Case Nos.: RO78/21; RO79/21

IN THE CROWN COURT AT SOUTHWARK

1 English Grounds, London, SE1 2HU

22 September 2023

BEFORE HIS HONOUR JUDGE BAUMGARTNER

IN THE MATTER OF MICHAL WIEROMIEJCZYK, PRZEMYSLAW MAREK WIEROMIEJCZYK AND IT SERVICES LIMITED

AND IN THE MATTER OF THE PROCEEDS OF CRIME ACT 2002 (EXTERNAL REQUESTS AND ORDERS) ORDER 2005

AND IN THE MATTER OF A REQUEST FOR PROVISIONAL MEASURES UNDER THE TRADE AND COOPERATION AGREEMENT BETWEEN THE UNITED KINGDOM AND THE EUROPEAN UNION

BETWEEN:

(1) MICHAL WIEROMIEJCZYK
(2) PRZEMYSLAW MAREK WIEROMIEJCZYK
(3) IT SERVICES LIMITED

Applicants

- and -

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

JUDGMENT

Ben Cooper KC with **Stuart Biggs** (instructed by **Janes Solicitors**) for the **Applicants**
Martin Evans KC (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 21 July 2023

I direct that pursuant to Crim. PR r.5.5(1)(a) no official shorthand note shall be taken of this judgment and that copies of this version as handed down (subject to editorial corrections) may be treated as authentic.

HIS HONOUR JUDGE BAUMGARTNER:

Introduction

1. On 11 November 2021, following an external request by the Republic of Poland to the United Kingdom (the **"First Request"**) and subsequent applications to this Court by the Respondent, His Honour Judge Grieve KC made two restraint orders *ex parte* and without a hearing, the first against Michal Wieromiejczyk (RO79/21) (the **"First Order"**) and the second against Przemyslaw Marek Wieromiejczyk and IT Services Limited (RO78/21) (the **"Second Order"**) (the First Order and the Second Order together, the **"Restraint Orders"**). The Restraint Orders were made by His Honour Judge Grieve KC pursuant to arts.7 and 8 of the Proceeds of Crime 2002 Act (External Requests and Orders) Order 2005 (the **"2005 Order"**).

2. The First Request (dated 29 October 2021) sets out details of an investigation being carried out by the Polish authorities in which it is alleged that the Applicants are part of an organised crime group producing and marketing psychoactive substances (commonly known as "legal highs") within the Republic of Poland through a network of shops called "Model Art" between 2016 and 2018 and, subsequently, online through websites. The psychoactive substances are said to have been sold in the form of products designed for modelling dioramas. The production and marketing of those psychoactive substances by the group and the proceeds of their sale are said by the Polish authorities to constitute criminal offences under Polish law. The funds frozen by the Restraint Orders were in the form of cryptocurrency accounts held by the Applicants with Payward Limited (trading as Kraken Exchange) (the **"Payward Accounts"**), which at the time these applications were made exceeded USD 24M, are said to be the criminal proceeds of the sale of those psychoactive substances. It is said that, in order to produce the psychoactive substances, the First Applicant arranged for the importation of their chemical ingredients from China and India through the Netherlands.

3. The Restraint Orders were varied subsequently by the Court as follows:

   (a) the First Order, by consent, by His Honour Judge Grieve KC, first on 16 November 2021 to amend the account number of the property under restraint; and then again on 25 February 2022 to vary the duration of the order until 29 April 2022 unless extended, discharged, or varied by further order;

   (b) both orders, by consent:

      (i) by His Honour Judge Grieve KC on 27 April 2022, to extend the duration of the orders until 26 May 2022;

      (ii) by His Honour Judge Bartle KC on 24 May 2022, to extend the duration of the orders until they were discharged or varied by further order, and to impose a requirement upon the Respondent pursuant to arts.7(1) and 8(4B) of the 2005 Order to report upon the progress of the investigation being carried out by the Polish authorities. This variation followed a further external request from Poland (dated 24 February 2022) (the **"Second Request"**, and the First and Second Requests together, the **"External Requests"**), and separate undertakings by the First and Second Applicants to inform the Court by 15

August 2022 whether then extant applications to discharge the Restraint Orders would be pursued. In the event, they were not.

4. The External Requests followed a freezing order made by the Regional Public Prosecutor's Office in Białystok, Poland (dated 29 October 2021 and 24 February 2022) to freeze the Payward Accounts for the reasons given in the requests. An application by the First Respondent to challenge those decisions was dismissed by the Circuit Court in Katowice in a judgment dated 16 March 2022. No challenge to the Prosecutor's decision to freeze the Payward Accounts was made by the Second or Third Respondents. In its reasons for dismissing the First Applicant's application, the Circuit Court said this:

   > "The [Regional Public Prosecutor] justified comprehensively the suspicion of the commission of the crimes investigated in the proceedings in the case RP I Ds.1.2018, their link to Michal Wieromiejczyk's activities and the transfer of the funds via the bank account which was maintained for him by Payward Ltd in Great Britain. This is indicated by the extensive evidence collected in the case files, especially the documentation gathered in the case, the minutes of inspection of email correspondence and items as well as witness statements and testimonies of the suspects. Therefore, the conditions to apply the freezing order stipulated in Article 89 of the above Act have been met."

5. The Applicants now apply to discharge the Restraint Orders by a written application dated 16 April 2023 (the **"Application"**), supported by a skeleton argument by Ben Cooper KC and Stuart Biggs dated 30 June 2023 and served on behalf of the Applicants. The Application is opposed by the Respondent on the bases set out in a skeleton argument by Martin Evans KC dated 14 July 2023. Mr Cooper KC appeared with Mr Biggs for the Applicants, and Mr Evans KC for the Respondent, when I heard oral arguments on 21 July 2023. This is my reserved judgment on the Application.

Grounds for the Application

6. The grounds for the application to discharge the Restraint Orders are set out at [6] of the Application. Ground (iv) is no longer pursued. The remaining four summary grounds now advanced by the Applicants are as follows:

   (i) The Payward Accounts are not "relevant property" for the purposes of art.7 of the 2005 Order.

   (ii) The Restraint Orders should be discharged because of the passage of time since they were first made on 11 November 2021.

   (iii) The Restraint Orders were extended on an incorrect interpretation of the law.

   (v) The Court was given incomplete or historic, incorrect or misleading information as to the status of related investigations being conducted in the Netherlands and in Germany, which may have given unwarranted support to the Respondent's applications.

7. Further to directions which I gave on 4 May 2023, the parties agreed a list of issues for the Court to consider in disposing of the Application. Those issues are allied to the Applicant's grounds, and are as follows:

(1) Whether the Trade and Cooperation Agreement (Treaty Series No.8 (2021)) (the **"TCA"**) prohibits the Court from considering the substantive reasons of the matter, as defined by the Respondent.

(2) Whether the property that is the subject of the Restraint Orders is relevant property; *i.e.*, are there reasonable grounds to believe that it may be needed to satisfy an external order that has been, or which may be, made?

(3) Whether the requirement of dual criminality is satisfied.

(4) Whether the Court has been given incomplete/historic, incorrect or misleading information as to the status of related investigations being conducted in, respectively, the Netherlands and in Germany, and if so the consequences of that.

(5) Whether the Restraint Order should now be discharged for reason of delay.

8. I shall deal with those agreed issues in considering each ground in turn, having considered all the material put before the Court. Before I do so, however, it is useful to revisit the legal framework underpinning the Restraint Orders.

Legal framework

9. The legal framework for giving effect to external requests in connection with criminal investigations or proceedings (such as the instant requests), and to external orders arising from such proceedings, is set out in Part 2 of the 2005 Order. Once a request has been referred pursuant to art.6, the Director of Public Prosecutions may apply to the Court under art.7 for a restraint order. The Court has jurisdiction under art.8 to make such an order provided one of the two conditions in art.7 is met.

<u>Article 7(2): first condition</u>

10. It is common ground that the first condition in art.7 of the 2005 Order applies in this case:

> "(2) The first condition is that—
>
> (a) relevant property in England and Wales is identified in the external request;
>
> (b) a criminal investigation has been started in the country from which the external request was made with regard to an offence, and
>
> (c) there are reasonable grounds to suspect that the alleged offender named in the request has benefited from his criminal conduct."

11. As I mentioned in *Torzi v Director of Public Prosecutions* [2021] 3 WLUK 678, at [23], the test in the first condition set out in art.7(2) previously aligned with that in the second condition in art.7(3) (which provides for reasonable grounds to believe that the alleged offender named in the request has benefited from his criminal conduct), but the test in the first condition was substituted with the lower test of "reasonable grounds to suspect" by the Proceeds of Crime Act 2002 (External Requests and Orders) (Amendment) Order 2015, art.6. Although *Torzi* concerned the application of the second condition test of

"reasonable cause to believe", I said this (at [24]-[25]) about the correct approach to the tests for suspicion and belief in the conditions set out in art.7 of the 2005 Order:

> "24. Thus, the Explanatory Notes suggest the words "reasonable cause to believe" require the Court to apply the civil burden of proof (that is, the balance of probabilities) in evaluating the evidence to decide whether a defendant has benefited from criminal conduct. This approach differs markedly to the one taken by Lang J in *National Crime Agency v Baker* [2020] EWHC 822 (Admin), at [24] *et seq.*, where the court considered a similar test under s.362B(2)(a) of the 2002 Act ("reasonable cause to believe that… the respondent holds the property"). Lang J began with the distinction between belief and suspicion, before going on to adopt the reasoning set out by Lord Hughes in *Re Assets Recovery Agency (Jamaica)* (2015) 85 WIR 440, which disclaimed the need for any evidential standard of proof:
>
> > "24. … i) 'Belief and suspicion are not the same, though both are less than knowledge. Belief is a state of mind by which the person thinks that X is the case. Suspicion is a state of mind by which the person in question thinks that X may be the case.' (per Laws LJ in *A and Others v Secretary of State for the Home Department* [2004] EWCA Civ 1123 at [229]).
> >
> > ii) Belief is 'a more positive frame of mind than suspicion.' (R (Errington) v Metropolitan Police Authority [2006] EWHC 1155 Admin., per Collins J at [27]).
> >
> > 25. A test of 'reasonable cause to believe' is not the same as discharging a burden of proof, whether to the civil or criminal standard. But it does require objectively reasonable grounds for the stated belief. As Lord Hughes explained in *Re Assets Recovery Agency (Jamaica)* (2015) 85 WIR 440, at [19]:
> >
> > > 'Reasonable grounds for believing a primary fact, such as that the person under investigation has benefited from his criminal conduct, or has committed a money laundering offence, do not involve proving that he has done such a thing, whether to the criminal or civil standard of proof. The test is concerned not with proof but the existence of grounds (reasons) for believing (thinking) something, and with the reasonableness of those grounds. Debate about the standard of proof required, such as was to some extend conducted in the courts below, is inappropriate because the test does not ask for the primary fact to be proved. It only asks for the Applicant to show that it is believed to exist, and that there are objectively reasonable grounds for that belief.'
> >
> > 26. It is ultimately for the Court, not the NCA [the National Crime Agency, the applicant before Lang J], to determine whether there is 'reasonable cause to believe'."

> 25. I respectfully adopt the approach set out in the reasoning of Lang J and Lord Hughes, which, if I may say so, must be correct because the Court at this stage is not concerned with the proof of primary facts as it is in a trial of issue. It is, to the contrary, concerned with establishing whether reasonable grounds exist to believe something. So, shortly put, reasonable cause to believe a respondent has benefited from criminal conduct does not involve the finding of a fact to an evidential standard, but rather the existence of grounds for believing something, and the reasonableness of those grounds."

"Relevant property"

12. In determining whether art.7(2) is satisfied and whether the request is an external request within the meaning of the Proceeds of Crime Act 2002 (the **"2002 Act"**), the Court must have regard to the definitions in sub-ss.(1), (4) to (8) and (11) of s.447 of 2002 Act: see art.7(4) of the 2005 Order.

13. "Relevant property" is defined in s.447(7) of the 2002 Act as follows:

    > "Property is relevant property if there are reasonable grounds to believe that it may be needed to satisfy an external order which has been or which may be made."

    An "external order" is an order made by an overseas court where property is found or believed to have been obtained as a result of or in connection with "criminal conduct" which is for the recovery of specified property or a specified sum of money: s.447(2).

14. In general terms, the criminal conduct which must underpin the external order is subject to a dual criminality requirement: see s.447(8) of the 2002 Act. This means that the criminal conduct relied upon by the requesting state in the external request must be conduct which also constitutes an offence in any part of the United Kingdom or would constitute an offence in any part of the United Kingdom if it occurred there.

15. If either of the art.7 conditions is satisfied, art.8 gives the Court a power to make a restraint order prohibiting any specified person from dealing with relevant property which is identified in the request and specified in the order.

Article 9: variation or discharge

16. By art.9 of the 2005 Order, any person affected by the order may apply for it to be varied or discharged. Where an order is made under the first condition, the court must discharge the order if within a reasonable time proceedings for an offence have not started: see art.9(7).

External requests and Brexit

Pre-Brexit

17. Before 31 January 2020 (the date on which the United Kingdom withdrew from the European Union, pursuant to the European Union (Withdrawal) Act 2018 and the European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No.3) Regulations 2019, reg.2 (**"Brexit"**)), external requests from another EU member state (a **"Member State"**) for restraint orders over property in England and Wales were determined in

accordance with Part 2 of the Criminal Justice and Data Protection (Protocol No.36) Regulations 2014 (the **"2014 Regulations"**). The 2014 Regulations gave effect to the UK's EU treaty obligations by transposing the Freezing Orders Framework Decision 2003 (Council Framework Decision 2003/577/JHA) (the **"2003 Framework Decision"**) into domestic law.

18. Part 2 of the 2014 Regulations provided for the recognition and enforcement of external restraint orders made by the authorities in other Member States. The scheme was designed to be operated speedily and on the basis of mutual recognition and of confidence in the legality of decisions of fellow Member States. Recital (4) to the 2003 Framework Decision provided:

> "Cooperation between Member States, based on the principle of mutual recognition and immediate execution of judicial decisions, presupposes confidence that the decisions to be recognised and enforced will always be taken in compliance with the principles of legality, subsidiarity and proportionality."

19. Reflecting this, Article 5(1) of the 2003 Framework Decision (which is headed "Recognition and immediate execution") provided, in relevant part:

> "The competent judicial authorities of the executing state shall recognise a freezing order, transmitted in accordance with Article 4 , without any further formality being required and shall forthwith take the necessary measures for its immediate execution in the same way as for a freezing order made by an authority of the executing state, unless that authority decides to invoke one of the grounds for non-recognition or a non-execution provided for in Article 7 or one of the grounds for postponement provided for in Article 8."

20. By reg.9(5) of the 2014 Regulations, the Court could decline to give effect to an external restraint order only if in its opinion it would be impossible as a consequence of an immunity under the law of England and Wales, or incompatible with Convention rights within the meaning of the Human Rights Act 1998. On an application by a person affected, the Court could cancel the registration or vary the property to which the order applied but, by reg.10(6):

> "No challenge to the substantive reasons in relation to which an overseas restraint order has been made by an appropriate court or authority in a member State may be considered by the court".

Post-Brexit

21. Following Brexit, the position is less than straightforward and requires a very careful analysis of the TCA and its domestic implementation within the United Kingdom. I was told by counsel that there is no authoritative statement from this or any other UK court on the point at least insofar as external requests for freezing or provisional measures under Title XI of the TCA are concerned. I acknowledge the very helpful assistance provided by counsel on the post-Brexit position in their skeleton arguments and in argument before me.

22. The starting point for such an analysis is the repeal of the 2014 Regulations. The 2014 Regulations were repealed when the transition period ended on 31 December 2020. On

30 December 2020, the UK and the EU agreed the TCA. Recitals 23 and 24 of the TCA touch upon the object and purpose of the agreement:

> "23. CONSIDERING that cooperation between the United Kingdom and the Union relating to the prevention, investigation, detection or prosecution of criminal offences and to the execution of criminal penalties, including the safeguarding against and prevention of threats to public security, will enable the security of the United Kingdom and the Union to be strengthened,
>
> 24. DESIRING that an agreement is concluded between the United Kingdom and the Union to provide a legal base for such cooperation".

23. The TCA came into force on 1 May 2021, having been provisionally applied from 1 January 2021, the day after the end of the Brexit transition period.

24. The TCA does not have direct effect in domestic law. Parliament, however, implemented the TCA by the European Union (Future Relationship) Act 2020 (the **"2020 Act"**), which received Royal assent on 31 December 2020 immediately before the expiry of the transition period. Part 3 of the 2020 Act covers general implementation. It creates broad powers for HM Government to make regulations to implement the TCA. Where there are gaps, s.29 of the 2020 Act seeks to fill the space. It provides:

> "(1) Existing domestic law has effect on and after the relevant day with such modifications as are required for the purposes of implementing in that law the Trade and Cooperation Agreement or the Security of Classified Information Agreement so far as the agreement concerned is not otherwise so implemented and so far as such implementation is necessary for the purposes of complying with the international obligations of the United Kingdom under the agreement."

25. Thus, by s.29 of the 2020 Act existing domestic law is modified to ensure the UK is complying with its obligations under the TCA, and courts must treat relevant domestic law as if it has been amended by the TCA. By s.30 of the 2020 Act, a court must have regard to Article 4 of the TCA when interpreting provisions of the TCA. Article 4 directs that provisions of the TCA must be interpreted in light of the object and purpose of the agreement.

26. Part Three of the TCA concerns "law enforcement and judicial cooperation in criminal matters". The objective of Part Three is set out in Article 522 as follows:

> "1. The objective of this Part is to provide for law enforcement and judicial cooperation between the Member States and Union institutions, bodies, offices and agencies, on the one side, and the United Kingdom, on the other side, in relation to the prevention, investigation, detection and prosecution of criminal offences and the prevention of and fight against money laundering and financing of terrorism.
>
> 2. This Part only applies to law enforcement and judicial cooperation in criminal matters taking place exclusively between the United Kingdom, on the one side, and the Union and the Member States, on the other side. It does not apply to situations arising between the Member States, or between Member States and Union institutions, bodies, offices and agencies, nor does it apply to the activities

of authorities with responsibilities for safeguarding national security when acting in that field."

27. Title XI to Part Three of the TCA applies to "Freezing and Confiscation", and largely adopts the regime set out in the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.198). The objectives and principles of cooperation are set out in Article 656 of the TCA:

> "1. The objective of this Title is to provide for cooperation between the United Kingdom, on the one side, and the Member States, on the other side, to the widest extent possible for the purposes of investigations and proceedings aimed at the freezing of property with a view to subsequent confiscation thereof and investigations and proceedings aimed at the confiscation of property within the framework of proceedings in criminal matters. This does not preclude other cooperation pursuant to Article 665(5) and (6). This Title also provides for cooperation with Union bodies designated by the Union for the purposes of this Title.
>
> 2. Each State shall comply, under the conditions provided for in this Title, with requests from another State:
>
> (a) for the confiscation of specific items of property, as well as for the confiscation of proceeds consisting in a requirement to pay a sum of money corresponding to the value of proceeds;
>
> (b) for investigative assistance and provisional measures with a view to either form of confiscation referred to in point (a).
>
> 3. Investigative assistance and provisional measures sought under point (b) of paragraph 2 shall be carried out as permitted by and in accordance with the domestic law of the requested State. Where the request concerning one of these measures specifies formalities or procedures which are necessary under the domestic law of the requesting State, even if unfamiliar to the requested State, the latter shall comply with such requests to the extent that the action sought is not contrary to the fundamental principles of its domestic law.
>
> 4. The requested State shall ensure that the requests coming from another State to identify, trace, freeze or seize the proceeds and instrumentalities, receive the same priority as those made in the framework of domestic procedures.
>
> 5. When requesting confiscation, investigative assistance and provisional measures for the purposes of confiscation, the requesting State shall ensure that the principles of necessity and proportionality are respected.
>
> …"

28. Article 658 of the TCA provides:

> "The States shall afford each other, upon request, the widest possible measure of assistance in the identification and tracing of instrumentalities, proceeds and other property liable to confiscation. Such assistance shall include any measure

providing and securing evidence as to the existence, location or movement, nature, legal status or value of those instrumentalities, proceeds or other property."

29. Article 656(5) requires the requesting state to observe the principles of "necessity and proportionality" in requesting provisional measures for the purposes of confiscation such freezing orders. That obligation, however, must be read subject to Article 689(2), which prohibits any party from challenging the substantive reasons for requested measures under Articles 663 to 666 (*e.g.*, the taking of provisional measures such as freezing orders, in Article 663) in a court in the requested State. I deal with this aspect in greater detail below. Article 658 requires the United Kingdom to afford the requesting State the widest possible measure of assistance in identifying and tracing of property liable to confiscation, including any measure providing and securing evidence as to the existence, location or movement, or value of such property.

30. The Applicants submit that Article 658 does not extend any obligation in respect of provisional measures such as freezing orders, but I do not accept that interpretation: it seeks to limit the wider words of the first sentence in Article 658 to the provisions in the second sentence. The second sentence is intended to add to the scope of the first sentence, whose meaning in and of itself clearly includes "the widest possible measure of assistance in the … tracing of … proceeds and other property liable to confiscation". In my judgment, those words clearly include freezing orders, which by their nature assist in the tracing of proceeds and other property liable to confiscation.

31. From all this it follows that the 2005 Order has effect as modified by Title XI of the TCA in respect of external requests received from a Member State.

32. Article 663 of the TCA establishes an "Obligation to take provisional measures":

> "1. At the request of another State which has instituted a criminal investigation or proceedings, or an investigation or proceedings for the purposes of confiscation, the requested State shall take the necessary provisional measures, such as freezing or seizing, to prevent any dealing in, transfer or disposal of property which, at a later stage, may be the subject of a request for confiscation or which might satisfy the request.
>
> …
>
> 3. Where a request is received under this Article, the requested State shall take all necessary measures to comply with the request without delay and with the same speed and priority as for a similar domestic case and send confirmation without delay and by any means of producing a written record to the requesting State.
>
> 4. Where the requesting State states that immediate freezing is necessary since there are legitimate grounds to believe that the property in question will immediately be removed or destroyed, the requested State shall take all necessary measures to comply with the request within 96 hours of receiving the request and send confirmation to the requesting State by any means of producing a written record and without delay."

33. "Freezing" and "property" are defined in Article 657.

34. Article 670 limits the grounds for refusal of an external request under Title XI:

> "1. Cooperation under this Title may be refused if:
>
> > (a) the requested State considers that executing the request would be contrary to the principle of *ne bis in idem*; or
> >
> > (b) the offence to which the request relates does not constitute an offence under the domestic law of the requested State if committed within its jurisdiction; however, this ground for refusal applies to cooperation under Articles 658 to 662 only in so far as the assistance sought involves coercive action."

I pause to note that reference here to the principle of *ne bis in idem* (literally "not twice in the same [thing]"; Article 670(2) refers to it as the principle of double criminality) derives from Article 7(1)(c) of the 2003 Framework Decision and a materially identical provision in the 2014 Regulations. Its equivalent in English law is the well-known double jeopardy principle. Article 670 continues:

> "2. The United Kingdom and the Union, acting on behalf of any of its Member States, may each notify the Specialised Committee on Law Enforcement and Judicial Cooperation that, on the basis of reciprocity, the condition of double criminality referred to in point (b) of paragraph 1 of this Article will not be applied provided that the offence giving rise to the request is:
>
> > (a) one of the offences listed in Article 599(5), as defined by the law of the requesting State; and
> >
> > (b) punishable by the requesting State by a custodial sentence or a detention order for a maximum period of at least three years."

35. The offences listed in Article 599(5) are those set out at part 3 of Section E of the prescribed form, and include "*participation in a criminal organisation*", "*illicit trafficking in narcotic drugs and psychotropic substances*", and "*laundering of the proceeds of crime*". Article 670 is only engaged where the UK and the requesting State have notified the Specialised Committee on Law Enforcement and Judicial Cooperation that, on the basis of reciprocity, the condition of double criminality referred to in Article 670(2) will not be applied. Both the UK and Poland have so notified the Specialist Committee in respect of the offences that are set out in section E.3 of the form prescribed by Article 678 (as to which I shall come shortly). It follows that the "double criminality" provision in s.447(8) of the 2002 Act is modified by s.29 of the 2020 Act (*i.e.,* to ensure the UK is complying with its obligations under the TCA) in respect of the listed offences, such that an external request made under Title XI of the TCA cannot be refused on the grounds of double criminality, but it must still satisfy the double criminality requirement in s.447(8). Having made those findings, I turn to consider the framework behind Articles 663, 675 and 689 of the TCA.

36. Article 675 of the TCA requires domestic courts when dealing with requests Article 663 to recognise any decision issued by a judicial authority taken in the requesting State regarding rights claimed by third parties. Article 678 requires requests for assistance under Article 663 be made using the prescribed form. The court in the receiving State

obtains no evidence on the substantive grounds beyond that set out in the prescribed form issued by the requesting State.

37. Importantly, Article 689(1) requires that:

> "Each State shall ensure that persons affected by measures under Articles 663 to 666 have effective legal remedies in order to preserve their rights".

However, by Article 689(2):

> "The substantive reasons for requested measures under Articles 663 to 666 shall not be challenged before a court in the requested State."

38. By way of comparison, before its repeal reg.10(6) of the 2014 Regulations (see [20] above) made very similar provision. The parties' intention in drafting Article 689(2) appears to have been to maintain the position enacted by implementing the Framework Decision 2003 through reg.10(6) of the 2014 Regulations. Regulation 10(6) of the 2014 Regulations was the subject of judicial consideration in *A v Director of Public Prosecutions* [2017] 1 WLR 713, where Davis LJ (giving the judgment of the Court of Appeal) said (at [61]):

> "The fundamental point remains that, in this context of overseas restraint orders, it is for the courts of the issuing state to deal with such arguments as these: *not* the courts of the executing state. Accordingly for the future Crown Court judges in England and Wales should refuse to entertain evidence or arguments on the part of persons against whom an overseas restraint order has been made which, when analysed, can be seen to be directed at the substantive basis for making the initial restraint order. Such an application should be directed towards the court of the issuing state if it is desired to pursue such arguments."

Davis LJ went on to say this, at [66]:

> "We were told that this is the first occasion on which an appeal against an order made by the Crown Court under the 2014 Regulations has come before this court. It may be that cases raising the principle of ne bis in idem in the overseas restraint order context will not be that common. However, this case also does highlight, among other things, the importance of having regard to and giving effect to the provisions of regulation 10(6), set in the context of the [2003 Framework Decision] itself. For those reasons, we give leave for this decision to refuse this application hereafter to be cited."

39. The Applicants submit that Article 663(1) permits the Court to entertain a challenge to an external request for a freezing order on the ground that the request extends beyond the amount of any confiscation order that the Polish authorities will be able to seek, such that it is not necessary or proportionate as Article 656(5) requires. I cannot, however, accept this submission, because Article 689(2) prohibits any challenge before this Court of the substantive reasons for a requested measure. Any challenge can only be made in Poland, because Article 656(5) imposes the requirement for necessity and proportionality on the requesting State. Such a challenge has, in fact, already been made by the First Applicant in Poland, albeit unsuccessfully as I noted at [4] above. If the Applicants' construction of Article 689(2) is as they now say, it begs the question why the First Applicant mounted

his unsuccessful challenge in the Polish courts to the Regional Public Prosecutor's decisions to freeze the Payward Accounts. In my judgment, the requirement in Article 663(1) is satisfied provided the external request states that the property to be frozen may "at a later stage" be the subject of a request for confiscation. In making such a request, it is Poland as the requesting State (*cf.* the UK as the receiving State) which must by Article 656(5) ensure that the principles of necessity and proportionality are respected. The provisions of Article 664 lend no assistance to the Applicants in their construction of Article 663(1), as the disclosure obligations created by that article are limited to "information sought which may question or modify the extent" of a freezing order sought by the requesting State from the receiving State: those are State-level obligations, and do not extend to animate any challenge by the Applicants outside of Article 689(2).

40. Nor does the placement of Article 689(2) at the tail end of Title XI assist the Applicants as they say it should by limiting its application to the damages provisions in Article 688. The words of Article 689(2) are perfectly clear and are not limited in any way to the remedies provided in Article 688 simply by proximity to that article. As I mentioned, the words in Article 689(2) closely follow words in reg.10(6) of the 2014 Regulations. Had the TCA parties intended those words to have the narrow construction proffered by the Applicants, I am in no doubt that they would have so provided. Such a narrow construction is inconsistent with the established principles for the interpretation of international instruments, which require a purposive construction: see *A v Director of Public Prosecutions*, at [14].

41. In any event, s.30 of the 2020 Act requires the Court to have regard to Article 4 of the TCA when interpreting the provisions of the TCA. Article 4 of the TCA directs that provisions of the TCA must be interpreted in light of the object and purpose of the TCA in accordance with customary rules of interpretation of public international law. In my judgment, it follows that the prohibition on challenges to the "substantive reasons for the requested measures" should not be limited to challenges to *e.g.* the motives of the Regional Public Prosecutor.

42. The effect of s.29 of the 2020 Act means that Article 689(2) is to be treated as a limitation to art.9(4) of the 2005 Order. Section 29 does not modify existing law that is already consistent with the TCA, but in the case of any doubt as to this the terms of the TCA take automatic effect: see *Heathrow Airport Limited v HM Treasury* [2021] EWCA Civ 783, at [230] per Green LJ. Since there is no such limitation in art.9(4) of the 2005 Order, then in relation to requests from Member States the limitation imposed by Article 689(2) must be applied.

43. It is for all those reasons that the TCA prohibits the Court from considering the substantive reasons of the matter, as defined by the Respondent, and I answer the first issue accordingly.

Summary of the current position

44. Having made those findings, and pulling all the threads together, to sum up the current position as I have outlined the post-Brexit position above, the correct interpretation of the TCA requires the United Kingdom to:

(1) cooperate to the widest extent possible for the purposes of proceedings aimed at the freezing of property with a view to subsequent confiscation thereof (Article 656(1));

(2) carry out the provisional measures sought as permitted by and in accordance with its domestic law (Article 656(3));

(3) take the necessary provisional measures, such as freezing or seizing, to prevent any dealing in, transfer or disposal of property which, at a later stage, may be the subject of a request for confiscation or which might satisfy the request (Article 663(1));

(4) use the form prescribed when requesting assistance under art.663 (Article 678);

(5) ensure that persons affected by protective measures have effective legal remedies in order to preserve their rights (Article 689(1));

(6) not permit any challenge before a court of the substantive reasons for requested measures (Article 689(2)); and

(5) treat the 2005 Order as if it has been amended so as to implement the requirements of Title XI to Part Three of the TCA.

45. I turn next to consider the Applicants' grounds against that framework.

Ground (i)

46. The Applicants submit that the property restrained is not "relevant property", because the test in s.447 of the 2002 Act is not made out. No challenge is otherwise made to the first condition test set out in art.7(2) of the 2005 Order, and so I do not consider the test beyond this point.

47. Property is "relevant property" if there are reasonable grounds to believe that it may be needed to satisfy an external order which has been or which may be made: see s.447(7) of the 2002 Act. An "external order" is an order made by an overseas court where property is found or believed to have been obtained as a result of or in connection with "criminal conduct" which is for the recovery of specified property or a specified sum of money: s.447(2). The "criminal conduct" which must underpin the "external order" is subject to a dual criminality requirement, such that the criminal conduct relied upon here by Poland must be conduct which also constitutes an offence in any part of the United Kingdom or would constitute an offence in any part of the United Kingdom if it occurred there: see s.447(8).

48. The offences relied upon by the Polish authorities in the External Requests are set out at part 3 of Section E of the prescribed form, and include "*participation in a criminal organisation*", "*illicit trafficking in narcotic drugs and psychotropic substances*" (although it appears that the box immediately below for "*illicit trafficking in weapons, munitions and explosives*" was checked in error, at least in the translation provided in the hearing bundle) , and "*laundering of the proceeds of crime*". Article 670 is only engaged where the UK and the requesting State have notified the Specialised Committee on Law Enforcement and Judicial Cooperation that, on the basis of reciprocity, the condition of double criminality referred to in Article 670(2) will not be applied. As I mentioned at

[35] above, both the UK and Poland have so notified in respect of the offences that are set out in section E.3 of the form prescribed by Article 678.

49. The Applicants do not take issue with the dual criminality requirement for "*laundering the proceeds of crime*" in and of itself, which has its equivalents in the offences created in ss.327 to 329 of the 2002 Act. They do, however, point out that the proceeds laundered must be the proceeds of crime, and that requirement cannot be met if there is no underlying crime upon which the laundering offences are predicate. They make the same points to the requirement for "*participation in a criminal organisation*" (which they concede would amount to conspiracy to commit a substantive offence or participation in a substantive offence), *i.e.* that that underlying conduct itself must satisfy the requirement of dual criminality. Thus, they say, it is the predicate offence of "*illicit trafficking in narcotic drugs and psychotropic substances*" which must first satisfy the dual criminality test. Before I turn to consider that issue, it is helpful to set out the alleged offences as they were put in the External Requests.

50. In her First Witness Statement dated 8 November 2021, Jenny Bordley of the Crown Prosecution Service sets out the basis for the First Request, in that it followed a freezing order made in Poland by the Regional Public Prosecutor, and that it was apparent from the request that proceedings for an offence have been started in Poland and not concluded (although that was an inaccurate statement of the true position, in that only a criminal investigation had been started). As I have already found, the substantive grounds for the freezing order – which meets the definition of "external order" as set out in s.447(2) of the 2002 Act – cannot be challenged in this Court. That extends to the benefit figure put forward by the Polish authorities which, if challenged by the Applicants, must be challenged in the Polish courts. At [15] in her First Witness Statement, Ms Bordley identifies the property to be restrained:

> "*The property consists of cryptocurrency funds held by the* [First Applicant] *in accounts with the London subsidiary of Kraken Exchange, namely Payward Limited. According to Company* [sic] *House records, the registered address of this company is 6th Floor, One London Wall, London, EC2Y 5EB. The thing in action represented by that account is therefore property located in England and Wales.*"

Pausing there, I do not think it necessarily follows that, simply because Payward Limited is a company registered in England and Wales, the chooses in action which represent Payward Accounts is property in England and Wales. I can reasonably infer that it is, given Payward Limited's registered address in London. No challenge is made on that issue, however, so I do not consider it further. Ms Bordley goes on to say (at [16]):

> "*The conduct alleged in Section E of the Request would constitute the offence of supply of a psychoactive substance and offering to supply psychoactive substance (s.5 Psychoactive Substances Act 2016) and Money Laundering if it occurred in England and Wales and is therefore criminal conduct within the meaning of article 7 of the 2005 Order, as defined by section 477(8) of the 2002 Act.*"

51. The External Requests set out three provisions of the Polish Penal Code as the criminal offences to which the requests relate: Article 165, and Articles 258 and 299. Articles 258 and 299 are said to relate to the offences of "*participation in a criminal organisation*" and "*laundering the proceeds of crime*". Article 165(1) of the Polish Penal Code is said

to relate to "*illicit trafficking in narcotic drugs and psychotropic substances*". It provides that:

> "Whoever causes danger to the life or health of many persons or property of a considerable value by:
>
> …
>
> (2) producing or marketing substances, foodstuffs or other commonly used goods harmful to health or pharmaceutical preparations which do not conform to binding quality standards,
>
> …
>
> (5) acting in another manner in especially dangerous circumstances,
>
> shall be subject to the penalty of the deprivation of liberty for a term of between 6 months and 8 years."

52. Section 5 of the Psychoactive Substances Act 2016 (the **"2016 Act"**) creates the offences of supplying, or offering to supply, a psychoactive substance. It provides as follows:

> "(1) A person commits an offence if—
>
> > (a) the person intentionally supplies a substance to another person,
> >
> > (b) the substance is a psychoactive substance,
> >
> > (c) the person knows or suspects, or ought to know or suspect, that the substance is a psychoactive substance, and
> >
> > (d) the person knows, or is reckless as to whether, the psychoactive substance is likely to be consumed by the person to whom it is supplied, or by some other person, for its psychoactive effects.
>
> (2) A person ('P') commits an offence if—
>
> > (a) P offers to supply a psychoactive substance to another person ('R'), and
> >
> > (b) P knows or is reckless as to whether R, or some other person, would, if P supplied a substance to R in accordance with the offer, be likely to consume the substance for its psychoactive effects.
>
> (3) For the purposes of subsection (2)(b), the reference to a substance's psychoactive effects includes a reference to the psychoactive effects which the substance would have if it were the substance which P had offered to supply to R.
>
> (4) This section is subject to section 11 (exceptions to offences)."

A person convicted on indictment of an offence contrary to s.5 is liable to imprisonment for a term not exceeding 7 years or a fine, or both: see s.10 of the 2016 Act.

53. The Applicants submit that Article 165 has no equivalent in the United Kingdom, such that the requirements of s.447(8) are not met. No point is taken on the timing of the alleged offending in Poland, or the enactment in the United Kingdom of any equivalent offence there. I note that, in any event, the Polish authorities have confirmed the alleged sale of psychoactive substances by the Applicants and the entities linked to them took place both before and after 21 August 2018, when the Polish Act on Counteracting Drug Addition was amended, and that the offending alleged before that date was prosecuted under Article 165 of the Penal Code. The Polish authorities have also confirmed that the Applicants' alleged trading in psychoactive substances spans from the beginning of 2016 to the end of 2021, such that, other than the first few months of 2016 prior to the coming into force of the 2016 Act, the dealing in psychoactive substances was also unlawful in England and Wales.

54. For those reasons, I am satisfied that:

    (a) the dual criminality requirement is met; and

    (b) the restrained property is therefore "relevant property" within the meaning of s.447 of the 2002 Act,

    and I answer the second and third issues accordingly.

55. This ground therefore fails in its entirety.

Ground (ii)

56. The second ground relied upon by the Applicants is delay. They submit that, given the Restraint Orders were made on 11 November 2021, the Court should discharge the Restraint Orders under art.9 of the 2005 Order because of the time which has passed since the orders were first made. Alternatively, the Applicants submit that the Court should now have regard to the passage of time in its assessment of the position set out in Ground (i) above.

57. By art.8(4B)(b) the court must discharge a restraint order made under the first condition in art.7(2) if proceedings for an offence are not started within a reasonable time. The applicable principles are explained in *R v S* [2019] EWCA Crim 1728, at [38]-[40] per Davis LJ (giving the judgment of the Court of Appeal), where the Court considered the equivalent provision to art.8(4B)(b) in s.42(7) of the 2002 Act:

> "38. Overall, therefore, s.42(7) is to be read without any gloss. It is then for the court to decide, having regard to all the circumstances of the particular case, whether or not the proceedings have been started within a reasonable time.
>
> 39. Just what those circumstances are, and the weight to be ascribed to them, will necessarily vary from case to case. It is not possible to identify by way of exhaustive list just what the relevant circumstances will be in every case. But in the ordinary way, we suggest, the following, in no particular order, at least will usually be likely to be relevant (there may of course, we stress, be others in any given case) where s.42(7) is under consideration:
>
> (1) The length of time that has elapsed since the Restraint Order was made;

> (2) The reasons and explanations advanced for such lapse of time;
>
> (3) The length (and depth) of the investigation before the Restraint Order was made;
>
> (4) The nature and extent of the Restraint Order made;
>
> (5) The nature and complexity of the investigation and of the potential proceedings;
>
> (6) The degree of assistance or of obstruction to the investigation.
>
> 40. It is the obligation of the judge to evaluate all the relevant circumstances of the particular case in reaching his or her judgment as to whether or not proceedings have been started within a reasonable time. If they are adjudged not to have been started within a reasonable time then the Restraint Order must be discharged; and accordingly the consequences flowing from such discharge are then irrelevant."

What is noteworthy, however, from this passage in *R v S* is that it does not impose a requirement on prosecuting authorities to act as rapidly as possible or to act expeditiously. The test imposed by art.8(4B)(2) is whether the time taken to charge the alleged offenders (or not charge) is reasonable or, to use the words of the article, "if proceedings for the offence are not started within a reasonable time".

58. In considering whether the "reasonable time" test is met, the Court should not "shut its eyes to the practical realities of litigious life": see *R v S*, at [34], quoting from Lord Bingham's opinion delivered in the Privy Council case of *Dyer v Watson* [2004] 1 AC 379. That was a case of alleged delay in bringing a matter on to trial after charges had been laid such that a breach of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms was asserted. Speaking in the context of that case and of Article 6(1) considerations, Lord Bingham said (at [55]):

> "… It is plain that contracting states cannot blame unacceptable delays on a general want of prosecutors or judges or courthouses or on chronic under-funding of the legal system. It is, generally speaking, incumbent on contracting states so to organise their legal systems as to ensure that the reasonable time requirement is honoured. But nothing in the Convention jurisprudence requires courts to shut their eyes to the practical realities of litigious life even in a reasonably well-organised legal system. Thus it is not objectionable for a prosecutor to deal with cases according to what he reasonably regards as their priority, so as to achieve an orderly dispatch of business. It must be accepted that a prosecutor cannot ordinarily devote his whole time and attention to a single case. Courts are entitled to draw up their lists of cases for trial some time in advance. It may be necessary to await the availability of a judge possessing a special expertise, or the availability of a courthouse with special facilities or security. Plans may be disrupted by unexpected illness. The pressure on a court may be increased by a sudden and unforeseen surge of business. There is no general obligation on a prosecutor, such as that imposed on a prosecutor seeking to extend a custody time limit under section 22(3)(b) of the Prosecution of Offences Act 1985, to show that he has acted 'with all due diligence and expedition'. But a marked lack of expedition, if unjustified,

> will point towards a breach of the reasonable time requirement, and the authorities make clear that while, for purposes of the reasonable time requirement, time runs from the date when the defendant is charged, the passage of any considerable period of time before charge may call for greater than normal expedition thereafter."

Moreover, since the investigation is being conducted in another jurisdiction, the Court should give due weight to information provided by the prosecutor as regards the progress of the investigation and the reasons for any delay in charging any of the suspects.

59. The Regional Public Prosecutor has reported twice on the progress of the investigations, as set out in the Ms Bordley's Fourth Witness Statement dated 15 November 2022 and her Fifth Witness Statement dated 12 May 2023, in compliance with the variation to the Restraint Orders on 24 May 2022 by His Honour Judge Bartle KC, which imposed a six-monthly reporting requirement pursuant to art.8(4B)(a) of the 2005 Order. In her Fifth Witness Statement, Ms Bordley exhibits the most recent update from the Prosecutor, dated 19 April 2023, which mentions the work underway to gather additional evidence to support the offences alleged against the Applicants. That work, it is said, will enable the issue of European Arrest Warrants for the arrest of the First and Second Applicants, and that, given the principle of specialty[1], it would be premature to formulate motions for the issuance of such warrants before the formulation of the final charges. The Prosecutor further explains – and I accept, for the time being – that this is a time-consuming process, especially given that much of the evidence sought by the Prosecutor is outside of Poland.

60. Taking into account the factors identified by Davis LJ in *R v S* at [39], I am not satisfied that the "reasonable time" threshold has been breached. In the circumstances of this case, the length of time which has passed since the Restraint Orders were made (just under 18 months as at the date this Application was made) is not such so as to give cause to discharge the orders on the grounds of delay. I accept that the work being undertaken by the Regional Public Prosectuor is time consuming. Although I am not told about the length and full extent of the Prosecutor's investigations before making the freezing order in October 2021, I accept that much of the evidence being sought in the investigation is outside Poland and has required the assistance of the authorities in the Netherlands and in Germany through European Investigation Orders, and that the investigation as a whole is a complex one. While the Applicants appear to have offered some assistance to the Polish authorities through their lawyers, they do not appear to be willing to return to Poland to assist the Polish authorities with the investigation.

61. I answer the fifth issue accordingly. The primary basis for this ground therefore fails.

62. Insofar as the alternative basis is put, that presents a collateral attack in this jurisdiction upon substantive grounds relied upon by the Polish authorities. That, as I have said, is not permitted by Article 689(2). The alternative basis also fails for this reason.

[1] A principle of international law in the extradition of persons between States which prohibits a person extradited from being prosecuted or punished for matters in the requesting State other than those for which they were extradited.

Ground (iii)

63. Thirdly, the Applicants submit that the Restraint Orders were wrongly extended by His Honour Judge Grieve KC and His Honour Judge Bartle KC on an incorrect interpretation of the law, *i.e.* on the basis that the Court was not able to consider the substantive reasons for making an order.

64. I need not rehearse the analysis which I made above, but for those reasons this ground too must fail.

Ground (v)

65. Lastly, the Applicants submit that the Respondent provided the Court with incomplete or historic, incorrect or misleading information as to the status of related investigations being conducted in, respectively, the Netherlands and in Germany, which may have given unwarranted support to the Respondent's application for the Restraint Orders.

66. In support of this submission, the Applicants rely upon the facts and matters set out in the Second Witness of James Mullion dated 26 May 2023. The upshot of Mr Mullion's evidence is that the authorities in the Netherlands and in Germany have concluded their investigations on the basis that the evidence they have does not support any charge under the law of either of those countries.

Disclosure

67. The Applicants sought disclosure by the Respondent of a number of matters set out in their solicitors' letter dated 20 March 2023. Those matters included whether there were related prosecutions in the Netherlands and Germany, or whether investigations in those countries had been discontinued; whether there was evidence of the Model Art shops' turnover for the sales of the psychoactive substances alleged, and the transfer of the proceeds of any such sales of those substances; and whether there was any evidence of online sales into Poland. To that enquiry, the Respondent responded as follows:

> "*Part 2 of the* [2005 Order] *makes provision for giving effect in England and Wales to external requests in connection with criminal investigations or proceedings and to external orders arising from such proceedings.*
>
> *Once a request has been referred pursuant to art.6, the* [Respondent] *may apply to the Crown Court under art.7 for a restraint order. The Crown Court has jurisdiction under art.8 to make such an order provided one of the two conditions is met.*
>
> *In determining whether the conditions are satisfied and whether the request is an external request within the meaning of the Act, the Court must have regard to the definitions in subs.(1), (4) to (8), and (11) of s.447* [of the 2002 Act]. *When an application is made for a restraint order pursuant to art.8 of the 2005 Order, the general rule is that, unless the Crown Court orders otherwise, any fact which needs to be proved in restraint proceedings or receivership proceedings by the evidence of a witness is to be proved by their evidence in writing:* [Crim.PR r.33.37].

Here, the Court was satisfied on the evidence presented that the statutory conditions were met. In the event that an application to discharge the orders is made, the [Respondent] *reserves the right to file further evidence in response.*"

68. There is no express provision for disclosure in the 2005 Order. In domestic restraint or receivership proceedings, Crim.PR r.33.40 provides for disclosure only where, in the course of restraint proceedings or receivership proceedings, an issue arises as to whether property is realisable property. The term "realisable property" relates solely to Part 2 of the 2002 Act; it is defined by s.83 as follows:

"Realisable property is—

(a) any free property held by the defendant;

(b) any free property held by the recipient of a tainted gift."

69. Whether property is "realisable property" in this context has nothing to do with the conditions in art.7 of the 2005 Order. For that reason, I do not consider Crim.PR r.33.40 has any application in these proceedings, notwithstanding Crim.PR. r.33.12. It cannot, *e.g.*, be used to create an obligation to answer interrogatories about relevant property as defined by s.447(7) of the 2002 Act.

70. While Article 664 of the TCA requires the requesting State spontaneously to provide all information which may question or modify the extent (*e.g.*, a freezing order) and all complementary information required by the requested State which is necessary "for the implementation of and follow-up to the provisional measures", it does not give rise to a free-standing obligation to provide answers or information demanded by the individuals under investigation. As I said at [39] above, those are State-level obligations. They do not impose any disclosure regime domestically.

71. On an application to discharge a restraint order under art.9 of the 2005 Order, the correct approach is for the Court to determine whether the conditions in art.7 are still met: *i.e.*, has relevant property (*i.e.*, property that there are reasonable grounds to believe may be needed to satisfy, *e.g.*, a Polish confiscation order) been identified; (and, so far as the first condition in art.7(2) goes) has a criminal investigation started, and are there reasonable grounds to suspect that the alleged offender has benefited from his criminal conduct. In considering these matters, the Court must consider the material set out in the External Requests and any additional information provided by the requesting State, but it must not entertain any challenge to the substantive reasons for requested measures, which is prohibited under Article 689(2) of the TCA. Only if, on the material available at the time of the hearing, the answer is to statutory questions "no" should the restraint order be discharged.

72. At the hearing on 21 July 2023 the Respondent relied upon a letter from the Regional Public Prosectuor dated 22 June 2023, which sought to answer the criticisms about the lack of disclosure which had been made about the position in the Netherlands and in Germany. In her letter, the Prosecutor makes the point that, although proceedings against the First and Second Applicants in the Netherlands and in Germany have not been pursued, this was because:

(a) the First and Second Applicants did not import illegal substances from China and India into the Netherlands with a view to placing them into the market in those countries: the final destinations for those substances was, in fact, Poland and other countries within the EU. She cites a number of consignment notes and other documents which show that Poland is the final destination of these substances within the EU;

(b) enquiries with the German authorities remain underway, albeit that no money laundering investigation is being continued by the German authorities; and

(c) the real source of the Applicants' criminal proceeds is the marketing and sale of psychoactive substances in Poland.

The Prosecutor also points out that the evidence produced by the First and Second Applicants to show permanent residence in the Netherlands dates from March 2023 to May 2023, after she had taken steps to freeze the Payward Accounts in this country. Other evidence to which she refers points to the First Applicant using an address in Spain, and the Second Applicant using an address in Germany, and to them holding bank accounts in the Czech Republic. I have also considered the facts and matters set out in the Witness Statement of Pawel Murawski dated 17 July 2023 regarding the First and Second Applicants' permanent residence in the Netherlands, much of which relates to proceedings in Poland concerning local court orders for the First and Second Applicant's pre-trial detention and which remain under appeal.

73. There is, as I mentioned, no statutory right or procedural rule upon which the Applicants can rely to seek disclosure from the Respondent in these proceedings. Having considered all the evidence, including the First to Fourth Witness Statements of Mr Mullion and the Witness Statement of Mr Murawski, I do not consider there is anything in that material which casts sufficient doubt on the tests in the first condition in art.7(2) being met. More particularly, having considered all the evidence, I am satisfied that there are reasonable grounds to suspect that the Applicants have benefited from their criminal conduct.

Non-disclosure

74. In *Torzi v Director of Public Prosecutions* I set out at [38] to [43] the requirement for an applicant to give full and frank disclosure of all material facts in restraint applications made without notice to a respondent.

75. The Applicants' complaints about non-disclosure are twofold: first, the amount of benefit alleged in the External Requests (put shortly, that there is an absence of evidence as to the fact and extent of criminal benefit), and, secondly, the position taken by the authorities in the Netherlands and in Germany.

76. Turning first to the benefit argument, the External Requests refer to a benefit amount of not less than PLN 100M on the basis that the funds transferred to the Payward Accounts match this sum (in USD). Having considered the matters set out in Section E of the prescribed form, in my view they provide substantial grounds to suspect that the Applicants benefited from the conduct alleged and that the funds in the Payward Accounts are part of that benefit. Indeed, that part of the form concludes with these words:

> "*... there is a high probability that the funds* [in the Payward Accounts] *... originate from the profits generated as a result of the criminal activity conducted by* [the First and Second Applicants] *i.e. production and marketing of new psychoactive substances. Therefore there are grounds for continuation of freezing the funds deposited in* [the accounts] *... because the funds may be subject to forfeiture at the later stage of the proceedings*."

And, in the Second Request, it is said that:

> "*The amount of the benefit was estimated to a minimum of 100,000,000 PLN, on the basis of the documentation concerning the operation of the legal highs shops and the testimony of some of the suspects who described the scale of the profits made from illegal activity. The above amount of the possible material benefit is, however, underestimated.*"

For those reasons, and for the reasons which I have given in Ground (i), I am satisfied that, at the time the Restraint Orders were made, there were reasonable grounds to believe that the property may be needed to satisfy an external order which may be made. I do not see how the Applicants' submission that there is an absence of evidence as to the fact and extent of criminal benefit (or, indeed, that there has been non-disclosure by the Respondent about it) can be sustained in this light.

77. Insofar as the position taken by the authorities in the Netherlands and in Germany, the Regional Public Prosecutor has explained the position in her letter dated 22 June 2023, as I have already set out above, and I do not see how it can be said that the position set out in the External Requests in the applications for the Restraint Orders without notice mispresented the position as it then was. Once the applications and the Restraint Orders were made, however, the papers were provided to the Applicants. Thereafter, variations to the Restraint Orders were made on notice to and without objection by the Applicants. At one point an application to discharge the Restraint Orders was made by the Applicants' then solicitors, but was not pursued. No complaint, however, is made by the Applicants about the initial application made without notice, but rather about the disclosures (or non-disclosures) in applications made by the Respondent thereafter. Those applications were, however, made on notice to the Applicants, and so the duty to give full and frank disclosure to the Court thereafter did not arise.

78. This ground must therefore also fail for these reasons, and I answer the fourth issue accordingly.

Disposal

79. For all those reasons each ground fails and the Application is dismissed.

80. The Respondent must have his costs of and incidental to the Application, to be assessed if not agreed.