# CRIMINAL FINANCE BRIEFING

## Criminal Finance Act 2017: crime still doesn't pay

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Financial gain provides the motivation behind all serious and organised crime. Billions of pounds are laundered through the UK every year. Understandably, it has long been the government's policy to implement effective legislation to tackle this issue.

The principal legislation in the fight against money laundering is the Proceeds of Crime Act 2002 (POCA). However, the modern world develops quickly and financial crime is no exception. It became clear that additional measures were needed to combat the increasingly global nature of money laundering. The Criminal Finances Act 2017 (2017 Act) was intended to assist with those goals and came into force on 30 September 2017 (*see News brief "Criminal Finances Act 2017: combating money laundering and tax evasion", www.practicallaw.com/w-008-3699*).

The explanatory notes to the 2017 Act state that its purpose is to give law enforcement agencies new capabilities and powers to recover the proceeds of crime and to tackle money laundering, corruption and terrorist financing.

However, two years on, the question arises of how successful the 2017 Act has been in tackling money laundering and corruption, and the extent to which it has assisted in making the UK a more hostile place to conceal the proceeds of crime.

### Introduction of new measures

The 2017 Act amended the suspicious activity report (SAR) regime and introduced the following measures:

- Unexplained wealth orders (UWOs).
- Account forfeiture and freezing orders.
- Recovery of listed assets orders.
- Corporate offences of failing to prevent the facilitation of tax evasion, relating to both UK and foreign tax.
- A mechanism for the voluntary sharing of information in connection with suspicions of money laundering.

It is self-evident that these measures amount to a significant development in the fight against international money laundering. It is, however, the effective use of these measures that will determine the degree to which the 2017 Act has been successful.

### Rate of asset recovery

The Home Office's latest asset recovery action plan records that £1.6 billion was taken from criminals between 2010 and 2018 using the powers under POCA, while many hundreds of millions more have been frozen (*www.gov.uk/government/publications/asset-recovery-action-plan*). At first glance, the figures suggest that the 2017 Act has not had the anticipated effect, as £248 million was recovered in 2016 but this declined to £201 million in 2017 and £185 million in 2018.

The reality, however, is that the amounts recovered in the years before 2016 were broadly similar to 2017 and 2018, and there happened to be a number of exceptionally large confiscation orders being paid in 2016. Therefore, these figures are not necessarily indicative of how effective the 2017 Act has been. Any analysis needs to go beyond the amount of money that is recovered on a year-on-year basis and focus on what is known about the implementation of the 2017 Act.

### Tax evasion and UWOs

The introduction of the new corporate offences of failing to prevent the facilitation of tax evasion and UWOs initially attracted widespread commentary, both in legal circles and the wider media (*see feature article "Facilitation of tax evasion: new offences of failure to prevent", www.practicallaw.com/w-010-4276*). However, to date there are no reported prosecutions relating to the corporate offences of failing to prevent the facilitation of tax evasion. There may be investigations currently ongoing but, if so, they are not yet in the public domain. There has been only a handful of UWOs and, although they have attracted significant media attention, the reality is that they have rarely been used in practice. While there appears to be a clear policy of using UWOs in a careful and considered way, it is still too early to assess their effectiveness.

The recovery of listed assets under the 2017 Act involves making applications in the Magistrates' Court to recover precious metals or stones, watches and works of art that have been obtained through unlawful conduct. However, court records suggest that these applications are not being made frequently or to any great effect.

### Account freezing orders

The power which is currently being used the most under the 2017 Act is, without doubt, account forfeiture and freezing orders. Account freezing orders (AFOs) are the latest development in non-conviction based civil recovery of the proceeds of crime. AFOs were used more than 650 times in 2018 to freeze over £110 million of suspected illicit funds. Recently, the Westminster Magistrates' Court granted AFOs covering eight bank accounts holding in excess of £100 million. Despite this, AFOs attract significantly less media attention than UWOs.

The power to seize and forfeit cash that is the proceeds of crime was significantly extended by POCA but was, however, limited to cash as defined narrowly by section 289(6) of POCA. AFOs have extended this power, under the 2017 Act, so that it applies to monies held in bank accounts. A bank or building society account may be frozen for up to two years while the source of the funds is investigated. In the event that sufficient evidence is uncovered, an application can be made for the forfeiture of the monies held in the accounts.

In February 2019, the National Crime Agency (NCA) obtained its first account forfeiture order for £466,322 relating to funds held in the bank accounts of the son of Vlad Filat, the former prime minister of Moldova. In May 2019, the NCA obtained a forfeiture order for £24,668 in relation to accounts held by the niece of Syrian ruler Bashar al-Assad. These orders demonstrate how AFOs and forfeiture orders can be used to target monies held within the UK banking system that are linked to corrupt foreign officials. This is significant because it raises the international profile of the measures in the 2017 Act, which in turn is likely to undermine the well-established

view of the UK as a safe haven to conceal the proceeds of crime.

It is not just the NCA that is making use of these powers. In March 2019, the Serious Fraud Office obtained an account forfeiture order in the sum of £1.5 million relating to monies held in an account controlled by Mr Nisar Afzal. These monies resulted from the sale of two properties in which Mr Afzal had an interest. Mr Afzal had been investigated, but not charged, in relation to a fraudulent mortgage scheme. This is a good example of the way in which the 2017 Act operates independently of the need for a criminal conviction.

### Suspicious activity reports

The final piece of the puzzle consists of the mechanism by which investigative authorities obtain the information they need to commence enquiries, and whether this has been successfully applied in practice. A SAR is the mechanism by which law enforcement authorities are alerted by banks and financial institutions that certain client or customer activity is suspicious and might indicate money laundering. The 2017 Act created a new mechanism for the voluntary sharing of information among banks and financial institutions, and between those bodies and the NCA, in connection with suspicions of money laundering. This allows for a more collaborative approach within the private sector to the prevention of money laundering, which is designed to improve and augment the amount of information that each body has access to. Where a notification is made in good faith it will not breach any obligations of confidence owed by the person making the disclosure or any other restriction on the disclosure of information. The joint information is then provided to the NCA.

In relation to money laundering offences, it is a defence if a person applies by way of authorised disclosure for consent to do the relevant act and that consent has either been granted or, if it has been refused, the moratorium period has expired. The moratorium period allows time for the investigation of the underlying activity and, if necessary, for appropriate action to be taken. Under the 2017 Act, the court may extend the moratorium period, which was previously fixed at 31 days, for a further 31 days and up to a maximum of six months or 186 days. This is significant because it allows more time for the investigative authorities to react to a SAR.

SARs are plainly an important tool for the investigation of money laundering. The Law Commission commented in its 2019 report on the SAR regime that high-quality SARs, namely those that are data-rich and are submitted to the NCA's UK Financial Intelligence Unit (UKFIU) in a format which is easy to process, can provide important evidence of money laundering in action (*www.lawcom.gov.uk/project/anti-money-laundering/*).

463,938 SARs were received and processed by the UKFIU between April 2017 and March 2018. This amounts to a 9.6% increase from the previous year. The NCA reported that £51 million was denied to criminals as a result of SARs where the financial institution requested consent to conduct the relevant act.

The volume of authorised disclosures made to the NCA continues to rise. In February 2019, the NCA received approximately 4,000 disclosures compared with 2,000 in February 2018. The SARs process needs a revamp, as it is clearly increasing to such a degree that it produces a huge strain on the NCA. One way to do so would be to increase the financial resources that are available to the NCA, although it does not seem that this is likely to happen in the near future.

### Investigative authorities

The 2017 Act introduced wide-ranging new powers. Their effectiveness was always going to depend on how investigative and prosecution authorities used them. Their success to date cannot be measured by merely looking at the amount of monies that have been recovered; a more considered analysis is required.

The last two years suggest that the authorities are taking a careful and cautious approach to their use of these new powers. Infrastructure has been created that assists in determining which cases should be targeted and which powers should be used in those cases (*see box "The NECC"*). In addition, it seems that the government continues to have an appetite for financing these investigative authorities. It is one thing to create the powers to tackle financial crime, but the real key is continued commitment from the government to the use of those powers; this requires investment in those tasked with its investigation. It will be interesting to see if that investment occurs.

## The NECC

In order to effectively use the powers available to them, all investigative authorities need to be well-resourced and have an established infrastructure allowing them to target the appropriate cases. The National Economic Crime Centre (NECC) was launched on 31 October 2018 for this purpose.

The NECC is made up of officers or representatives from, among others, the National Crime Agency, the Serious Fraud Office, the Financial Conduct Authority, HM Revenue & Customs and the City of London Police. They are tasked with working together to guide the UK's response to financial crime. In practice, this amounts to identifying precisely which investigation is appropriate in each specific case. This helps to ensure that unexplained wealth orders and account freezing orders (AFOs) are used to the maximum effect.

Recently, the NECC was instrumental in using AFOs in relation to 95 bank accounts that were suspected of being funded by laundered money. These accounts were mainly held by overseas students (mostly from China) studying in the UK, and contain an estimated £3.5 million.

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