) Act) reformed the UWO regime so that it better applied to individuals and companies, particularly those based overseas by enabling a UWO to be issued to an officer of the respondent legal entity. Reforms were also made to the enforcement authorities' liability to pay legal costs or expenses in proceedings and to extend the period for which a property could be frozen for whilst under investigation.

Cryptoassets

- 5.3 Recent law enforcement activity has seen a huge rise in the use of digital technologies and cryptoassets which has provided criminals with new methods to conduct crime and deposit gains from criminality. To ensure that the enforcement response keeps pace with these technologies, the Economic Crime and Corporate Transparency Act 2023 (ECCT Act) introduced changes to better enable POCA powers to be used in cryptoassets cases. The ECCT Act:
- a) Reformed the criminal confiscation powers in Parts 2 to 4 of POCA to ensure they better cater for intangible assets and enable cryptoassets to be seized earlier in the confiscation process, so that those assets can be more easily confiscated at a later date.
 - b) Inserted a new non-conviction civil forfeiture scheme into Part 5 of POCA so that cryptoassets can be recovered swiftly in the magistrates' or sheriff court.
 - c) Amended the investigatory powers in Part 8 of POCA to enable the use of existing powers in "cryptoasset investigations".
- 5.4 Criminal activity occurs cross-border. For effective enforcement against crime globally, requests are made from and to overseas jurisdictions to the UK to use proceeds of crime powers. The Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005, 2013 and 2014, all make provision for processing requests from overseas jurisdictions to make and enforce orders relating to asset recovery and the freezing of property which is suspected to be the proceeds of crime. This Order will amend those provisions to make provision for processing cryptoasset civil recovery requests from overseas jurisdictions or overseas courts and for UWO investigations.
- 5.5 This Order amends previous Orders in Council ("2005"¹, "2013"² and "2014"³) to implement the following legislative changes to POCA:

¹ The Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005

² The Proceeds of Crime Act 2002 (External Investigations) Order 2013

³ The Proceeds of Crime Act 2002 (External Investigations) Order 2014

- The EC(TE) Act reformed the Unexplained Wealth Order (“UWO”) regime to extend and reinforce the scope of UWOs to enable greater prospects of the recovery of assets derived from the proceeds of serious or organised crime; and
- The ECCT Act introduced new civil recovery powers under Part 5 of POCA to seize and recover cryptoassets and made amendments to the existing criminal confiscation powers under Parts 2 to 4 of POCA to support the recovery of cryptoassets.

What was the previous policy, how is this different?

- 5.6 UWOs are investigative tools that require an individual or organisation to present information on property ownership. The EC(CT) Act strengthened the UWO regime to better apply where property is owned by a company or overseas individual. The reforms also enable a Property Freezing Order to be in place on that property for longer to prevent the property being dealt with or sold during the investigation.
- 5.7 The ECCT Act amends POCA to enable enforcement agencies to more effectively tackle criminal use of cryptoassets. These reforms will enable officers to seize cryptoassets, and other property, during the course of a criminal investigation without first having arrested someone for an offence; enable officers to seize cryptoasset-related items; and enable the courts to better enforce unpaid confiscation orders against a defendant’s cryptoassets.
- 5.8 They also bring cryptoassets within the scope of civil forfeiture powers in Part 5 of POCA and ensure that forfeiture powers are accompanied by supplementary investigative powers in Part 8 of POCA, similar to investigatory powers that exist to support the forfeiture of cash, specific assets and funds in certain accounts that is already provided for under the law.
- 5.9 These reforms in the law must also consider where a request comes from an overseas jurisdiction to deal with and recover assets held in the UK. The previous orders establish the procedures for how these requests are processed to ensure that the UK 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.

6. Legislative and Legal Context

How has the law changed?

- 6.1 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 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)).
- 6.2 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 2005 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.

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

- 6.3 This Order in Council amends the 2005 Order to reflect the amendments made to POCA by the ECCT Act which are set out in the following paragraphs.

Amendments to Part 2-4 POCA

- 6.4 The ECCT Act, Schedule 8, amends POCA to make provision in connection with cryptoassets and confiscation orders, in particular:
- a) It removes the requirement for a person to have been arrested for an offence before property may be seized under the power conferred by Parts 2 to 4 of POCA. It also amends the existing power to seize property in order to support the seizure of “cryptoassets” by appropriate officers. A “cryptoasset” is a cryptographically secured digital form of property such as bitcoin.
 - b) It introduces the concept of a “cryptoasset-related item” as a new class of seizable property. Such items are defined as property that is, or that contains or gives access to any information that is, likely to assist in the seizure of any cryptoassets under the power in the relevant section. That definition would cover a number of different types of property.
 - c) It allows an appropriate officer to seize any free property if he or she has reasonable grounds to suspect that such property is a cryptoasset-related item. It provides that the detention condition can also be met where there are reasonable grounds to suspect that the property is a cryptoasset-related item.
 - d) It provides for the further detention of cryptoasset-related items which are exempt property, pending the making or variation of a restraint order. Here, “exempt property” is that which is necessary either: for the holder of the property’s employment, business, or vocation; or for satisfying the basic domestic needs of them or their family. Further detention in these circumstances must be authorised by a “senior officer”.
 - e) It inserts provision for the magistrates’ court, or sheriff court in Scotland, to make an order authorising the further detention of cryptoasset-related items. Such orders may be sought by officers in situations where seized property is not subject to a restraint order, and no application has been made for a restraint order authorising its detention.
 - f) It makes provision to deal with property which has been released, but where there is no intention on the part of the owner to collect it. Property which is seized under the relevant Part of POCA with a view to realising it will always be seized on the basis of officers perceiving it to have a monetary value. Hence, if investigations or proceedings cease and property is released back to the owner, then they have an incentive to collect. With the introduction of powers to seize cryptoasset-related items, property may be seized which might have no value, or may only have nominal value. Provision is made for officers to retain, dispose of or destroy such property if it is not collected within a year of its release. Officers may only do so where they have approval from a senior officer and have taken reasonable steps to notify people with an interest in the property of its release.

Amendments to Part 5 POCA

6.5 The ECCT Act inserts a new Chapter 3C into Part 5 of POCA, which makes provision for:

- a) The seizure of cryptoassets (and cryptoasset-related items), the freezing of cryptoassets held by third party service providers and the recovery of cryptoassets where they are recoverable property or are intended for use in unlawful conduct. However, the measures in this Order apply only to cryptoassets which are “recoverable property” and not property intended for use in unlawful conduct. The provisions build on existing powers in Chapters 3, 3A and 3B of POCA, to seize, freeze and recover cash, listed assets and funds in accounts.
- b) Powers to search for a cryptoasset-related item which are only exercisable on the proviso that an enforcement officer has lawful authority to be on the premises and has reasonable grounds to suspect that there is an item of property there that is, or that contains or gives access to information that is, likely to assist in the seizure of cryptoassets under Part 5 of POCA. Search powers may only be used where prior judicial authority has been obtained or, if that is not practicable, with the approval of a senior officer.

6.6 The ECCT Act also inserts into Part 5 of POCA:

- a) New Chapter 3D, which makes provision for the freezing of cryptoassets, held by a third party, in crypto wallets, where the assets are recoverable property (or are intended for use in unlawful conduct).
- b) New Chapter 3E, which makes provision for the forfeiture of cryptoassets following detention in pursuance of an order under Chapter 3C, or frozen in a wallet under an order made under Chapter 3D.
- c) New Chapter 3F, which provides for detained or frozen cryptoassets to be converted into money, on application to a relevant court.

6.7 The EC(TE) Act makes the following amendments to POCA:

- a) The EC(TE) Act inserts a new category of persons who may be specified in a UWO, referred to as “responsible officers”. See new section 362A(8) of POCA.
- b) The EC(TE) Act amends the existing income requirement in section 362B(3) of POCA to include a new test, which focuses upon there being reasonable grounds to suspect that property that is the subject of the UWO application has been obtained through unlawful conduct.
- c) The EC(TE) Act inserts a new section 362U into POCA to limit an enforcement authority’s costs liability in UWO proceedings, unless the applicant enforcement authority seeking the UWO has acted dishonestly, unreasonably or improperly.
- d) The EC(TE) Act inserts equivalent provisions for Scotland in relation to responsible officers, a new test for UWOs and liability to pay expenses.

Why was this approach taken to change the law?

6.8 This is the only possible approach to make the necessary changes.

7. Consultation

Summary of consultation outcome and methodology

- 7.1 This order is technical and necessary to meet our obligation under the Warsaw Convention (2005, CETS 198⁴) to adopt the measures necessary to ensure that requests from other states receive the same priority as domestic investigations. No public consultation has therefore been carried out.

8. Applicable Guidance

- 8.1 The Codes of Practice⁵ issued by the Secretary of State and Attorney General, providing guidance and operational requirements on the use of investigation powers (see section 377, 377A and 410 of POCA (as amended)), will apply to the use of the relevant powers under this Order.
- 8.2 The Proceeds of Crime Centre (part of the National Crime Agency)⁶, which has responsibility for the training, monitoring and accreditation of financial investigators under section 3 of POCA, will provide necessary guidance as appropriate.
- 8.3 The United Kingdom's Mutual Legal Assistance (MLA) Guidance is publicly available and provides advice to other countries on how to obtain evidence or freeze and confiscate property in the UK.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

- 9.1 A full Impact Assessment has not been produced for this instrument because no significant impact on businesses is foreseen by this Order.
- 9.2 An impact assessment was conducted on the cryptoassets measures which can be found here:
https://assets.publishing.service.gov.uk/media/63d27043e90e071baeb3a7c2/b_Cryp-toassets_IA_Jan_2023_-_signed.pdf.
- 9.3 Familiarisation and training costs to the public are estimated in a range of £1.0 to £17.1 million, with a central estimate of £6.8 million (2021/22 prices) in year 1 only. Total ongoing costs are estimated in a range of £2.4 to 221.8 million (PV), with a central estimate of £26.2 million (PV) over 10 years. Total costs are estimated in a range of £3.4 to £239.0 million (PV), with a central estimate of £32.9 million (PV) over 10 years. Law Enforcement Agencies (LEAs) will incur the majority of the costs.
- 9.4 Total benefits are estimated in a range of **£107.6 to £1,721.5 million (PV)**, with a central estimate of £430.4 million (PV) over 10 years. All the benefits fall to the public sector and are derived from asset recovery receipts.
- 9.5 An impact assessment was conducted for on the UWO reforms here:
<https://bills.parliament.uk/publications/45474/documents/1584>
- Transition costs are estimated in the range of £0.01 to £0.35 million, with a central estimate of £0.05 million. The total ongoing costs to enforcement agencies and

⁴ <https://www.coe.int/en/web/conventions/-/council-of-europe-council-of-europe-convention-on-laundering-search-seizure-and-confiscation-of-the-proceeds-from-crime-and-on-the-financing-of-terrorism>

⁵ <https://www.gov.uk/government/collections/proceeds-of-crime-act-2002-codes-of-practice>

⁶ [Proceeds of Crime Centre - Nationhttps://www.nationalcrimeagency.gov.uk/contact-us/13-proceeds-of-crime-central Crime Agency](https://www.nationalcrimeagency.gov.uk/contact-us/13-proceeds-of-crime-central-Crime-Agency)

courts are not monetised due to the high degree of uncertainty in the volume of UWO cases, instead, a unit cost per UWO case is provided, estimated in the range of £11,000 to £2.0 million, with a central estimate of £1.0 million per UWO case (all 2021/22 prices).

- The total benefits from assets recovered are not monetised due to the high degree of uncertainty in the volume of UWO cases, instead, the average value of assets per UWO case is provided. **These are estimated in the range of £5 to £20 million**, with a central estimate of £10 million per UWO case.

Impact on businesses, charities and voluntary bodies

- 9.6 This instrument makes no, or no significant, impact on business, charities or voluntary bodies.
- 9.7 This instrument does not impact small or micro businesses.
- 9.8 This instrument makes no, or no significant, impact on the public sector.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

- 10.1 The approach to monitoring this legislation is, together 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 as the changes it makes are essentially consequential and technical.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

- 11.1 None.

12. European Convention on Human Rights

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

13. The Relevant European Union Acts

- 13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 (“relevant European Union Acts”).