

Home Office Circular: Criminal Finances Act 2017

FORFEITURE OF CERTAIN PERSONAL (OR MOVEABLE) PROPERTY SECTIONS 303B-303Z

Introduction

1. This circular is issued to ensure consistency in practice by law enforcement agencies (LEAs) in the operation of provisions with regard to forfeiture of certain personal or moveable property. This circular does not constitute legal advice. It is not a statement of law and is not intended to provide a comprehensive description or interpretation of the power.

Summary

2. Amendments made to Part 5 of the Proceeds of Crime Act 2002 (POCA) by the Criminal Finances Act 2017 allow authorised law enforcement agencies to seek the seizure, detention and subsequent forfeiture of 'listed assets', where all or part of the asset is recoverable property or is intended by any person for use in unlawful conduct. The value of the asset (or the portion of it intended for use in unlawful conduct) must also be over the 'minimum value' (currently set at £1,000). These powers can be exercised by a relevant officer, those being an officer of Revenue and Customs (HMRC), a constable (including NCA officers if designated with the powers of a constable), an SFO officer, or an accredited financial investigator (AFI - specified within a separate legislative order made for this purpose, namely SI 2018 No. 318).
3. A "listed asset" can be defined as an item of property that falls within one of the following descriptions:¹
 - Precious metals²
 - Precious stones
 - Watches
 - Artistic works³
 - Face-value vouchers⁴
 - Postage stamps

Searches

4. The provisions allow a relevant officer to search for a listed asset on any premises, on the proviso that the officer is on the premises lawfully and has reasonable grounds for suspecting that there is a seizable listed asset on the premises.

¹ Please note that this list can be amended by the Secretary of State, in consultation with Scottish Ministers and the Department of Justice.

² "Precious metal" means gold, silver or platinum (whether in an unmanufactured or a manufactured state).

³ "Artistic work" means a piece of work falling within section 4(1)(a) of the Copyright, Designs and Patents Act 1988.

⁴ "Face-value voucher" means a voucher in a physical form that represents a right to receive goods or services to the value of an amount stated on it.

5. This includes the power to require a suspect to permit a search of and/or entry to a vehicle, assuming that the officer has grounds for suspecting that there is a seizable listed asset in the vehicle, it is under the control of the suspect who is in (or in the vicinity of) the vehicle, and that the vehicle is in a place to which the public has access at the time of the proposed search (but is not a dwelling). Should the vehicle be in a garden (or yard or other land intended to be used for dwelling), the relevant officer may still use these powers if they have reasonable grounds for believing that the suspect does not reside in the dwelling, and that the vehicle is not in this area/dwelling with the permission of the dwelling's resident. The vehicle may be detained for as long as is necessary in exercising the use of these powers.
6. Should the relevant officer have reasonable grounds to suspect that the suspect is carrying a seizable listed asset, the officer may require the subject to permit a search of any item the suspect has with them, or indeed the suspect's person. The suspect may be detained for as long as it is necessary in exercising the use of these powers, though these powers do not require a person to submit to an intimate or strip search.⁵
7. In the case of more than one seizable listed asset, the search powers are to apply as if the value of each asset (or part of the asset) was equal to the aggregate value of all of those assets or parts of assets.
8. Searches:
 - a. Are exercisable only as far as reasonably required for the purpose of finding a listed asset.
 - b. Include the power to carry out tests of anything found during the course of the search in order to determine if it is a listed asset.
 - c. Are exercisable by an officer of Revenue and Customs only if there are reasonable grounds for suspecting that the unlawful conduct in question relates to an assigned matter.⁶
 - d. Are exercisable by an SFO officer or AFI only in relation to the following:

Search Type	Jurisdiction	Section of POCA
Premises	England and Wales ⁷	303C(1)
Vehicles		303C(5) and (8)(a)
Suspects		303C(6) and (8)(b)

9. Searches require appropriate approval prior to exercising the power from a judicial officer or, where this is not practicable, a senior officer.⁸ If the powers are exercised without the approval of a judicial officer, the relevant officer who exercised the power must give a written report to the appointed person (where no property has been seized, or property seized was not detained for more than 48

⁵ As defined within the meaning of section 164 of the Customs and Excise Management Act 1979.

⁶ Within the meaning of the Customs and Excise Management Act 179

⁷ These powers have not yet commenced in Northern Ireland. Following commencement in this jurisdiction, searches will likewise only be exercisable by SFO officers and AFIs in searches of premises, vehicles and suspects in relation to the same sections of POCA.

⁸ In England, Wales and Northern Ireland, a judicial officer can be defined as a justice of the peace. In Scotland, the sheriff fills this role.

hours).⁹ If, however, the relevant officer seizes cash (by virtue of POCA section 294) and it is detained for more than 48 hours, the officer does not need to submit a report.

10. This report must give details of why the officer believed that the powers were exercisable and it was not possible to obtain the approval of a judicial officer. If, however, the relevant officer seizes cash (by virtue of section 294 of POCA) and it is detained for more than 48 hours, the officer does not need to submit a report.
11. The appointed person must submit their own report as soon as possible at the end of each financial year, giving their opinion as to the way in which search powers under these provisions are being exercised, and making recommendations where appropriate.
12. The powers of search are subject to guidance issued in codes of practice. The codes of practice under these provisions must be made appropriately under each jurisdiction, as set out in sections 303G-303I of POCA.

Seizure

13. A relevant officer may seize any item of property if the officer has reasonable grounds to suspect that the property:
 - is a listed asset;
 - is recoverable property or intended for use by any person in unlawful conduct; and
 - its value does not fall below £1,000.

The powers can also apply where there are reasonable grounds to suspect that part of the property is recoverable, or intended for use in unlawful conduct. Where this is the case, a relevant officer may seize the whole item of property if it is not practicable to seize only that part. The value of the part to which the suspicion relates must be at least £1,000.

14. Property seized may be detained for an initial period of 6 hours. A senior officer can authorise further detention (where the reasonable grounds for suspicion still exist) for a further 42 hours.
15. An application can be made to a magistrates court (in England and Wales) or to the sheriff (in Scotland) for an order to extend the period of detention of the seized property for up to 6 months (with further orders not exceeding a two year period from the date of the first order). It should be noted that a justice of the peace may also exercise the powers of the magistrate's court to make the first order for further detention of seized property. An application can be made in Scotland by a procurator fiscal or by Ministers in connection with their functions under section 303O of POCA. In England and Wales, an application can be made by the Commissioners for HMRC, a constable, an SFO officer, or an AFI specified within

⁹ The appointed person (in POCA section 303F) means a person appointed by the Secretary of State (in England and Wales), a person appointed by Scottish Ministers (in Scotland) or someone appointed by the Department of Justice (in Northern Ireland).

a separate legislative order made for this purpose by the Secretary of State. For this order to be made, the court must be satisfied that the property is a listed asset, the value of the property is not less than the minimum value, and that either condition 1 or 2 below is met. Any resulting order must provide for notice to be given to the persons affected by it.

16. Condition 1 is that there are reasonable grounds for suspecting that the property is recoverable and that either –
 - (a) Its continued detention is justified while its derivation is further investigated or consideration is given to bringing (in the United Kingdom or elsewhere) proceedings against any person for an offence with which the property is connected, or
 - (b) Proceedings against any person for an offence with which the property is connected have been started and not been concluded.
17. Condition 2 is that there are reasonable grounds for suspecting that the property is intended to be used in unlawful conduct and that either –
 - (a) Its continued detention is justified while its intended use is further investigated or consideration is given to bringing (in the United Kingdom or elsewhere) proceedings against any person for any offence with which the property is connected, or
 - (b) Proceedings against any person for an offence with which the property is connected have been started and have not been concluded.
18. Where an application for an order has been made with respect to two or more items that were seized at the same time by the same person, the above is to apply as if the value of each item was equal to the aggregate value of those items.
19. A relevant officer may arrange for and carry out tests of any item of property seized to establish whether or not it is a listed asset.
20. Whilst property is detained (either initially or during further detention periods), a magistrates' court (or in Scotland, the sheriff) may direct the release of all or part of the property if it is satisfied that the conditions for detention (in sections 303K or 303L) are no longer met. In the same vein, a relevant officer (or in Scotland, a procurator fiscal) may release all or part of the detained property, after notifying the magistrates' court, sheriff or justice.

Forfeiture

21. Whilst property has been detained, an application may be made for the forfeiture of all or part of the detained property. An application can be made to the sheriff by the Scottish Ministers, whilst an application can be made to a magistrates' court by a relevant officer. A sheriff or court may order the forfeiture of the property or any part of it if it is satisfied that the property is a listed asset, and that what is to be forfeited is recoverable property or intended for use in unlawful conduct by any person.

22. Except in Scotland, the order may provide for payment of reasonable legal expenses that the suspect has incurred (or may reasonably incur) with regard to the proceedings under which the order is made, or related proceedings. A sum in respect of a relevant item of expenditure is not payable unless the person who applied for the order agrees to its payment, or the court has assessed the amount allowed in respect of that item and the sum paid in respect of that amount. If the person who applied for the order was a constable, an SFO officer or an AFI, the person may not agree to the payment of this sum unless the person is a senior officer or has had appropriate authorisation from a senior officer.

Associated and joint property

23. In the case of “associated” property, this refers to property of any of the following descriptions (that is not the forfeitable property):

- (a) Any interest in the forfeitable property
- (b) Any other interest in the property in which the forfeitable property subsists;
- (c) If the forfeitable property is a tenancy in common, the tenancy of the other tenant;
- (d) If (in Scotland) the forfeitable property is owned in common, the interest of the other owner;
- (e) If the forfeitable property is part of a larger property, but not a separate part, the remainder of that property.

24. Where there is agreement between the person who applied for the order and the person who holds the associated property (or who is the excepted joint owner), the magistrates’ court (or sheriff) may make an order requiring the person who holds the associated property or who is the excepted joint owner to make a payment to the person identified in the order (under section 303O(3) of POCA). This order would be instead of making a separate forfeiture order under section 303O(3) of POCA.

25. This payment will be in the amount which those above agree represents the value of the forfeitable property, or the value of the forfeitable property less the value of the joint owners’ share (as applicable, as detailed in POCA 303Q(2)). The amount of this payment can also be reduced if the person who applied for the order agrees that the other party to this agreement has suffered loss as a result of the seizure and detention of the property (and any associated property).

26. Except in Scotland, this order may provide for payment of reasonable legal expenses (as detailed in 303Q(12)) that a person has reasonably incurred under these proceedings and related proceedings. This amount must be agreed to by the person who applied for the original forfeiture order, and must be assessed by the court and paid in respect of this assessed amount.

27. If there is more than one item of associated property or more than one excepted joint owner, the agreement on the total amount to be paid (and by each person) must be agreed by both (or all) of these parties and the person who applied for the original forfeiture order. If the person who applied for this original order was a constable, an SFO officer or an AFI, that person may enter into this agreement

only if this person is a senior officer or has relevant authorisation from a senior officer to do so.

28. Any amount received as a result of the order with regard to associated or joint property must be applied first in making payment of legal expenses (as detailed in POCA 303Q(6) to (12), except in Scotland), then in the reimbursement of reasonable costs incurred in storing or insuring the forfeitable property whilst detained, and last into the Consolidated Fund (in the case of orders made in the magistrates' court) or the Scottish Consolidated Fund (in the case of orders made by the sheriff).
29. Where there is no agreement the magistrates' court or sheriff must transfer the application for forfeiture to the High Court (or Court of Session in Scotland) if satisfied that the value of the forfeitable property (and any associated property) is £10,000 or more. Likewise, the magistrates' court or sheriff may transfer the application for forfeiture to the High Court (or Court of Session in Scotland) if satisfied that the value of the forfeitable property (and any associated property) is less than £10,000.
30. Within England and Wales, High Court procedure is governed by the Civil Procedure Rules and associated Practice Directions. Practice Direction 8A has been amended to include provisions to allow the court to handle papers and evidence in these transferred cases.
31. Following this, the High Court or Court of Session may make an order under section 303R to forfeit the property (or any part of it) if it is satisfied that the property is a listed asset and is recoverable property or intended for use in unlawful conduct. The court may also (as well as making the forfeiture order), make an order providing for the forfeiture of the associated property or for the interest of the excepted joint owner to be extinguished or severed. If there is no transfer made to the High Court or Court of Session, the magistrates' court or sheriff may also make an order providing for the forfeiture of the associated property or for the interest of the excepted joint owner to be extinguished or severed. In either instance, the order must provide for the payment of an amount to the person who holds the associated property or who is an excepted joint owner.
32. If the High Court or Court of Session (or magistrates' court or sheriff) is satisfied that this person has suffered loss as a result of this process (or if circumstances are exceptional), an order by the court may require the payment of compensation to this person.
33. Any interested party to proceedings for an order for the forfeiture of property may appeal (with regard to the criteria set out in POCA 303S(1)), no later than 30 days after the day on which the order is made. The court of appeal in this instance is:
 - (a) The Crown Court in England and Wales
 - (b) The Sheriff Appeal Court in Scotland
 - (c) A county court in Northern Ireland
34. The property cannot be realised (when forfeited) before the time in which an appeal may be made. If an appeal is made, the property cannot be realised until

the appeal is determined or disposed of. The proceeds of this realisation must be carried out in line with the specifications in 303U(1).

35. With regards to victims, a person who claims that any detained property (or any part of it) belongs to him or her may apply for the property to be released. An application must be made in England and Wales or Northern Ireland to a magistrates' court, or to the sheriff in Scotland. The court may order the property released if it appears to the court that:
 - (a) The applicant was deprived of the property to which the application relates, or of property which it represents, by unlawful conduct
 - (b) The property the applicant was deprived of was not, immediately before the applicant was deprived of it, recoverable property, and
 - (c) The property belongs to the applicant.

36. If no order is made in respect of the property seized and detained under these provisions, the person to whom the property belongs or from whom it was seized may apply for compensation. If the court or sheriff is satisfied that the Applicant has suffered a loss as a result of the detention of the property and that the circumstances are exceptional, the court or sheriff may order compensation to be paid. Compensation is to be paid by the relevant force or agency as set out in POCA 303W(5) to (9)

37. The Director of Public Prosecutions or the Director of Public Prosecutions for Northern Ireland may appear for a constable or AFI if asked by or on behalf of a constable or AFI to do so and if they feel it appropriate. Likewise, the Director of Public Prosecutions may appear for the Commissioners of HMRC as an officer of HMRC in proceedings if asked by or on behalf of the Commissioners of HMRC to do so and they consider it appropriate.