**EXPLANATORY MEMORANDUM TO**

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

**2019 No. 1369 (L. 11)**

## 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.

## 2. Purpose of the instrument

2.1 The purpose of this instrument is to provide for court procedure to underpin the operation of articles 213Z1 to 213Z5, 213Z7 and 213Z11 to 213Z12 of Part 5B 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 31 of The Proceeds of Crime Act 2002 (External Investigations and External Order and Requests)(Amendment) Order 2018 (SI 2018 No. 1078), which inserted Part 5B to that Order.

2.2 The 2005 Order makes provision for cooperation with other countries in the enforcement of their orders relating to the freezing and recovering the proceeds of crime. Specifically, Part 5B makes provision for the freezing and forfeiture of money held in bank and building society accounts 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 None.

***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 in section 16, provision for the freezing and forfeiture of bank and building society accounts, where those accounts contain the proceeds of unlawful conduct (as defined in section 241 of POCA) or funds which are intended for use in unlawful conduct. Section 15 of the Criminal Finances Act inserted a new Chapter 3B into Part 5 of POCA (civil recovery of the proceeds etc. of unlawful conduct). These new provisions also have associated safeguards to the operation of these powers such as the ability to draw funds for living expenses and legal fees, and the ability 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 additional domestic power to recover property intended to be used in crime is not replicated. Also, the ability to issue a forfeiture notice without recourse to the courts is not replicated in the

2005 Order provisions: all cases which are related to an overseas request will be heard by the courts.

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 (Freezing and Forfeiture of Money in Bank and Building Society Accounts) Rules 2017 (SI 2017/1297)). 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 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 freeze and forfeit money in bank and building society accounts 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 for 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 (Freezing and Forfeiture of Money in Bank and Building Society Accounts) Rules 2017; this instrument provides similar provisions in relation to international cooperation cases subject to the 2005 Order.

***Application for account freezing order and application for variation or setting aside of an account freezing order***

7.4 Article 213Z3 of the 2005 Order sets out the procedure for the court to follow when making an Account Freezing Order ("AFO"). An AFO can be applied for by an enforcement officer which is defined at article 213Z1(6) as an officer of HM Revenue and Customs, a constable and a SFO officer. Part 5B also contains circumstances in which an AFO might not be granted, including where the amount is below the minimum amount (defined as £1,000 in article 213Z1(6) of the 2005 Order which refers to section 303Z8 of POCA).

7.5 The court may make an AFO if it is satisfied that the funds in the account (whether all or in part), are recoverable property. The court sets the timeframe for the freezing order which must be no more than two years. The court can make an order to vary or set aside an AFO at any time, and can also do so upon application by any person affected by such an order (see article 213Z4).

7.6 Rule 3 set out the rules and process for identifying the court to which the application for an AFO should be made. Rules 3 and 4 set out the procedure for making applications, giving notice to those with an interest and the setting of a court date for hearing the application.

***Powers for prosecutors to appear in proceedings***

7.7 Article 213Z12 provides that the Director of Public Prosecutions can agree to appear in proceedings under Part 5B of the 2005 Order, on behalf of a law enforcement agency. Rule 6 of these Rules makes provision in respect of notifying the court in these circumstances.

***Application for compensation***

7.8 Where no forfeiture is made, following an AFO, the person whose account to which that AFO applied may apply to the court for compensation under article 213Z11 of the 2005 Order, where the circumstances are exceptional. Rule 7 of these Rules lists those 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.

***Giving of documents***

7.9 Rules 8 to 13 of these Rules set out how documents are to be given under the Rules. This may be by post (rule 9), by electronic communication (rule 10), or by any alternative method authorised by the court (rule 11). In addition, rule 12 set out how documents are to be given to children and protected persons and rule 13 to persons outside the United Kingdom.

***Transfer of proceedings***

7.10 Rule 14 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***

7.11 Rule 15 of these Rules makes provision for how hearings of applications under Part 5B 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.

## 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 (Freezing and Forfeiture of Money in Bank and Building Society Accounts) 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. 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: 07956418231 or 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 Phillip MP. Parliamentary Under-Secretary of State at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.