Are new Government AML/CTF proposals a step too far?

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Introduction

On 21 April 2016, the Government released its new Action Plan for anti-money laundering (AML) and counter-terrorist finance (CTF). The Action Plan contains a number of AML/CTF proposals on which the UK Government wishes to consult. Describing the Action Plan as representing the most significant change to the UK's AML/CTF regime in over a decade, the Government aims to send a clear message that the UK will not stand for money laundering or the funding of terrorism through its institutions[1].

The Action Plan comes at a time when the UK's position in terms of combatting serious, global financial crime is high on the political agenda, given the recent release of the "Panama Papers" and the upcoming International Anti-Corruption Summit to be hosted in the UK in May. However, a number of the proposals appear to offend against basic legal principles and therefore warrant careful examination.

The Proposals

The Action Plan contains a total of 19 "actions", each comprising a number of proposals. The proposals range from fundamental reforms to the system of Suspicious Activity Reports to the creation of new regulatory powers and criminal offences.

This article will focus on what are arguably the three most contentious proposals: the creation of unexplained wealth orders (UWOs); the creation of a criminal illicit enrichment offence; and new powers to enable the forfeiture of money held in bank accounts.

UWOs

UWOs are a form of non-conviction based asset confiscation. When served on a person suspected of having wealth or assets that represent the proceeds of unlawful activity, they essentially require the recipient to explain the origin of their assets. There appears to be no requirement that the recipient be subject to any sort of formal investigation or criminal proceedings. UWOs are a relatively recent development in confiscation and forfeiture jurisprudence, but they are already used in some countries, including Ireland and Australia. The Government states that UWOs could

"provide critical information on which law enforcement authorities can build their case"[2].

Linked to UWOs would be a new forfeiture power to enable the forfeiture of any assets for which a satisfactory explanation cannot be given.

The criminal offence of illicit enrichment

It is a requirement under the UN Convention Against Corruption (UNCAC) for states to consider introducing an illicit enrichment offence. The Government therefore intends to explore whether such an offence would be effective in the UK and compatible with the UK's legal system. "Illicit enrichment" is defined in the UNCAC as "a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income"[3] and some countries have already criminalised such conduct.

While the Action Plan alludes to the offence being capable of commission only by public officials, it does not make this clear and so it may be that a wider application is being considered. In a number of countries that have already introduced an illicit enrichment offence (where it was typically introduced to target narcotics barons rather than corrupt politicians), the offence is universally applicable.

The main argument for such an offence is that it would make it easier for prosecutors to recover potentially ill-gotten gains by removing the need to establish that any crime had occurred or that identified assets were gained through criminal activity. All that prosecutors would be required to show is that the defendant had assets that exceeded those possible based on the person's legitimate source(s) of income. The Organization for Security and Co-operation in Europe considers the existence of such an offence to be one of the best practices for combatting corruption[4].

New powers to enable the forfeiture of money held in bank accounts

The Proceeds of Crime Act 2002 (POCA) currently provides for effective action to be taken against criminal cash. However, the definition of "cash" does not include money held in bank accounts[5]. Money in bank accounts can be recovered via the civil recovery powers in POCA (which enable prosecutors to recover any form of property obtained through unlawful conduct), but the Government considers these civil recovery powers to be too complex and resource-demanding.

The Government therefore intends to explore whether new powers are needed to enable the forfeiture of money held in back accounts, in cases where there is no criminal conviction against the account holder (because, for example, the account was opened under a false identity) and there is a suspicion that the funds are the proceeds of crime.

The Government also wants to explore whether, following an initial hearing at a Magistrates' Court, this new power could be used administratively. Such administrative forfeitures would be authorised by a senior law enforcement officer where the value held is below a certain limit (for example £100,000) and the case is uncontested.

The aim of these changes is to give law enforcement agencies the ability to obtain the forfeiture of money held in bank accounts more quickly and effectively.

Analysis

Basic legal concerns

While the desire to tackle money laundering is admirable, the proposals outlined above raise some serious concerns regarding basic legal principles and guarantees.

For instance, UWOs and the illicit enrichment offence reverse the burden of proof onto the suspect. In doing so, they run contrary to the presumption of innocence, the privilege against self-incrimination and legitimate expectations with regards to fairness and due process. Certain suspects could well find themselves in a situation where they risk incriminating themselves by providing an explanation for their asset increase, or alternatively face forfeiture and/or a criminal conviction for illicit enrichment if they remain silent.

Analogies have been drawn between the UWO regime and the "section 2 powers" available to the Serious Fraud Office (SFO) pursuant to the Criminal Justice Act 1987, under which it can compel the provision of documents or information. However, it is hard to see how such an analogy can reasonably be drawn. In all cases aside from corruption, section 2 powers can only be used by the SFO after it has accepted a case for investigation. More crucially, section 2 powers are typically not used against suspects, and important protections apply in terms of the use to which any compelled information can be put (broadly speaking, no compelled statement can be used in criminal proceedings against the person who made it). In contrast, UWOs appear to be designed for use on suspects, and no equivalent protections are mentioned in the proposals.

The creation of a criminal illicit enrichment offence is designed to obviate the sometimes difficult prosecutorial hurdles of establishing that a substantive offence has occurred or that the identified assets were gained through criminal activity. In doing so, it would effectively criminalise the inability to provide an explanation as to a sudden increase in personal income or wealth. This is an unwarranted extension of the criminal law, as well as an unjustified intrusion into the private property rights of individuals.

The new powers to allow money in bank accounts to be forfeited are arguably the most intrusive, as the pre-emptive forfeiture of assets takes place before the suspect has even had an opportunity to explain potentially legitimate sources of wealth. Further, given the draconian nature of these proposed powers, it is concerning that on the current proposals they will only be subject to the judicial scrutiny by the Magistrates' Court.

The parameters of the UWO regime

Much is still to be decided as to the parameters of the UWO regime, including the proposed threshold test for issuing an UWO and what would constitute a "satisfactory explanation". In a recent report, Transparency International (TI) suggests that the civil standard of "arguable case" has considerable logic as a threshold test. It also suggests that a change in the threshold for non-conviction based asset forfeiture from "irresistible inference" to "reasonable cause to suspect" should be considered. However, the seizure of assets by the state is an extreme measure that should not be used unless absolutely necessary. The threshold is high for a reason.

It is also unclear what type of criminal activity would be captured by UWOs. TI has discussed the use of such orders in the UK as an anti-corruption tool, but they could theoretically be used against those suspected to have unexplained wealth derived from all types of criminal activity. Unless appropriate safeguards are put in place, there is a clear danger of UWOs being used to facilitate "fishing expeditions" into people's private financial affairs.

Conclusion

It may be that the tough-talking Action Plan is little more than a political reaction to recent events, at a time when the Government wants to show that it is taking steps to address global corruption and other serious crimes. Taken at face value, however, a number of the proposed measures are difficult to reconcile with fundamental principles of English law. The removal of the "presumption of responsibility" from the senior managers' regime provides a recent example of the resistance with which attempts to reverse the burden of proof are often met. It will therefore be interesting to see whether these proposals are eventually adopted and, if they are, whether they are adopted as currently envisioned and to what extent they will face court challenges.

The closing date for responses to the Action Plan is 2 June 2016, and the Action Plan aims to start having measures completed by July 2016. The Anti-Corruption Summit is set to begin on 12 May 2016, where it is expected that the Government will make further announcements about how the UK will tackle serious crime.

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[1] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/517992/6-2118-Action_Plan_for_Anti-Money_Laundering__web_.pdf

[2] Ibid.

[3] Art. 20 United Nations Convention Against Corruption: https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf

[4] Organization for Security and Co-operation in Europe. 2004. Best Practices in Combating Corruption: http://www.osce.org/eea/13738?download=true

[5] S.289(6) Proceeds of Crime Act 2002