European Convention on Human Rights (ECHR) Memorandum

Parts 4 and 5 of the Economic Crime and Corporate Transparency Bill (Home Office, Ministry of Justice and Serious Fraud Office measures)

A. Summary of the Bill

1. The Economic Crime and Corporate Transparency Bill (the "**Bill**") follows the Economic Crime (Transparency and Enforcement) Act 2022 and similarly seeks to address the threat of illicit finance whilst maintaining the ease of doing business for legitimate commerce.

2. The Bill is made up of six Parts: the first three deal with Companies House processes, the law on limited partnerships and the Register of Overseas Entities. This memorandum focuses on the fourth Part which deals with the seizure of cryptoassets, and the fifth which deals with money laundering and other economic crime. The sixth contains general provisions.

Cryptoassets:

3. The aim of Part 4 of the Bill, which introduces the amendments in Schedules 6 and 7, is to extend the powers of law enforcement agencies to search for, seize or freeze, detain and recover, "cryptoassets". These are a digital form of property which is cryptographically secured and can include cryptocurrency such as Bitcoin. The amendments will do this, in particular:
    a. by removing the requirement in the Proceeds of Crime Act 2002 ("POCA") for a suspect to have been arrested before powers are used to search for and seize property ahead of possible confiscation and by expanding the search, seizure and detention powers to allow those powers to be used effectively in relation to cryptoassets;
    b. by creating new powers in POCA – modelled on existing powers – to search for and seize or freeze cryptoassets suspected of having been obtained through unlawful conduct or of being intended for use in unlawful conduct; and ultimately to forfeit those which have been obtained through, or which are intended for use in, such conduct.

Money laundering, terrorist financing and other economic crime:

4. The principal aims of Part 5 of the Bill (miscellaneous) are to:
    a. create new exemptions from the key money laundering offences, so that firms subject to anti-money laundering duties (the "regulated sector") can carry out certain acts on behalf of their customers without seeking consent in advance from the National Crime Agency ("NCA");
    b. expand law enforcement powers in POCA and the Terrorism Act 2000 ("TACT") to seek information from the regulated sector in order to tackle money laundering or terrorist financing;

c. allow the UK's list of high-risk countries under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 to be updated by way of a list published by HM Treasury;
d. enable certain businesses to share information between them for the purposes of tackling economic crime, without incurring liability for breach of confidence;
e. ensure that frontline legal regulators and the Legal Services Board are able to monitor legal professionals effectively in relation to compliance with obligations to combat economic crime, by adding a new regulatory objective into the Legal Services Act 2007 and removing the statutory limit on the level of financial penalty that can be imposed by the Solicitors Regulation Authority for disciplinary matters that are related to economic crime; and
f. expand the pre-investigation powers of the Serious Fraud Office by removing a restriction in the Criminal Justice Act 1987 that applies certain powers only to cases of international bribery and corruption.

ECHR Issues

5. The table below sets out those clauses where, in the relevant Department's view, ECHR rights ("Convention rights") are engaged. Where a clause or Schedule is not mentioned it is because the Department considers that no issues arise under the Convention:

Measure	Article 6	Article 8	Article 1, Protocol 1 ("A1P1")
Cryptoasset recovery powers Schedules 6 and 7		X	X
Information orders clauses 145 and 146	X	X	
Disclosures for preventing etc. economic crime clauses 148 to 153		X	
Regulation of legal practitioners clause 155			X
SFO pre-investigation powers clause 156	X	X	X

Article 6: Right to a fair trial

Clauses 145 and 146: Information orders

6. The existing "further information order" powers in POCA and TACT can require the provision of information by certain businesses. Such orders can *currently* be made by the magistrates' court or the sheriff under sections 339ZH of POCA or section 22B of TACT. They can require a person carrying on business in the regulated sector (as defined in Schedule 9 to POCA and Schedule 3A to TACT) to provide information in order to enable law enforcement officers to analyse information received as part of a statutory disclosure under POCA or TACT.

7. The provisions of this Bill will not alter the existing Conditions 1 and 2 set out in the current legislation. Clauses 145 and 146 will insert additional Conditions in order to allow these orders to be made in more circumstances. Specifically, an order will be able to be made without the requirement for the applicant to have received a statutory disclosure. But, in such circumstances, they will only be able to be made to assist the NCA or a foreign financial intelligence unit ("FIU") to acquire information that will assist them in conducting operational or strategic analysis that is relevant to money laundering or terrorist financing, or suspected money laundering or terrorist financing. The entire power is being re-named simply "information orders".

8. The power could theoretically require a person to self-incriminate but the nature and potential extent of any incidence of interference would not be different to that provided for in the existing powers. The existing safeguards include express provision that any statement made by a person in response to a further information order (as it is currently called) may not be used in evidence against that person in criminal proceedings, except for a very limited class of proceedings. As is the case now, the power may not be used to obtain legally privileged material.

9. On the basis that any potential interference with Article 6 would be no different as a result of the amendments made by this Bill, the Home Office considers that any interference with Article 6 is proportionate to achieving the legitimate aim of countering money laundering and terrorist financing.

<u>Schedules 6 and 7: Confiscation and civil recovery powers</u>

10. Schedule 6 to the Bill contains amendments to the three regimes in Parts 2, 3 and 4 of POCA relating to confiscation in England and Wales; Scotland; and Northern Ireland. Each regime contains provisions that allow a convicted person to be deprived of the benefit of the benefits of their crime.

11. The making of a confiscation order under POCA is an aspect of the sentencing process and therefore it engages Article 6(1) (*Phillips v The United Kingdom*, no. 41087/98, §39, ECHR 2001-IV). However, the new measures do not have a bearing on the existing process for courts to determine the making of a confiscation order. They are merely either interim measures

before the final determination of a person's rights, or they are of an enforcement nature, enforcing a determination that has already been made by the courts on that person's rights. Therefore, these provisions are not considered to engage Article 6.

12. The amendments made by Schedule 7 to the Bill will introduce into POCA new provisions for the seizure, freezing and forfeiture of cryptoassets, mirroring the regimes that already exist in Part 5 of POCA in relation to cash, specified tangible items called "listed assets", and money in bank accounts.

13. The Home Office considers that the new measures for the civil recovery of cryptoassets also do not engage Article 6. 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*). The determination of property rights under these provisions is made by court order and the court will ensure that Article 6(1) is complied with.

Clause 156: SFO's pre-investigation powers

14. Clause 156 expands the availability of the Serious Fraud Office's existing pre-investigation powers. The powers themselves are set out in section 2 of the Criminal Justice Act 1987 and include powers to require a person to answer questions, furnish information and produce documents. Currently, the powers are only exercisable either: for the purposes of an ongoing investigation (under section 2) or before an investigation has been commenced for the purposes of determining whether to start an investigation, but only in suspected cases of international bribery and corruption (under section 2A). The proposed amendment to the Criminal Justice Act 1987 removes this restriction on the types of cases where section 2A pre-investigation powers can be used so that the powers will be exercisable before an investigation has been commenced in all cases falling within the SFO's remit.

15. Article 6 is not engaged at the time that the pre-investigation powers are exercised. This is because the powers can only be used for the purpose of determining whether to open an investigation. At this stage, they are therefore not being used to seek legal evidence in respect of a criminal charge.

16. It is possible that Article 6 may be engaged at a later date, if the SFO seeks to use information obtained from use of the pre-investigation powers in a prosecution. It is considered that the expansion of the pre-investigation powers to a wider range of offences does not alter in any way the current analysis that the section 2A powers are compatible with Article 6. As the powers can be used to compel a person to answer questions, the key potential interference with Article 6 is with the right to remain silent and not to incriminate oneself.

17. Section 2(8) of the Criminal Justice Act 1987 applies equally to section 2A as to section 2. It renders inadmissible against a person a statement made by them under compulsion of the powers contained in those sections, except in a prosecution against them for making a false statement or where they make a statement in evidence which is inconsistent with it. It therefore ensures that information obtained from a compulsory interview cannot be used against that individual in a prosecution and that they are not required to incriminate themselves.

18. More generally, the use of these powers to compel documents may be relevant to the overall assessment of whether a fair trial has occurred. However, it is the existing position that the powers themselves do not breach Article 6. There is an explicit exemption in section 2 for LPP material. To the extent that there might be any further interference with Article 6, the trial judge retains the power under section 78 of the Police and Criminal Evidence Act 1984 and common law to exclude unfair evidence in order to ensure the fairness of the proceedings.

Article 8: Right to respect for private and family life, home and correspondence

Clauses 145 and 146: Information orders

19. It is accepted that the new ways in which information orders could be used as a result of the amendments made by these clauses could engage Article 8. However, this will not be to any substantially greater extent than it is engaged by the existing sections in POCA and TACT.

20. It is considered that an interference with someone's Article 8 rights by this measure would be 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 both domestic and foreign criminals to conceal the proceeds of crime and corruption or to finance terrorism. It is essential that the NCA has sufficient powers to allow it to effectively carry out both operational and strategic analysis relating to money laundering and terrorist financing.

21. Further information orders (as they are currently called) can be made by the magistrates' court, or, in Scotland, the sheriff. Under new Conditions 3 and 4, information orders will only be able to be made on application by an authorised NCA officer (or the Director General of the NCA), or in Scotland, on application by a procurator fiscal at the request of an authorised NCA officer (or the Director General of the NCA).

22. The courts will only make such orders where they are satisfied that the information would assist an authorised NCA officer to conduct operational or strategic analysis for the purposes of the NCA's statutory criminal intelligence

function (in section 1 of the Crime and Courts Act 2013) so far as that analysis relates either to money laundering or terrorist financing. Where an application follows a request from an overseas FIU to the NCA, the court can only make the order if the information is likely to be of substantial value to the foreign FIU in carrying out equivalent types of money laundering or terrorist financing analysis as that carried out by the UK's FIU.

23. As with the current powers, the courts will only be able to make new orders under the new conditions where they are satisfied that it would be reasonable in all the circumstances that the information should be provided. Information orders still not be able to require the provision of legally privileged material.

24. Additional safeguards exist in respect of the making of orders in support of foreign FIUs. As with the current powers, the NCA retains discretion as to whether to take action on a request from a foreign FIU. The NCA's decision on whether to assist will be based on, amongst other factors, the Government's Overseas Justice and Security Assistance Guidance. Additionally, by making an order the courts must be satisfied that the information is likely to be of substantial value to the foreign FIU in carrying out the relevant analysis.

25. These restrictions on the use of the power ensure that its exercise is limited so far as possible, and that where it is used, Article 8-engaging information will only be ordered to be provided where it is strictly relevant to the legitimate aim of preventing and detecting money laundering or terrorist financing.

Clauses 148 to 153: Information sharing provisions

26. The measures in clauses 148 to 153 disapply the duty of confidence in relation to disclosures of information between firms that have the purpose of helping firms to prevent, detect or investigate economic crime.

27. The disclosure of confidential information between firms could, in itself, interfere with the customer's right to respect for private life (see, for example, *MN v San Marino (2016) 62 EHRR 19*). In particular, it would be an interference with the confidentiality of the customer's financial affairs. The firms themselves are not public authorities for the purposes of the Human Rights Act 1998 and the proposed provision will not require them to share confidential information. However, it is arguable that the legislation would, itself, give rise to an interference with Article 8 rights that requires justification.
28. The Home Office considers that a court would be likely to attach significant weight to the customer's right to keep their confidential financial information private. An individual's rights in relation to his or her personal data are fundamental rights which require a consistent and high level of protection (see *Case C362/14 Schrems v Data Protection Commissioner [2016] QB 527*). Those rights are interfered with by the processing of those data even if the data are not sensitive and the processing does not inconvenience the

individual in any way (*Joined Cases C-293/12 and C-594/12 Digital Rights Ireland v Minister for Communications, Marine and Natural Resources [2015] QB 127*).

29. In the Home Office's view, the objective of the prevention, detection and investigation of economic crime would, in principle, be considered to be an important public interest to which a court would be likely to attach significant weight (see, for example, *Michaud v France (2014] 59 EHRR 9, paragraphs 123, 131*).

30. In many cases there will be no material difference between a proportionality analysis under Article 8 of the ECHR and a proportionality analysis under Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data, as it forms part of the law of the UK by virtue of section 3 of the European Union (Withdrawal) Act 2018 ("the "UK GPDR"): see, for example, *Rechnungshof and others v Osterreichischer Rundfunk and Others [2003] 3 CMLR 10*).

31. Ultimately, the UK GDPR ensures that any use made of personal information is proportionate to the objectives. The Home Office considers that any interference is justified in the interests of preventing, detecting and investigating economic crime.

Schedule 7: Cryptoassets: civil recovery powers

32. The operation of the new cryptoasset civil recovery measures (inserted into Part 5 of POCA by Schedule 7 to the Bill) is set out in more detail below, where this memorandum considers Article 1, Protocol 1.

33. In summary, this power allows officers to search for, seize or detain and ultimately forfeit certain items of property. The powers focus on cryptoassets which are the proceeds of crime or are intended to be used in unlawful conduct. They also include the power to search for and seize items which are likely to assist in the seizure of such cryptoassets ("cryptoasset-related items") (discussed in more detail below in relation to confiscation powers). It is accepted the powers engage Article 8.

34. In the Home Office's view, the new powers to search for, and seize, cryptoasset-related items are necessary for the new measures to be used effectively, given that the cryptoassets themselves do not have physical form. Cryptoasset-related items may be the only way to access cryptoassets. Officers exercising the powers must still have reasonable cause to suspect that the cryptoassets themselves are the proceeds of crime or intended for use in unlawful conduct. There are a number of safeguards which are modelled on existing powers to search for cash and certain other assets (for example, in relation to prior approval).

35. The Home Office therefore considers that these powers are a proportionate interference with Article 8, justified in the interests of the prevention of crime.

Schedule 6: confiscation powers – cryptoasset-related items

36. The new measure will permit officers to seize cryptoasset-related items even if they are "exempt property". Exempt property is essentially that which is necessary either: for a person's employment, business or vocation; or for satisfying the basic domestic needs of the defendant or their family. For England and Wales, this is set out at section 47C(4) of POCA; for Scotland, section 127C(4) and for Northern Ireland, section 195C(4). It is accepted that the seizure and detention of such property would be an interference with their Article 8 rights. The Home Office also accepts that the use of the power to seize items from persons other than a suspect, defendant (or accused) or the recipient of a tainted gift, could potentially interfere with Article 8 rights.

37. The purpose of Parts 2, 3 and 4 of POCA is ultimately to deprive criminals of any financial benefit that they have accumulated through their criminal conduct. The powers of restraint, seizure, and detention are important mechanisms for preserving the value of property so as not to allow the purpose of those Parts to be frustrated.

38. A "cryptoasset-related item" is defined for the purposes of Parts 2, 3 and 4 of POCA (as amended by Schedule 6) as "an item of property that is, or that contains or gives access to information that is, likely to assist in the seizure under subsection (1) of any cryptoasset." That definition would cover a number of different types of property. It could include pieces of paper that have a cryptoasset recovery seed phrase written on them, an electronic hardware wallet or a piece of electronic hardware.

39. Cryptoassets are now a major asset class used for storing value, but cryptoasset-related items may provide the only means for law enforcement to access the cryptoassets. The POCA framework was not designed to allow seizure of property solely for the purpose of seizing other property. The Home Office therefore considers it appropriate to treat cryptoasset-related items differently from other exempt property.

40. The legislation will, however, set much more rigorous safeguards for the detention of cryptoasset-related items that are exempt property (compared to those which are not exempt property). Cryptoasset-related items which are exempt property will be capable of being detained for 48 hours under section 47J of POCA (in England and Wales), section 127J (in Scotland) or section 195J (in Northern Ireland) – similarly to non-exempt property. Thereafter, the item will require senior officer approval for its continued detention while an application is pending for the court to make either a restraint order or a further

detention order. Non-exempt property does not require such senior officer approval for this period pending the making of an order.

41. Where a Crown Court is considering whether to grant a restraint order in England and Wales (under section 41 of POCA (read with section 41A)) in respect of the cryptoasset-related item which is exempt property, the Home Office considers that it would be equipped to adequately weigh any interference with Article 8 in the making of its order. This is also the case for section 120 (read with section 120A) in relation to Scotland and 190 (read with section 190A) in relation to Northern Ireland.

42. In addition, where the relevant court (the magistrates' court or the sheriff) is considering whether to grant a further detention order under section 47M of POCA (in England and Wales), section 127M (in Scotland) or section 195M (in Northern Ireland) it will only be able to do so if it is satisfied that the person applying for the order is working diligently and expeditiously either: to determine whether the property is a cryptoasset-related item, or if it has already been determined to be such an item, to seize any cryptoassets under section 47C(1), 127C or 195C. Such provision goes beyond the existing tests for further detention of other property that is clearly non-exempt property.

43. Furthermore, the court will only be able to order further detention for a period of up to 14 days (which will be renewable). Fourteen days is considered by the Home Office to be an appropriate period because of the (often) technological complexity of cryptoasset-related items, and the need to afford sufficient time to law enforcement to deal with that complexity in investigating the item. This can be contrasted with the new provisions for non-exempt cryptoassets, which allow for the further detention for periods of six months. The 14 -day period can also be contrasted with the existing further detention order provisions which do not prescribe a maximum time limit for such orders.

44. Finally, any person affected by a further detention order may apply to the court at any time for its variation or discharge (see section 47N for England and Wales). Therefore, if law enforcement officers are not working expeditiously to investigate the item or seize cryptoassets using it or information contained in it during a 14-day period and the suspect, defendant (or accused) applies to have the order discharged, the court will be able to discharge that order and the item would be released back to the holder.

45. The Home Office also considers it justified to search for, seize and detain cryptoasset-related items held by other persons, where those cryptoasset-related items may assist with the seizure of a suspect's, defendant's (or accused's) cryptoassets in situations where there are reasonable grounds to suspect that the person may dissipate those assets in a way which may frustrate a confiscation order.

46. A restriction on the use of the power to require the production of information – for the purpose of either determining whether any property is a cryptoasset-related item or enabling or facilitating the seizure of any cryptoasset – will not authorise an officer to require a person to produce any information which the person would be entitled to withhold on the grounds of legal privilege.

47. The Home Office considers these safeguards to represent a proportionate balance between the interference with Article 8 rights and the legitimate aim of preserving property in anticipation that it may be used to satisfy a criminal confiscation order.

Clause 156: SFO's pre-investigation powers

48. As use of the SFO's powers compels the production by a person of information or documents, Article 8 is potentially engaged where that includes private information.

49. As for the existing powers, there is a legitimate aim in the use of the powers to prevent crime and protect the rights and freedoms of others (who might be the victims of fraud). The SFO already ensures through training, guidance and authorising processes, that its powers are used in accordance with the law and only where necessary and in a proportionate way in pursuit of those aims. The pre-investigation powers can only be exercised where it appears to the Director of the SFO that relevant conduct may have taken place and it is expedient for the purpose of determining whether to start an investigation for them to be exercised.

50. It is considered that extension of the powers to be usable at the pre-investigation stage for all offences investigated by the SFO is itself also necessary and proportionate. Over the past decade, the types of fraud that the SFO considers for formal investigation have become more complex and more international, and therefore it has become increasingly difficult for the SFO's Intelligence Division to gather sufficient information to allow the "reasonable cause to suspect" threshold to be met in a reasonable timeframe (or at all). Some fraud cases can take over a year to be developed by the SFO's Intelligence Division prior to a formal investigation commencing. This not only takes up a large amount of taxpayer funded resource within the SFO but also has detrimental effects on victims.

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

Schedule 7: Civil recovery of cryptoassets

51. It is considered that the cryptoasset civil recovery powers, introduced into Part 5 of POCA by Schedule 7 to the Bill, engage the right to peaceful enjoyment of possessions as they can result in either the temporary, or permanent, deprivation of a person's property. The regime is modelled on the existing

regimes in Part 5 of POCA, which apply to cash or listed assets, and to money held in bank accounts. These provide for the temporary detention of the cash or listed assets, or for "freezing" of the bank account, and ultimately for a court to order that such property is forfeited permanently. Broadly speaking, in the case of forfeiture, a court must be satisfied that the property was obtained through unlawful conduct or is intended for use in such conduct.

52. New Chapter 3F of Part 5, as inserted by that Schedule, also includes power for a court to order the conversion of detained or frozen cryptoassets into more conventional money, prior to their forfeiture or release. This is to deal with the potential for extreme volatility in the value of cryptoassets, where there is not such a magnitude of risk in relation to cash, listed assets or money held in an account.

53. The new measures include powers for law enforcement officers to seize cryptoassets (that is, assume control over them). They also allow officers to apply for an order to "freeze" (that is, prohibit transactions using) a third party hosted account, similar to a bank account, called a "crypto wallet". The powers are exercisable on the basis of reasonable suspicion that the assets are the proceeds of crime or intended for use in any unlawful conduct. That is the same test that currently applies to the seizure and detention of cash or listed assets under existing powers in Chapters 3 and 3A of Part 5 of POCA and to the making of an "account freezing order" over a bank account, under the existing Chapter 3B. Either of these measures (seizure and detention, or freezing) will remove or restrict the use of the cryptoassets by their previous holder so that, for example, they cannot be sold or transferred elsewhere. Ultimately, cryptoassets which a court is satisfied are the proceeds of crime or intended for use in unlawful conduct can be permanently forfeited by law enforcement – as can cash, listed assets, and money in bank accounts.

54. Both the initial detention or freezing stage, and the final forfeiture, involve an interference by the state with the property rights of the owner of the cryptoassets. Under the new cryptoasset forfeiture regime, a court may also make an order for the conversion of detained, or frozen, cryptoassets into conventional money. In doing so, the court must have had regard to whether the cryptoassets are likely to suffer a significant loss in value before they are released or forfeited. In principle, the use of this power could interfere with the right of the owner or holder of the cryptoassets to keep them in their original form at the time they were seized or subject to a freezing order. But the purpose is to preserve the value of the cryptoassets for the future holder of the property, whether they are the existing owners or the state.
55. Criminals have been increasingly using cryptoassets, which are a digital store of value or contractual rights, to store, transfer and conceal property which derives from criminal activity or is intended for use in crime. Their intangible form and other properties mean that they be used to move assets discretely, remotely and securely and in large quantities. It is already possible, under

Part 5 of POCA, to seize and ultimately forfeit cash and other physical objects including artworks and jewellery. Cryptoassets do not fall within these current categories which leaves a gap in the powers of law enforcement agencies to act quickly and disrupt criminal activity. In addition, cryptoassets held with a third party host will not be susceptible to the bank account freezing powers in the current Chapter 3B of Part 5 of POCA. Fast action in relation to suspicious cryptoassets held in this way is possible largely through voluntary cooperation by the firms concerned.

56. In addition to specific cryptoasset search and seizure powers, the power to seize will usually rely on law enforcement officers gaining control of the assets via information obtained from physical objects ("cryptoasset-related items", considered above in relation to confiscation) which are not themselves necessarily the proceeds of crime or intended for use in unlawful conduct.

57. There will be safeguards around the detention and release of the items, similar to those for other seizable assets, but the nature of cryptoassets means that it may take days or weeks for the information to be obtained from the items that will enable cryptoassets to be seized. A variation on the timescales for detention of these items – and of cryptoassets themselves – is that they may ultimately be detained for up to three years, rather than two, in cases where a longer period is necessary for international mutual legal assistance procedures to be completed. This is needed in view of the frequently cross-border nature of criminal activity concerning cryptoassets. Applications to the magistrates' court or sheriff on a six-monthly basis will still be required. Importantly, the clock will not stop when a request is made for mutual legal assistance and the measure simply gives slightly greater flexibility on timing, while still ensuring that the entire process is completed quickly and that the cryptoassets can either be forfeited (subject to a court order) or released as soon as possible.

58. The new measures will also allow a court to approve, in advance, the detention of any cryptoassets seized using information from a seized physical item. Again, this is because, unlike cash, cryptoassets and the devices that give access to them can take time to examine and investigate, and yet criminals can often move quickly in the meantime to move the cryptoassets beyond the reach of law enforcement – even after a hardware device has been seized.

59. As with the existing forfeiture regimes, there is provision for an asset holder or owner to apply for an order for compensation where they have suffered loss as a result of the detention of their property and where the circumstances are exceptional.

60. As with cash, the person from whom the items or cryptoassets are seized, or a third party claiming that the items, or the cryptoassets, belong to them, may

apply to the relevant court for their release at any stage of the proceedings. As with the existing bank account freezing order measures in Chapter 3B of Part 5 of POCA, a relevant court may also, at any time, vary or set aside a crypto wallet freezing order and in doing so must give the opportunity to be heard to any person who may be affected by the decision. Exclusions from a crypto wallet freezing order may be made in order to allow a person to meet reasonable living expenses or to carry on any trade, business, professional or occupation.

61. The provisions contain safeguards to ensure that the rights of joint owners are protected. As in the current listed assets regime in Chapter 3A of Part 5 of POCA, there are 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 cryptoassets, in return for the release of the cryptoassets to them. This is also akin to the procedure under the existing civil recovery mechanism in the High Court, applying to all types of property.

62. There are two differences with the established forfeiture regimes in Chapters 3, 3A and 3B in Part 5 of POCA (cash, listed assets, and bank accounts) which may be worth highlighting here.

63. Firstly, one limitation does not apply in the case of cryptoassets: there is no "minimum amount" for the value of assets to be forfeited. Under the other civil forfeiture regimes in POCA, this is £1,000. In the other regimes, this ensures proportionality by focusing the use of the powers on relatively more serious crimes. However, as explained above, the value of cryptoassets can be extremely volatile and a minimum amount would make the powers more difficult to use, since the value of the cryptoassets to be recovered could not be easily assessed from an operational point of view in advance of their seizure. In addition, the types of crime for which cryptoassets may be most useful – including ransomware attacks and other crimes with an international dimension, where physical assets would be difficult to move undetected – are among those of most concern to Government and law enforcement agencies.

64. Another difference from the regimes already established is the power for a court to order the conversion of detained or frozen cryptoassets into conventional money. The need for a court order provides a safeguard against unjustified interference with the owner's rights. Before making an order, the court must give an opportunity to the parties to the proceedings and any other person who may be affected by its decision. The court will therefore be able to take account of all the relevant circumstances, including the wishes of the owner and any evidence they might produce as to the market conditions which would support or undermine the case for converting the cryptoassets.

65. The Home Office therefore considers these new measures to be proportionate and justified in the interests of preventing crime.

Schedule 6: Confiscation powers – Removal of the requirement for a person to have been arrested before property can be seized

66. Under existing section 47C of POCA (in England and Wales), section 127C (in Scotland) or section 195C (in Northern Ireland), property can be seized where an appropriate officer is satisfied that there are reasonable grounds for suspecting that:

    a. the property may otherwise be made unavailable for satisfying any confiscation order that has been or may be made against a suspect, defendant (or in Scotland, an accused); or
    b. the value of the property may otherwise be diminished as a result of conduct by the suspect, defendant (or accused) or any other person.

67. However, that seizure power can only be used where specified conditions are satisfied. Those conditions are set out under section 47B, 127B or 195B (depending on the jurisdiction). The first two conditions both relate to circumstances where an investigation has been started with regard to an indictable offence but proceedings have not yet been initiated.

68. Condition 1 requires that an officer have reasonable grounds to suspect that the person from whom the property is to be seized has benefited from conduct constituting a criminal offence. Condition 2 requires a restraint order to be in force (and a restraint order can only be made where the court is satisfied that there are reasonable grounds to suspect that a person has benefited from conduct constituting a criminal offence). Both conditions also currently require that a person has been arrested for an offence.

69. It is accepted that the exercise of the powers would interfere with the A1P1 rights of anyone who holds an interest in the seized and detained property.

70. This measure will remove the requirement that a person be arrested for an offence before Conditions 1 or 2 can be satisfied. The purpose of this measure is to prevent property being dissipated in cases where the person under investigation cannot be arrested for the offence.

71. There are two main types of scenario where there is a serious risk of a suspect who cannot be arrested dissipating their assets to frustrate an anticipated confiscation order. The first is where a suspect is not on the premises being searched which contains cryptoasset-related items, but is otherwise made aware of the search and is able to remotely dissipate cryptoassets using a different device. That first scenario has greater application for cryptoassets. The second has more general application and is

why the Home Office is applying it to all types of property. That second scenario is where a person cannot legally be arrested, but where there are reasonable grounds to suspect that the suspect intends to dissipate their assets.

72. For example, the suspect in a criminal investigation could, at present, make clear to officers their intention to dissipate all their assets. But if one of the reasons for arrest without a warrant cannot be satisfied in England and Wales and Northern Ireland, then the suspect cannot lawfully be arrested, and therefore, none of their property can be seized under Part 2 seizure powers (section 47C for England and Wales).

73. The reasons for which a person can be arrested by a constable without a warrant in England and Wales and Northern Ireland relate to either the investigation and prosecution of offences, or to public safety.

74. Given the lack of connection between: on the one hand securing the preservation of assets, and on the other, the preservation of the integrity of an investigation or public safety, the Home Office considers that the extent of any interference with a person's A1P1 rights in the exercise of these powers is not made any more proportionate by that person having been arrested.

75. In Scotland, the police have wider powers of arrest without warrant. Constables in Scotland are able to arrest a person once they have reasonable grounds for suspecting that the person has committed or is committing an offence punishable by imprisonment (section 1 Criminal Justice (Scotland) Act 2016)).

76. In relation to the proportionality of removing the arrest requirement from section 127B(2)(b) and (3)(b) in Part 3 of POCA for Scotland, the Home Office considers that if the arrest requirement does not add to the proportionality of the exercise of seizure power in England and Wales and Northern Ireland, then it is unlikely to add to the proportionality of its exercise in Scotland.

77. Finally, the Home Office notes that even with the removal of the arrest requirement, the seizure power is still quite tightly framed in that:

    - an investigation into an indictable offence must have been started,
    - an officer must be satisfied that there must be reasonable grounds for suspecting that the person has benefited from conduct constituting a criminal offence (or in situations where a restraint order has already been made, a court will have been satisfied that such grounds exist),
    - an appropriate officer must be satisfied that there are reasonable grounds for suspecting that:

        - the property may otherwise be made unavailable for satisfying any confiscation order that has been or may be made against the suspect, defendant (or accused), or
        - the value of the property may otherwise be diminished as a result of conduct by the suspect, defendant (or accused),
    - an appropriate officer cannot seize exempt property needed for a person's employment, business or vocation, or anything necessary for satisfying the basic domestic needs of the suspect, defendant (or accused) or their family (subject to the power to seize "cryptoasset-related items" which are exempt property, described above in relation to Article 8),
    - an appropriate officer cannot exercise the power without appropriate approval unless in the circumstances it is not practicable to obtain that approval before exercising the power. Appropriate approval is by authorisation of the court, or, where that is not practicable, a senior officer, and
    - where an appropriate officer exercises the seizure power without senior officer approval (because it is not practicable in the circumstances), and the property is not subsequently detained by order of the court, then that officer must submit a report to a person appointed by the Secretary of State, Scottish Ministers, or Department of Justice (as appropriate) to detail the circumstances of the seizure. The appointed person must submit an annual report to his or her appointing person or department, which is then required to lay it in the respective legislature.

78. As such the power will continue to be subject to stringent safeguards and any infringement by this measure with Convention rights is considered justified and proportionate.

<u>Schedule 6: Confiscation powers – Seizure and detention of cryptoasset-related items</u>

79. As explained above, Schedule 6 will introduce powers into Parts 2, 3 and 4 of POCA for officers to seize and detain cryptoasset-related items. Such items will be seizable from anyone, so long as the seizure conditions are met. Currently, property in general can only be seized from a suspect, defendant (or accused) or the recipient of a tainted gift.

80. It is accepted that the exercise of these powers would represent an interference with a person's A1P1 rights. It is also considered that any such interference would be justified as necessary and proportionate for the purpose of the prevention and detection of crime. The same rationale for the proportionality of this measure in respect of interference with a person's Article 8 rights applies equally to any interference with their A1P1 rights.

Schedule 6: Confiscation powers – Power to dispose of unclaimed cryptoasset-related items which have been released by officers

81. Property must be released by law enforcement where the conditions satisfying the conditions for detention are no longer met. This is provided for in section 47R of POCA in England and Wales, in section 127Q in Scotland and in section 195R in Northern Ireland. This will apply equally to detained cryptoasset-related items.

82. By contrast with seized property in general, cryptoasset-related items are likely to include low-value property, or property with only a nominal value: for example, paper records containing cryptoasset wallet seed recovery phrases or low-value hardware wallets. In cases where law enforcement officers have used the cryptoasset-related item to secure the seizure of cryptoassets, those cryptoassets may ultimately be subject to confiscation where there is non-payment of a confiscation order debt. The cryptoasset-related item may therefore be redundant to the person from whom it was seized.

83. Schedule 6 introduces measures allowing senior officers to authorise the disposal of cryptoasset-related items which have been unclaimed for a year after release. Schedule 6 will insert subsections (6) to (9) into section 47R of POCA (for England and Wales) to that effect, with similar amendments being made to section 127Q (for Scotland) and 195R (for Northern Ireland).

84. The measure will permit the retention, disposal or destruction of the cryptoasset-related item by the relevant law enforcement officer. It is accepted that any of these courses of action would constitute a deprivation of property, and therefore interfere with the rights of the person from whom the property was seized, and any third parties who may have an interest in the property.

85. The measure is considered to be justified and in line with legislation applying already to property held by the police (or the NCA) under the Police (Property) Act 1897 and the Police (Property) Regulations 1997. There is no material difference, in the Home Office's view, between items acquired in pursuit of possible confiscation and those obtained in pursuit of a criminal investigation. The Home Office considers that the indefinite retention by law enforcement authorities of released cryptoasset-related items would place an unnecessary demand on law enforcement authorities' storage capacity (which is needed for keeping evidence in ongoing investigations). The measure provides a one-year period from the date of release for someone to collect their property. The Home Office considers this to be a reasonable time period and in line with the legislation referred to above.

86. The measure also includes a requirement on law enforcement officers to take reasonable steps to notify the release of the property to the person from whom the property was seized, and any other persons who the officer has reasonable grounds to believe have an interest to the property. This

requirement is designed to protect the interests of those who have an interest in the property so as to limit any interference to the rights caused by the retention, disposal or destruction of their property.

Schedule 7: Civil recovery powers – Power to dispose of unclaimed cryptoasset-related items which have been released by officers

87. Schedule 7 introduces equivalent measures to those described above (in relation to confiscation powers in Schedule 6) allowing senior officers to authorise the disposal of cryptoasset-related items which have been unclaimed for a year after release. The same justifications and safeguards will apply as in the case of the confiscation powers described above.

Schedule 6: Confiscation powers – Power to enforce a confiscation order against cryptoassets in crypto wallets administered by third parties

88. This measure will permit the magistrates' court and in Scotland, the sheriff, to enforce confiscation orders against cryptoassets held by cryptoasset service providers. In relation to England and Wales, this will be provided for under Part 1 of Schedule 6 to the Bill which will insert new section 67ZA into POCA, with Part 2 of that Schedule inserting new section 131ZB in relation to Scotland and Part 3 inserting new section 215ZA in relation to Northern Ireland.

89. Additionally, the measure will permit those same courts to enforce a confiscation order debt[1] against cryptoassets seized by law enforcement, by way of authorising their destruction. In relation to England and Wales, this will be provided for under Part 1 of Schedule 6 which will insert new section 67AA into POCA; in relation to Scotland, Part 2 of that Schedule will insert new section 131AA and in relation to Northern Ireland, Part 3 will insert new section 215AA.

90. The making of a confiscation order under section 6 of POCA (in England and Wales), section 92 (in Scotland) or section 156 (in Northern Ireland) as part of the sentencing process interferes with a person's A1P1 rights because it establishes a statutory debt. At the point of making the confiscation, though, the debt does not create a charge or specific interest in any particular piece of property.

[1] A confiscation order must be made by a Crown Court (in England and Wales (under section 6), and Northern Ireland (under section 156)) or the High Court of Judiciary, the Sheriff Appeal Court, or the sheriff (in Scotland, under section 92) if certain conditions are met after a person is convicted of an offence. Such orders set out a "recoverable amount" equal to the defendant's financial benefit from the offending, or if less is available, an "available amount". The recoverable amount or available amount essentially becomes a debt owed to the Crown. In England and Wales, HMCTS, via the magistrates' courts enforces such debts. Powers are given to the magistrates' court to do so (see section 69(2)(d)).

91. Where a person fails to satisfy their confiscation order debt within the prescribed timeframes set down by the court, it becomes enforceable by the magistrates' court, and, in Scotland, the sheriff. It is accepted that the enforcement of the debt against specific property is a further interference with a person's A1P1 rights in the specific item of property which the confiscation debt is being enforced against.

92. Section 67 of POCA (England and Wales) contains similar provision to that which will be included in new section 67ZA as does section 131ZA (Scotland) and section 215 (Northern Ireland). Sections 67, 131ZA and 215 permit the relevant court to enforce an outstanding confiscation debt against money held in accounts maintained by the defendant with a bank or building society. The provisions also extend sections 67, 131ZA and 215 to permit enforcement against money maintained in accounts with electronic money institutions and payment institutions.

93. These new measures in new sections 67ZA, 131ZB and 215ZA are justified in the same way as current sections 67, 131ZA and 215 are justified. Their aim is to ensure that orders of the court, which are designed to deprive criminals of the benefit of their crimes, are given effect.

94. New section 67AA of POCA, inserted by Part 1 of Schedule 6, will allow the court in England and Wales to authorise an appropriate officer to destroy cryptoassets which have been seized. Similar provision is made in Part 2 of that Schedule which inserts new section 131AA in relation to Scotland and by Part 3 which inserts new section 215AA in relation to Northern Ireland. Such an order will be able to be made where either: it is not reasonably practicable to realise the cryptoassets, or there are reasonable grounds to believe that the realisation of the cryptoassets would be contrary to the public interest, having regard in particular to how likely it is that the entry of the cryptoassets into general circulation would facilitate criminal conduct by any person. Such scenarios could arise in cases where certain cryptoassets belong to a particular cryptocurrency class which is understood to be used overwhelmingly for criminal purposes. The realisation of such cryptoassets and the return of an amount of them back into general circulation would carry a high risk of furthering, or at least providing facilities for, criminality. Those cryptocurrencies could be contrasted with cryptoassets such as Bitcoin which also have legitimate commercial uses.

95. The extent of the interference with a person's property is no different to that already provided for under the current sections 67, 131ZA and 215 and the new sections 67ZA, 131ZB and 215ZA. Under all of these powers, the value of property destroyed, as established by the court, will go towards the satisfaction of the person's confiscation order.

96. By way of safeguard to all parties with an interest in the cryptoassets being considered by the court for destruction, the court must give persons who hold interests in the cryptoassets a reasonable opportunity to make representations to it before it makes the order (see section 67AA(4), 131AA(4) and 215AA(4)).

97. Any interference with Convention rights in therefore considered to be proportionate and justified.

Clause 154: Law Society: powers to fine

98. This measure will amend section 44D of the Solicitors Act 1974 and paragraph 14B of Schedule 2 to the Administration of Justice Act 1985 to remove the statutory cap on the level of penalty that the Law Society, as delegated to the Solicitors Regulation Authority ("SRA"), may issue to recognised bodies and solicitors where the disciplinary matter concerns economic crime. Economic crime is defined with reference to clause 153(4) of the Bill. It includes the offences listed in Schedule 8, ancillary offences and equivalent offences overseas. The offences listed include fraud, money laundering and terrorist financing and an offence under regulations made under section 1 of the Sanctions and Anti-Money Laundering Act 2018.

99. The Law Society's power, as delegated to the SRA, to direct a solicitor or an employee of a solicitor is set out in section 44D(1) and (2)(b) of the Solicitors Act 1974 where there has been a breach of a rule or requirement under the 1974 Act or in rules set by the Law Society, or where there has been professional misconduct on behalf of the solicitor. Under paragraph 14B(1) and (2)(b) of Schedule 2 to the Administration of Justice Act 1985, the Law Society may direct a law firm or sole solicitor's practice, their employees or managers to pay a penalty where there has been a breach of a rule of requirement under the 1985 Act or in rules set by the Law Society. Both provisions set out the maximum penalty of £25,000. This amount can be amended via an order made by the Lord Chancellor.

100. The clause will therefore allow the SRA to use its power, as delegated from the Law Society, to set the level of financial penalty it may direct a solicitor or law firm to pay where the disciplinary matter is related to economic crime via its regulatory arrangements such as its conduct or disciplinary arrangements, rather than it being capped in primary legislation. The measure will not remove existing processes and so the SRA will still be subject to the LSB's approval of changes to its regulatory arrangements under part 3 of Schedule 4 to the Legal Services Act 2007. Additionally, the SRA will still be required to consult the Solicitors Disciplinary Tribunal ("SDT") when making rules about how the power is to be exercised and persons will still be able to appeal the decision to direct a person to pay a penalty and the amount of penalty to the SDT.

101. In principle, the measure engages A1P1, in that it concerns financial penalties that may be issued against regulated entities and individuals.

102. However, the measure does not determine the level of penalty and instead allows the SRA to set the maximum for disciplinary matters relating to economic crime. It would therefore fall to the SRA to set proportionate penalties under this power. The SRA is a public body subject to the Human Rights Act 1998 and must not act in a way which is incompatible with Convention rights. It is therefore considered that the measure does not raise any concerns in terms of compliance with the ECHR.

Clause 156: SFO's pre-investigation powers

103. As use of the SFO's powers may compel the production by a person of documents which are their property (and allows the SFO take copies or extracts), A1P1 is also potentially engaged by this measure.

104. As for the existing powers, there is a legitimate aim in upholding the public interest with respect to possessions that are not being peacefully enjoyed as a result of serious fraud. The SFO already ensures through training, guidance and authorising processes, that its powers are used in accordance with the law and only where necessary and in a proportionate way in pursuit of those aims. The pre-investigation powers can only be exercised where it appears to the Director of the SFO that relevant conduct may have taken place and it is expedient for the purpose of determining whether to start an investigation for them to be exercised.

105. It is considered that extension of the powers to be usable at the pre-investigation stage for all offences investigated by the SFO is itself also necessary and proportionate. Over the past decade, the types of fraud that the SFO considers for formal investigation have become more complex and more international, and therefore it has become increasingly difficult for the SFO's Intelligence Division to gather sufficient information to allow the "reasonable cause to suspect" threshold to be met in a reasonable timeframe (or at all). Some fraud cases can take over a year to be developed by the SFO's Intelligence Division prior to a formal investigation commencing. This not only takes up a large amount of taxpayer funded resource within the SFO, but also has detrimental effects on victims.

September 2022

Home Office

Ministry of Justice

Attorney General's Office