

SCHEDULE 2

Article 3(2)

MODIFICATIONS OF PART I OF THE CRIMINAL JUSTICE (SCOTLAND)  
ACT 1987 IN ITS APPLICATION TO EXTERNAL CONFISCATION ORDERS

1. For section 1 there shall be substituted the following section:–

**“1 External confiscation orders**

(1) An order made by a court in a designated country for the purpose of recovering payments or other rewards received in connection with drug trafficking or their value is referred to in this Act as an “external confiscation order”.

(2) In subsection (1) above the reference to an order includes any order, decree, direction or judgment, or any part thereof, however described.

(3) In this Part of this Act, “drug trafficking” means doing or being concerned in any of the following, whether in Scotland or elsewhere–

- (a) producing or supplying a controlled drug where the production or supply contravenes section 4(1) of the Misuse of Drugs Act 1971<sup>(1)</sup>;
- (b) transporting or storing such a drug where possession of it contravenes section 5(1) of that Act;
- (c) importing or exporting such a drug where the importation or exportation is prohibited by section 3(1) of that Act;
- (d) producing, supplying, transporting, storing, importing or exporting such a drug in contravention of a corresponding law (“corresponding law” having the meaning assigned by section 36(1) of that Act);
- (e) manufacturing or supplying a scheduled substance within the meaning of section 12 of the Criminal Justice (International Co-operation) Act 1990<sup>(2)</sup> where the manufacture or supply is an offence under that section,

and includes, whether in Scotland or elsewhere, entering into or being otherwise concerned in an arrangement whereby–

- (i) the retention or control by or on behalf of another person of the other person’s proceeds of drug trafficking is facilitated; or
- (ii) the proceeds of drug trafficking by another person are used to secure that funds are placed at the other person’s disposal or are used for that other person’s benefit to acquire property by way of investment.”.

2. Sections 2 to 4 shall be omitted.

3. In section 5(3)–

(a) for subsection (1) there shall be substituted the following subsection:–

“(1) Subject to subsection (3) below the following property is realisable in terms of this Part of this Act–

- (a) in relation to an external confiscation order made in respect of specified property, the property which is specified in the order; and
- (b) in any other case–

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(1) 1971 c. 38.

(2) 1990 c. 5.

(3) Section 5(3)(b) was amended by the Prevention of Terrorism (Temporary Provisions) Act 1989 (c. 4), section 25(1) and Schedule 8, paragraph 9.

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- (i) the whole estate of a person against whom an external confiscation order has been made, or against whom proceedings which may result in an external confiscation order being made, have been, or are to be, instituted in a court in a designated country or against whom a restraint order has been made; and
    - (ii) the whole estate of a person to whom any person whose whole estate is realisable by virtue of sub-paragraph (i) above has (directly or indirectly and whether in one transaction or in a series of transactions) made an implicative gift,if the proceedings have not been concluded.”;
  - (b) For subsection (2) there shall be substituted the following sub-section:–
    - “(2) In sub-section (1) above, “the whole estate of a person” means his whole estate, wherever situated and includes–
      - (a) any income or estate vesting in the holder of the realisable property; and
      - (b) the capacity to exercise, and to take proceedings for exercise of, such powers in, over or in respect of any property as might have been exercised by the holder of the realisable property for his own benefit.”;
  - (c) In subsection (3)(a) for the words “subsection (1)(a) or (b)” there shall be substituted “subsection (1)(b)”;
  - (d) subsections (4), (7) and (8) shall be omitted;
  - (e) for subsection (5) there shall be substituted the following subsection:–
    - “(5) For the purposes of this Part of this Act, the value–
      - (a) of realisable property (other than money) owned by a person in respect of whom an external confiscation order has been made shall be its market value having regard to any security or real burden which would require to be discharged in realising the property or any other factors which might reduce the amount recoverable by such realisation;
      - (b) of an implicative gift shall, subject to section 6(2) and (3) of this Act, be–
        - (i) the value of the gift when received adjusted to take account of subsequent changes in the value of money, or
        - (ii) where subsection (6) below applies, the value there mentioned,whichever is the greater.”;
  - (f) for subsection (6) there shall be substituted the following subsection:–
    - “(6) If at any time the recipient holds–
      - (a) the property which he received (not being cash); or
      - (b) property which in whole or in part, directly or indirectly represents in his hands the property which he received,the value referred to in subsection (5)(b)(ii) above is, subject to section 6(2) and (3) of this Act, the value at that time of the property mentioned in paragraph (a) above or, as the case may be, of the property mentioned in paragraph (b) above so far as it represents the property which he had received.”.
4. In section 6(1)–
- (a) for the words “section 1 of this Act” there shall be substituted the words “the Confiscation of the Proceeds of Drug Trafficking (Designated Countries and Territories) (Scotland) Order 1991.”;

(b) for paragraph (a) there shall be substituted the following paragraph:–

“(a) made not more than six years before the date on which in respect of a person, proceedings which might result in an external confiscation order being made were instituted against him or a restraint order was made (whichever first occurs);”.

5. For section 7 there shall be substituted the following section:–

**“7 Application of provisions relating to fines to enforcement of external confiscation orders**

(1) An external confiscation order which has been registered by the Court of Session in terms of section 30A of this Act shall be remitted for enforcement to and shall be enforceable as if it were a fine imposed under the Criminal Procedure (Scotland) Act 1975(4) by the sheriff of Lothian and Borders at Edinburgh.

(a) (2) Where an external confiscation order has been remitted to the sheriff in terms of subsection (1) of this section the sheriff may at any time except where an administrator has been appointed in relation thereto order that it shall be enforced by civil diligence;

(b) an order in terms of paragraph (a) of this subsection shall have the effect of authorising the like diligence as if the external confiscation order was a fine imposed under the Criminal Procedure (Scotland) Act 1975 and, without prejudice to the foregoing generality, inhibition and adjudication and such diligence, whatever the amount of the external confiscation order, may be executed in the same manner as if the proceedings were on an extract decree of the sheriff in a summary cause.

(3) Any sums recovered in respect of an external confiscation order shall be payable to and recoverable by the proper office in Exchequer for Her Majesty’s use.”.

6. In section 8–

(a) for subsection (1) there shall be substituted the following subsection:–

“(1) Where–

(a) proceedings which might result in an external confiscation order being made have been instituted against a person in a designated country and–

(i) the proceedings have not been concluded; and

(ii) either an external confiscation order has been made in the proceedings or it appears to the Court of Session that there are reasonable grounds for believing that such an order may be made in them, or

(b) it appears to the Court of Session that proceedings which might result in an external confiscation order being made are to be instituted against a person in a designated country and that there are reasonable grounds for believing that an external confiscation order may be made in them,

the Court of Session may, on the application of the Lord Advocate, make in respect of the person such order (in this Act referred to as a “restraint order” as is described in section 9 of this Act. Any such application shall be heard in chambers.”;

(b) for subsection (5) there shall be substituted the following subsection:–

“(5) Where, a restraint order having been made by virtue of subsection (1) above, the proceedings in relation to which the external confiscation order was made are concluded,

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(4) 1975 c. 21.

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the Lord Advocate shall forthwith apply to the Court of Session for recall of the restraint order and the Court shall grant the application.”.

7. In section 9–

- (a) In subsection (1) the words “, subject to subsection (5) below,” shall be omitted;
- (b) for subsection (2) there shall be substituted the following subsection:–
  - “(2) A restraint order may provide for the service on, or the provision of notice to, persons affected by the order in such manner as the Court of Session may direct.”;
- (c) in subsection (3)(b) for the words “Great Britain” there shall be substituted the word “Scotland”;
- (d) subsections (4) and (5) shall be omitted.

8. In section 10, for subsection (1) there shall be substituted the following subsection:–

“(1) A constable or a person commissioned by the Commissioners of Customs and Excise may, for the purpose of preventing realisable property of a person subject to a restraint order from being removed from Scotland, seize the property.”.

9. After section 10 there shall be inserted the following section:–

**“Application for restraint orders**

**10A.** An application under section 8(1) of this Act shall be supported by a certificate which shall–

- (a) state, where applicable, the grounds for believing that an external confiscation order may be made in proceedings instituted or to be instituted in the designated country concerned;
- (b) give particulars of realisable property in respect of which the order is sought and specify the person or persons holding such property;
- (c) in a case to which section 8(1)(b) of this Act applies, indicate when it is intended that proceedings should be instituted in the designated country concerned,

and the certificate may unless the Court of Session otherwise directs, contain statements of information or belief with the sources and grounds thereof.”.

10. In section 11, subsection (6) shall be omitted.

11. In section 13–

- (a) in paragraph (b) of subsection (1) for the words “where a confiscation order has been made” there shall be substituted the words “where an external confiscation order has been registered in the Court of Session under section 30A of this Act”;
- (b) in paragraph (b) of subsection (2) for the words “paragraph (b)” there shall be substituted “paragraph (b)(ii)”;
- (c) in sub-section (3)(a)(i) the word “external” shall be inserted before the word “confiscation”.

12. In section 14, for paragraph (c) of sub-section (1) there shall be substituted the following paragraph:–

“(c) may bring, defend or continue any legal proceedings relating to the property;”.

13. In section 15 for subsection (3) there should be substituted the following subsection:–

“(3) In subsection (1) above “appropriate bank or institution” means a bank or an institution authorised by the Bank of England under the Banking Act 1987<sup>(5)</sup>.”.

**14.** In section 16–

- (a) in subsection (1)–
  - (i) for the words from “be applied”, in the last place where they occur, to the end of the subsection there shall be substituted the words “be paid to the Court of Session and applied for the purposes specified in subsection (3) below and in the order so specified.”;
  - (ii) in paragraph (b) the word “external” shall be inserted before the word “confiscation”;
- (b) in subsection (2) for the words “If, after the amount payable under the confiscation order”, there shall be substituted the words “Where a fixed amount is payable under the external confiscation order and after that amount”;
- (c) in subsection (3)<sup>(6)</sup>–
  - (i) for the words from “The receipt” to “money received” there shall be substituted the words “The sheriff clerk shall apply any sum received on account of an amount payable under an external confiscation order”;
  - (ii) for the words from “and the balance” to the end of the subsection there shall be substituted the words “and any sums remaining after all the payments required to be made under the foregoing provisions of this section have been made shall be paid into the Consolidated Fund.”.

**15.** In section 23–

- (a) in subsection (2) for the words from “making available” to the end of the subsection there shall be substituted the words “recovering property which is liable to be recovered under an external confiscation order registered under section 30A of this Act or as the case may be with a view to making available for recovering property which may become liable to be recovered under any external confiscation order which may be made in the case of a person.”;
- (b) in subsection (4) the words “(a) or” shall be omitted;
- (c) in subsection (6)–
  - (i) for the words “a confiscation” there shall be substituted the words “an external confiscation”;
  - (ii) the words “(other than an obligation having priority within the meaning of section 5(8) of this Act)” shall be omitted;
- (d) subsection (7) shall be omitted.

**16.** Sections 25 to 30 and 31 and 32 shall be omitted.

**17.** In section 33–

- (a) in subsection (2)–
  - (i) for the words “, 24, 27 and 28” there shall be substituted the words “and 24”;
  - (ii) the word “external” shall be inserted immediately before the word “confiscation”;
- (b) in subsection (5)–

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<sup>(5)</sup> 1987 c. 22.

<sup>(6)</sup> Subsection (3) was amended by the Criminal Justice Act 1988 (c. 33), Schedule 5, paragraph 21.

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- (i) in paragraph (a) the words “proceedings as regards an offence to which section 1 of this Act relates have been instituted against him and have not been concluded or when” shall be omitted; and
- (ii) in paragraph (b) for the words “conclusion of the proceedings” there shall be substituted the words “discharge of the restraint order.”.

**18.** In section 34(7)–

- (a) in subsection (2) for the words “, 24, 27 and 28” there shall be substituted the words “and 24”;
- (b) in subsection 5(a) the words “proceedings for a drug trafficking offence have been instituted against him and have not been concluded or when” shall be omitted;
- (c) in subsection 5(b) for the words “conclusion of the proceedings” there shall be substituted the words “discharge of the restraint order”; and
- (d) for subsection (6) there shall be substituted the following subsection:–

“(6) In any case in which a petition in bankruptcy was presented, or a receiving order or an adjudication in bankruptcy was made, before 29th December 1986 (the date on which the Insolvency Act 1986(8) came into force), subsection (2) above shall have effect as if–

- (a) for the reference to the bankrupt’s estate for the purposes of Part IX of the Insolvency Act 1986 there were substituted a reference to the property of the bankrupt for the purposes of the Bankruptcy Act 1914(9);
- (b) for the reference to section 280(2)(c) of the Act of 1986 there were substituted a reference to section 26(2) of that Act; and
- (c) subsection (2)(b) were omitted.”.

**19.** In subsection (2) of section 35, for the words “, 24, 27 and 28” there shall be substituted the words “and 24”.

**20.** In section 35, for subsection (4) there shall be substituted the following subsection:–

“(4) For the purposes of the application of Parts IV and V of the Insolvency Act 1986 (winding up of registered companies and winding up of unregistered companies) to a company which the Court of Session has jurisdiction to wind up, a person is not a creditor in so far as any sum due to him by the company is due in respect of an external confiscation order.”.

**21.** In subsection (2) of section 37 the words “or (3) (a)” shall be omitted.

**22.** Sections 38 to 41 shall be omitted.

**23.** Sections 42 to 44 shall be omitted.

**24.** In section 45–

- (a) in subsection (1) the word “external” shall be inserted before the word “confiscation”;
- (b) in subsections (4), (5)(a)(i), and (5)(c) for the words “a confiscation” there shall be substituted the words “an external confiscation”;
- (c) in subsection (5)–
  - (i) for paragraph (a)(ii) there shall be substituted the following:–

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(7) Section 34(6) was amended by the Criminal Justice Act 1988 (c. 33), Schedule 5, paragraph 22.

(8) 1986 c. 45.

(9) 1914 c. 59.

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- “(ii) at the end there shall be added the words “; and in the foregoing provisions of this subsection “external confiscation order” has the meaning assigned by section 1(1) of the Criminal Justice (Scotland) Act 1987”;;
  - (ii) for paragraph (b) there shall be substituted the following:–
    - “(b) in section 7(1) (constitution of apparent insolvency)–
      - (i) in paragraph (b), at the beginning there shall be inserted the words “not being a person whose property is for the time being affected by a restraint order or subject to an external confiscation order.”;
      - (ii) in paragraph (c), after the words “became due” there shall be inserted the words “or that but for his property being affected by a restraint order or subject to an external confiscation order, he would be able to do so”; and
      - (iii) at the end there shall be added the words “In paragraph (d) above liquid debt” does not include a sum payable under an external confiscation order, and in the foregoing provisions of this subsection–
        - “external confiscation order” has the meaning assigned by section 1(1) of the Criminal Justice (Scotland) Act 1987; and
        - “restraint order” has the meaning assigned by section 9 of the said Act of 1987.”;
  - (d) subsections (2), (3), (6) and (7) shall be omitted.
- 25.** In section 47–
- (a) in subsection (1)–
    - (i) the definitions of “authorised government department” and “designated country” shall be omitted;
    - (ii) the word “external” shall be inserted immediately before the word “confiscation”;
    - (iii) the following shall be inserted after the definition of “restraint order”:-
      - “the 1975 Act means the Criminal Procedure (Scotland) Act 1975.”;
  - (b) in subsection (4)–
    - (i) paragraph (a) shall be omitted;
    - (ii) at the end of paragraph (b) there shall be added the words “, and whether received before or after the commencement of the Confiscation of the Proceeds of Drug Trafficking (Designated Countries and Territories) (Scotland) Order 1991 and whether received in connection with drug trafficking carried on by the recipient or some other person.”;
  - (c) for subsection (5) there shall be substituted the following subsection:–
    - “(5) For the purposes of this Part of this Act–
      - (a) proceedings are instituted in a designated country when–
        - (i) under the law of the designated country concerned one of the steps specified in relation to that country in column 2 of the Appendix hereto has been taken there in respect of alleged drug trafficking by a person which may result in an external confiscation order being made; or
        - (ii) an application has been made to court in a designated country for an external confiscation order,

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and where the application of this paragraph of this subsection would result in there being more than one time for the institution of proceedings, they shall be taken to have been instituted at the earliest of those times; and

- (b) proceedings are concluded as regards an offence—
  - (i) when (disregarding any power of a court to grant leave to appeal out of time) there is no further possibility of an external confiscation order being made in the proceedings; or
  - (ii) on the satisfaction of an external confiscation order made in the proceedings (whether by the recovery of all property liable to be recovered, or the payment of any amount due, or otherwise).”

**26.** After section 47 there shall be inserted the Appendix set out at the end of Schedule 3 to this Order.