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STATUTORY INSTRUMENTS

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**2018 No. 1078**

**The Proceeds of Crime Act 2002 (External Investigations and External Orders and Requests) (Amendment) Order 2018**

**PART 2**

External investigations: amendments to the 2013 Order

**CHAPTER 1**

Introduction

**Amendments to the 2013 Order**

4. The 2013 Order is amended as provided for in Chapters 2 and 3 of this Part.

**CHAPTER 2**

External investigations: amendments for England and Wales

**Scope of Part 1**

5. In article 3 (scope of Part 1)—
- (a) in paragraph (1), for “or a relevant Director” substitute “, a relevant Director or (in relation to an unexplained wealth order or an interim freezing order in England and Wales) an enforcement authority”;
  - (b) in paragraph (2), for “or the relevant Director” substitute “, the relevant Director or (in relation to an unexplained wealth order or an interim freezing order in England and Wales) the enforcement authority”;
  - (c) omit paragraph (5).

**Action on receipt of request in relation to an external investigation**

6. In article 4(1) and (2) (action on receipt of request in relation to an external investigation), for “or a relevant Director” substitute “, a relevant Director, or (in England and Wales) the FCA, the Commissioners for Her Majesty’s Revenue and Customs or an enforcement authority”.

**Unexplained wealth orders (England and Wales)**

7. After article 21 (supplementary) insert—

**“Unexplained wealth orders (England and Wales)**

**21A.**—(1) The High Court may, on an application made by an enforcement authority (see article 2(12) (interpretation)), make an unexplained wealth order in respect of any property if the court is satisfied that each of the requirements for making the order is fulfilled.

- (2) An application for the order must—
  - (a) specify or describe the property in respect of which the order is sought, and
  - (b) specify the person in England and Wales whom the enforcement authority thinks holds the property (“the respondent”).
- (3) An application for an unexplained wealth order may be made without notice.
- (4) An unexplained wealth order is an order requiring the respondent to provide a statement—
  - (a) setting out the nature and extent of the respondent’s interest in the property in respect of which the order is made,
  - (b) explaining how the respondent obtained the property (including, in particular, how any costs incurred in obtaining it were met),
  - (c) where the property is held by the trustees of a settlement, setting out such details of the settlement as may be specified in the order, and
  - (d) setting out such other information in connection with the property as may be so specified.
- (5) The order must specify—
  - (a) the form and manner in which the statement is to be given,
  - (b) the person to whom it is to be given, and
  - (c) the place at which it is to be given or, if it is to be given in writing, the address to which it is to be sent.
- (6) The order may, in connection with requiring the respondent to provide the statement mentioned in paragraph (4), also require the respondent to produce documents of a kind specified or described in the order.
- (7) The respondent must comply with the requirements imposed by an unexplained wealth order within whatever period the court may specify (and different periods may be specified in relation to different requirements).
- (8) For the purposes of this article and article 21B (requirements for making of unexplained wealth order), property is held by a person if that person holds an interest in it (see also article 21G (holding of property: trusts and company arrangements etc.)).

### **Requirements for making of unexplained wealth order**

- 21B.**—(1) These are the requirements for the making of an unexplained wealth order in respect of any property.
- (2) The High Court must be satisfied that there is reasonable cause to believe that—
    - (a) the respondent holds the property, and
    - (b) the value of the property is greater than that of the sum for the time being specified in section 362B(2)(b) of the Proceeds of Crime Act 2002<sup>(1)</sup> (requirements for making of unexplained wealth order).
  - (3) The High Court must be satisfied that there are reasonable grounds for suspecting that the known sources of the respondent’s lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property.
  - (4) The High Court must be satisfied that—
    - (a) the respondent is a politically exposed person, or

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(1) Section 362B was inserted by section 1 of the Criminal Finances Act 2017.

- (b) there are reasonable grounds for suspecting that—
  - (i) the respondent is, or has been, involved in serious crime (whether in England and Wales or elsewhere), or
  - (ii) a person connected with the respondent is, or has been, so involved.
- (5) It does not matter for the purposes of paragraph (2)(a)—
  - (a) whether or not there are other persons who also hold the property;
  - (b) whether the property was obtained by the respondent before or after the coming into force of this article.
- (6) For the purposes of paragraph (3)—
  - (a) regard is to be had to any mortgage, charge or other kind of security that it is reasonable to assume was or may have been available to the respondent for the purpose of obtaining the property;
  - (b) it is to be assumed that the respondent obtained the property for a price equivalent to its market value;
  - (c) income is “lawfully obtained” if it is obtained lawfully under the laws of the country from where the income arises;
  - (d) “known” sources of the respondent’s income are the sources of income (whether arising from employment, assets or otherwise) that are reasonably ascertainable from available information at the time of the making of the application for the order;
  - (e) where the property is an interest in other property comprised in a settlement, the reference to the respondent obtaining property is to be taken as if it were a reference to the respondent obtaining direct ownership of such share in the settled property as relates to, or is fairly represented by, that interest.
- (7) In paragraph (4)(a), “politically exposed person” has the same meaning as for the time being specified in section 362B of the Proceeds of Crime Act 2002.
- (8) For the purposes of this article—
  - (a) a person is involved in serious crime in England and Wales or elsewhere if the person would be so involved for the purposes of Part 1 of the Serious Crime Act 2007 (see in particular section 2 of that Act)<sup>(2)</sup> (involvement in serious crime: England and Wales orders);
  - (b) section 1122 of the Corporation Tax Act 2010<sup>(3)</sup> (“connected” persons) applies in determining whether a person is connected with another.
- (9) Where the property in respect of which the order is sought comprises more than one item of property, the reference in paragraph (2)(b) to the value of the property is to the total value of those items.

### **Non-compliance with an unexplained wealth order**

**21C.**—(1) This article applies in a case where the respondent fails, without reasonable excuse, to comply with the requirements imposed by an unexplained wealth order in respect of any property before the end of the response period.

(2) For the purposes of paragraph (1) where an unexplained wealth order imposes more than one requirement on the respondent, the respondent is to be taken to have failed to

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<sup>(2)</sup> 2007 c. 27. Section 2 of that Act was amended by paragraph 3(a) and (b) of Schedule 1 to the Serious Crime Act 2015 (c. 9).  
<sup>(3)</sup> 2010 c. 4.

comply with the requirements imposed by the order unless each of the requirements is complied with or is purported to be complied with.

(3) In the event of a failure by the respondent to comply with the requirements of an unexplained wealth order, the enforcement authority that applied for the order must inform the Secretary of State of that failure and whether an interim freezing order has effect in relation to the property (see article 21H (unexplained wealth order: application for interim freezing order)).

(4) The Secretary of State must—

- (a) inform the requesting party of the non-compliance with the unexplained wealth order, and
- (b) if an interim freezing order has effect in relation to the property, inform the requesting party that the interim freezing order will cease to have effect on the expiry of 28 days beginning with the day after the day with which the response period ends.

(5) In this article—

“requesting party” means the overseas authority that requested assistance with the external investigation in question;

“response period” means the period specified by the court in accordance with article 21A(7) (period specified for complying with the order).

#### **Compliance or purported compliance with an unexplained wealth order**

**21D.**—(1) This article applies if—

- (a) before the end of the response period, the respondent complies, or purports to comply, with the requirements imposed by an unexplained wealth order in respect of any property in relation to which the order was made, and
- (b) an interim freezing order has effect in relation to the property (see article 21H (unexplained wealth order: application for interim freezing order)).

(2) In this article “compliance material” means—

- (a) any statement given in compliance or purported compliance with an unexplained wealth order, and
- (b) any document produced in compliance, or purported compliance, with a requirement included in the order by virtue of article 21A(6) (provision of documents);

and compliance material is “provided” when it is given or produced as required by the order.

(3) The enforcement authority that has been provided with the compliance material must give the Secretary of State a copy of the compliance material, and inform the Secretary of State of the date upon which the compliance material was provided.

(4) The Secretary of State must—

- (a) inform the requesting party of the compliance, or purported compliance, with the unexplained wealth order,
- (b) supply the requesting party with a copy of the compliance material, and
- (c) inform the requesting party that the interim freezing order will cease to have effect on the expiry of 120 days beginning with the day after the day on which the compliance material was provided to the enforcement authority.

(5) If the compliance material is not all provided at the same time, it is to be regarded as provided when the last of that material is provided.

## Statements

**21E.**—(1) A statement made by a person in response to a requirement imposed by an unexplained wealth order may not be used in evidence against that person in criminal proceedings.

(2) Paragraph (1) does not apply—

- (a) in the case of proceedings under Part 2 of the Proceeds of Crime Act 2002 (confiscation: England and Wales),
- (b) in the case of proceedings under Part 2 of the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (giving effect in England and Wales to external requests in connection with criminal investigations or proceedings and to external orders arising from such proceedings),
- (c) on a prosecution for an offence under section 5 of the Perjury Act 1911<sup>(4)</sup> (false statements), or
- (d) on a prosecution for some other offence where, in giving evidence, the person makes a statement inconsistent with the statement mentioned in paragraph (1).

(3) A statement may not be used by virtue of paragraph (2)(d) against a person unless—

- (a) evidence relating to it is adduced, or
- (b) a question relating to it is asked,

by the person or on the person's behalf in proceedings arising out of the prosecution.

## Disclosure of information, copying of documents etc.

**21F.**—(1) An unexplained wealth order has effect in spite of any restriction on the disclosure of information (however imposed).

(2) But paragraphs (1) to (5) of article 20 (further provisions: rights in connection with privileged information, questions and material) apply in relation to requirements imposed by an unexplained wealth order as they apply in relation to requirements imposed under a disclosure order.

(3) The enforcement authority may take copies of any documents produced by the respondent in connection with complying with the requirements imposed by an unexplained wealth order.

(4) Documents so produced may also be retained for so long as it is necessary to retain them (as opposed to a copy of them) in connection with an external investigation in relation to the property in respect of which the unexplained wealth order is made.

(5) But if the enforcement authority has reasonable grounds to believe that the documents—

- (a) may need to be produced for the purposes of any legal proceedings, and
- (b) might otherwise be unavailable for those purposes,

they may be retained until the proceedings are concluded.

(6) Unless article 21D (compliance or purported compliance with an unexplained wealth order) applies, an enforcement authority which has been provided with compliance material may send the compliance material to the requesting party or to the Secretary of State for forwarding to the requesting party.

### **Holding of property: trusts and company arrangements etc.**

**21G.**—(1) This article applies for the purposes of articles 21A (unexplained wealth orders) and 21B (requirements for making of unexplained wealth order).

(2) The cases in which a person (“P”) is to be taken to “hold” property include where—

- (a) P has effective control over the property,
- (b) P is the trustee of a settlement in which the property is comprised,
- (c) P is a beneficiary (whether actual or potential) in relation to such a settlement.

(3) A person is to be taken to have “effective control” over property if, from all the circumstances, it is reasonable to conclude that the person—

- (a) exercises,
- (b) is able to exercise, or
- (c) is entitled to acquire,

direct or indirect control over the property.

(4) Where a person holds property by virtue of paragraph (2) references to the person obtaining the property are to be read accordingly.

(5) References to a person who holds or obtains property include any body corporate, whether incorporated or formed under the law of a part of the United Kingdom or in a country or territory outside the United Kingdom.”.

### **Interim freezing orders (England and Wales)**

**8.** After article 21G (holding of property: trusts and company arrangements etc.) (which is inserted by article 7 (unexplained wealth orders: England and Wales)) insert—

#### **“Unexplained wealth order: application for interim freezing order**

**21H.**—(1) This article applies where the High Court makes an unexplained wealth order in respect of any property.

(2) The court may make an interim freezing order in respect of the property if the court considers it necessary to do so for the purposes of avoiding the risk of any external order (within the meaning of section 447(2) of the Proceeds of Crime Act 2002 (interpretation)) that might subsequently be obtained being frustrated.

(3) An interim freezing order is an order that prohibits the respondent to the unexplained wealth order, and any other persons with an interest in the property, from in any way dealing with the property (subject to any exclusions under article 21J (exclusions)).

(4) An interim freezing order—

- (a) may be made only on the application of the enforcement authority that applied for the unexplained wealth order to which the interim freezing order relates,
- (b) may be made only in order to give effect to an external request (within the meaning of section 447(1) of the Proceeds of Crime Act 2002),
- (c) must be made in the same proceedings as those in which the unexplained wealth order is made, and
- (d) may be combined in one document with the unexplained wealth order.

(5) If an application for an unexplained wealth order in respect of property is made without notice, an application for an interim freezing order in respect of the property must also be made without notice.

### **Variation and discharge of interim freezing order**

- 21I.**—(1) The High Court may at any time vary or discharge an interim freezing order.
- (2) The High Court must discharge an interim freezing order, so far as it has effect in relation to property, in each of the following two cases.
- (3) The first case is where—
- (a) the applicable period has ended, and
  - (b) a relevant application has not been made before the end of that period in relation to the property concerned.
- (4) The second case is where—
- (a) a relevant application has been made before the end of the applicable period in relation to the property concerned, and
  - (b) proceedings on the application (including on any appeal) have been determined or otherwise disposed of.
- (5) The “applicable period” means—
- (a) in a case where the respondent complies, or purports to comply, with the requirements imposed by an unexplained wealth order before the end of the response period, the period of 120 days beginning with the day after the day upon which the compliance material was provided to the enforcement authority ends (see article 21D(2) (provision of compliance material)), and
  - (b) in any other case, the period of 28 days beginning with the day after the day with which the response period ends.
- (6) In calculating a period for the purposes of paragraph (5), no account is to be taken of—
- (a) any Saturday or Sunday,
  - (b) Christmas Day,
  - (c) Good Friday,
  - (d) any day which is a bank holiday under the Banking and Financial Dealings Act 1971(5) in England and Wales.
- (7) Before exercising the power under this article to vary or discharge an interim freezing order, the court must (as well as giving the parties to the proceedings an opportunity to be heard) give an opportunity to any person who may be affected by its decision to be heard.
- (8) Paragraph (7) does not apply where the court is acting as required by paragraph (2).
- (9) In this article, “relevant application” means an application for—
- (a) a restraint order under article 8 of the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (restraint orders), or
  - (b) a prohibition order under Part 4A of that Order (giving effect in England and Wales and Northern Ireland to external requests by means of civil proceedings).

### **Exclusions**

- 21J.**—(1) The power to vary an interim freezing order includes (amongst other things) power to make exclusions as follows—
- (a) power to exclude property from the order, and

- (b) power, otherwise than by excluding property from the order, to make exclusions from the prohibition on dealing with the property to which the order applies.
- (2) Exclusions from the prohibition on dealing with the property to which the order applies (other than exclusions of property from the order) may also be made when the order is made.
- (3) An exclusion may (amongst other things) make provision for the purpose of enabling any person—
  - (a) to meet the person’s reasonable living expenses, or
  - (b) to carry on any trade, business, profession or occupation.
- (4) An exclusion may be subject to conditions.
- (5) Where the court exercises the power to make an exclusion for the purposes of enabling a person to meet legal expenses that the person has incurred, or may incur, in respect of proceedings under this Order, it must ensure that the exclusion—
  - (a) is limited to reasonable legal expenses that the person has reasonably incurred or reasonably incurs,
  - (b) specifies the total amount that may be released for legal expenses in pursuance of the exclusion, and
  - (c) is made subject to the same conditions as would be the required conditions (see article 198 of the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (legal expenses excluded from freezing: required conditions)) if the order had been made under article 147 of that Order (application for property freezing order).
- (6) The court in deciding whether to make an exclusion for the purposes of enabling a person to meet legal expenses in respect of proceedings under this Order—
  - (a) must have regard to the desirability of the person being represented in any proceedings under this Part in which the person is a participant, and
  - (b) must disregard the possibility that legal representation of the person in any such proceedings might, were an exclusion not made, be made available under arrangements made for the purposes of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012(6).
- (7) If excluded property is not specified in the order it must be described in the order in general terms.

### **Restrictions on proceedings and remedies**

- 21K.—**(1) While an interim freezing order has effect—
- (a) the High Court may stay any action, execution or other legal process in respect of the property to which the order applies, and
  - (b) no distress may be levied, and no power to use the procedure in Schedule 12 to the Tribunals, Courts and Enforcement Act 2007(7) (taking control of goods) may be exercised, against the property to which the order applies except with the leave of the High Court and subject to any terms the court may impose.

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(6) 2012 c. 10.

(7) 2007 c. 15. Schedule 16 was amended by paragraph 10 of Schedule 1 to the Finance Act 2008 (c. 9) and by section 25(2) to (6) and paragraph 52(1)(b) and (2) of Schedule 9 to the Crime and Courts Act 2013 (c. 22).



(2) If a court (whether the High Court or any other court) in which proceedings are pending in respect of any property is satisfied that an interim freezing order has been applied for or made in respect of the property, it may—

- (a) stay the proceedings, or
- (b) allow them to continue on any terms it thinks fit.

(3) If an interim freezing order applies to a tenancy of any premises, a right of forfeiture in relation to the premises is exercisable—

- (a) only with the leave of the High Court, and
- (b) subject to any terms that the court may impose.

(4) The reference in paragraph (3) to a “right of forfeiture” in relation to premises is to the right of a landlord or other person to whom rent is payable to exercise a right of forfeiture by peaceable re-entry to the premises in respect of any failure by the tenant to comply with a term or condition of the tenancy.

(5) Before exercising a power conferred by this article, the court must (as well as giving the parties to any proceedings an opportunity to be heard) give an opportunity to any person who may be affected by the court’s decision to be heard.

#### **Receivers in connection with interim freezing orders**

**21L.**—(1) This article applies where the High Court makes an interim freezing order on an application by an enforcement authority.

(2) The court may, on an application by the enforcement authority, by order appoint a receiver in respect of any property to which the interim freezing order applies.

(3) An application under paragraph (2) may be made at the same time as the application for the interim freezing order or at any time afterwards.

(4) The application may be made without notice if the circumstances of the case are such that notice of the application would give rise to a risk of any external order that might subsequently be obtained being frustrated.

(5) In its application the enforcement authority must nominate a suitably qualified person for appointment as a receiver.

(6) The person nominated may be a member of staff of the enforcement authority.

#### **Powers of receivers appointed under article 21L**

**21M.**—(1) If the High Court appoints a receiver under article 21L (receivers in connection with interim freezing orders) on an application by an enforcement authority, the court may act under this article on the application of the authority.

(2) The court may by order authorise or require the receiver—

- (a) to manage any property in respect of which the receiver is appointed;
- (b) to take any other steps the court thinks appropriate in connection with the management of any such property (including securing the detention, custody or preservation of the property in order to manage it).

(3) Managing property includes—

- (a) selling or otherwise disposing of assets comprised in the property which are perishable or which ought to be disposed of before their value diminishes;
- (b) where the property comprises assets of a trade or business, carrying on, or arranging for another to carry on, the trade or business;

- (c) incurring capital expenditure in respect of the property.
- (4) The court may by order require any person in respect of whose property the receiver is appointed—
  - (a) to bring the property to a place in England and Wales specified by the receiver or to place it in the custody of the receiver (if in either case the person is able to do so);
  - (b) to do anything the person is reasonably required to do by the receiver for the preservation of the property.
- (5) The court may by order require any person in respect of whose property the receiver is appointed to bring any documents relating to the property which are in the person's possession or control to a place in England and Wales specified by the receiver or to place them in the custody of the receiver.
- (6) Any prohibition on dealing with property imposed by an interim freezing order does not prevent a person from complying with any requirements imposed by virtue of this article.
- (7) Paragraph (8) applies in a case where—
  - (a) the receiver deals with property that is not property in respect of which the receiver was appointed under article 21L, but
  - (b) at the time of dealing with the property the receiver believed on reasonable grounds that they were entitled to do so by virtue of being appointed under article 21L.
- (8) The receiver is not liable to any person in respect of any loss or damage resulting from the receiver's dealing with the property.
- (9) But paragraph (8) does not apply to the extent that the loss or damage is caused by the receiver's negligence.

#### **Supervision of article 21L receiver and variations**

- 21N.**—(1) Any of the following persons may at any time apply to the High Court for directions as to the exercise of the functions of a receiver appointed under article 21L (receivers in connection with interim freezing orders)—
- (a) the receiver;
  - (b) a party to the proceedings for the appointment of the receiver or the interim freezing order concerned;
  - (c) a person affected by an action taken by the receiver;
  - (d) a person who may be affected by an action proposed to be taken by the receiver.
- (2) Before it gives directions under paragraph (1) the court must give an opportunity to be heard to—
- (a) the receiver;
  - (b) the parties to the proceedings for the appointment of the receiver and for the interim freezing order concerned;
  - (c) a person who may be interested in the application under paragraph (1).
- (3) The court may at any time vary or discharge—
- (a) the appointment of a receiver under article 21L,
  - (b) an order under article 21M (powers of receivers appointed under article 21L), or
  - (c) directions under this article.

(4) Before exercising a power under paragraph (3) the court must give an opportunity to be heard to—

- (a) the receiver;
- (b) the parties to the proceedings for the appointment of the receiver, for the order under article 21M or (as the case may be) for the directions under this article;
- (c) the parties to the proceedings for the interim freezing order concerned;
- (d) any person who may be affected by the court’s decision.

### **Registration**

**21O.** Section 362Q of the Proceeds of Crime Act 2002 (registration) applies in relation to interim freezing orders under this Order as it applies to property freezing orders under section 245A of that Act (application for property freezing order).

### **Compensation**

**21P.**—(1) Where an interim freezing order in respect of any property is discharged, the person to whom the property belongs may make an application to the High Court for the payment of compensation.

(2) The application must be made within the period of three months beginning with the discharge of the interim freezing order.

(3) The court may award compensation to be paid to the applicant only if satisfied that—

- (a) the applicant has suffered loss as a result of the making of the interim freezing order,
- (b) there has been a serious default on the part of the enforcement authority that applied for the order, and
- (c) the order would not have been made had the default not occurred.

(4) Where the court orders the payment of compensation—

- (a) the compensation is payable by the enforcement authority that applied for the interim freezing order, and
- (b) the amount of the compensation to be paid is the amount that the court thinks reasonable, having regard to the loss suffered and any other relevant circumstance.”.

### **Other amendments consequential on articles 7 and 8**

**9.**—(1) In article 1(2) (extent of Part 1), after “only” insert “, except for articles 21A to 21P which extend to England and Wales only.”.

(2) In article 2 (interpretation)—

(a) After paragraph (7) insert—

“(7A) “Settlement” (in relation to unexplained wealth orders and interim freezing orders) has the meaning given by section 620 of the Income Tax (Trading and Other Income) Act 2005(8).”.

(b) After paragraph (11) insert—

“(12) For the purposes of this Part—

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(8) 2005 c. 5. Section 620 was amended by paragraph 552 of Schedule 1 to the Income Tax Act 2007 (c. 3) and by S.I. 2012/964.

“enforcement authority” means (in relation to England and Wales)—

- (a) the National Crime Agency;
- (b) Her Majesty’s Revenue and Customs;
- (c) the FCA;
- (d) the Director of the Serious Fraud Office, or
- (e) the Director of Public Prosecutions;

“external request” has the same meaning as in article 21H (unexplained wealth order: application for interim freezing order);

“interim freezing order” has the same meaning as in article 21H;

“requesting party” has the same meaning as in article 21C(5) (non-compliance with an unexplained wealth order);

“respondent” has the same meaning as in article 21A(2)(b) (unexplained wealth orders);

“response period” has the same meaning as in article 21C(5);

“unexplained wealth order” has the same meaning as in article 21A(4).”.

### **Extension of powers to the Financial Conduct Authority, its officers and Her Majesty’s Revenue and Customs**

**10.** In article 2 (interpretation)—

(a) for paragraph (1) substitute—

“(1) An “appropriate officer” means—

- (a) an NCA officer;
- (b) in England and Wales, an FCA officer;
- (c) in England and Wales, an officer of Revenue and Customs;
- (d) a relevant Director.”;

(b) after paragraph (5) insert—

“(5A) “FCA” means the Financial Conduct Authority and “an FCA officer” is a member of the staff of the FCA.”;

(c) for paragraph (11) substitute—

“(11) A “senior appropriate officer” means—

- (a) in relation to an NCA officer, the Director General of the NCA or any NCA officer authorised by the Director General (whether generally or specifically) for this purpose;
- (b) in relation to an FCA officer (in England and Wales), an FCA officer who is not below such grade as is designated by the Treasury for the purposes of this Order; and
- (c) in relation to an officer of Revenue and Customs (in England and Wales), the Commissioners for Her Majesty’s Revenue and Customs or an officer of Revenue and Customs authorised by the Commissioners (whether generally or specifically) for this purpose.”.

### **Amendments consequential on article 10**

**11.**—(1) In article 12 (supplementary), in paragraph (4)—

- (a) for “an NCA officer” substitute “an officer of a description mentioned in paragraph (a), (b) or (c) of the meaning of appropriate officer (see article 2 (interpretation))”; and
  - (b) for “need not be by the same NCA officer” substitute “may be made by a different officer of the same description”.
- (2) In article 13 (search and seizure warrants), in paragraph (5), after “NCA officer” insert “, FCA officer (in England and Wales), officer of Revenue and Customs (in England and Wales)”.
- (3) In article 14 (requirements where production order not available), in paragraph (8), after “NCA officer” insert “, FCA officer (in England and Wales), officer of Revenue and Customs (in England and Wales)”.
- (4) In article 21 (supplementary), in paragraph (4)—
- (a) for “an NCA officer” substitute “an officer of a description mentioned in paragraph (a), (b) or (c) of the meaning of appropriate officer (see article 2 (interpretation))”; and
  - (b) for “need not be by the same NCA officer” substitute “may be made by a different officer of the same description”.
- (5) In article 28 (supplementary), in paragraph (4)—
- (a) for “an NCA officer” substitute “an officer of a description mentioned in paragraph (a), (b) or (c) of the meaning of appropriate officer (see article 2 (interpretation))”; and
  - (b) for “need not be by the same NCA officer” substitute “may be made by a different officer of the same description”;
- (6) In article 34 (supplementary), in paragraph (3)—
- (a) for “an NCA officer” substitute “an officer of a description mentioned in paragraph (a), (b) or (c) of the meaning of appropriate officer (see article 2 (interpretation))”; and
  - (b) for “need not be by the same NCA officer” substitute “may be made by a different officer of the same description”.

## CHAPTER 3

### External investigations: amendments for Scotland

#### Scope of Part 2

12. In article 37 (scope of Part 2)—
- (a) omit paragraph (5);
  - (b) in paragraph (6)(a), after “disclosure orders” insert “, unexplained wealth orders and interim freezing orders”.

#### Unexplained wealth orders (Scotland)

13. After article 46 (supplementary) insert—

##### “Unexplained wealth orders

**46A.**—(1) The Court of Session may, on an application made by the Scottish Ministers, make an unexplained wealth order in respect of any property if the court is satisfied that each of the requirements for making the order is fulfilled.

- (2) An application for the order must—
- (a) specify or describe the property in respect of which the order is sought, and

- (b) specify the person in Scotland whom the Scottish Ministers think holds the property (“the respondent”).
- (3) An unexplained wealth order is an order requiring the respondent to provide a statement—
  - (a) setting out the nature and extent of the respondent’s interest in the property in respect of which the order is made,
  - (b) explaining how the respondent obtained the property (including, in particular, how any costs incurred in obtaining it were met),
  - (c) where the property is held by the trustees of a settlement, setting out such details of the settlement as may be specified in the order, and
  - (d) setting out such other information in connection with the property as may be so specified.
- (4) The order must specify—
  - (a) the form and manner in which the statement is to be given,
  - (b) the person to whom it is to be given, and
  - (c) the place at which it is to be given or, if it is to be given in writing, the address to which it is to be sent.
- (5) The order may, in connection with requiring the respondent to provide the statement mentioned in paragraph (3), also require the respondent to produce documents of a kind specified or described in the order.
- (6) The respondent must comply with the requirements imposed by an unexplained wealth order within whatever period the court may specify (and different periods may be specified in relation to different requirements).
- (7) For the purposes of this article and article 46B (requirements for making of unexplained wealth order), property is held by a person if that person holds an interest in it (see also article 46G (holding of property: trust and company arrangements etc.)).

### **Requirements for making of unexplained wealth order**

- 46B.**—(1) These are the requirements for the making of an unexplained wealth order in respect of any property.
- (2) The Court of Session must be satisfied that there is reasonable cause to believe that—
    - (a) the respondent holds the property, and
    - (b) the value of the property is greater than that of the sum for the time being specified in section 396B(2)(b) of the Proceeds of Crime Act 2002<sup>(9)</sup> (requirements for making of unexplained wealth order).
  - (3) The Court of Session must be satisfied that there are reasonable grounds for suspecting that the known sources of the respondent’s lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property.
  - (4) The Court of Session must be satisfied that—
    - (a) the respondent is a politically exposed person, or
    - (b) there are reasonable grounds for suspecting that—
      - (i) the respondent is, or has been, involved in serious crime (whether in Scotland or elsewhere), or

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<sup>(9)</sup> Section 396B was inserted by section 4 of the Criminal Finances Act 2017.

- (ii) a person connected with the respondent is, or has been, so involved.
- (5) It does not matter for the purposes of paragraph (2)(a)—
  - (a) whether or not there are other persons who also hold the property;
  - (b) whether the property was obtained by the respondent before or after the coming into force of this article.
- (6) For the purposes of paragraph (3)—
  - (a) regard is to be had to any heritable security, charge or other kind of security that it is reasonable to assume was or may have been available to the respondent for the purpose of obtaining the property;
  - (b) it is to be assumed that the respondent obtained the property for a price equivalent to its market value;
  - (c) income is “lawfully obtained” if it is obtained lawfully under the laws of the country from where the income arises;
  - (d) “known” sources of the respondent’s income are the sources of income (whether arising from employment, assets or otherwise) that are reasonably ascertainable from available information at the time of the making of the application for the order;
  - (e) where the property is an interest in other property comprised in a settlement, the reference to the respondent obtaining property is to be taken as if it were a reference to the respondent obtaining direct ownership of such share in the settled property as relates to, or is fairly represented by, that interest.
- (7) In paragraph (4)(a), “politically exposed person” has the same meaning as for the time being specified in section 396B of the Proceeds of Crime Act 2002.
- (8) For the purposes of this article—
  - (a) a person is involved in serious crime in Scotland or elsewhere if the person would be so involved for the purposes of Part 1 of the Serious Crime Act 2007 (see in particular section 2A of that Act) (involvement in serious crime: Scotland orders);
  - (b) section 1122 of the Corporation Tax Act 2010<sup>(10)</sup> (“connected” persons) applies in determining whether a person is connected with another.
- (9) Where the property in respect of which the order is sought comprises more than one item of property, the reference in paragraph (2)(b) to the value of the property is to the total value of those items.

#### **Non-compliance with an unexplained wealth order**

**46C.**—(1) This article applies in a case where the respondent fails, without reasonable excuse, to comply with the requirements imposed by an unexplained wealth order in respect of any property before the end of the response period.

(2) For the purposes of paragraph (1) where an unexplained wealth order imposes more than one requirement on the respondent, the respondent is to be taken to have failed to comply with the requirements imposed by the order unless each of the requirements is complied with or is purported to be complied with.

(3) In the event of a failure by the respondent to comply with the requirements of an unexplained wealth order, the Scottish Ministers must inform the Secretary of State of that

failure and whether an interim freezing order has effect in relation to the property (see article 46I (unexplained wealth order: application for interim freezing order)).

- (4) The Secretary of State must—
- (a) inform the requesting party of the non-compliance with the unexplained wealth order, and
  - (b) if an interim freezing order has effect in relation to the property, inform the requesting party that the interim freezing order will cease to have effect on the expiry of 28 days beginning with the day after the day with which the response period ends.
- (5) In this article—
- “requesting party” means the overseas authority that requested assistance with the external investigation in question;
- “response period” means the period specified by the court in accordance with article 46A(6) (period specified for complying with the order).

#### **Compliance or purported compliance with an unexplained wealth order**

- 46D.**—(1) This article applies if—
- (a) before the end of the response period, the respondent complies, or purports to comply, with the requirements imposed by an unexplained wealth order in respect of any property in relation to which the order was made; and
  - (b) an interim freezing order has effect in relation to the property (see article 46I (unexplained wealth order: application for interim freezing order)).
- (2) In this article “compliance material” means—
- (a) any statement given in compliance or purported compliance with an unexplained wealth order, and
  - (b) any document produced in compliance, or purported compliance, with a requirement included in the order by virtue of article 46A(5) (provision of documents);

and compliance material is “provided” when it is given or produced as required by the order.

(3) The Scottish Ministers must give the Secretary of State a copy of the compliance material which has been provided, and inform the Secretary of State of the date upon which the compliance material was provided.

- (4) The Secretary of State must—
- (a) inform the requesting party of the compliance, or purported compliance, with the unexplained wealth order,
  - (b) supply the requesting party with a copy of the compliance material, and
  - (c) inform the requesting party that the interim freezing order will cease to have effect on the expiry of 120 days beginning with the day after the day on which the compliance material was provided to the person to whom the order required it to be given.
- (5) If the compliance material is not all provided at the same time, it is to be regarded as provided when the last of that material is provided.



### **Statements**

**46E.**—(1) A statement made by a person in response to a requirement imposed by an unexplained wealth order may not be used in evidence against that person in criminal proceedings.

(2) Paragraph (1) does not apply—

- (a) in the case of proceedings under Part 3 of the Proceeds of Crime Act 2002 (confiscation: Scotland),
- (b) in the case of proceedings under Part 3 of Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (giving effect in Scotland to external requests in connection with criminal investigations or proceedings and to external orders arising from such proceedings),
- (c) on a prosecution for perjury, or
- (d) on a prosecution for some other offence where, in giving evidence, the person makes a statement inconsistent with the statement mentioned in paragraph (1).

(3) A statement may not be used by virtue of paragraph (2)(d) against a person unless—

- (a) evidence relating to it is adduced, or
- (b) a question relating to it is asked,

by the person or on the person’s behalf in proceedings arising out of the prosecution.

### **Disclosure of information, copying of documents etc.**

**46F.**—(1) An unexplained wealth order does not confer the right to require a person to answer any question, provide any information or produce any document which the person would be entitled to refuse to answer, provide or produce on the grounds of legal privilege.

(2) An unexplained wealth order has effect in spite of any restriction on the disclosure of information (however imposed).

(3) The Scottish Ministers may take copies of any documents produced by the respondent in connection with complying with such a requirement.

(4) Documents so produced may also be retained for so long as it is necessary to retain them (as opposed to a copy of them) in connection with an external investigation in relation to the property in respect of which the unexplained wealth order is made.

(5) But if the Scottish Ministers have reasonable grounds to believe that the documents—

- (a) may need to be produced for the purposes of any legal proceedings, and
- (b) might otherwise be unavailable for those purposes,

they may be retained until the proceedings are concluded.

(6) Unless article 46D (compliance or purported compliance with an unexplained wealth order) applies, an enforcement authority which has been provided with compliance material may send the compliance material to the requesting party or to the Secretary of State for forwarding to the requesting party.

### **Holding of property: trusts and company arrangements etc.**

**46G.**—(1) This article applies for the purposes of articles 46A (unexplained wealth orders) and 46B (requirements for making of unexplained wealth order).

(2) The cases in which a person (“P”) is to be taken to “hold” property include where—

- (a) P has effective control over the property;

- (b) P is the trustee of a settlement in which the property is comprised;
- (c) P is a beneficiary (whether actual or potential) in relation to such a settlement.

(3) A person is to be taken to have “effective control” over property if, from all the circumstances, it is reasonable to conclude that the person—

- (a) exercises,
- (b) is able to exercise, or
- (c) is entitled to acquire,

direct or indirect control over the property.

(4) Where a person holds property by virtue of paragraph (2) references to the person obtaining the property are to be read accordingly.

(5) References to a person who holds or obtains property include any body corporate, whether incorporated or formed under the law of a part of the United Kingdom or in a country or territory outside the United Kingdom.

### **Supplementary**

**46H.**—(1) An application for an unexplained wealth order may be made without notice.

(2) Provision may be made by rules of court as to the discharge and variation of unexplained wealth orders.

(3) An application to discharge or vary an unexplained wealth order may be made to the Court of Session by—

- (a) the Scottish Ministers, or
- (b) any person affected by the order.

(4) The Court of Session may—

- (a) discharge the order, or
- (b) vary the order.”.

### **Interim freezing orders (Scotland)**

**14.** After article 46H (supplementary) of the 2013 Order (which is inserted by article 13 (unexplained wealth orders: Scotland)) insert—

#### **“Unexplained wealth order: application for interim freezing order**

**46I.**—(1) This article applies where the Court of Session makes an unexplained wealth order in respect of any property.

(2) The court may make an interim freezing order in respect of the property if the court considers it necessary to do so for the purposes of avoiding the risk of any external order (within the meaning of section 447(2) of the Proceeds of Crime Act 2002 (interpretation)) that might subsequently be obtained being frustrated.

(3) An interim freezing order is an order that prohibits the respondent to the unexplained wealth order, and any other persons with an interest in the property, from in any way dealing with the property (subject to any exclusions under article 46K (exclusions)).

(4) An interim freezing order—

- (a) may be made only on the application of the Scottish Ministers;
- (b) may be made only in order to give effect to an external request (within the meaning of section 447(1) of the Proceeds of Crime Act 2002);

- (c) must be made in the same proceedings as those in which the unexplained wealth order is made, and
  - (d) may be combined in one document with the unexplained wealth order.
- (5) If an application for an unexplained wealth order in respect of property is made without notice, an application for an interim freezing order in respect of the property must also be made without notice.

### **Variation and discharge of interim freezing order**

**46J.**—(1) The Court of Session may at any time vary or discharge an interim freezing order.

(2) The Court of Session must discharge an interim freezing order, so far as it has effect in relation to property, in each of the following two cases.

(3) The first case is where—

- (a) the applicable period has ended, and
- (b) a relevant application has not been made before the end of that period in relation to the property concerned.

(4) The second case is where—

- (a) a relevant application has been made before the end of the applicable period in relation to the property concerned, and
- (b) proceedings on the application (including on any appeal) have been determined or otherwise disposed of.

(5) The “applicable period” means—

- (a) in a case where the respondent complies, or purports to comply, with the requirements imposed by an unexplained wealth order before the end of the response period, the period of 120 days beginning with the day after the day upon which the compliance material was provided to the enforcement authority (see article 46D(2) (provision of compliance material), and
- (b) in any other case, the period of 28 days beginning with the day after the day with which the response period ends.

(6) In calculating the period of 48 hours for the purposes of paragraph (5), no account is to be taken of—

- (a) any Saturday or Sunday,
- (b) Christmas Day,
- (c) Good Friday,
- (d) any day which is a bank holiday under the Banking and Financial Dealings Act 1971 in Scotland.

(7) Before exercising the power under this article to vary or discharge an interim freezing order, the court must (as well as giving the parties to the proceedings an opportunity to be heard) give an opportunity to any person who may be affected by its decision to be heard.

(8) Paragraph (7) does not apply where the court is acting as required by paragraph (2).

(9) In this article, “relevant application” means an application for—

- (a) a restraint order under article 58 of the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (restraint orders), or
- (b) a prohibition order under Part 4B of that Order (giving effect in Scotland to external requests by means of civil proceedings).

## **Exclusions**

**46K.**—(1) The power to vary an interim freezing order includes (amongst other things) power to make exclusions as follows—

- (a) power to exclude property from the order, and
- (b) power, otherwise than by excluding property from the order, to make exclusions from the prohibition on dealing with the property to which the order applies.

(2) Exclusions from the prohibition on dealing with the property to which the order applies (other than exclusions of property from the order) may also be made when the order is made.

(3) An exclusion may (amongst other things) make provision for the purpose of enabling any person—

- (a) to meet the person's reasonable living expenses, or
- (b) to carry on any trade, business, profession or occupation.

(4) An exclusion may be subject to conditions.

(5) An exclusion may not be made for the purpose of enabling any person to meet any legal expenses in respect of proceedings under this Part.

(6) If excluded property is not specified in the order it must be described in the order in general terms.

## **Restrictions on proceedings and remedies**

**46L.**—(1) While an interim freezing order has effect the Court of Session may sist any action, execution or other legal process in respect of the property to the order applies.

(2) If a court (whether the Court of Session or any other court) in which proceedings are pending in respect of any property is satisfied that an interim freezing order has been applied for or made in respect of the property, it may—

- (a) sist the proceedings, or
- (b) allow them to continue on any terms it thinks fit.

(3) Before exercising a power conferred by this article, the court must (as well as giving the parties to any proceedings an opportunity to be heard) give an opportunity to any person who may be affected by the court's decision to be heard.

## **Arrestment of property affected by interim freezing order**

**46M.**—(1) On the application of the Scottish Ministers the Court of Session may, in relation to moveable property to which an interim freezing order applies (whether generally or to such of it as is specified in the application), grant warrant for arrestment.

(2) An application under paragraph (1) may be made at the same time as the application for the interim freezing order or at any time afterwards.

(3) A warrant for arrestment may be granted only if the property would be arrestable if the person entitled to it were a debtor.

(4) A warrant under paragraph (1) has effect as if granted on the dependence of an action for debt at the instance of the Scottish Ministers against the person and may be executed, recalled, loosed or restricted accordingly.

(5) An arrestment executed under this article ceases to have effect when, or in so far as, the interim freezing order ceases to apply in respect of the property in relation to which the warrant for arrestment was granted.

(6) If an arrestment ceases to have effect to any extent by virtue of paragraph (5), the Scottish Ministers must apply to the Court of Session for an order recalling or, as the case may be, restricting the arrestment.

### **Inhibition of property affected by interim freezing order**

**46N.**—(1) On the application of the Scottish Ministers, the Court of Session may, in relation to the property mentioned in paragraph (2), grant warrant for inhibition against any person specified in an interim freezing order.

(2) The property is heritable property situated in Scotland to which the interim freezing order applies (whether generally or to such of it as is specified in the application).

(3) The warrant for inhibition—

- (a) has effect as if granted on the dependence of an action for debt by the Scottish Ministers against the person and may be executed, recalled, loosed or restricted accordingly, and
- (b) has the effect of letters of inhibition and must forthwith be registered by the Scottish Ministers in the register of inhibitions and adjudications.

(4) Section 155 of the Titles to Land Consolidation (Scotland) Act 1868<sup>(11)</sup> (effective date of inhibition) applies in relation to an inhibition for which warrant is granted under paragraph (1) as it applies to an inhibition by separate letters or contained in a summons.

(5) An inhibition executed under this section ceases to have effect when, or in so far as, the interim freezing order ceases to apply in respect of the property in relation to which the warrant for inhibition was granted.

(6) If an inhibition ceases to have effect to any extent by virtue of paragraph (5), the Scottish ministers must—

- (a) apply for the recall or, as the case may be, the restriction of the inhibition, and
- (b) ensure that the recall or restriction is reflected in the register of inhibitions and adjudications.

### **Receivers in connection with interim freezing orders**

**46O.**—(1) This article applies where the Court of Session makes an interim freezing order on an application by the Scottish Ministers.

(2) The Court of Session may, on an application by the Scottish Ministers, by order appoint a receiver in respect of any property to which the interim freezing order applies.

(3) An application under paragraph (2) may be made at the same time as the application for the interim freezing order or at any time afterwards.

(4) The application may be made without notice if the circumstances of the case are such that notice of the application would give rise to a risk of any external order that might subsequently be obtained being frustrated.

(5) In its application the Scottish Ministers must nominate a suitably qualified person for appointment as a receiver.

(6) The person nominated may be a member of staff of the Scottish Ministers.

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<sup>(11)</sup> 1868 c. 101 (31 & 32 Vict). Section 155 was amended by section 98(1) and (2) of the Criminal Justice (Scotland) Act 1995 (c. 20), and by section 149 of the Bankruptcy & Diligence etc. (Scotland) Act 2007 (asp 3).

### **Powers of receivers appointed under article 46O**

**46P.**—(1) If the Court of Session appoints a receiver under article 46O (receivers in connection with interim freezing orders), the court may act under this article on the application of the Scottish Ministers.

(2) The court may by order authorise or require the receiver—

- (a) to manage any property in respect of which the receiver is appointed;
- (b) to take any other steps the court thinks appropriate in connection with the management of any such property (including securing the detention, custody or preservation of the property in order to manage it).

(3) Managing property includes—

- (a) selling or otherwise disposing of assets comprised in the property which are perishable or which ought to be disposed of before their value diminishes;
- (b) where the property comprises assets of a trade or business, carrying on, or arranging for another to carry on, the trade or business;
- (c) incurring capital expenditure in respect of the property.

(4) The court may by order require any person in respect of whose property the receiver is appointed—

- (a) to bring the property to a place in Scotland specified by the receiver or to place it in the custody of the receiver (if in either case the person is able to do so);
- (b) to do anything the person is reasonably required to do by the receiver for the preservation of the property.

(5) The court may by order require any person in respect of whose property the receiver is appointed to bring any documents relating to the property which are in the person's possession or control to a place in Scotland specified by the receiver or to place them in the custody of the receiver.

(6) In paragraph (5) “document” means anything in which information of any description is recorded.

(7) Any prohibition on dealing with property imposed by an interim freezing order does not prevent a person from complying with any requirements imposed by virtue of this article.

(8) Paragraph (9) applies in a case where—

- (a) the receiver deals with property that is not property in respect of which the receiver was appointed under article 46O, but
- (b) at the time of dealing with the property the receiver believed on reasonable grounds that they were entitled to do so by virtue of being appointed under article 46O.

(9) The receiver is not liable to any person in respect of any loss or damage resulting from the receiver's dealing with the property.

(10) But paragraph (9) does not apply to the extent that the loss or damage is caused by the receiver's negligence.

### **Supervision of article 46O receiver and variations**

**46Q.**—(1) Any of the following persons may at any time apply to the Court of Session for directions as to the exercise of the functions of a receiver appointed under article 46O (receivers in connection with interim freezing orders)—

- (a) the receiver;

- (b) a party to the proceedings for the appointment of the receiver or the interim freezing order concerned;
  - (c) a person affected by an action taken by the receiver;
  - (d) a person who may be affected by an action proposed to be taken by the receiver.
- (2) Before it gives directions under paragraph (1) the court must give an opportunity to be heard to—
- (a) the receiver;
  - (b) the parties to the proceedings for the appointment of the receiver and for the interim freezing order concerned;
  - (c) a person who may be interested in the application under paragraph (1).
- (3) The court may at any time vary or discharge—
- (a) the appointment of a receiver under article 46O,
  - (b) an order under article 46P (powers of receivers appointed under article 46O), or
  - (c) directions under this article.
- (4) Before exercising a power under paragraph (3) the court must give an opportunity to be heard to—
- (a) the receiver;
  - (b) the parties to the proceedings for the appointment of the receiver, for the order under article 46O or (as the case may be) for the directions under this article;
  - (c) the parties to the proceedings for the interim freezing order concerned;
  - (d) any person who may be affected by the court’s decision.

### **Compensation**

**46R.**—(1) Where an interim freezing order in respect of any property is recalled, the person to whom the property belongs may make an application to the Court of Session for the payment of compensation.

(2) The application must be made within the period of three months beginning with the recall of the interim freezing order.

(3) The court may award compensation to be paid to the applicant only if satisfied that—

- (a) the applicant has suffered loss as a result of the making of the interim freezing order,
- (b) there has been a serious default on the part of the Scottish Ministers in applying for the order, and
- (c) the order would not have been made had the default not occurred.

(4) Where the court orders the payment of compensation—

- (a) the compensation is payable by the Scottish Ministers, and
- (b) the amount of the compensation to be paid is the amount that the court thinks reasonable, having regard to the loss suffered and any other relevant circumstance.”.

### **Amendments consequential on Articles 13 and 14**

**15.** In article 36 (interpretation of Part 2), after paragraph (8) insert—

“(9) “Settlement” (in relation to unexplained wealth orders and interim freezing orders) has the meaning given by section 620 of the Income Tax (Trading and Other Income) Act 2005.

(10) For the purposes of this Part—

“external request” has the same meaning as in article 46I (unexplained wealth order: application for interim freezing order);

“interim freezing order” has the same meaning as in article 46I;

“requesting party” has the same meaning as in article 46C(5) (non-compliance with an unexplained wealth order);

“respondent” has the same meaning as in article 46A(2)(b) (unexplained wealth orders);

“response period” has the same meaning as in article 46C(5);

“unexplained wealth order” has the same meaning as in article 46A (unexplained wealth orders: Scotland).”.