

EXPLANATORY MEMORANDUM TO
THE MAGISTRATES' COURTS (DETENTION AND FORFEITURE OF LISTED
ASSETS) RULES 2017

2017 No. 1293 (L. 24)

1. Introduction

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

2. Purpose of the instrument

- 2.1 The purpose of this instrument is to provide for court procedure to underpin the operation of sections 303B–303Z in Chapter 3A of Part 5 of the Proceeds of Crime Act 2002 (“POCA”). Chapter 3A makes provision for the seizure, detention and forfeiture of certain listed types of personal or moveable property (“listed assets”) that are the proceeds of unlawful conduct or intended for use in such conduct. The provisions build on existing powers in Chapter 3 of POCA to seize and recover cash that is the proceeds of ‘unlawful conduct’ or intended for use in such conduct. Please see below for a more detailed description of the legislation.

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 As this instrument is subject to negative resolution procedure and has 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 144 of the Magistrates’ Courts Act 1980 (c. 43) provides for rules regulating and prescribing the practice and procedure of magistrates’ courts, except in relation to any criminal cause or matter, or family proceedings, to be made by the Lord Chief Justice with the concurrence of the Lord Chancellor. Since proceedings in relation to listed assets are neither criminal nor family proceedings, these Rules are made under section 144.
- 4.2 As described above, a new Chapter 3A is inserted in Part 5 of POCA by section 15 of the Criminal Finances Act 2017 (c. 22) which makes provision for the seizure and forfeiture of listed types of personal or moveable property (“listed assets”) that are the proceeds of unlawful conduct or intended for use in such conduct. The provisions build on and partly mirror existing powers in Chapter 3 of Part 5 of POCA to seize and recover cash that is the proceeds of unlawful conduct or intended for use in such conduct.

4.3 Applications in respect of the new powers are to be made to the magistrates' court, as with the existing summary forfeiture procedure for cash.

5. Extent and Territorial Application

5.1 The extent of this instrument is England and Wales.

5.2 The territorial application is England and Wales.

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 Prior to the amendments made by the Criminal Finances Act 2017, POCA only allowed law enforcement to apply for the forfeiture of cash. There is evidence that certain types of personal (or moveable) property were being used in lieu of cash to move illicit wealth, both domestically and across international borders. The relevant assets are defined in section 303B of POCA ("listed assets") as follows: precious metals; precious stones; watches; artistic works; face-value vouchers, and postage stamps.

7.2 The aim of these powers is to ensure that such activity can be disrupted where it is a means of moving criminal assets or of storing illicit wealth, and to create a procedure to allow the recovery of the assets via summary procedure in the magistrates' court. Accordingly, POCA has been amended to create new powers to search for, seize and forfeit listed assets.

7.3 These powers are similar to the cash forfeiture procedure. This is because, whilst criminals continue to use cash in significant amounts, there is a distinct need to be able to take action against criminals transferring and retaining illicit wealth through other means. Basing these procedures on those already in existence will assist in this, meaning that rules for the magistrates' court are required, which will be similar to the existing rules for the detention and forfeiture of cash in the magistrates' court (see S.I 2002/2998).

7.4 It should be noted that, unlike the statutory provisions for the forfeiture of cash, Chapter 3A of POCA does not contain a corresponding administrative forfeiture procedure for listed assets. The relevant parts of the procedure in respect of which magistrates' court rules are required are set out in the following paragraphs.

Prior approval of searches for property

7.5 Section 303C of POCA provides a power to search for, and seize, listed assets. The search powers will only be exercisable on private premises where the "relevant officer" (meaning an officer of Revenue and Customs, a constable, an SFO officer or an accredited financial investigator ("AFI")) has lawful authority to be present. The Act also makes provision for the search of vehicles and persons. Section 303E of POCA provides that the prior approval of a judicial officer of a senior officer is required before the search power can be exercised, save where it is not practicable to obtain that prior approval. "Senior Officer" is also defined for all of the agencies

permitted to use these powers. Rule 3 of these Rules makes provision for applications for prior approval from a judicial officer.

First application for the continued detention of seized property

- 7.6 Should a relevant officer have reasonable grounds for suspecting that listed asset or assets derive from, or are intended for use in, unlawful conduct, these may be seized. Section 303Y of POCA provides that there is a minimum value threshold of £1,000 for the use of these powers. It should be noted that a relevant officer may also seize a listed asset where that asset cannot reasonably be divided and only part of that asset is under suspicion (provided that relevant part meets the minimum threshold). The asset seized may only be detained for an initial period of six hours, but it may be further detained for a period of 42 hours with the approval of a senior officer. Rule 4 of these Rules makes provision in relation to giving notice of the first application for further detention, including provision to take account of situations where cases involving cash forfeiture cases or forfeiture of funds in banks or building societies (under Chapter 3B of Part 5 of POCA) have been heard previously, and relate to the same grounds of suspicion as in the current application.

Further applications for the continued detention of seized property

- 7.7 The detention of the listed asset may be extended up to a maximum of two years (from the date of the first order). The court must be satisfied that there are reasonable grounds for the continued detention of the asset. Rule 5 of these Rules makes provision in respect of giving notice for any further applications for detention of seized listed assets.

Applications for the release of detained property

- 7.8 The person from whom the property was seized may apply to the magistrates' court under section 303N of POCA for the release of the listed assets. The release will be ordered if the court is satisfied that the property is not intended for use in criminality or did not derive from unlawful conduct. Rule 6 of these Rules makes provision in respect of giving notice for applications for the release of detained property.

Application for forfeiture of detained property

- 7.9 Section 303O of POCA provides that the law enforcement agency can apply to the magistrates' court for the forfeiture of a listed asset (or assets) which has been detained under these provisions. Rule 7 of these Rules specifies the court to which forfeiture applications should be sent, and makes provision in respect of how notice of a forfeiture application is to be given. Rule 7 also provides that a directions hearing is to be listed by the court to manage the forfeiture application.

Associated and Joint Property

- 7.10 Sections 303P and 303Q of POCA make provision in respect of 'associated' and jointly held property in these instances. These terms are defined in section 303P, but in essence they relate to interests in the property which do not attract the necessary suspicion to make the interests susceptible to a forfeiture order (such as where they were obtained legitimately by a third party). Section 303Q allows for an agreement to be reached between the law enforcement agency and the person that holds the associated property (or who is the excepted joint owner) to come to an agreement as to how the value of the listed asset is to be apportioned. Where there is no agreement

regarding associated or joint property, section 303R of POCA provides that the magistrate's court must transfer the application to the relevant court if it is satisfied that the value of the forfeitable property and any associated property is £10,000 or more. Rule 8 of these sets out what is required from the parties before the court can give effect to an agreement under section 303Q of POCA.

Application for compensation

- 7.11 Where no forfeiture is made, following seizure, the person from whom the property was seized, or the person to whom the cash belongs, may apply to the court for compensation under section 303Q of POCA, where the circumstances are exceptional. Rule 9 of these Rules states to whom a copy of any application for compensation must be sent.

Director of Public Prosecutions appearing in Proceedings

- 7.12 Section 303X of POCA provides that the Director of Public Prosecutions can agree to appear in proceedings under Chapter 3A of Part 5 of POCA, on behalf of a law enforcement agency. Rule 10 of these Rules makes provision in respect of notifying the court in these circumstances.

Notice

- 7.13 The powers specify that any person that would need to be notified under the Rules may be sent this by post or fax to their address for the purposes of these Rules.

Giving of documents

- 7.14 Rules 11 to 16 of these Rules set out how documents are to be given under the Rules. This may be by post (rule 12), by electronic communication (rule 13), or by any alternative method authorised by the court (rule 14). In addition, rules 15 and 16 set out how documents are to be given to children and protected persons.

Transfer of proceedings

- 7.15 Rule 17 of these Rules provides that any person party to proceedings may make an application to the court requesting that they be transferred to a different local justice area. The court may grant the application if it is satisfied that it would be more convenient or fairer for proceedings to be transferred to a different local justice area.

Procedure at hearings

- 7.16 Rule 18 of these Rules makes provision for how hearings of applications under Chapter 3A of Part 5 of POCA are to be conducted, including who may attend and be heard on the question of whether the application should be granted.

Consolidation

- 7.17 No consolidation of the rules is planned at present.

8. Consultation outcome

- 8.1 The Home Office consulted with relevant stakeholders on the provisions themselves, inviting and reviewing suggestions and observations amongst the groups potentially affected by this legislative change. No consultation has been undertaken with regard to these rules specifically, although they have been reviewed by persons experienced

in magistrates' courts procedure in non-criminal matters (some technical amendments being made in response to comments received as part of that process).

9. Guidance

- 9.1 The Home Office will issue a formal Circular to relevant stakeholders, offering policy guidance on the use of the powers in Chapter 3A of POCA. There is no guidance planned with regard to the use of these Rules specifically.

10. Impact

- 10.1 There is no impact on business, charities or voluntary bodies.
10.2 The impact on the public sector is minimal.
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 may be undertaken by small businesses.

12. Monitoring & review

- 12.1 The Home Office will monitor the use of the powers in Chapter 3A of Part 5 of POCA. Any reports of the operation of these powers can be gathered by Her Majesty's Courts and Tribunal Service and reported to the Home Office. The National Crime Agency, which monitors the performance of financial investigators will also report issues to the Home Office.

13. Contact

- 13.1 Amrita Dhaliwal can answer any queries regarding this instrument (Telephone: 0203 334 6306 or email: amrita.dhaliwal@justice.gov.uk).