

EXPLANATORY MEMORANDUM TO
THE CRIMINAL FINANCES ACT 2017 (CONSEQUENTIAL AMENDMENT)
REGULATIONS 2018

2018 No. 80

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 Section 15 of the Criminal Finances Act 2017 (c.22) (“CFA”) amended the Proceeds of Crime Act (c.29) (“POCA”) by inserting new Chapter 3A into POCA which contains powers to search, seize and forfeit listed assets (such as precious metals, precious stones and artistic works) in summary proceedings. These assets can be forfeited under new section 303O of POCA if the court is satisfied that they are the proceeds of crime or intended for use in unlawful conduct. Alternatively, section 303R provides a mechanism for a forfeiture application to be dealt with by the High Court (or, in Scotland, the Court of Session) in certain circumstances.
- 2.2 This instrument amends section 278 of POCA so that assets forfeited by an order made under section 303R of POCA cannot be subject to further recovery action under the existing civil recovery powers in Chapter 2 of Part 5 of POCA.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland and Northern Ireland.

4. Legislative Context

- 4.1 These Regulations are made under section 54 of the CFA, which contains a power to make provision in consequence of any provision made by or under Part 1 or 2 of that Act. Section 54(5) provides that amendments may be made to primary legislation.
- 4.2 Chapter 3A of Part 5 of POCA (as inserted by section 15 of the CFA) makes provision for the forfeiture of certain listed items of property by order of the magistrates’ court (or, in Scotland, the sheriff). The property to which this applies is listed in section 303B(1) of POCA, and Chapter 3A provides three types of forfeiture order which can be made in respect of this property.
- 4.3 Under section 303O(3) of POCA the court or sheriff may order the forfeiture of the property if satisfied that the property is a listed asset, and that the property to be forfeited is recoverable property or is intended by any person for use in unlawful conduct. Under section 304 of POCA, “recoverable property” means property obtained through unlawful conduct.

- 4.4 Sections 303Q and 303R of POCA provide mechanisms to allow for third party interests in the relevant property to be taken into account, in accordance with section 303P. Section 303Q applies where the parties come to an agreement as to how the property is to be divided. Instead of making a forfeiture order as above, the court can enforce this agreement by way of an order that the third party who holds an interest will make a payment to the person who applied for the order of a sum equivalent to the value of the forfeitable property (or the share of the property which is forfeitable). Section 303Q only applies where those parties are in agreement.
- 4.5 Where no such agreement is made, section 303R of POCA allows the court to either make an order for the forfeiture of the property (or any part), or to transfer the application to the High Court (in Scotland, the Court of Session) to consider the case and order the forfeiture of assets. Where the value of the property as a whole is £10,000 or more, the magistrates' court (in Scotland, the sheriff) must transfer the application. Where the value is under £10,000 it may transfer the application. Where an application is so transferred, the High Court or Court of Session can make an order for the forfeiture of the property, or any part of it, if satisfied that the property is a listed asset and that what is to be forfeited is recoverable property or intended by any person for use in unlawful conduct.
- 4.6 More generally, Part 5 of POCA sets out the civil recovery procedure by which law enforcement agencies can recover the proceeds of crime using a recovery order (see section 266 of POCA). Section 278(3) of POCA provides a limit on the operation of these civil recovery powers, by stating that a court is not to make a recovery order if it thinks that the enforcement authority's right to recover property has been satisfied by a previous recovery order. Additionally, subsection (7) provides that a recovery order cannot be made against property that has been subject to a previous cash forfeiture order (see section 298 of POCA).
- 4.7 Section 278 was amended by paragraph 30 of Schedule 5 to the CFA so that a recovery order cannot be made against property that has been previously subject to orders made under new sections 303O and 303Q. This instrument makes a further amendment to include a reference to orders made under section 303R. These amendments ensure that all the new forfeiture orders are captured by section 287(7). In summary, civil recovery orders cannot be made in relation to property that has been previously subject to another recovery order or any forfeiture order under POCA.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is England and Wales, Scotland and Northern Ireland.
- 5.2 The application of this instrument is England and Wales, Scotland and Northern Ireland.

6. European Convention on Human Rights

- 6.1 The Minister of State for the Home Department, Ben Wallace, has made the following statement regarding Human Rights:

“In my view, the provisions of the Criminal Finances Act 2017 (Consequential Amendment) Regulations 2018 are compatible with the Convention rights”

7. Policy Background

What is being done and why

- 7.1 The civil recovery powers in Chapter 3 of Part 5 of POCA allow for the recovery of property that is or represents the proceeds of crime. Section 278 of POCA provides certain safeguards (as set out in paragraph 4.6 above) to ensure that property that has already been subject to forfeiture under other powers in POCA cannot then be subject to civil recovery. Section 15 of the CFA inserts a new forfeiture scheme into POCA (inserted as Chapter 3A of Part 5). In accordance with the purpose of section 278, property that is forfeited under any power within this forfeiture scheme should be excluded from any subsequent civil recovery action.
- 7.2 Paragraph 30 of Schedule 5 to the CFA already amends section 278 of POCA to include orders made under forfeiture powers created elsewhere in that Act. These Regulations amend section 278 again as a consequence of the introduction of the power for forfeiture orders to be made under section 303R, and so ensure that a consistent approach is taken to all previous orders against property.
- 7.3 This ensures that the proceeds of the same criminal conduct cannot be recovered twice, first through the listed asset forfeiture scheme in Chapter 3A of POCA and then again through civil recovery.

Consolidation

- 7.4 There is no need for consolidation.

8. Consultation outcome

- 8.1 The Secretary of State has consulted with the Department of Justice in Northern Ireland and Scottish Ministers as required under section 55 of the CFA.

9. Guidance

- 9.1 No guidance will be issued about this instrument. It is a technical amendment reflecting the overall purpose of section 278 of POCA, which is to ensure that property already forfeited under POCA cannot then be subject to further civil recovery action.

10. Impact

- 10.1 There is no impact on business, charities or voluntary bodies.
- 10.2 The impact on the public sector is nil.
- 10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

- 11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

- 12.1 There is no need to monitor or review this instrument.

13. Contact

- 13.1 Stephen Goadby at the Home Office Telephone: 0207 035 1559 or email: stephen.goadby@homeoffice.x.gsi.gov.uk can answer any queries regarding this instrument.