EXPLANATORY MEMORANDUM TO

THE PROCEEDS OF CRIME ACT 2002 (EXTERNAL REQUESTS AND ORDERS)

(AMENDMENT) ORDER 2016

2016 No. 662

AND

THE PROCEEDS OF CRIME ACT 2002 (EXTERNAL INVESTIGATIONS)

(AMENDMENT) ORDER 2016

2016 No. 663

1. Introduction

1.1 This explanatory memorandum has been prepared by 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 These two Orders and the Orders which they amend are made under Part 11 of the Proceeds of Crime Act 2002 ("the 2002 Act"). Part 11 provides that Orders in Council may make provision for cooperation in the investigation and enforcement of orders relating to recovering the proceeds of crime.

2.2 These Orders are necessary because of amendments made to the 2002 Act on 1 March 2016 by the Policing and Crime Act 2009 ("the 2009 Act"), the Crime and Courts Act 2013 ("the 2013 Act") and the Serious Crime Act 2015 ("the 2015 Act"). These Acts introduced various new powers by amending the provisions in the 2002 Act relating to the investigation and recovery of the proceeds of crime. The Orders being amended need to be updated in light of those amendments so equivalent powers are available in providing assistance to overseas courts and authorities.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 These Orders are similar to ones already made; The Proceeds of Crime Act 2002 (External Requests and Orders)(Amendment) Order 2015 (SI 2015 No. 1750) and The Proceeds of Crime Act (External Investigations)(Amendment) Order 2015 (SI 2015 No. 1751). Those Orders were primarily made as a consequence of the amendments mentioned in paragraph 2.2 in relation to England and Wales. The amendments were commenced in England and Wales on 1 June 2015 and the consequential amendments to the Orders in Council could therefore be made earlier than the ones being made by these Orders. The amendments mentioned in paragraph 2.2 were fully commenced in Northern Ireland and Scotland by 1 March 2016; nine months later than in England

and Wales. These Orders could therefore not be made at the same time as those for England and Wales.

Other matters of interest to the House of Commons

3.2 As these instruments are subject to negative resolution procedure and have not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

4.1 Section 444 of the 2002 Act provides that the Secretary of State can make provision (by Order in Council) for the freezing of property in the United Kingdom which may be needed to satisfy overseas orders in relation to the recovery of criminal proceeds, and for the enforcement of such orders by the realisation of property in any part of the United Kingdom. The Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (SI 2005 No. 3181)("the 2005 Order") made such provision corresponding to the domestic provisions in Parts 2, 3 and 4 (confiscation in England and Wales, Scotland and Northern Ireland respectively) and Part 5 (civil recovery) of the 2002 Act.

4.2 The Proceeds of Crime Act 2002 (External Requests and Orders) (Amendment) Order 2016 amends the 2005 Order to reflect the amendments made to the 2002 Act which are set out in the following paragraphs.

4.3 Sections 11, 20 and 33 of the 2015 Act amended the 2002 Act in relation to restraint orders. A restraint order has the effect of freezing property that may be liable to confiscation following a criminal conviction and the making of a confiscation order. These sections amended the provisions relating to restraint orders in two ways. Firstly, the condition for exercise of the power to make a restraint order where a criminal investigation has been started was changed from "reasonable cause to believe that the alleged offender has benefited from his criminal conduct" to "reasonable grounds to suspect that the alleged offender has benefited from his criminal conduct". Secondly, a requirement was introduced that, where a restraint order has been made in cases where there is an ongoing investigation, the prosecution must regularly report to the court on the development of that investigation to ensure that the case is progressing. The provisions in the 2002 Act came into force on 1 June 2015 in England, Wales and Northern Ireland and on 1 March 2016 in Scotland (see sections 40 and 41 of the 2002 Act for England and Wales, sections 119 and 120 for Scotland and sections 189 and 190 for Northern Ireland).

4.4 Sections 52 to 60 of the 2009 Act amended the 2002 Act to provide that certain property that may be used in the future to satisfy a confiscation order can be detained. This is either property that has been seized under another power or property that has been seized under new bespoke powers introduced by the 2009 Act (these new powers can be found at sections 47A-47S for England and Wales, sections 127A-127S for Scotland and sections 195A-195S for Northern Ireland). This property can be sold to pay towards the settlement of a confiscation order. These provisions came into force on 1 June 2015 in England, Wales and Scotland and on 1 March 2016 in Northern Ireland. The provisions for the detention and sale of this property for England and Wales are set out in sections 41A, 44A and 67A-67D of the 2002 Act. For Scotland, the relevant provisions are in sections 120A, 122A and 131A-131D, and for Northern Ireland they can be found in sections 190A, 193A and 215A-215D.

4.5 Sections 7, 16 and 29 of the 2015 Act amend the 2002 Act to provide for a compliance order to be made by the court that also makes the related confiscation order. This provides the court with the power to make such an order as it believes appropriate for the purposes of ensuring that a confiscation order is paid. The court is at liberty to impose any restrictions, prohibitions or requirements as part of a compliance order provided they are considered appropriate for the purpose of securing that the confiscation order is effective, but it must consider whether to impose a ban on the defendant's travel outside the United Kingdom. These provisions came into force in England, Wales and Northern Ireland on 1 June 2015 and on 1 March 2016 in Scotland (see sections 13A and 13B, 97B-97D and 163A and 163B of the 2002 Act).

4.6 Sections 5 and 28 of the 2015 Act amended the 2002 Act in relation to England, Wales and Northern Ireland in respect of the time given by a court for a defendant to satisfy a confiscation order. The expectation is that a confiscation order is paid immediately unless the defendant can show that this is impossible. The defendant can then be given extensions of time to pay up to a maximum of six months but must show the court their efforts to meet this deadline. These provisions came into force on 1 June 2015 (see sections 11 and 161 of the 2002 Act).

4.7 In addition to the process for enforcement of external orders by mutual legal assistance in the 2005 Order, member states of the EU can send confiscation orders to courts in the UK for enforcement under the principle of mutual recognition. The procedure for this is established by the Criminal Justice and Data Protection (Protocol No. 36) Regulations 2014 ("the 2014 Regulations"). There is an overlap with the procedure established by the 2005 Order, in that it is possible that a member state might obtain a restraint order in respect of property under the 2005 Order, but then register a confiscation order in respect of that property under the 2014 Regulations. The 2005 Order provides (at articles 9(6), 59(8) and 96(6)) that a restraint order must be discharged if within a reasonable time an external order has not been registered under the relevant part of the 2005 Order. Where the member state chooses to register an overseas confiscation order under the 2014 Regulations instead, the Order provides that a restraint order made under the 2005 Order should not be discharged.

The Proceeds of Crime Act 2002 (External Investigations) (Amendment) Order 2015

4.8 Section 445 of the 2002 Act provides that the Secretary of State can make provision (by Order in Council) for investigative powers to be made available in respect of overseas investigations, known as "external investigations". The domestic investigation orders and warrants are provided for in Part 8 of the 2002 Act and external investigations are defined in section 447(3) of that Act as the overseas equivalents to domestic confiscation, money laundering and civil recovery investigations.

4.9 The Proceeds of Crime Act 2002 (External Investigations) Order 2013 (SI 2013 No. 2605) ("the 2013 Order") made provisions equivalent to the civil recovery investigation provisions in Part 8 of the 2002 Act. These investigation powers are available in cases where it is expected that a subsequent court order to recover the proceeds of crime will be made in a civil proceeding, i.e. where there is no criminal conviction.

4.10 Section 49 of, and Schedule 19 to, the 2013 Act amended Part 8 of the 2002 Act to allow for civil recovery investigations to be conducted against persons as well as known property (see section 341 of the 2002 Act). These provisions came into force

in England, Wales and Scotland on 1 June 2015 and on 1 March 2016 in Northern Ireland.

4.11 The Proceeds of Crime Act 2002 (External Investigations) (Amendment) Order 2015 (SI 2015 No. 1751) amended the 2013 Order in relation to England and Wales and Scotland to correspond to amendments made to the 2002 Act by the 2013 Act.

4.12 The Proceeds of Crime Act 2002 (External Investigations) (Amendment) Order 2016 amends the 2015 Orders in relation to Northern Ireland to correspond to amendments made to the 2002 Act by the 2013 Act. The amendment to the 2015 Order applies the amendments in Northern Ireland, by removing the provision in the 2015 Order which stated that the 2015 order did not apply to Northern Ireland, and by adding an additional paragraph to confirm that the amendments apply to Northern Ireland.

5. Extent and Territorial Application

5.1 The extent of the two Orders is as follows –

- The Proceeds of Crime Act 2002 (External Requests and Orders) (Amendment) Order 2016 extends to England and Wales, Northern Ireland and Scotland.
- The Proceeds of Crime Act 2002 (External Investigations) (Amendment) Order 2015 extends to Northern Ireland.

5.2 The territorial application of these two Orders is -

- The Proceeds of Crime Act 2002 (External Requests and Orders) (Amendment) Order 2016 applies to England and Wales, Northern Ireland and Scotland.
- The Proceeds of Crime Act 2002 (External Investigations) (Amendment) Order 2015 applies to Northern Ireland.

6. European Convention on Human Rights

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

7. Policy background

What is being done and why

7.1 The Orders that are being amended provide the mechanism for international cooperation through mutual legal assistance in investigating, freezing and recovering the proceeds of crime. The 2005 Order allows courts across the United Kingdom to give effect to restraint orders and confiscation orders made by overseas countries as if they were orders of the court in the United Kingdom. It makes equivalent provisions to those set out in the 2002 Act in respect of the enforcement of these orders, and in respect of discharging and appealing them. In addition, the 2005 Order allows the courts in the United Kingdom to make a prohibition order in civil cases in response to an external request to prevent particular property from being dealt with.

7.2 The 2013 Order establishes a range of investigatory powers which are available to assist with external investigations, and which correspond to the provisions in Part 8 of the 2002 Act. These include search and seizure warrants, disclosure orders and production orders among other powers.

7.3 The 2009 Act, 2013 Act and 2015 Act made a number of amendments to the equivalent domestic schemes in the 2002 Act, as set out above. For the purposes of the 2005 Order, these include the introduction of a new scheme to search for, seize, detain and sell property in confiscation cases, and the making of a compliance order to assist in the enforcement of a confiscation order. In respect of the 2013 Order, the amendments made by the 2013 Act extended civil recovery powers so that they could be exercised in relation to property or to a person who holds (or has held) that property.

7.4 These amendments necessitate parallel amendments to the Orders so that the co-operation, enforcement and investigation regimes for external requests, orders and investigations continue to function effectively. The Proceeds of Crime Act 2002 (External Requests and Orders)(Amendment) Order 2015 (SI 2015 No. 1750) and The Proceeds of Crime Act (External Investigations)(Amendment) Order 2015 (SI 2015 No. 1751) made some of the necessary changes to the 2005 and 2013 Orders. There is a need following the full commencement of the provisions mentioned in paragraph 2.2 for the Orders in Council to provide similar powers and provisions throughout the rest of the United Kingdom, in order to ensure that external requests and orders are dealt with as effectively as possible.

7.5 Accordingly, the first Order amends part 3 of the 2005 Order (which applies to Scotland) to change the conditions under which a court can give effect to an external request (see paragraph 4.3 above). Further amendments are made to introduce the requirement for the prosecution to make regular reports to the court on the progress of an investigation where a restraint order has been granted, and to allow the court to make compliance orders in respect of external orders (see paragraphs 4.3 and 4.5 above). In addition, the order makes various minor amendments and corrections to provisions within Part 3 and Schedule 1 of the 2005 Order in respect of Scotland.

7.6 This order also amends Part 4 of the 2005 Order (which applies to Northern Ireland). Similar amendments are made in respect of the conditions required for a court to give effect to an external order, and the introduction of the reporting requirements for restraint orders. Further amendments are made to introduce a power to retain seized property, and a power for the court to make compliance orders (see paragraphs 4.3 and 4.5 above). This Order also introduces new articles 103A-L, which are similar to the search and seizure powers in sections 195A-S of the 2002 Act, with modifications for external orders (see paragraph 4.4 above). Article 132 sets out how the court and receiver must exercise their powers and the new articles are included within this general guidance and requirements. Article 112 of the 2005 order is also amended to reflect the amendments to the time for payment in section 161 of the 2002 Act (see paragraph 4.6 above).

7.7 Part 4 is also amended to include provisions corresponding to sections 215A-215D of the 2002 Act, which provide for the realisation of seized personal property, and for the appropriate officer to reclaim the costs of storage and realisation. Provisions are also made for appeals in respect of these matters. Various minor amendments are also made to Part 4 of the 2005 Order.

7.8 In addition, amendments are made to articles 9(6), 59(8) and 96(6) of the 2005 Order to address the issue set out in paragraph 4.7 above, by removing the requirement for the Court to discharge a restraint order if an overseas confiscation order has been registered under the 2014 Regulations.

Consolidation

7.9 These instruments make further amends to principal orders. It is not intended to consolidate at this time.

8. Consultation outcome

8.1 Drafting of these Orders was developed in consultation with the Devolved Administrations. As these Orders make amendments to the cooperation powers which are equivalent to those made already in the 2009 Act, 2013 Act and 2015 Act to the 2002 Act, they are essentially consequential and technical; no public consultation has therefore been carried out.

8.2 The equivalent Orders in Council made in November 2015 were developed in consultation with the Serious Fraud Office, the National Crime Agency and the Crown Prosecution Service. These Orders in Council primarily provide equivalent provisions in Scotland and Northern Ireland to the ones made in these earlier Orders in England and Wales.

9. Guidance

9.1 The Codes of Practice issued by the Secretary of State and Attorney General providing guidance on the use of investigation powers (see sections 377 and 377A of the 2002 Act) and by the Department of Justice in relation to the search and seizure powers (see section 195S of the 2002 Act) shall apply to the use of the relevant powers under these Orders.

9.2 The Proceeds of Crime Centre (part of the National Crime Agency), which has responsibility for the training, monitoring and accreditation of financial investigators under section 3 of the Proceeds of Crime Act 2002, will provide necessary guidance as appropriate.

9.3 These Orders make provision corresponding to amended provisions in Parts 3, 4 and 8 of the 2002 Act. Investigators, prosecutors, judges and legal representatives will be familiar with the provisions.

10. Impact

10.1 The impact on business, charities or voluntary bodies is negligible.

10.2 The impact on the public sector is negligible.

10.3 An Impact Assessment has not been prepared for these instruments. It is of note that these Orders amend existing Orders and are equivalent to the domestic provisions in the 2002 Act. Businesses are already familiar with these.

11. Regulating small business

11.1 The legislation applies to activities that are undertaken by small businesses.

11.2 Small businesses will be subject to the same requirements and liabilities as they are under the operation of the domestic powers under the 2002 Act. The impact on small businesses is negligible

12. Monitoring & review

12.1 Mutual legal assistance request from overseas countries 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 standard of these requests with the burden they place on investigators, prosecutors, the courts and respondents to the orders made by the courts.

13. Contact

13.1 Stephen Goadby at the Home Office can answer any queries regarding the instrument: Telephone: 020 7035 1559 or email: stephen.goadby@homeoffice.x.gsi.gov.uk .