THE ECONOMIC CRIME (TRANSPARENCY AND ENFORCEMENT) BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS MEMORANDUM BY THE HOME OFFICE, THE DEPARTMENT FOR BUSINESS, ENTERPRISE AND INDUSTRIAL STRATEGY AND HM TREASURY

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights ("ECHR") in relation to the Economic Crime (Transparency and Enforcement) Bill ("the Bill"). This memorandum has been prepared by the Home Office, the Department for Business, Enterprise and Industrial Strategy, and HM Treasury. On publication of the Bill, the Secretary of State (the Rt Hon Priti Patel MP) made a statement that, in her view, the provisions of the Bill are compatible with the Convention rights.

Summary

2. The Bill is divided into three Parts: the first deals with the registration of overseas entities; the second deals with unexplained wealth orders; and the third deals with sanctions.

Part 1 – registration of overseas entities

3. In 2018, the Register of Overseas Entities Bill (the "ROE Bill") was put out for pre-legislative scrutiny. An amended version of the ROE Bill forms Part 1 of the Bill. Part 1 establishes a register of overseas entities, in which an overseas entity can apply to be registered by providing details about itself and its beneficial owners. While registration is *prima facie* voluntary, Part 1 provides that not doing so will result in: (1) an overseas entity being unable to register as proprietor of land in the UK (critical for obtaining full legal title) via the three Land Registries, and (2) certain dispositions made by an overseas entity registered proprietor being incapable of registration at the Land Registries.

4. Clauses 3 to 18 create the register and the framework in which an overseas entity can apply to be registered. Once registered, an overseas entity is

required to update annually until such time as it successfully applies to be removed from the register. The application will require the overseas entity to disclose information about itself and its beneficial owners, having first taken steps to identify its beneficial owners.

5. The register will be held by the registrar of companies for England and Wales and will be, for the most part, accessible to the public. Clauses 19 to 31 replicate a number of functions and powers contained in the Companies Act 2006 ("the 2006 Act") pertaining to the registrar in relation to the register it keeps for UK companies.

6. Schedule 1 to the Bill sets out the information required about an overseas entity, its beneficial owners, and where required, its managing officers for the purposes of the application to register and the updating requirements.

7. Schedule 2 to the Bill sets out who is a beneficial owner of an overseas entity. This is modelled on the "People with Significant Control" Regime for UK companies set out in Part 21A of, and Schedule 1A to, the 2006 Act.

8. Part 1 of Schedule 3 to the Bill, as introduced by clause 32, inserts new Schedule 4A into the Land Registration Act 2002 ("LRA 2002"). Schedule 4A provides that no application may be made to register an overseas entity as proprietor of a "qualifying estate" (a freehold estate or a leasehold estate of over 7 years) unless the overseas entity is a "registered overseas entity" at the time of the application (or is exempt). For these purposes, an overseas entity will not be a "registered overseas entity" unless it has registered on the overseas entity register and has complied with the update requirement.

9. Where an overseas entity is registered as proprietor of a qualifying estate, Schedule 4A requires HM Land Registry for England and Wales ("HMLR") to insert a restriction into the title register for the estate. The restriction will prohibit the registration of certain dispositions in respect of the estate unless the entity is a registered overseas entity (or is exempt) at the time of the disposition. The

dispositions are (a) a transfer of the estate (i.e. sale); (b) the grant of a lease of over 7 years out of the estate; and (c) the creation of a charge over the estate.

10. When land is sold to a person, it is legally possible for that person to make dispositions in respect of the land before being registered as the proprietor. Schedule 4A therefore also prohibits the registration of the dispositions mentioned above made by an overseas entity in these circumstances.

11. Both the restriction and the prohibition on registration are subject to exceptions, aimed at protecting third party rights. An overseas entity that makes a disposition which cannot be registered by virtue of the restriction or prohibition against registration (as the case may be) will be guilty of a criminal offence.

12. Part 2 of Schedule 3 provides for a transitional regime for overseas entities that are registered proprietors of qualifying estates when the Bill comes into force and became so on or after 1 January 1999 (the date when HMLR began to record whether or not a registered proprietor is an overseas entity). These entities will have 18 months from the commencement date in which they can register as an overseas entity or dispose of the land if they choose to. If, at the end of that period, the overseas entity remains the registered proprietor of the estate and has not registered in the overseas entities register, it will have committed an offence. HMLR is also required to insert the restriction described above into the title registers of these estates, which will come into effect at the end of the transitional period.

13. Schedule 4 to the Bill amends the Land Registration etc. (Scotland) Act 2012. It inserts new Schedule 1A into that Act which makes equivalent provision as Schedule 4A described above in respect of Scotland, subject to existing differences in land registration in Scotland. The key difference is that, while the requirements will apply to some overseas entities that are existing registered proprietors of qualifying estate at the time of commencement, it is limited to those entities that registered from 8 December 2014 (rather than 1 January 1999 in England and Wales). This is the relevant date on which the Registers

of Scotland (the equivalent to HMLR) began to record whether or not a registered proprietor was an overseas entity.

14. Schedule 5 to the Bill inserts Schedule 8A into the Land Registration Act (Northern Ireland) 1970. Schedule 8A makes provision equivalent to Schedule 4A described above in respect of Northern Ireland, again subject to existing differences in land registration in Northern Ireland. The key difference is that the requirements will only apply to new purchases by overseas entities on or after the commencement date; those which are existing registered owners of land in Northern Ireland are not in scope due to the lack of information held about those entities by the Northern Ireland Land Registry currently.

Part 2 – Unexplained Wealth Orders

15. The aim of Part 2 of the Bill is to amend the Proceeds of Crime Act 2002 ("POCA") to strengthen powers of the National Crime Agency ("NCA") to make effective use of "unexplained wealth orders" ("UWOs") by:

a) where a UWO is made in respect of a legal entity, providing that it may also specify a "responsible officer" in respect of that legal entity (including for example a director or officer, or a partner in a partnership) and to whom the obligations in the UWO will equally apply (clauses 40 and 41); and amending the current provisions for the 'income requirement' in sections 362B(3) and 396B of POCA (clauses 42 and 43);

b) increasing the maximum statutory time period afforded to enforcement authorities to review material provided to them in response to a UWO before a corresponding Interim Freezing Order ("IFO") over the relevant property expires (and so before the property can be moved beyond the reach of law enforcement) (clauses 44 and 45);

c) reforming the costs rules so far as they are applied to these cases, to limit an enforcement authority's liability to meet the legal costs of the

respondent that may arise in relation to certain proceedings related to a UWO or a corresponding IFO (clauses 46 and 47).

Part 3 – sanctions

16. There are four short clauses in relation to sanctions:

a) Clause 48 amends section 146(1) of the Policing and Crime Act 2017 to change the basis on which the Treasury can impose a monetary penalty against a person who breaches financial sanctions. There will no longer be a need for the Treasury to prove that the person knew or had reasonable cause to suspect that they were breaching sanctions.

b) Clause 49 relates to the imposition of monetary penalties and removes the obligation on a Minister of the Crown to determine a review (of the Treasury's decision to impose a penalty) personally.

c) Clause 50 enables the Treasury to publicise reports of cases where the Treasury has concluded there was a breach of sanctions but decided not to impose a financial penalty against the person.

d) Clause 51 widens the powers in the Sanctions and Anti-Money Laundering Act 2018 to make provision about sharing of information.

17. The Government considers that the provisions of the draft Bill are compatible with the European Convention on Human Rights.

ECHR issues

18. This section addresses issues arising under the ECHR in relation to the Bill. The table below shows where ECHR issues are discussed in relation to each clause.

Clauses	*Art 6*	*Art 8*	*Art 14*	*A1P1*	*Retrospection*
Clauses 4, 7, 12 and 13 *Paragraphs 3, 6 and 7(1)(g) of Schedule 1*		●			
Paragraphs 3(1)(b) of new Schedule 4A (which Schedule 3 inserts into the Land Registration Act 2002) *Paragraph 6 of Schedule 3*				●	●
Paragraph 10 of Schedule 4				●	●
Schedules 3, 4 and 5			●	●	
Clause 38				●	●
Part 2 (clauses 40-47)	●	●		●	
Clause 48	●				
Clause 50		●			

19. The Departments (the Home Office, the Department for Business, Enterprise and Industrial Strategy ("BEIS"), and the Treasury) consider that the clauses of, and Schedules to, the Bill which are not mentioned in this section do not give rise to any ECHR issues.

<u>Article 6: Right to a fair trial</u>

Part 2 (clauses 40-47): unexplained wealth orders

20. As a preliminary point, the Government does not consider that proceedings in relation to UWOs or IFOs engage Article 6(1). It is accepted that an IFO interferes with the property rights of a property holder insofar as it amounts to a control of use of that property, and may in some circumstances engage Article 8. In respect of an IFO therefore, Article 8 and A1P1 import procedural protections that must strike a fair balance between the rights of the property holder and the public interest.

Extending the class of respondent to a UWO to include responsible officers

Interference: the responsible officer

21. Where the property holder to whom a UWO is given is a legal entity, the proposed amendment to POCA will enable the UWO to specify one or more persons who are a "responsible officer" in respect of that legal entity (including for example a director or officer, or a partner in a partnership). A person so specified will be a "specified responsible officer" and the obligations in the UWO will apply equally to that person as they apply to the legal entity.

22. The purpose of the proposed amendment is to provide that a UWO can specify a responsible officer thereby making that person subject to the obligation to provide the information sought by it, even though the responsible officer is not the property holder (the property being held by the respondent of whom the responsible officer is a director or officer etc).

23. The obligation on a specified responsible officer will be to provide information in response to the UWO, within the applicable response period, that is not false or misleading.

24. Therefore, without prejudice to paragraph 21 above, any interference that may be occasioned in respect of a specified responsible officer is limited insofar as the civil rights and obligations affected by the making of a UWO in respect of that person would not pertain to that person's holding of the property to which

the UWO relates. If it were the case that the responsible officer held the property in question then the responsible officer would, in fact, be a respondent themselves and a UWO would be sought accordingly.

Interference: the respondent

25. Under the current UWO regime, a failure by the respondent to comply with the requirements of a UWO, before the end of the response period, leads to a statutory presumption that the property in question is recoverable property – for the purposes of any proceedings which are subsequently taken under Part 5 of POCA (civil recovery) – unless the contrary is shown (section 362C and section 396C of POCA).

26. If a rebuttable presumption arises, the Department's view is that this is 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. An individual would not be deprived of their property unless a court made a recovery order at a subsequent hearing (where Article 6 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.

27. The Department's view is that this remains the case where, in addition to the respondent, the UWO specifies a responsible officer of the respondent.

28. Proceedings under Part 5 of POCA are subject to a number of safeguards. For example, an application for a civil recovery order must state who is alleged to hold the property (and, where the authority is unable to identify who holds the property, the steps that have been taken to try to establish their identity.)

29. The new category of responsible officer will be *in addition* to the person that the authority understands "holds" the property (see section 362A and section

396A). So, it is considered that the property holder will be aware that their property is being investigated under the terms of UWO and will therefore have the opportunity to participate and provide information affecting their property regardless of whether any specified responsible officer also does so. This is important as the information being provided (or not) to an enforcement agency could result in the application of the statutory presumption under section 362C or section 396C.

30. The Home Office considers that the ability to specify a responsible officer in a UWO will not result in any interference with the Article 6 rights of the relevant respondent.

Amending the costs rules

Interference

31. The proposed clause will remove the ability of a successful party to recover costs against an enforcement agency other than in circumstances in which the agency has acted unreasonably, dishonestly or improperly. This represents a departure from the long-standing principle that costs incurred must be met by the losing party, regardless of the reasonableness of the application.

32. The right of access to a court is a long-standing common law right,[1] as well as being guaranteed by Article 6 per *Golder v United Kingdom* (1979-80) 1 EHRR 524. In that case, the Court found the right of access to a court to be an inherent aspect of the safeguards enshrined in Article 6, referring to the principles of the rule of law and the avoidance of arbitrary power which underlay much of the Convention.

33. The Court has also held that the right of access to a court is not absolute but may be subject to limitations – see *Ashingdane v UK* (1985) 7 EHRR 528 at §57). Such limitations are within the State's margin of appreciation, and *"it is*

[1] See e.g. R (Unison) v Lord Chancellor [2017[UKSC 51

no part of the Court's function to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field".

34. However, the right of access to a court must be "practical and effective" rather than "theoretical and illusory". It must be shown that any limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.

35. Furthermore, a limitation will not be compatible with Article 6 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

36. *Černius and Rinkevičius v. Lithuania,* 2020 concerned modest fines levied against the applicants for a failure to comply with local labour laws. In each case the decision to issue the fines was successfully challenged in domestic proceedings. However, the legal costs incurred in doing so exceeded the level of the fine, thereby leaving the individuals financially worse off than if they had not challenged the fines. The domestic legal system made no provision for the recovery of costs even in the event that the impugned decisions had been unlawful. The applicants alleged a violation of the right to access to court, under Article 6(1).

37. The Court referred to the applicants' statement that going to court to defend their rights is pointless if in the end they are in a worse situation than they were before litigating. This was exactly what occurred since the financial burden on each of the applicants was nearly double or treble that which they had initially faced. Accordingly, the Court found that the *ex post facto* refusal to reimburse their costs nevertheless constituted a hindrance of the applicants' right of access to court.

38. As to the question of the proportionality of the interference, the Court also disagreed with the government's suggestion that the applicants should have chosen to be represented by a person of a lesser calibre than an advocate, in

order to mitigate the costs. The Court also did not find that the litigation costs which the applicants incurred were excessive or beyond what the recommendations by the Ministry of Justice indicated. The resulting disproportionate effect created an individual and excessive burden on the applicants.

Justification

39. The Home Office does not consider that the imposition of a UWO engages Article 6(1) whether made in respect of a respondent, or a responsible officer. The UWO procedure is an investigative tool and is not determinative of civil rights or obligations: it is used to obtain information about the ownership of certain property that it is not otherwise possible for an enforcement agency to obtain.

40. Following the making of a UWO, if the respondent (and, in future, any specified responsible officer) is able to provide information which explains adequately the ownership of the property in question, then the UWO and any corresponding IFO will be discharged (or recalled) and it is unlikely that further proceedings in respect of that property will follow. However, where that is not the case then a rebuttable presumption arises that the property is recoverable, and it is likely that civil recovery proceedings under Part 5 will follow.

41. The IFO procedure does not engage Article 6(1) directly insofar as it is not determinative of civil rights or obligations but merely prevents dissipation of assets to which a UWO relates. However, because it engages the control of use limb of A1P1 through the freezing of the property, and may engage Article 8 in some circumstances, then some procedural safeguards are required as part of the "fair balance" test.[2]

[2] See *Jokela v Finland* (2003) 37 EHRR 26, which was considered by the Court of Appeal in *Bank Mellat v HMT* [2011] EWCA Civ 1 (the Supreme Court subsequently declined to decide the A1P1 issue).

42. In that regard it is worth noting that there are several existing safeguards in respect of an IFO: enforcement agencies must comply with the published code of practice; an IFO requires, and is made in support of, a UWO; the making of an IFO is subject to prior judicial authorisation; an IFO is limited in duration (up to a maximum of 183 days under current proposals); the High Court (or Court of Session in Scotland) may vary an IFO and may discharge (or, in Scotland, recall) it at any time; there is a mechanism by which the owner of the property affected may make an application for compensation following the discharge (or recall) of an IFO in respect of losses occasioned by it.

43. The Home Office also argues that there is a clear distinction between the purposes of UWO and IFO proceedings — to investigate the origin of assets with limited impact of individual property rights in the meantime — and civil recovery — which may lead to the permanent deprivation of property.

44. Without prejudice to paragraphs 21 and 40 above, in terms of Article 6(1), the Home Office acknowledges the importance of the general principle on costs in ensuring that the right of access to a court is practical and effective. However, in this particular context, adherence to the general principle has the potential to expose enforcement authorities seeking UWOs (and corresponding IFOs) to a level of potential costs risk that is likely to impede their operational effectiveness.

45. The Court in *Černius and Rinkevičius v. Lithuania* acknowledged that public interest-related financial considerations *could* sometimes play a part in the State's policy to decrease State expenses. However, *"restricting an individual's right to recover the costs incurred in court when challenging the unlawful acts of public authorities, with the sole aim of reducing the possible financial burden on the State"* would be incompatible with the Convention.

46. In *Stankewicz v Poland* (2007) 44 EHRR 47 the Court recognised that restrictions on the recovery of costs against, in that case, a public prosecutor

who is unsuccessful in civil proceedings could be justified for the “protection of the legal order”,

47. The Court in *Černius* did not disregard the possibility that to limit reimbursement of litigation fees in administrative proceedings would be legitimate in the public interest provided: (a) the sole aim of such restriction was not reducing the possible financial burden on the State, and (b) the proceedings to which the restriction applied were not concerned with challenging the lawfulness of an administrative decision.

48. The current procedural framework governing costs already permits the court discretion to decide what costs are appropriate — e.g. in *NCA v Baker* the respondent’s costs were reduced from the £2.3 million initially sought to roughly £855k paid. Further, the court also has an existing power to strike out vexatious litigation.

49. However, case law has shown the application of the CPR and existing cost limiting measures to be narrow and only applicable in exceptional circumstances and in accordance with relevant Practice Direction of the CPR. There must be a substantial imbalance between the finances of the parties with costs disproportionately incurred, which is unlikely to be applicable in favour of an enforcement authority. Enforcement authorities are unlikely to have income that is disproportionately less than the respondents of a UWO.

50. Changes are therefore necessary to ensure that enforcement agencies acting in the public interest are able effectively to exercise their powers in support of the legitimate aim pursued by the UWO regime i.e. the prevention and detection of crime. The Home Office considers that, when taking reasonable steps to protect the public, enforcement authorities should not be exposed to excessive potential costs risk if they act with integrity and bring a reasoned case. This is consistent with the approach taken in respect of forfeiture proceedings in the case of R. *(Perinpanathan) v City of Westminster Magistrates' Court* [2010] EWCA Civ 40.

51. Corrupt actors must not be beyond the reach of law enforcement or legal challenge because they have extensive wealth—this is counterproductive to the aims of the UWO regime and POCA generally. Any reforms must recognise the balance to be struck between apportionment of an unjustified liability to substantial costs, individuals' property rights and their ability to fund their representation of their choosing.

52. Notwithstanding the Department's position that the UWO procedure does not engage Article 6(1), the Home Office considers that the existing safeguards around UWOS and IFOs are and will remain sufficient to ensure that the UWO regime is ECHR compliant.

53. The Home Office also considers that the common law constitutional right of access to justice is not disproportionately affected by the proposed changes. The Supreme Court in *R (Unison) v Lord Chancellor* considered the importance of the right of access to justice and the impact of, in that case, tribunal fees on that right. To note that those proceedings concerned an Order made by the Lord Chancellor in respect of tribunal fees, rather than primary legislation.

54. The Supreme Court emphasised the constitutional importance of the right of access to a court. It held that any hindrance or impediment to the right of access to a court had to have clear Parliamentary authority. In that case the Order to which the proceedings related was found to be *ultra vires* because there was a clear risk that persons would effectively be prevented from having access to justice because of it. In this case, the Home Office seeks an amendment to primary legislation.

55. The Home Office does not consider that, in all the circumstances, the proposed changes will create a clear risk that access to justice will effectively be prevented. Costs will still be recoverable in the circumstances set out in the draft clause (i.e. where an enforcement agency has acted unreasonably, dishonestly or improperly). This safeguard will motivate enforcement agencies

to ensure that cases are robust before applications are made, and will provide a safeguard against arbitrary use of the relevant powers.

56. Accordingly, the Home Office considers that the restrictions proposed strike a fair balance between the rights of affected individuals to access justice and the public interest in ensuring that the UWO regime is effective.

Part 3 (sanctions)

57. Clause 48 relates to the imposition of civil financial penalties on persons. It takes away, for the purposes of the civil law, the need for the Treasury to prove, on a balance of probability, that the person breached sanctions with knowledge or reasonable cause to suspect that they were doing so.

58. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

59. Article 6 is clearly engaged in relation to the determination of civil rights and obligations. This is all about the imposition of civil penalties for breach of sanctions' prohibitions. Equally, it is clear that the relevant person has access to justice. There are a series of safeguards available to fully protect a person's Article 6 rights. (1) The Treasury must still decide on a balance of probabilities based on the evidence that a breach of the prohibited act has been established. (2) The Treasury must explain the grounds for imposing a penalty and the person is given a statutory right to make representations before any penalty is imposed. (3) The Treasury must (as a matter of public law) consider those representations and must (by statute) inform the person of the decision. (4) The person may seek a review of that decision. This will no longer need to be undertaken by the Minister personally but will be taken, if not by the Minister, by someone senior who is not the original decision-maker. (5) The person can appeal the decision (on any ground) to the Upper Tribunal.

60. It is unclear whether or not a court would take the view that the power in s.146 of the Policing and Crime Act 2017 involves the determination of a criminal charge. The penalty is clearly civil in nature, which is one of the relevant considerations. However, (as also stated in the Memo for the 2017 Bill) the Government recognises that, due to the level of potential penalty, the impact on persons and that the same basic prohibitions are subject to criminal offences, it is arguable that the monetary penalty provisions could be classified as involving the determination of a criminal charge under the Engel criteria.

61. What this clause does is to take away the need to prove a mental element in the breach. This only applies however to the imposition of a civil penalty, not to the criminal offence. The Treasury also still bears the burden of proof to establish that there was in fact a breach of a financial sanctions prohibition. The change in the law will assist the Treasury in its remit to consider and enforce breaches of sanctions. It should also have the effect of driving behavioural change in companies, particularly but not only in the financial sector, who need to put in place appropriate systems and procedures to mitigate the risk of sanctions breach.

62. For the same reasons as given above, the Treasury's view is that this scheme is compatible with Article 6, whether assessed as a determination of civil rights or obligations or of a criminal charge. In particular, the obligation to seek and consider representations before making a final decision to impose a penalty, the additional safeguard of a review and, ultimately, the protection of an appeal before an independent and impartial tribunal where the powers of the Tribunal to set aside the decision are wide. While there will no longer be a need, in determining whether the Treasury have the power to impose a penalty, to decide that the person had requisite knowledge or suspicion of a breach, the Treasury is also obliged by statute to issue guidance as to the circumstances in which it may consider it appropriate to impose a penalty and how it will determine the amount of a penalty. This guidance will include provision about the culpability of the person including provision about the impact a person's knowledge, suspicion or the adequacy of systems and procedures may have

on the imposition and determination of a penalty.**Article 8: Right to respect for private and family life, home and correspondence**

Part 1 – registration of overseas entities

Clauses 4, 7, 12 and 13
Paragraphs 3, 6 and 7(1)(g) of Schedule 1

63. As explained above, an overseas entity will be required to have registered in the overseas entities register before applying to the relevant Land Registry to register as a proprietor of a qualifying estate. A disposition of registered estate does not operate at law until it is registered at the Land Registry, and therefore an overseas entity will not be able to acquire full legal title to the estate until it is registered as an overseas entity. Similarly, an overseas entity will be required to have registered in the overseas entities register (and have complied with the updating duty) for any subsequent dispositions made in relation to that estate to be registered.

64. A condition of registration is that the overseas entity discloses information about its beneficial owners. Where the entity has none, or they cannot provide complete information about them, details about their managing officers (e.g. a director) are required - see clause 4.

65. The required information about a beneficial owner or managing officer that is a natural person is set out in paragraphs 3 and 6 of Schedule 1 respectively, and includes their name, date of birth and nationality, a service address and usual residential address. Where a managing officer is not a natural person, paragraph 7(1)(g) of Schedule 1 requires that the name and contact details of an individual who may be contacted about the managing officer are provided.

66. Under clause 7, a registered overseas entity must deliver to the registrar updated information about, inter alia, the details of its natural person beneficial owners, managing officers and (in the case of non-natural person managing officers) individuals who may be contacted about them.

67. Before making an application for registration (clause 4) or removal (clause 9), or before updating the registrar under the duty in clause 7, an overseas entity is required by clause 12 to take reasonable steps to identify its beneficial owners. This includes sending an information notice to any person that it believes is its beneficial owner (clause 12(3)). The notice will require the person to whom it is given to state whether they are a beneficial owner and to confirm or correct the required information. The overseas entity may also send a notice under clause 13 to a person who the entity believes will know the identity of the entity's beneficial owner.

68. Any person who receives a notice under clauses 12 or 13 and fails to respond within 1 month of receipt without reasonable excuse will have committed an offence (see clause 15). Should the Secretary of State make regulations under the power in clause 38, a person committing this offence could be liable for a financial penalty under such regulations, instead of prosecution.

Interference

69. Part 1 of the Bill therefore requires the beneficial owner (and in some cases the managing officer or individual who can be contacted about the managing officer) to provide to the overseas entity personal information. The overseas entity is then required to disclose that information onto the register, the majority of which will be publicly accessible.

70. Therefore BEIS is of the view that clauses 4, 7, 12 and 13, as well as paragraphs 3, 6 and 7(1)(g) of Schedule 1, engage Article 8 of the ECHR which provides that everyone has the right to respect for his private and family life, his home and his correspondence. The Court has established that private life is a broad concept and the collection of information by officials of the state about an individual without his consent will interfere with the right to private life[3].

Justification

[3] X v UK No 9702/82, 30 DR 239 (1982)

71. BEIS is of the view that there are good arguments that this interference with Article 8 is justifiable under Article 8(2) of the ECHR, and necessary in a democratic society both in the interests of the economic well-being of the country and for the prevention of crime. Making beneficial ownership/managing officer information of overseas entities which own land in the UK publicly available will significantly aid law enforcement in identifying and sanctioning those who ultimately control overseas entities that are used for criminal purposes, as well as potentially deter the criminal misuse of corporate structures. There is also a wider economic and public benefit in increasing the transparency around overseas entities that own land in the UK.

72. BEIS also considers there to be good arguments that the measure is proportionate to the aims. The information required about individual beneficial owners and managing officers does not go beyond what is necessary in order to achieve the underlying policy objective. Moreover it closely follows the information that is required of individuals in relation to the "People with Significant Control" (PSC) Regime for UK companies and in respect of UK company directors (see sections 790K(1) and 163(1) of the 2006 Act respectively). This information is also made publicly available on the register for UK companies.

73. As is the case for PSCs and UK company directors, there are safeguards in the Bill provisions about disclosure of certain information. For example, an individual's usual residential address and day of date of birth will not be included in the material on the register that is open to public inspection (clause 22(1)). That information will only be available to law enforcement and other public authorities specified in regulations made under the power in clause 23. Clause 24 also contains a power to make regulations which will allow an individual to apply for their details to be protected from public disclosure. The policy intention is that regulations made under this power will allow a person to make this application where the public disclosure of their details (either as a beneficial owner or managing officer of the entity) will put them at risk of physical harm.

74. In relation to new purchases of land in the UK, it will be for the overseas entity (and where they have sufficient control, its beneficial owners) to decide whether they are content with the requirements of registration when considering the purchase. In relation to those overseas entities that are existing registered proprietors and will be in scope of the requirements, the transitional period will provide beneficial owners of the overseas entities 18 months in which to divest from/reduce control over the overseas entity or (where they have sufficient control) direct the overseas entity to dispose of the property – either of which will result in that person's details not going on the public register.

Part 2 - unexplained wealth orders

Extending the class of respondent to a UWO to include responsible officers

Interference

75. It is accepted that the UWO powers engage Article 8 because the requirement to explain the derivation of the property may have a significant impact upon a person's right to a private and family life, home and correspondence. The extension to the types of respondent could increase that impact by asking a specified responsible officer (e.g. an individual officer or director of a legal entity) to provide that information about a property they do not themselves hold. A UWO has effect in spite of any restriction on the disclosure of information: section 362G of POCA in respect of England and Wales and Northern Ireland, and section 396G in respect of Scotland.

76. It is possible in some circumstances that an IFO may engage Article 8 e.g. if the property to which it relates is domestic property, or property which a person requires to carry on a business, trade or profession, and the freezing order has an effect on the ability of a person to use it for that purpose. However, in that regard it is important to note that an IFO relates to the property held by the respondent and not by a specified responsible officer. The changes to which this part of the memo relates therefore do not make any change to the potential for an IFO to engage Article 8 and no further consideration is required.

Justification

77. The purpose of the UWO power is to assist law enforcement authorities in gathering evidence of criminal assets which derive from serious crime or corruption. There is strong evidence to suggest that high value assets are being purchased in the UK for the purpose of concealing the proceeds of crime and corruption and that these assets often far outstrip the declared or known income of persons in possession of them. There is a strong public interest in ensuring that the proceeds of crime are not deposited in the UK. Furthermore, the categories of person who can be a respondent to a UWO will still be clearly limited, with prior judicial authorisation and subsequent oversight of the power's use. The consequences of a UWO for any individual whose details are disclosed will also be subject to the safeguards described in paragraph 79 above.

Part 3 - sanctions

78. Clause 50 enables the Treasury to publicise the outcome of a decision not to impose a monetary penalty against an individual or company, but only in cases where the Treasury has decided on the balance of probabilities that the person has breached a financial sanctions prohibition. It is likely to engage Article 8 in the sense that the publication of a decision that a person has breached sanctions might adversely affect the reputation of the person.

79. Article 8, however, is not an absolute right. There are good reasons for the Office of Financial Sanctions Implementation (the part of the Treasury that makes these decisions) to want to publicise outcomes which result in a breach: (1) it helps to deter others, (2) it raises awareness of sanctions and what may constitute a breach of sanctions. Both these issues help to improve compliance with financial sanctions. The policy only applies where there is found to be a breach of the prohibited act on a balance of probability, after scrutiny of the relevant evidence. The clause itself (in simply stating the power) cannot be incompatible with Convention Rights. In any event, however, there are legitimate reasons underlying the power and it seems likely in practice that

publication would be considered to be a justified and proportionate interference with any Article 8 rights.

Article 1, Protocol 1: Right to peaceful enjoyment of possessions

Part 1 - registration of overseas entities

Paragraph 3 of Schedule 4A to the Land Registration Act 2002 (inserted by paragraph 4 of Schedule 3 to the Bill)

Paragraph 6 of Schedule 3

Paragraph 10 of Schedule 4 (makes equivalent provision in respect of Scotland)

80. Paragraph 4 of Schedule 3 to the Bill inserts a new Schedule 4A into the LRA 2002. Paragraph 3(1) of Schedule 4A requires HMLR to enter a restriction on the title register of a qualifying estate where satisfied that the registered proprietor of the estate is an overseas entity, and that entity became registered as proprietor on or after 1 January 1999. This will therefore apply to any overseas entity that was registered as proprietor after that date, and any new registrations on or after the commencement date.

81. The legal effect of the restriction is described in paragraph 7 above. The practical effect of the restriction is that where an overseas entity makes a relevant disposition at a time when it is not registered, and none of the exceptions apply, those dispositions cannot be completed by registration. For example, if the overseas entity sold the estate to A, A would not be able to register himself as the new proprietor. The policy intention is to prevent third parties conveyancing with the overseas entity where the overseas entity has not complied with the registration requirements. An overseas entity that makes a disposition which cannot be registered will commit an offence under paragraph 6 of Schedule 4A.

82. There are six exceptions to the effect of the restriction. The first is if the overseas entity is a registered overseas entity or an exempt overseas entity at the time of the disposition (“exempt overseas entity” means an entity which is

exempted under regulations made using the power in clause 33(6)). The remaining five are aimed at protecting third parties. They are: when the disposition is made in pursuance of a statutory obligation, court order or occurs by operation of law; when a contract made before the restriction is entered in the register required the disposition; where the disposition is made in the exercise of a power of sale or leasing conferred on the proprietor of a registered charge or a receiver appointed by such a proprietor; where the Secretary of State gives consent under paragraph 5 to the registration of the disposition (circumstances where it would be unjust not to register the disposition); or where the disposition is made by a specified insolvency practitioner in specified circumstances.

83. The operation of the restriction in relation to proprietors that registered before the commencement date is dealt with in the transitional regime in paragraph 6 of Schedule 3. Although HMLR will be required to enter this restriction after commencement, it will not come into effect until 18 months after that date. Over this period, using the contact details for these overseas entities (held at the Land Registry), officials at Companies House will write out to these entities to inform them of the incoming requirements. The overseas entities will be free over that period to either dispose of the land freely, or register on the overseas entities register. Colleagues at the Land Registries have confirmed that they can rely on existing powers to share contact information about these overseas entities with Companies House.

84. Paragraph 10 of Schedule 4 is intended to have the same effect in relation to overseas entities that are proprietors of land in Scotland at the commencement date as the restriction in paragraph 6 of Schedule 3, described above. There is no equivalent concept to a “restriction” (or an “inhibition” in the case of Northern Ireland) in land registration law for Scotland. Therefore, instead of the Keeper of the Registers of Scotland being under a duty to insert a restriction into the title registers of land owned by overseas entities, paragraph 10 of Schedule 4 provides, on the face of the Bill, that an overseas entity which is the proprietor of land in Scotland on the commencement date, and became proprietor on or after 8 December 2014, will have an 18 month transitional period in which they

will be free to dispose of the property if they choose to. At the expiry of that 18 month period, if the overseas entity remains a proprietor in relation to that estate, and has not complied with the registration requirements (and is not an exempt entity), not only will that entity commit an offence (see paragraph 9 of Schedule 4), any relevant dispositions made by that entity from that point onwards will not be capable of registration at the Registers of Scotland. The dispositions in scope are the same as for England, Wales and Northern Ireland: a transfer of the estate, the grant of a long lease or creation of a charge out of the estate.

85. The retrospective effect of these provisions and details about the consent of the Attorney General in May 2016 is discussed further below.

Interference

86. Paragraph 3 of Schedule 4A to the LRA 2002, in so far as it applies to overseas entities that are existing registered proprietors at the commencement date, and paragraph 10 of Schedule 4 to the Bill, engage Article 1, Protocol 1 ECHR ("**A1P1**") as they have the potential to interfere with the right of overseas entities to peaceful enjoyment of their property located in England, Wales or Scotland (as the case may be). The analysis that follows refers in shorthand to paragraph 3 of Schedule 4A, but it is equally applicable in relation to paragraph 10 of Schedule 4 to the Bill (which, as described above, makes equivalent provision in relation to overseas entities that own land in Scotland).

87. The ECtHR, when applying A1P1, follows the approach set out in *Sporrong and Lönnroth v Sweden*[4], which separated interference into three types, relating to peaceful enjoyment of possessions, deprivation of possessions or control of their use. The view of BEIS Legal is that the control limb is most likely to be engaged on the basis that the proposed sanctions fall short of a "de facto expropriation". In short, the Bill will control the use of an overseas entity's property where that overseas entity is in scope of paragraph 3(1)(b) of Schedule 4A, and the 18 month transitional period has expired. The overseas entity will

[4] (1983) 5 EHRR 35

subsequently not be able to make certain registrable dispositions in relation to the estate unless it is a "registered overseas entity" at the time of the disposition (or one of the exceptions applies).

Justification

88. BEIS's view is that the potential interference of paragraph 3 of Schedule 4A with A1P1 is justifiable because the restriction on registration of certain dispositions made by an overseas entity is in the public interest, is proportionate and strikes a fair balance between competing interests.

89. The ECtHR accepts that States are best placed to determine whether a given aim is **in the public interest** and therefore will not interfere unless the determination is "manifestly without reasonable foundation".

90. Where property rights are concerned, states have a considerable margin of appreciation in determining the existence of a problem of general public concern and in implementing measures designed to meet it. The general interest has been held to encompass a wide variety of measures including measures taken to combat crime[5] and in relation to criminal proceedings[6]. In *Air Canada v United Kingdom*[7] the ECtHR held that the measures taken (seizure of aircraft) conformed to the general interest in combatting international drug trafficking. It can be argued that the measures imposed by the overseas entities regime to prevent and combat the use of UK property for money laundering is one that is in the general interest and therefore justified.

91. Where land is currently owned by an overseas entity, the information available about that entity on the three Land Registers is very limited, at most showing the entity name and territory of incorporation. In practice, it is extremely difficult to ascertain the true owners of a large number of properties in the UK and particularly in London. Due to the opacity offered by company structures, which helps to distance the ultimate owners from assets they really own and

[5] *Air Canada v United Kingdom* (1995) 20 E.H.R.R. 150
[6] *Venditteli v Italy* (1994) 19 E.H.R.R. 464
[7] (1995) 20 E.H.R.R. 150

control, entities are at high risk of being used as a vehicle by crime organisations and corrupt individuals to hide proceeds of bribery, corruption and organised crime. Metropolitan Police Proceeds of Corruption Unit report that over £180 million worth of land in the UK was brought under criminal investigation as the suspected proceeds of corruption between 2004 and 2014, and 75% of these properties under investigation were owned by overseas entities. They report that these investigations often arrive at dead ends due to the lack of information available about the individuals who ultimately own or control the entity. Therefore BEIS's view is that there are compelling public interest reasons in requiring overseas entities that wish to carry out conveyancing transactions to register and provide beneficial ownership information as a way of identifying, combatting and preventing money laundering through UK property.

92. We note that these compelling public interest reasons for the measures form part of the proportionality analysis. BEIS is of the view that the restriction on registration of certain dispositions is a proportionate measure. There is a clear link between the aim of the restriction (to prevent the use of UK property as a means to launder money and to improve the transparency of overseas entities that own property in the UK) and the restriction as a measure which will prevent an overseas entity from enjoying the benefits of owning that property where that overseas entity has not complied with its legal obligations. In determining whether a fair balance is achieved, the State enjoys a wide margin of appreciation "both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question"[8].

93. We note that paragraph 5 of Schedule 3 provides that an overseas entity which is still the registered proprietor at the end of the 18 month transitional period and has not registered on the overseas entity register will have committed an offence. The Department considers that the criminal offence, while necessary to ensure the overseas entity registers *before* it comes to making a disposition

[8] *AGOSI v United Kindom* (1987) 9 EHRR 1 at [52]

(which may not be until many years down the line) will not, we believe, be sufficient in isolation. There are challenges to enforcing any criminal sanctions against overseas entities that may not have a physical presence in the UK beyond the land in question (they might not have an office or officers in the UK). The view of BEIS is that the proposed restriction will act as an effective method of enforcement. Finally we would add that the Bill provides for an 18 month transitional period in which an overseas entity can, if it chooses do, dispose of the property freely rather than register in the overseas entities register.

94. BEIS considers that the Bill has the potential to interfere with the right to the peaceful enjoyment of possessions and of private life, of the affected overseas entities but that such interference in these circumstances is justified in that it pursues the legitimate aim of tackling serious crime and corruption, and constitutes a proportionate means of achieving that aim.

95. Paragraph 10 of the new Schedule 4, achieves the same result as the restriction described above in relation to property owned by overseas entities in Scotland. There is no equivalent of a “restriction” under Scots law but the requirement on The Keeper to reject an application to register a “qualifying registrable deed” will have the same effect as the restriction. Therefore this provision also engages A1P1 and the justifications for the interference discussed above in relation to the provisions for England and Wales are applicable here.

Clause 38

96. This clause empowers the Secretary of State, by regulations, to make provision conferring power on the registrar to impose a financial penalty on a person if satisfied, beyond reasonable doubt, that the person has engaged in conduct amounting to an offence under Part 1 of the Bill.

97. Regulations made under clause 38 may, inter alia, include provision: about the procedure to be followed in imposing penalties; about the amount of penalties; for the imposition of interest or additional penalties for late payment; conferring rights of appeal against penalties; and about the enforcement of penalties.

98. The provision that may be made about enforcement includes provision for unpaid amounts to be secured by a charge on an interest in land (including provision about the priority of any such charge).

99. Under clause 38(4), the regulations must provide that (a) no financial penalty may be imposed under the regulations on a person in respect of conduct amounting to an offence if the person has been convicted of that offence in respect of that conduct, and (b) no proceedings may be brought or continued against a person in respect of conduct amounting to an offence if the person has been given a financial penalty under the regulations in respect of that conduct.

Interference

100. The power in clause 38 engages A1P1 as, if and when exercised, it will introduce a financial penalty regime which will deprive people of their property.

Justification

101. BEIS's view is that the interference of clause 38 regulations with A1P1 is justifiable because a civil sanctions regime, which is an alternative to prosecution, is in the public interest, is proportionate and strikes a fair balance between competing interests. BEIS does not consider that such regulations' ECHR interference would be "manifestly without reasonable foundation": the ECtHR would be extremely likely to defer to the UK's assessment that this regime is in the public interest, given the UK's wide margin of appreciation. A civil sanctions regime is a mechanism for enforcing the offence provisions in Part 1 of the Bill, acting as an additional deterrent to the threat of prosecution, and thereby representing a proportionate measure oriented to the legitimate end of combatting crime. Clause 38 regulations may prescribe the procedure for imposing, and the amount of, penalties, so the law will be clear and predictable, satisfying the "subject to the conditions provided for by law" requirement of A1P1. The possibility of appeal against the imposition of a penalty will present a safeguard against arbitrary A1P1 interference.

Part 2 – unexplained wealth orders

Extending the class of respondent to a UWO to include responsible officers

102. The same considerations apply as in relation to Article 6, above. To the extent that the amendment would involve any interference with the right to peaceful enjoyment of possessions, the Home Office considers this is justified in the interests of the prevention of crime.

Change to time limit for interim freezing order

103. An interim freezing order is an order made by a court under section 362J and section 396J in support of a UWO. It prohibits the respondent and any person from dealing in anyway with the property to which it relates, which will be property which is the subject of a UWO. Its purpose is to preserve the property to which the UWO relates whilst enquiries are carried out.

Interference

104. It is clear to the Home Office that law enforcement authorities may require longer than 60 days from compliance to assess a respondent's response to a UWO to determine the appropriate action to take.

105. As the High Court (or the Court of Session, in Scotland) is given the power to grant interim freezing orders, and may discharge or vary them under section 362K (in Scotland, recall or vary – see section 396K), it is reasonable that they are given the power to extend those orders should enforcement authorities have a legitimate need. It is considered the relevant court should be empowered to grant an additional 126 days to enforcement authorities reviewing any material provided in response to a UWO, on application.

106. The amendment will simply increase the *maximum* time period, for example from 60 to 100 days, as in some cases fewer than 60 days may be sufficient. The relevant court's power to grant, vary or discharge / recall a UWO is discretionary. In granting the court the power to extend the UWO, it

will be expected to exercise its discretion in an equivalent manner, taking into account the facts of the case and the proportionality of the proposed order.

Justification

107. In some cases, the 60-day period may not allow sufficient time to investigate the material provided by respondents to UWO. If new investigatory orders are required under Part 8 of POCA, this is likely to take weeks to obtain, particularly in cases with complex ownership structures. In some cases, multiple assets are frozen at the same time under a single investigation, requiring additional time to investigate each asset. Some UWOs require evidence to be gathered from overseas. Respondents may also provide excessive amounts of information to slow down the investigation.

108. Given the concerns above, and that the court will retain the flexibility to keep the time limit proportionate in the particularly circumstances, the Home Office takes the view that any additional interference caused by the extension of the maximum time limit would be proportionate and justified.

Part 3 - sanctions

109. Clause 48 relates to the imposition of civil financial penalties on persons. It takes away the need for the Treasury to prove on a balance of probability that the person breached sanctions with knowledge or reasonable cause to suspect that they were doing so. Culpability will however be considered in the decision whether to impose a penalty at all and, if so, how much. The imposition of financial penalties necessarily engages Article 1, Protocol 1. Subject to appeal, any penalty is required to be paid. But Article 1, Protocol 1 is not an absolute right. As set out above, there can be interference with this provision where the State is following a legitimate aim in the public interest. It is plainly justifiable for a State to decide that it is in the public interest to fine a person for breaching financial sanctions, which are put in place to meet important foreign policy objectives. As explained in the section on Article 6 there are also a number of

procedural protections further justifying the proportionality of this measure, including an appeal right to an independent and impartial tribunal. There are also limits to the amount that can be imposed: a maximum of £1m or 50% of the value of the breach, where known (whichever is the greater).

Article 14

Part 1 – registration of overseas entities

Schedules 3, 4 and 5 to the Bill

110. Schedules 3 to 5 insert new land registration provisions into the relevant land registration legislation for England and Wales, Scotland and Northern Ireland, which require an overseas entity to register in the overseas entities register in order to register title to land with one of the UK's three land registries. A failure to register with Companies House or to adhere to the updating duty will in most cases also affect the ability of the overseas entity to either sell the land, or create a long lease or a legal charge over the land as any buyer, lessee or chargee would be unable to register title/the charge (as relevant) with any of the land registries.

Interference

111. Article 14 of the ECHR provides that the enjoyment of rights and freedoms set forth in the ECHR shall be secured without discrimination on any ground, such as national or social origin. Article 14 therefore provides for a right not to be discriminated against in respect of the other rights laid down in the ECHR and its Protocols. It can be relied upon by both natural and legal persons. A measure can violate Article 14 taken in conjunction with another substantive article because it operates in a discriminatory way, even if the requirements of the substantive article are met.

112. The entities in scope of the new registration requirements are overseas entities; registration at Companies House is a pre-requisite to (i) registration of land ownership with the land registries and (ii) making certain registrable dispositions in relation to their land. UK-registered entities, while subject to the

requirement to disclose the same information about their beneficial owners (referred to under the domestic regime in the Companies Act 2006 as "people with significant control"), they are not subject to the same consequences in respect of land registration where they have failed to comply. Instead, the PSC requirements are enforced by way of making disclosure an initial condition of incorporation/formation and, going forward, underpinned by criminal offences.

113. Therefore the Government is of the view that as the provisions in Schedule 3–5 engage A1P1, they also engage Article 14 because their effect is that an overseas entity which has not registered in the overseas entities register will face consequences in respect of land registration which would not be the case for a UK entity in equivalent circumstances.

Justification

114. Different treatment does not constitute discrimination contrary to Article 14 where it has an objective and reasonable justification; that is where it is in pursuit of a legitimate aim and proportionate to that aim[9].

115. The Government considers that the measures have a legitimate aim in preventing the use of UK property as a means to launder money and to improve the transparency of overseas entities that own property in the UK.

116. For a measure to be proportionate it must strike a fair balance between the rights and freedoms of the individual and the general interest, having regard to the requirements of a democratic society. States are not required to show that there was no alternative non-discriminatory means of achieving the same aim[10]. The Government's view is that enforcing the registration requirements through land registration provisions is necessary because of the type of entity in scope of the regime. In contrast to UK entities, in relation to which the PSC regime is underpinned by criminal sanctions, limiting the enforcement measures under the draft Bill purely to criminal sanctions would give rise to a

[9] See *Case "relating to certain aspects of laws on the use of languages in education in Belgium" v Belgium ("Belgian Linguistics")*, App. No. 1474/62 et al; (1968) 1 E.H.R.R. 252 ("The Law", Part I(B), para. 10)
[10] *Rasmussen v Denmark*, App. No. 8777/79; (1984) 7 E.H.R.R. 371 (para. 41)

much less effective policy. In contrast to UK entities, which are much more likely to be based in the UK (as well as those individuals managing the affairs of those entities) it will be challenging for prosecutors to bring proceedings against overseas entities that may well not have any presence in the UK (other than through the land itself). It is therefore necessary that an additional enforcement mechanism is put in place, to ensure compliance with the new regime.

117. In addition, while UK-registered entities are subject to criminal sanctions for non-compliance with the domestic PSC regime, the domestic regime also has a dual enforcement mechanism; UK companies cannot incorporate in the UK if they do not provide information about their beneficial owners (i.e. people with significant control) to Companies House as part of their incorporation application. These two methods of enforcement are sufficient and adequate to ensure compliance of UK-registered companies with the PSC regime; however, in the context of the overseas entities regime, (i) enforcement through criminal sanctions is challenging and (ii) the UK has no control over incorporation of overseas entities and therefore the latter method of ensuring compliance cannot be used. The Government's view is that any potentially different treatment is proportionate given the nature of the entities in scope of the regime. Finally, as the policy is aimed at preventing the use of UK property for money laundering purposes, there is a clear link between the enforcement method (preventing the registration of certain land transactions in respect of the overseas entity) and the ultimate aim of the policy.

Parts 2 and 3 – unexplained wealth orders and sanctions

118. Neither Part 2 nor 3 give rise to Article 14 issues.

1 March 2022

Home Office

Department for Business, Enterprise and Industrial Strategy

HM Treasury