



HM TREASURY

Draft terrorist asset-freezing bill:

summary of responses



Draft terrorist asset-freezing bill: summary of responses

Presented to Parliament by
by Command of Her Majesty

July 2010

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Summary

1.1 Following a Supreme Court ruling and the passage of temporary asset freezing legislation in February 2010, the previous Government launched a public consultation exercise on draft terrorist asset freezing legislation. The consultation opened on 18 March and closed on 18 June 2010. The consultation asked for views on three questions:

- Does the draft Bill set out the most effective way of meeting our United Nations obligations and protecting national security whilst also ensuring sufficient safeguards in respect of human rights?
- Do you have any views on the current operation of the UK's asset freezing regime?
- Does the Regulatory Impact Assessment accurately reflect the costs and benefits of the regime? Is there more that can be done to reduce the costs for the financial sector and others in implementing the regime whilst maintaining its effectiveness?

1.2 Sixteen responses to the consultation were received from a range of organisations including law firms, financial institutions, not for profit organisations and academics.

1.3 This document summarises the responses to the consultation received by HM Treasury, outlines the Government's response and sets out the next steps that the Government intends to take.

1.4 In summary, most of the respondents recognised the need for the UK to operate an asset freezing regime to meet UN obligations to prevent and disrupt the financing of terrorism. However, most respondents also felt that the draft legislation proposed by the previous Government did not sufficiently safeguard civil liberties. Proposals made for strengthening civil liberties safeguards included:

- raising the legal test for imposing an asset freeze from requiring a reasonable suspicion of terrorist activity to a higher standard;
- that there should be a right of appeal of asset freezing decisions (as opposed to judicial review), which fully reviews the evidence on which a decision is based;
- that the legislation should require consideration of prosecution to be given prior to the freeze being implemented or that there should be a specific link to terrorist financing;
- that the publication of the identity of those subject to the measures should be tailored to the specific circumstances of the individual concerned;
- requiring a judicial role in the designation process by giving permission for an asset freeze to be imposed and/or conducting a mandatory review of each designation decision, as with control orders);
- that designations should be subject to more regular review or that asset freezes should apply only for a limited time; and
- building in a specific right for designated persons to make representations and for HM Treasury to take those representations into account.

1.5 The Government is committed to putting the UK's terrorist asset freezing regime on a secure legislative footing and is introducing primary legislation, the Terrorist Asset-Freezing etc. Bill in order to achieve this. The legislation incorporates the safeguards that exist in the current regime and adds some further safeguards: the requirement for an annual independent review of the operation of the asset freezing regime; formalising the requirement for HM Treasury to report quarterly to Parliament on the operation of the regime; and clarification that payments of state benefits to the spouses or partners of designated persons are not caught by the asset freezing regime.

1.6 The Government is committed to striking the appropriate balance between protecting national security and protecting civil liberties across all counter-terrorism legislation. The Government believes that the legislation it is proposing on terrorist asset freezing strikes a reasonable balance in this regard.

1.7 However, the Government will consider further whether there is a strong case for strengthening the civil liberties safeguards in the asset freezing regime along the lines proposed by respondents to the consultation in light of the conclusion of the wider review of counter-terrorism legislation. This review does not include asset freezing but will consider issues such as whether reasonable suspicion is the appropriate threshold for action and the judicial review test in the context of control orders. The Government will consider in particular whether there is a strong case for:

- raising the legal threshold for freezing a person's assets; and/or
- further strengthening the role of the Courts in either approving or reviewing asset freezes.

1.8 Following the review, the Government will examine in particular:

- the operation of existing safeguards and whether they are sufficiently effective in addressing civil liberties concerns;
- the impact of further safeguards on the operation of the asset freezing regime in meeting the UK's national security needs and in disrupting global terrorist finance;
- the consistency between asset freezing and other counter-terrorism tools; and
- the approach taken by other countries and international best practice in meeting UN asset freezing obligations.

1.9 The Government intends to consider these issues alongside the wider review of counter-terrorism legislation that it is undertaking, which is due to conclude in Autumn 2010. If the conclusions of the review support the case for making further changes to strengthen civil liberties safeguards in the asset freezing regime, then relevant amendments will be brought forward.

2

Current operation of the UK's asset freezing regime

2.1 The UK's asset freezing regime is designed to balance national security needs and the need to meet the UK's international obligations to prevent and disrupt the financing of terrorism and with protecting civil liberties. Respondents to the consultation were supportive of these broad objectives, but a number of respondents queried whether specific aspects of the current regime achieved this balance in practice. These respondents focused on three aspects of the regime: its impact on human rights, its impact on the financial sector and the operation of the licensing system.

Impact on human rights

Consultation responses

2.2 Some respondents questioned the proportionality of the current asset freezing regime, in particular the extent to which it impacts on the human rights of a designated person and third parties, such as family and associates. One respondent suggested that each asset freezing decision and each licence should be subject to broader human rights analysis of the human rights impact.

The Government's response

2.3 The Government accepts that asset freezes do impact on human rights, including the right to property and the right to respect for home, private and family life. When implementing asset freezes, every effort is made to ensure that any infringement of the human rights of designated persons or third parties is proportionate and limited to what is strictly necessary. Human rights concerns and the requirement for proportionality are part of the consideration process for every designation and licensing decision.

Impact on the financial sector

Consultation responses

2.4 A number of respondents raised concerns about the impact of asset freezing on the financial sector. Specific points focused on:

- whether there was sufficient guidance to enable effective implementation of the regime, particularly for small firms and those outside the financial sector;
- the difficulties banks face in implementing confidential designations;
- whether relevant HM Treasury officials would benefit from greater knowledge of banking procedures to improve engagement with the sector; and
- delays in responding to reports or requests, such as requests for licences, preventing businesses from operating efficiently and effectively.

The Government's response

2.5 The financial sector is a key partner in effectively implementing the asset freezing regime. The Government is therefore mindful of the potential compliance costs of sanctions legislation and works proactively with the sector to minimise this.

2.6 The systems and controls required by the financial sector to comply with the existing terrorist asset freezing regime are also required for other reasons, such as tackling financial crime and money laundering, or implementing country-based financial sanctions and financial restrictions under the Counter-Terrorism Act 2008. Nevertheless, the Government recognises that the asset freezing regime does impose a compliance cost and is committed to working with the financial sector to avoid unnecessary or disproportionate costs.

2.7 Consequently, the legislation the Government is bringing forward will reflect the views of a number of financial institutions that checking whether they have had business dealings with designated persons in the five years previous to the date of a designation places an unreasonable burden on industry. This requirement will now be removed.

2.8 With respect to guidance, the Government already works closely with a number of trade and supervisory bodies and attends outreach events to promote understanding of the asset freezing regime. The Government will seek to extend its outreach further. Guidance on financial sanctions can already be found on HM Treasury's website, in Joint Money Laundering Steering Group guidance and similar industry guidance, and in Financial Services Authority publications. HM Treasury will continue to work with its partners to ensure that appropriate guidance and information is available in relation to all of the financial sanctions regimes.

2.9 In answer to the points raised concerning compliance with confidential designations, the Government recognises that this may not be straightforward for banks, including those that operate global compliance systems. However, the relevant statement of confidentiality that accompanies notices of confidential designations states that details of confidential designations should only be communicated to persons within the bank who need to know its contents in order to give effect to the requirements under the legislation. This does not prohibit banks from sharing information with staff where appropriate, in accordance with the Data Protection Act 1998, to give effect to the asset freezing measures.

2.10 HM Treasury will continue to engage with the financial sector and other parties to deepen its expertise on asset freezing implementation issues and to ensure that all enquiries are dealt with as promptly and effectively as possible.

Licensing

Consultation responses

2.11 A number of respondents expressed concerns about the operation of the licensing regime. Some respondents were concerned with the policy of requiring that state benefit payments to spouses or partners of designated persons are made under the authority of a licence with monthly reporting required on how these benefits are spent. One respondent also suggested that the position should be formally changed in light of the recent judgment of the Court of Justice of the European Union (CJEU) on this issue.

2.12 One respondent raised a number of specific concerns with the operation of the licensing regime. These were that:

- the measures not only freeze all the current assets of a designated individual but also their future assets and income since persons cannot receive any funds without permission from HM Treasury;

- individuals cannot access cash or only very small amounts authorised by a licence (generally below £10); and that
- HM Treasury monitors receipts provided by the designated person and his family to check that all funds are accounted for.

2.13 Some respondents from the financial sector also raised concerns about the clarity of obligations in licences issued by HM Treasury. These respondents suggested that the process could be improved further by HM Treasury working with the financial sector to ensure licences are effective.

The Government's response

2.14 By allowing for exemptions to be made to asset freezes, the licensing regime plays a key role in ensuring that the impact of an asset freeze on a designated person, their family and other third parties is mitigated. The Government aims to meet all licence requests where doing so would not create a terrorist financing risk. For example, the Government allows designated persons to receive their full entitlement to state benefits.

2.15 To guard against terrorist finance risks, it can be necessary to include certain conditions, such as a requirement that a particular transaction takes place electronically, or that reporting is provided as evidence of how licensed funds have been used.

2.16 The Government has no policy of restricting designated individuals to a particular amount of cash across the board; each case is assessed individually according to the terrorist finance risks, and the Government's intention is to impose only those controls that are necessary to protect against this risk. The Government keeps all licence conditions under review, and a designated person may request a review of any aspect of their licence conditions at any time. The Government will consider any representations made, bearing in mind the terrorist finance risks involved in individual cases and the effect these conditions have on the individual's rights.

2.17 The Government will clarify in the legislation it brings forward that benefit payments to the spouses or partners of designated persons are not caught by the asset freezing regime to reflect the ruling made by the CJEU (see Chapter 3 for further detail). This change will be implemented in all current cases. Controls will remain on any state benefits being paid directly to a designated person.

2.18 The Government also recognises the importance of ensuring that licences are clearly understood by all affected parties, including the financial sector. HM Treasury has a regular dialogue on these issues both with representative bodies and with individual banks. As a result of this dialogue, certain changes have been made to the licensing process, including improved clarity in licences and the provision of accompanying guidance letters to parties affected by a licence. Through the continuation of dialogue, the Government will consider further improvements that can be made to the operation of the licensing regime.

3

Balancing safeguards and national security in the legislation

3.1 This chapter deals with the first question asked in the public consultation: “Does the draft Bill set out the most effective way of meeting our UN obligations and protecting national security whilst also ensuring sufficient safeguards in respect of human rights?”

3.2 Twelve respondents commented on this question. Of these, two put forward the view that the draft legislation proposed by the previous Government was the most effective way of meeting UN obligations, protecting national security and safeguarding civil liberties.

3.3 However, the majority of respondents took the view that the draft legislation proposed by the previous Government did not go far enough in safeguarding civil liberties. The points raised by respondents in this regard and the Government’s responses are outlined below.

The legal test for designation

Consultation responses

3.4 The previous Government’s draft legislation proposed that a person can be made subject to an asset freeze (i.e. designated) if HM Treasury has reasonable grounds to suspect that the person is or has been involved in terrorist activity and that a freeze is necessary for public protection. A number of respondents argued that reasonable suspicion was too low a threshold for an asset freeze to be imposed, that it goes beyond the requirements of United Nations Security Council Resolution 1373 (2001) and is contrary to the judgment of the Supreme Court.

3.5 A small number of respondents commented that the power to freeze the assets of those who are or *have been* involved in terrorist activity means that asset freezing can be applied to a wider category of persons than was the case under the Terrorism Orders.

3.6 One respondent proposed that, as with control orders, consideration should be given to prosecution prior to designation. Another suggested that there should be a legislative connection between designating individuals and terrorist financing.

The Government’s response

3.7 The Government believes that, to be consistent with UNSCR 1373 (2001) and to meet the UK’s national security needs, the asset freezing regime should be preventative in nature. This means that the regime should not only allow assets to be frozen when someone has already been convicted of a terrorist offence, but it should allow preventative action to be taken to disrupt terrorist activity. Taking a preventative approach is consistent with standards set out by the international Financial Action Task Force (FATF) and with the approach taken by many other countries. The Government believes that the ability to act on reasonable suspicion is an appropriate standard, consistent with the preventative nature of the measures.

3.8 For this reason, the legislation the Government is introducing will retain the power to freeze assets on a preventative basis, on a reasonable suspicion of involvement in terrorist activity. The Government considers that reasonable suspicion, rather than a higher threshold such as reasonable belief, is the appropriate threshold because it permits action where there is a threat

to national security but the information available could not support a higher threshold than reasonable suspicion.

3.9 However, legitimate questions have been raised about the appropriate legal threshold for asset freezing. Therefore, as set out in Chapter 1, the Government will consider further whether there is a strong case for raising the legal threshold for freezing assets in a way that would still be consistent with meeting UN obligations and with meeting the UK's national security needs.

3.10 Whilst in many cases, asset freezing does proceed in tandem with prosecutions for terrorist offences, the Government does not believe that asset freezing should be limited only to cases where prosecutions have been brought. This would not be consistent with a preventative approach as outlined above.

3.11 The Government does not believe that asset freezing should be limited only to those who are or have been involved in financing terrorism. UNSCR 1373 (2001) is clear that states should freeze the assets of persons "who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; ... entities owned or controlled directly or indirectly by such persons; and ... persons and entities acting on behalf of, or at the direction of, such persons and entities."

3.12 The Government believes that the legal test of whether a person is *or has been* involved in terrorist activity is an appropriate way of giving effect to the requirement in UNSCR 1373 (2001) outlined above. The inclusion of past activity is not intended to broaden the scope of the existing legal test, but rather to make clear the current practice, which is that the judgment of whether someone is a person who commits, attempts to commit, participates in or facilitates terrorist acts does not depend exclusively on current terrorist activity. Relevant and recent past terrorist activity can also be taken into account in making this judgment. The test is also subject to the safeguard that even if HM Treasury consider there to be reasonable grounds for suspecting a person is or has been involved in terrorist activity, that person's assets can only be frozen where HM Treasury consider it is necessary for public protection.

Closed source material and special advocates

Consultation responses

3.13 The consultation document referred to provision for the use of special advocates to act in the interests of designated persons in asset freezing cases where intelligence information has been used. A number of respondents criticised the special advocate procedure and the use of closed source material. There were also specific concerns that the evidence against a designated person should be made available to them, so they can properly challenge their designation. One respondent commented that the difficulties in using closed source material would be resolved if intercept material was used in open court as it is in other countries.

The Government's response

3.14 As noted in paragraph 4.32 of the public consultation,¹ HM Treasury's practice is to send a letter to those subject to the asset freeze upon designation setting out the reasons for the designation as fully as possible without risking national security or undermining future criminal proceedings.

¹ See paragraph 4.32 of *Public consultation: draft terrorist asset-freezing bill*, HM Treasury, March 2010

3.15 The urgent review of counter-terrorism legislation being undertaken by the Home Office will include consideration of the control order system. This will include consideration of concerns about the operation of the special advocate system which is used in control orders. The Government will consider any impact the outcome of the review has on the asset freezing regime.

3.16 The use of intercept material in court is outside the scope of this consultation. However, as set out in the Coalition Agreement, the Government is committed to seeking to find a practical way to allow the use of intercept evidence in court.²

Review, appeal and court involvement

Consultation responses

3.17 A Treasury Minister currently makes the decision as to whether the legal test for designation is met. This decision is made on the basis of open and/or closed source information provided by law enforcement and security agencies. One respondent argued that this responsibility should be moved from the executive to the judiciary.

3.18 Another respondent suggested there should be a specific right to make representations once notified about designation, and a specific duty on HM Treasury to take those representations into account.

3.19 A small number of respondents suggested that the judicial challenge should be strengthened by replacing the existing review procedures with a full right of appeal, in which the court would substitute its own decision for that of the decision-maker.

3.20 One respondent suggested that the legislation should have an appeal provision, separate to the right to challenge decisions of HM Treasury on judicial review principles in clause 22(2), for persons wishing to challenge licensing decisions.

The Government's response

3.21 The Government is not proposing to change the role of the Courts in asset freezing. The current regime provides for all asset freezing decisions to be challenged in the Courts under a judicial review procedure and this provides a meaningful safeguard. The Government seeks to accommodate all licence requests provided that appropriate conditions can be put in place to minimise any risk of divergence of funds for terrorist financing. As a result, there are few appeals against licence terms.

3.22 However, the Government recognises that legitimate questions around the role of the Courts in asset freezing have been raised. Therefore, as set out in Chapter 1, HM Treasury will examine these issues further in the context of the wider Home Office review of counter-terrorism legislation that is taking place.

3.23 Under the existing legislation, asset freezes expire after 12 months unless the freeze is reviewed and renewed. Given that asset freezes interfere with human rights, HM Treasury is under a duty to keep under review the necessity and proportionality of any asset freeze. This includes an obligation to consider any representations made in respect of Treasury asset freezing decisions. HM Treasury proactively reviews cases when there is a significant change in a designated person's circumstances, and HM Treasury seeks and considers representations from the designated person when reviewing their case. A designated person can make representations at any time, and HM Treasury will consider these.³

² See page 24 of *The Coalition: Our Programme for Government*, HM Government, May 2010

³ See paragraph 4.36 of *Public consultation: draft terrorist asset-freezing bill*, HM Treasury, March 2010

3.24 The Government notes the concerns expressed that licensing decisions should be proportionate, and that there must be sufficient avenues for a designated person, or other party, to seek to challenge a decision to refuse a licence, or the conditions included in any licence.

Duration of designations

Consultation responses

3.25 Several respondents questioned the duration of the designation. Specific issues were whether designations should be subject to more regular review or whether an asset freeze should apply only for a limited time. One respondent suggested this should be a maximum of two years, before forfeiture proceedings are brought. Other respondents suggested the asset freeze could extend beyond a certain period in some cases, but only when a higher standard of proof than reasonable suspicion is applied.

The Government's response

3.26 The Government recognises that some asset freezes can be in place for a number of years. However, asset freezes will only be maintained for as long as both elements of the legal test for designation continue to be met. As mentioned above, a designation expires after one year unless it is renewed after a careful examination of whether it is still necessary for the freeze to be imposed. In addition there are reviews whenever there is a significant change in the designated person's circumstances that may have a bearing on whether the legal test for designation continues to be met. A designated person can make representations and request a review at any time. In practice, this means HM Treasury often reviews UK residents' cases before 12 months have passed.

3.27 The Government does not believe that setting an arbitrary maximum duration for an asset freeze would be consistent with meeting UN obligations or with meeting UK national security needs or is necessary on the grounds of fairness or proportionality.

3.28 Separate powers exist under the Terrorism Act 2000 and the Proceeds of Crime Act 2002 in relation to forfeiture. HM Treasury does not believe that it is appropriate to include further forfeiture powers in asset freezing legislation.

Impact on third parties

Consultation responses

3.29 Many respondents were concerned about the impact asset freezes can have on third parties, particularly friends and associates of designated persons. Respondents from the financial sector stated that the prohibitions relating to making funds or economic resources available indirectly to or for the benefit of a designated person are insufficiently explained and are unclear. As a result, some respondents claim that these provisions could have the effect of extending the asset freeze to third parties, such as spouses, who are not themselves designated.

The Government's response

3.30 The Government recognises the importance of ensuring as far as possible that the asset freezing regime does not impact unnecessarily and disproportionately on third parties, such as family members. In order to address this, the Government will clarify in the legislation that payments of state benefits to the spouses or partners of designated persons are not caught by the asset freezing regime. This sets out in legislation the ruling of the Court of Justice of the European Union a relevant EC Regulation on the scope of a prohibition on making funds available for the benefit of a designated person. The legislation will also ensure that prohibitions

on the making of funds or economic resources available indirectly to or for the benefit of a designated person are sufficiently clear and targeted.

3.31 The Government will continue to use the licensing regime to ensure that the asset freezing regime does not impact disproportionately on third parties.

Independent review of the operation of the legislation

Consultation responses

3.32 One respondent recommended a mandatory review by an independent body of the impact the asset freeze has on the designated person's family, and that the legislation should be amended depending on the outcome of the review. Another respondent asked that the independent review of the operation of the regime is made public.

The Government's response

3.33 The Government recognises the need for ensuring proper accountability and transparency and welcomes the views expressed on the remit of the proposed independent review. The independent reviewer will be free to examine any aspect of the regime including the safeguards in place in respect of human rights and the impact of asset freezes on designated persons and their families. The review will be available to the public (with any information sensitive to national security redacted if necessary) and the legislation requires HM Treasury to lay the report before Parliament.

3.34 In addition, the Government will continue to present quarterly reports to Parliament, as the legislation will now require, and will consider these issues further ahead of appointing any independent reviewer(s). HM Treasury will consider the independent reviewer's conclusions and recommendations very carefully and will publish its response.

Other fairness and proportionality issues

Consultation responses

3.35 A number of other issues were raised on the fairness and proportionality of the regime.

3.36 Some respondents questioned why the draft legislation used wording that was also in an Order quashed by the Supreme Court.

3.37 One respondent was concerned that clauses 16 to 18 of the draft legislation (powers to request information, production of documents and failure to comply with request for information) collectively represent a threat to the privilege against self-incrimination.

3.38 Some respondents considered that the legislation was incompatible with the European Convention of Human Rights (ECHR).

The Government's response

3.39 The Supreme Court quashed the Terrorism (United Nations Measures) Order 2006 (the "2006 Order") because it went beyond the scope of the power in Section 1 of the United Nations Act 1946 to make Orders, under which the 2006 Order was made. The 2009 Order was vulnerable to being quashed on the same basis. Whilst some of the Supreme Court justices were critical of the impact asset freezing had on the designated person and third parties, the 2006 Order was not quashed on human rights grounds. Furthermore, the comments made by the Supreme Court justices were made in relation to the operation of the 2006 Order, not the 2009 Order which included a number of provisions to make the impact of the regime more proportional, as set out in the consultation document.

3.40 The provisions in the draft legislation are not intended to and do not override or limit the common law privilege against self-incrimination.

3.41 The Government is satisfied that the legislation it is introducing is compatible with the ECHR and this is set out in the relevant section of the Explanatory Notes that will be published alongside the legislation.

4

Regulatory Impact Assessment

4.1 A small number of respondents, representing the financial sector, commented on the Regulatory Impact Assessment (RIA).

Costs and benefits

Consultation responses

4.2 About a third of respondents thought the RIA reflected accurately the costs and benefits of the regime to the financial sector. The other respondents who commented disagreed. The majority thought the RIA did not have enough information to be able to comment on and did not reflect accurately costs to the financial sector. All respondents felt more could be done to relay the successes of the regime. One respondent thought that information on the costs and benefits of the regime should be reflected in the quarterly report.

The Government's response

4.3 The Government acknowledges these points and has amended the RIA to provide more detail on the costs and benefits where possible. It is the Government's view that it is not possible to quantify many of the benefits of terrorist asset freezing, for example reducing the risk of a terrorist attack threatening the UK's national interest. HM Treasury will continue to work with the financial sector to explore ways in which information on the successes and benefits of asset freezing can be better shared.

4.4 The Government does not believe that the Quarterly Report to Parliament is the appropriate vehicle for reporting on the costs and benefits of the asset freezing regime, as these are not factors that tend to change on a quarterly basis. However, this is something that may be brought out more in the annual independent report on the operation of the asset freezing regime that the legislation will require to be carried out.

Cost efficiencies

Consultation responses

4.5 The consultation document also asked for views on whether more could be done to reduce the costs for the financial sector and others in implementing the regime whilst maintaining its effectiveness. A small number of respondents commented on the need for better identifying information on the targets of asset freezing measures to reduce the time and cost incurred in resolving possible matches.

The Government's response

4.6 The Government recognises that effective implementation requires good quality identifying information. HM Treasury believes that the identifying information provided for domestic terrorist asset freezes is of a high standard and it continues to work with the Foreign and Commonwealth Office and with international partners to ensure that identifying information for international designations is also of a sufficient standard.

5

Additional issues

5.1 Responses to the consultation also highlighted several other issues that did not fall within the immediate scope of the questions asked. However, many of these points were relevant and are addressed below.

Consolidation of counter-terrorism legislation

Consultation responses

5.2 Several respondents questioned why the Government was introducing another Act, when there are already several pieces of counter-terrorism legislation in place. Only one respondent thought specific asset freezing legislation was unnecessary. The majority of respondents thought there should instead be a review of all counter-terrorism legislation to rationalise existing powers. Specifically, it was asked why the Al-Qaida and Taliban asset freezing regime under United Nations Security Council Resolution 1267 (1999) is not included in this legislation.

The Government's response

5.3 In view of the temporary nature of existing terrorist asset freezing legislation, the Government believes that new terrorist asset freezing legislation is needed. The legislation is not creating new powers, but rather putting existing powers on a more secure and durable footing.

5.4 The Government has examined whether other existing counter-terrorism powers could be used to meet UN terrorist asset freezing obligations and has concluded that they cannot. However, the Government is not proposing to include the UNSCR 1267 (1999) Al-Qaida and Taliban asset freezing regime in the legislation it is bringing forward at this stage, as this regime is currently implemented across the European Union through an EU Regulation that is directly applicable in the UK and other Member States.

Clarification and definitions

Consultation responses

5.5 Many of the respondents asked for clarification of certain terms used in the legislation or requested definitions of specific words. In addition, there were a small number of requests to amend the wording of the legislation, usually to provide clarity of the scope and meaning.

5.6 A key issue for respondents was that some of the terms used in the prohibitions are considered unclear and consequently difficult to implement. Specifically, a number of respondents identified 'significant financial benefit'.

5.7 Some respondents also expressed concern that the terms 'basic expense' and 'economic resource' were also problematic.

5.8 The previous Government's draft Bill included a provision to enable financial sector institutions to credit payments to a frozen account, with a requirement to report the transaction to HM Treasury 'without delay'. It was suggested that 'without delay' be amended to 'as soon as practicable'.

5.9 A small number of respondents felt it would be useful if HM Treasury could define what is meant by a 'reasonable' period of time in which an individual must produce documents.

5.10 One respondent queried how data protection constraints will affect the information gathering and disclosure provisions in the Bill.

The Government's response

5.11 The Government notes concerns expressed by some respondents that the term 'significant financial benefit' is not sufficiently clear. The Government believes that it is fairer and more proportionate to limit the prohibition so that it only applies to payments that confer a significant financial benefit, rather than any financial benefit, on the designated person. However, it will look to provide greater clarity to third parties about circumstances in which a significant financial benefit is likely to be conferred.

5.12 The legislation the Government is bringing forward reflects changes made in the 2009 Order to the treatment of 'economic resources' so that the offence of making economic resources available to a designated person is only committed where the person giving the economic resource knows or has reason to suspect that the designated person would be likely to exchange the economic resource, or use it in exchange, for funds, goods or services.

5.13 With regard to 'basic expense', although the UN for procedural reasons distinguishes between 'basic' and 'extraordinary' expenses in the UNSCR 1267 (1999) Al-Qaida and Taliban regime, the Government does not apply this distinction in cases under the Terrorism Orders. The Government's policy – consistent with taking a proportionate approach – is that designated persons should have access to their income and other property insofar as this can be arranged without giving rise to risk of terrorist financing.

5.14 It is important that credits to frozen accounts are reported promptly to HM Treasury in order to ensure effective compliance with the asset freeze. 'Without delay' is used rather than specifying a number of days to enable HM Treasury to take a reasonable and flexible approach depending on the circumstances of a particular case. 'Without delay' is also the terminology used in the relevant EU asset freezing legislation.

5.15 In respect of requests to define what is meant by a 'reasonable' period of time for the production of documents, the Government does not consider that such an amendment is necessary as reasonable times for a response will vary from case to case and a timeframe will be specified in correspondence.

5.16 With regard to the query about data protection constraints, nothing in the draft legislation authorises disclosure, whether by a relevant institution, HM Treasury or any other person, where that disclosure would contravene the Data Protection Act 1998. The provisions of that Act, including the exemptions such as in section 29 (3), which makes personal data exempt from the non-disclosure provisions where it is processed for the purposes of, for example, prevention or detection of crime or the apprehension or prosecution of offenders, are not disapplied in any way by the provisions of the Bill.

5.17 The other requests for definitions of specific words have all been noted and the Government will consider whether further guidance can be provided.

Related legislation

Consultation responses

5.18 Respondents also commented on related legislation. One respondent proposed an update to the Counter-Terrorism Act 2008 (CTA), in particular updating the second condition for using the powers ("HM Treasury reasonably believe that there is a risk that terrorist financing or money

laundering activities are being carried on in the country, by the government of the country, or by persons resident or incorporated in the country, and that this poses a significant risk to the national interests of the United Kingdom”) to apply widely to any person or entity wherever located.

5.19 One respondent recommended that a re-evaluation of the CTA in line with the asset freezing legislation and the Money Laundering Regulations 2007 would ensure that there is no duplication of requirements across different pieces of legislation.

5.20 Another area of legislation that respondents commented on was the Suspicious Activity Reporting (SAR) consent regime, which falls out of the scope of this consultation.

The Government’s response

5.21 The CTA provides HM Treasury with powers to implement financial restrictions in response to risks to the UK’s national interests posed by other countries. Substantial revision would need to be made to use the CTA to meet UN terrorist asset freezing obligations. The Government therefore believes that this is better achieved through the proposed Bill that has been drafted for this purpose, rather than through an amendment to an existing, but different, power.

5.22 The Government has identified some minor technical improvements that could be made to the CTA financial restrictions powers, including one to ease implementation for industry, and it will include these in the legislation it is introducing on asset freezing. A review of the Money Laundering Regulations is also underway and has included extensive engagement with industry. The Government acknowledge this legislation is intended to address issues that are often closely related and that the systems and controls put in place by firms must provide for compliance with each piece of legislation. That firms are able to use large parts of the same systems and controls to comply with the various legislative requirements may also have its benefits.

Extra-territoriality

5.23 A number of respondents found the extra-territorial provisions in the draft legislation difficult to understand. The Government is reviewing the explanatory notes to see if the provisions can be explained more clearly.

5.24 The Government does not agree with the point made by one respondent that the extra territorial extension of offences goes beyond the scope of UNSCR 1373 (2001). The intention of the Resolution is for Member States to take action against terrorism finance, prohibiting their nationals, wherever they are, from making funds, financial services and economic resources available for purposes of terrorism. ‘Nationals’ in this context is not to be construed as only nationals within the UK borders; it extends to actions taken by UK nationals everywhere. It would undermine the regime if the conduct of a UK company in the UK would constitute an offence but identical conduct by a UK company abroad would not.

Other issues

5.25 One respondent did not want to see the Bill impact upon the role of the Charity Commission as the independent regulator of the charity sector and raised concerns that an asset freeze could impact upon legitimate charity beneficiaries.

5.26 The Government’s legislation applies to the terrorist asset freezing regime and would not affect the role of the Charity Commission. The powers available to the Charity Commission, and the grounds on which they can be used, are different to those that are set out in Treasury’s asset freezing legislation. HM Treasury works closely with the Charity Commission and other Government Departments to ensure the most appropriate tools are used to prevent terrorist financing. Asset freezes could, potentially, affect charities either because they are subject to an asset freeze, or because there is a risk that charitable payments may go to persons who are.

Should a charity be affected by an asset freeze, HM Treasury would work closely with the Charity Commission and other stakeholders to minimise the impact on third parties and ensure charitable funds reach legitimate beneficiaries. HM Treasury can issue licences that provide exemptions from the prohibitions of the asset freeze.

5.27 The sufficiency of the notification of designation provisions was questioned given the consequences of breaches of the prohibitions and a practical issue was highlighted in that many parties affected by the Order may not use the website which displays designations. HM Treasury will seek to write to persons where it believes there is a particular a risk that persons may make funds or economic resources available to, or for the benefit of, a designated person. It is not possible to commit an offence under the core prohibitions in the draft legislation unless the person has knowledge or reasonable suspicion that they are dealing with the funds of, or making them available to or for the benefit of, a designated person.

5.28 One respondent asked of the continuing utility of the freezing powers in the Anti-Terrorism, Crime and Security Act 2001. These powers, whilst not generally suitable for asset freezing under UNSCR 1373 (2001) for the reasons set out in paragraphs 2.17 to 2.20 of the public consultation, allow freezing orders to be made to address other threats to national security.

5.29 In the public consultation statistics were provided on designations and delistings under the Terrorism Orders. Respondents asked how many persons are designated under both the UNSCR 1267 (1999) and the UNSCR 1373 (2001) regimes, and in addition, how many persons are solely designated under the UNSCR 1267 (1999) regime.

5.30 Thirty-nine persons are designated under both the UNSCR 1267 (1999) regime and the UNSCR 1373 (2001) regime. 459 persons are designated under only the UNSCR 1267 (1999) regime.

A

List of respondents

A.1 The Government is grateful to the following people and organisations for their contributions to the consultation process:

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Association of British Insurers

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