Criminal Finances Bill Proposes Some Intrusive & Impractical POCA Measures

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On 25 October 2016, the Criminal Finances Bill 2016–2017 (the "Bill") had its second reading in the House of Commons and passed without objection. In addition to containing the proposed new offence of failing to prevent the facilitation of tax evasion, the Bill is the vehicle being used to implement the legislative elements of the Government's Anti-Money Laundering/Counter-Terrorist Finance Action Plan. This article considers some of the Bill's proposed amendments to the Proceeds of Crime Act 2002 ("POCA"), including the controversial introduction of unexplained wealth orders ("UWOs") and changes to the Suspicious Activity Report ("SAR") regime.

1. UWOs

If enacted, the Bill would amend POCA so as to empower the High Court, on application by the relevant enforcement authority, to make UWOs in certain circumstances. An UWO would essentially require the respondent company or individual to explain how specified property was obtained, where there is a reasonable suspicion that the property may have been obtained using the proceeds of crime. UWOs are a relatively new concept, but are already in use in countries such as Ireland and Australia.

UWOs are intended, in part, to be a tool to help tackle the "cancer" of global corruption. However, they are hard to reconcile with the basic legal principles of the presumption of innocence and the privilege against self-incrimination. A previous WilmerHale W.I.R.E. article has discussed the fundamental legal concerns that the creation of UWOs raises, but the Bill gives us a better idea of what a UWO regime in the UK is likely to look like.

In the Bill as currently drafted, for the court to make an UWO it must be satisfied that:

- The property in question exceeds £100,000 in value;
- There are reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient to obtain the property in question; and
- The respondent is a politically exposed person ("PEP") or there are reasonable grounds for suspecting that the respondent (or a person connected to him) is/has been involved in

serious crime.

Unsurprisingly, the court would also have the power to make an interim freezing order over the property subject to the UWO, to avoid the risk of any subsequent recovery order being frustrated.

Someone responding to an UWO will have to provide a statement setting out the nature and extent of the respondent's interest in the property and explaining how they obtained it. Where the respondent fails, without reasonable excuse, to comply with an UWO within the period specified by the court, there is a rebuttable presumption that the property is recoverable property for any proceedings taken against it under Part 5 of POCA. If, in purporting to comply with an UWO, the respondent knowingly or recklessly makes a false or misleading material statement, they could face up to two years in prison and/or an unlimited fine.

Any respondents to an UWO could therefore find themselves in a precarious position. If they failed to respond adequately, their property could be presumed to have been obtained through unlawful conduct. On the other hand, complying with an UWO may be fraught with risk. Although the Bill contains the standard protections regarding the use to which compelled statements can be put (essentially that any statement made in response to an UWO may not be used in evidence against the respondent in a criminal trial, except in very limited circumstances), there would be nothing preventing investigators from using the compelled information to help guide their investigation. Responses to UWOs will therefore need to be drafted with extreme care.

Even in cases where source of wealth is established and no criminal investigation ensues, UWO respondents may still have been forced to reveal their perfectly legal-yet-private financial planning arrangements. There may also be circumstances in which PEPs (which, for these purposes, only means PEPs appointed by non-EEA states) would be compelled to disclose sources of income which they are not required to disclose in the country in which they hold office. These countries may have perfectly legitimate reasons as to why PEPs do not have to disclose private sources of income, such as the threat of kidnap.

AFactsheet published by the Government on 1 November 2016 states that UWOs will be subject to a statutory code of practice. Curiously this is not reflected in the Bill, but it is to be hoped that any future enactment imposes such a requirement.

Following its analysis of consultation responses, the Government has decided that a bespoke forfeiture power linked to UWOs is not necessary. The Government has also thankfully decided not to proceed with the creation of a criminal illicit enrichment offence. In dropping this offence, the government cited concerns around reversing the burden of proof in the criminal context (drawing a distinction with the UWO regime, which uses civil recovery powers) and concerns as to whether it would be effective in practice.

2. Reform of the SARs regime

At the time it published its AML/CTF Action Plan, the Government was considering the removal of the statutory consent defence in POCA and replacing it with a system which targeted those entities deemed to represent the highest money laundering or terrorist financing risk. Mercifully, the removal

and replacement of the consent regime (and the uncertainty that it would have generated) have not made it into the Bill.

The Bill instead contains measures that would give the Crown Court, on application by the relevant enforcement authority, the power to extend the current moratorium period for SARs. Under the current system, the National Crime Agency ("NCA") has seven working days from the day after the SAR is submitted to decide whether to give its consent (the "notice period"). If the NCA does not respond during the notice period, the submitter is afforded a defence under POCA, as the NCA's consent is deemed to have been given. Where consent is refused during the notice period, the NCA has a further 31 calendar days in which it can investigate (the "moratorium period"). If no action is taken and the moratorium period expires, consent is deemed to be given. The Bill contains measures that would give law enforcement agencies the ability to apply to extend the moratorium period from 31 days to an eye-watering total of 186 days. This 186 day period would only begin with the day after the end of the initial 31 day moratorium period, so the total moratorium period could actually be over seven months.

This vastly extendable moratorium period could, if introduced, have an extremely disruptive effect. If consent were initially refused by the NCA and an extension of the moratorium period were sought and granted, the reporter would have to spend considerably longer in limbo while trying to manage client expectations. Meanwhile, of course, those in the regulated sector would have to take great care to avoid committing the "tipping off" offence. Whilst it is reasonable to expect the authorities to require more than a month in which to investigate genuine suspicions of money laundering, it is to be hoped that the proposed new powers will be used sparingly and in recognition of the very onerous burden that they are likely to place on transactions and client relationships.

Alongside the longer moratorium period, it is proposed that the NCA be given a new power to apply to the Magistrates' Court for "further information orders". Such orders are intended to enable the NCA to obtain additional information from SAR reporters, to help further its investigations. Failure to comply with such requests could lead to a fine of up to £5,000.

3. Other key POCA measures

New seizure and forfeiture powers

The Bill extends powers in POCA to enable the seizure and forfeiture of money held in bank accounts and high-value property (such as precious metals & stones, watches and artistic works). The minimum required value of the cash or property is £1,000. These powers will only be subject to judicial scrutiny in the Magistrates' Court and some of the powers (for example the power to search for readily moveable property) can be authorised by a senior police officer.

Disclosure Orders

The Bill contains measures that would extend the use of disclosure orders (which are typically used to obtain information from a suspect's banks/advisers) to money laundering and terrorist financing investigations.

New information sharing gateway

The Bill contains measures to improve the sharing of information between regulated companies for the purposes of combatting money laundering. The Bill sets out mechanisms which enable regulated entities to share information, where they request information from each other or where the NCA requests that information be shared.

4. Next steps for the Bill

The Bill has now been committed to a Public Bill Committee where it will be scrutinised in more detail. The Public Bill Committee is expected to report back to the House by 24 November 2016.

Although the Bill is currently still being scrutinised, the broad approval that it has so far achieved suggests that many of its measures, in some shape or form, will make it into the final Act.