Supplementary European Convention on Human Rights (ECHR) Memorandum

Parts 4 and 5 of the Economic Crime and Corporate Transparency Bill (Home Office and Ministry of Justice 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, 7 and 8, 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; and
    c. by amending the Anti-Terrorism Crime and Security Act 2001 ("ATCSA") to insert similar powers – modelled on those already contained in ATCSA – to seize or freeze cryptoassets suspected, and ultimately to forfeit those shown, (a) to be intended to be used for the purposes of terrorism, (b) to consist of resources of an organisation which is a proscribed organisation, or (c) to be, or represent, property obtained through terrorism.

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 civil liability including 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,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, removing the fining cap of the Scottish Solicitors Discipline Tribunal, and allowing the SRA to proactively request information to monitor compliance with economic crime rules; 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, 7 and 8		X	X
Information orders clauses 172 and 173	X	X	
Disclosures for preventing etc. economic crime clauses 175 to 180		X	
Regulation of legal practitioners clause 181			X

SRA information request power clause 184	X	X	
SFO pre-investigation powers clause 185	X	X	X

Article 6: Right to a fair trial

Clause 184: SRA information request power

6. The clause will introduce a new information power for the Solicitors Regulation Authority (SRA) to request information and documents from both recognised bodies (as defined by section 9 of the Administration of Justice Act 1985) and licensed bodies (as defined by section 72 of the Legal Services Act 2007), for the purpose of monitoring compliance with and detecting breaches of the rules and legislation related to economic crime, which for example includes offences relating to money laundering, terrorist financing and sanctions. The power will assist the Law Society (whose regulatory functions are delegated to the SRA) by ensuring that it has sufficient information request powers to fulfil its obligations to effectively oversee and enforce existing measures to deter and detect economic crime. This will support clause 184 that inserts a new regulatory objective into the Legal Services Act 2007 that is focused on economic crime and will apply to the SRA.

7. While the SRA has existing powers to compel the production of information and documents (such as under section 44D of the Solicitors Act 1974 Act), those powers do not enable it to obtain information in respect of the full range of its regulatory activities, in relation to its responsibilities to oversee compliance with the economic crime regime. This is because those powers require an investigation and so cannot be used on a more proactive basis. Powers under regulation 66 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 ("the MLRs") can be exercised on a more proactive basis but do not cover all law firms that the SRA regulates, as areas such as litigation, criminal and family law typically fall outside of the scope of the Regulations.

8. The power will ensure that the SRA can proactively request information and documents from all individuals and entities that they regulate and license, to assess compliance with the rules relating to economic crime and monitor whether the legal sector is upkeeping with the obligations placed on it in this space.

9. Article 6 is not engaged in so far as the powers are exercised at a pre-investigation stage. As stated above, the objective is to allow the SRA to proactively request information and documents, and to be able to carry out spot checks to assess compliance with the economic crime regime. For that reason, unlike under section 44B of the Solicitors Act 1974, an investigation is

not required before the power can be exercised. Therefore, the Article right is not engaged in so far as the power is exercised for the purpose of determining whether to open an investigation.

10. It is possible that Article 6 may be engaged at a later date if the SRA then seeks to use information obtained from the exercise of such pre-investigation powers in a subsequent investigation and prosecution. The use of the power to request (and potentially compel) the production of documents with the consent of the High Court may be relevant to the overall assessment of whether a fair trial has occurred. However, it is considered that the power itself does not breach Article 6. The extent that there might be any interference with Article 6 will be for the trial judge to exclude any unfair evidence in order to ensure the fairness of the proceedings.

11. Where information or documents that the SRA requires are in the control of a third person, the High Court needs to agree to an order to provide the information or produce the documents. The High Court can only make the order if it is satisfied that it is likely the information or document is in the control of the person, and that there is reasonable cause to believe that the information or document is reasonably required by the Authority in connection with its role as a regulator to oversee and assess compliance with the rules and requirements relating to economic crime placed on those it regulates. The High Court can request an individual, via an order, to produce information, if they refuse to.

12. The MoJ have assessed this measure to be compatible with the ECHR.

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

Clauses 175 to 180: Information sharing provisions

13. The measures in clauses 175 to 180 disapply the duty of confidence, and exclude wider forms of civil liability, in relation to disclosures of information between firms that have the purpose of helping firms to prevent, detect or investigate economic crime.

14. 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.

15. 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*). In addition, Article 8 has been found to include protection of reputation: *Axel Springer AG v Germany* [2012] ECHR 227. This is especially relevant to claims for defamation or for negligent misstatement.

16. 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*).

17. 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*).

18. The conditions on disclosures under these clauses are considered sufficient to ensure that any interference with a customer's right to respect for privacy, including reputation, is proportionate. They will only apply to information which the disclosing party is satisfied will or may assist the recipient in carrying out relevant actions for the purpose of preventing, detecting or investigating economic crime. The clauses will not authorise any disclosures that breach the UK GDPR, which protects the principles of "accuracy" and "fairness". In addition, they will not prevent civil action being brought under the UK GDPR.

19. 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.

<u>Schedules 7 and 8: Cryptoassets: civil recovery powers</u>

20. The operation of the new cryptoasset civil recovery measures (inserted into Part 5 of POCA by Schedule 7 to the Bill, and into Schedule 1 to ATCSA by Schedule 8 to the Bill, is set out in more detail below, where this memorandum considers Article 1, Protocol 1.

21. In summary, the POCA powers allow officers to search for, seize or detain and ultimately forfeit certain items of property. The POCA 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). The new powers in ATCSA to seize cryptoasset-related items and terrorist cryptoassets have similar elements although without new search powers. It is accepted the powers engage Article 8.

22. 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).

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

Clause 184: SRA information request power

24. It is accepted that the power to request information could potentially engage Article 8 as the types of information that could be requested may include information or correspondence relating to a person's private or family life, legal privileged information and/or excluded material. It could include information relating either to the person who is required to provide it, or to information held by that person about another person.

25. It is considered that to the degree there could be any interference with an individual's Article 8 rights by this clause, it would be justified as necessary and proportionate for the purpose of the prevention and detection of crime. The UK is a prominent part of the global financial services sector and its supporting services regulated sector is targeted by both domestic and foreign criminals to conceal the proceeds of crime and corruption. It is therefore essential that the SRA (as the regulator of law firms that are one of the primary support service sectors for international finance) has sufficient powers to allow it to effectively ensure it is meeting its regulatory objectives associated with economic crime.

26. There are safeguards on the use of the power to ensure that its exercise is limited so far as possible, such as the High Court oversight if a person fails to comply with a notice. The High Court can make an order requiring the production of any documents or information specified, but Article 8-engaging information is only likely to be ordered to be provided where it is strictly

relevant to the legitimate aim of preventing and detecting money laundering or terrorist financing. Accordingly, it is considered that any such potential interferences are proportionate. In addition, it is considered that the power would be compliant with the Data Protection Act 2018 and the UK GDPR. It is considered that the lawful basis for the processing of personal data would be under Article 6(1)(e), as it is necessary for the performance of a task carried out in the public interest or in the exercise of the controller's official authority. The SRA is the regulator of solicitors and law firms in England and Wales and would be processing this information as part of its regulatory functions. The SRA's authority, as delegated from the Law Society, is set out in legislation.

27. The MoJ have assessed this measure to be compatible with the ECHR.

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

Schedules 7 and 8: Civil recovery of cryptoassets

28. It is considered that the cryptoasset civil recovery powers, introduced into Part 5 of POCA by Schedule 7 to the Bill, and into Schedule 1 to ATCSA by Schedule 8 to the Bill, engage the right to peaceful enjoyment of possessions. The powers can result in either the temporary, or permanent, deprivation of a person's property. The regimes are modelled on the existing regimes in Part 5 of POCA, and in Schedule 1 to ATCSA, which apply to cash or tangible assets, and to money held in bank accounts. These provide for the temporary detention of the cash or tangible assets, or for "freezing" of the bank account, and ultimately for a court to order that such property is forfeited permanently. Broadly speaking, to order forfeiture under POCA, a court must be satisfied that the property was obtained through unlawful conduct or is intended for use in such conduct. Under ATCSA, the court must be satisfied that the property (a) is intended to be used for the purposes of terrorism, (b) consists of resources of an organisation which is a proscribed organisation, or (c) is, or represents, property obtained through terrorism.

29. New Chapter 3F of Part 5 of POCA, and new Part 4BD of Schedule 1 to ATCSA, also each include 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.

30. 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 new powers in POCA 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. The new powers in ATCSA also mirror the current tests for seizure and detention of terrorist cash or terrorist assets, and freezing of bank accounts, under ATCSA. 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 meet the relevant statutory tests can be permanently forfeited by law enforcement – as can cash, listed assets, and money in bank accounts.

31. 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 regimes, 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.

32. Criminals and terrorists have been increasingly using cryptoassets, which are a digital store of value or contractual rights, to store, transfer and conceal property which derives from terrorist or wider criminal activity or is intended for use in terrorism or other 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 and Schedule 1 to ATCSA, 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 or terrorist 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 or Part 4B of Schedule 1 to ATCSA. Fast action in relation to suspicious cryptoassets held in this way is possible largely through voluntary cooperation by the firms concerned.

33. 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, terrorist property or intended for use in unlawful or criminal conduct.

34. 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 and terrorist 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.

35. 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 and terrorists 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.

36. 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.

37. 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 at any stage of the proceedings for their release. As with the existing bank account freezing order measures in Chapter 3B of Part 5 of POCA, and Part 4B of Schedule 1 to ATCSA, 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.

38. The provisions contain safeguards to ensure that the rights of joint owners are protected. As in the current regimes in Chapter 3A of Part 5 of POCA, and Part 4A of Schedule 1 to ATCSA, 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 or Court of Session, applying to all types of property.

39. 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.

40. 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.

41. Another difference from the regimes already established, including those in Parts 4, 4A and 4B of Schedule 1 to ATCSA (terrorist cash, terrorist assets and terrorist money in bank accounts), is a new 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.

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

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Home Office

Ministry of Justice