

Draft Regulations laid before the Scottish Parliament under section 2(2) of the European Communities Act 1972 for approval by resolution of the Scottish Parliament.

DRAFT SCOTTISH STATUTORY INSTRUMENTS

2014 No.

CRIMINAL PROCEDURE

The European Protection Order (Scotland) Regulations 2014

Made - - - -

Coming into force in accordance with regulation 1

The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 2(2) of the European Communities Act 1972(1) and all other powers enabling them to do so.

Citation, commencement and extent

1.—(1) These Regulations may be cited as the European Protection Order (Scotland) Regulations 2014.

(2) These Regulations come into force on—

- (a) the day after the day on which they are made, or
- (b) 11th January 2015,

whichever is the later.

(3) These Regulations extend to Scotland only.

Amendment of the Criminal Procedure (Scotland) Act 1995

2.—(1) The Criminal Procedure (Scotland) Act 1995(2) is amended as follows.

(2) After section 254 (forfeiture: search warrant for forfeited articles), insert—
“European Protection Orders

European Protection Orders: interpretation

254A. In this section and in sections 254B, 254C, 254D and 254E—

(1) 1972 c.68. Section 2(2) was amended by the Scotland Act 1998 (c.46) (“the 1998 Act”), Schedule 8, paragraph 15(3) (which was amended by section 27(4) of the Legislative and Regulatory Reform Act 2006 (c.51) (“the 2006 Act”). Section 2(2) was also amended by section 27(1)(a) of the 2006 Act and by the European Union (Amendment) Act 2008 (c.7), Schedule 1, Part 1. The functions conferred upon the Minister of the Crown under section 2(2), in so far as within devolved competence, were transferred to the Scottish Ministers by virtue of section 53 of the 1998 Act.

(2) 1995 c.46.

“competent authority” means the judicial or equivalent authority in a member state of the European Union which has power to issue and recognise a European Protection Order,

“European Protection Order” means a decision—

- (a) in relation to a protection measure, taken by a competent authority in a member state of the European Union, and
- (b) on the basis of which the competent authority of another member state of the European Union may take any appropriate measure or measures under its own national law with a view to continuing the protection of the protected person,

“issuing state” in relation to a European Protection Order, means the member state of the European Union, other than the United Kingdom, whose competent authority has issued the Order,

“non-harassment order” means a non-harassment order made under section 234A of this Act as modified by section 254D(4) of this Act,

“offender”, in relation to a protection measure or, as the case may be, a non-harassment order, means the individual whose conduct is the subject of the measure or order,

“protected person” in relation to a protection measure or, as the case may be, a non-harassment order, means the individual who is the object of the protection given by the measure or order,

“protection measure” means a decision taken in criminal matters in an issuing state which is intended to protect a protected person from the criminal conduct of the offender by imposing one or more of the following prohibitions or restrictions—

- (a) prohibiting the offender from entering certain localities, places or defined areas where the protected person resides or visits,
- (b) prohibiting the offender from contacting, or regulating the offender’s contact with, the protected person in any form (for example by telephone, electronic or ordinary mail or fax), or
- (c) prohibiting the offender from coming closer than a prescribed distance to the protected person or regulating the approach of the offender to the protected person within such a distance.

Issuing of a European Protection Order

254B.—(1) A protected person, or an authorised representative of such a person, may apply to a court for a European Protection Order.

(2) A court may issue a European Protection Order in respect of a protected person if the court is satisfied that—

- (a) a protection measure is in force, and
- (b) the protected person—
 - (i) resides or stays in the executing state, or
 - (ii) has decided to reside or stay in the executing state.

(3) In deciding whether to issue a European Protection Order, the court must take into account—

- (a) the period or periods of time during which the protected person intends to reside or stay in the executing state, and
- (b) the seriousness of the need for protection of the protected person.

(4) Where the court decides not to issue a European Protection Order, the court must inform the protected person of that decision.

(5) Where a court issues a European Protection Order under subsection (2) the court must, as soon as reasonably practicable, transmit the European Protection Order to the competent authority of the executing state.

(6) Where a European Protection Order has been issued by a court under subsection (2) and the court subsequently modifies or revokes the protection measure on which it is based, the court must, as soon as reasonably practicable—

- (a) modify or revoke the European Protection Order accordingly, and
- (b) inform the competent authority of the executing state of that decision.

(7) For the purposes of this section—

“court” means the High Court, a sheriff or a justice of the peace court, and

“executing state” means a member state of the European Union, other than the United Kingdom in which the protected person resides, stays, or intends to reside or stay.

Recognition of a European Protection Order

254C.—(1) This section applies where a sheriff receives a European Protection Order from a competent authority of an issuing state.

(2) Except where one or more grounds specified in subsection (3) applies, the sheriff must recognise the European Protection Order.

(3) The grounds are—

- (a) the sheriff, after complying with subsection (4), decides that the European Protection Order is incomplete,
- (b) the European Protection Order does not relate to a protection measure (as defined in section 254A),
- (c) the prohibitions or restrictions contained in the European Protection Order relate to an act that does not constitute a criminal offence in Scotland,
- (d) the protection created by the prohibitions or restrictions contained in the European Protection Order derives from the execution of a penalty or measure that is covered by an amnesty under the law of Scotland,
- (e) there is immunity conferred on the offender in Scotland, which would make it impossible to adopt a protection measure following recognition of the European Protection Order,
- (f) criminal proceedings against the offender for the conduct in relation to which the prohibitions or restrictions contained in the European Protection Order have been adopted would be prohibited in Scotland under any enactment had the conduct occurred in Scotland,
- (g) recognition of the European Protection Order would be inconsistent with the rule against double jeopardy provided for in section 1(1) of the Double Jeopardy (Scotland) Act 2011(3),
- (h) the offender, by reason of the offender’s age, could not have been held criminally responsible for the conduct in relation to which the prohibitions or restrictions contained in the European Protection Order have been adopted had the conduct occurred in Scotland,

- (i) the prohibitions or restrictions contained in the European Protection Order relate to a criminal offence which, under the law of Scotland, is regarded as having been committed, wholly or for a major or essential part, within Scotland.
- (4) Where the sheriff considers that the European Protection Order is incomplete, the sheriff must—
 - (a) inform the competent authority of the issuing state in writing,
 - (b) request that the competent authority of the issuing state provide the missing information, and
 - (c) allow the competent authority of the issuing state such reasonable period of time as the sheriff may specify in order to comply with that request.
- (5) Where the sheriff refuses to recognise a European Protection Order on any of the grounds specified in subsection (3), the sheriff must inform the competent authority of the issuing state and the protected person of the refusal and the grounds of refusal.

Implementation of a recognised European Protection Order

- 254D.**—(1) Where a sheriff recognises a European Protection Order under section 254C(2), the sheriff must make a non-harassment order in relation to the offender.
- (2) A non-harassment order made in pursuance of subsection (1) may impose on the offender only such requirements as to the offender’s conduct—
- (a) as may constitute a protection measure, and
 - (b) which correspond, to the highest degree possible, to the prohibitions or restrictions contained in the European Protection Order.
- (3) In considering which requirements to specify in a non-harassment order imposed in pursuance of subsection (1), the sheriff must consider—
- (a) the nature of the prohibitions or restrictions contained in the European Protection Order, and
 - (b) the duration of the prohibitions or restrictions contained in the European Protection Order.
- (4) Section 234A of the Act(4) applies in relation to a non-harassment order made in pursuance of subsection (1) as it applies to a non-harassment order made following a conviction in Scotland subject to the following modifications—
- (a) for subsection (1), substitute—
 - “(1) For the purposes of giving effect to a European Protection Order, a sheriff may make a non-harassment order against the offender requiring the offender to refrain from such conduct in relation to the protected person as may be specified in the order for such period (which includes an indeterminate period) as may be so specified.
 - (1A) For the purposes of subsection (1), the expressions “European Protection Order”, “offender” and “protected person” have the same meanings as in section 254A of this Act.”,
 - (b) subsections (2) to (3) and (6) and (7) do not apply.
- (5) Where the sheriff makes a non-harassment order in pursuance of subsection (1), the sheriff must provide the information in subsection (6) to—

(4) 1995 c.46. Section 234A was added by the Protection from Harassment Act 1997 (c.40) section 11 and was subsequently amended by the Crime and Punishment (Scotland) Act 1997 (c.48) Schedule 3, paragraph 1; the Criminal Justice (Scotland) Act 2003 (asp 7) section 49; and the Criminal Justice and Licensing (Scotland) Act 2010 (asp 13) section 15.

- (a) the offender,
 - (b) the competent authority of the issuing State, and
 - (c) the protected person.
- (6) The information is—
- (a) that the non-harassment order has been made,
 - (b) that a breach of the non-harassment order is an offence under section 234A(4),
 - (c) information about the punishments to which the offender may be liable following conviction for an offence under section 234A(4), and
 - (d) information about the powers of arrest available to a constable under section 234A(4A) and (4B).
- (7) Where the offender is convicted of an offence consisting of, or involving, a breach of a non-harassment order made in pursuance of subsection (1), the convicting court must notify the competent authority of the issuing state.

Modification and revocation of a non-harassment order made under section 254D

254E.—(1) This section applies to a non-harassment order made in pursuance of section 254D(1).

(2) Where a sheriff is informed by a competent authority of an issuing state that the European Protection Order to which a non-harassment order relates has been modified, the sheriff must—

- (a) modify the non-harassment order so that the requirements as to the offender's conduct contained in the modified non-harassment order correspond, to the highest degree possible, to the prohibitions or restrictions contained in the modified European Protection Order,
- (b) where the information submitted by the competent authority of the issuing state in relation to the modification of the European Protection Order is incomplete, refuse to modify the non-harassment order until the missing information is provided by the competent authority of the issuing state, or
- (c) where the prohibitions or restrictions contained in the modified European Protection Order no longer constitute a protection measure (as defined in section 254A), revoke the non-harassment order.

(3) A sheriff may, on the application of an offender to whom a non-harassment order relates, modify the order on either or both of the following grounds—

- (a) that the requirements as to the offender's conduct contained in the non-harassment order do not correspond, or do not correspond sufficiently, to the prohibitions or restrictions contained in the European Protection Order to which the non-harassment order relates,
- (b) the European Protection Order to which the non-harassment order relates has been modified by the competent authority of the issuing state and the non-harassment order should be modified in a similar manner.

(4) Where a sheriff is informed by a competent authority of an issuing state that the European Protection Order to which a non-harassment order relates has been revoked or withdrawn, the sheriff must revoke the non-harassment order.

(5) A sheriff may, on the application of an offender to whom a non-harassment order relates, revoke the order on any of the following grounds—

- (a) the recognition of the European Protection Order to which the non-harassment order relates should have been refused on one of the grounds specified in section 254C(3),
 - (b) the protected person no longer resides or stays in Scotland,
 - (c) where the prohibitions or restrictions contained in the European Protection Order have been modified and no longer constitute a protection measure (as defined in section 254A),
 - (d) the European Protection Order has been revoked or withdrawn by the competent authority of the issuing member state, or
 - (e) a decision on supervision measures, within the meaning of Article 4 of Framework Decision 2009/829/JHA⁽⁵⁾, which includes the prohibitions or restrictions contained in the European Protection Order, is transferred to Scotland after the recognition of the European Protection Order.
- (6) Where a sheriff modifies or revokes a non-harassment order under this section, the sheriff must inform—
- (a) the competent authority of the issuing state, and
 - (b) where possible—
 - (i) the protected person, and
 - (ii) the offender.”.

St Andrew’s House,
Edinburgh
Date

Name
A member of the Scottish Government

(5) Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention. OJ L 294, 11.11.2009 (p.20).

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations implement, in part, Directive 2011/99/EU of the European Parliament and of the Council on the European Protection Order. They extend to Scotland only.

Regulation 2 adds five new sections to the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) so as to allow Scottish courts to issue a European Protection Order (“EPO”) and to recognise and implement an EPO issued in another member state of the European Union.

New section 254A to be added to the 1995 Act provides a number of definitions for the terms used in sections 254A to 254E. A “protected person” is an individual who is the object of the protection given by a protection measure and a “protection measure” involves the imposition of certain prohibitions or restrictions on the conduct of one individual in order to protect another individual. The issuing state is the member state of the European Union whose competent authority issues the EPO and the executing state is the member state of the European Union in which the protected person resides or stays or intends to reside or stay.

New section 254B to be added to the 1995 Act allows the court to issue a European Protection Order (“EPO”) on the application of a protected person or their authorised representative. The court must be satisfied that a protection measure is in place and that the protected person either resides or stays, or has decided to reside or stay, in the executing state. Subsection (3) provides two matters which the court must take into account in deciding whether to issue an EPO. Subsection (4) obliges the court to inform the protected person if the application for an EPO is refused. Subsection (5) obliges the court, once it has issued an EPO, to transmit the EPO to the competent authority of the executing state. Subsection (6) obliges the court to modify or revoke the EPO and inform the executing state if the protection measure imposed in Scotland is modified or revoked.

New sections 254C, 254D and 254E to be added to the 1995 Act cater for the situation where an EPO is received by a sheriff. New section 254C deals with the recognition of an incoming EPO. Subsection (2) obliges the sheriff to recognise the EPO unless one of the grounds for refusal specified in subsection (3) apply. Subsection (4) obliges the sheriff to request further information from the competent authority of the issuing state where the sheriff considers the EPO to be incomplete. Subsection (5) provides for the competent authority of the issuing state and the protected person to be informed of a decision to refuse to recognise the EPO.

New section 254D deals with the implementation of an EPO once it has been recognised under section 254C. Subsection (1) provides that the court must take steps to implement the EPO by imposing a non-harassment order (NHO). Subsection (2) places some restrictions on the requirements as to the offender’s behaviour which may be contained in the NHO. Subsection (3) specifies two matters which the sheriff must consider when considering which requirements to impose on the offender in the NHO. Subsection (4) applies section 234A of the 1995 Act to an NHO made in pursuance of section 254D(1) in the same way as it applies to NHOs made following conviction in Scotland but subject to certain modifications. Subsections (5) and (6) place an obligation on the sheriff to provide certain information to the offender, the competent authority of the issuing state and the protected person where it makes an NHO in pursuance of section 254D(1). Subsection (7) places an obligation on a court which convicts the offender of a breach of an NHO made in pursuance of section 254D(1) to inform the competent authority of the issuing state.

New section 254E to be added to the 1995 Act, provides powers and duties for sheriffs to revoke or modify an NHO made in pursuance of section 254D(1). Subsection (2) provides powers by which the NHO can be modified or revoked in response to a modification of the European Protection Order

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to which the non-harassment order relates. Subsection (3) creates a process by which the offender can apply to a sheriff for a modification of the NHO. Subsection (4) obliges a sheriff to revoke the NHO where the sheriff is informed by the competent authority of the issuing state that the EPO to which the NHO relates has been revoked or withdrawn. Subsection (5) creates a process by which the offender can apply to a sheriff for a revocation of the NHO. Subsection (6) obliges the sheriff to inform the issuing state and, where possible, the protected person and the offender where the NHO is modified or revoked under section 254E.