

EXPLANATORY MEMORANDUM TO
THE PROCEEDS OF CRIME ACT 2002 (REFERENCES TO FINANCIAL
INVESTIGATORS) (ENGLAND AND WALES AND NORTHERN IRELAND)
(AMENDMENT) ORDER 2024

2024 No. 425

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 Tom Tugendhat, Security Minister 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 the Home Office:
HomelandSecurityCriminalFinancesandAssetRecoveryUnit@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 (References to Financial Investigators) (England and Wales and Northern Ireland) Order 2021 (“2021 Order”) specifies which public bodies can exercise powers conferred on accredited financial investigators (“AFIs”) under the Proceeds of Crime Act 2002 (c. 29) (“POCA”) in England and Wales and Northern Ireland.
- 4.2 This Order amends the 2021 Order to grant the organisations listed additional powers to support their ability to recover the proceeds of crime. Additionally, the Cabinet Office run Public Sector Fraud Authority is being included in the Order to better enable the organisation to investigate and tackle fraud against the public sector.
- 4.3 The 2021 Order is also being amended to include changes introduced in the Economic Crime and Corporate Transparency Act 2023 (c. 56) (“ECCT Act”). The ECCT Act introduces new civil powers in POCA to support the recovery of assets known as “cryptoassets” such as bitcoin. The ECCT Act also amends the existing confiscation powers under Parts 2 (England and Wales) and 4 (Northern Ireland) of POCA.

Where does the legislation extend to, and apply?

- 4.4 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales and Northern Ireland, apart from article 3 which extends to England and Wales and article 4 which extends to Northern Ireland.

- 4.5 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales and Northern Ireland apart from article 3 which applies to England and Wales, article 4 which applies to Northern Ireland, and certain amendments relating to civil recovery, money laundering and investigations which apply only in England and Wales and certain amendments relating to civil recovery and investigations which apply only in Northern Ireland.

5. Policy Context

What is being done and why?

- 5.1 POCA grants a wide variety of powers to law enforcement officers to recover the proceeds of crime. Police officers, immigration officers, officers of HM Revenue and Customs and Serious Fraud Office officers have access to certain powers in POCA, as do officers of the National Crime Agency (“NCA”) who have been designated with the powers of a constable under the Crime and Courts Act 2013 (c. 22).
- 5.2 Other staff working in public sector agencies can use POCA powers by becoming an AFI, if they work in an agency that is listed in the 2021 Order under the power in section 453 of POCA. This statutory instrument amends the 2021 Order primarily to:
- (a) provide additional powers to the organisations listed in the Order;
 - (b) designate certain employees of the Cabinet Office as AFIs; and
 - (c) include the new civil recovery powers introduced by the ECCT Act 2023.
- 5.3 Crime is conducted across a breadth of sectors, and it is vital that the investigative bodies of organisations are equipped with the right powers under POCA for their AFIs to investigate, disrupt and recover the proceeds of crime. Additional powers are being granted to 4 organisations already in the 2021 Order – The Security Industry Authority, The Food Standards Agency, The Environmental Agency and the Department of Work and Pensions.

The Security Industry Authority (SIA)

- 5.4 The SIA currently applies for confiscation and restraint cases. However, as the capability has developed, cases have been identified by enforcement agencies that require the use of civil recovery powers not available to the SIA. The SIA has therefore previously had to rely on other organisations to conduct civil recovery proceedings on their behalf which has led to delays. This Order gives AFIs working for the SIA additional investigative and civil recovery powers under POCA to enable them to conduct fuller investigations and recoveries themselves.

The Food Standards Agency (FSA)

- 5.5 The FSA undertake financial investigations in relation to POCA. Between 2015 and 2022, the FSA has recovered £28,000, with further funds in the process of being recovered. However, the FSA do not have search and seizure powers available to them that enable them to search and seize in relation to a confiscation investigation which has hindered their investigations. This Order grants the FSA search and seizure powers under Part 2 (confiscation: England and Wales) and Part 4 (confiscation: Northern Ireland) of POCA.

The Environment Agency (EA)

- 5.6 The EA has enforcement capabilities and the power to investigate criminal offences under the Environmental Protection Act 1990. The EA are often in possession of high value property. Currently, they have confiscation powers under POCA but not the

ability to search and seize. This Order grants the EA search and seizure powers under Part 2 and Part 4 of POCA.

The Department for Work and Pensions (DWP)

- 5.7 DWP has the ability to investigate and enforce under the Social Security Administration Act 1992. However, DWP also lacks the power to search and seize under Part 2 of POCA. Granting DWP those powers will enable them to more quickly and easily search when crime arises, particularly where there has been fraudulent conduct.

Cabinet Office - Public Sector Fraud Authority

- 5.8 The Cabinet Office houses the Public Sector Fraud Authority (“PSFA”) that responds to the increasing risk of fraud in the public sector. An enforcement unit will operate centrally in the PSFA to provide services to departments and public bodies to fight fraud. Confiscation powers (Part 2 of POCA) and civil recovery powers in the magistrates’ courts (Part 5 of POCA) are being granted to AFIs based in the PSFA to investigate fraud cases and recover assets as appropriate in England and Wales.

ECCT Act

- 5.9 POCA provides law enforcement with powers to investigate and recover the proceeds of crime. Under Part 5 of POCA, civil recovery powers are a useful alternative route for enforcement agencies to disrupt and recover the proceeds of crime where the respondent has not been convicted of a criminal offence. In recent years, a rise in the use of cryptoassets in conducting crime has presented challenges for law enforcement agencies using existing civil recovery powers. This is because cryptoassets present certain technological qualities that makes it difficult to apply the existing provisions. The ECCT Act introduced new civil powers in POCA for cryptoasset cases.

What was the previous policy, how is this different?

- 5.10 Prior to the ECCT Act, no provisions were made in POCA that were specifically intended to deal with cryptoassets. The ECCT Act amends POCA to enable law enforcement to apply POCA powers effectively to cryptoasset cases. This includes:
- Reforming the criminal conviction based confiscation powers in Part 2 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.
 - Inserting a new non-conviction civil forfeiture scheme into Part 5 of POCA so that cryptoassets can be recovered swiftly in the magistrates’ court via so-called “civil recovery”.
 - Amending the investigatory powers in Part 8 of POCA: to enable the use of existing powers in “cryptoasset investigations”.

6. Legislative and Legal Context

How has the law changed?

- 6.1 Section 453 of POCA allows the Secretary of State to provide that references in specific provisions of POCA to AFIs are to be read as references to AFIs as set out by order (and can do so by reference to a particular grade or training received). The Secretary of State can provide that specified references to an AFI include staff of organisations listed in an order made under section 453 of POCA, for some or all of the powers available to AFIs under POCA.

- 6.2 Before being able to exercise powers under POCA, financial investigators must first satisfy accreditation requirements. The scheme for accreditation and training of AFIs is provided by the NCA in accordance with section 3 of POCA.
- 6.3 AFIs can exercise various functions under POCA, depending on the organisation that the AFI belongs to. This Order effectively “switches on” those powers to grant AFIs those powers. POCA provides for a number of powers that can be exercised by an AFI, including:
- The power to apply to the court for a restraint order to effectively freeze property which may become subject to a confiscation order following a conviction (section 42 of POCA in relation to England and Wales and section 191 in relation to Northern Ireland)
 - The power to search for, seize and detain property with a view to its future realisation (sections 47A to 47R of POCA in relation to England and Wales, and sections 195A to 195R in relation to Northern Ireland)
 - The powers to search for, seize, detain and seek the forfeiture of cash suspected of being obtained through the proceeds of crime or intended for use in unlawful conduct (sections 289 to 303A of POCA)
 - The powers to search for, seize, detain and seek the forfeiture of certain personal (or moveable) personal property suspected of being obtained through the proceeds of crime or intended for use in unlawful conduct (sections 303B to 303Z of POCA)
 - The powers to freeze and forfeit funds in a bank account that are suspected of being obtained through the proceeds of crime or intended for use in unlawful conduct (sections 303Z1 to 303Z19 of POCA)
 - The power to apply for an extension of the moratorium period (section 336D(7)(h) of POCA)
 - The ability to apply to the court for investigation orders and warrants in certain financial investigations under Chapter 2 of Part 8 of POCA (section 378 of POCA)
 - The power to apply for and execute search warrants in financial investigations (sections 352 and 353 of POCA).

ECCT Act 2023

- 6.4 Schedule 9 to the ECCT Act inserts into POCA a new statutory regime for non-conviction based civil forfeiture of cryptoassets in England and Wales, Scotland and Northern Ireland. Four new chapters are inserted into Part 5 of POCA (civil recovery) as follows:
- Chapter 3C: Enables law enforcement agencies to take control of and recover cryptoassets discovered when executing a search warrant. These powers will be used in circumstances where cryptoassets are “unhosted” and not in the custody of a third-party, akin to a bank. This involves replicating and expanding the scope of search, seize and detention powers to make it explicitly clear that officers have the authority to recreate cryptoasset wallets and transfer assets into a law enforcement-controlled wallet. It also introduces the concept of a “cryptoasset-related item” – a physical item which may lead to the seizure of incorporeal cryptoassets.
 - Chapter 3D: Enables law enforcement agencies to temporarily take control of and recover cryptoassets directly from businesses known as cryptoasset exchange providers and custodian wallet providers.

- Chapter 3E: Provides for the forfeiture of cryptoassets. Assets may be recovered where the magistrates court is satisfied—on the balance of probabilities—that they are recoverable property or are intended for use in unlawful conduct.
- Chapter 3F: Provides for the conversion of cryptoassets to fiat currency, on application to the court, to mitigate concerns regarding volatility of detained or frozen assets.

Business Departments

- 6.5 This Order makes one additional technical amendment. In 2023, the Department for Business, Energy and Strategy was split to form the Department of Business and Trade, the Department for Energy, Security and Net Zero, and the Department for Science, Innovation and Technology. This Order updates the references to “the Department for Business, Energy and Industrial Strategy” in the 2021 Order to enable AFIs reliant on that designation to continue to exercise their functions. These organisations are:
- The Department of Energy, Security and Net Zero
 - The Department of Science, Innovation and Technology.

Why was this approach taken to change the law?

- 6.6 This is the only possible approach to make the necessary changes.

7. Consultation

Summary of consultation outcome and methodology

- 7.1 Although there is no statutory duty to consult on an Order made under section 453 of POCA, the Home Office published a public consultation to seek views on the inclusion of five additional organisations. Please see the following link for the consultation document: <https://www.gov.uk/government/consultations/proceeds-of-crime-act-2002-accredited-financial-investigations-powers/changes-to-bodies-granted-investigatory-and-other-powers-under-the-proceeds-of-crime-act-2002>
- 7.2 The consultation ran from 7 December 2022 to 1 March 2023 and was open to the public and targeted at individuals, businesses and organisations in England, Wales and Northern Ireland. It sought views on six types of investigative power for the following organisations: Security Industry Authority, Food Standards Agency, Environment Agency, Public Sector Fraud Authority and the Department for Work and Pensions. Responses were received from five individuals, primarily from bodies with AFI powers, or to be granted AFI powers. The majority of responses “agreed” or “strongly agreed” that the bodies in the consultation should be granted the powers listed in the consultation. Two police forces saw the powers as especially required for the Public Sector Fraud Authority (Cabinet Office) who will need the powers to support their functions as a law enforcement agency and support an overall higher-level public sector response to fighting fraud. One dissenting view was received, which came from a member of the public that saw one organisation as better as it was without the new powers. However, no detail was provided on their rationale for objecting so we cannot articulate their concerns further.
- 7.3 Following the public consultation, the Home Office decided to include in this Order the five organisations set out in in this Order, in addition to the organisations listed in the previous orders. It is the policy intention of this instrument that AFI powers will be exercisable by officials in these five agencies.

8. Applicable Guidance

- 8.1 There is no guidance planned regarding this Order specifically. Section 3 of POCA requires the NCA to monitor the performance of AFIs. This monitoring takes the form of continuing professional development (“CPD”) activities, work based CPD submissions via the NCA’s financial investigation professional register and their communication and regular liaison with individual financial investigators and bodies. A sample of all evidence submitted in support of the continued correct use of the powers will mean that the actual casework is examined by the NCA Proceeds of Crime Centre. Any incorrect use of the powers could result in the withdrawal of accredited status.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

- 9.1 A full Impact Assessment has not been prepared for this instrument as the change did not warrant an impact assessment. However, we have considered the overall impact of commencing the 2023 Act during Bill passage rather than preparing separate assessments for each statutory instrument in this package. The full list of impact assessments can be found at this link:
<https://www.gov.uk/government/publications/economic-crime-and-corporate-transparency-bill-2022-impact-assessments>.
- 9.2 An impact assessment has been drafted for the cryptoassets - https://assets.publishing.service.gov.uk/media/63d27043e90e071baeb3a7c2/b_Cryptoassets_IA_Jan_2023_-_signed.pdf. All benefits are monetised. 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. The data and assumptions surrounding cryptoassets are limited due to the technology being relatively new and rapidly changing. It is also sensitive, and many figures and police data are not suitable for the public domain.

Impact on businesses, charities and voluntary bodies

- 9.3 There is no, or no significant, impact on business, charities or voluntary bodies.
- 9.4 The legislation does not impact small or micro businesses.
- 9.5 There is 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 This instrument will not be subject to formal review. The Home Office will monitor the use of amendments introduced by the ECCT Act with key stakeholders by hosting feedback sessions. In line with Government requirements, the ECCT Act will be formally reviewed within 5 years.

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 this instrument is subject to 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”).