POLICY NOTE

THE CRIMINAL JUSTICE AND DATA PROTECTION (PROTOCOL NO. 36) AMENDMENT (SCOTLAND) REGULATIONS 2020

SSI 2020/386

The above instrument is made in exercise of the powers conferred by section 2(2) of the European Communities Act 1972. The instrument is subject to the negative procedure.

Purpose of the instrument.

The purpose of this instrument is to make necessary amendments to the Criminal Justice & Data Protection (Protocol No. 36) Order 2014 (the CJDP) to facilitate the proper functioning of the 2018 Regulation in Scotland.

Policy Objectives

Regulation EU 2018/1805 (the 2018 Regulation) on the mutual recognition of freezing orders and confiscation orders in criminal cases between EU Member States will come into force on the 19th December 2020.

Background and Existing Law

Council Framework Decision 2003/557/JHA ("the 2003 Framework Decision") establishes rules under which a Member State recognises and executes in its territory a freezing order for property or evidence issued by the judicial authority of another Member State in criminal proceedings.

Council Framework Decision 2006/783/JHA ("the 2006 Framework Decision") ensures all Member States have effective rules governing the confiscation of proceeds from crime, and that they can confiscate not only property that is or which represents the proceeds of the crime for which the individual has been convicted, but also other property that is or represents the proceeds of other criminal activity by that individual.

The CJDP fully transposes the 2003 Framework Decision and the 2006 Framework Decision into UK Law. Schedule 1 to the CJDP makes provision for Scotland in relation to the freezing and confiscation of criminal assets, including the instrumentalities of crime (instrumentalities are assets used for criminal conduct).

Schedule 1 to the CJDP makes provision to enable restraint and confiscation orders made by Scottish courts against property in other Member States, to be enforced by the authorities in those States. It also makes provision to allow Scottish courts to recognise and enforce restraint and confiscation orders made against property in the UK, or persons normally resident in the UK, made by the authorities in other Member States.

Regulation EU 2018/1805

The European Commission is of the view that the existing regime for the mutual recognition of freezing orders and confiscation orders is not fully effective. The Commission has concluded that the 2003 and 2006 Framework Decisions have not been implemented and applied uniformly in the Member States, which has led to insufficient mutual recognition and inadequate cross-border cooperation.

The 2018 Regulation therefore seeks to ensure the effective mutual recognition of freezing orders and confiscation orders by setting out legally binding rules on the recognition and execution of such orders.

With specific relevance to this instrument, Article 3 of the 2018 Regulation provides a list of criminal offences applicable to the execution of freezing and confiscation orders in Member States. In addition, Annexes 1 and 2 of the 2018 Regulation prescribe the form by which freezing and confiscation certificates must be transmitted to the executing state.

Article 3, and Annexes 1 and 2 constitute changes to what is currently legislated for in the CJDP. Whilst the CJDP sets out a framework for the mutual recognition of overseas freezing and confiscation orders from other Member States, this has been made in consequence of the 2003 and 2006 Framework Decisions. As a result, there are a number of references to the form of certificates which relate to certification of domestic orders to be sent to other Member States and to the definition of criminal conduct that have now been rendered obsolete by the 2018 Regulation.

In order to avoid gaps in terms of the certification for domestic orders and the definition of criminal conduct in the recognition of orders from other Member States, it is necessary to make amendments to the CJDP to replace references to the 2003 and 2006 Framework Decisions with reference to the 2018 Regulation in order to facilitate its proper functioning in Scotland.

Consultation
The Scottish Government has sought the views of the Crown Office & Procurator Fiscal Service on the compatibility of the EU Regulation with Scots Law and its practical implementation.

Impact Assessments
There are no equality impact issues.

Financial Effects
The Cabinet Secretary for Justice has confirmed that no BRIA is necessary, as the instrument has no financial effects on the Scottish Government, local government or on business.
Scottish Government

Scottish Government
DSCR: Organised Crime Unit

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