EXPLANATORY MEMORANDUM TO

THE MAGISTRATES' COURTS (PROCEEDS OF CRIME ACT 2002 (EXTERNAL REQUESTS AND ORDERS) ORDER 2005, PART 5A, AND MISCELLANEOUS AMENDMENTS) RULES 2019

2019 No. 1368 (L. 10)

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice with the assistance of the Home Office and is laid before Parliament by Command of Her Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 The purpose of this instrument is to provide for court procedure to underpin the operation of articles 213E, 213K to 213O and 213S to 213U of Part 5A of the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (SI 2005 No. 3181 – "the 2005 Order"). The 2005 Order was amended by article 30 of The Proceeds of Crime Act 2002 (External Investigations and External Order and Requests) (Amendment) Order 2018 (SI 2018 No. 1078), which inserted Part 5A.

2.2 The 2005 Order makes provision for cooperation with other countries in the enforcement of their orders relating to recovering the proceeds of crime. Specifically, Part 5A makes provision for the seizure, detention and forfeiture of certain listed types of personal or moveable property ("listed assets") which has been obtained as a result of or in connection with criminal conduct.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 In addition to the principal content which is explained in this memorandum, this instrument makes minor amendments to the following instruments to address instances of defective drafting identified by the Joint Committee on Statutory Instruments in paragraphs 10 and 11 of its Eleventh Report of Session 2017-19 (in the first four cases amending references to the "designated officer" to become references to the "court", and in the final case amending two references to Chapter 3A of Part 5 of the Proceeds of Crime Act 2002 to become references to Chapter 3B of Part 5 of that Act)—

- S.I. 20014013, in rules 7B and 9F(6)(b) (inserted by S.I. 2017/1295, which was the instrument reported on);
- S.I. 2002/2998, in rule 5(3A) (inserted by S.I. 1291, which was the instrument reported on);
- S.I. 2017/1290, in rules 5(4) and 7;
- S.I. 2017/1293, in rule 17(6)(b);
- S.I. 2017/1297, in rules 2(d) and 7.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is England and Wales.

5. European Convention on Human Rights

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

6. Legislative Context

6.1 This instrument is made under section 144 of the Magistrates' Court Act 1980, which confers power on the Lord Chief Justice, with the approval of the Lord Chancellor, to make rules for regulating and prescribing the procedure and practice to be followed in magistrates' courts, except in criminal matters. Matters arising in relation to the 2005 Order are not criminal in nature, and so rules fall to be made under section 144, rather than being Criminal Procedure Rules. This instrument provides for procedure in relation to proceedings under provisions by the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (as amended) – see below for details of these new proceedings. The new proceedings will become possible from 12 November 2019 (see article 1(2) of the Proceeds of Crime Act 2002 (External Investigations and External Orders and Requests) (Amendment) Order 2018), and so this instrument comes into force on that date.

6.2 The 2005 Order and amending 2018 Order were made under section 444 of the Proceeds of Crime Act 2002 (POCA). Section 444 of POCA provides that Orders in Council may 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; and may include provision corresponding to certain provisions of POCA itself. Section 447 defines "external request" as a request by an overseas authority to prohibit dealing with relevant property (see section 447(1)). An "external order" is defined as an order 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) of POCA).

6.3 The Order in Council under section 444, namely the 2005 Order, contains provisions for recognising and enforcing an overseas country's requests to freeze and recover the proceeds of crime, which correspond to those provided for in the domestic provisions of POCA. As originally enacted, therefore, the 2005 Order provided the ability to process and enforce external order by methods corresponding to those then available under the domestic provisions of POCA.

6.4 Since 2005, POCA has been amended to provide further powers for the recovery of the proceeds of crime. Notably and relevant to this instrument, the Criminal Finances Act 2017 introduced, by amendment at section 15, provision for the forfeiture of certain personal (or moveable) property ("listed assets"). Section 15 of the Criminal

Finances Act inserted a new Chapter 3A into Part 5 of POCA (civil recovery of the proceeds etc. of unlawful conduct). These new provisions introduced the power to search for, seize, detain and seek the forfeiture of listed assets. Listed assets are explicitly defined and include precious metals, precious stones and artistic works. There are also associated safeguards to the operation of these powers such as a code of practice providing guidance on the use of the search power, an independent Appointed Person who oversees the conduct of searches that would otherwise not come before a court, the ability for victims to seek return of property and for persons to seek compensation.

6.5 The 2005 Order was consequentially amended by the 2018 Order to provide similar powers in relation to providing cooperation to other countries' court orders to recover the proceeds of crime. These amendments include modifications to the POCA provisions in the 2005 Order to make them operable in the context of providing international cooperation (referred to as Mutual Legal Assistance) and to be within the scope of the enabling powers in section 444 of POCA. For example, section 444 only provides for the recovery of the proceeds of crime and so the domestic ability to also recover property intended to be used in crime is not replicated. Also, as section 444 only provides for an interim freezing stage to prevent a person dealing with property, the ability to physically seize and detain property to recover the proceeds of crime in only provided as part of the powers of recognising and enforcing a final order to recover the proceeds of crime.

6.6 The domestic provisions in relation to POCA have associated rules of court to provide practice and procedure in dealing with these cases (the Magistrates' Courts (Detention and Forfeiture of Listed Assets) Rules 2017 (S.I. 2017/1293)). This instrument provides similar rules in relation to cases under the parallel provisions in the 2005 Order relating to international cooperation cases.

7. Policy background

What is being done and why?

7.1 The Criminal Finances Act 2017 was introduced to improve significantly the United Kingdom's ability to tackle money laundering, corruption, tax evasion and terrorist financing. Included in its measures were new powers to improve our capability to recover the proceeds of crime. These domestic provisions were commenced in April 2018 and the amendments to the 2005 Order make corresponding provision allowing for the use of those powers where the United Kingdom is providing assistance in international cases. The new 2005 Order provisions are to be commenced in November 2019.

7.2 The policy is that powers available in recovering the proceeds of crime in the United Kingdom's domestic cases should also be available in assisting other countries in their cases where property of interest is in this country. This ensures that the United Kingdom can provide the widest and most effective possible assistance to other countries in their cases relating to recovering the proceeds of crime.

7.3 The 2005 Order was therefore amended to provide that the ability to search for, seize, detain and forfeit listed assets is an option for the United Kingdom in recognising and enforcing an external order to recover the proceeds of crime. There is a corresponding need to provide for detailed court procedure to ensure the effective, consistent and fair operation of these powers, and this instrument provides for that procedure. In a

domestic context, procedure is provided by the Magistrates' Courts (Detention and Forfeiture of Listed Assets) Rules 2017 (S.I. 2017/1293): this instrument makes provision in relation to international cooperation cases subject to the 2005 Order corresponding to that in those Rules for domestic cases.

Prior approval of searches for property

7.4 Article 213C of the 2005 Order provides for a power to search for, and seize, listed assets. The search power will only be exercisable on private premises where the "relevant officer" (meaning an officer of HMRC, a constable or a SFO officer) has lawful authority to be present. The 2005 Order also makes provision for the search of vehicles and persons. Article 213E of the 2005 Order provides that the prior approval of a judicial officer or a senior officer is required before the search power can be exercised, save where it is not practicable to obtain that prior approval. "Senior officer" is also defined for all agencies permitted to use these powers. Rule 3 of these Rules makes provisions for applications for prior approval from a judicial officer.

Application for the release of detained property

7.5 The person from whom the property was seized may apply to the magistrates' court under article 213K of the 2005 Order for the release of the listed assets. The release will be ordered if the court is satisfied that the property did not derive from crime or the other criteria for detention are no longer met. Also, article 213 provides that victims and other owners of the property can apply for the release of the listed asset. Rule 4 of these Rules makes provision in respect of giving notice for applications for the release of detained property.

Application for forfeiture of detained property

7.6 Article 213L of the 2005 Order provides that the law enforcement agency can apply to the magistrates' court for the forfeiture of a listed asset (or assets) which has been detained under these provisions. Rule 5 of these Rules specifies the court to which forfeiture applications should be sent, and makes provision in respect of how notice of a forfeiture application is to be given. Rule 7 also provides that a directions hearing is to be listed by the court to manage the forfeiture application.

Agreements about associated and joint property

7.7 Articles 213M and 213N of the 2005 Order make provision in respect of 'associated' and jointly held property in these instances. In essence these terms relate to interests in the property which could not result in the fair making of a forfeiture order against that particular property (such as where they were obtained legitimately by a third party). Article 213N allows for an agreement to be reached between the law enforcement agency and the person that holds the associated property (or who is the excepted joint owner) to come to an agreement as to how the value of the listed asset is to be apportioned. Where there is no agreement regarding associated or joint property, article 213O provides that the magistrate's court must transfer the application to the relevant court if it is satisfied that the value of the forfeitable property and any associated property is £10,000 or more (and also has the discretion to transfer cases where the value is less than £10,000). In relation to England and Wales, the relevant court is the High Court. Rule 6 of these Rules sets out what is required from the parties before the court can give effect to an agreement under article 213N of the 2005 Order.

Application for compensation

7.8 Where no forfeiture is made, following seizure, the person from whom the property was seized, or the person to whom the property belongs, may apply to the court for compensation under article 213T of the 2005 Order, where the circumstances are exceptional. Rule 7 of these Rules states to whom a copy of any application for compensation must be sent. It also provides the timing of the date of a court hearing in relation to that application.

Powers for prosecutors to appear in proceedings

7.9 Article 213U provides that the Director of Public Prosecutions can agree to appear in proceedings under Part 5A of the 2005 Order, on behalf of a law enforcement agency. Rule 8 of these Rules makes provision in respect of notifying the court in these circumstances.

Giving of documents

7.10 Rules 9 to 14 of these Rules set out how documents are to be given under the Rules. This may be by post (rule 10), by electronic communication (rule 11), or by any alternative method authorised by the court (rule 12). In addition, rule 13 set out how documents are to be given to children and protected persons and rule 14 to persons outside the United Kingdom.

Transfer of proceedings

7.11 Rule 15 of these Rules provides that any person party to proceedings may make an application to the court requesting that they be transferred to a different local justice area. The court may grant the application if it is satisfied that it would be more convenient or fairer for proceedings to be transferred to a different local justice area.

Procedure at hearings

7.12 Rule 16 of these Rules makes provision for how hearings of applications under Part 5A of the 2005 Order are to be conducted, including who may attend and be heard on the question of whether the application should be granted.

Miscellaneous amendments

7.13 Rule 17 of these Rules makes amendments to other instruments containing rules for magistrates' court procedure in relation to proceedings under POCA, to correct drafting errors in those other instruments identified by the Joint Committee on Statutory Instruments in its Eleventh Report of Session 2017-19.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

9.1 These are the first and principal rules relating to these court procedures. There is no issue relating to consolidation at present.

10. Consultation outcome

10.1 The Home Office consulted with relevant stakeholders on the model domestic provisions in the Criminal Finances Act 2017, inviting and reviewing suggestions and observations amongst the groups potentially affected by this legislative change.

Comments were also invited and considered on the consequential amendments made to the 2005 Order, in relation to international cooperation.

10.2 No consultation has been undertaken with regard to these rules specifically, but they are closely modelled on The Magistrates' Courts (Detention and Forfeiture of Listed Assets) Rules 2017. Those 2017 Rules were reviewed by persons experienced in magistrates' courts procedure in non-criminal matters and some technical amendments were made to those Rules in response to comments made as part of that process.

11. Guidance

11.1 The Home Office has issued a formal Circular to relevant stakeholders, providing policy guidance on the use of the equivalent domestic powers in POCA. In addition, the Codes of Practice that apply to the equivalent powers in POCA in a domestic context shall apply to the use of the relevant powers under the 2005 Order. Also, as part of a wider exercise, consideration is to be given on amending the United Kingdom's Mutual Legal Assistance Guidelines to take account of the new provisions under Part 5A of the 2005 Order. There is no guidance planned with regard to the use of these Rules specifically.

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.

12.3 An Impact Assessment has not been prepared for this instrument because the powers they support in the 2005 Order are equivalent to existing domestic powers in POCA. Businesses should already be familiar with these powers, and it is not anticipated that the new powers in the 2005 Order will lead to significant further impact on business.

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 approach to monitoring of this legislation is in tandem with the 2005 Order. Mutual legal assistance requests from overseas will be made through the Secretary of State. The Home Office will therefore be able to closely monitor the number of these cases and the burden and other issues they place on investigators, prosecutors, the courts and respondents to the orders.

15. Contact

15.1 David Hamilton at the Ministry of Justice Telephone 07956418231or email: david.hamilton5@justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 David Parkin Deputy Director for Civil Justice and Law, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 Chris Philp MP Parliamentary Under-Secretary of State at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.