

CRIMINAL FINANCES BILL (HL)
EUROPEAN CONVENTION ON HUMAN RIGHTS
MEMORANDUM BY THE
HOME OFFICE AND HM REVENUE AND CUSTOMS

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Criminal Finance Bill. The Government is satisfied that the Home Secretary can make a statement under section 19(1)(a) of the Human Rights Act 1998 that, in her view, the provisions of the Bill are compatible with the Convention rights.

Summary of the Bill

2. The Bill is in four Parts.
3. Part 1 contains a number of measures which mainly amend the Proceeds of Crime Act 2002 (“POCA”). They fall under the chapters of: Investigations; Money Laundering; Civil Recovery; Enforcement Powers and Offences and Miscellaneous provisions.
 - Chapter 1 introduces a new investigatory tool of ‘unexplained wealth orders’ which is designed to allow law enforcement authorities to better investigate the source of property that does not appear to be proportionate to the known income of the person owning it. It is designed as a potential precursor to pursuing civil recovery action against the property in question. The Chapter also extends the scope of disclosure orders so that they may be sought in investigations into money laundering offences and so that they may be applied for by a range of law enforcement authorities which will better reflect the range of authorities tasked with investigating the recovery of the proceeds of crime and money laundering offences.
 - Chapter 2 makes various amendments to Part 7 of POCA to enhance the flow of information about suspected money laundering ensuring that UK’s domestic position is fully aligned with international commitments.
 - Chapter 3 inserts two major sets of new provision into Part 5. The first enables law enforcement agencies to pursue the civil recovery of money held in bank and building societies that is reasonably suspected to be the proceeds of crime or intended for use in crime. The second allows for the civil recovery of certain personal or moveable items of property where there is evidence to suggest that criminals are using such property in lieu of cash. In both cases, the provisions have been modelled so far as possible upon the existing cash seizure and forfeiture provisions in Chapter 3 (recovery of cash in summary proceedings).
 - Chapter 4 extends powers to law enforcement authorities that practically need access to POCA powers and will therefore streamline recovery proceedings.

It also creates new criminal offences in cases where officers are wilfully obstructed in the course of exercise of powers under POCA.

- Chapter 5 makes a series of amendments to deal with various minor and technical issues which have arisen in the application of POCA.
4. Part 2 makes equivalent provision in relation to a number of the measures in Part 1 for the purpose of dealing with terrorist financing and property. The provisions amend the Terrorism Act 2000 (“TACT”) and the Anti-Terrorism Crime and Security Act 2001 (“ATCSA”).
 5. Part 3 creates new criminal offences of corporate failure to prevent a person acting in the capacity of an associated person from criminally facilitating the evasion of tax. Offences are created in relation to the facilitation of the evasion of UK taxes and those taxes owed in foreign countries. Provision is also made for the issuing of guidance to relevant bodies as to the prevention procedures that they might put in place to prevent persons associated with them from facilitating the evasion of taxes.
 6. Part 4 contains general provisions.
 7. The Government considers that the clauses of this Bill and its Schedules which are not mentioned in this memorandum do not give rise to any human rights issues such as to merit discussion in this memorandum.

ECHR Analysis

8. A number of provisions in the Bill engage Articles 6 and 8, and Article 1 of the First Protocol (“A1P1”) of the ECHR and these are discussed in detail below. Articles 8 and A1P1 are qualified rights, which mean that interference with the rights may be justified. Any interference must be set down and regulated by a clear and ascertainable legal regime “in accordance with the law”, or “subject to the conditions provided for by law”. Article 8 requires that any interference is necessary in a democratic society and is a proportionate means of achieving a legitimate aim. A1P1 requires that any deprivation of possessions must be “in the public interest”.
9. For any interference with a qualified right to be compatible, there must be a lawful domestic basis for doing so, the law must be adequately accessible to the public, and its operation must be sufficiently foreseeable, so that people who are subject to it can regulate their conduct.
10. The requirement of legality goes further than the law being adequately prescribed, accessible and foreseeable. The law must contain sufficient safeguards to avoid the risk that power will be arbitrarily exercised and thus that unjustified interference with a fundamental right will occur. The Government considers that this Bill meets these stringent requirements.
11. The sections headed Article 6, Article 8 and A1P1, below, discuss the issues that arise from powers in the Bill and the justification for any interference with these rights under each heading.

Article 6 – Right to a fair trial

12. Article 6 is not a qualified right and accordingly the measures that this Bill introduces do not interfere with it.
13. The Government considers that the key provisions of the Bill that give rise to Article 6 issues in Part 1 are: unexplained wealth orders (“UWO”), disclosure orders, information notices and orders, the power to extend the moratorium period and civil recovery measures. The Government considers that the equivalent provisions in Part 2 relating to disclosure orders, information notices and orders and civil recovery raise the same issues. In Part 3, each corporate failure to prevent the facilitation offence has a defence of having in place reasonable prevention procedures which is subject to a reverse legal burden. The analysis of each provision is set out below.

Part 1 – Proceeds of Crime

14. Unexplained Wealth Orders (Cl. 1-6) – The Government does not consider that Article 6(1) (civil) is engaged by the UWO procedure itself because the requirement to provide the explanation does not, of itself, determine the individual’s right to their property. Article 6 is potentially engaged in later proceedings in the course of which the statement obtained by means of the UWO may be used as evidence. Those proceedings before a Court will of course be governed by and comply with Article 6(1).
15. The effect of the UWO measures is that the statement provided can be used in evidence, but not in the course of any criminal proceedings against the individual making the statement. This is similar to the use of evidence provided in response to a disclosure order under section 359 of POCA. This ensures that the person cannot be compelled to self-incriminate. Further, a UWO does not require a person to answer any question, provide any information or produce any document which is subject to legal privilege.
16. If a rebuttable presumption arose in respect of the property (due to non-compliance with the order), the Government’s view is that this is also not determinative of the individual’s civil rights. The presumption is rebuttable, and accordingly does not constitute a final determination of the legitimacy of the ownership. The individual would not be deprived of the property unless a court made a recovery order at a subsequent hearing (where Article 6(1) rights would be engaged and complied with). For example, the individual would at the subsequent hearing be entitled to advance evidence to rebut the presumption (as indeed they would be at any time prior to such a hearing).
17. Disclosure orders (Cl. 7-8) – It is considered that Article 6 would be engaged if the power could be used to compel a person to self-incriminate or to obtain legally privileged material.
18. However, there is express provision already within POCA providing that any information obtained as a result of the disclosure order process cannot be used in

evidence in criminal proceedings against that person except in explicit limited circumstances including proceedings taken under Parts 2-4 of POCA (Confiscations); for non-compliance with the disclosure order; for perjury or for another offence where the person makes a statement that is inconsistent with that made under the order. (See existing S. 360 of POCA). It is considered that this provides a robust safeguard against the use of this power to for the purpose of self-incrimination). In addition an order cannot be used to obtain legally privileged material (see existing S. 361 of POCA).

19. Power to extend the moratorium period (Cl. 9) – The Government is of the view that neither Article 6(1) nor (2) (civil or criminal respectively) are engaged by this power as it determines neither criminal liability nor civil rights or obligations. The power is to extend the period of time for which the relevant defence to the money laundering offences in S. 327-329 of POCA is not available. That has the practical effect of preventing the regulated sector from providing a service where they have suspicion that to do so would involve taking action in relation to property that they suspect to be criminal.
20. Nevertheless, it is provided that an application for an extension must be made to the relevant Court and the affected parties are entitled to appear and be represented. The Court has a discretion to exclude specified information from parties (and to exclude them from relevant parts of the hearing) in certain circumstances. These are restricted to the following circumstances: where evidence of an offence would be interfered with, the gathering of information about the possible commission of an offence would be interfered with, a person would be interfered with or physically injured, the recovery of property would be hindered or national security would be put at risk
21. Even if Article 6 is engaged which the Government considers not to be the case, it is considered that the judicial oversight is sufficient to meet the standards of Article 6 (civil). A judge is a robust safeguard as regards the interests of the affected parties where they are excluded from part of proceedings. The test does not involve a determination of the issues and so it is not necessary for the parties to see all the material that the law enforcement authority may want to rely upon. The categories on which material may be excluded from the parties (or where they may be excluded from the hearing) are expressly defined and are considered necessary and proportionate to ensure, for example, that investigations are not prejudiced, persons are not harmed.
22. Further information notices and orders (Cl. 11) – The power allows the National Crime Agency (“NCA”) to compel the provision of information and therefore would potentially engage Article 6 if it permitted a person to be required to self-incriminate.
23. As with disclosure orders, it is expressly provided in new 339ZK(1) that information obtained under an order made under these provisions may not be used in evidence in criminal proceedings against the person compelled to provide it except for the very limited classes of prosecutions corresponding to those described above at paragraph 18. This is considered sufficient to ensure that there will be no requirement of self-

incrimination arising by reason of this power. In addition the power may not be used to obtain legally privileged material.

24. Civil recovery (Cl. 14-15) – The Government considers that provisions governing civil recovery of certain personal (or moveable) property and forfeiture of money held in bank accounts do not engage Article 6(2). In respect of that Article, these measures do not introduce any new elements to the civil recovery procedure. The Supreme Court has held that civil recovery proceedings are civil proceedings, and that article 6(2) is not engaged (*Gale and another v SOCA* [2011] UKSC 49). While it is acknowledged that the right to a fair hearing in Article 6(1) would be engaged, the determination of property rights under these provisions is made by court order and the Court will ensure that Article 6(1) will be complied with.
25. Provision is additionally made for the administrative forfeiture of money in bank accounts. It is to be noted that this measure is similar to the existing procedure for the administrative forfeiture of cash in POCA. Under this procedure, after the court has made an account forfeiture order, the law enforcement agency may give a notice of administrative forfeiture in respect of the money. If no objection is received to that forfeiture, the money can be forfeited. If an objection is received, the money can only be forfeited following an order of the court. Accordingly, this measure is still capable of being brought before a court that will ensure compliance with Article 6(1).

Part 2 – Terrorist Financing

26. The measures contained in Part 2 make equivalent provision to a number of those contained in Part 1 and engage the same rights. They do so in relation to an arguably more urgent public interest – the prevention of terrorism. For that reason the analysis as to justification carried out in relation to Part 1 applies at least equally to these provisions. To avoid repetition, the Government identifies only the key issues relating to Part 2 below.
27. Disclosure orders (Cl. 33) – The measures amend the Terrorism Act 2000 to provide that disclosure orders may be sought to obtain information from a person where a person is suspected of having committed one of the terrorism financing offences under Sections 15 to 18 of the Terrorism Act 2000. It is designed for use against persons who may be enabling the commission of terrorism financing offences rather than against the suspect.
28. As in the equivalent Part 1 power, there is an explicit bar on the use of a statement obtained by means of a disclosure order in criminal proceedings against the person who made it (subject to the limited exceptions of prosecution for non-compliance with the order; perjury or on prosecution for another offence where a statement made is inconsistent with this statement). Legally privileged material is also excluded. For this reason it is considered that there is no interference with Art. 6.
29. Further information notices and orders (Cl. 35) – This is a power for police to direct that information is provided where it relates to a disclosure of suspicious activity made under Part 3 of the Terrorism Act 2000 (terrorist property). An explicit statutory

bar (subject to the exceptions explained above) is included to prevent the use of information obtained in criminal proceedings against the person it was obtained from and legally privileged material is excluded. For this reason it is considered that there is no interference with Art. 6.

30. Civil Recovery (Cl. 37-38) – The measures amend the ATCSA to enable forfeiture of certain personal (or moveable) property or money held in bank and building society accounts which is earmarked as terrorist property.
31. As with Civil Recovery provisions in Part 1, the Government considers that provisions governing civil recovery of certain personal (or moveable) property and forfeiture of money held in bank accounts do not engage Article 6(2). While it is acknowledged that the right to a fair hearing in Article 6(1) would be engaged, the determination of property rights under these provisions is made by court order and the Court will ensure that Article 6(1) will be complied with.

Part 3 – Corporate Failure to Prevent the Facilitation of Tax Evasion

32. The reasonable procedures defence that accompanies each of the offences created by Part 3 of the Bill (clause 42(2) & 43(3)) is subject to a reverse legal burden. It would be for the defendant relevant body to establish on the balance of probabilities any facts that need to be proved in advancing the defence. Part 3 of the Bill thus engages and interferes with Article 6.
33. However, imposing reverse *legal* burdens (as opposed to merely evidential burdens) can be justified on the basis that:
 - a. The difficulties in prosecuting corporations are well documented;
 - b. The relevant body will be uniquely well placed to know what procedures it has in place, indeed this information is likely to be in the defendant relevant body's sole knowledge;
 - c. Investigators and prosecutors would find it very difficult to obtain evidence of these procedures from anyone apart from the defendant relevant body;
 - d. The relevant body will find it very easy to adduce evidence of its procedures, it will be in possession of them and an employee or officer of the company could give evidence about them;
 - e. There is very little prospect of a defendant relevant body being wrongly convicted as a result of practical difficulties in proving a defence that it in fact has; the defence will be easy to prove if it exists;
 - f. The objective of the new offences, to encourage relevant bodies to take responsibility for ensuring that those who act for or on their behalf do not commit tax crimes when acting in that capacity, would be significantly undermined if investigators and prosecutors had to investigate to discover what procedures were in place and then disprove the defence beyond reasonable doubt, such a burden would render the offence difficult to prosecute; conversely, the aim is better served by requiring the defendant relevant body to raise and prove the defence, a task that imposes only a modest burden upon the defendant relevant body;

- g. Relevant bodies suspected of committing the offence are in any event likely to gather evidence of their procedures and put them before law enforcement at an early stage in order to seek non-conviction disposals (such as civil penalties or deferred prosecution agreements), thus the reverse legal burden adds little practical burden.

34. In so concluding, support is drawn from the House of Lords' decision in Sheldrake v DPP¹ and its discussion of the line of authorities starting with the European Court of Human Rights' decision in Salabiaku v France² and culminating in the decisions of the House of Lords in both R v Lambert³ and R v Johnstone⁴.

Article 8 – Right to respect for private and family life

35. The Government considers that provisions of Parts 1 and 2 raise issues relating to Article 8 rights. In Part 1 these are: UWOs, Disclosure Orders, the Power to Extend the Moratorium Period, Information Sharing measures, the Power to Obtain Further Information and Civil Recovery measures. In Part 2 these are Disclosure Orders, Information Sharing and the Power to Obtain Further Information and the civil recovery measures. The analysis of each provision is set out below.

Part 1 – Proceeds of Crime

36. Unexplained Wealth Orders (Cl. 1-6) – It is accepted that the UWO would engage and interfere with Article 8 because the requirement to explain the origin of the property may have an impact upon a person's right to a private and family life, home and correspondence. The Government considers that the interference is in accordance with law and necessary and proportionate in a democratic society for the prevention and detection of crime.

37. The purpose of the UWO is to assist law enforcement authorities in gathering evidence of criminal property which derive from serious crime or corruption, and as such the UWO forms part of a wider suite of investigative powers for this overall purpose. There is strong evidence to suggest that high value property is being purchased in the UK for the purpose of concealing the proceeds of crime and corruption and that the value of such property often far outstrips the declared or known income of the persons in possession of it. There is a strong public interest in ensuring that the proceeds of crime are not deposited in the UK and this measure is applied in targeted and proportionate manner, overseen by the senior civil courts.

¹ [2004] UKHL 43; [2005] 1 A.C. 264.

² (1991) 13 E.H.R.R. 379.

³ [2001] UKHL 37; [2002] 2 A.C. 545.

⁴ [2003] UKHL 28; [2003] 1 W.L.R. 1736.

38. The extent of any interference with Article 8 is restricted by the scope of the UWO power, which requires an explanation of how the property was legitimately obtained; information relating to other matters cannot be requested. The order is made by the senior courts, and as such there will be judicial oversight for any requests for specific information or disclosure which form part of the order and the court is itself obliged to ensure compliance with Article 8. More broadly, the order is only available in respect of particular individuals who either (i) fall within the definition of a “politically exposed person” (“PEP” – A PEP is a person entrusted with prominent public functions by an international organisation or non-EEA (European Economic Area) State, a family member of such a person, or someone known to be a close associate of such a person); or (ii) are reasonably suspected of involvement in serious crime. It cannot be deployed outside these prescribed groups and cannot be applied to the general population. The order can only be made in circumstances where the value of the property exceeds a threshold of £100,000, a substantial sum which will in itself prevent unwarranted use, and only where the court is convinced that the value of the property exceeds that which might be obtained on the basis of the individual’s legitimate income.
39. Disclosure orders (Cl. 7-8) – Where an order is granted, the person subject to it must provide information to the law enforcement authorities that relates to the person specified in the order. Failure to do so is an offence. It is acknowledged that Article 8 is engaged and that a disclosure order may interfere with both persons’ rights.
40. The Government considers that the interference is justified on the grounds that it is necessary and proportionate in a democratic society for the purpose of the prevention and detection of crime. Here the provision of a disclosure order power in respect of suspected money laundering offences adds a valuable new investigatory tool for law enforcement authorities. It is comparable in effect to the power already available to the Director of the Serious Fraud Office under Section 2(3) of the Criminal Justice Act 1987. This power is necessary in order to obtain information and potentially evidence, not from the person suspected of the offence, but from others who may for example be providing financial or legal services to the suspect. It is the case that there is a wide range of professional service providers who either knowingly or unknowing facilitate the commission of money laundering crime and this power is necessary to ensure that they are required to provide information which could be used to prevent and detect such crime in a similar manner as exists for other financial crime such as fraud.
41. It is considered that the requirements that there must be a named person who is reasonably suspected of committing an offence and that the order must be sought for the purpose of the investigation sufficiently restrict the scope of the power. It can only be used where it is necessary for the purposes of a specific criminal investigation into a money laundering offence. Moreover, the power is subject to robust safeguarding measures to ensure that it will only be used when necessary and in a manner that is proportionate. Foremost among them is the requirement that a senior court must be satisfied that the test is met. It is also considered that the requirement of permission from a senior officer before making the application will safeguard the power from being used arbitrarily or other misuse. In addition the power will be subject to Codes

of Practice with which officers must comply. This further bounds the circumstances in which the power may be used and ensures consistency of approach.

42. Power to extend moratorium period (Cl. 9) – It is accepted that it is arguable that the extension of the moratorium period may interfere with Article 8 in so far that it will have the likely effect of extending the period of time by which property may not be processed by a service provider. This could leave property, for example, sitting on account for up to 186 days instead of the current 31 days.
43. It is considered that the power is necessary and proportionate to the aim of preventing and detecting the commission of crime. It is necessary to allow the investigating authorities sufficient time to investigate the possibility of further action to either recover the property or take criminal proceedings against those involved. An extension may only be granted by the court and extensions can only be for a period of up to 31 days, renewable up to 186 days from the end of the first 31 day period. The justifications outlined below in relation to A1P1 also apply for Article 8 purposes. (see below at Paragraphs).
44. An automatic extension for a period of up to 31 days is provided for where a Court has been unable to determine an application prior to the expiry of the initial moratorium period; to allow for a potential further period of up to 5 days for consideration as to whether or not to bring an appeal; and to allow for a potential further period of up to 31 days to allow an appeal court to consider the application for appeal. The Court will have to deduct the period of any automatic extension from the duration of any extension it grants to the moratorium period.
45. It is considered that these potential additional periods of automatic extension are necessary and proportionate to ensure that there is sufficient judicial oversight of the application for an extension of the moratorium period. They do not significantly increase the potential likelihood of disproportionate interference with rights beyond the Clause as it stands and as explained in the original Memorandum.
46. Sharing of information within the regulated sector (Cl. 10) – The provisions set up a gateway which enables the sharing of information between persons within the regulated sector as defined in Schedule 9 of POCA without incurring civil liability. This engages Article 8 in so far as it enables the sharing of information of customers where the customer would otherwise expect it to be held subject to a duty of confidence.
47. It is considered that the measure is necessary and proportionate in a democratic society for the purpose of the prevention and detection of crime. The UK is one of the world's leading providers of financial and related services and the regulated sector is targeted by criminals (both international and domestic) to attempt to conceal the proceeds of crime and corruption. It is considered that enabling persons in the Regulated Sector to share information about persons over whom they have suspicions of money laundering will assist the sector to develop its risk based approach and lead to the prevention and better detection of persons engaged in such crime.

48. In particular, the gateway is only applicable where there is reasonable suspicion that a person is engaged in money laundering and further information is required in connection with that suspicion to enable a full report to be made to the National Crime Agency.
49. While the effect of the gateway will be to remove civil liability in relation to the sharing of the information, it will have to be shared in accordance with the data protection principles set out in the Data Protection Act 1998 at Schedule 1; personal data shall be processed fairly and lawfully, personal data shall be processed in accordance with the rights of data subjects, etc.
50. Further information notices and orders (Cl. 11) – It is accepted that a requirement to provide further information engages Article 8 potentially in relation to the person from whom the information is requested and the persons who are the subject of that information.
51. It is considered that the potential interference is justified as necessary and proportionate for the purpose of the prevention and detection of crime. The UK is one of the world's leading providers of financial and related services and the regulated sector is targeted by criminals (both international and domestic) to conceal the proceeds of crime and corruption. It is essential that the National Crime Agency has sufficient powers to allow it to analyse and investigate reports of suspicious activity that it receives from the sector. This is in line with the recommendations made by the Financial Action Task Force under which a Financial Investigation Unit should be able to obtain information from persons in the regulated sector (Recommendation 29). The power is in accordance with law, restricted to this purpose and overseen by judicial authority. These safeguards prevent arbitrary or other misuse of the power and ensure necessity and proportionality.
52. In addition, an authorised officer may direct the provision of information to the NCA where an external request is received from overseas. It is considered necessary to provide this power to ensure that the UK is able to provide information to foreign partners in accordance with FATF Recommendation 29. This information may only be provided if the NCA authorised officer is satisfied that there are reasonable grounds to believe that the information relates to a disclosure made under a corresponding disclosure requirement, the person to whom the notice is given is in possession of all or part of the information, and the information is likely to be of substantial value to the foreign authority. If the person refuses to provide the information, then it may only be compelled by way of a court order. Whether or not to direct the provision of information, apply for an order or communicate information received to the foreign authority would be at the discretion of the NCA who would have regard to the requirements of the Overseas Justice and Security Assistance Guidance at all stages. These restrictions ensure that the exercise of the foreign disclosure power is proportionate and in accordance with the law for the prevention and detection of crime.
53. Unlawful Conduct: Gross Human Rights Abuses or Violations (Cl. 12) – This clause amends the Proceeds of Crime Act 2002 (“POCA”) to provide that ‘unlawful conduct’

for the purposes of the civil recovery provisions within Part 5 of POCA may include conduct that occurs overseas which constitutes or is connected to the torture or inhuman, degrading or cruel treatment or punishment of a person in consequence of that person having whistle blown on illegal activity by a public official or otherwise having sought to obtain, exercise, defend or promote human rights or fundamental freedoms. The conduct need not be criminal in the place where it occurred but must, if it had been carried out in the UK, constitute an offence triable on indictment (or either way). The torture or inhuman, degrading or cruel treatment or punishment (but not conduct connected to it) must have been carried out by a public official or done at the instigation, consent or acquiescence of one.

54. Conduct that is connected to torture or inhuman, degrading or cruel treatment or punishment includes: acting as an agent for another in connection with activities relating to it; directing, or sponsoring, such activities; profiting from such activities, or materially assisting such activities.
55. The provisions as they relate to torture will have retrospective effect but civil recovery proceedings are subject to a statutory limitation period providing that the civil action must be brought within 20 years of conduct occurring. The provisions as they relate to inhuman, degrading or cruel treatment or punishment do not have retrospective effect.
56. The application of these provisions could interfere with Article 8 in that they enable the state to recover the property of persons on the ground that the property was obtained through unlawful conduct.
57. It is considered that the interferences with Article 8 is justified as necessary and proportionate for the purpose of achieving a legitimate aim – the prevention and deterrence of torture and inhuman, degrading or cruel treatment or punishment and the use of the UK financial system as a repository for sums made by or in connection with such activities. It is considered that both forms of conduct have long been unlawful under international law (UN Convention Against Torture) and any persons engaging in, or connected, with such activity could reasonably expect that any property deriving from that conduct is apt to become recoverable by the UK. The same justification would apply in respect of any interference with A1P1.
58. Definition of Cash (Cl. 13) - This clause amends the Proceeds of Crime Act 2002 (POCA) and the Anti-Terrorism Crime and Security Act 2001 (ATCSA) to bring additional means of money transfer into the definition of 'cash' in that legislation (which provides for the seizure, detention and forfeiture of cash). These include: gaming vouchers and fixed value casino tokens.
59. It is acknowledged that this may interfere with Art. 8 however any interference is considered justified on the basis that there is evidence to support the view that such instruments are being used for criminal purposes. The existing safeguards on the exercise of powers against 'cash' will be applicable also to these instruments. It is therefore considered that the use of powers against these

instruments are necessary and proportionate and therefore compatible with Art. 8. This analysis also applies for the purpose of A1P1.

60. Forfeiture of certain personal (or moveable) property (Cl. 14) – This provision contains a power to search premises for property, which derives from or is intended for use in unlawful conduct. The power is exercisable where an officer is lawfully on premises, and reasonably suspects that a “seizable” listed property is on the premises. The search power extends to vehicles, and to a search of the person, with restrictions and which mirror existing procedures under section 289 of POCA (in respect of searches for cash). It is accepted that the power to search will give rise to issues relating to Article 8.
61. The search can only be carried out where an officer suspects that there is on the premises a “seizable” item, meaning an item falling within the categories applicable for these powers, which derives from, or is intended for use in, unlawful conduct. It follows that the search power can only be exercised in pursuance of the restricted purpose of the power. The powers can only be exercised with prior approval of a judicial officer or (where that is not practicable) by a senior officer. This would include circumstances where there is insufficient time to make a judicial application. This enables the powers to be used urgently where the property might otherwise be dissipated, but imposes safeguards by establishing that prior authorisation should normally be obtained for the use of the powers.
62. In addition, where the search is of a vehicle, the powers may not be exercised where the vehicle is at the individual’s dwelling, or with permission at another person’s dwelling. Searches of the person are only exercisable so far as reasonably required for finding a listed property, and do not include intimate or strip searches. These safeguards ensure that the exercise of the search power is proportionate, as well as in pursuit of a legitimate purpose.
63. As the power allows the forfeiture of certain listed property types, it is necessary to consider whether an individual’s Article 8 rights might be infringed by the forfeiture of a particular item. The Government does not accept that, as a matter of principle, an individual’s rights under Article 8 are engaged by the forfeiture of a listed item. However, if their Article 8 right was engaged any interference would be justified on the basis that the property can only be forfeited where a court has found that it derives from, or was intended for use in, unlawful conduct.
64. Accordingly, any interference with Article 8 in respect of these measures is considered to be justified.

Part 2 – Terrorist Financing

65. The measures contained in Part 2 make equivalent provision to a number of those contained in Part 1 and engage the same rights. They do so in relation to an arguably more urgent public interest – the prevention of terrorism. For that reason the analysis carried out in relation to Part 1 applies at least equally to these provisions.
66. Disclosure orders (Cl. 33, Schedule 2) – It is acknowledged that Article 8 may be engaged in the same way as the corresponding POCA amendments in Part 1.
67. It is considered that any interference with the Article 8 rights of either the subject of the order or the person to whom it is addressed will be justified as necessary and proportionate in a democratic society for preventing terrorist financing offences from occurring and investigating terrorism property. That is a serious public interest and is within the permitted interferences with Article 8.
68. There must be reasonable suspicion that a person has committed an offence under Sections 15 to 18 of the Terrorism Act 2000 (offences relating to fund raising, use and possession of money or property for the purposes of terrorism, funding arrangements and money laundering) before an Order may be sought. The information sought must be relevant to the terrorist finance investigation. In addition an application for the Order must be made to the Crown Court by a senior police officer. It is considered that this power is necessary in order to obtain all relevant information from third party sources where a person is suspected of involvement in terrorism financing offences and that it is subject to sufficient safeguarding to ensure that it is used proportionately.
69. Sharing of information within the regulated sector (Cl. 34) – Article 8 is engaged in the same way as for Part 1 as it is considered necessary to the need to prevent terrorism to permit persons in the regulated sector who may be providing services to persons concerned in terrorism to report their suspicions to the police without incurring civil liability. The gateway is sufficiently restricted by the need for suspicion and the police must be provided with information in relation to the initial suspicion.
70. Further information notices and orders (Cl. 35) – This power enables police or the NCA to direct that any person in the regulated sector to provide specified information relevant to the investigation of a suspicious activity report received under S. 21A of TACT in relation to the terrorist financing offences (S15-18 of TACT). It can also be triggered by a request from a foreign authority. In both cases, police may apply to a court to compel the provision of the specified information.
71. It is necessary and proportionate in a democratic society to allow for the relevant authorities to compel further information in relation to reports of suspicious activity relating to terrorism financing and property in order to prevent and detect acts of terrorism. The power is overseen by the appropriate court and may only used to obtain further information in relation to the disclosure initially received. In addition the power is considered necessary to achieve the standards required by with FATF Recommendation 29. Accordingly, any interference with Article 8 in respect of this measure is considered justified.

72. Civil Recovery (Cl. 37-38) – The measures amend the Anti-Terrorism Crime and Security Act 2001 to enable forfeiture of certain personal (or moveable) property or money held in bank and building society accounts. The measures provide a power to disrupt and prevent terrorist activities equivalent to the civil recovery provisions in relation to other criminal activity outlined above. The Government considers that the same justifications as above apply at least to the same extent in relation to terrorism and perhaps even more strongly as preventing terrorist activity is of the utmost importance to public safety and the prevention of disorder or crime.

A1P1 – Protection of property

73. The Government considers that the key provisions of Part 1 giving rise to A1P1 issues relate to UWOs; the power to extend the moratorium period; and, civil recovery measures including: cash forfeiture; extension of ‘unlawful conduct’ for civil recovery purposes to torture etc; forfeiture of money held in bank and building society accounts and forfeiture of certain listed items of property. The Government considers that the equivalent provisions in Part 2 relating to the forfeiture of terrorist cash and property also engage A1P1. In Part 3, issues would arise in the (unlikely) event that the offence in relation to foreign taxes (clause 38) was prosecuted in circumstances where the foreign tax in question violated human rights”

Part 1 – Proceeds of Crime

74. Unexplained Wealth Orders – The effect of the UWO itself is limited, and it is not the mechanism by which property is finally recovered. It is merely an investigative tool not a property seizing power. There are two main effects of the UWO; firstly, the individual concerned is required to explain how the property was legitimately obtained. Secondly, and only where that individual fails to comply with the requirements of the UWO order, the rebuttable presumption that the property is recoverable property arises. The effect of this is that the enforcement agency is able to use recovery proceedings under section 266 of POCA, or use other existing civil recovery mechanisms. The UWO is intended to provide a mechanism to gather evidence in full, and the rebuttable presumption is primarily intended to incentivise cooperation with the UWO and the ongoing investigation.

75. A1P1 specifies that individuals are entitled to the peaceful enjoyment of their possessions, and in particular that no person shall be deprived of his possessions except in the public interest and subject to conditions provided for by law and by the general principles of international law.

76. It is accepted that the nature of the UWO procedure means that A1P1 may be engaged. However, for the reasons given above, the UWO itself does not result in the individual being deprived of ownership of the property, so the extent of any possible interference is restricted to the requirement for the individual to provide an explanation of the origin of the property.

77. The remaining question is whether the UWO constitutes interference with the “peaceful enjoyment” of the property. The Government’s view is that the UWO does not interfere with the individual’s possession or use of the property, as the requirement to explain the origin of the property does not curtail or restrict those aspects of ownership. The Government acknowledges that the position is different where an Interim Freezing Order is imposed in addition to the UWO, as the effect of this secondary order will be to restrict the way in which the individual can use his property.
78. In any event the safeguards around the use of these provisions are sufficient to mitigate any interference with A1P1 so as to bring it within the permitted interferences. Firstly, the purpose of the UWO is in pursuit of the legitimate aim of recovering property which was obtained through crime, and the Government submits that this is unquestionably in the “general interest” (to use the terminology of A1P1). Secondly, the scope of application of the UWO is restricted, as set out above, and is subject to judicial oversight in the High Court. The Interim Freezing Order is consequential upon a UWO being made, and is itself subject to the further safeguard that the court must consider it appropriate to impose the freezing order because it is “necessary to avoid the risk of any recovery order that might subsequently be obtained being frustrated”.
79. Power to extend the moratorium period (Cl. 9) – The practical effect of extending the moratorium period is that a service provider is highly unlikely to provide a service in relation to property as requested for the duration of the extended moratorium period because the service provider would not be able to rely upon the statutory defence to the money laundering offences at S. 327-329 of POCA. If they provided the service they would therefore likely commit one of those offences. This could mean that property might be suspended for the duration of the moratorium period, for example sitting on account, rather than released to the originator or onwards in line with the original service request. The only change to the existing power is to provide a court process by which the duration of the moratorium period may be extended. It may now be extended for a total period of up to 186 days from the end of the first 31 day period rather than the current 31 day period. Each period of extension may only be for up to 31 days. It is accepted that it is arguable that extension of the period may engage A1P1 in so far that it restricts access to property albeit for a limited period of time.
80. It is considered that the power is justified as necessary and proportionate in a democratic society for the prevention and detection of crime. The power is necessary so that law enforcement authorities can properly investigate disclosures they receive to ensure that they may take relevant steps to either prosecute money laundering offences or commence civil recovery proceedings in respect of the relevant property. It is often the case in practice that the relevant law enforcement authorities are unable to progress their investigations sufficiently within the 31 day period to take action against the persons involved or in relation to the underlying property. This will allow them further time to progress either criminal or civil proceedings and prevent the commission of a crime in the interim period.

81. In order to obtain an extension, there must be an investigation being carried out into a relevant disclosure; it must be carried out diligently and expeditiously; further time must be required in order to progress the investigation and it must be reasonable in all the circumstances of the case.
82. The Crown Court provides a senior level of judicial authorisation. The parties are entitled to appear and be represented before it and the Court will not extend a moratorium where it would not be reasonable to do so in all the circumstances of the case.
83. Civil Recovery – ‘Extension of unlawful conduct to torture’ etc. and ‘extension of cash’ - It is considered that the justification given under Art. 8 above applies to A1P1.
84. Civil Recovery - Forfeiture of money held in bank and building society accounts (Cl. 15) – The power to forfeit money held in a bank or building society account is exercisable by order of the Magistrates’ Court. The test for whether the money can be forfeited replicates the existing test for the forfeiture of cash at section 298 of POCA. The court must be satisfied that the money is recoverable property (within the established meaning of sections 304-310 POCA), or that it is intended for use in unlawful conduct (“unlawful conduct” is defined at section 241 of POCA). It is accepted that A1P1 is engaged when a measure has the effect of depriving an individual of ownership of their property.
85. The new powers create a specific type of freezing order (an Account Freezing Order- “AFO”) which can be obtained by order of the Magistrates’ Court. It is accepted that freezing the property arguably could constitute an interference with an individual’s rights under A1P1, despite the fact that the AFO does not result in a final determination of the individual’s rights.
86. Given that forfeiture only occurs where the court is satisfied that the property was obtained through, or intended for use in, unlawful conduct, it is submitted that this is proportionate, and in keeping with both domestic and international law on the recovery of the proceeds of crime.
87. The powers do not extend the scope of civil recovery, as bank accounts are already potentially recoverable property (though under existing powers for recovery in the High Court a minimum threshold of £10,000 applies, whereas for this procedure the minimum threshold is £1,000).
88. The application for the AFO must be made with the permission of a senior officer in the relevant law enforcement agency. The court may only make the order if satisfied that there are reasonable grounds for suspecting that money held in the account is recoverable property, or is intended for use in unlawful conduct. The AFOs effect is limited as it applies for a period of time specified by the court, which may be varied upon application, to a maximum limit of 2 years. These provisions ensure that the interference with the individual’s property rights is both proportionate and subject to judicial oversight.

89. The powers could be utilised in respect of joint accounts, including in circumstances where one of the account holders is not linked to the property which is suspected to be linked to unlawful conduct. Any person who is affected by the account freezing order may apply, at any time, to the court to set aside or vary the order. In those circumstances, the court has the ability to make exclusions from the prohibition on making withdrawal or payments from the account (as it also can when it makes the order initially). Any person aggrieved by the forfeiture can appeal the order to a higher court.
90. As with the cash forfeiture provisions, there is an administrative forfeiture procedure for these powers. It is intended that this will be used in circumstances where it is unlikely that the forfeiture will be contested. This includes cases where an account is suspended due to suspicions held by the bank or building society. The administrative forfeiture procedure is available after an account freezing order has been made under the procedure above. A senior officer may then give a forfeiture notice. If a forfeiture notice is given, and no objection to forfeiture is made within a period of not less than 30 days, the money can be forfeited. An objection must be made in writing to an address specified on the notice, but may be made by anyone. On receipt of an objection, the law enforcement agency must, within 48 hours, determine whether to apply for a forfeiture order (or a further freezing order) from the court. If no such application is made, the AFO ceases to have effect. These provisions ensure that administrative forfeiture of the money is proportionate, and can only arise where the account has first been frozen by order of the court. The process for objecting is not onerous, and offers an appropriate safeguard.
91. Civil Recovery - Forfeiture of certain personal (or moveable) property (Cl. 14) – The purpose of these powers is to provide a method by which items which are being used within the criminal economy in lieu of cash might be recovered. The items in question are all potentially recoverable using existing procedures in the High Court (as above, this is subject to a minimum threshold of £10,000, whereas the new powers will apply a minimum threshold of £1,000). The new powers differ because they will allow officers to seize listed items and subsequently apply for forfeiture in the Magistrates' court. For complex cases, the procedure will operate in the High Court.
92. It is accepted that seizure of property may give rise to issues relating to A1P1, even though they do not represent a final determination of property rights. Seizure can only be carried out where an officer has reasonable grounds to suspect that: the item is listed type of property on the face of the legislation; it is recoverable property (as defined in Part 5 of POCA as the proceeds of unlawful conduct), or intended for use in unlawful conduct (whether this applies to all or part of the property); and its value is not below the minimum threshold of £1000.
93. The continued detention of the seized property must be authorised by a senior officer after an initial detention period of 6 hours. The senior officer may only authorise detention for a further 42 hours (making a total of 48 hours from the time the property was seized). Only where the court is satisfied that the property is a listed item, of the relevant value and that further detention is justified while the derivation or intended use of the property is investigated, may it authorise further detention beyond this time. The initial order for further detention may not exceed a period of 6 months from

seizure, and any subsequent orders for further detention may not exceed a total period of 2 years from the seizure. If the court is satisfied, upon an application, that the conditions for detaining the property are no longer met, it can order the release of the property.

94. By setting these requirements, the provision ensures that seizure can only be carried out for a legitimate purpose, and is subject to appropriate initial safeguards in addition to judicial oversight where the item is to be detained for more than 48 hours.
95. There is no administrative forfeiture procedure for these listed categories of property, and forfeiture orders are made by the Magistrates' Court. The court may order forfeiture only if it is satisfied that the property, or part of the property, is recoverable property or is intended for use in unlawful conduct. This is proportionate, and in keeping with domestic and international principles on the recovery of the proceeds of crime.
96. The provisions contain safeguards to ensure that the rights of joint owners are protected. Where the court orders forfeiture of part of an item of property, there are provisions which allow the law enforcement agency to realise the value of the property, and return to the owner of the share that was not forfeited the value of his share. There are also provisions which allow the parties to come to an agreement about the extent of each owner's share, and the joint owner whose share is not to be forfeited can pay a sum equivalent to the forfeitable property, in return for the release of the item to him. This is akin to the procedure under the existing civil recovery mechanism in the High Court. It is possible to appeal against both the order to forfeit some or all of the item or for an order by the court to determine the shares held by each owner.
97. While it is acknowledged that compelling the sale of the property would interfere with the A1P1 rights of the owner of the non-forfeited share of the property, that owner will still receive the equivalent value of his property. This is a proportionate outcome which balances the State's legitimate interest in recovering the proceeds of crime against the joint owner's rights under A1P1. In general, the provisions relating to joint owners contain robust safeguards to ensure that the interests of joint owners whose share is not forfeitable are protected.

Part 2 – Terrorist Financing

98. The measures contained in Part 2 make equivalent provision to a number of those contained Part 1 and engage the same rights. They do so in relation to an arguably more urgent public interest – the prevention of terrorism. For that reason the analysis carried out in relation to civil recovery under Part 1 applies at least equally to these provisions.
99. Civil recovery of terrorist property - forfeiture of certain personal (or moveable) property (Cl. 37) – This is a power for police to seize and apply for forfeiture of property, consisting of listed tangible items, that is reasonably suspected to be

derived from terrorism or intended for use in terrorism. It is accepted that the seizure and forfeiture of such property engages A1P1.

100. It is considered that terrorists may use property in lieu of cash in order to evade the cash forfeiture provisions of the Anti-Terrorism Crime and Security Act 2001. Accordingly similar provision is required as for the POCA amendments discussed above. The forfeiture of this property may only take place following a judicial hearing and the owners of the property have full opportunity to make representations at the court hearing. It is considered that it is necessary for police to have the power to disrupt exchange of terrorist property in order to prevent acts of terrorism from taking place and to recover the proceeds of any acts of terrorism. The safeguards described above ensure that the power will be used proportionately.
101. There is no minimum threshold applicable to the value of property that may be subject to this measure (and that discussed below) as there is in the equivalent Part 1 measures and that reflects the fact that property of very low value can be used in the commission, preparation and instigation of acts of terrorism.
102. Civil recovery of terrorist property – forfeiture of terrorist money held in bank and building society accounts (Cl. 38) – This is a power of forfeiture over money that is reasonably suspected to be terrorist property that is deposited in a bank account. It is accepted that this engages A1P1.
103. It is considered that terrorists have terrorist property in bank accounts and that is difficult to recover such money as often it may be of relatively low value so that civil recovery proceeding would not be possible. Accordingly powers which enable a more straightforward means of recovery, analogous to that in relation to terrorist cash, is necessary in order to disrupt terrorism and recover the proceeds of terrorism. An application will have to be made to a court to forfeit the money and the owners will have the right to attend the court hearings. Accordingly it is considered a necessary measure and the attendant safeguards ensure that its use will be consistent and proportionate.
104. The Government considers that this interference with the A1P1 rights of those involved in terrorist activities will be justified as necessary and proportionate in a democratic society for preventing terrorist financing offences from occurring and investigating terrorism property. That is a serious public interest and is within the permitted interferences of A1P1.

Part 3 – Corporate Failure to Prevent the Facilitation of Tax Evasion

105. Foreign Tax Offence (Cl. 43) – The foreign tax offence makes it an offence (subject to the reasonable procedures defence) for a corporation to fail to prevent a person associated with it from criminally facilitating another person from committing a foreign tax evasion offence (subject to a requirement of “dual criminality”).

106. Were a foreign tax imposed in a discriminatory or expropriating fashion that violated human rights (for example a 99% rate of tax imposed only on a specific minority of the population), a prosecution for the new offence, to indirectly enforce that human rights violating tax, may be argued in limited circumstances to interfere with the defendant relevant body's rights (typically A1-P1).
107. To the extent that there is an interference, it is considered that it is justified by the general interest in the existence of an offence to address the difficulties in prosecuting corporations who engage in the facilitation of tackle tax evasion. If the circumstances were to arise where the defendant's rights were so affected a prosecution is unlikely to be in the public interest.

Home Office and HM Revenue & Customs

28 February 2017