POLICY NOTE

THE SCOTLAND ACT 1998 (AGENCY ARRANGEMENTS) (SPECIFICATION) (OVERSEAS PRODUCTION ORDERS) ORDER 2021

2021 No. 144

Introduction

This policy note has been prepared by the Scottish Government and is laid before Parliament.

The Scotland Act 1998 (Agency Arrangements) (Specification) (Overseas Production Orders) Order 2021 is made in exercise of the power conferred by section 93(3) of the Scotland Act 1998. The instrument is subject to annulment by either House of the UK Parliament and is subject to negative procedure in the Scottish Parliament.

Policy Objectives

The main purpose of this instrument is to allow for the Lord Advocate to enter into an agency arrangement with the Secretary of State for the Home Department so that the Lord Advocate's function of serving overseas production orders (OPOs), as set out in Section 14 of the Crime (Overseas Production Orders) Act 2019 (the COPO Act), can be carried out by the Secretary of State for the Home Department on the Lord Advocate's behalf. This is currently prohibited by Section 9(3) of the COPO Act.

This order is necessary to ensure that OPOs" made in Scotland by reference to the Agreement between the Government of the United Kingdom and the Government of the United States of America on Access to Electronic Data for the Purpose of Countering Serious Crime ("the Agreement") can be served by the Secretary of State for the Home Department.

The policy intention of this instrument is to ensure that OPOs made in Scotland by reference to the Agreement can be served on US-based communications services providers by the Secretary of State for the Home Department. This can only be achieved through a legislative mechanism such as an Order enabling agency arrangements to be made between the Lord Advocate and the Secretary of State for the Home Department.

The COPO Act grants law enforcement and prosecuting authorities the power to apply for and obtain electronic data directly from service providers (those who create, process, communicate, or store electronic data) using an OPO for the purposes of criminal investigations and prosecutions. OPOs may only be used when permitted under an international co-operation arrangement between the UK and the country where the subject of the Order is located.

The Agreement is the first international co-operation arrangement to be designated as a relevant international agreement for the purposes of the COPO Act. It will allow UK public authorities to obtain data directly from US-based service providers for the purpose of preventing, detecting, investigating, and prosecuting serious crime and can be used in conjunction with OPOs.

The Agreement and the COPO Act both set out requirements for the service of Orders. Article 5(5) of the Agreement states that "Orders shall be transmitted by the Issuing Party's Designated Authority", and Article 1(8) of the Agreement indicates that there will be one UK Designated Authority, which must be designated by the Secretary of State for the Home Department. The Investigatory Powers Unit within the Home Office has since been designated by the Secretary of State for the Home Department as the UK Designated Authority. Section 14 of the COPO Act sets out the means by which OPOs may be served. In this context, "served" means served on an overseas person, such as a US-based service providers and is equivalent to the term "transmitted" used in the Agreement.

However, Section 9(3) of the COPO Act states that "An overseas production order made in Scotland may be served only by the Lord Advocate". Consequently, the UK Designated Authority is currently prohibited from serving OPOs made in Scotland.

This Order therefore provides the necessary legal power for the Lord Advocate and the Secretary of State for the Home Department to enter into agency arrangements. Once agreed, any arrangement will allow for the Lord Advocate's function of serving OPOs, as set out in Section 14 of the COPO Act, to be carried out by the Secretary of State for the Home Department on the Lord Advocate's behalf, with the Lord Advocate retaining the overall responsibility for the powers. This will ensure that OPOs made in Scotland can be served by the UK Designated Authority for the purposes of the Agreement .

Legislative Context

Section 93(1) of the Scotland Act 1998 enables the Scottish Ministers to make arrangements for any of their functions to be exercised on their behalf by a Minister of the Crown. Section 93(1) applies to the Lord Advocate as it does to Scottish Ministers (section 93(3)). Functions to be subject to such arrangements must be specified in an Order in Council, made under section 93(3).

The Agreement was designated in the Overseas Production Orders and Requests for Interception (Designation of Agreement) Regulations 2020 as a relevant international agreement for the purposes of the COPO Act.

This instrument is made to allow the Secretary of State for the Home Department and the Lord Advocate to enter into agency arrangements under Section 93(1) of the Scotland Act 1998 to allow the Secretary of State for the Home Department to carry out the Lord Advocate's function of serving OPOs made in Scotland on the Lord Advocate's behalf for the purposes of the Agreement.

Consultation

There has been no general public consultation specific to this Order as it simply allows administrative arrangements to be entered into.

Impact Assessments

A Business and Regulatory Impact Assessment has not been prepared for this Order as it will have no impact on business or civil society organisations.

The Order has no direct impact on the public sector, it simply allows for arrangements to be entered into.

Monitoring and Review

There is no need for monitoring or review. Any arrangements will be subject to the UK and Scottish Governments being agreed that they should continue.

Contact

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February 2021