

STATES OF JERSEY



Jersey

DRAFT PROCEEDS OF CRIME (MISCELLANEOUS AMENDMENTS No. 2) (JERSEY) REGULATIONS 202-

**Lodged au Greffe on 18th May 2021
by the Minister for External Relations and Financial Services
Earliest date for debate: 29th June 2021**

STATES GREFFE

REPORT

Jersey has a long-term policy of compliance with International Standards on anti-money laundering and countering the financing of terrorism (“AML/CFT”) as set out by the Financial Action Task Force (the “FATF”) – the international standard setter on financial crime. The Government remains absolutely committed to that policy in furtherance of the worldwide fight against financial crime.

FATF Recommendation 4 (Confiscation and provisional measures) requires countries to have measures that enable the confiscation of –

- (a) laundered property;
- (b) the proceeds or instrumentalities use or intended for use in money laundering or predicate offences;
- (c) property which is the proceeds of, or is used in or intended or allocated for use in, the financing of terrorism, terrorist acts or organisations; or
- (d) property of a corresponding value.

Criterion 4.2(c) provides that countries should have measures, including legislative measures that enable their competent authorities to take steps that will prevent or void actions that prejudice the country’s ability to freeze or seize or recover property that is subject to confiscation.

In Jersey’s 4th round mutual evaluation by MONEYVAL, concerns were raised regarding the ability of authorities to confiscate monies which were given to third parties as gifts, particularly those that were put into trust where the settlor retains a beneficial interest.

Under the [Proceeds of Crime \(Jersey\) Law 1999](#) (the “POCL”), it is a defendant’s “realisable property” which may be subject to a *saisie judiciaire* or a confiscation order under Part 2 of POCL (if the pre-requisite conditions are met and the Court orders either). “Realisable property” is defined in Article 2(1) of POCL to mean –

- (a) any property held by the defendant;
- (b) any property held by a person to whom the defendant has directly or indirectly made a gift caught by Part 2; and
- (c) any property to which the defendant is beneficially entitled.

According to Article 2(9) of POCL, a gift is caught by Part 2 if –

- (a) it was made by the defendant at any time after the commission of the offence or, if more than one, the earliest of the offences to which the proceedings for the time being relate; and
- (b) the Court considers it appropriate in all the circumstances to take the gift into account.

The MONEYVAL Evaluation Team noted its concerns regarding circumstances where the proceeds of crime and laundered property (etc.) were no longer within the reach of the authorities and property of corresponding value had been given away to a third party as a gift prior to the offending. It was noted at paragraph 308 of the MONEYVAL report that: *“Nevertheless, assets contributed to a discretionary trust before the criminal conduct to which the external confiscation order relates, are not gifts within the definition in Article 2(9) of the Proceeds of Crime Law ... and a saisie judiciaire can of course only be applied to “realisable property”. This is subject to two caveats,*

- I. *where a beneficiary has an entitlement to income or capital the gift will still be realisable property; and*
- II. *where he has made a transaction at an undervalue by making the gift into trust within 5 years before being declared bankrupt (en désastre) under the Bankruptcy (Désastre) (Jersey) Law 1990 then the gift can be set aside.”*

The report went on to criticise the inability of the authorities to attack property which the defendant had settled into a discretionary trust, of which he was one of the beneficiaries, prior to the offending. The report agreed that a beneficial interest in a discretionary trust should not, as such, automatically be considered realisable property but that nonetheless the Jersey authorities could consider that there might be circumstances where (e.g. by examination of the other evidence, such as the settlor’s letter of wishes) it may be appropriate to make inroads into the principles of trust law.

The Government does not consider it appropriate to make inroads into fundamental principles of trust law by seeking to prescribe how much of the trust’s assets a discretionary beneficiary might theoretically be entitled to, and letters of wishes are not absolute which would make such an exercise in most cases practically very difficult.

The proposed amendment to Article 2(9) of the Proceeds of Crime (Jersey) Law 1999, inserts a “clawback” provision which will mitigate against circumstances where a criminal has given away assets as gifts prior to his or her offending. The clawback provision has the same period for transactions at an undervalue as in the [Bankruptcy \(Désastre\) \(Jersey\) Law 1990](#) and the [Companies \(Jersey\) Law 1991](#) (i.e. 5 years).

If this amendment is approved, in addition to what is already caught by Part 2 of Proceeds of Crime (Jersey) Law 1999, any gifts made within a period of 5 years ending with the criminal offence (or the earliest of the offences to which the proceedings relate) may also be caught by Part 2 of Proceeds of Crime (Jersey) Law 1999, if the court considers it appropriate in all the circumstances to take the gift into account.

Financial and manpower implications

There are no other resource implications for the Government of Jersey that would arise as a consequence of adopting these draft Regulations.

EXPLANATORY NOTE

The Draft Proceeds of Crime (Miscellaneous Amendments No. 2) (Jersey) Regulations 202-, if passed, will amend the Proceeds of Crime (Jersey) Law 1999 (the “POC Law”) to provide that Part 2 of the POC Law (confiscation orders) applies to a gift made into a trust, as long as certain conditions are met. The Regulations also amend the Schedule to the Proceeds of Crime (Enforcement of Confiscation Orders) (Jersey) Regulations 2008, which modifies the POC Law, in order that the amendments to the POC Law apply equally to external confiscation orders. In particular –

Regulation 1 amends Article 1(1) (interpretation) of the POC Law to insert definitions of “beneficiary”, “trust” and “trust property”.

Regulation 2 amends Article 2 of the POC Law by adding in 3 new paragraphs (9A), (9B) and (9C), which together provide that Part 2 of the POC Law applies to (that is to say, a confiscation order may be made in respect of) a gift made into trust by a defendant if the gift was made up to 5 years before the offence, and the defendant is a beneficiary or a prospective or contingent beneficiary of the trust.

Regulation 3 amends the Schedule to the Proceeds of Crime (Enforcement of Confiscation Orders) (Jersey) Regulations 2008. This Schedule specifies modifications to the POC Law for the purposes of the Proceeds of Crime (Enforcement of Confiscation Orders) (Jersey) Regulations 2008. Regulation 3 amends the Schedule to insert a new paragraph 2(e), which modifies Article 2(9A) of the POC Law (as inserted into the POC Law by *Regulation 2*), in order that Article 2(9A) applies to external confiscation orders.

Regulation 4 gives the citation and provides that the Regulations come into force 7 days after they are made.



Jersey

DRAFT PROCEEDS OF CRIME (MISCELLANEOUS AMENDMENTS No. 2) (JERSEY) REGULATIONS 202-

Made [date to be inserted]
Coming into force [date to be inserted]

THE STATES make these Regulations under Articles 1(9), 2(11) and 28A of the Proceeds of Crime (Jersey) Law 1999¹ –

1 **Article 1(1) (interpretation) of the Proceeds of Crime (Jersey) Law 1999 amended**

In Article 1(1) of the Proceeds of Crime (Jersey) Law 1999² –

- (a) before the definition “Commission”, there is inserted –
““beneficiary” has the meaning given by Article 1(1) of the Trusts (Jersey) Law 1984³”;
- (b) after the definition “*saisie judiciaire*” there is inserted –
““trust” has the meaning given by Article 1(1) of the Trusts (Jersey) Law 1984⁴;
“trust property” means the property for the time being held in a Jersey trust as defined by Article 1(1) of the Trusts (Jersey) Law 1984⁵ or a foreign trust as defined by that Article;”.

2 **Article 2 (meanings of expressions relating to realisable property) of the Proceeds of Crime (Jersey) Law 1999 amended**

In Article 2 of the Proceeds of Crime (Jersey) Law 1999⁶ –

- (a) for paragraph (9) there is substituted –
“(9) A gift (including a gift made before the commencement of this Article) is caught by Part 2 if –
 - (a) it was made by the defendant at any time after the commission of the relevant offence or, if more than one, the earliest of the relevant offences; and
 - (b) the Court considers it appropriate in all the circumstances to take the gift into account.

- (9A) A gift (including a gift made before the commencement of this Article) made by the defendant into a trust is caught by Part 2 if –
- (a) it was made within the period of 5 years preceding the commission of the relevant offence or, if more than one, the earliest of the relevant offences;
 - (b) the Court considers it appropriate in all the circumstances to take the gift into a trust into account; and
 - (c) at any point after the reference date any of the following apply –
 - (i) the defendant is a beneficiary (including a discretionary beneficiary) of the trust,
 - (ii) the trustees of the trust have the power to add the defendant as a beneficiary of the trust, or
 - (iii) written documents of any kind exist which anticipate the defendant benefitting from the trust property at some future time.
- (9B) In paragraphs (9) and (9A), “relevant offence” means an offence to which the proceedings for the time being relate, and includes, where the proceedings have resulted in the conviction of the defendant, a reference to any offence that the Court takes into consideration when determining the defendant’s sentence.
- (9C) In paragraph (9A) “reference date” means the date that is 5 years before the date of commission of the relevant offence, or, if more than one, the earliest of the relevant offences.”;
- (b) in paragraph (10) after “to another person” there is inserted “or into a trust”.

3 Schedule to the Proceeds of Crime (Enforcement of Confiscation Orders) (Jersey) Regulations 2008 amended

For paragraph 2(d) of the Schedule to the Proceeds of Crime (Enforcement of Confiscation Orders) (Jersey) Regulations 2008⁷ there is substituted –

- “(d) for paragraphs (9) and (9A) there is substituted –
- “(9) A gift (including a gift made before the commencement of the Enforcement Regulations) is caught by this Law if –
- (a) it was made by the defendant at any time after the conduct to which the external confiscation order relates; and
 - (b) the Court considers it appropriate in all the circumstances to take the gift into account.
- (9A) A gift (including a gift made before the commencement of the Enforcement Regulations) made by the defendant into a trust is caught by this Law if –
- (a) it was made within the period of 5 years preceding the conduct to which the external confiscation order relates;
 - (b) the Court considers it appropriate in all the circumstances to take the gift into a trust into account; and

(c) at any point after the reference date any of the following apply –

- (i) the defendant is a beneficiary (including a discretionary beneficiary) of the trust,
- (ii) the trustees of the trust have the power to add the defendant as a beneficiary of the trust, or
- (iii) written documents of any kind exist which anticipate the defendant benefitting from the trust property at some future time.”;

(e) paragraph (9B) is deleted;

(f) for paragraph (9C) there is substituted –

“(9C) In paragraph (9A) “reference date” means the date that is 5 years before the date of the conduct to which the external confiscation order relates.”.”.

4 Citation and commencement

These Regulations may be cited as the Proceeds of Crime (Miscellaneous Amendments No. 2) (Jersey) Regulations 202- and come into force on the same day as the Proceeds of Crime (Amendment No. 4) (Jersey) Law 202-.

ENDNOTES

Table of Endnote References

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|-------------------|--------------------------|
| 1 | <i>chapter 08.780</i> |
| 2 | <i>chapter 08.780</i> |
| 3 | <i>chapter 13.875</i> |
| 4 | <i>chapter 13.875</i> |
| 5 | <i>chapter 13.875</i> |
| 6 | <i>chapter 08.780</i> |
| 7 | <i>chapter 08.780.60</i> |