EXPLANATORY MEMORANDUM TO

THE NATIONAL CRIME AGENCY (DIRECTED TASKING) ORDER 2023

2023 No. [XXXX]

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. Purpose of the instrument

2.1 This Order gives effect to an element of the Government's approach to tackling economic crime, an issue which causes significant direct and indirect harm to the UK. Subject to proper safeguards, it brings the investigative capability of the Serious Fraud Office's work within scope for direction by the Director General of the National Crime Agency – akin to what already exists in relation to police forces in England and Wales. The arrangements set out in the Order will be part of a more effective and integrated law enforcement response to economic crime and fraud.

2.2 Section 5(5) of the Crime and Courts Act 2013 ("the 2013 Act") lists the persons whom the Director General of the National Crime Agency ("the NCA") may direct to perform a task. This Order amends that list to add the Director of the Serious Fraud Office ("SFO"). Consequently, this Order amends section 2 of the Criminal Justice Act 1987 to provide that the investigation powers of the Director of the SFO shall be exercisable following a direction given by the Director General of the NCA.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The extent of this instrument is (that is, the jurisdiction(s) which the instrument forms part of the law of) England and Wales, Scotland and Northern Ireland.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales, Scotland and Northern Ireland.

5. European Convention on Human Rights

5.1 The Minister of State for Security, Rt Hon. Tom Tugendhat, has made the following statement regarding Human Rights:

"In my view the provisions of the National Crime Agency (Directed Tasking) Order 2023 are compatible with the Convention rights.".

6. Legislative Context

6.1 The 2013 Act established the NCA. Section 5 of, and Schedule 3 to, the 2013 Act make provision about the relationships between the NCA and other agencies regarding tasking and assistance. Section 5 and Schedule 3 set out powers for the Director General of the NCA and law enforcement partners to obtain specialist

support and assistance from one another. The two elements of this are tasking and assistance. The provision of support can be conducted on a voluntary basis or following a direction.

6.2 The Criminal Justice Act 1987 established the SFO and sets out its powers and the powers of the Director of the SFO. Section 1 establishes the Director's power to investigate any suspected offence which appears to them to involve serious or complex fraud. Section 2 sets out the Director of the SFO's investigation powers, which are exercisable for the purposes of an investigation under section 1.

Directed Tasking

6.3 Section 5(5) of the 2013 Act makes provision for the Director General of the NCA to direct chief officers of an England and Wales police force or the Chief Constable of the British Transport Police to perform a task specified in the direction. Directed tasking is subject to a threefold test set out in section 5(6). This provides that the Director General may give a direction only if the Director General considers that: performance of the task would assist the NCA to carry out its functions; it is expedient for the directed person to perform that task; and satisfactory arrangements cannot be made, or cannot be made in time, under subsection (1) (voluntary tasking).

6.4 This Order amends section 5(5) to include the Director of the SFO in the list of those persons that the Director General of the NCA may direct to perform a task. The power to amend that list is set out in paragraph 33 of Schedule 3 to the 2013 Act. The Order also prohibits a direction being given to the Director of the SFO in relation to their prosecution functions and requires that the matter must relate to serious or complex fraud.

6.5 Part 5 of Schedule 3 to the 2013 Act sets out the arrangements for the payment of tasks, assistance or the use of facilities. Paragraphs 29(2)(a) and 32 of that Schedule provide that the Director General of the NCA must pay the appropriate amount to a UK law enforcement agency if that agency performs a task in response to a request under section 5. The consequential amendments made by this Order provide that the Director General of the NCA must pay an appropriate amount to the SFO in respect of the task being directed.

7. Policy background

What is being done and why?

7.1 Economic crime has a significant impact on the UK's economy, financial market competitiveness and reputation, and it facilitates the serious and organised crime that causes harm to individuals and communities across the UK. On 30 March 2023, His Majesty's Government published the Economic Crime Plan 2, detailing the action the Government is taking to tackle economic crime and the risks it poses to individuals, businesses and the integrity of our financial system. On 3 May 2023, the Government also published its Fraud Strategy. A broad package of reforms was announced, including the creation of a National Fraud Squad. The delivery of the package of reforms will improve the operational response to the tackling of economic crime, specifically in the areas of intelligence sharing, collective prioritisation, and coordinating collaborative investigations across the regulatory and law enforcement spaces. The Government will soon publish a new Serious and Organised Crime Strategy to further strengthen the overall response to serious and organised crime. The Director of the SFO is content with the proposed approach.

7.2 The SFO plays an important role in the fight against economic crime, and is a key partner in the National Economic Crime Centre. The Director General of the NCA may currently task the Director of the SFO on a voluntary basis, and this Order seeks to extend the NCA's directed (that is, mandatory) tasking power to the Director of the SFO. The Director General of the NCA already has directed tasking powers over the chief officer of an England and Wales police force and the Chief Constable of the British Transport Police provided that certain considerations are met and appropriate consent is obtained as set out in the 2013 Act[1]. Extending the NCA Director General's directed tasking power will not impinge on the prosecutorial independence of the Director of the SFO. The new powers will not enable the NCA to give a direction relating to the prosecution functions of the Director, and so will not be capable of being used to instruct the SFO to prosecute a particular case.

The Crime and Courts Act 2013 (National Crime Agency and Proceeds of Crime) (Northern Ireland) Order 2015

7.3 The Crime and Courts Act 2013 (National Crime Agency and Proceeds of Crime) (Northern Ireland) Order 2015 (the "2015 Order") extended some "relevant NCA provisions" (as defined in Schedule 24 to the 2013 Act) and all of the "relevant civil recovery provisions" and "relevant investigation provisions" (as defined in Schedule 25 to the 2013 Act) to Northern Ireland. The 2015 Order also made modifications to the way "relevant NCA provisions" would be exercised in Northern Ireland. Provisions in the 2015 Order are supported by administrative arrangements in Memoranda of Understanding between the Department of Justice in Northern Ireland, the Police Service of Northern Ireland and the NCA. These, in particular, deal with the ways in which the duties conferred on NCA officers by virtue of the 2015 Order operate. These Memoranda of Understanding will be reviewed and amended as necessary, to reflect the extension of the directed tasking powers in this Order and to ensure that the safeguards in place relating to Northern Ireland are retained.

Explanations

What did any law do before the changes to be made by this instrument?

7.4 The Crime and Courts Act 2013 established the NCA and set out powers for the Director General of the NCA to voluntary task other law enforcement agencies to carry out specific activity, including the SFO.

Why is it being changed

7.5 The change from a voluntary to directed tasking power will enhance NCA and SFO collaboration, and assist in the sharing of tools and expertise to fight economic crime and fraud. The directed tasking power in relation to the SFO applies to SFO's legislative remit to tackle serious or complex fraud, including bribery and corruption.

What will it now do?

7.6 It will give the NCA a new power to directly task the SFO to investigate a case of serious or complex economic crime that falls within the SFO's remit.

[1] Crime and Courts Act 2013 (legislation.gov.uk)

8. European Union Withdrawal and Future Relationship

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 This Order amends primary legislation and so the question of consolidation does not arise.

10. Consultation outcome

10.1 As required in paragraph 3 of Schedule 3 to the 2013 Act, the Secretary of State has consulted the Director of the SFO on making the SFO an agency that can be subject to directed tasking by the Director General of the NCA. The Director has indicated that he is content with these proposals.

10.2 The Department of Justice Northern Ireland ("DoJNI") was consulted on this instrument and on the extension of the directed tasking powers in this Order to ensure that the safeguards in place relating to Northern Ireland are retained. At official level, DoJNI has identified no concerns in relation to the amendment of the Crime and Courts Act 2013 to allow the NCA to direct the SFO to investigate matters throughout the UK, including Northern Ireland.

10.3 DoJNI officials confirmed they were content with the instrument, in particular, how directions to the SFO to carry out a task in Northern Ireland would operate.

11. Guidance

11.1 No guidance is being issued in relation to this instrument.

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. In the event of a directive tasking by the NCA, the NCA and SFO will discuss issues of organisational impact and costs and have recourse to the Secretary of State and Attorney General, should that be necessary. Significant impact is not anticipated and any directive tasking will be related to serious or complex fraud.

12.3 An impact assessment has not been prepared for this instrument.

13. Regulating small business

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

14. Monitoring & review

14.1 The powers relating to tasking and assistance in the 2013 Act will be kept under regular review to ensure they continue to be operationally suitable, including this legislation.

15. Contact

15.1 Richard Hilder at the Home Office email: Richard.Hilder@homeoffice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Rod McLean, Head of the SOC Law Enforcement Unit, at the Home Office can confirm that this explanatory memorandum meets the required standard.

15.3 The Security Minister, Rt Hon. Tom Tugendhat, at the Home Office can confirm that this explanatory memorandum meets the required standard.