

CONFIDENTIAL
CABINET OFFICE

THIS FILE MUST NOT GO OUTSIDE THE CABINET OFFICE

E
1875

1994

CLOSED

1276/35

FRAUD (JURISDICTION), DRUG TRAFFICKING, MONEY
LAUNDERING AND INSIDER TRADING BILL

PART NUMBER

FILE BEGINS 2.3.92.

ENDS

18.4.94

FILE No.

1276/35

PART NUMBER

INDEX HEADINGS

REFERRED TO	DATE	REFERRED TO	DATE	REFERRED TO	DATE	REFERRED TO	DATE

Folio	Ref No.	Date	Subject
1L	QF443	02/03/92	LEGISLATIVE PROGRAMME: BANKING (INFORM.&INVESTI
2	QF677	05/05/92	FRAUD ETC BILL
3	A5423	05/05/92	FRAUD ETC BILL
4	QF063	11/05/92	FRAUD ETC BILL
5	QF721	12/05/92	FRAUD ETC BILL
6	R9682	13/05/92	FRAUD ETC BILL
7	R9683	14/05/92	FRAUD ETC BILL
8	K0163	15/05/92	FRAUD,DRUG TRAFFICKING ETC BILL
8M	K0164	15/05/92	FRAUD,DRUG TRAFFICKING ETC BILL
9	K545	18/05/92	FRAUD,DRUG TRAFFICKING,MONEY LAUNDERING BILL
10	A6182	19/05/92	FRAUD,DRUG TRAFFICKING,MONEY LAUNDERING BILL
11	R9684	20/05/92	SECOND BANKING COORDINATION DIRECTIVE
12	A9287	21/07/92	WORKING GROUP ON CONFISCATION
13	K0278	28/07/92	WORKING GROUP ON CONFISCATION
14	A9883	30/07/92	WORKING GROUP ON CONFISCATION
15	R9685	30/07/92	WORKING GROUP ON CONFISCATION
16	K836	30/07/92	WORKING GROUP ON COMPENSATION
17	A9885	30/07/92	WORKING GROUP ON CONFISCATION
18	A9917	31/07/92	WORKING GROUP ON CONFISCATION
19	A10053	04/08/92	SECOND REPORT ON CONFISCATION
20	A10075	04/08/92	WORKING GROUP ON CONFISCATION
21	A10126	05/08/92	WORKING GROUP ON CONFISCATION
21M	A10032	05/08/92	WORKING GROUP ON CONFISCATION
22	A10950	08/09/92	FRAUD ETC BILL: INCLUSION OF EXTRADITION PROV
22M	A11385	17/09/92	MONEY LAUNDERING OFFENCES
23	A11856	28/09/92	FRAUD BILL:INCLUSION OF EXTRADITION PROVISIONSI
23M	A15653	23/11/92	WORKING GROUP ON CONFISCATION
24	A10670	23/07/93	THE MONEY LAUNDERING REGULATIONS

File ok MEX 10.3.94

Handwritten signature



6297

CABINET OFFICE	
A	10670
23 JUL 1993	
FILING INSTRUCTIONS	
FILE No.	76/35

FOLIO 24

Treasury Chambers, Parliament Street, SW1P 3AG

David Maclean MP
Minister of State
Home Office
Queen Anne's Gate
LONDON
SW1

Handwritten initials 'He' in a circle

Handwritten signature 'Mr. [unclear]'

Handwritten signature 'Mr. Niven'

Handwritten note: 'Mr. Gird (letter only)'

23 July 1993

Handwritten signature

26/7

Dear Minister,

THE MONEY LAUNDERING REGULATIONS

I enclose a copy of the draft Money Laundering Regulations. If you and colleagues to whom I am copying this are content, I propose that they should be laid down before Parliament as soon as the Criminal Justice Bill receives Royal Assent.

As you are aware, the Regulations implement those provisions of the EC Money Laundering Directive that are not contained in the Criminal Justice Bill. In content the Regulations are little changed from the draft that was issued for consultation in November last year. They have, however, been thoroughly overhauled to improve their clarity, and to ensure that they impose as small a compliance burden as possible on those that they affect. I attach a short summary of the main changes.

I am aware that a proposal to introduce any new legislation affecting the way that the financial sector conducts its business must be examined in the light of our commitment to deregulation. I am satisfied that the Money Laundering Regulations impose no more burden than is justified by our need to combat the threat posed by this activity and to meet our EC obligations. The consultation exercise conducted by my officials has been thorough, and the changes introduced have been warmly welcomed by those with whom they have been discussed.

Attached to the draft Regulations you will find compliance cost assessment, which will be published when the Regulations are laid. In the course of consultation my officials found a recognition among those affected of the need for the new legislation, and an acceptance that all possible steps had been taken to minimise the burdens that it will impose.

My officials have discussed this draft with yours, and with those of copy recipients. The few outstanding drafting points (relating to minor points of Scottish and Northern Irish law) will be tidied up by the weekend. Given the limited time available before the recess, I hope that it will be acceptable for me to propose that the Regulations should be laid on 28 July unless I hear to the contrary from you or others on or before 27 July.

Copies of this letter and the enclosures go to James Mackay, Ian Lang, Patrick Mayhew, Nick Lyell, Neil Hamilton and Sir Robin Butler,

Yours sincerely,
Sir Ian Jones

pp ANTHONY NELSON

Encs

[Approved by the Economic Secretary and signed in his absence]

THE MONEY LAUNDERING REGULATIONS

This note explains the contents of the Money Laundering Regulations, and indicates what changes have been made in the light of consultation.

Regulation 1: citation and commencement

This names the Regulations, and also sets 1 April 1994 as the date on which they come into force.

It was clear that some interval would be necessary between laying the Regulations and bringing them into force. We had originally proposed a six month period, to allow those covered by the Regulations to improve or introduce the necessary systems and procedures. Following representations from trade associations and some regulators we have extended this to eight months. This additional time will allow the production of sector-specific guidance by supervisors and others, which will greatly ease the task of introducing new systems.

Regulation 2: interpretation

This defines the terms used throughout the Regulations.

In response to comments received in consultation, a number of the definitions have been clarified. In particular the term "business relationship" has been given an expanded definition which is set out in Regulation 3 (see below).

The definition of money laundering given in Regulation 2 is almost identical to that in primary legislation. However, for technical reasons the latter encompasses laundering the proceeds of activities which, although legal where they are performed, would not be legal in the UK - for instance Sunday trading. The use of prosecutorial discretion prevents this being a matter of concern in primary legislation. For the purposes of the Regulations, however, the definition is limited to activities which are illegal both in the UK and the place in which they take place. This application of dual criminality allows the Regulations to apply to money laundering as it is normally understood.

Regulation 3: business relationships

This defines the term "business relationship".

The distinction between a business relationship, and what is referred to as a "one-off transaction" is crucial, in that the identification requirements in the Regulations apply only to one-off transactions involving more than ecu 15,000, but to all business relationships regardless of the sums of money involved. Once identification has been obtained at the start of a business relationship, however, no further identification is required whatever the size of subsequent transactions within it.

In redrafting the legislation we have sought to take as wide as possible a range of financial dealings outside the definition of "business relationship", so that the identification requirements would not be triggered by, for instance small scale consumer credit agreements, the purchase of a small holding in a unit trust or a single premium life assurance policy. This new Regulation has been discussed with the Finance and Leasing Association (FLA) and the Association of Unit Trusts and Investment Funds (AUTIF), both of whom have welcomed it.

Regulation 4: relevant financial business

This defines the activities which are subject to the requirements of the Regulations.

The earlier draft defined the coverage of the Money Laundering Regulations in terms of the scope of a number of EC Directives, as the Money Laundering Directive itself does. In consultation it was pointed out that it would be important for those who were covered by the Regulations to know whether their customers were also covered, so that they could take advantage of the exemptions from identification requirements that this circumstance permitted.

We have therefore recast this Regulation in terms of the UK legislation which mirrors the relevant Directives, including the Banking, Insurance and Financial Services Acts. Thus it is now clear that any institution authorised to carry on investment business under the Financial Services Act is also subject to these Regulations.

Regulation 5: systems and training to prevent money laundering

This makes it an offence to carry on financial business without having in place customer identification, record-keeping and internal reporting procedures, and without relevant staff training and other control and communication systems to guard against money laundering.

This Regulation received little specific comment during the consultation exercise, and has been little altered.

Regulation 6: offences by bodies corporate, partnerships and unincorporated associations

This applies the criminal offence under Regulation 5 to directors and other responsible officers of an institution if the offence arises out of the consent, connivance or negligence of that officer.

This Regulation received little specific comment during the consultation exercise, and has been little altered.

Regulation 7: identification procedures; business relationships and transactions

This requires customer identification procedures to define the circumstances under which customers must be identified, and, where satisfactory identification cannot be obtained, to require business not to proceed.

The original Regulation required the business in question to make the necessary identification checks. In response to representations from the FLA, whose members rely on credit reference agencies for customer identification checks, the Regulation now permits firms to rely on others to do the checking, although the firm itself will still be responsible for ensuring that this is done.

Regulation 8: payment by post etc.

Where payments are not made face-to-face, this permits firms to rely for identification on the fact that the payment comes directly from an account held in the customer's own name.

In the Money Laundering Directive itself, the ability to rely for identification solely on the fact that payment is to be made from an account in the customer's name is only explicitly extended to insurance business. We believe that, in order to create a level playing field for all forms of investment, it is appropriate to go a little wider. We understand that the EC Commission share this view. At the same time, we are limiting it to circumstances where there is no face-to-face contact: where there is, fuller identification should not be problematic.

To extend the derogation to the opening of bank accounts would be to open a distinct loophole in the Regulations, and this is not therefore permitted. However, in response to the Building Societies Association (BSA) we are adopting a sufficiently narrow definition of "account" so as not to bite upon those bank and building society products which although called "accounts" are in fact very limited savings and investment products.

Regulation 9: transactions on behalf of another

This allows customer identification procedures to require that only reasonable measures need be taken to identify the underlying customers of those direct customers who are or appear to be acting as agents. When dealing with clients who are regulated under a regime with anti-money laundering provisions equivalent to those in the EC, such procedures may allow the firm to rely on a written statement that the client identifies his own customers.

This Regulation has been heavily redrafted, following long and detailed discussions with representatives of the British Merchant Bankers Association and others involved in international financial business. The objective has been to ensure that an audit trail can be established for any future money laundering investigation, without disrupting existing legitimate market practices. The Regulation achieves these two objectives, and has been welcomed by market participants.

We are aware, however, that there remains a risk that, while customer identification evidence will have been obtained, it will not be readily accessible to investigators, because it is held in a jurisdiction where access is difficult. We believe that this should not cause any major problems, but we will be keeping the operation of this Regulation under close review.

Regulation 10: identification procedures; exemptions

This specifies a range of circumstances under which the identification requirements will not need to apply.

This Regulation gathers together the various exemptions permitted by the Directive, which were spread across the earlier draft. It also introduces an identification process equivalent to that in Regulation 9, but applying to business introduced by a regulated firm, rather than conducted through such a firm acting as agent. The same benefits and caveats apply here as in the previous case.

Regulation 11: identification procedures; supplementary provisions

This sets out what is meant by satisfactory evidence of identity, and what may be taken into account in determining how quickly customer identification procedures should be completed.

This is a new Regulation, which expands on elements of the earlier draft, to allow those covered by the Regulations to take into account the nature of their business and the circumstance of each transaction in determining how their identification procedures have been drawn up. The new draft allows a great deal of flexibility, within the overall requirement properly to identify customers.

Regulation 12: record-keeping procedures

This requires records of customer identification and business transacted to be held for at least five years.

This Regulation now clarifies what evidence should be kept to demonstrate customer identification, and it allows the records to be kept by others. These amendments will simplify procedures and reduce compliance costs.

Regulation 13: record-keeping procedures; supplementary provisions

This new Regulation introduces provisions detailing the record keeping requirements in the case of the customer becoming insolvent or defaulting on his or her obligations. It also clarifies the responsibilities for record keeping when business is conducted through representatives and agents.

Regulation 14: internal reporting procedures

This sets out the essential elements of an internal reporting system.

This Regulation received little comment, and is substantially unchanged. Flexibility has been introduced in that the officer responsible for receiving reports of suspected money laundering is no longer required to investigate such reports himself, but may pass them to another designated person for this purpose. This reflects existing practice within large financial institutions.

Regulation 15: supervisory authorities

This lists those supervisors exempted from the suspicions reporting offences in the forthcoming Criminal Justice Act 1993.

This list of supervisors has been drawn up to include all those who have a genuine supervisory function. It now includes inspectors appointed under companies and financial services legislation, as well as the supervisory authorities themselves.

We have considered whether it would be possible or desirable to include recognised investment exchanges, who do have a limited supervisory role, in the list. We have concluded however that we do not have the necessary vires under the European Communities Act.

Regulation 16: supervisors etc. to report evidence of money laundering

This places a statutory duty on those supervisors listed in Regulation 14 to report any evidence they may discover of money laundering to the authorities.

In replacing a criminal offence with a statutory duty which carries no actual sanctions, we are reflecting the different circumstances under which institutions and supervisors may come across indications of money laundering.

Regulation 17: transitional provisions

These make it clear that financial institutions will not have to apply identification procedures to their existing customers.

MONEY LAUNDERING REGULATIONS 1993

COMPLIANCE COST ASSESSMENT

The purpose and expected benefits of the Regulations

The Regulations require financial institutions to put in place systems to deter money laundering, and to assist the relevant authorities to detect money laundering activities. They are an essential part of the measures taken by the UK to implement the EC Directive on Money Laundering. Other provisions to implement the Directive are included in the Criminal Justice Act 1993. The Regulations will be made under Section 2(2) of the European Communities Act 1972.

Business sectors affected

2. The Regulations will affect the financial and professional services sector. Within this sector, they will apply to:

- all banks, building societies and other credit institutions;
- all individuals and firms authorised to conduct investment business under the Financial Services Act 1986;
- all insurance companies covered by the EC Life Directives, including the life business of Lloyd's of London;
- all other undertakings carrying out any of a range of financial activities listed in the annex to the Second Banking Supervision Directive. This includes notably *bureaux de change* and money transmission services.

Compliance costs

3. Costs are likely to increase in the areas of administration, training and provision of storage space for business records.

4. **Administration.** Institutions will be required to obtain evidence of identity from their customers when entering into a business relationship or carrying out a transaction or series of linked transactions of ECU 15,000 or more. They will also be required to keep records of identification evidence and financial dealings for 5 years (the minimum period required by the Directive).

5. Some institutions may have to introduce new systems of control as a result, for example revisions of computer software, which they would not otherwise have introduced, or introduced so quickly.

6. For members of self regulatory organisations which are already required to identify customers, and for other firms which may require identification for professional reasons, the main change is likely to be in the nature of the evidence required and the time for which it must be kept.

7. Most banks and building societies, and some other financial institutions, already have well developed procedures in these areas. The cost of compliance for these firms will be relatively lower.

8. **Training.** The institutions affected will be required to give all relevant staff initial and recurrent training in the reporting and customer identification requirements of the Regulations, in the legislative position, and in the company's anti-money laundering policies and procedures. There will be one-off costs in producing new procedures and training manuals.

9. Provision of storage space. The record-keeping requirement will have implications for the amount of storage space needed. Records may be stored in any form that is admissible as evidence in court.

Estimated compliance costs for a "typical" business in the sectors principally affected

10. The expense incurred will depend on the nature of existing measures of control and is likely to vary considerably. Furthermore, it is difficult to produce estimates for "typical" institutions as, even within the different areas of financial services activity the Regulations will apply to a wide variety of businesses in terms of staff numbers, volume of transactions, and existing degree of money laundering compliance. The tables at the end of this assessment are derived from figures obtained from a number of individual institutions and trade associations. The majority of those consulted said that they were unable to provide any firm figures for costs. However in no case was the cost of compliance raised as a general concern. Where specific features of the draft Regulations did appear to threaten the viability of particular lines of business or particular financial products, suitable amendments were made.

Total compliance costs

11. The difficulties discussed above apply even more strongly to any attempt to estimate the cost of compliance for the economy as a whole. It is necessary not only to estimate the number and sizes of the firms affected but also the degree to which they are already in compliance with the Regulations. Moreover, some of the measures needed to comply with the Regulations may coincide with steps taken to improve management or quality of service.

12. On the other side, there will be benefits to business from reducing their vulnerability to money laundering.

13. It has not been possible to produce more than very broad brush estimates based on illustrative assumptions.

- Substantial revision of computer programmes may well be needed by most medium and large institutions outside the banking and building societies area. This might affect some 500 firms, at a weighted average cost of around £40,000 pounds each. Ongoing maintenance might be ten percent of this total.
- Identification procedures will require new manuals to be produced by all but the smallest firms, at a total cost of perhaps £3 million, and the procedures may increase ongoing staff workload by perhaps 500,000 man-hours.
- Staff training might amount to some 500,000 man-hours annually, with additional total set-up costs of perhaps £5 million.
- Recurring record-keeping costs might be of the same order.

14. Allowing for a margin of other costs, the total might be of the order of £30m of initial costs and £20m of recurring costs.

Effects on international competitiveness

15. The Regulations require new identification procedures to be followed in transactions involving parties from non-EC countries. Some financial institutions consider that this will lead to some loss of business from non-EC customers. Amendments have been made to the Regulations to ensure that the additional procedures for dealing with non-EC customers are proportionate to the risk of money laundering involved in doing business with customers from the countries concerned.

Extent of consultation

16. Businesses were asked to give their views on the cost of the proposed Regulations in 'Implementation of the EC Money Laundering Directive' H M Treasury consultation paper issued in May 1992 for comments by 31 July 1992. One thousand copies were issued to a wide range of regulatory authorities, recognised professional bodies and trade associations, and to a number of individual businesses.

17. Consultees were asked "to identify and quantify any additional direct or indirect costs (recurring and non-recurring)" that would be likely to arise as a result. Of the 60 respondents, fewer than ten commented on costs, and only one respondent attempted to quantify them. This suggested that costs arising directly from the Money Laundering Directive were not a major cause for concern.

18. 450 copies of the draft Money Laundering Regulations were issued in November 1992, to those bodies most closely affected.

19. In June 1993 a further draft of the Regulations and a draft compliance cost assessment was sent for comment to a range of regulatory authorities, recognised professional bodies and trade associations, and was made available on request to other interested bodies.

Arrangements for monitoring and review

20. It is not intended that actual costs will be actively monitored against estimated costs, not least because of the difficulties referred to above of quantifying costs across the different sectors affected. However the effectiveness of the Regulations will be kept under review, and the compliance burden will be taken fully into account in any revision of them.

H M TREASURY
22 JULY 1993

TYPICAL COMPLIANCE COSTS

LARGE BUILDING SOCIETY

Annual running costs: £53 m

Non-recurring costs:

computer systems	minimal
new manuals	£10,000
training	£50,000
other	minimal

TOTAL	£60,000
% of total annual running costs	0.11%

Recurring costs:

maintenance of computersystems	minimal
identification procedures	£16,000
training	minimal
record keeping	£ 7,000
other	minimal

TOTAL	£23,000
% of total annual running costs	0.04%

LARGE UNIT TRUST AND PEP PLAN MANAGEMENT COMPANY

Annual running costs: £19M

Non-recurring costs:

computer systems	£200,000
new manuals	£ 10,000
training	£ 20,000
other	minimal

TOTAL	£230,000
% of total annual running costs	1.21%

Recurring costs:

maintenance of computer systems	£ 15,000
id procedures, etc	£ 50,000
training	£ 20,000
record keeping	£ 10,000
other	£ 50,000

TOTAL	£145,000
% of total annual running costs	0.76%

LARGE LIFE ASSURANCE/PENSIONS COMPANY

Annual running costs: £142.2M

Non-recurring costs:

computer systems	£ 50,000
new manuals	£ 22,000
training	£600,000
other	minimal

TOTAL	£672,000
% of total annual running costs	0.47%

Recurring costs:

maintenance of computer systems	minimal
identification procedures	£ 10,000
training	£ 20,000
record keeping	minimal
other (audit)	£ 15,000

TOTAL	£ 45,000
% of total annual running costs	0.03%

MEDIUM SIZED MOTOR FINANCE HOUSE

Annual running costs: £600,000

Non-recurring costs:

computer systems	£10,000
new manuals	£ 2,000
training	£10,000
other	minimal

TOTAL	£22,000
% of total annual running costs	3.67%

Recurring costs:

maintenance of computer systems	£ 3,000
training	£ 3,000
record keeping	£10,000
other	minimal

TOTAL	£16,000
% of total annual running costs	2.67%

DRAFT

MONEY LAUNDERING REGULATIONS 1993

ARRANGEMENT OF REGULATIONS

General

1. Citation and commencement.
2. Interpretation.
3. Business relationships.
4. Relevant financial business.

Systems and training to prevent money laundering

5. Systems and training to prevent money laundering.
6. Offences by bodies corporate, partnerships and unincorporated associations.

Identification procedures

7. Identification procedures; business relationships and transactions.
8. Payment by post etc.
9. Identification procedures; transactions on behalf of another.
10. Identification procedures; exemptions.
11. Identification procedures; supplementary provisions.

Record-keeping procedures

12. Record-keeping procedures.
13. Record-keeping procedures; supplementary provisions.

Internal reporting procedures

14. Internal reporting procedures.

*Duty of supervisory authorities to report evidence of
money laundering*

15. Supervisory authorities.
16. Supervisors etc. to report evidence of money laundering.

Transitional provision.

17. Transitional provisions.

SCHEDULE -- Annex to the Second Banking Coordination Directive

General

Citation and commencement

1.—These regulations may be cited as the Money Laundering Regulations 1993.

(2) These Regulations shall come into force on 1 April 1994.

Interpretation

2.—(1) In these Regulations—

"applicant for business" means a person seeking to form a business relationship, or carry out a one-off transaction, with a person who is carrying out relevant financial business in the United Kingdom;

"business relationship" has the meaning given by regulation 3 below;

"Case 1", "Case 2", "Case 3" and "Case 4" have the meanings given in regulation 7 below;

"constable" includes a person commissioned by the Commissioners of Customs and Excise;

"insurance business" means long term business within the meaning of the Insurance Companies Act 1982;

"the Money Laundering Directive" means the Council Directive on prevention of the use of the financial system for the purpose of money laundering (No. 91/308/EEC);

"one-off transaction" means any transaction other than a transaction carried out in the course of an established business relationship formed by a person acting in the course of relevant financial business;

"relevant financial business" has the meaning given by regulation 4 below; and

"supervisory authority" has the meaning given by regulation 15 below.

(2) In these Regulations "ecu" means the european currency unit as defined in article 1 of Council Regulation No.3180/78/EEC; and the exchange rates as between the ecu and the currencies of the member States to be applied for each year beginning on 31 December shall be the rates applicable on the last day of the preceding October for which rates for the currencies of all the member States were published in the Official Journal of the Communities.

(3) In these Regulations, except in so far as the context otherwise requires, "money laundering" means doing any act which constitutes an offence under —

- (a) section 23A or 24 of the Drug Trafficking Offences Act 1986 (which relate to handling etc of proceeds of drug trafficking);
- (b) sections 42A or 43 of the Criminal Justice (Scotland) Act 1987 (which relate to the handling etc of proceeds of drug trafficking);
- (c) section 93A, 93B or 93C of the Criminal Justice Act 1988 (which relate to the handling etc of proceeds of certain other criminal conduct);
- (d) section 11 of the Prevention of Terrorism (Temporary Provisions) Act 1989 (which relate to financial assistance for terrorism);
- (e) section 14 of the Criminal Justice (International Co-operation) Act 1990 (concealing or transferring proceeds of drug trafficking);
- (f) section 53 or 54 of the Northern Ireland (Emergency Provisions) Act 1991 (which relate to the handling etc of proceeds of terrorist-related activities); or
- (g) any provision whenever made, which has effect in Northern Ireland, and corresponds to any of the provisions mentioned in sub-paragraph (a), (b) or (c) above;

or in the case of an act done otherwise than in the relevant part of the United Kingdom would constitute such an offence if done in the United Kingdom.

(4) The reference in paragraph (3) above to doing any act which would constitute an offence under the provisions mentioned in sub-paragraph (c) of that paragraph shall, for the purposes of these Regulations, be construed as a reference to doing any act which would constitute an offence under those provisions if, for the definition of "criminal conduct" in section 93A(7) of the Criminal Justice Act 1988, there were substituted –

"(7) In this Part of this Act "criminal conduct" means –

(a) conduct which constitutes an offence to which this Part of this Act applies;
or

(b) conduct which –

(i) would constitute such an offence if it had occurred in England and Wales or (as the case may be) Scotland; and

(ii) does contravene the law of a country outside England and Wales or Scotland."

(5) For the purposes of these Regulations, any provision having effect in Northern Ireland which corresponds to the provisions referred to in paragraph (3)(c) above shall be construed as if it had been amended by a provision which corresponds to paragraph (4) above, with appropriate modifications.

(6) For the purposes of this regulation, a business relationship formed by any person acting in the course of relevant financial business is an established business relationship where that person has obtained, under the procedures maintained by him in accordance with regulation 7 below, satisfactory evidence of the identity of the person who, in relation to the formation of that business relationship, was the applicant for business.

Business relationships.

3.-(1) Any reference in this regulation to an arrangement between two or more persons is a reference to an arrangement in which at least one person is acting in the course of a business.

(2) For the purposes of these Regulations "business relationship" means any arrangement between two or more persons where –

(a) the purpose of the arrangement is to facilitate the carrying out of transactions between the persons concerned on a frequent, habitual or regular basis; and

(b) subject to paragraph (3) below, the total amount of any payment or payments to be made by any person to any other in the course of that arrangement is not known or capable of being ascertained at the time the arrangement is made.

(3) Where an account is to be opened with a institution falling within regulation 8(4)(a) or (b) below, the opening of that account shall for the purposes of these Regulations be treated as the formation of a business relationship notwithstanding that the condition set out at paragraph (2)(b) above is not met.

Relevant financial business

4.-(1) For the purposes of these regulations, "relevant financial business" means, subject to paragraph (2) below, the business of engaging in one or more of the following –

(a) deposit-taking business carried on by a person who is for the time being authorised under the Banking Act 1987;

(b) acceptance by a building society of deposits made by any person (including the raising of money from members of the society by the issue of shares);

(c) business carried on by the National Savings Bank;

(d) business carried on by a credit union within the meaning of the Credit Unions Act 1979 or the Credit Unions (Northern Ireland) Order 1985;

(e) any home regulated activity carried on by a European institution which has complied with the requirements of paragraph 1 of Schedule 2 to the Banking Coordination (Second Council Directive) Regulations;

(f) investment business within the meaning of the Financial Services Act 1986;

(g) any of the activities in points 1 to 12, or 14, of the Annex to the Second Banking Coordination Directive (the text of which is, for convenience of reference, set out in the Schedule to these regulations), other than an activity falling within paragraphs (a) to (f) above;

(h) insurance business carried on by a person who has received official authorisation under article 6 or 27 of the First Life Directive.

(2) A business is not relevant financial business in so far as it consists of –

(a) any of the following activities carried on by a society registered under the Industrial and Provident Societies Act 1965 –

(i) the issue of withdrawable share capital within the limit set by section 6 of that Act; or

(ii) the acceptance of deposits from the public within the limit set by section 7(3) of that Act;

(b) business carried on by the Bank of England;

(c) in relation to any person who is an exempted person for the purposes of section 45 of the Financial Services Act 1986 (miscellaneous exemptions for holders of certain judicial and other offices), such of the activities as are specified in that section in relation to that person.

(3) For the purposes of paragraph (1)(f) above, any reference in these Regulations to the carrying on of relevant financial business in the United Kingdom shall be construed in accordance with section 1(3) of the Financial Services Act 1986.

(4) In this regulation –

"building society" has the same meaning as in the Building Societies Act 1986;

"deposit-taking business" has the same meaning as in the Banking Act 1987;

"European institution" has the same meaning as in the Banking Coordination (Second Council Directive) Regulations 1992;

"the First Life Directive" means the First Council Directive on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life assurance (No. 79/267/EEC); and

"the Second Banking Coordination Directive" means the Second Council Directive on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions (No. 89/646/EEC).

Systems and training to prevent money laundering

Systems and training to prevent money laundering

5.— (1) No person shall, in the course of relevant financial business carried on by him in the United Kingdom, form a business relationship, or carry out a one-off transaction, with or for another unless that person —

(a) maintains the following procedures established in relation to that business —

(i) identification procedures in accordance with regulations 7 and 9 below;

(ii) record-keeping procedures in accordance with regulation 12 below;

(iii) except where the person concerned is an individual who in the course of relevant financial business does not employ or act in association with any other person, internal reporting procedures in accordance with regulation 14 below; and

(iv) such other procedures of internal control and communication as may be appropriate for the purposes of forestalling and preventing money laundering;

(b) takes appropriate measures from time to time for the purposes of making employees whose duties include the handling of relevant financial business aware of —

(i) the procedures under sub-paragraph (a) above which are maintained by him and which relate to the relevant financial business in question, and

(ii) the enactments relating to money laundering; and

(c) provides such employees from time to time with training in the recognition and handling of transactions carried out by, or on behalf of, any person who is, or appears to be, engaged in money laundering.

(2) Any person who contravenes this regulation shall be guilty of an offence and liable —

(a) on conviction on indictment, to imprisonment not exceeding a term of two years or a fine or both;

(b) on summary conviction, to a fine not exceeding the statutory maximum.

(3) In determining whether a person has complied with any of the requirements of paragraph (1) above, a court may take account of —

(a) any relevant supervisory guidance which applies to that person;

(b) in a case where no guidance falling within sub-paragraph (a) above applies, any other relevant guidance issued by a body that regulates, or is representative of, any trade, profession, business or employment carried on by that person.

(4) In proceedings against any person for an offence under this regulation, it shall be a defence for that person to show that he took all reasonable steps and exercised all due diligence to avoid committing the offence.

(5) In this regulation –

"enactments relating to money laundering" means the enactments referred to in regulation 2(3) above and the provisions of these Regulations; and

"supervisory guidance" means guidance issued, adopted or approved by a supervisory or regulatory authority.

Offences by bodies corporate, partnerships and unincorporated associations.

6.– (1) Where an offence under regulation 5 above committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity he, as well as the body corporate, shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

(2) Where the affairs of a body corporate are managed by the members, paragraph (1) above shall apply in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.

(3) Where an offence under regulation 5 above committed by a partnership, or by an unincorporated association other than a partnership, is proved to have been committed with the consent or connivance of, or is attributable to any neglect on the part of, a partner in the partnership or (as the case may be) a person concerned in the management or control of the association, he, as well as the partnership or association, shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Identification procedures

Identification procedures; business relationships and transactions.

7.– (1) Subject to regulations 8 and 10 below, identification procedures maintained by a person are in accordance with this regulation if in Cases 1 to 4 set out below they require, as soon as is reasonably practicable after contact is first made between that person and an applicant for business concerning any particular business relationship or one-off transaction –

(a) the production by the applicant for business of satisfactory evidence of his identity; or

(b) the taking of such measures specified in the procedures as will produce satisfactory evidence of his identity;

and where that evidence is not obtained, the procedures are in accordance with this regulation if they require, subject to paragraph (6) below, that the business relationship or one-off transaction in question shall not proceed any further.

(2) Case 1 is any case where the parties form or resolve to form a business relationship between them.

(3) Case 2 is any case where, in respect of any one-off transaction, any person handling the transaction knows or suspects that the applicant for business is engaged in money laundering, or that the transaction is carried out on behalf of another person engaged in money laundering.

(4) Case 3 is any case where, in respect of any one-off transaction, payment is to be made by or to the applicant for business of the amount of ecu 15,000 or more.

(5) Case 4 is any case where, in respect of two or more one-off transactions –

(a) it appears at the outset to a person handling any of the transactions that –

(i) the transactions are linked, and

(ii) the total amount, in respect of all of the transactions, which is payable by or to the applicant for business is ecu 15,000 or more; or

(b) at any later stage, it comes to the attention of such a person that sub-paragraphs (a)(i) and (ii) above are satisfied.

(6) The procedures referred to in paragraph (1) above are in accordance with this regulation if, when a report is made in circumstances falling within Case 2 (whether in accordance with regulation 14 or directly to a constable), they provide for steps to be taken in relation to the one-off transaction in question in accordance with the directions of a constable.

(7) In these Regulations references to satisfactory evidence of a person's identity shall be construed in accordance with regulation 11(1) below.

Payment by post etc.

8.– (1) Where satisfactory evidence of an applicant for business would, apart from this paragraph, be required under identification procedures in accordance with regulation 7 above but –

(a) the circumstances are such that a payment is to be made by the applicant

for business; and

(b) it is reasonable in all the circumstances –

(i) for the payment to be sent by post or by any electronic means which is effective to transfer funds; or

(ii) for the details of the payment to be sent by post, to be given on the telephone or to be given by any other electronic means;

then, subject to paragraph (2) below, the fact that the payment is debited from an account held in the applicant's name at an institution mentioned in paragraph (4) below (whether the account is held by the applicant alone or jointly with one or more other persons) shall be capable of constituting the required evidence of identity.

(2) Paragraph (1) above shall not have effect to the extent that –

(a) the circumstances of the payment fall within Case 2; or

(b) the payment is made by any person for the purpose of opening a relevant account with an institution falling within paragraph (4)(a) or (b) below.

(3) For the purposes of paragraph (1)(b) above, it shall be immaterial whether the payment or its details are sent or given to a person who is bound by regulation 5(1) above or to some other person acting on his behalf.

(4) The institutions referred to in paragraph (1) above are–

(a) an institution which is for the time being authorised by the Bank of England under the Banking Act 1987 or by the Building Societies Commission under the Building Societies Act 1986;

(b) a European authorised institution within the meaning of the Banking Coordination (Second Council) Directive Regulations 1992; or

(c) any other institution which is an authorised credit institution.

(5) For the purposes of this regulation –

"authorised credit institution" means a credit institution as defined in Article 1 of Council Directive 77/780/EEC which is authorised to carry on the business of a credit institution by a competent authority of a member state; and

"relevant account" means an account from which a payment may be made by any means to a person other than the applicant for business, whether such a payment –

(a) may be made directly to such a person from the account by or on behalf of the applicant for business; or

(b) may be made to such a person indirectly as a result of –

(i) a direct transfer of funds from an account from which no such direct payment may be made to another account, or

(ii) a change in any of the characteristics of the account.

Identification procedures; transactions on behalf of another.

9.– (1) This regulation applies where, in relation to a person who is bound by regulation 5(1) above, an applicant for business is acting otherwise than as principal.

(2) Subject to regulation 10 below, identification procedures maintained by a person are in accordance with this regulation if, in a case to which this regulation applies, they require reasonable measures to be taken for the purpose of establishing the identity of any person on whose behalf the applicant for business is acting.

(3) In determining, for the purposes of paragraph (2) above, what constitutes reasonable measures in any particular case regard shall be had to all the circumstances of the case and, in particular, to best practice which, for the time being, is followed in the relevant field of business and which is applicable to those circumstances.

(4) Without prejudice to the generality of paragraph (3) above, if the conditions mentioned in paragraph (5) below are fulfilled in relation to an applicant for business who is, or appears to be, acting as an agent for a principal (whether undisclosed or disclosed for reference purposes only) it shall be reasonable for a person bound by regulation 5(1) above to accept a written assurance from the applicant for business to the effect that evidence of the identity of any principal on whose behalf the applicant for business may act in relation to that person will have been obtained and recorded under procedures maintained by the applicant for business.

(5) The conditions referred to in paragraph (4) above are that, in relation to the business relationship or transaction in question, there are reasonable grounds for believing that the applicant for business –

(a) acts in the course of a business in relation to which an overseas regulatory authority exercises regulatory functions; and

(b) is based or incorporated in, or formed under the law of, a country other than a member State in which there are in force provisions at least equivalent to those set out in the Money Laundering Directive.

(6) In paragraph (5) above, "overseas regulatory authority" and "regulatory functions" have the same meaning as in section 82 of the Companies Act 1989.

Identification procedures; exemptions

10.–(1) Subject to paragraph (2) below, identification procedures under regulations 7

and 9 above shall not require any steps to be taken to obtain evidence of any person's identity-

- (a) where there are reasonable grounds for believing that the applicant for business is a person who is bound by the provisions of regulation 5(1) above;
- (b) where there are reasonable grounds for believing that the applicant for business is otherwise a person who is covered by the Money Laundering Directive;
- (c) where any one-off transaction is carried out with or for a third party pursuant to an introduction effected by a person who has provided an assurance that evidence of the identity of all third parties introduced by him will have been obtained and recorded under procedures maintained by him, where that person identifies the third party and where -
 - (i) that person falls within sub-paragraph (a) or (b) above; or
 - (ii) there are reasonable grounds for believing that the conditions mentioned in regulation 9(5)(a) and (b) above are fulfilled in relation to him;
- (d) where the person who would otherwise be required to be identified, in relation to a one-off transaction, is the person to whom the proceeds of that transaction are payable but to whom no payment is made because all of those proceeds are directly reinvested on his behalf in another transaction -
 - (i) of which a record is kept, and
 - (ii) which can result only in another reinvestment made on that person's behalf or in a payment made directly to that person;
- (e) in relation to insurance business consisting of a policy of insurance in connection with a pension scheme taken out by virtue of a person's contract of employment or occupation where the policy -
 - (i) contains no surrender clause, and
 - (ii) may not be used as collateral for a loan;
- (f) in relation to insurance business in respect of which a premium is payable in one instalment of an amount not exceeding ecu 2,500:
- (g) in relation to insurance business in respect of which a periodic premium is payable and where the total payable in respect of any calendar year does not exceed ecu 1,000.

(2) Nothing in this regulation shall apply in circumstances falling within Case 2.

(3) In this regulation "calendar year" means a period of twelve months beginning on 31 December.

Identification procedures; supplementary provisions

11.-(1) For the purposes of these Regulations, evidence of identity is satisfactory if –

(a) it is reasonably capable of establishing that the applicant is the person he claims to be; and

(b) the person who obtains the evidence is satisfied, in accordance with the procedures maintained under these Regulations in relation to the relevant financial business concerned, that it does establish that fact.

(2) In determining for the purposes of regulation 7(1) above the time span in which satisfactory evidence of a person's identity has to be obtained, in relation to any particular business relationship or one-off transaction, all the circumstances shall be taken into account including, in particular –

(a) the nature of the business relationship or one-off transaction concerned;

(b) the geographical locations of the parties;

(c) whether it is practical to obtain the evidence before commitments are entered into between the parties or before money passes;

(d) in relation to Case 3 or 4, the earliest stage at which there are reasonable grounds for believing that the total amount payable by an applicant for business is ecu 15,000 or more.

Record-keeping procedures

Record-keeping procedures.

12.-(1) Record-keeping procedures maintained by a person are in accordance with this regulation if they require the keeping, for the prescribed period, of the following records –

(a) in any case where, in relation to any business relationship that is formed or one-off transaction that is carried out, evidence of a person's identity is obtained under procedures maintained in accordance with regulation 7 or 9 above, a record that indicates the nature of the evidence and–

(i) comprises a copy of the evidence; or

(ii) provides such information as would enable a copy of it to be obtained; or

(iii) in a case where it is not reasonably practicable to comply with sub-paragraph (i) or (ii) above, provides sufficient information to

enable the details as to a person's identity contained in the relevant evidence to be re-obtained; and

(b) a record containing details relating to all transactions carried out by that person in the course of relevant financial business.

(2) For the purposes of paragraph (1)(a) and (b) above, the prescribed period is, subject to paragraph (3) below, the period of at least five years commencing with –

(a) in relation to such records as are described in sub-paragraph (a), the date on which the relevant business was completed within the meaning of paragraph (4) below; and

(b) in relation to such records as are described in sub-paragraph (b), the date on which all activities taking place in the course of the transaction in question were completed.

(3) Where a person who is bound by the provisions of regulation 5(1) above –

(a) forms a business relationship or carries out a one-off transaction with another person;

(b) has reasonable grounds for believing that that person has become insolvent; and

(c) after forming that belief, takes any step for the purpose of recovering all or part of the amount of any debt payable to him by that person which has fallen due;

the prescribed period for the purposes of paragraph (1)(a) or (b) above is the period of at least five years commencing with the date on which the first such step is taken.

(4) For the purposes of paragraph (2)(a) above the date on which relevant business is completed is, as the case may be –

(a) in circumstances falling within Case 1, the date of the ending of the business relationship in respect of whose formation the record under paragraph (1)(a) above was compiled;

(b) in circumstances falling within Case 2 or 3, the date of the completion of all activities taking place in the course of the one-off transaction in respect of which the record under paragraph (1)(a) above was compiled;

(c) in circumstances falling within Case 4, the date of the completion of all activities taking place in the course of the last one-off transaction in respect of which the record under paragraph (1)(a) above was compiled;

and where the formalities necessary to end a business relationship have not been observed, but a period of five years has elapsed since the date on which the last transaction was carried

out in the course that relationship, then the date of the completion of all activities taking place in the course of that last transaction shall be treated as the date on which the relevant business was completed.

Record-keeping procedures; supplementary provisions

13.— (1) For the purposes of regulation 12(3)(b) above, a person shall be taken to be insolvent if, but only if, in England and Wales —

(a) he has been adjudged bankrupt or has made a composition or arrangement with his creditors;

(b) an order has been made with respect to him under section 112 to 112B of the County Courts Act 1984 (administration orders, orders restricting enforcement and administration orders with composition provisions);

(c) he has died and his estate falls to be administered in accordance with an order under section 421 of the Insolvency Act 1986 (insolvent estates of deceased persons); or

(d) where that person is a company, a winding up order or an administration order is made or a resolution for voluntary winding up is passed with respect to it, or a receiver or manager of its undertaking is duly appointed, or possession is taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property of the company comprised in or subject to the charge or a voluntary arrangement proposed for the purpose of Part I of the Insolvency Act 1986 is approved under that Part.

[(2) and (3) *Equivalent provision for Scotland and Northern Ireland.*]

(4) Where a person bound by regulation 5(1) above —

(a) is an appointed representative;

(b) is not —

(i) an authorised person within the meaning of the Financial Services Act 1986 Act, or

(ii) authorised under the Building Societies Act 1986 or the Banking Act 1987;

it shall be the responsibility of the appointed representative's principal to ensure that record-keeping procedures in accordance with regulation 12 above are maintained in respect of any relevant financial business carried out by the appointed representative which is investment business carried on by him for which the principal has accepted responsibility in writing.

(5) Where record-keeping procedures in accordance with regulation 12 above are not maintained in respect of business relationships formed, and one-off transactions carried out, in the course such relevant financial business as is referred to in paragraph (4) above, an

appointed representative's principal shall be regarded as having contravened regulation 5 in respect of those procedures and he, as well as the appointed representative, shall be guilty of an offence and shall be liable to be proceeded against and punished accordingly.

(6) Section 44(2) of the Financial Services Act 1986 (construction of references to appointed representative, his principal and investment business carried out by an appointed representative) shall apply for the purposes of paragraph (4) and (5) above as it applies for the purposes that Act.

Internal reporting procedures

Internal reporting procedures.

14. Internal reporting procedures maintained by a person are in accordance with this regulation if they include provision –

(a) identifying a person ("the appropriate person") to whom a report is to be made of any information or other matter which comes to the attention of a person handling relevant financial business and which, in the opinion of the person handling that business, gives rise to a knowledge or suspicion that another person is engaged in money laundering;

(b) requiring that any such report be considered in the light of all other relevant information by the appropriate person, or by another designated person, for the purpose of determining whether or not the information or other matter contained in the report does give rise to such a knowledge or suspicion;

(c) for any person charged with considering a report in accordance with sub-paragraph (b) above to have reasonable access to other information which may be of assistance to him and which is available to the person responsible for maintaining the internal reporting procedures concerned; and

(d) for securing that the information or other matter contained in a report is disclosed to a constable where the person who has considered the report under the procedures maintained in accordance with the preceding provisions of this regulation knows or suspects that another person is engaged in money laundering.

Duty of supervisory authorities to report evidence of money laundering

Supervisory authorities

15.–(1) References in these Regulations to supervisory authorities shall be construed in accordance with the following provisions.

(2) For the purposes of these Regulations, each of the following is a supervisory authority –

(a) the Bank of England;

- (b) the Building Societies Commission;
- (c) a designated agency within the meaning of the Financial Services Act 1986;
- (d) a recognised self regulating organisation within the meaning of the Financial Services Act 1986;
- (e) a recognised professional body within the meaning of the Financial Services Act 1986;
- (f) a transferee body within the meaning of the Financial Services Act 1986;
- (g) a recognised self-regulating organisation for friendly societies within the meaning of the Financial Services Act 1986;
- (h) the Secretary of State;
- (i) the Treasury;
- (j) the Council of Lloyd's;
- (k) the Director General of Fair Trading;
- (l) the Friendly Societies Commission;
- (m) the Chief Registrar of Friendly Societies;
- (n) the Central Office of the Registry of Friendly Societies;
- (o) the Registrar of Friendly Societies for Northern Ireland;
- (p) the Assistant Registrar of Friendly Societies for Scotland.

(3) Regulation 16 below applies to the Secretary of State in the exercise, in relation to any person carrying on relevant financial business, of his functions under the enactments relating to insurance companies, companies or insolvency or under the Financial Services Act 1986.

Supervisors etc. to report evidence of money laundering.

16.-(1) Subject to paragraph (2) below, where a supervisory authority –

- (a) obtains any information; and
- (b) is of the opinion that the information indicates that any person has or may have been engaged in money laundering,

the authority shall, as soon as is reasonably practicable, disclose that information to a constable.

(2) Where any person is a secondary recipient of information obtained by a supervisory authority, and that person forms such an opinion as is mentioned in paragraph (1)(b) above, that person may disclose the information to a constable.

(3) Where any person within paragraph (5) below –

(a) obtains any information whilst acting in the course of any investigation, or discharging any functions, to which his appointment or authorisation relates; and

(b) is of the opinion that the information indicates that any person has or may have been engaged in money laundering,

that person shall, as soon as is reasonably practicable, either disclose that information to a constable or disclose that information to the supervisory authority by whom he was appointed or authorised.

(4) Any disclosure made by virtue of the preceding provisions of this regulation shall not be treated as a breach of any restriction imposed by statute or otherwise.

(5) Persons falling within this paragraph are –

(a) a person or inspector appointed under section 17 of the Industrial Assurance Act 1923 or section 65 or 66 of the Friendly Societies Act 1992;

(b) an inspector appointed under section 49 of the Industrial and Provident Societies Act 1965 or section 18 of the Credit Unions Act 1979;

(c) an inspector appointed under section 431, 432, 442 or 446 of the Companies Act 1985;

(d) a person or inspector appointed under section 55 and 56 of the Building Societies Act 1986;

(e) an inspector appointed under section 94 or 177 of the Financial Services Act 1986;

(f) a person appointed under section 41 of the Banking Act 1987; and

(g) a person authorised to require the production of documents under section 44 of the Insurance Companies Act 1982, section 447 of the Companies Act 1985, section 106 of the Financial Services Act 1986 or section 84 of the Companies Act 1989.

(6) In this regulation "secondary recipient", in relation to information obtained by a supervisory authority, means any person to whom that information has been passed by the authority.

Transitional provisions

Transitional provisions

17.— (1) Nothing in these Regulations shall require a person who is bound by regulation 5(1) above to maintain procedures in accordance with regulations 7 and 9 which require evidence to be obtained, in respect of any business relationship formed by him before the date on which these Regulations come into force, as to the identity of the person with whom that relationship has been formed.

(2) For the purposes of regulation 2(6) above, any business relationship referred to in paragraph (1) above shall be treated as if it were an established business relationship.

(3) In regulation 10(1)(g), the reference to the total payable in respect of any calendar year not exceeding ecu 1,000 shall, for the period commencing with the coming into force of these regulations and ending with 30 December 1994, be construed as a reference to the total payable in respect of that period not exceeding ecu 750.

SCHEDULE

"ANNEX

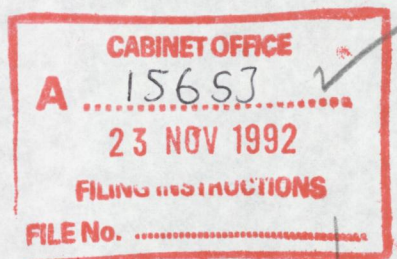
LIST OF ACTIVITIES SUBJECT TO MUTUAL RECOGNITION

1. Acceptance of deposits and other repayable funds from the public.
2. Lending(1).
3. Financial leasing.
4. Money transmission services.
5. Issuing and administering means of payment (e.g. credit cards, travellers' cheques and bankers' drafts).
6. Guarantees and commitments.
7. Trading for own account or for account of customers in:
 - (a) money market instruments (cheques, bills, CDs, etc.);
 - (b) foreign exchange;
 - (c) financial futures and options;
 - (d) exchange and interest rate instruments;
 - (e) transferable securities.
8. Participation in securities issues and the provision of services related to such issues(2).
9. Advice to undertakings on capital structure, industrial strategy and related questions and advice and services relating to mergers and the purchase of undertakings.
10. Money broking.
11. Portfolio management and advice.
12. Safekeeping and administration of securities.
13. Credit reference service.
14. Safe custody services."

(1) Including *inter alia*:
- consumer credit
- mortgage credit
- factoring, with or without recourse
- financing of commercial transactions (including forfaiting).

(2) This paragraph represents the text as amended in accordance with a corrigendum published in the Official Journal of the European Communities No. L 83 of 30 March 1990.

The Rt. Hon. Michael Heseltine MP
President of the Board of Trade



Secretary of State
Department of
Trade and Industry

Ashdown House
123 Victoria Street
London SW1E 6RB

Direct line
071-215 4440

DTI Enquiries
071-215 5000

The Rt Hon Kenneth Clarke QC MP
Secretary of State for the Home Department
50 Queen Anne's gate
LONDON
SW1H 9AT

23 November 1992

Mr Bird

Mr Galloway

Mr Turnbull

WORKING GROUP ON CONFISCATION

Thank you for copying me your recent letter to Nicholas Lyell about the handling of the publication of the second Report of the Working Group on Confiscation.

The procedures for publication which you have agreed with Nicholas appear sensible and I have no difficulties with them.

As I remarked in my letter to you of 31 July on this subject, my officials will be glad to work closely with yours in the detailed drafting of the legislation - especially of those elements which concern money laundering and disclosure of information to prosecutors.

Copies of this letter go to Nicholas Lyell, James Mackay, Douglas Hurd, Norman Lamont, Ian Lang, Patrick Mayhew; and to Sir Robin Butler and Sir Brian Unwin.

For Sir
[Signature]

JW11154

dti

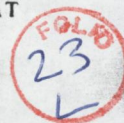
the department for Enterprise





PRIVY COUNCIL OFFICE
WHITEHALL, LONDON SW1A 2AT

8 October 1992



J. Ken,

Mr Butler

Mr Galloway

Mr Paul

FRAUD ETC BILL: INCLUSION OF EXTRADITION PROVISIONS

Thank you for your further letter of 28 September requesting the inclusion of an enabling clause in the Fraud Etc Bill to allow, by a later order, the application of speciality requirements to extradition arrangements between the Republic of Ireland and the United Kingdom.

Douglas Hurd, Paddy Mayhew and Nick Lyell wrote supporting your request for early legislation. I am content therefore for you to include the provisions in the Fraud Bill. I am concerned however that the inclusion of these provisions should not delay consideration of the Bill at LG Committee on 20 October. You should therefore lose no time in the submission of instructions to Parliamentary Counsel.

I am copying this letter to Norman Lamont, Douglas Hurd, John Wakeham, Patrick Mayhew, Richard Ryder and Nick Lyell, and to Sir Robin Butler and First Parliamentary Counsel.

ew-
Copy

TONY NEWTON

The Rt Hon Kenneth Clarke QC MP
Home Secretary
Home Office
50 Queen Anne's Gate
LONDON SW1H 9AT

Fraud Bill folder

Mr Galloway

FOLIO
23



CABINET OFFICE
A11.8.56.....
29 SEP 1992
FILING INSTRUCTIONS
FILE No.R 76/35.....

QUEEN ANNE'S GATE LONDON SW1H 9AT

cc Miss Neill-Jones

W 28 SEP 1992

c w Bill

FRAUD ETC BILL: INCLUSION OF EXTRADITION PROVISIONS

Thank you for your letter of 1 September, about my proposal to include an enabling clause in the Fraud Etc Bill to allow, by a later order, the application of speciality requirements to extradition arrangements between the Republic of Ireland and the United Kingdom. I am glad that you support in principle the need to legislate.

Your first question was whether legislation could be postponed until the 1993-4 session. I, and other Ministerial colleagues directly involved, do not believe that this would satisfy the Irish Government, who, as Nick Lyell said in his letter of 9 September, are looking for UK legislation at the earliest possible moment, and are likely to block extradition generally if we cannot show them action now. A statement of commitment to legislate without the backing of immediate proposals would add little to the holding operation we have been conducting for some time in the Anglo-Irish Conference; it is now imperative to go further. Also, as Paddy Mayhew pointed out in his letter of 9 September, until we legislate on speciality the Irish will not deliver the changes to their law on the political offence exception to extradition which we so badly need. Without these, it will remain de facto impossible to extradite from the Republic for a wide range of offences committed by terrorists. And there is a considerable Anglo-Irish political dimension: Paddy Mayhew tells me that early legislative action would greatly improve the atmosphere between us and the Irish, to which he attaches particular importance at present.

You also felt that we should consider an alternative legislative mechanism, such as a stand-alone one clause Bill. We have considered this carefully, but I have to say that it looks unattractive. The enabling clause we have in mind, while not perhaps unduly controversial in itself, brings us into an area - Irish extradition - which has been known to arouse passions in the House. I feel that the chance of a smooth passage for this

The Rt Hon Tony Newton, OBE, MP
Lord President of the Council
Privy Council Office
Whitehall
London SW1

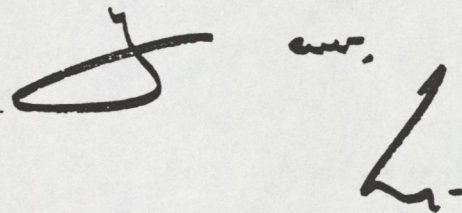
/cont

clause would be far higher if it were part of a wider measure including a number of other subjects. We do not, moreover, feel that handling two Bills, one of which made this issue prominent, would be easier than handling one portmanteau bill - indeed, we suspect the opposite would be the case.

A further point to register is that, were we to introduce a stand alone bill on extradition, there are certain other significant changes, including some which already have policy clearance, which we should seek to include, both on their own merits and to provide 'cover' for the Irish extradition clause. An expanded stand alone Bill would be a more complicated operation, likely to consume more Parliamentary time, than the addition to the Fraud Bill which I propose.

X | I hope that in the light of this reply and the letters from other colleagues, you will now feel able to agree that the best solution would be to include the Irish enabling clause in the Fraud Etc Bill.

I am copying this letter to John Wakeham, Douglas Hurd, Paddy Mayhew, Nick Lyell and Norman Lamont, and to Sir Robin Butler and First Parliamentary Counsel.

A handwritten signature in dark ink, consisting of a large, stylized 'K' followed by a smaller 'C' and a horizontal line.

KENNETH CLARKE

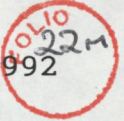
FROM THE RIGHT HONOURABLE THE LORD MACKAY OF CLASHFERN

Sir Robin Butler



HOUSE OF LORDS, *RB*
SW1A 0PW *R*

17 September 1992



The Right Honourable
Kenneth Clarke MP
Home Office
Queen Anne's Gate
London SW1H 9AT



cc Mr Diner
Mr Hadley

Dear Kenneth,

I have seen your letter of 4th September to Norman Lamont about extending the scope of the UK's current money laundering offences beyond drug trafficking and terrorism to encompass the proceeds of other serious criminal activities. While this seems a sensible approach to me and useful in that it will bring us into line with what is proposed by many of our European partners, I am concerned that it may result in an increase in the workload of the courts. I fully appreciate that extension of the scope may not make a very significant difference to the number of disclosures received by the investigating agencies since many of these already relate to "other serious crime" suspicions as well as to drug related suspicions. However, once the source of any proceeds has been established, there will be a clear incremental effect if other serious crime is to be added to drug related proceeds. It is this additional element that may add to the workload for the courts. If it were to do so to any substantial extent this would have financial consequences which I would not be able to accommodate within my existing budget.

You also mentioned a further minor amendment to the envisaged primary legislation in relation to the requirement to report suspicions. You suggested that we should explore the possibility of exempting solicitors to some degree, although not absolutely, from this requirement with a view to ensuring that legal privilege and client confidentiality were not compromised. I welcome this suggestion which I hope will go some way to meeting the concerns that have been expressed to me by the Law Society on this topic.

I am sending a copy of this letter and enclosure to the recipients of your letter.

Yours ever,
James



005/09/A

R

PRIVY COUNCIL OFFICE
WHITEHALL, LONDON SW1A 2AT

8 September 1992



CABINET OFFICE
A 10950
8 SEP 1992
FILING INSTRUCTIONS
FILE No. R 76/35

cc Mr Bird

*Dear Home Secretary***FRAUD ETC BILL: INCLUSION OF EXTRADITION PROVISIONS**

Thank you for your letter of 1 September requesting the inclusion of an enabling clause in the Fraud Etc Bill to allow, by a later order, the application of speciality requirements to extradition arrangements between the Republic of Ireland and the United Kingdom. I have also seen Paddy Mayhew's letter of 5 September supporting your request.

I share your concern that extradition arrangements with the Republic of Ireland should not be put at risk. However the additional provisions you propose could substantially widen the scope of the Fraud Etc Bill and make its handling considerably more complicated. You may therefore wish to look again at confining action, at this stage, to a firm statement of our intention to legislate as soon as possible with a bid made in the normal way for a place in the 1993-4 Session.

If however there are compelling reasons to legislate immediately, we shall need to think carefully about the appropriate legislative mechanism. I am therefore copying this correspondence to Richard Ryder.

I am also sending copies of this letter to John Wakeham, Douglas Hurd, Paddy Mayhew, Nick Lyell and Norman Lamont, and to Sir Robin Butler and First Parliamentary Council.

*Yours sincerely,**(on D. Stage)**(Approved by the Lord President & signed in his absence.)*

TONY NEWTON

The Rt Hon Kenneth Clarke QC MP
Home Secretary
Home Office
50 Queen Anne's Gate
LONDON SW1H 9AT

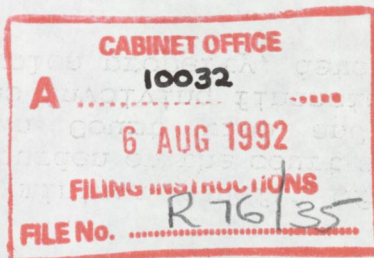
Copy to Sir Robin Butler



JOHN M TAYLOR M.P.
Parliamentary Secretary
LORD CHANCELLOR'S DEPARTMENT

TREVELYAN HOUSE
30 GREAT PETER STREET
LONDON SW1P 2BY

TEL. 071-210 8562



Mr. Russell

5 August 1992

The Right Honourable
The Secretary of State for the Home Department
Home Office
Queen Anne's Gate
London SW1H 9AT

Dear Ken,

Mrs Bailey

File

*Fraud
Bill*

WORKING GROUP ON CONFISCATION

Thank you for copying to the Lord Chancellor your letter of 21 July to the Attorney General enclosing the draft of the second report of the Home Office Working Group on Confiscation. I am replying in the absence of the Lord Chancellor, on his behalf.

I have also had the advantage of seeing the Attorney's response of 30 July. I would support his view that a more detailed evaluation of the effectiveness of the provisions of the Criminal Justice Act 1988 is required before we consider whether its regime should be extended; it would also assist presentation of any proposals for strengthening those provisions.

I share the Attorney's doubts about the recommendation that the tender of a notice by the prosecution should oblige the court to make a confiscation order. It is unlikely to be attractive to the judges and I am particularly concerned that the proposed timetable for consultation on the report takes no account of the summer absence of the senior judiciary who would have no opportunity to comment until the beginning of the new term in October.

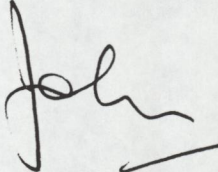
The removal of the minimum benefit of £10,000 suggests a potentially substantial burden on the court service and legal aid fund in terms of Crown Court time and civil enforcement proceedings. In offences involving financial transactions such as fraud and handling stolen property, determination of the

/continued

amount of benefit may well be complex and time-consuming for the Crown Court, and it would be important to seek to quantify that, and other resource implications, before adopting these proposals.

I have the same reservations as the Attorney General on the proposals for parity with the Drug Trafficking Offences Act assumptions, which were intended to combat the particular nature and far-reaching effects of a discrete category of offences. To adopt the same approach to the wider range of offences proposed in the Report would, I feel, be controversial, particularly if retrospective.

For these reasons, I would support the Attorney's view that caution is needed in proceeding with these proposals.

Yours ever,


JOHN TAYLOR

Parliamentary Secretary



HOME OFFICE
QUEEN ANNE'S GATE
LONDON SW1H 9AT



5 August 1992

CABINET OFFICE
A 10126
7 AUG 1992
FILING INSTRUCTIONS
FILE No. 76/35

Mr Bird Mrs Bailey

File Fraud Bill

Dear Nicholas,

WORKING GROUP ON CONFISCATION

Thank you for your letter of 30 July to Kenneth Clarke in response to his of 21 July. I am responding in his absence.

I note that you do not feel able to agree to publication of the working group's report. In the light of the points that you raise, we have decided not to proceed with publication. Instead we will reflect on your comments and those of other colleagues, for which we are most grateful, and then seek to determine the best way forward. As you probably know, Kenneth Clarke is not at present in the office, but I am sure that, on his return, he will wish to respond more fully to the points you have raised, and to see your views and those of colleagues on the best way of proceeding. In the meantime, our officials will be in touch with yours.

I am copying this letter to James Mackay, Douglas Hurd, Norman Lamont, Ian Lang, Patrick Mayhew, Michael Heseltine, and to Sir Robin Butler and Sir Brian Unwin.

Yours ever
Michael

MICHAEL JACK



Northern Ireland Office
Stormont Castle
Belfast BT4 3ST



The Rt Hon Kenneth Clarke QC MP
Secretary of State for the
Home Department
50 Queen Anne's Gate
LONDON
SW1H 9AT



4th August 1992

W Bird
Mrs Bailey

Handwritten signature

WORKING GROUP ON CONFISCATION

Thank you for copying to me your letter of 21 July to Nicholas Lyell.

I confirm that I am content for you to publish the Working Group's report early in August as you propose.

Copies of this letter go to the recipients of yours.

Handwritten signature
1007



FOLIO
19

FCS/92/147

HOME SECRETARY

Mr Bird

Mrs Bailey

CABINET OFFICE	
A	10053
6 AUG 1992	
FILING INSTRUCTIONS	
FILE No.	R76/35

File
Fraud
Bill

Second Report of the Home Office Working Group
on Confiscation

1. Thank you for copying to me your letter of 21 July to the Attorney General. We have no objection to the publication of the Working Group's second report for consultation.
2. I welcome proposals to make our legislation more effective and note that certain of them are necessary for us to comply with the EC Money Laundering Directive due to come into force on 1 January.
3. I am copying this minute to the Lord Chancellor, Attorney General, Chancellor of the Exchequer, Scottish Secretary, Northern Ireland Secretary, the President of the Board of Trade, the Chairman of the Board of HM Customs and Excise and to Sir Robin Butler.

DLH

(DOUGLAS HURD)

Foreign and Commonwealth Office
4 August 1992

The Rt. Hon. Michael Heseltine MP
President of the Board of Trade



Secretary of State
Department of
Trade and Industry

Ashdown House
123 Victoria Street
London SW1E 6RB

Direct line
071-215 4440

DTI Enquiries
071-215 5000

The Rt Hon Kenneth Clarke QC MP
Secretary of State for the Home Department
50 Queen Anne's Gate
LONDON
SW1H 9AT

31 July 1992



Mr Bird

Mrs Bailey

File
Fraud

WORKING GROUP ON CONFISCATION

Your letter of 21 July to Nicholas Lyell, copied to me, sought the agreement of colleagues to the publication for consultation of the second report of the Working Group on Confiscation.

I agree with this proposal and with your further proposal that, subject to the results of the consultation, the proposed Fraud (Jurisdiction) Bill should include the Working Group's agreed recommendations.

My officials will be glad to work closely with yours in the detailed drafting of the legislation - especially of those elements which concern money laundering and disclosure of information to prosecutors.

Copies of this letter go to Nicholas Lyell, James Mackay, Douglas Hurd, Norman Lamont, Ian Lang, Patrick Mayhew; and to Sir Robin Butler and Sir Brian Unwin.

JW7399

dti

the department for Enterprise





Treasury Chambers, Parliament Street,
London, SW1P 3AG

The Rt Hon Kenneth Clarke QC MP
Home Secretary
Home Office
Queen Anne's Gate
LONDON
SW1H 9AT

M. Bird

Mrs Bailey

20th July 1992

File

Fraud etc.

Dear Kenneth

WORKING GROUP ON CONFISCATION

Thank you for sending the Chancellor a copy of your letter of 21 July to the Attorney General.

I am content for the second report of the Working Group on Confiscation to be published, on the basis that the costs of the agreed recommendations are expected to be minimal and met from within existing provision.

I understand that your officials are currently consulting departments on the costs of the proposed DTOA provisions, and that this will also be done in respect of the agreed CJA recommendations shortly. We will need to take the resource implications into account when considering whether to reflect the recommendations in the Fraud, etc Bill: again, the presumption is that any additional costs will be met from within existing provision.

I am copying this letter to James Mackay, Douglas Hurd, Ian Lang, Patrick Mayhew, Michael Heseltine and to Sir Robin Butler.

Yours
John Cope

THE RT HON SIR JOHN COPE MP



Mr Bentley (a)

Mr Russell
149/07/P

PRIVY COUNCIL OFFICE
WHITEHALL, LONDON SW1A 2AT

File
Fraud etc Bill

30 July 1992



Mr Ke.

WORKING GROUP ON COMPENSATION

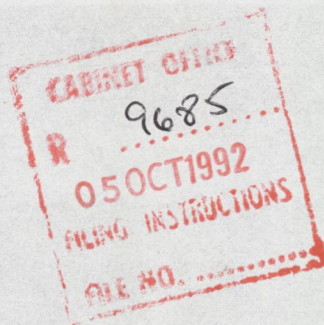
My attention has been drawn to your letter of 21 July to the Attorney General.

I note in particular that, subject to the outcome of a consultation process you now propose to embark on, you envisage putting proposals to EDH Committee for further additions to the Fraud etc Bill. Particularly in my role as Chairman of EDH(D) I naturally have no objection in principle to strengthening the confiscation regime. But, as you will recall from our brief discussion in Cabinet on 22 July, it is absolutely vital for the proper management of business in the House of Lords that the Fraud etc Bill should be ready for introduction in the first week after the Recess, which means that it must be considered by the Legislation Committee on Tuesday 20 October. I do have some concern that the timetable you envisage for consultation would make that hard to achieve, and must therefore underline the need to have the Bill ready on that timescale should be paramount, even if that means leaving out provisions which would otherwise be desirable.

Mr Ke.
Tony

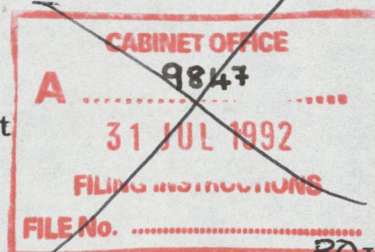
TONY NEWTON

The Rt Hon Kenneth Clarke QC MP
Home Secretary
Queen Anne's Gate
LONDON
SW1H 9AT



SCOTTISH OFFICE
WHITEHALL, LONDON SW1A 2AU

The Rt Hon Kenneth Clarke QC MP
Secretary of State for the Home Department
Queen Anne's Gate
LONDON
SW1H 9AT



30 July 1992

Mr Russell

Dear Home Secretary,

WORKING GROUP ON CONFISCATION

cc Mr Paul or
+ file on Fraud
Bill.

Thank you for copying to me your letter of 21 July to Nick Lyell about publication of the second report of the Home Office Working Group on confiscation and the implications for the proposed Fraud (Jurisdiction), Drug Trafficking etc Bill.

I am content for you to proceed as you outline in your letter. The provisions which the report addresses in Part VI of the Criminal Justice Act 1988 on the confiscation of the proceeds of serious crime have at present no equivalent in Scottish legislation. The Scottish Law Commission are however reviewing the law in Scotland on confiscation and forfeiture and I would therefore not wish to seek to extend to Scotland any of the recommendations which you may, in the light of the consultations, be minded to include in the Bill. The implications of the Group's reports will however be considered in any future proposals for legislation on confiscation for Scotland and I would therefore be grateful to be kept informed of developments.

I am copying this letter to James Mackay, Douglas Hurd, Norman Lamont, Patrick Mayhew, Michael Heseltine and Alan Rodger; and to Sir Robin Butler and Sir Brian Unwin.

Yours sincerely
Robert Lang

PP IAN LANG
Approved by the Secretary of State
& signed in his absence.



071-828 1884

The Rt. Hon. Kenneth Clarke MP
Secretary of State for the Home Department
Home Office
Queen Anne's Gate
London SW1H 9AT

9 BUCKINGHAM GATE
LONDON SW1E 6JP

14

CABINET OFFICE	
A	9883
3 AUG 1992	
FILING INSTRUCTIONS	
FILE No.	

30 July 1992

M. Bird

Mrs Bailey

File
Fraud etc

Dear Ken,

WORKING GROUP ON CONFISCATION

Thank you for your letter of 21 July 1992 enclosing a copy of the second report of the Working Group on confiscation. Although it is right that we should keep the operation of the 1988 legislation under review, I do not think that the report is yet a suitable basis for a consultation exercise.

The main problem is that there is as yet no real measurement in the report of the effectiveness of the 1988 provisions against the modest objectives which underlies that legislation. I recall that it was targeted mainly at "victimless" crime so as not to interfere with the arrangements for compensation orders or the availability of assets to those seeking to secure redress. That is important because compensation orders are suitable only in straightforward and clear cases - seldom in cases of serious crime where there are likely to be competing claims from numerous victims. The scheme was also deliberately confined to those situations where the amount involved and the existence of realisable assets were both such as to justify the substantial costs likely to be associated with the recovery process. In fixing the amount at £10,000 it was recognised that the courts already have substantial ability through the use of fines to make crime uneconomic.

By contrast the report seems to have evaluated the effectiveness of the 1988 legislation against the wider objectives suggested at paragraph 2.17 and that is now reflected in many of its proposals. The question whether the 1988 legislation is delivering its original objectives ought to be separate from the policy question of whether we should extend the regime.

So far as the extension of the 1988 regime is concerned I think that ought to be considered separately by colleagues on the basis of a more broadly based paper analysing the advantages and disadvantages and any consultation confined to that which is regarded as politically acceptable.



For my part I would have substantial difficulty with the recommendation that the courts should be obliged to make a confiscation order where written notice was tendered by the prosecution, save in particular specified circumstances. The stimulus for this proposal seems to be dissatisfaction with the manner in which the judiciary presently exercises its discretion. There is likely to be disquiet at the notion of an obligation on the judiciary triggered by the exercise of prosecutorial discretion. That would be very different to the present statutory obligation under the Drug Trafficking Offences Act which arises from the nature of the proceedings. The judiciary might well regard such a proposal as insensitive at a time when Government is seeking to improve relationships.

I am also concerned by the cost implications of removing the £10,000 threshold on confiscation orders. Its adoption was the result of a considered view that the costs associated with confiscation would be unlikely to make it cost effective in less substantial cases. I have not seen any revised costings to justify a change of policy and the real value of the limit is in any event significantly lower now than in 1988. It would be a mistake to raise expectations of a policy which might, when analysed, prove unaffordable. I am also concerned by the cost resource implications generally.

The proposals for full parity with the Drug Trafficking Offences Act (i.e. the application of assumptions to assessment as to benefit) and the proposals for retrospection also trouble me. Colleagues were conscious that the DTOA provisions were draconian but considered them justifiable having regard to the very special evil associated with drug trafficking. Moreover, as the report points out, it is recognised as a "life style". Extending confiscation arrangements in the manner suggested would amount to substantial punishment (albeit not custodial) without the protection of trial. I question the wisdom of putting forward such proposals at the present time and they certainly deserve a more effective consultation period than the present timetable would allow. The same must apply to the proposal to extend the money laundering offence.

I recognise the attractiveness of a legislative vehicle but am sure we should proceed with caution. It may be that some of the less contentious measures could be incorporated without difficulty into the forthcoming legislation even without the benefit of a consultation exercise but I believe, subject to your further views, that we would be unwise to go further.

Copies of this letter go to James Mackay, Douglas Hurd, Norman Lamont, Ian Lang, Patrick Mayhew, Michael Heseltine and to Sir Robin Butler and Sir Brian Unwin.

Yours ever

Nick.

POLICY IN CONFIDENCE

KO278

*papers for
Fraud file
(Some duplicates)*

FROM: A M RUSSELL
DATE: 28 July 1992

13

cc: Miss Kirton
Mr Maclean
Mr Ollard
Mrs Bailey (o/r)
Mr Paul

*'A' copy (full
document) attached*

MR SUTTON

WORKING GROUP ON CONFISCATION

I refer to the attached letter of 21 July from the Home Secretary to the Attorney General, which was not copied to the Business Managers.

2. The Home Secretary is proposing consultation on strengthening of the law on confiscation, with a view to including agreed elements in the Fraud etc Bill. His timing for this looks tight, and I think there would be advantage in the Lord President recording at this stage the need to ensure that the production of the Bill is not delayed. A draft letter is attached for consideration.

A M Russell
A M RUSSELL

POLICY IN CONFIDENCE

POLICY IN CONFIDENCE

DRAFT FOR THE LORD PRESIDENT

The Rt Hon Kenneth Clarke QC MP
Home Secretary
Queen Anne's Gate
London SW1H 9AT

WORK GROUP ON COMPENSATION

My attention has been drawn to your letter of 21 July to the Attorney General.

I note in particular that, subject to the outcome of a consultation process you now propose to embark on, you envisage putting proposals to EDH Committee for further additions to the Fraud etc Bill. Particularly in my role as Chairman of EDH(D) I naturally have no objection in principle to strengthening the confiscation regime. But, as you will recall from our brief discussion in the Cabinet on 22 July, it is absolutely vital for the proper management of business in the House of Lords that the Fraud etc Bill should be ready for introduction in the first week after the Recess, which means that it must be considered by the Legislation Committee on Tuesday 20 October. I do have some concern that the timetable you envisage for consultation would make that hard to achieve, and must therefore insist that the need to have the Bill ready on that timescale should be paramount, even if that means leaving out provisions which would otherwise be desirable.

POLICY IN CONFIDENCE

POLICY IN CONFIDENCE

I am copying this letter to Nicholas Lyell, James Mackay, Douglas Hurd, Norman Lamont, Ian Lang, Patrick Mayhew, Michael Heseltine; and to Sir Robin Butler and Sir Brian Unwin.

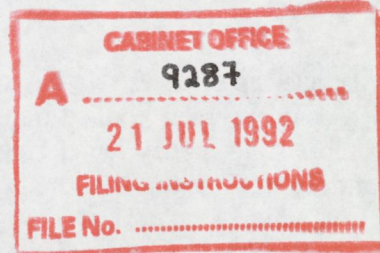
TONY NEWTON

POLICY IN CONFIDENCE



12

QUEEN ANNE'S GATE LONDON SW1H 9AT



21 JUL 1992

Mr Russell

Mr Russell

WORKING GROUP ON CONFISCATION

The purpose of this letter is to invite you, and the colleagues to whom I am also copying this letter and enclosure, to agree to the publication of the second report of the Home Office Working Group on Confiscation (copy attached). The Working Group, which included CPS representation, was established in 1990 to review the operation of the provisions in the Drug Trafficking Offences Act 1986 (DTOA) and the Criminal Justice Act 1988 (CJA), both of which deal with the confiscation of the proceeds of serious crime, and to make recommendations for dealing with problems encountered. Its first report, on the confiscation provisions of the DTOA, was published in May 1991. Subject to certain adjustments made following consultation, it has been decided that the recommendations in that report should be implemented in the Fraud (Jurisdiction), Drug Trafficking etc Bill which it is proposed to introduce later in this session.

The Working Group has just completed its consideration of the confiscation provisions in Part VI of the Criminal Justice Act 1988. A copy of its draft report is enclosed. As Kenneth Baker indicated might be the case when he wrote on 4 February 1991 to Paddy Mayhew, the Working Group has not found it easy to resolve the difficulties that have been experienced in the operation of the CJA provisions. In particular there was some difference of opinion among members of the Working Group about the extent to which it would be appropriate or helpful to bring the confiscation provisions of the CJA into line with the stricter regime of the DTOA. These differences are explained in paragraphs 2.15 to 2.18 of the report. Nevertheless, the Group was able to agree to a package of recommendations which should significantly strengthen the existing law. In brief these proposals (which are summarised in the report's final chapter) are that:

- In any case in which it was satisfied that an offender had received personal benefit from the offence or offences of which he had been convicted, and where written notice was tendered by the prosecution, the court should be obliged to make a confiscation order, save in particular specified circumstances; (currently courts have discretion as to whether or not to make a confiscation order and do so rarely);
- The present £10,000 threshold for triggering the confiscation provisions should cease to apply;
- The court should have the power to postpone the making of a confiscation order for up to six months (exceptionally longer), meanwhile proceeding to sentence the offender;
- In assessing a defendant's benefit from an offence, the court should be required to deduct from its final calculation any sum which it intends to award to the victim by way of a compensation order;

The Rt Hon Sir Nicholas Lyell QC MP
Attorney General's Chambers
Buckingham Gate
LONDON, S.W.1.

/cont....

- There should be new money laundering offences relating to the proceeds of these criminal offences which could attract a confiscation order under the CJA; these would mirror the existing money laundering offences which relate only to the proceeds of drug trafficking;
- The requirement of the European Directive on Money Laundering in relation to reporting knowledge or suspicion of 'money-laundering' should be applied to the proceeds of all money laundering and failure to report should be a criminal offence;
- Investigators should be able to apply to a court for a production order or a search warrant in respect of material believed to be relevant to the making of a restraint or confiscation order;
- For the purpose of pursuing the possibility of applying for a confiscation order in respect of the proceeds of criminal activity, prosecutors should be able to obtain disclosure of information held by Government departments (as they can do now in pursuing the proceeds of drug trafficking);
- A new criminal offence of prejudicing an investigation (by "tipping off") should be created;
- A power should be available to allow the court at any stage in the confiscation process to obtain information which it might require to make a confiscation order;
- Responsibility for appointing a receiver should be vested in designated county courts where the value of a confiscation order is below £5,000, and in the High Court or designated county court where the value is £5,000 or above;
- A receiver should be able to apply to the High Court for a downward variation of a confiscation order.

As already indicated, there is a place in the 1992/93 legislative programme for a Bill which would, inter alia, make necessary improvements to the operation of the confiscation provisions of the DTOA.

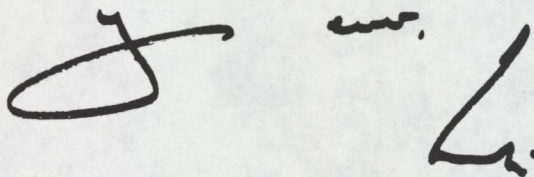
My present feeling, subject to the views of colleagues, is that it would be appropriate to seek also to include in the proposed Bill the agreed recommendations from the Working Group's latest report on if, but only if, the consultation exercise on which I propose that we should now embark does not reveal any significant opposition to them. Whatever the result of the consultation process, I do not think it would be practicable to try to include provisions giving effect to the more far reaching proposals for change that were supported only by some members of the Working Group.

As before, it is planned, for the purpose of this consultation exercise, to send copies of the Working Group's report to the main interest groups so as to give them an opportunity to point out any flaws in the Group's proposals and, generally, to test their likely acceptability. This exercise should help us to judge the extent to which there might be support for the options about which the Group was not able to reach a unanimous view, although even if there is widespread support for them, they will almost certainly need more detailed work before they could be ready to be put into legislative form.

3.

In the light of comments received, I propose to consider whether further proposals for provisions to be included in the Fraud etc Bill should be put to EDH Committee for policy clearance. Because we are now working to a tight deadline for the introduction of that Bill, it will be possible to keep open the option of including the Working Group's agreed proposals in it only if we can publish the report for consultation early in August for responses by end-September. I should be glad to know, therefore, whether you and colleagues are content for me to proceed to publication in this way and would be most grateful if I could have a reply on this point by 30 July.

2 I am copying this letter to James Mackay, Douglas Hurd, Norman Lamont, Ian Lang, Patrick Mayhew, Michael Heseltine; and to Sir Robin Butler and Sir Brian Unwin.

A handwritten signature in dark ink, appearing to be 'J. M. L.' or similar, written in a cursive style.

KENNETH CLARKE

THE HOME OFFICE
WORKING GROUP
ON CONFISCATION

REPORT ON PART VI OF THE
CRIMINAL JUSTICE ACT 1988

August 1992

CHAPTER 1

INTRODUCTION

1.1 The Working Group on Confiscation published its first report, on the Drug Trafficking Offences Act 1986, in May 1991.¹ The report recommended a number of changes to that Act, and invited comments. This is the Working Group's second report. It identifies a range of options and makes a number of recommendations for changes in the confiscation provisions in Part VI of the Criminal Justice Act 1988. These relate to serious criminal offences other than drug trafficking. The report also considers related aspects of the law on money laundering. The Working Group's Terms of Reference are reproduced at Appendix A; its membership is at Appendix B.

1.2 This report covers:

Chapter 2: The procedure for making confiscation orders under the Criminal Justice Act 1988.

Chapter 3: Investigative powers.

Chapter 4: Enforcement procedures

Chapter 5: Summary of recommendations

1.3 Comments are invited on the options and proposals in this report. They should be sent to Ms Vikki Molloy, C2 Division (Room 483), Home Office, 50 Queen Anne's Gate, London SW1H 9AT, by [30 September 1992].

¹ The Home Office Working Group on Confiscation: Report on the Drug Trafficking Offences Act 1986. (1991)

CHAPTER 2

THE PROCEDURE FOR MAKING CONFISCATION ORDERS UNDER THE CRIMINAL JUSTICE ACT 1988

Background

2.1. Part VI of the Criminal Justice Act 1988 (CJA) came into force on 3 April 1989. It empowered the courts to make confiscation orders in respect of benefit derived from the commission of any indictable offences (that is offences triable on indictment and either way offences) and certain highly lucrative summary offences. In either case, a confiscation order may only be made when the offender's benefit is at least £10,000.

2.2. The key differences between the provisions of Part VI of the 1988 Act and the parallel confiscation regime under the Drug Trafficking Offences Act 1986 (DTOA) are that the court is not under Part VI, as it would be on convicting someone of a drug trafficking offence, obliged to make a confiscation order where benefit is established; and there is not, as in the 1986 Act, a discretion for the court to make assumptions, following conviction, and require the offender to show that any assets he has acquired within the last 6 years were not the proceeds of crime. Instead, the amount of any confiscation order made is limited to the value of the benefit derived from offences of which the defendant has been convicted or which are to be taken into consideration in sentencing him. The 1988 Act also recognises the position of the victim, by providing that when the court is considering making a confiscation order it may take into account that a victim of an offence has instituted or intends to institute civil proceedings against the defendant (section 72(3)).

The problem

2.3. At the time Parliament considered what became the 1988 CJA, it did not

consider that the more stringent powers available under the drug trafficking regime should be extended to other offences. It was therefore decided that the CJA powers should not be as extensive as those of the DTOA. "Drug trafficking", though it may take many different forms, was nevertheless seen as an identifiable generic and lucrative activity known to be engaged in by professional criminals to a degree that made it reasonable for courts to assume that it was a 'lifestyle' and that an offender's total assets came from this form of offending. The Working Group recognised the logic of this assessment. It also acknowledged that the CJA provisions were relatively new to the courts and thus less familiar than those of the DTOA. On this basis, it recognised the force of the argument that it could be premature to attempt either to facilitate the application of the provisions, or to make them more rigorous. Nevertheless, the figures for the number of confiscation orders made under the CJA are disappointingly low. The 1989 Criminal Statistics² show that only four confiscation orders were recorded for non-drugs offences in that year. Practitioners have reported that the courts are finding the provisions difficult to apply in practice. Moreover, there is a growing perception among prosecutors and law enforcement officers that the CJA provisions are ineffectual in tackling criminal organisations and those who finance their lifestyle from offending, given that the offence charged may only be the tip of an iceberg of criminal activity.

2.4. It is with such considerations in mind that the Working Group has approached the difficulties which have been identified in the operation of the CJA provisions. The main problems are examined below:-

(i) The discretionary nature of the provisions.

2.5. Judges have a discretion whether to make a confiscation order, where notice has been given under section 72(1) that benefit appears to exceed £10,000. In many cases they have exercised that discretion not to make an order. The reasons include

² Criminal Statistics England and Wales 1989, HMSO. (No comparable statistics are available for 1990.)

the desire to avoid deferring sentence until an order can be made and the wish not to prejudice the position of third parties with civil claims.

(ii) The inability to confiscate for previous criminal activity.

2.6. Unlike section 1(3) of the DTOA, section 71(2) of the 1988 Act permits a court to confiscate only to the value of the benefit from the offence of which the defendant is convicted, or from that offence taken together with some other offence of which he or she is convicted in the same proceedings, or which the court takes into consideration in determining sentence, and which is not a drug trafficking offence. This provision causes particular difficulties when it comes to confiscating in respect of a criminal enterprise involving e.g. a series of offences, systematic fraud or the replication of the same offence many times over. In such cases, the accepted charging practice is to select specimen counts to avoid overloading the indictment. The prosecutor may then ensure that a schedule of offences to be taken into consideration (TIC's) is drawn up to be put to the defendant upon conviction. Such offences will only be taken into consideration at the defendant's request.

2.7. The consequence of this practice is that if the defendant denies the schedule of offences, or if the offences beyond those specifically charged are so numerous as to make the compilation of a schedule totally impractical, confiscation will be confined to benefit flowing from the specimen counts. This would not reflect the true criminality of the defendant and may amount to a sum less than the minimum amount, thereby precluding confiscation. The options available to the prosecutor to ensure that the court has at its disposal power to confiscate in respect of the entire criminal enterprise are threefold:-

- to charge in the indictment every offence committed;
- to make use of a so-called 'roll-up' charge;

- to charge the defendant with conspiracy.

2.8. These options are not thought to be adequate to cover existing difficulties. The first is impractical and amounts to bad charging practice; the use of a 'roll-up' charge has to be strictly confined to those instances where the evidence fails to prove individual offences; and a conspiracy charge would have to be feasible, appropriate on the facts of the case and accord with accepted practice³.

(iii) The calculation of benefit from offences committed by two or more people jointly.

2.9. In the case of offences such as robbery or burglary, where the proceeds may have been jointly gained, courts have sometimes encountered difficulty in assessing each individual's share in those proceeds. This will be particularly significant where the amount of proceeds is such that it is unclear whether some or all of the participants in the offence benefited by more than £10,000 - an essential assessment, given that the confiscation powers are only applicable if the individual concerned has personally benefited by that amount or more.

(iv) The position of victims

2.10. Unlike drug trafficking, offences to which CJA provisions apply are likely to involve a victim who has a justifiable claim for compensation (which may, indeed correspond to the benefit to the offender, thus rendering confiscation less appropriate than compensation). Payment of such claims would have to be made from the defendant's assets. This interrelationship of confiscation and compensation to the victim makes the determination of financial matters more complicated, and would cause conflict at the enforcement stage were it not for section 72(7) of the CJA which allows compensation to be paid out of any sums recovered under the confiscation order where it appears to the court that the

³ See Practice Direction [1977] 2 ALL ER 540

offender will not have sufficient means to satisfy both orders. Offenders who have the means to satisfy both a confiscation and a compensation order in full may, however, be required to do so, even though this means that in effect they pay twice because the assessment of benefit for the purposes of confiscation includes the amount taken from the victim which will be returned as compensation. There are also difficulties, as described in paragraph 2.39 below, for prosecutors, who, having obtained an order restraining property for the purpose of confiscating it, subsequently find that the case results in a compensation order, or that civil compensation proceedings are pending.

(v) The lack of a criminal offence for money laundering

2.11. The present money laundering offences are to be found in section 24 of the Drug Trafficking Offences Act 1986 (equivalent legislation exists in Scotland and Northern Ireland), section 14 of the Criminal Justice (International Co-operation) Act 1990 and section 11 of the Prevention of Terrorism (Temporary Provisions) Act 1989. Section 24 of the 1986 Act makes it an offence for any person to enter into an arrangement whereby the retention or control of another person's proceeds of drug trafficking is facilitated or the proceeds are used to secure that funds are available or to acquire property by way of investment. To be guilty of an offence, the defendant must know or suspect that the person is a drug trafficker or has benefited from drug trafficking.

2.12. The provisions in the 1990 Act were included to allow the ratification in June 1991 of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Section 14(1) of the 1990 Act makes it an offence for a person to conceal, disguise, convert or transfer his proceeds of drug trafficking for the purpose of avoiding prosecution for a drug trafficking offence or the making or enforcement of a confiscation order. Section 14(2) creates an offence where a person carries out any of the activities listed in subsection (1) knowing or having reasonable grounds to suspect that the property concerned is another person's proceeds of drug trafficking, if done for the purpose of assisting any person to avoid

prosecution for a drug trafficking offence or the making or enforcement of a confiscation order.

2.13. Section 14(3) makes it an offence to acquire another person's proceeds of drug trafficking for no or inadequate consideration if the acquirer knows or has reasonable grounds to suspect that the property concerned is the proceeds of drug trafficking. (An exception is made in Section 14(5) of the Act in respect of any person who provides goods or services unconnected with drug trafficking activities and receives payment for them, even if that person knows or has reasonable grounds to suspect that the payment derived from proceeds. But, of course, if the goods or services assisted the drug trafficker in drug trafficking activities, an offence would be committed).

2.14. Section 11 of the Prevention of Terrorism Act 1989 makes it an offence to enter into an arrangement whereby the retention or control by or on behalf of another person of terrorist funds is facilitated, whether by concealment, removal from the jurisdiction or transfer to nominees. To be guilty of an offence, the defendant must know or have reasonable cause to suspect that the arrangement relates to terrorist funds.

2.15. The existing money laundering offences described above do not extend beyond drug trafficking or terrorist-related offences. The Working Group considered this to be a significant gap in our defences against crime.

Possible solutions

2.16. The Working Group recognised that, where the courts are prepared to impose heavy fines alongside or instead of custodial sentences, these have some effect in depriving offenders of their criminal proceeds. Such fines, however, are not meant to be an alternative to, and are unlikely to go as far as, the confiscation provisions. The Group concluded that the latter are still needed and that they must be made to work effectively: legislation should be strengthened and clarified in order to resolve

the problems which appear to be occurring at the stage of the court hearing. This might be achieved in a number of ways, according to the view taken on the issue of principle as to how far non-drugs offences should be treated in the same way as drug trafficking or the financing of terrorism, and about the circumstances in which it might be right, as with drug trafficking, for the court to make rebuttable assumptions about the criminal origins of a convicted offender's assets.

2.17. The Working Group identified the essential problem in applying the confiscation provisions to the full range of criminal activity as one of targeting. It agreed that it was desirable, in seeking to deprive all offenders of significant proceeds of crime:

- (i) to confiscate the proceeds of the crimes of which a person is convicted; and
- (ii) in the case of offenders who make their living out of crime (of whatever nature) for the confiscation order to be able to reflect that.

The Working Group wanted these objectives to be achieved in such a way that there would be no risk of unfairness in the court's assessment of benefit. It went on to consider the following possibilities.

Alignment to the Drug Trafficking Offences Act

2.18. The Working Group recognised the attraction, from the point of view of ease of application of the provisions, of bringing the powers in the CJA more closely into alignment with their equivalents in the DTOA - or to be precise, the DTOA as it might be modified as a consequence of the recommendations in the Working Group's first report on that Act. As a result of the consultation exercise undertaken on that first report, certain adjustments have been made to the original recommendations (in chapter 6). The principal changes are that the confiscation procedures would be triggered by a notice seeking a confiscation order tendered by

the prosecution. Where no such notice is given, the court would be able to exercise its discretion and proceed to make a confiscation order. Alternatively, it would be able to deal with the offender by way of forfeiture or a fine. Also, where notice is given, the prosecution would be required to submit a 'section 3' statement to assist the court in making a confiscation order. The court would also be able to request a 'section 3' statement in cases where no notice had been given but, nonetheless, the court wished to make a confiscation order. However, no substantive change is contemplated to the Working Group's original proposals that the standard of proof in determining benefit from drug trafficking should be that applicable to civil proceedings; that the Crown Court should have power to postpone the making of a confiscation order for up to six months after conviction (or longer in exceptional circumstances), during which time the court may proceed to sentence the offender; that the court should be required to state its reasons where it chooses not to apply the assumptions; and that the court should be given power to order a defendant to provide within a specified period any information which it might require for the purpose of making a confiscation order⁴.

2.19. It is understood that the Government intends to introduce legislation later this year to make these changes to the Drug Trafficking Offences Act 1986.

2.20. Aligning the 1988 Criminal Justice Act's provisions with those of the DTOA (as it is intended to be amended) would involve putting an obligation on the courts - in contrast to their present discretion - to make a confiscation order where notice was given by the prosecution. It would also involve the removal of any financial threshold for the amount of benefit - there is no threshold applying to the proceeds of drug trafficking which are liable to confiscation - and giving the Crown Court power to postpone the making of a confiscation order, meanwhile proceeding to sentence the offender. Further, full alignment would involve giving the courts the

⁴ The Court of Appeal has recently ordered disclosure under both the CJA and the DTOA for the purposes of a restraint order: Re O [1991] 2QB 520; Re Thomas (15 May 1992); and the extent of the court's powers will need to be further considered in the light of those decisions.

right to assume - when assessing the amount by which a convicted person had benefitted from crime - that all assets accrued or enjoyed during the last six years were the proceeds of crime, unless the convicted person could show otherwise: and to confiscate accordingly.

2.21. The practical advantages of harmonising the provisions are clear. Courts would only have to apply one set of confiscation provisions and confusion would be less likely to occur. The key question, however, is whether it would be right to amend the CJA so as to apply a DTOA-equivalent regime to serious crime other than drug trafficking. Members of the Working Group representing ACPO, NCIS and Customs considered that such an approach would go a long way towards ensuring that criminals did not benefit from their offences, nor retain proceeds to fund future criminal acts. They took the view that the logic is the same, whether the offence which generated the proceeds is drug trafficking or any other crime. If the approach taken in respect of drug trafficking was thought to be fair to the interests of the defendant, then, they argued, there could be no unfairness in applying it more widely.

2.22. Other members of the Working Group, however, took a different view. They argued that a combination of factors, including the intrinsic seriousness of the offence, the damage caused to society and the fact that drug trafficking was almost invariably a 'lifestyle' offence, supported the conclusion that more stringent confiscation provisions were appropriate for drug trafficking than for the generality of offences. There was particular concern about the justification for extending to serious crime generally the court's discretion under the DTOA to make assumptions that benefit is the proceeds of drug trafficking unless the defendant can demonstrate that these assumptions are, in the circumstances, incorrect. Exact alignment of the CJA with the DTOA (as it is proposed to amend it) would mean that a person convicted of any serious crime would face confiscation not only of the proceeds of the crime for which he or she had been convicted and any other crime committed at any time earlier, but also - if the court chose to include these items in its assessment of benefit - confiscation of any assets possessed at the time of

conviction, plus the value of any property which had passed through his or her hands and any payments he or she had made in the preceding six years, unless the person could satisfy the court that the assets, property or money to make the payments had come from a source other than serious crime. If the CJA's existing categories of crime rendering a person liable to a confiscation order remain unchanged, the commission of any offence triable on indictment could expose the convicted person to this degree of confiscation. The Working Group as a whole was conscious that some crimes in this category might well be considered as reprehensible as drug trafficking e.g. major fraud or other forms of organised crime; but most others (petty theft, for example) might be thought insufficiently grave to attract the full weight of the confiscation arrangements appropriate to drug trafficking. It was also noted that introducing the assumptions in cases of serious crime other than drug trafficking would make it possible to confiscate any personal assets which the convicted person could not prove had been honestly come by. Such a consequence could only be avoided by defining more narrowly the serious crimes or types of serious crime to which confiscation provisions equivalent to the DTOA confiscation regime would apply; but the Working Group was unable to suggest any satisfactory narrower definition.

2.23. The Working Group did not find this question easy to resolve; but it agreed, that it was in the public interest that the issue should be addressed in this report and that the views of the judiciary and other interested bodies should be sought. Moreover, recognising that there were arguments for saying that a full-scale extension of the DTOA regime would be inappropriate, the Group decided to make various other proposals which would go some way, but not the whole way, towards more closely aligning the CJA provisions with the DTOA provisions. These proposals range from a minimal position, upon which the Working Group was able to agree unanimously (paragraph 2.24) to much more far reaching proposals, which some members of the Group thought might address specific problems inherent in the current system (paragraphs 2.27 - 2.36).

2.24. As a minimum the Working Group agreed to recommend that Part VI of the CJA 1988 should be amended, so that:

- (i) the court should be under an obligation, rather than merely having the discretion, to make an order confiscating the proceeds of the immediate offence(s) where the prosecution has tendered a notice seeking this, and other criteria are met;
- (ii) this obligation should apply in respect of any criminal offence to which the CJA applies, regardless of the amount of the benefit which the offender might have gained from involvement in this offence;
- (iii) the court should be given the power to postpone the making of a confiscation order for up to six months after conviction (longer in exceptional circumstances) during which time the court may proceed to sentence the offender.

2.25. Thus whenever the prosecution was of the view that a confiscation order would be an appropriate measure, it would tender a notice to this effect. The court would then be obliged to make a confiscation order except in the following circumstances:-

- where it was satisfied that the defendant had not benefited as alleged from the crime of which he was convicted;
- where, and to the extent that, the realisable property would be insufficient to meet the order;
- where, and to the extent, necessary to take account of the interests of victims (see paragraph 2.40).

2.26. The £10,000 threshold for triggering the confiscation provisions would cease to apply: the prosecution could invite the court to confiscate the proceeds of the offence for which the offender had been convicted, whatever the apparent size of those proceeds. This would meet the problem of calculating benefit in the case of offences committed jointly (as described in paragraph 2.9) and avoid the artificiality of a fixed threshold. The logic of the proposition is that which lies at the heart of the confiscation scheme itself: namely that crime should not pay, and criminals should not benefit from their crimes. That principle applies whatever the amount of benefit. Hitherto, the role of the threshold has principally been to ensure that the confiscation process is not brought into play in respect of proceeds too small for it to be economic to enforce. The Working Group accepts that this must remain a major consideration, and believes that giving the prosecution an effective say over when orders are made will do much to ensure that the powers are not used inappropriately.

Previous offences

2.27. The Working Group was conscious that the changes proposed in paras 2.24 to 2.26 above could not affect those who had been convicted of criminal offences from which they had derived substantial financial benefit prior to the implementation of the CJA 1988, and who were now in a position not only to continue to enjoy these proceeds, but also to use them to finance further criminal activities.

2.28. The representatives of Customs and Excise, ACPO and NCIS proposed that where any person now convicted of any criminal offence had previously been convicted before the implementation of the provisions of Part VI of the Criminal Justice Act 1988, and where the Court was satisfied that an offender had benefited from those earlier criminal offences, it should be empowered to make a confiscation order that would take these earlier benefits into account. The use of such a procedure would only be mandatory on the application of the prosecution. The Court or the prosecution, in invoking the provisions, would have to consider whether there were likely to be any realisable assets left after confiscation for the instant

offence had been dealt with, and whether any fines or other relevant orders had been made and satisfied in relation to such previous conviction(s) which might affect the current issue.

2.29. The offences covered by this provision would be those already covered by Part VI of the CJA; ie. all indictable offences other than drug trafficking offences, and certain summary offences listed in Schedule 4 to the 1988 Act, as amended by the Criminal Justice Act 1988 (Confiscation Orders) Order 1990. The assumptions provided in section 2 of the DTOA would apply, but only for the period of six years preceding the date of institution of proceedings in the current case.

2.30. Although this proposal does not have the unanimous support of the Working Group comments are sought on it. In particular it would be useful to have views, from those with relevant knowledge, on the extent to which such a provision would be used if it were made available. Investigators on the Working Group, while in favour of the proposal, acknowledged that it would be difficult to estimate the number of cases where the provision might be put into use, given that financial investigations into the value of an offender's benefit from crime were not carried out extensively prior to the introduction of the confiscation powers in the CJA in April 1989. It was also accepted that the proposal would need the assumptions to work effectively, and that the CJA 1988 would itself be 5-6 years old by the time the proposal would become law. Before any provision was introduced, it would be necessary to have some assurance that it was meeting a real need. There was also concern within the Group that such a provision might be viewed by some as double punishment for the same offence. The offender would already have been dealt with by the courts for the previous offence(s) committed before implementation of the CJA 1988 and might even have been given an additional fine or extra long prison sentence in recognition of the extent of his or her personal gain from involvement in those offences. The Group also recognised that this proposal raised issues similar to those which are currently being considered by the European Commission on Human Rights. Account would need therefore to be taken of any ruling by the Commission before a decision could be taken to proceed with putting it into effect.

Sample offences

2.31. The problem of dealing with sample offences and potential cases taken into consideration (TIC) was identified in paragraphs 2.6-2.8. It is believed that offenders who would otherwise have pleaded guilty to other offences under the TIC procedure are being deterred by the confiscation order implications. The Working Group considered two separate options for dealing with this problem through the creation of new criminal offences. The first involves the creation of an offence of possessing the proceeds of crime. It was thought that such an offence might give prosecutors an alternative way of dealing with offenders who refuse to agree TIC's.

2.32. The premise was that existence of the offence would encourage defendants to agree TIC's rather than face the charge, whilst simultaneously permitting the court to confiscate the proceeds of the entire criminal enterprise. However, further consideration of this proposal led the Working Group to conclude that since the stigma attached to being convicted of an offence of possessing the proceeds of crime would be less than that attaching to TIC's and since in either case the defendant would lose the entire proceeds of the criminal enterprise that had come to him, the creation of an offence of possessing the proceeds of crime was unlikely to provide a defendant with an incentive to agree to TIC's. In addition, the Working Group recognised that there would be evidential problems with the proposal. The prosecution would have to show that the defendant's property was the proceeds of specific criminality. This would be quite onerous and extend the prosecution well beyond the sample counts charged. Accordingly, it seemed that the offence would not lend itself to inclusion in the same indictment as the principal charges. The Working Group therefore decided not to pursue this option.

2.33. As a separate proposal, the Working Group considered the creation of an all-crime money laundering offence or offences. It concluded that this could help in situations where it was not possible to confiscate the whole of the proceeds through the normal confiscation procedures. It would also be more apt in the English courts than a possession offence, because it would mirror provisions on money laundering

of drug proceeds already present in English law. For further discussion of this option see paragraphs 2.41-2.44.

2.34. The Working Group also considered a suggestion for dealing with the problem of confiscating when the criminal conduct involved a series of similar offences or the replication of the same offence many times over. The suggestion was to bring confiscation procedures into line with the accepted charging practice whereby a number of sample counts are selected to avoid overloading the indictment. Thus, when the court had satisfied itself that the offences of which the defendant was convicted were examples of a continuing course of criminal conduct and that those offences marked the lifespan of the conduct, it would be able to confiscate the proceeds of that conduct insofar as they were then within the possession or control of the defendant.

2.35. This proposal would effectively permit the courts to confiscate the proceeds of offences for which there had not been a conviction; no admission of guilt by the defendant would be necessary. In order for the proposal to be practicable, it would probably be necessary for the court to have at its disposal statutory assumptions similar to those in the DTOA (though use of the assumptions would of course be limited to the lifespan of the criminal conduct). The proposal was, however, seen as a potential solution to a very real problem. Prosecutors on the Group had experience of persistent frauds, for example, involving as many as 180 instances of the same offence. Although evidence might exist to prove each individual offence, an indictment listing them all would be unmanageable, and would then be quite likely to be unacceptable to the court.

2.36. The Working Group agreed that it would be helpful to have a reaction from interested parties to this proposal. In particular, comments would be welcomed on:

- (i) whether such a proposal would be acceptable in principle;

- (ii) whether the DTOA statutory assumptions should be available to the court;
- (iii) whether a time limit should be imposed (eg. limiting liability to confiscation to proceeds acquired up to six years before the institution of proceedings);
- (iv) whether the proposal should encompass all offences covered by the CJA, or be limited in some way (e.g. to particularly lucrative offences or, if an appropriate definition can be found, to offences which indicate a lifestyle of criminality).

Joint offenders

2.37. The problem of dealing with offences where the proceeds may have been gained by two or more offenders jointly was described in paragraph 2.9 above. Case law has, however, given guidance as to the calculation of benefit where such benefit has been jointly gained, the test being that if at the time of conviction the defendant is in possession of property or has a sufficient control over it to be able to dispose of it, it is the defendant's benefit from drug trafficking. This could hold equally for general crime. It is of course also the defendant's realisable property (for the purpose of section 74 of the CJA).

2.38. Clearly, if two people who had a joint interest in the relevant property were both convicted and both before the court at the confiscation hearing, to make a confiscation order against each of the defendants in the total sum of benefit would be unfair. They could not both satisfy such an order and it would expose one or other (or both) of them to potential sentences in default. (Case law has shown such orders, where made in the past, to be unenforceable). Individual confiscation orders must be made against each defendant and their respective share of benefit determined. The position reached by the courts is as follows. In the absence of evidence the court may assume that each defendant has obtained an equal benefit.

Where, however, only one of a number of defendants has been convicted and has sufficient control to realise the property then a confiscation order in the total amount may be made against the defendant before the court. The Working Group took the view that this existing judicial guidance, taken with its proposal to abolish the £10,000 threshold in the CJA, should allow courts to deal adequately with the problem of joint offenders.

Victims

2.39. The Working Group considered whether any special provision was needed to deal with the position of victims. In practice, under existing legislation, prosecutors tend not to submit a written notice under section 72(1) where they judge that the proceeds available for confiscation are likely to be subsumed by a compensation order. Difficulties, however, can arise where proceeds from an offence are subject to a restraint order. Where it subsequently becomes apparent that it is unlikely that a confiscation order will be made or that there are insufficient realisable assets to justify a confiscation order, the prosecution will apply for the restraint order to be discharged. The prosecution is not empowered to obtain restraint on behalf of private individuals in anticipation of a compensation order or civil compensation action. Moreover, it cannot generally disclose the evidence gathered for the prosecution to third parties to assist in any civil compensation action.

2.40. The CPS were of the opinion that, in the majority of cases involving victims, the specific loss incurred as a direct result of the commission of the offence of which the defendant stood convicted could easily be quantified. Thus the CPS proposed and the Working Group agreed that, in order to ensure that the interests of the victim should not be prejudiced by the making of a confiscation order, the court, in assessing a defendant's benefit from an offence, should be required to deduct from the figure arrived at any sum that the court intended to award to the victim by way of a compensation order made pursuant to section 35 of the Powers of Criminal Courts Act 1973. This would reinforce the mutually exclusive nature of confiscation and compensation. Furthermore, it would ensure that the defendant

was not penalised by having to pay a confiscation order based upon a figure for the benefit obtained, which would necessarily include the benefit lost by the victim, in addition to a compensation order. In short, the possibility of double counting would be eliminated. The Working Group agreed, however, that this proposal, if implemented, would have implications for sections 72(5), 72(7), 81(7) and 81(8) of the 1988 Act, under which the prosecution may assist the magistrates courts to enforce compensation orders where those orders are to be paid out of confiscation orders.

Money laundering

2.41. The Working Group considered whether some of the shortcomings in the existing law identified by prosecutors could be removed by extending the money laundering offence created by section 24 of the DTOA (supplemented by section 14 of the Criminal Justice (International Co-operation) Act 1990) to the proceeds of other types of crime beyond drug trafficking. At present, the only relevant provision in the 1988 Act is one which permits, with immunity from liability for breach of confidence, a voluntary disclosure of a suspicion or belief that proceeds are derived from criminal activity (section 98). The Group noted that the Theft Act 1968 contains a wide ranging offence of dishonestly handling stolen goods or the proceeds of stolen goods, including the proceeds of blackmail and in some cases of fraud. Those who launder the proceeds of crime may also in some cases be liable as accessories or conspirators in relation to the principal offence. However, these offences do not penalise as wide a range of criminal conduct as the drugs money laundering offences mentioned above.

2.42. The Working Group received evidence to the effect that the arrangements made by the banking community with the National Criminal Intelligence Service for making disclosures are already leading to the discovery of a range of criminal activities besides drug trafficking, because it is neither feasible nor appropriate for banks themselves to look too deeply into the underlying nature of a suspicious transaction or account. The Working Group understand that in many cases the

financial institutions find it difficult to assess whether a suspicious transaction is connected to drug trafficking or to some other serious crime. There is a compelling argument that such a situation should be adequately covered by the law. Moreover, at a time when there is a good deal of public concern about economic crimes, the Group considered that an extension of the existing money laundering offences would help to sustain public confidence in the probity of financial institutions and in the effectiveness of action against lucrative crime.

2.43. The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime⁵ and the recommendations of the Financial Action Task Force on money laundering⁶ provide for and encourage participating countries to develop such wider laundering offences. In addition, the EC Directive on Money Laundering⁷ invites Member States to take measures against the laundering not only of drug proceeds (mandatory under the Directive) but also of the proceeds of other criminal activities.

2.44. The Government has already invited views on this issue in the consultation paper on the implementation of the Directive issued by the Treasury on 29 May 1991. That document did not specifically recommend widening the existing drugs money laundering offences to cover all serious crime; but the Working Group agreed that the time had come to make such a recommendation. It recommends, therefore, that new offences should be created which would deal with entering into an arrangement by which another is assisted to retain the benefit of the proceeds of a criminal offence, knowing or suspecting that the assets concerned were or represented such proceeds. The scope of any new money laundering offences would be restricted to the proceeds of those criminal offences which are already capable

⁵ CM 1561, HMSO

⁶ See Financial Action Task Force on Money Laundering Report, February 1990 (HM Treasury)

⁷ Directive on the prevention of the use of the financial system for the purpose of money laundering (91/308/EEC)

of attracting a confiscation order under Part VI of the 1988 Act.

2.45. To ensure compliance with the EC Directive on Money Laundering, credit and financial institutions and their directors and employees will be required to co-operate fully with the authorities responsible for combatting money laundering by informing those authorities, at their own initiative, of any fact which might be an indication of money laundering and to provide, on request, all necessary information. The Directive will also require relevant institutions to refrain from carrying out transactions which they know or suspect to be related to money laundering until they have notified the responsible authorities; or, where this is impossible or is likely to frustrate efforts to pursue the beneficiaries of a suspected money laundering operation, to carry out the transaction and notify the responsible authorities immediately afterwards.

2.46. Section 24 of the DTOA, which established a suspicion based reporting regime, falls short of the requirements of the Directive in that the section 24 offence does not require a report to be made to the law enforcement authorities and applies only to persons who are themselves involved in money laundering - not to employees who simply become aware of laundering activity.

2.47. At paragraph 19 of the Treasury consultation paper, the Government has indicated its intention to create a new offence to meet the requirements of the Directive. This would be to the effect that any person who, acting in the course of any trade, business or profession, knows or suspects that another person is engaged in 'money laundering' shall be guilty of an offence unless he discloses any matter on which that knowledge or suspicion is based to a constable as soon as is practicable after he has acquired the knowledge or suspicion. It is also proposed that a defence for this new offence of reasonable excuse for failure to report a suspicion to a constable should be available which would be consistent with that available for the money laundering offence in section 24(4)(c) of the DTOA. It is anticipated that where an employee makes a report through the internal system, a court would accept that he had reasonable excuse for not reporting his knowledge or suspicion to

a constable.

2.48. The Working Group recommends that the reporting requirements of the Directive should be applied to all criminal activity and that failure to report should be made a criminal offence.

Conclusion

2.49. In sum, comments are sought on the extent to which the confiscation provisions in the CJA should be changed. The members of the Working Group were able to agree on and recommend two basic changes: to make the CJA provisions mandatory rather than discretionary, subject to a notice procedure, and to remove the £10,000 threshold for triggering confiscation (paragraph 2.26). They also agreed that the courts should be given power to postpone the making of a confiscation order for up to six months after conviction (exceptionally, longer) during which time the offender could be sentenced (paragraph 2.24); that, when assessing a defendant's benefit from an offence, the courts should be required to deduct any sum they intended to award the victim as compensation (paragraph 2.40); and that existing money laundering offences for drug trafficking should be extended to other serious crimes (paragraphs 2.41-2.48). Beyond this, there was no unanimity about the extent to which the CJA powers should be made identical to their equivalents in the DTOA, although there was a feeling among some Group members that the "minimum" position just described might not go far enough. Accordingly, more far-reaching suggestions are put forward for comment:

- (i) full parity with the Drug Trafficking Offences Act, i.e not just the changes described above, but also, inter alia, giving courts the discretion to make assumptions, when assessing the amount by which a convicted person has benefited from crime, that all assets accrued or enjoyed during the previous six years are the proceeds of crime unless the convicted person can show otherwise, and to confiscate accordingly (paragraphs 2.18-2.23);

- (ii) confiscation of proceeds of offences of which the offender was convicted before the CJA came into force, with the availability of statutory assumptions to assist the prosecution (paragraph 2.27-2.30);
- (iii) introduction of a new procedure allowing the courts to confiscate for a continuing course of criminal conduct (paragraphs 2.34-2.36)

CHAPTER 3

INVESTIGATIVE POWERS

Background

3.1. The DTOA introduced new powers to assist enforcement officers in the investigation of drug trafficking. Section 27 of the Act provides for a circuit judge to make an order (subject to specified conditions) to require material relevant to a drug trafficking enquiry to be produced to a constable or Customs Officer or to give a constable or Customs Officer access to it within the period specified in the order. Section 28 provides, for the purpose of an investigation into drug trafficking, that a circuit judge may issue a warrant authorising a constable or Customs Officer to enter and search specified premises provided he is satisfied either that a section 27 order has not been complied with or that, inter alia, there are reasonable grounds for suspecting that a specified person has carried on or has benefitted from drug trafficking. Section 30 enables the High Court, on an application by the prosecutor, to order disclosure, in certain circumstances, of information held by Government departments. This provision is primarily intended to facilitate the obtaining of restraint and charging orders.

3.2. The investigative powers under the CJA 1988 are more limited. There is no power corresponding to the power to make a section 27 DTOA order. Search and seizure powers under the Police and Criminal Evidence Act 1984 (PACE) only come into play where there are reasonable grounds to suspect that a serious arrestable offence has taken place and where the material is likely to be relevant and of substantial value to prosecuting the offence. There is no equivalent power in the 1988 Act to section 30 of the DTOA.

3.3. The police maintain that this lack of investigative powers in the 1988 Act has resulted in the Act having little effect in preventing criminals from benefitting from the results of their crimes. Officers wishing to carry out the necessary

financial investigations are having to rely on PACE and the Bankers Books Evidence Act 1879 (BBEA). Procedures under these Acts are far more restricted than those under the DTOA in respect of reactive enquiries (ie. those where there is already firm evidence that an offence has been committed). Where there are only reasonable grounds to suspect the commission of a relevant offence, and the information sought may relate to proceeds from crime rather than to evidence of an offence, discreet enquiries which might safeguard the property against dissipation are rendered virtually impossible owing to the inter partes nature of the Schedule 1 PACE orders, and the requirement of prior institution of legal proceedings under the BBEA.

3.4. The Working Group took the view that the inability of law enforcement officers to enquire into proceeds at an early stage in an investigation was a serious hindrance to the effectiveness of the confiscation provisions of the 1988 Act. The Group accepted that there had been underlying reasons for the disparity between the two Acts. In drafting the 1988 Act, it was evidently thought that the investigative powers available in existing legislation in respect of the offence under investigation would be sufficient for the purpose of enquiries into proceeds. Unfortunately, this has not proved to be the case. By contrast, use of the investigative provisions of the DTOA has proved effective. The Working Group concluded that parallel powers should be created for the investigation of non-drugs proceeds. It recommended the addition of the following provisions to the 1988 Act:

- (i) powers akin to those in sections 27 and 28 of the DTOA for investigators to seek a production order or a search warrant in respect of material believed to be relevant to the making of a restraint or confiscation order under the CJA 1988. It would be desirable also to introduce provision for an ex parte application for a production order in connection with the proceeds of an offence when there was otherwise a risk of prejudice to the investigation or dissipation of the assets.

- (ii) powers equivalent to section 30 of the DTOA to enable prosecutors to obtain disclosure of information held by Government departments.

3.5. As in the DTOA, provision would also need to be made to deal with those who "tip off" a suspect that he is under investigation. The common law offence of perverting the course of justice would not adequately cover such activity, as the offence could only apply once the criminal proceedings had begun and would not cover the investigative stage. The Working Group therefore recommended the creation of a separate criminal offence of prejudicing an investigation, modelled on section 31 of the DTOA.

Disclosure of information by the defendant

3.6 During an investigation into a defendant's financial situation the onus is on the prosecution to gather the information necessary for the preparation of the financial statement under section 73 of the CJA. The defendant, or prospective defendant, is not compelled to disclose any details of his or her assets. As a result, defendants asked about their assets after charge tend to remain silent, on legal advice. This is thought to have impaired the effectiveness of the CJA.

3.7 In its 1991 report on the DTOA, the Working Group put forward a proposal that the court should have a power to require the defendant in drug trafficking cases to provide, within a specified period, sufficient information to assist in determining whether there has been benefit, the amount of the proceeds and the offender's realisable assets (see paragraph 2.9 of the 1991 report). It is understood that the Government plans to pursue this suggestion in proposed legislation.

3.8 It is proposed that this power should also be made available in CJA cases. The power should be available at any stage in the confiscation process to allow the court to obtain information which it might require for the purpose of making the confiscation order. In particular, it could be used to order the defendant to respond to the financial statement put forward by the prosecution under section 73.

If the defendant failed to comply without reasonable excuse the court should be free to draw adverse inferences from that silence.

CHAPTER 4

ENFORCEMENT PROCEDURES

Background

4.1 The CJA presently provides for a confiscation order to be made by the Crown Court in respect of all indictable offences and by the magistrates' court in respect of certain summary offences listed in Schedule 4 to the Act (as amended by the Criminal Justice Act 1988 (Confiscation Orders) Order 1990 (SI 1990 No 1570)). As in the case of orders made under the DTOA, the Act provides for a confiscation order to be enforced by the magistrates' court, like a fine, in accordance with the procedures set out in the Powers of the Criminal Courts Act 1973 and Part III of the Magistrates' Courts Act 1980. The prosecutor may apply to the High Court under the CJA for the appointment of a receiver to realise property in satisfaction of a confiscation order. Alternatively, the magistrates' court may (as if it were a fine) issue a distress warrant or obtain a garnishee order from a county court.

4.2 The Working Group's first report on the DTOA (at paragraphs 3.3 to 3.5) recommended the creation of new orders to assist the enforcement process. Recently available figures, however, show a marked increase in the amounts realised as a result of enforcement of confiscation orders. This improvement can probably be put down to the time it has taken for courts and prosecutors to familiarise themselves with confiscation procedures and to the increasing use of receivers. The Working Group has concluded, therefore, that the orders proposed in its DTOA report are probably no longer necessary.

4.3 The Working Group considered, however, that the recommendations set out in paragraph 3.6 to 3.10 of their DTOA report should also be applied to the CJA. Thus it is recommended that responsibility for appointing a receiver should be vested in designated county courts where the value of a confiscation order is below £5,000, and either in the High Court or designated county courts where the value is £5,000 or above. It is also recommended that the receiver should be able to apply to the High Court for a downward variation of a confiscation order.

4.4 The Working Group's first report on the DTOA (at paragraphs 3.11 to 3.12) recommended that service of an additional period in prison in default of payment should no longer expunge the trafficker's liability to pay and that the existing link between the default periods for fine and confiscation order defaulters should be broken. It is understood that the Government intends to implement this recommendation in forthcoming legislation.

4.5 This issue again raises the question of the extent to which it would be right to apply more stringent measures against drug traffickers than against other criminals. The Working Group's recommendation in its DTOA report was an attempt to deal with the problem of defendants opting to spend additional time in prison in default rather than satisfy the value of a confiscation order. It can be argued that the underlying principle is the same whether the offender is a drug trafficker or, for example, a fraudster. There is a danger of creating an even wider gulf between drug traffickers and other criminals if the procedures in respect of default are not the same. If - assuming implementation of the Working Group's DTOA report recommendation - the drug trafficker does not meet the cost of the confiscation order, a period of imprisonment in default will not expunge the debt. By contrast, if the provisions of the CJA are changed no more than envisaged by the Group's unanimous recommendations in paragraph 2.24, a fraudster, for example, could be deprived of the value of the proceeds from the specific offence(s) for which he or she had been convicted, but would continue to be able to enjoy the proceeds from other criminal activities. Moreover if that person chose not to pay the amount ordered to be confiscated then he or she could have the debt expunged by serving a period of imprisonment in default. On the other hand, the Working Group also recognised the arguments against further change. When Parliament passed the Criminal Justice Act 1988, it took the view that the differences between drug traffickers and other offenders justified a more stringent confiscation regime for the former. Although it may be argued that some offences, which are similarly motivated by a desire for substantial financial gain (such as fraud), are no different in principle from drug trafficking, others (such as petty theft) might not be thought

sufficiently grave to attract the full weight of the confiscation arrangement appropriate to drug trafficking. If, as a general rule, a term of imprisonment in default does not expunge an offender's liability for a confiscation order (a financial penalty), that term might look like an additional penalty, rather than the method of last resort of enforcing the order. The Working Group considered that this was a sensitive issue and that it would be particularly valuable to have comments from the judiciary and other interested bodies on the proposition that the service of an additional period of imprisonment in default of payment of a confiscation order made under the CJA 1988 should, in contrast to imprisonment in default of payment of a fine, not expunge the convicted person's liability to pay the amount of confiscation ordered.

CHAPTER 5

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

CHAPTER 2: The procedure for making confiscation orders under the Criminal Justice Act 1988

Recommendations

- The court should be obliged to make a confiscation order where written notice was tendered by the prosecution, save in particular specified circumstances (paragraph 2.24-2.25)
- The £10,000 threshold for triggering the confiscation provisions should cease to apply (paragraph 2.26)
- The court should have the power to postpone the making of a confiscation order for up to six months after conviction (exceptionally, longer) meanwhile proceeding to sentence the offender (paragraph 2.24)
- In assessing a defendant's benefit from an offence, the court should be required to deduct from the figure arrived at any sum the court intends to award to the victim by way of a compensation order (paragraph 2.40)
- There should be new money laundering offences relating to the proceeds of those criminal offences which already attract a confiscation order under the CJA which would mirror the existing money laundering offences which relate to drug trafficking (paragraph 2.44)

- The requirements of the European Directive on Money Laundering in relation to reporting knowledge or suspicion of 'money laundering' should be applied to the proceeds of all money laundering and failure to report should be a criminal offence (paragraph 2.48)

Other propositions on which comments are sought

- Full parity with the Drug Trafficking Offences Act i.e in addition to the changes recommended above, giving the courts the discretion to make assumptions, when assessing the amount by which a convicted person has benefitted from crime, that all assets accrued or enjoyed during the previous six years are the proceeds of crime unless the convicted person can show otherwise, and to confiscate accordingly; (paragraphs 2.18-2.23)
- To allow the courts to confiscate the proceeds of offences of which the offender was convicted before the CJA came into force with the availability of statutory assumptions to assist the prosecution (paragraph 2.27-2.30)
- To allow the courts to confiscate for a continuing course of criminal conduct (paragraphs 2.34 - 2.36)

CHAPTER 3: Investigative Powers

Recommendations

- Investigators should be able to obtain a production order or a search warrant in respect of material believed to be relevant to the making of a restraint or confiscation order (paragraph 3.4)
- Prosecutors should be able to obtain disclosure of information held by

Government departments (paragraph 3.4)

- A criminal offence of prejudicing an investigation should be created (paragraph 3.5)
- A power should be available to allow the court at any stage in the confiscation process to obtain information which it might require to make a confiscation order (paragraph 3.8)

CHAPTER 4: Enforcement Procedures

Recommendations

- Responsibility for appointing a receiver should be vested in designated county courts where the value of a confiscation order is below £5,000, and in the High Court or designated county court where the value is £5,000 or above (paragraph 4.3)
- A receiver should be able to apply to the High Court for a downward variation of a confiscation order (paragraph 4.3)

Proposition on which comments are sought

- A term of imprisonment imposed for non-payment of a confiscation order should not expunge the debt (paragraph 4.5)

Terms of reference

- (i) To review the operation to date of the restraint, confiscation and money laundering provisions;
- (ii) To identify those areas in which changes are required as a matter of priority, taking into account the needs of the practitioners and the key role of the confiscation powers in the Government's fight against drug trafficking and other serious crime;
- (iii) To determine which of these changes require primary legislation, and which could be brought about by other means; and
- (iv) to make proposals on those issues requiring urgent primary legislation.

Membership

Mr Owen Kelly

Commander Roy Penrose

National Criminal Intelligence Service
National Criminal Intelligence Service

Mr Dennis Walton
Mr John Tester
Mr John Cooney
Ms Jenny Clarke
Ms Anne Stuart

HM Customs and Excise
HM Customs and Excise
HM Customs and Excise
HM Customs and Excise
HM Customs and Excise

Mr Boyd McAdam

Scottish Home and Health Department

Miss Susan Taylor
Mr Martin Hinton

Crown Prosecution Service
Crown Prosecution Service

Mr Steven Wilcox

Lord Chancellor's Department

Mr Alistair Brown
Mr Norman McFadyan

Crown Office
Crown Office

Ms Melanie Carter
Ms Sue Rex
Mr Peter Vallance
Ms Susan Wale
Ms Vikki Molloy (Secretary)

Home Office
Home Office
Home Office
Home Office
Home Office

Mr Crieve
Mr Fairclough
Mr Burns

4402



CABINET OFFICE
R 9684
05 OCT 1992
FILING INSTRUCTIONS
FILE NO.

cc. Mr Jarma
FOLIO 11

A lot clearer, only a
little shorter, but at
least the
thing has now
gone!

THE TREASURY SOLICITOR

Queen Anne's Chambers, 28 Broadway, London SW1H 9JS

DX No. 2318 Victoria Fax 071-210 3310 Switchboard 071-210 3000

Direct Line 071-210 3344 (G1N 7-210 3344)

cc. Mr Russell
(Cabinet Office)

Miss R A Jeffreys
Law Officers' Department
9 Buckingham Gate
London
SW1E 6JP

Maia 20/5

haven't yet heard
from Law Officers

shd do next wk.
But advice may not be
SECOND BANKING COORDINATION DIRECTIVE

Please quote:

Your reference:

Date:

This is the letter seeking
advice from the Law
Officers on which the
position of the Banking
(Information & Investigations)
Bill depends.

20 May 1992

simple.

28/6

Thygesen
22/5

At Stephen Hyett's meeting on 29 January it was agreed that Colin Gregory should seek the Law Officers' opinion on whether section 2(2) of the European Communities Act 1972 could be used to give Gibraltar banks the right to carry on business in the UK on similar terms to banks from elsewhere in the Community.

2. Since then the Law Officers have given advice in connection with the implementation of the UCITS Directive. That advice affects the implementation in the UK of the Second Banking Coordination Directive (the Second Directive) and at John Vaux's meeting on 1 April it was agreed that the Law Officers should be consulted on the questions it raised.

3. Colin originally wrote to Chris Muttukumaru about the Directive on 31 October 1990. That letter related to the need for primary legislation in order to enable us to create criminal offences more serious than the 1972 Act allows. Chris replied on 6 February 1991. He also wrote to you about the Directive on 16 October 1991 - in relation to "non-credit institutions" - and Colin Wilson's letter of 4 February to Mark Bucknill deals with that point.

4. As you know, the Second Directive will enable credit institutions authorised in one Member State to carry on business in any other Member State. The Banking Act 1987 requires all credit institutions wishing to take deposits

in the UK in the course of a deposit taking business to be authorised. Regulations are being drafted under section 2(2) of the 1972 Act which will remove the need for credit institutions authorised in other Member States to be authorised by the Bank of England. They will also contain procedures to implement the provisions of the Second Directive giving UK credit institutions the right to carry on business in other Member States (known as the "passport"). As well as dealing with the position of Gibraltar banks, this letter deals with the question whether we can achieve the policy objective of making available the passport to UK credit institutions by means of regulations under section 2(2) of the 1972 Act, or whether to do so would require primary legislation extending the section 2(2) vires. ✓

5. The key provision in the Second Directive is Article 18(1), which says that institutions authorised in one Member State get the passport to carry on the activities listed in the Annex in other Member States "provided that such activities are covered by the authorisation".

What does "authorisation" mean?

6. "Authorisation" is defined in Article 1(2) to mean "authorisation as defined in the second indent of Article 1 of Directive 77/780/EEC" (the First Directive). That says that "'authorisation' means an instrument issued in any form by the authorities by which the right to carry on the business of a credit institution is granted". The first indent of that article States that "'credit institution' means an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account".

7. It therefore follows that the "authorisation" referred to in Article 18(1) of the Second Directive means the authorisation "by which the right to carry on the business of a credit institution is granted". The First Directive's definition of a credit institution is not amended by the Second Directive. However, Article 18(1) extends the passport to the activities listed in the Annex (provided they are "covered by the authorisation") and Article 13(1) States that the prudential supervision of credit institutions by home Member States must include the activities carried on "in accordance with Article 18". (I should also note that the questions raised in this letter about the provision of a passport capable of covering all Annex activities are also relevant to Article 18.2, which gives the passport to subsidiaries of ✓

credit institutions if they meet certain conditions; I should be grateful if the Law Officers could have this in mind when advising.)

8. It is arguable that once the Second Directive comes into force, the definition of "authorisation" in the First Directive should be construed to mean an instrument giving the right to carry on not only the business of taking deposits and lending but also some or all of the other activities listed in the Annex. In the UK authorisations for some of these activities are granted by bodies other than the Bank of England, such as Financial Services Act regulators. The first question is whether such authorisation would suffice for the purpose of Article 18 as long as those regulators were "competent authorities" for the purposes of the Second Directive.

9. "Competent authorities" are defined in Article 1(5) of the Second Directive by reference to Article 1 of Directive 83/350/EEC (the First Consolidated Supervision Directive) which defines them to mean "the national authorities which are empowered by law or regulation to supervise credit institutions". "Supervision" is itself defined to mean (pending subsequent coordination) "the techniques, in whatever form and however implemented, employed by the competent authorities in each Member State in order to monitor prudential aspects of a credit institution's business". (The draft Second Consolidated Supervision Directive, which is due to come into force on 1 January 1993, revokes the first Consolidated Supervision Directive. It substitutes in Article 1(5) of the Second Directive the same words as currently appear in Article 1 of the first Consolidated Supervision Directive; the definition of "supervision" is not replaced.)

10. At the time the Second Directive was being negotiated we secured a Minutes Statement that "the Council and the Commission agree that for the purposes of the Directive the definition of competent authorities covers national authorities empowered by virtue of laws or regulations to carry out the prudential supervision of credit institutions with regard to the activities listed in the Annex" with a view to ensuring that the Financial Services Act regulators would be treated as "competent authorities" within the meaning of Article 1(5), and accordingly that authorisations granted by them (under the Financial Services Act) sufficed for the purposes of Article 18.

OK

11. Subsequently, however, attention focused on whether this view - ie that authorisations granted otherwise than by the Bank would be sufficient for Article 18 purposes - was consistent with the definition of "authorisation" in Article 1(2), and a meeting of Whitehall lawyers chaired by John Vaux on 5 November 1991 concluded that "authorisation" meant authorisation by the Bank of England under the Banking Act (or by the Building Societies Commission under the Building Societies Act 1986). A further meeting chaired by John on 1 April (which you came to) did not dissent from the view that only Banking (or Building Societies Act) authorisation was relevant, but it was agreed the Law Officers should be asked to advise whether they agree with it.

12. This letter proceeds on the basis that "authorisation" in Article 18 means authorisation as a bank under the Banking Act, but in any event the question may be academic because even if authorisations other than those granted by the Bank count for the purposes of Article 18, they would not "cover" all the activities listed in the Annex. Some of those activities, such as the provision of safe custody services, do not on their own require any authorisation in the UK, and are therefore arguably not at present 'covered' by any authorisation. Others are regulated under the Financial Services Act 1986, the Consumer Credit Act 1974 and the Insurance Companies Act 1982. However not every transaction falling within the Annex would require authorisation under those Acts: it depends on the circumstances of the case. I attach a copy of a letter (Doc 1) from Jane Stokes which explains the differences between the activities in the Annex and the scope of "investment business" under the 1986 Act. I attach a similar comparison (Doc 2) of the relationship between the directive term "consumer credit" and the Consumer Credit Act 1974. If you are interested we could supply further material on the other activities in the Annex. It is not necessary to study these differences in detail, merely to note that "authorisation" under the relevant legislation, even if "authorisation" for the purposes of Article 18, would not cover all the activities in the Annex.

Can section 2(2) be used to extend Banking Act authorisation?

13. It is desired as a matter of policy that UK credit institutions should be able to benefit from the passport in respect of all the activities in the Annex. It is also desired that any legislative changes needed to achieve this

should be made by secondary legislation. The most recent draft therefore provides as follows:

"For the purposes of these Regulations a UK authorised institution is authorised to carry on in the United Kingdom any scheduled activity other than one -

- (a) which the institution is precluded from carrying on by virtue of a condition imposed under section 12 of the Banking Act; or
- (b) which constitutes investment business which, by virtue of any provision of the Financial Services Act, or of any rules or regulations made or any prohibition imposed under that Act, the institution is precluded from carrying on."

much better

14. The draft Regulations provide, in addition, that it should be grounds for revoking a Banking Act authorisation for a UK credit institution to engage in the UK in any of the activities in the Second Directive's Annex without first having given notice to the Bank - thus enabling them to exercise their powers to prevent it - and that the Bank should have power to revoke authorisation if informed by the Secretary of State that the grounds set out in section 28(1)(b) of the Financial Services Act 1986 are satisfied, or by the Director-General that any of the acts described in section 25(2) of Consumer Credit Act have been committed by the institution, its employees etc. These additional provisions have been included to meet the concern that a provision of the kind set out in the preceding paragraph, extending the Banking Act authorisation in form only, would not be sufficient.

15. In the light of the Law Officers' advice on the implementation of the UCITS Directive, as expressed in your letter of 13 March to Jane Stokes, it would appear that there are vires for provision under section 2(2) only if the UK is obliged under Community law to make the passport available in respect of all the activities listed in the Annex (section 2(2)(a), or if to make such provision could properly be said to be for the purpose of dealing with matters related to a Community obligation (section 2(2)(b).

Is there a Community obligation to extend Banking Act authorisation?

16. I shall deal first with the question of whether there is a Community obligation. It may exist either under the Second Directive or under the Treaty.

Is there an obligation under the Second Directive?

17. The basic thrust of the measure is that institutions should be allowed to carry on abroad any of the activities in the Annex they can do at home without further authorisation. This view is supported by the twelfth recital which reads "Whereas, by virtue of mutual recognition, the approach chosen permits credit institutions authorised in their home Member States to carry on, throughout the Community, any or all of the activities listed in the Annex by establishing branches or providing services."

18. However, the Second Directive does not state expressly that institutions must be able to exercise the passport in respect of all the activities in the Annex. Indeed it expressly contemplates that, for some institutions, activities may not be "covered" by their authorisation (Article 18.1). In what circumstances may an authorisation not cover an activity? One interpretation of the Directive is that the words in Article 18.1 refer to the situation contemplated in Article 19.3, which states that the home Member State authorities must pass on passport details to host State authorities unless "they have reason to doubt the adequacy of the administrative structure or the financial situation of the credit institution, taking into account the activities envisaged." It is certainly arguable that any refusal would have to be justified objectively by reference to those criteria and that an institution could not be refused the passport simply on the grounds that the activities in question were, in the UK, regulated by a different competent authority, or that they were not the subject of an independent authorisation requirement in the UK, and therefore could not be said to be 'covered' by banking authorisation. The latter would be particularly difficult to defend, since an institution would be able to argue that the Bank already had powers to prevent the banks they authorise from carrying on these activities, and did indeed take a prudential interest in them, as required by, for example, the recently adopted Consolidated Supervision Directive (which states that supervision on a consolidated basis must take in all the activities defined in the Second Directive Annex). A home State authority which refuses to notify

a host State authority of passport details must give reasons for the refusal and the refusal has to be subject to a right to apply to the courts in the home Member State. It is arguable that it follows from these provisions that an institution can be denied the passport only where it fails to meet some supervisory criterion, and not because a Member State takes the view that it has no supervisory criteria in this area. On this view there would be an obligation to make available the passport and some provision is needed to ensure that "unregulated" activities, and possibly (depending on the advice on the question raised at paragraph 11 above) activities covered by non-Banking Act authorisations, are "covered" by the Banking Act authorisation.

19. The contrary view is that the Second Directive expressly contemplates that the authorisations of some institutions will not "cover" all the activities in the Annex and that Articles 19 and 20 of the Second Directive are essentially procedural and cannot extend the scope of Article 18(1). If an activity is not "covered" by the institution's authorisation, Articles 19 and 20 would on this view not apply to it and could not be relied on to found an obligation to make available the passport. John Vaux's meeting on 1 April concluded that although the arguments in paragraph 18 above were plausible, they were not immediately consistent with Article 18(1). The meeting was therefore unable to conclude that this necessarily represented a certain way of founding an obligation for the purposes of section 2(2).

20. The above analysis considers the position mainly from the perspective of the home State. The argument that a home State has an obligation to provide a comprehensive outward passport would be considerably strengthened if host States are permitted by the Directive to require that credit institutions wishing to carry on Annex activities in their territories must do so via the passport, and that they may not provide services or establish themselves by obtaining local authorisation.

21. It has, of course, been necessary to consider whether this course of action is open to the UK, or indeed required of us, as a host state under the Directive, as regards incoming institutions. The approach decided upon distinguishes between activities that are capable of being authorised in home or host state, and those that are not. In particular, the intention is that the UK's implementation of the Directive will have the consequence that, where

activities are capable of being authorised in home and host state, the passport will be the only route by which credit institutions from other member states can carry them on in the UK: to permit local authorisation for these activities here would be unacceptable, and may be a breach of Article 5 of the EEC Treaty. However, incoming institutions whose home state "authorisation" cannot "cover" these activities will be able to obtain "top-up" local authorisations from the relevant Regulator.

22. It may be argued that this willingness to provide local authorisation for incoming institutions is inconsistent with the argument that there is an obligation to make available the possibility of a comprehensive outward passport. However, even though the view is being taken that institutions retain certain rights under the Treaty to obtain local authorisation in other member states, this may be considerably less convenient for some than relying on the passport. So it does not therefore follow that if these rights subsist, there can as a result be no obligation to make the passport available for those who want it.

Is there any obligation under the Treaty?

23. If there is no obligation under the Second Directive to make the passport available, there may be an obligation under the Treaty. This argument was alluded to in paragraph 4 of your letter of 13 March on UCITS. In your letter you said that it did appear to the Law Officers that failure to allow UK UCITS to operate as open-ended investment companies might be said to be reverse discrimination contrary to Article 52 of the Treaty.

24. As I understand it, we generally take the view that reverse discrimination is not contrary to the Treaty on the basis of the 1978 case of Saunders. You will recall that Miss Saunders was convicted of theft and bound over on condition that she went to Northern Ireland and did not return to England and Wales for 3 years. The ECJ was asked whether that order was invalid because it was in derogation of the rights conferred by Article 48 of the Treaty on the freedom of movement for workers. The court held that although Article 48 might lead Member States to amend their legislation "even with respect to their own nationals" the Article did not restrict the power of Member States to restrict freedom of movement in implementation of domestic

criminal law. The court held that the provisions of the Treaty on freedom of movement for workers cannot be applied to situations "which are wholly internal to a Member State, in other words, where there is no factor connecting them to any of the situations envisaged by Community law". That must of course be right, but it is a long way removed from the present situation which does not involve infringements of the criminal law but is directly related to the subject matter of the Second Directive, namely the right of credit institutions to carry on business as such.

25. A case in which the court took a different view was the case of Knoors (1979) ECR 399, also heard in 1978. That case concerned a Dutch plumber who had qualified in Belgium. The ECJ held that the Dutch authorities' refusal to allow him to practice in the Netherlands without obtaining a further Dutch qualification was contrary to Article 52 and the relevant EC Directive. The court held that although "the provisions of the Treaty relating to establishment and the provision of services cannot be applied to situations which are purely internal to a Member State, the position nevertheless remains that the reference in Article 52 to "nationals of a Member State" who wish to establish themselves "in the territory of another Member State" cannot be interpreted in such a way as to exclude from the benefit of Community law a given Member State's own nationals when the latter, owing to the fact that they had lawfully resided on the territory of another Member State and have there acquired a trade qualification which is recognised by the provisions of Community law, are, with regard to their State of origin, in a situation which may be assimilated to that of any other persons enjoying the rights and liberties guaranteed by the Treaty". The case of Knoors has been followed in a number of other cases referred to in the observations the UK is submitting in the cases of Werner and Smith¹.

26. It is arguable that the issue for consideration falls within the line of authorities established by Knoors or would be seen by the ECJ as analogous. Although UK institutions would not be exercising rights obtained in other Member States, it cannot be said that the situation is one which is "wholly internal to a Member State" or where "there is no factor connecting [it] to any of the situations envisaged by Community law". The situation would have

¹ You will also note the attached brief Financial Times report (Doc 3) of Cases C-251/90 and C-252/90.

a close connection to one envisaged by Community law, namely the right under the Second Directive for credit institutions authorised in one Member State to carry on business in other Member States without separate authorisation.

27. The Second Directive is made under Article 57(2) of the Treaty. This provides that the Council "is to issue Directives for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking up and pursuit of activities of self-employed persons". The purpose of such action is Stated in Article 57(1), namely "in order to make it easier for persons to take up and pursue activities of self-employed persons". The fact that Articles 52 and 59 both refer to rights of nationals from other Member States, but Article 57 simply refers to making it "easier for persons to take up and pursue activities as self-employed persons" strengthens the view that to deny UK institutions the passport for activities not covered by Banking Act authorisation would be reverse discrimination contrary to the Treaty.

28. Further assistance may also be gained from Case 81/87 R v The Treasury and Commissioners of Inland Revenue, Ex Parte Daily Mail and General Trust Plc. That case concerned the transfer of central management and control of a UK registered company to another Member State, and the implications for the right of establishment of a consent requirement. In the course of its judgment the ECJ observed that:

"Even though [the provisions of Article 58] are directed mainly to ensuring that foreign nationals and companies are treated in the host Member States in the same way as nationals of that State they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation which comes within the definition contained in Article 58. As the Commission rightly observed, the rights guaranteed by Article 52 et seq would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving in order to establish themselves in another Member States."

29. The contrary argument is that there is no suggestion here that the UK

would prohibit or hinder undertakings from doing business in other Member States; the only question is the range of activities they may engage in under the passport. Is there a Treaty obligation then on Member States, given the adoption of the directive, to enable undertakings if authorised to be in a position to compete in other Member States across the whole range of activities listed in the Annex?

30. The Law Officers are asked to advise whether in their view there is any obligation under either the Directive or the Treaty to extend Banking Act authorisations to "cover" all the activities listed in the Annex sufficient to enable section 2(2)(a) of the 1972 Act to be used for this purpose.

Is provision allowing for a passport covering all Annex activities related to a Community obligation for the purposes of section 2(2)(b) of the European Communities Act 1972?

better 31. Treasury Solicitor's view is that although it may be difficult to conclude on balance that there is an Community obligation to make provision for a passport capable of covering all Annex activities (whether under the Directive or, notwithstanding the Knoors and Daily Mail cases, the Treaty), section 2(2)(b) of the 1972 Act may provide the necessary vires to do so. I understand that recent advice from the Law Officers on this subject is summarised in the Cabinet Office Legal Adviser's note dated 10 March 1992, a copy of which is attached (Doc 4). 2BCD establishes a regime whereby institutions may carry on in other Member States activities which are covered by their home state authorisation. Whether the home State authorisation is capable of covering all annex activities may depend upon the extent to which those activities are regulated under banking legislation; but once covered by an authorisation the institution is free to enjoy the benefits that the passport provides. Indeed, institutions whose home states do not regulate any particular activity under their banking legislation would be put at a competitive disadvantage in carrying on that activity in a member State where that activity is regulated, in comparison with institutions from States whose banking authorisation covers the whole range of annex activities. So it can strongly be argued that removing that disadvantage by enabling the passport to be enjoyed across the whole range of Annex activities would be "related to" the clear obligations that the UK has to establish the 2BCD regime, and would

be consistent with a broad construction of "related to".

32. It is the case that an aspect of making available the possibility of a passport covering all Annex activities would, under the proposed notice provision referred to at paragraph 14 above, create a new (albeit not especially onerous) restriction on all UK authorised credit institutions, whether or not they ever take advantage of their passport rights. However, whether the overall approach to providing a passport capable of covering the whole range of Annex activities described in this letter can be properly regarded for the purpose of dealing with matters as "related to" 2BCD obligations has to be considered against the background of the potential benefits identified above for those authorised UK institutions which may choose to exercise the rights such a passport would give².

33. Accordingly, the Law Officers are asked to advise whether, if they conclude that there is no Community obligation to make possible a passport covering all Annex activities, the vires to do so nevertheless exist under section 2(2)(b).

Gibraltar

34. I now turn to the question of Gibraltar banks. Stephen Hyett's meeting on 17 December concluded that for the purposes of the Second Directive, Gibraltar and the UK must be treated as part of the same Member State. At the meeting on 29 January it was also agreed that Colin Gregory should seek the Law Officers' opinion on the basis that Community law did not require Gibraltar banks to be permitted to carry on business in the UK - in other words we would not ask the Law Officers at this stage to consider whether reverse discrimination was permitted in this context, we were to assume it was. It may be that in the light of the Law Officers advice on the UCITS Directive this view is no longer correct. I should be grateful for the Law Officers' views on whether the assumption is legitimate.

² You may be interested in the attached extract from *Banking in Europe - the Single Market* by R Dixon (Doc 5). This evidences the expectation that when the directive is in force, UK credit institutions will be able, under the passport, to carry on in other Member States those Annex activities that they may lawfully carry on in the UK.

35. Assuming however, that reverse discrimination against Gibraltar banks is permitted and if, as a matter of policy, it is desired to give Gibraltar-based banks the right to operate in the UK without separate authorisation, but they have no Community right to do so, can they be given the right in the regulations under the 1972 Act on the same basis as institutions from elsewhere in the Community?

36. The regulations will not only need to provide for Gibraltar banks to operate here without authorisation (something that in theory could already be done by exempting them under section 4 of the 1987 Act but not, or not satisfactorily, under the Financial Services or Consumer Credit Acts) but will also need to apply the new regime being created for EC banks to those from Gibraltar. Institutions from elsewhere in the Community will of course be subject to home State supervision, but host States will have the right to impose rules "adopted in the interest of the general good". The draft regulations give the Bank of England and other regulators new powers to enforce such rules, and to monitor liquidity and market risks, which are host State responsibilities. These powers would need to be exercisable in relation to Gibraltar based banks. The draft regulations also give State supervisors from elsewhere in the Community powers to carry out investigations and collect information. The Gibraltar authorities would need to be given the same powers under UK law. I can provide further details of these provisions if you would find that useful.

37. Article 18(2) of the Second Directive gives the passport to subsidiaries of credit institutions if they meet certain conditions. The questions raised about the position of Gibraltar banks apply also to them.

38. It could be argued that section 2(2)(b) provides the vires for regulations equating the position of Gibraltar banks with that of banks from elsewhere in the EC on the basis that the regulations would be "for the purpose of dealing with matters arising out of or related to" the obligation to admit banks from other Member States. However, it is not easy to see how such a proposition could be justified: the provisions relating to Gibraltar banks would not be consequential but substantive; and enacting such provisions would on the face of it be no different from doing so in relation to US or Japanese banks, which would clearly not be possible. On the other hand

Gibraltar banks will have a right to operate elsewhere in the Community: could it be argued that they would be able to exercise this right more easily if they were also allowed to operate in the UK, because overseas supervisors might be less cooperative if they were obliged to let Gibraltar banks operate in their territory when the UK was keeping them out? I would be grateful to know the Law Officers' views.

39. I am copying this letter to Colin Wilson (LAD), Iain Jamieson (Scottish Office), Stephen Hyett (Cabinet Office Legal Adviser), Colin Farthing (HMT), Kevin Chamberlain (FCO), and Philip Bovey and Jane Stokes (DTI).

M J HEMMING



QUEEN ANNE'S GATE LONDON SW1H 9AT

19 May 1992

Mr Russell 21/5

Mr Russell,



Mr Hartley
Paul

Thank you for your letter of 23 April about the proposed Bill on Fraud (Jurisdiction), Drug Trafficking, Money Laundering and Insider Dealing.

I quite agree with your comments about the importance of implementing the European Community Directive on money laundering and insider dealing. As you will know, I decided to reinstate the Bill as a Home Office bid, and it is now included among the Bills which FLG have recommended for the 1992/93 legislative programme. However, there is still a good deal of work to be done before a draft Bill can be produced and I have asked the Lord President to consider deferring its introduction until the autumn.

I am copying this to the Prime Minister, the Foreign Secretary, the Chancellor of the Exchequer, the Lord President, First Parliamentary Counsel, the Lord President and to Sir Robin Butler.

J. L.

KENNETH CLARKE

Richard Needham Esq, MP
Minister of State
Department of Trade and Industry
Ashdown House
123 Victoria Street
London SW1



To: ~~MR RUSSELL~~ 19/5

From: T J Sutton
Date: 18 May 1992

cc: Mr Graham
Miss Kirton
Mr Maclean
Mr Ollard
Mrs Bailey
Mr Paul
Mrs Paxman

File
As Bailey We need to close
up Treasury. R b/f
accordingly. 19/5

**FRAUD (JURISDICTION), DRUG TRAFFICKING, MONEY LAUNDERING, INSIDER
TRADING AND BANKING (INFORMATION AND INVESTIGATIONS) BILL**

The Lord President has seen and noted your helpful progress report of 15 May. He is content with the conclusions you reach so far and awaits your progress report on whether a separate Banking Bill will be necessary.

7.
T J SUTTON
Principal Private Secretary



CABINET OFFICE

70 Whitehall London SW1A 2AS Telephone 071-270
Fax: 071 270 0113

0189

Mrs BARNES

File

FOLIO
84

KO164

Ms Caroline McCreadie
Home Office
C2 Division
Room 472
50 Queen Anne's Gate
LONDON
SW1H 9AT

15 May 1992

Dear Ms. McCreadie,

FRAUD (JURISDICTION), DRUG TRAFFICKING, MONEY LAUNDERING, INSIDER TRADING AND BANKING (INFORMATION AND INVESTIGATIONS) BILL

I am grateful to you and to others who attended the meeting on 12 May to discuss the various component elements of the Fraud (Jurisdiction), Drug Trafficking, Money Laundering, Insider Trading and Banking (Information and Investigations) Bill. I was concerned to find that there were still problems to be resolved on a number of parts of the Bill. We agreed that the objective should be to complete the submission of instructions to Parliamentary Counsel by early July, except where a consultation timetable made this impossible, so that the Bill can be drafted for Autumn introduction. The following paragraphs record briefly the conclusions we reached at yesterday's meeting and set a target timetable for taking work forward.

Fraud

Limited further discussions are required to settle one of the central questions relating to the definition of national interest in court cases. Parliamentary Counsel are considering how this might best be achieved after which I understand you propose to consult Law Officers, Scottish Law Officers, Department of Trade and Industry, Crown Prosecution Service, Serious Fraud Office and revenue departments. The Bill will also contain a number of clauses relating to EC fraud, on which no delays are expected. Final instructions should be sent to Parliamentary Counsel by Friday 3 July.

Drug Trafficking

I understand that there has been a substantial re-think of a number of aspects of court procedure, with a view to achieving a workable solution for both the judiciary and the prosecutors. Policy clearance, where necessary, should be obtained as quickly as possible. Revised instructions should be sent to Parliamentary Counsel by Friday 3 July.

Money Laundering

A consultation paper is to be sent to the banking community on 29 May on which comments will be sought by 31 July. Draft instructions have already been sent to Parliamentary Counsel: these may need to be altered to take on board any comments received. Final instructions should be with Parliamentary Counsel by Friday 28 August.

Insider Trading

Policy is yet to be resolved on the issue of published price-sensitive information. I understand that it will take about one month to produce draft clauses, on which you propose a limited consultation exercise for interested parties to comment. Allowing a further month for this, final instructions should be sent to Parliamentary Counsel by Friday 17 July.

Banking (Information and Investigations)

The original banking provisions are, I understand, drafted and ready for introduction. You would be content for these to be included in the combined Bill, and could update the penalty provisions after enactment. You were however seeking urgent advice from the Law Officers about whether all the remaining provisions of the Directive could be achieved by secondary legislation, which would require additions to the Bill. If it was thought that additional clauses would be necessary, a separate Banking Bill would be needed on a faster track, so that regulations could be enacted by the end of the year, if an unacceptable gap in the regulatory framework was to be avoided. You should try to obtain legal advice as soon as possible so that the position becomes clearer. I should be very grateful to be copied all correspondence.

It is important that the various elements of the Bill are not allowed to slip and that periods of consultation and the deadlines for getting instructions to Parliamentary Counsel are strictly adhered to. It is essential that the Cabinet Office are kept informed of any developments or problems that arise which would threaten the Bill's state of readiness for Autumn introduction.

I am copying this letter to Peter Vallance, David Bentley and Denis Evans (Home Office), John Compton (Department of Trade and Industry), Steven Bowden, Colin Farthing (HM Treasury) and Edward Caldwell (Parliamentary Counsel Office).

Yours sincerely

David Patten

cc. A M RUSSELL

KO163

FROM: A M RUSSELL
DATE: 15 May 1992cc: Mr Graham
Miss Kirton
Mr Maclean
Mr Ollard
Mrs Bailey
Mr Paul

MR SUTTON

FRAUD (JURISDICTION), DRUG TRAFFICKING, MONEY LAUNDERING, INSIDER TRADING AND BANKING (INFORMATION AND INVESTIGATIONS) BILL

We met on 12 May with representatives of the Home Office, Treasury, Department of Trade and Industry and Parliamentary Counsel to discuss the proposed Fraud (Jurisdiction), Drug Trafficking, Money Laundering, Insider Trading and Banking (Information and Investigations) Bill. The purpose of the meeting was to ensure that we had a complete and up-to-date picture of each component of the Bill, the proposed timescale of their preparation and, as a result, whether it would be possible to include all the components in a single Bill.

2. The position is not all that promising. There are problems of varying degree with each component of the Bill, which effectively rule out any chance of introducing it before the recess.

3. We considered each element of the Bill:

- Money Laundering. A consultation paper is to be sent to the banking community on 29 May on which comments are being sought by 31 July. After this some period of time will be needed to evaluate the findings and take on board any comments. Draft instructions are already with Parliamentary Counsel. Revisions after this consultation should not delay autumn introduction.
- Drug Trafficking. There has been a substantial re-think of a number of aspects of court procedure, with a view to ensuring that a workable solution is achieved

for both the judiciary and the prosecutors. Policy clearance, where necessary, will be sought on an urgent basis, with a view to providing instructions to Parliamentary Counsel in time for autumn introduction.

- Fraud. One of the central questions relating to the definition of national interest in court cases is still to be settled. Parliamentary Counsel are at present considering how this might best be achieved, after which a further limited period of discussion will be necessary. Parliamentary Counsel are satisfied that a Bill can be ready for autumn introduction.
- Insider Trading. There is, of course, no prospect of meeting the June 1992 implementation deadline for the EC Directive on Insider Dealing. The issue of published price-sensitive information is still to be resolved which could take a further month. Once this is done, officials recommend a limited consultation exercise for interested parties to comment on the draft clauses. This process could take a further month or so. Parliamentary Counsel are confident that, if they can have final instructions by mid-July, the Bill could be ready for autumn introduction.
- Banking. It was recognised that this component had a different theme from the rest of the Bill, having been included as a result of pressure on the legislative programme. This part of the Bill, as originally envisaged, was drafted and ready for introduction. The Treasury were content for it to be included in the combined Bill, and would update the penalty provisions after enactment. They were however seeking urgent advice from the Law Officers about whether all the remaining provisions of the Directive could be achieved by secondary legislation; if not, this would require additions to the Bill. If this is necessary, a separate Banking Bill will be needed on a faster track, so that regulations can be enacted by the end of the year, if an unacceptable gap in the regulatory

framework is to be avoided. Legal advice should be obtained as soon as possible so that a clearer decision could be taken on whether to include the EC provisions in the main Bill or whether it will require separate legislation.

4. My conclusion from the meeting is that the composite Fraud (Jurisdiction), Drug Trafficking, Money Laundering, Insider Trading and Banking (Information and Investigations) Bill will not be ready for introduction until the autumn; and that the only element which might realistically be split off and introduced earlier is the Banking (Information and Investigations) provisions. I will report further in due course on whether a separate Banking Bill is necessary.

David Padi

pp.

A M RUSSELL



HOME OFFICE
QUEEN ANNE'S GATE
LONDON SW1H 9AT

FOLIO
7

IMMEDIATE BY FACSIMILE

CABINET OFFICE
9683
05 OCT 1992
RECEIVED INSTRUCTIONS
PAGE NO.

Date 11/5/92

Time

no. of page transmitted 2 including this

DESTINATION

Name David Paul

Address

telephone 270 0113

SENDER

Name Steve Gorman

Address Parliamentary Section

telephone

facsimile no. London 071 273 3429

MESSAGE

As requested.

PARLIAMENTARY QUESTION FOR ORAL ANSWER ON THURSDAY 14 MAY 1992

Mr John Greenway (Ryedale): To ask the Secretary of State for the Home Department, if he will make a statement on recent progress on his policy to combat drug trafficking.

DRAFT REPLY

MR. KENNETH BAILEY

Clarke ?!

[As my honourable and learned Friend the Lord Chancellor announced on 12 May,] we plan to bring forward a Bill, later this year, to strengthen the powers of the courts to confiscate the assets of drug traffickers. It will seek to rectify perceived shortcomings in the Drug Trafficking Offences Act 1986 identified in an interdepartmental Working Group report published in May 1991. [The Bill will also enable us to implement two important Community Directives on money laundering and insider dealing; and it will extend the power of our courts to deal with international fraudsters.]

7



HOME OFFICE
QUEEN ANNE'S GATE
LONDON SW1H 9AT

401/0
7

CABINET OFFICE
9683
05 OCT 1992
FREEK INDIAN/INDIAN
PMS 1992

IMMEDIATE BY FACSIMILE	
Date	11/5/92
Time	
no. of page transmitted	2 including this
DESTINATION	
Name	David Paul
Address	
telephone	270 0113
SENDER	
Name	Steve Gorman
Address	Parliamentary Section
telephone	
facsimile no. London	071 273 3429
MESSAGE	
As requested.	

PARLIAMENTARY QUESTION FOR ORAL ANSWER ON THURSDAY 14 MAY 1992

Mr John Greenway (Ryedale): To ask the Secretary of State for the Home Department, if he will make a statement on recent progress on his policy to combat drug trafficking.

DRAFT REPLY

MR. KENNETH BAILEY

Clarke ?!

[As my honourable and learned Friend the Lord Chancellor announced on 12 May,] we plan to bring forward a Bill, later this year, to strengthen the powers of the courts to confiscate the assets of drug traffickers. It will seek to rectify perceived shortcomings in the Drug Trafficking Offences Act 1986 identified in an interdepartmental Working Group report published in May 1991. [The Bill will also enable us to implement two important Community Directives on money laundering and insider dealing; and it will extend the power of our courts to deal with international fraudsters.]

7

D R A F T



FROM: A M RUSSELL
DATE: 13 May 1992

cc: Miss Kirton
Mr Maclean
Mr Ollard
Mr Graham
Mrs Bailey
Mr Paul



MR SUTTON

FRAUD (JURISDICTION), DRUG TRAFFICKING, MONEY LAUNDERING, INSIDER TRADING AND BANKING (INFORMATION AND INVESTIGATIONS) BILL

We met yesterday with representatives of the Home Office, Treasury, Department of Trade and Industry and Parliamentary Counsel to discuss the proposed Fraud (Jurisdiction), Drug Trafficking, Money Laundering, Insider Trading and Banking (Information and Investigations) Bill. The purpose of the meeting was to ensure that we had a complete and up-to-date picture of each component of the Bill, the proposed timescale of their preparation and, as a result, whether it would be possible to include all the components in a single Bill.

2. The position is not all that promising. There are problems of varying degree with each component of the Bill, which effectively rule out any chance of introducing it before the recess.

3. We considered each element of the Bill:

- Money Laundering. A consultation paper is to be sent to the banking community on 29 May on which comments are being sought by 31 July. After this some period of time will be needed to evaluate the findings and take on board any comments, although these may not alter the primary legislation greatly. It is however important presentationally to be seen to be giving some thought to comments received. Draft instructions are already with Parliamentary Counsel and he is confident that he should be able to take on any revisions in time to prepare a Bill for autumn introduction.

mai. re-think

- Drug Trafficking. The policy on this subject is still to be worked up fully on a number of aspects of Court procedure, in the light of recent comments by the Crown Prosecution Service. The Home Office are considering whether new policy clearance will be required for these changes. They are confident of getting revised instructions to Parliamentary Counsel by early July in time for the Bill to be drafted for autumn introduction.

Other pt

- Fraud. One of the central questions relating to the definition of jurisdiction by Courts is still to be settled. This will require limited further discussion but Parliamentary Counsel are happy that a Bill can be ready for autumn introduction.

- Insider Trading. There is no prospect of meeting the June 1992 implementation deadline for the EC Directive on Insider Dealing. The issue of published price-sensitive information is still to be resolved which could take a further month. Once this is done, officials recommend a limited consultation exercise for interested parties to comment on the draft clauses. This process could take a further month or so. Parliamentary Counsel are confident that, if they can have final instructions by mid-July, the Bill could be ready for autumn introduction.

- Banking. It was recognised that this component did not help to give the Bill a coherent theme, but had been included as a result of pressure on the legislative programme. This part of the Bill, as originally envisaged, was drafted and ready for introduction. A number of situations had however been identified which might not be capable of resolution by secondary legislation, and which would therefore require additions to the Bill. Advice was being sought on an urgent basis from the Law Officers. If fears about the additional clauses proved unrealised, then the Banking provisions could be included in the main Bill,

updating the penalties required by the Second Banking Directive when Royal Assent had been received. If, however, it was thought that additional situations could arise which could lead to infraction proceedings, it would be necessary to proceed with a separate Banking Bill on a faster track. Legal advice should be obtained as soon as possible so that a clearer decision could be taken on whether to include the EC provisions in the main Bill or whether it would require separate legislation.

4. It is vital that the timing of the various elements of the Bill (or Bills) is not allowed to slip. I have written to Caroline McCreadie (copy attached) underlining the importance of adhering strictly to the periods of consultation and the deadlines for getting instructions to Parliamentary Counsel, and stressing that Cabinet Office should be kept informed of any developments or problems that arise which might threaten the Bill's state of readiness for autumn introduction.

A M RUSSELL



CABINET OFFICE

70 Whitehall London SW1A 2AS Telephone 071-270 0189

15 May 1992

Ms Caroline McCreadie
Home Office
C2 Division
Room 472
50 Queen Anne's Gate
LONDON
SW1H 9AT

FRAUD (JURISDICTION), DRUG TRAFFICKING, MONEY LAUNDERING, INSIDER TRADING AND BANKING (INFORMATION AND INVESTIGATIONS) BILL

I am grateful to you and to others who attended the meeting on 12 May to discuss the various component elements of the Fraud (Jurisdiction), Drug Trafficking, Money Laundering, Insider Trading and Banking (Information and Investigations) Bill. I was concerned to find that there were still problems to be resolved on a number of parts of the Bill. We agreed that the objective should be to complete the submission of instructions to Parliamentary Counsel by early July, except where a consultation timetable made this impossible, so that the Bill can be drafted for Autumn introduction. The following paragraphs record briefly the conclusions we reached at yesterday's meeting and set a target timetable for taking work forward.

Fraud

Limited further discussions are required to settle one of the central questions relating to the definition of jurisdiction by courts, and Instructions should be sent to Parliamentary Counsel by Friday 3 July.

Drug Trafficking

I understand that there has been a substantial re-think of a number of aspects of court procedure, with a view to ensuring that the solution is workable for both the judiciary and the prosecutors. Policy clearance, where necessary, should be obtained as quickly as possible. Revised instructions should be sent to Parliamentary Counsel by Friday 3 July.

Money Laundering

A consultation paper is to be sent to the banking community on 29 May on which comments will be sought by 31 July. Draft instructions have already been sent to Parliamentary Counsel: these may need to be altered to take on board any comments received. Final instructions should be with Parliamentary Counsel by Friday 28 August.

Insider Trading

Policy is yet to be resolved on the issue of published price-sensitive information. I understand that it will take about one month to produce draft clauses, on which you propose a limited consultation exercise for interested parties to comment. Allowing a further month for this, final instructions should be sent to Parliamentary Counsel by Friday 17 July.

Banking (Information and Investigations)

The original banking provisions are, I understand, drafted and ready for introduction. You would be content for these to be included in the combined Bill, and could update the penalty provisions after enactment. You were however seeking urgent advice from the Law Officers about whether all the remaining provisions of the Directive could be achieved by secondary legislation, which would require additions to the Bill. If it was thought that additional clauses would be necessary, a separate Banking Bill would be needed on a faster track, so that regulations could be enacted by the end of the year, if an unacceptable gap in the regulatory framework was to be avoided. You should try to obtain legal advice as soon as possible so that the position becomes clearer. I should be very grateful to be copied all correspondence.

It is important that the various elements of the Bill are not allowed to slip and that periods of consultation and the deadlines for getting instructions to Parliamentary Counsel are strictly adhered to. It is essential that the Cabinet Office are kept informed of any developments or problems that arise which would threaten the Bill's state of readiness for Autumn introduction.

I am copying this letter to Peter Vallance, David Bentley and Denis Evans (Home Office), John Compton (Department of Trade and Industry), Steven Bowden, Colin Farthing (HM Treasury) and Edward Caldwell (Parliamentary Counsel Office).

A M RUSSELL



Treasury Chambers, Parliament Street, SW1P 3AG
071-270 3000

LORD PRESIDENT OF THE COUNCIL RECEIVED	
13 MAY 1992	
3AG	<i>M. Russell</i>
10	<i>Mr. Bailey</i>

12 May 1992

Mr Paul

Rt Hon Antony Newton OBE MP
Lord President of the Council
and Leader of the House of Commons
Privy Council Office
68 Whitehall
LONDON
SW1A 2AT

CABINET OFFICE	
Qf	721....
13 MAY 1992	
FILING INSTRUCTIONS	
FILE No.	

Dear Tony

FRAUD (JURISDICTION), DRUG TRAFFICKING, MONEY LAUNDERING ETC BILL

I have seen Ken Clarke's letter to you of 5 May. I would like to add my support to what he says.

I do not think that this Bill should be introduced ahead of the summer recess. As Ken says, we will shortly be starting a consultation exercise on the money laundering provisions. A consultation paper will be issued to financial institutions, law enforcement authorities, and other interested groups. It would not be reasonable to ask them to comment in less than two months. We will then need a further period to consider the responses that we receive. This points to the introduction of the Bill after, rather than before, the summer recess.

Ken also refers to the complexity of the legislation on confiscating drug trafficking proceeds. The current legislation, contained in the Drug Trafficking Offences Act 1986 has a number of serious drawbacks which are preventing us from recovering the proceeds of drug trafficking. We need to tackle this urgently if our efforts to combat this menace are not to be frustrated. But we must get the legislation right.

I also share Ken's concerns over the inclusion of the provisions to implement the Second Banking Directive. It is absolutely



imperative that these are in place by 1 January 1993. Otherwise the Bank of England will not have all the powers necessary to supervise banks under the single passport regime. The inclusion of these provisions in a large and potentially controversial bill could threaten the timetable as well as widening the scope of the Bill still further. Like Ken, therefore, I would prefer these provisions to form a separate short Bill.

Should a separate Bill not prove possible, however, I would insist on the retention of the banking elements in the Bill, rather than lose them altogether.

I am copying this letter to the Prime Minister, the Foreign Secretary, the Home Secretary, the President of Board of Trade, the First Parliamentary Council and to Sir Robin Butler.

A handwritten signature in dark ink, consisting of a large, stylized 'N' followed by a horizontal line and a smaller, more fluid signature.

NORMAN LAMONT



CABINET OFFICE

70 Whitehall London SW1A 2AS Telephone 071-270 0135

Fax Number 071 270 0113

QF063

11 May 1992

Caroline McCreadie
Home Office
C2 Division
Room 472
50 Queen Anne's Gate
LONDON
SW1H 9AT

Dear Ms. McCreadie,

MEETING: TUESDAY 12 MAY, 9.00 AM IN CONFERENCE ROOM A,
CABINET OFFICE, 70 WHITEHALL

The attached note sets out the basis for Mr Russell's meeting tomorrow on the Fraud (Jurisdiction), Drug Trafficking, Money Laundering, Insider Trading and Banking (Information and Investigations) Bill. It summarises what we understand to be the state of play on each component of the Bill.

The purpose of the meeting is three-fold. First, we wish to confirm that the position as set out in the attached note is correct and that considerations regarding timing are accurate. Secondly, we would wish to discuss how reasonable it would be to include these components as one Bill. Thirdly, that we aim to consider which parts of the Bill might be ready for early introduction.

I am copying this letter to Peter Vallance (Home Office), Denis Evans (Home Office), Colin Farthing (HM Treasury), Steven Bowden (HM Treasury), Edward Caldwell (Parliamentary Counsel Office), and to Muir Russell and Joan Bailey here.

Yours sincerely,

D C PAUL

Money Laundering

Consultation paper to be sent to the banking community is not yet finalised, but is expected to be circulated soon. Comments are being requested by 31 July 1992, after which a period of time will be needed for evaluation. Instructions have already been sent to Parliamentary Counsel, but these will need to be adjusted in the light of the terms of the consultation paper and possibly still further in the light of comments received. The Bill is needed to implement an EC Directive on Money Laundering by the end of the year, although it is thought that introduction could be delayed somewhat if it were already in the Parliamentary process. This part of the Bill is unlikely to be ready until the Autumn.

Drug Trafficking

Drafting instructions were sent to Parliamentary Counsel in July 1991. They are complex and introduce a number of new concepts in court procedures. Consultations are still taking place with Departments on the final form they might take. Customs and Excise have asked that some of the proposed changes be dropped. The proposed changes to court procedures will need to take account of recent legal advice on the form this might take. This part of the Bill is unlikely to be ready until early Autumn.

Fraud

This arose from a Law Commission report, to which a Bill was attached. It proposed two revised definitions which are relatively straightforward. There is however a problem with the third aspect which involves extending the jurisdiction of the courts to try cases of fraud etc (at the moment such cases can only be tried if the final Act, ie the realisation of proceeds occurs in the UK. Parliamentary Counsel are at present considering how this might be resolved. Consultation exercises will need to be carried out with a number of the interested Departments. The question of which department funds the resources needed to put the Bill into practice, which could be substantial, has also yet to be resolved by Departments.

Insider Trading

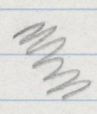
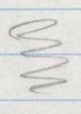
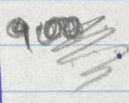
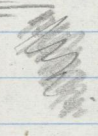
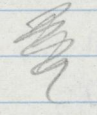
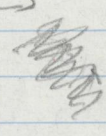
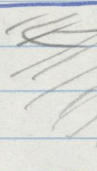
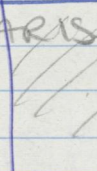
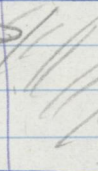
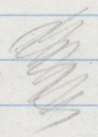
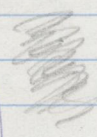
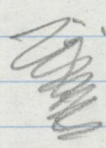
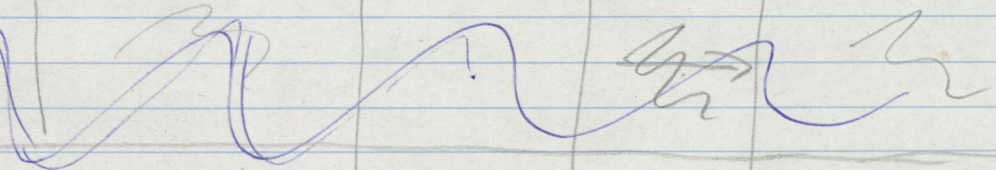
This Bill is needed to implement the EC Directive on insider dealing by the end of 1992. The Bill is short and drafting is well advanced.

Banking (Information and Investigations) Bill

The Bill is very short. Part I, which is already drafted, gives powers to introduce new penalties under the Second Banking Directive which could not be achieved by secondary legislation. Part II, which may not be needed, gives scope to introduce other clauses which are affected by the Second Banking Directive. It is not yet clear what scenarios might be affected by this; lawyers have identified a number of potential situations and the advice of law officers is being sought. If it was decided that only the first part of the Bill was necessary, the Bill would be ready for early introduction. If, however, the second part is considered necessary, then it is likely to delay the readiness of the Bill until the Autumn. How this might affect the achievement of Royal Assent at the end of the year would depend on the format in which it was introduced; as part of a wider Bill, progress could be delayed.

Mark de Pulford 273 2260
C4 G7 'Frank'

CR T

	(11)	(12)	(14)
	MON	TUES	THURS WEDNES
✓ Caroline McCreddie HO - 273 3923			
✓ Peter Vallance HO - 273 3071		9.00 	← PARIS →   
G7 rep: Denis Evans G7 To ring Christine Stewart ✓ HO - 273 3487	AL		
✓ Steve Borden HMT - 4502		9.00	← PARIS →   
✓ Colin Farthing Gill Noble 4670 HMT - 4670 4819		9.00 	
✓ Edward Caldwell PCO			
John Taylor HMT 5549			

Tues
19

Addresses +
writing on Monday
annotated agenda.

273
3705

PTO
add.

MTG FRAUD BILL
CR A, 70 W
12 May 9.00

Denis Evans
C4 Div
Rm 336
QAG.

C Maccreadie
C2 Div
Rm 472
QAG.

Peter Vallance
Rm 472
QAG.

Steve Bowden
42/G
GOGGS

Colin Farthing
Rm 35a/G
GOGGS.

Edward Caldwell
36 W.

J is DCP attending?

Winters Hair Chair (70W)

273 3923

Peter Valera (+) House Office
also Brings

(found) 273 3487

Staten Bijder Treasary (Money laundering)

Grav Noble	Bounding	Cell. Entry	4670	(John Taylor)	5549
4478	more water	Hugh Burns	4402		

DTs

Pl. ask Tsy whether they know who deals with Insider Trading now

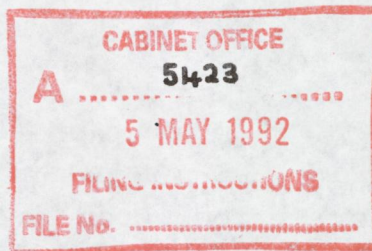
Elusory Calves (PCO) will also attend to Roe Men Two Turns.

See Men Tues Thurs.

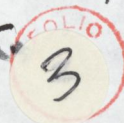


QUEEN ANNE'S GATE LONDON SW1H 9AT

5 May 1992



M. Russell



D. T.

File

I am grateful that the Fraud (Jurisdiction), Drug Trafficking, Money Laundering etc Bill has been included in the list of Bills to be included in the 1992/93 legislative programme.

I know that this Bill is being considered for early introduction. I am afraid, however, that I do not see any realistic prospect of the Bill being introduced before the summer recess.

A major difficulty is that the money laundering provisions are the subject of a consultation exercise being undertaken by the Treasury. My understanding is that this exercise will not be completed before the latter half of July and that the prospects for a speedier resolution are poor. In any case, some time will then be necessary to evaluate the views of the banking community. It would be controversial to introduce legislation on the sensitive issue of money laundering before that consultation has been completed.

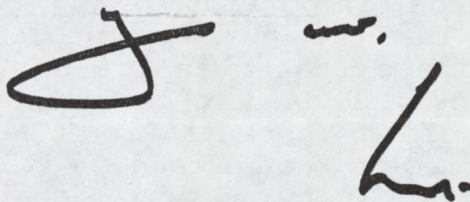
Apart from money laundering, I am conscious that our proposals on drug trafficking and fraud represent substantial changes to existing legislation. Legislation on confiscating drug trafficking proceeds, in particular, is a complex area of law and it is important that we get the procedures right this time around. I anticipate that when the drafting of the Bill gets underway our policy will need to be further developed on a number of issues in close consultation with other interested departments. Moreover, on fraud, whilst most of the legal changes are clear, at least one of the central questions relating to the determination of jurisdiction by our courts remains to be resolved. This is a particularly difficult drafting exercise and before final decisions are taken will also require further consultation with other departments and, on a limited basis, with the practitioners.

The Rt Hon Tony Newton, MP
Lord President of the Council
Privy Council Office
Whitehall
London SW1

For these various reasons, I fear that this Bill would be better included among those for introduction in the Autumn. By that time, we shall be much better placed to introduce a comprehensive package on all the issues.

I am also worried that it has been proposed to include in the Bill provisions to implement the Second Banking Directive. Our understanding is that it is unlikely that the necessary provisions can be completed by the Treasury in time for introduction before the summer recess. I did not raise my doubts at the full Cabinet because that was not the right place for a discussion of this detail. However, I do have some concern over the extent to which the addition of the Banking provisions would widen the scope of the Bill. This could well delay the progress of the legislation. It is also doubtful whether some of the banking provisions could be regarded as appropriate to a Bill about the criminal law. My understanding is that the Treasury have hitherto planned to take these provisions forward by means of a short, free-standing Bill. If, as I believe, it is vital that Royal Assent should be achieved by the end of the year in order to implement the Second Banking Directive, a separate Bill seems much the better course.

I am copying this letter to the Prime Minister, the Chancellor of the Exchequer, the Foreign Secretary, the President of the Board of Trade, the First Parliamentary Counsel and to Sir Robin Butler.

A handwritten signature in dark ink, consisting of a large, stylized 'J' followed by a smaller, less distinct mark.



LETTER OF THE COUNCIL RECEIVED 05 MAY 1992	
FROM	<i>M. Russell</i>
TO	<i>Mr. Bailey</i>

QUEEN ANNE'S GATE LONDON SW1H 9AT

5 May 1992

de Paul.

No document.

7/5

D. Tony.

I am grateful that the Fraud (Jurisdiction), Drug Trafficking, Money Laundering etc Bill has been included in the list of Bills to be included in the 1992/93 legislative programme.

I know that this Bill is being considered for early introduction. I am afraid, however, that I do not see any realistic prospect of the Bill being introduced before the summer recess.

A major difficulty is that the money laundering provisions are the subject of a consultation exercise being undertaken by the Treasury. My understanding is that this exercise will not be completed before the latter half of July and that the prospects for a speedier resolution are poor. In any case, some time will then be necessary to evaluate the views of the banking community. It would be controversial to introduce legislation on the sensitive issue of money laundering before that consultation has been completed.

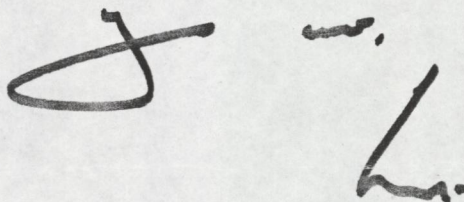
Apart from money laundering, I am conscious that our proposals on drug trafficking and fraud represent substantial changes to existing legislation. Legislation on confiscating drug trafficking proceeds, in particular, is a complex area of law and it is important that we get the procedures right this time around. I anticipate that when the drafting of the Bill gets underway our policy will need to be further developed on a number of issues in close consultation with other interested departments. Moreover, on fraud, whilst most of the legal changes are clear, at least one of the central questions relating to the determination of jurisdiction by our courts remains to be resolved. This is a particularly difficult drafting exercise and before final decisions are taken will also require further consultation with other departments and, on a limited basis, with the practitioners.

The Rt Hon Tony Newton, MP
Lord President of the Council
Privy Council Office
Whitehall
London SW1

For these various reasons, I fear that this Bill would be better included among those for introduction in the Autumn. By that time, we shall be much better placed to introduce a comprehensive package on all the issues.

I am also worried that it has been proposed to include in the Bill provisions to implement the Second Banking Directive. Our understanding is that it is unlikely that the necessary provisions can be completed by the Treasury in time for introduction before the summer recess. I did not raise my doubts at the full Cabinet because that was not the right place for a discussion of this detail. However, I do have some concern over the extent to which the addition of the Banking provisions would widen the scope of the Bill. This could well delay the progress of the legislation. It is also doubtful whether some of the banking provisions could be regarded as appropriate to a Bill about the criminal law. My understanding is that the Treasury have hitherto planned to take these provisions forward by means of a short, free-standing Bill. If, as I believe, it is vital that Royal Assent should be achieved by the end of the year in order to implement the Second Banking Directive, a separate Bill seems much the better course.

I am copying this letter to the Prime Minister, the Chancellor of the Exchequer, the Foreign Secretary, the President of the Board of Trade, the First Parliamentary Counsel and to Sir Robin Butler.

A handwritten signature in dark ink, consisting of a large, stylized 'J' followed by a smaller, less distinct mark.

fraud etc

Cons with WMT

don't want 2 bills : talk officials

? only cope with reduced bill

short, copeable, essentials only

~~req~~ fd. look through corres

no lms Tel

mta officials beg. wk.

Fraud → L Comm.

4T. →

G. S. ish

E. Caldwell.

LA Land Sec.

THINGS TO DO

MAIN GOAL(S) ✓ Euro Info Sys. Hedgipass → DOE
chk

PRIORITY

COMPLETED CARRY FORWARD

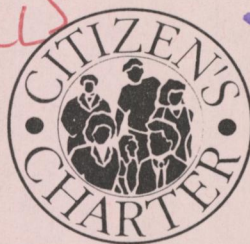
- 1 ☒ EDH Ac System Cyber Sites will reappear ☐ ☐
- 2 ☒ LA Land Search TS. ☐
- 3 ☒ Scot Ten Charter R.R. ☐ ☐
- 4 ☒ eth. An Bdg Tech chk ☐ ☐
- 5 ☒ Corfor ORDNS ☒ ☐
- 6 ☒ Ass a Police Officer ☐ stym. ☐
- 7 ☒ Crim Proc (scot) ☒ ☐
- 8 ☒ Partnership : Offenders in Comm. ☒ ☐
- 9 ☒ Land Reg in Eng + Wales. ☐ stym. ☐
- 10 ☒ Transport Bill Rd. ☒ ☐
- 11 ☒ Law of Property ☐ if next ☐
- 12 ☐ Terrorist Exp of Con Ind. ☒ NLO ☐
- 13 ☒ AF + E (LC, HO....) ☐ ☐
- 14 ☐ NAD. ☐ ☐
- 15 ☐ WW Brief on Alcohol Divs LP Health (Health first) ☐

3 Alc
2 Drugs

HANDOUT BILLS

San ring rd. tan
w/ chit me.

Rec Maint +
enf.





HOME SECRETARY CABINET OFFICE RECEIVED 05 MAY 1992	
COPIES TO	<i>M Russell</i> <i>Mr Bailey</i>

QUEEN ANNE'S GATE LONDON SW1H 9AT

5 May 1992

*D. Tony.*

I am grateful that the Fraud (Jurisdiction), Drug Trafficking, Money Laundering etc Bill has been included in the list of Bills to be included in the 1992/93 legislative programme.

I know that this Bill is being considered for early introduction. I am afraid, however, that I do not see any realistic prospect of the Bill being introduced before the summer recess.

A major difficulty is that the money laundering provisions are the subject of a consultation exercise being undertaken by the Treasury. My understanding is that this exercise will not be completed before the latter half of July and that the prospects for a speedier resolution are poor. In any case, some time will then be necessary to evaluate the views of the banking community. It would be controversial to introduce legislation on the sensitive issue of money laundering before that consultation has been completed.

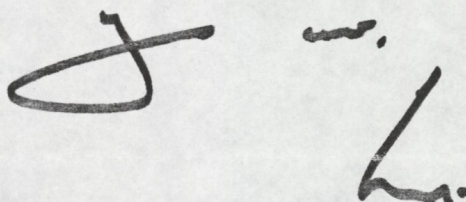
Apart from money laundering, I am conscious that our proposals on drug trafficking and fraud represent substantial changes to existing legislation. Legislation on confiscating drug trafficking proceeds, in particular, is a complex area of law and it is important that we get the procedures right this time around. I anticipate that when the drafting of the Bill gets underway our policy will need to be further developed on a number of issues in close consultation with other interested departments. Moreover, on fraud, whilst most of the legal changes are clear, at least one of the central questions relating to the determination of jurisdiction by our courts remains to be resolved. This is a particularly difficult drafting exercise and before final decisions are taken will also require further consultation with other departments and, on a limited basis, with the practitioners.

The Rt Hon Tony Newton, MP
Lord President of the Council
Privy Council Office
Whitehall
London SW1

For these various reasons, I fear that this Bill would be better included among those for introduction in the Autumn. By that time, we shall be much better placed to introduce a comprehensive package on all the issues.

I am also worried that it has been proposed to include in the Bill provisions to implement the Second Banking Directive. Our understanding is that it is unlikely that the necessary provisions can be completed by the Treasury in time for introduction before the summer recess. I did not raise my doubts at the full Cabinet because that was not the right place for a discussion of this detail. However, I do have some concern over the extent to which the addition of the Banking provisions would widen the scope of the Bill. This could well delay the progress of the legislation. It is also doubtful whether some of the banking provisions could be regarded as appropriate to a Bill about the criminal law. My understanding is that the Treasury have hitherto planned to take these provisions forward by means of a short, free-standing Bill. If, as I believe, it is vital that Royal Assent should be achieved by the end of the year in order to implement the Second Banking Directive, a separate Bill seems much the better course.

I am copying this letter to the Prime Minister, the Chancellor of the Exchequer, the Foreign Secretary, the President of the Board of Trade, the First Parliamentary Counsel and to Sir Robin Butler.

A handwritten signature in dark ink, consisting of a large, stylized 'J' followed by a smaller, less distinct mark.

CONFIDENTIAL

LORD PRESIDENT
OF THE COUNCIL
RECEIVED

03 MAR 1992

ACTION
FORCOPIES
TO

M. Turner
M. Bailey

Treasury Chambers, Parliament Street, SW1P 3AG

Rt Hon John MacGregor MP
Lord President of the Council
Cabinet Office
70 Whitehall
London

CABINET OFFICE	
Of	...443...
7 MAR 1992	
FILING INSTRUCTIONS	
FILE No.	...
2 March 1992	

CC Mr Paul

ref

1L

Dear John,

X ref.

LEGISLATIVE PROGRAMME: BANKING (INFORMATION AND INVESTIGATIONS)
BILL AND IMPLEMENTATION OF THE SECOND BANKING COORDINATION
DIRECTIVE

You asked me for a note on the progress in other member states in implementing the Second Banking Coordination Directive as background to decisions on the timing of Banking (Information and Investigations) Bill. I think it might be helpful first if I explained what this Directive is about, where we have got to in implementing it in the UK and where the Banking (Information and Investigations) Bill fits in to the picture. I think we may be facing a major problem on the implementation of this Directive of which I was not aware when we discussed the matter in FLG and it bears on the timing of the Bill.

Background

The Directive introduces the so called "single European passport" for banking: from 1 January 1993 a bank authorised in one member state will be entitled to set up branches and conduct a wide range of activities including investment and securities business as well as deposit taking, in any other member state without further authorisation by the host country. The host countries' banking authorities will have only limited residual and emergency powers over branches of banks from another member state operating in their territory, and instead, the so called "home country" supervisors must be given powers to require information from, conduct investigations into, and take action against branches of the banks it has authorised in each member state in which those branches operate.

It will be evident from that description that there can be no question of our failing to implement the Directive on time. If we do not have the necessary legislation in place, there will be banks operating in the UK on 1 January 1993 with no effective

CONFIDENTIAL

supervisor: any attempt by the Bank of England to exercise its Banking Act powers over the branch of an EC bank will be open to ready challenge in the European Court, and its home supervisor will have no powers under UK law to act in the Bank of England's place. When one recalls that BCCI operated in the UK through branches of a Luxembourg bank, the dangers to UK depositors will be obvious.

The Banking (Information and Investigation) Bill is a very small element in the package of legislation required to implement this important Directive. The bulk of the legislation will be affirmative orders under the European Communities Act. These will be long and complex orders, amending the Banking Act, Financial Services Act and the Consumer Credit Act. (Orders are also needed to amend the Building Societies Act, but these are only to enable building societies to use the outward passport into Europe, not to provide the inward passport. They will be made by the Building Societies Commission mainly using their powers under the Building Societies Act).

The Banking (Information and Investigation) Bill is only required to ensure that the penalties for offences under the amended legislation (eg, for failing to supply information to the supervisors or obstructing investigations) are adequate and the same as those for existing, equivalent offences under the Banking Act. The penalties in the Banking Act for such offences exceed those that can be created under the European Communities Act. The Bill has been drafted to provide enhanced enabling powers so that the full penalties required can be imposed by the main Orders and I think the Orders will need to be available in draft, to put in the House Library, so that Members can understand the context of the Bill.

Timetable problems on the Secondary legislation

The timetable for preparing the Orders is, however, at the moment in disarray. Following normal procedures for secondary legislation under the Communities Act, the Orders were being drafted by departmental lawyers in the Treasury and DTI, in consultation with the SIB and the Bank and it was planned to issue them for consultation during March. Allowing for a two month consultation period, this would have enabled the orders to be made comfortably before the summer recess, and well in advance of the implementation date. Parliamentary Counsel saw sections of the draft Orders last May, together with a full copy of the Directive when the Banking (Information and Investigations) Bill was drafted. Nevertheless, I understand that Counsel has just decided to take over the drafting of the Orders and has substantially rewritten them. The upshot is that much of the work done with the Bank and the SIB and the British Bankers' Association over the past months is now abortive and the planned timetable for the legislation has been severely disrupted.

It has not been possible to settle a revised timetable yet with Parliament Counsel, but it will not be possible to make these Orders before the summer recess, unless they can be got ready to issue for consultation by Easter and we curtail the planned consultation period. That is very tight because the Bank and the

CONFIDENTIAL

SIB will need to be consulted again in detail on the new drafts before they can be issued. The alternative is, however, very uncomfortable. It would mean laying the Orders after Parliament returns after the summer recess, presumably in mid-October, and debating them in November, little more than a month before they are due to take effect. In the wake of BCCI and the Bingham Inquiry, (which is due to report to the Chancellor in the early summer) they are bound to attract considerable Parliamentary interest. It may well require some skill on the part of the business managers to get them through the House of Lords, in particular, on such a tight timetable, and we will be clearly be open to criticism for pushing through such major legislative changes in such a way for implementation within a few weeks. For that reason we clearly need to aim to lay the Orders in time for them to complete their Commons stages at least by the summer recess.

The timing of the Bill

The timing of the Banking (Information and Investigations) Bill is clearly affected by this, but is perhaps the least of our problems. I am not at present clear when we will have complete drafts of the Orders, and it certainly looks unlikely that they would be available immediately after an early election to place in the House Library to help explain the purpose of the Bill. Without that, the Bill will be a good deal harder to handle.

The Bill could instead, be redrafted to follow the Orders - that is, the Orders would create the maximum penalty possible under the European Communities Act and the Bill would then increase those to the required level. If the Orders are not made until November, we would almost certainly have a period where there are inadequate penalties in place and we would be open to some criticism. But I think that is not an overriding consideration, so long as the Bill has been introduced by 1 January, so our intentions are clear. In the circumstances, this may well be the most sensible way to deal with the matter.

Finally, on the original question which FLG asked, we have comparatively little detailed knowledge on how far other member states have got with implementing this Directive; nor do the Commission, who UKREP have consulted, know the full picture. We know that Denmark has the relevant legislation fully in place waiting for the 1 January deadline. We also understand that Italy, which has hitherto had the worst record in the Community for implementing Directives, has also got its primary legislation in place, though there may be additional secondary legislation required which we do not know about. Belgium, Netherlands and France have told the Commission they have "partially implemented" the Directive, though we are not certain precisely what that means; and Greece and Luxembourg have shown drafts of the necessary legislation to the Commission. All member states will, however, have to have the necessary legislation in place in time - the consequences of failing to do so are so clearly unacceptable.

Conclusion

So far as our own timetable is concerned, we will have to press on as fast as we can and hope that we can get the draft Orders ready

CONFIDENTIAL

for consultation by Easter. But I thought you ought to be aware of this potentially awkward problem and the difficulties it may cause for the business managers in the autumn if that proves impossible. Clearly anything Parliamentary Counsel can do to expedite matters will help.

I am copying this to members of FLG, to the Secretary of State for Trade and Industry, the Chancellor, the Economic Secretary and First Parliamentary Counsel.

*Yours
Gillian*

GILLIAN SHEPHARD

CONFIDENTIAL

CONFIDENTIAL