EXPLANATORY MEMORANDUM TO

THE PROCEEDS OF CRIME ACT 2002 (SEARCH, SEIZURE AND DETENTION OF PROPERTY: CODE OF PRACTICE) (NORTHERN IRELAND) ORDER 2024

2024 No.

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, the Minister for Security at the Home Office confirms that this Explanatory Memorandum meets the required standard.

2.2 Tom Bell, Deputy Director for Criminal Finances and Asset Recovery, at the Home Office confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Amelia Smith at the Home Office (email: Amelia.smith37@homeoffice.gov.uk) in the Criminal Finances and Asset Recovery Unit at the Home Office 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 This Order brings into operation one revised code of practice relating to search, seizure and detention of property under the Proceeds of Crime Act 2002 ("POCA") in relation to Northern Ireland.

4.2 The revised code is required because of amendments to POCA made by the Economic Crime and Corporate Transparency Act 2023 ("the 2023 Act"). The 2023 Act makes it easier for law enforcement to take control of and recover cryptoassets under the powers in Part 4 of POCA, which relates to confiscation in Northern Ireland. The code of practice is being revised by outlining the powers of certain officers. The code also provides for checks on these powers so that enforcement officers behave in a proportionate manner.

Where does the legislation extend to, and apply?

4.3 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is Northern Ireland.

4.4 The territorial application of this instrument (that is, where the instrument produces a practical effect) is Northern Ireland.

5. Policy Context

What is being done and why?

5.1 The rapid development and evolution of cryptoassets along with its pseudo-anonymous methods to assist in the movement of funds using advanced technology and rapid transaction speeds, has meant that this technology is exploited by criminals. The Government has a responsibility to ensure that law enforcement agencies have the right legislative framework in place to recover cryptoassets. Without it, those assets could be used to fund further criminality.

5.2 The threat of cryptoassets being exploited by criminals is more apparent than ever before. The National Crime Agency's National Strategic Assessment noted a particular acceleration in the criminal use of these assets during the pandemic. Further, cryptoassets are one of only a few accepted payment mechanisms most used by cyber criminals demanding payment following a ransomware attack. Ransomware is a type of malware which prevents you from accessing your device and the data stored on it, usually by encrypting your files. A criminal group will then demand a ransom in exchange for decryption. These attacks are increasingly common and pose a significant threat to the UK public and businesses.

5.3 The Joint Terrorism Analysis Centre (JTAC) also assessed that the use of cryptoassets by terrorist groups and individuals of terrorism concern could be exploited to raise and move funds for terrorist activities in the future. For example, donations made via cryptoasset wallets fund the smuggling of individuals of concern for terrorism-related matters out of internally displaced people camps in Syria.

5.4 The 2023 Act amends both criminal confiscation powers in Parts 2, 3 and 4 of POCA and civil recovery powers in Part 5 of POCA to enable enforcement agencies to more effectively tackle criminal use of cryptoassets.

5.5 These reforms will enable officers to seize cryptoassets, and other property, during the course of an 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.

5.6 Section 195 of POCA relates to the exercise of search and seizure powers in Northern Ireland. A code of practice made under POCA for this section provides guidance to the officers and other persons exercising their functions under POCA, and establishes 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.

5.7 The various POCA codes include detailed and clear explanations of the powers and the legal requirements that must be met before these powers are exercised by officers. They set 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 codes require 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 codes also contain 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.

What was the previous policy, how is this different?

5.8 Prior to this change, a previous code of practice was in force. The previous code did not touch upon the new powers to search for, seize and detain cryptoassets and cryptoasset-related items, which were introduced by the 2023 Act.

5.9 The revision of this code is necessary to reflect the provisions inserted by the 2023 Act.

5.10 This instrument will bring into operation, a revised code of practice relating to the powers of certain officers under Part 4 of POCA to search for, seize and detain property, including cryptoassets and related items, in Northern Ireland. It will also revoke a previous instrument which brought into force a previous code of practice.

5.11 The code is made in connection with the exercise of the following powers in POCA: seizure powers conferred by section 195C on appropriate officers; search powers conferred by sections 195D to 195F on appropriate officers; the function of senior officers in giving appropriate approval under section 195G; the function of appropriate officers in making a report to the "appointed person" on any exercise of the search or seizure powers without judicial approval under section 195H; and powers to detain property conferred by sections 190A, 193A and 195J to 195P.

5.12 Sections 195C to 195F provide appropriate officers with certain search and seizure powers to prevent the dissipation of realisable property (as defined in section 83 of POCA) which may be used to satisfy a confiscation order made under Part 4 of POCA. Realisable property is any free property held by the defendant and any free property held by the recipient of a tainted gift.

5.13 Section 195B sets out a number of pre-conditions for the exercise of the seizure powers under section 195C.

6. Legislative and Legal Context

How has the law changed?

6.1 POCA provides powers to recover the proceeds of crime. This instrument brings into operation one revised code of practice concerning the use of asset recovery powers in POCA. In particular, it relates to the exercise of the powers conferred by section 195S(4) and (5) of POCA as inserted by the 2023 Act. It brings into operation a revised code of practice relating to the powers of certain officers under Part 4 of POCA to search for, seize and detain property, including cryptoassets and related items, in Northern Ireland. This includes officers from His Majesty's Revenue and Customs, immigration officers, and officers from the National Crime Agency and the Serious Fraud Office.

6.2 The code of practice brought into operation by this Order replaces the previous code that came into force by means of S.I. 2021/729.

6.3 Although the code will only apply in Northern Ireland, and confiscation is a devolved matter, this code is issued by the Secretary of State because it relates to the exercise of powers by bodies that have reserved functions. A separate code will be issued by the Department of Justice in Northern Ireland in relation to other bodies using these powers.

6.4 Sections 195A to 195T of POCA provide for search and seizure powers in Northern Ireland to prevent the dissipation of realisable property that may be used to satisfy a confiscation order. "Realisable property" is defined in section 83 of POCA. Section 195C contains the seizure powers, while sections 195D to 195F contain the search

powers. A code of practice is made by the Secretary of State under section 195S of POCA in relation to the use of these powers in Northern Ireland. A code of practice is also made by the Department of Justice under 195T of POCA in relation to these powers.

6.5 Part 3 of Schedule 8 to the 2023 Act amends some of these sections of POCA to include powers to search for, and seize, "cryptoasset-related items", information from which can be used in order to seize cryptoassets (such as, for example, bitcoin).

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 The code of practice was subject to a twelve-week public consultation from 28th March to 20th June 2023.[1]

7.2 Respondents were asked three questions - if they have any comments on the proposed amendments, whether these proposed amendments to the codes would have an adverse effect on their organisation, and if they had any other comments. There were six responses – five from law enforcement and prosecutorial agencies (NCA, SFO, HMRC, FCA, CPS) and one from a safer communities network. The responses were supportive of the codes and included comments focusing on how the codes could be improved with a number of suggestions or recommendations to ensure the guidance is as clear as possible. On the codes generally, law enforcement agencies' responses requested clarification of certain definitions in the legislation and additional guidance on the practical operation of the powers to seize cryptoassets and related items. For instance, a response by one enforcement agency sought clarity on the definitions in a different code on property, cryptoassets and wallets and also suggested where additional guidance could be added on storage and searches. Another agency requested that the definition of "control" is given clear guidance.

7.3 Only grammatical comments were made on this code specifically. These responses have been factored into the final draft of the response. The responses to this code were useful in highlighting minor technical drafting errors which have been corrected.

7.4 The Home Office also invited representations from the Department of Justice in Northern Ireland (DoJNI) draft Code of Practice to the extent that the Secretary of State was required to do so under POCA. DoJNI has confirmed they are content.

8. Applicable Guidance

8.1 There is no guidance planned with regard to this Order specifically.

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 we have considered the overall impact of commencing the cryptoassets measures in the 2023

[1] https://www.gov.uk/government/consultations/draft-codes-of-practice-issued-under-poca-2002-and-the-terrorism-act-2000

Act in it own impact assessment.[2] The total benefits of introducing a cryptoassets regime 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 across all cryptoassets powers introduced in the 2023 Act, including the search, seizure and detention of property powers in Northern Ireland.

Impact on businesses, charities and voluntary bodies

9.2 There is no, or no significant, impact on business, charities or voluntary bodies.

9.3 The legislation does not impact small or micro businesses.

9.4 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 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.

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 The Minister for Security has made the following statement regarding Human Rights:

"In my view the provisions of the Proceeds of Crime Act 2002 (Search, Seizure and Detention of Property: Code of Practice) (Northern Ireland) Order 2024 are compatible with the Convention rights."

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").

[2] https://bills.parliament.uk/publications/47792/documents/2815