

For information

**Bills Committee on
United Nations (Anti-Terrorism Measures) (Amendment) Bill 2012**

**Response to issues raised at the Bills Committee meeting
held on 20 March 2012**

At the Bills Committee meeting held on 20 March 2012, Members requested the Administration to provide supplementary information in relation to the United Nations (Anti-Terrorism Measures) (Amendment) Bills 2012 (“the Bill”). This note provides the information requested.

Definition and Coverage of “property”

2. The Financial Action Task Force on Money Laundering (“FATF”) recommended that the definition of “funds” under the United Nations (Anti-Terrorism Measures) Ordinance (“UNATMO”) should be extended to ‘assets of every kind, whether tangible or intangible, movable or immovable’ as required under its Special Recommendation II¹. The Bill seeks to repeal the definition of “funds”² in the UNATMO and to replace the term “funds” by “property” throughout the UNATMO to cover assets of every kind in order to address the recommendation of the FATF, as set out in the 2008 Mutual Evaluation Report on Hong Kong (“the Report”).

3. “Property” is defined in the Interpretation and General Clauses Ordinance (Cap. 1) to include –

(a) money, goods, choses in action and land; and

¹ **Special Recommendation II**— Criminalizing the financing of terrorism, terrorist acts and terrorist organizations: Each country should criminalize the financing of terrorism, terrorist acts and terrorist organisations. Countries should ensure that such offences are designated as money laundering predicate offences.

² **“Funds” (資金)** is defined in section 2(1) and Schedule 1 to the UNATMO to include –

1. Gold coin, gold bullion, cash, cheques, claims on money, drafts, money orders and other payment instruments.
2. Deposits with financial institutions or other entities, balances on accounts, debts and debt obligations.
3. Securities and debt instruments (including stocks and shares, certificates representing securities, bonds, notes, warrants, debentures, debenture stock and derivatives contracts).
4. Interest, dividends or other income on or value accruing from or generated by property.
5. Credit, rights of set-off, guarantees, performance bonds or other financial commitments.
6. Letters of credit, bills of lading and bills of sale.
7. Documents evidencing an interest in funds or financial resources, and any other instrument of export financing.

- (b) obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as defined in (a).

4. The definition of “property”, as set out under Cap.1, will extend the existing coverage of “funds” defined in Schedule 1 to the UNATMO to “fund” and “non-fund” property. “Non-fund” property includes goods, land, easements, etc. The amendment is consistent with the recommendation of the relevant Bills Committee during the scrutiny of the UNATMO in 2002 that the definition of “property” under Cap.1 should be adopted under the UNATMO. In fact, the United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003, as passed by LegCo in 2004, also used the word “property” to replace the term “funds” under section 6 of the UNATMO to implement the requirement of the UNSCR 1373 and FATF Special Recommendation for freezing “fund” and “non-fund” assets of terrorists and terrorist entities.

5. The definition of “property” under Cap.1 is neutral as to whether it covers property outside Hong Kong. Whether the definition includes property outside Hong Kong will depend on the context and legislative intent of a particular provision. As a general principle, legislation does not have extra-territorial effect unless it is expressly provided or implied in the legislation that it should apply extra-territorially.

6. Paragraph 1(b) and (d) of the UNSCR 1373 mandates the exercise of jurisdiction on the basis of territoriality (i.e. the provision or collection of funds etc. by persons and entities within the States’ territories) and nationality (i.e. the provision or collection by the States’ nationals within or outside the States’ territories). Section 3 of the UNATMO provides that sections 7 and 8 shall apply to a Hong Kong permanent resident or body incorporated under the law Hong Kong that is outside Hong Kong. Taking into account the intention of UNSCR 1373 and section 3 of the UNATMO, the word “property” in sections 7 and 8 should be understood as including property outside Hong Kong.

Section 8 of the UNATMO

(A) Mental Element of “Recklessness”

7. In accordance with the relevant Bills Committee Report (LC Paper No. CB(2)2801/03-04), the Bills Committee on the United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003 considered that the use

of the mental element of "having reasonable grounds to believe" in section 8 of the UNATMO at that time was too low a threshold. Having considered the views of the Bills Committee, the Administration agreed to the suggestion of the Bills Committee that the mental element of "having reasonable grounds to believe" in section 8 be replaced by "recklessness". The then Bills Committee agreed that applying "recklessness" to section 8, the prosecution would have to prove that the offender either –

- (a) had not given thought to whether the person concerned was a terrorist or terrorist associate in circumstances where there was an obvious risk that this was the case; or
- (b) having recognised that there was a risk the person concerned was a terrorist or terrorist associate, proceeded anyway.

8. For the provision of basic necessities (such as food as mentioned by Members) to terrorists, a person would only commit an offence under the new section 8(a) if he knows that or being reckless as to whether the person is a terrorist or terrorist associate. Similarly, a person who collects property (such as legal expenses) for a terrorist or terrorist associate would commit an offence under the new section 8(b) if he knows that or being reckless as to whether the person is a terrorist or terrorist associate. The Prosecution has to prove the requisite mens rea of 'knowing' or 'reckless'. The Court of Final Appeal has previously held³ that the subjective interpretation of 'recklessness' in *R v G & Another* has to be followed. In other words, it has to show that the defendant's state of mind was culpable in that he acted recklessly in respect of a circumstance if he was aware of a risk which did or would exist, or in respect of a result if he was aware of a risk that it would occur, and it was, in the circumstances known to him, unreasonable to take the risk. Conversely, a defendant cannot be regarded as culpable so as to be convicted if, due to his age or personal characteristics, he genuinely did not appreciate or foresee the risks involved in his action.

9. In appropriate cases, a defendant may be excused if he can show that (i) the commission of the crime was necessary, or reasonably believed to have been necessary, for the purpose of avoiding or preventing death or serious injuries to himself or another; (ii) that necessity was the *sine qua non* of the commission of the crime; and (iii) the commission of crime, viewed objectively, was reasonable and proportionate having regard to the evil to be avoided or prevented. It will not avail the defendant that he believed what he did to have been necessary to avoid the evil if, view objectively, it was unnecessary, or though necessary, was disproportionate.

³ The relevant Court of Final Appeal case was: *Sin Kam Wah & Another v HKSAR* (2005) 8 HKCFAR 192

It will be for the court to decide whether such defence can be substantiated having regard to the facts of each individual case.

(B) Licence

10. We note that, except for the United Kingdom and Singapore, the anti-terrorism legislation of major common law jurisdictions, such as Australia, New Zealand and Canada, does not provide for exceptions (such as a licence) under the legal provisions in relation to prohibition in the provision and the collection of property for terrorists or terrorist associates. As regards the United Kingdom and Singapore, similar to the proposed new sections 8(a) and 8(b) under the Bill, exceptions are only provided for under the legal provision that prohibits the making of funds, economic resources or financial services available to terrorists or terrorist associates (i.e. the new section 8(a)), but not for the collection of funds, economic resources or financial services available for terrorists or terrorist associates (i.e. the new section 8(b)). The proposed new section 8(b) is consistent with the anti-terrorism legislation of major common law jurisdictions and the requirements of the FATF. To avoid creating a loophole under the UNATMO, making it possible for individuals using humanitarian or legal expenses as reasons to freely collect property for terrorists or terrorist associates, it would not be appropriate to include a licence provision under section 8(b).

Legislative Work Required

11. In 2008, FATF completed the Report on our compliance with FATF's recommendations in countering money laundering and terrorist financing. In respect of the UNATMO, FATF recommended that Hong Kong should bring the UNATMO into full operation as soon as possible in order to improve its compliance with Special Recommendation III⁴. Further, we also need to amend the UNATMO to comply with Special Recommendation I⁵ and Special Recommendation II (please refer to footnote 1 as stated above).

⁴ **Special Recommendation III**— Freezing and confiscating terrorist assets : Each country should implement measures to freeze without delay funds or other assets of terrorists, those who finance terrorism and terrorist organisations in accordance with the United Nations resolutions relating to the prevention and suppression of the financing of terrorist acts. Each country should also adopt and implement measures, including legislative ones, which would enable the competent authorities to seize and confiscate property that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organisations.

⁵ **Special Recommendation I**— Ratification and implementation of UN instruments. Each country should take immediate steps to ratify and to implement fully the 1999 United Nations International Convention for the Suppression of the Financing of Terrorism. Countries should also immediately implement the United Nations resolutions relating to the prevention and suppression of the financing of terrorist acts, particularly United Nations Security Council Resolution 1373.

12. As recommended by FATF, we needed to press ahead with the legislative work in relation to Special Recommendation III, which was relatively more complicated, to ensure timely completion within the timeframe to seek removal from FATF's follow-up process. The required legislative work included the enactment of a new Order 117A to the Rules of the High Court in December 2009, the making of a code of practice under section 12A of the UNATMO in July 2010, and following with the making of and the formal gazettal of a commencement notice in October 2010 to appoint 1 January 2011 as the date from which the UNATMO commenced full operation. During the drafting process, considerable time was required for consultation with various relevant parties, including the Judiciary, Department of Justice and the law enforcement agencies. According to FATF's procedures, we reported in the progress report submitted to FATF in 2011 that the UNATMO had been brought into full operation to address Special Recommendation III. As regards Special Recommendation I and Special Recommendation II, we need to implement them through the Bill. In accordance with the stipulated procedures, the draft Bill was scrutinized by the relevant departments/bureaux (including the Department of Justice, Financial Services and Treasury Bureau and the law enforcement agencies, etc.), endorsed by the Policy Committee, and finally decided by the CE in Council that it should be submitted to the Legislative Council for scrutiny.

Reference Materials

13. A Member requested the Administration to provide a copy of the United Nations Security Council Resolution 1373, the Special Recommendations of the Financial Action Task Force on Money Laundering and the United Nations International Convention for the Suppression of the Financing of Terrorism, we forwarded the copies to the LegCo Secretariat on 21 March 2012.

Security Bureau
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