UK Criminal Finances Act 2017: A Dechert “Dirty Money” Report

Dechert
LLP

Executive Summary

The Criminal Finances Act 2017 (the "Act") represents a significant development in the approach to the investigation and prosecution of financial crime in the UK.[1]

From 30 September 2017, businesses will be required to take a more active role in the detection and prevention of potential financial crime, and by this date must have reasonable procedures in place to prevent associated persons (see below) from committing tax evasion facilitation offences. Businesses should act now to examine and update their compliance policies and procedures to ensure they are compliant with the Act by 30 September and beyond.

This Dechert "Dirty Money" report explores the key compliance takeaways for UK businesses. In Part One: "A Fistful of Tax Dollars" we explore the new offences of failure to prevent the facilitation of tax evasion; in Part Two: "For a Few Days More" we comment on reform of the suspicious activity reporting regime; and in Part Three "The Good, The Bad and The Wealthy" we summarise the implications of new unexplained wealth orders (UWOs).

	What does this mean?	What should businesses be doing?
New corporate offence of failure to prevent the facilitation of tax evasion	This new offence is designed to revolutionise corporate attitudes to tax-sensitive activities, and places the onus on corporates to stop persons who act for them, or on their behalf, from facilitating tax evasion wherever in the world it occurs.	Corporates should prepare to undertake risk assessments and implement prevention procedures (including enhancements to existing compliance policies and procedures) to mitigate business risk arising from the new offence.
Reform of the suspicious activity reporting (SAR) regime	Law enforcement agencies have additional powers to extend their investigation period and obtain further information from businesses that reported suspicious activity, or others in the regulated sector.	To minimise the risk of serious disruption to their day-to-day business, entities in the UK regulated sector must be prepared to take a more pro-active approach to analysing whether a suspicious activity report is genuinely required, rather than routinely filing suspicious activity reports.
Unexplained wealth orders ("UWOs")	UWOs place onerous requirements on individuals or companies to explain the source of their assets in the UK and beyond.	It is not presently entirely clear how UWOs will be used in practice, and we foresee that they will likely be subject to multiple challenges in UK courts.

1 We refer to both UK-wide laws and courts, and the laws and courts of England and Wales as "UK law" or "UK courts" for simplicity. The Act contains a number of Scotland-specific provisions, which this white paper does not consider.

Part One: "A Fistful of Tax Dollars"

Failure to Prevent the Facilitation of Tax Evasion is a New Corporate Offence

In one of its final acts before it dissolved ahead of the general election, the UK Parliament passed the Criminal Finances Act 2017, which received Royal Assent on 27 April 2017. When the Act comes into force on 30 September 2017, it will develop the financial crime enforcement landscape in the UK in a manner which will affect individuals and corporates alike.

Context

Historically, it has proved notoriously difficult to prosecute corporates in the UK — particularly large, complex organisations — due to the need to demonstrate that relevant acts were carried out by senior individuals who represented the "directing mind and will" of the company (the so-called "identification principle").

In recent years, the UK has sought to reform this area of law, including by adopting a new type of offence, criminalising a corporate for "failure to prevent" a criminal offence from being committed. This type of offence imposes strict liability on an entity unless it can demonstrate it has certain preventative measures in place. The first example of this type of offence in relation to financial crime[2] is under section 7 of the Bribery Act 2010, which imposes strict liability on a company for failure to prevent bribery by a person associated with it, unless it can show that it had adequate procedures in place to prevent bribery. The Government ran consultation earlier this year in relation to the reform of corporate criminal liability, and is considering a more general extension of the "failure to prevent model."

The Offences

In the meantime, the Act creates two new "failure to prevent" offences under UK law:

- Failure to prevent facilitation of UK tax evasion.
- Failure to prevent facilitation of foreign tax evasion.

The basic requirements for both offences are the same. A body corporate or partnership (which includes a "firm or entity of a similar character formed under the law of a foreign country") is guilty of an offence if an "associated person" of that body (i.e. an employee, agent or any other person acting *for and on behalf of* that body), who is acting in such a capacity, commits a (UK or foreign) tax evasion facilitation.[3]

The consequences of a conviction are potentially severe and include an unlimited fine and the possibility of prohibition from bidding for public contracts.

The offences also have extra-territorial effect. None of the conduct of either the relevant body or any other person whose conduct constitutes part of either the original tax evasion or connected tax evasion facilitation needs to have occurred in the UK.

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2 It has been possible for companies and organisations to be found guilty of corporate manslaughter since the Corporate Homicide Act 2007 came into force on 6 April 2008, and for wider health and safety offences since the Health and Safety at Work etc. Act 1974 came into force on 1 October 1974.

3 The offence of failure to prevent a *foreign* tax evasion facilitation will apply to a relevant body that: (a) is incorporated or formed in the UK; (b) carries on business or part of a business in the UK; or (c) carries on conduct constituting part of the foreign tax evasion facilitation offence in the UK.

In essence, the offences consist of three stages.

For these purposes:

- A "UK tax evasion offence" includes the broad common law offence of cheating the public revenue and any other offence under UK law which concerns "being knowingly concerned in, or taking steps with a view to, the fraudulent evasion of a tax". Dishonesty is a necessary element of the UK tax evasion offence.
- A "foreign tax evasion offence" catches conduct which: (a) amounts to an offence in a foreign country; (b) relates to a breach of a duty relating to a tax under the laws of that country; and (c) would constitute an offence of being knowingly concerned in, or taking steps with a view to, the fraudulent evasion of a tax if it took place in the UK (the "dual criminality" requirement).

For these purposes:

- A "UK tax evasion facilitation offence" consists of: (a) being knowingly concerned in, or taking steps with a view to, the fraudulent evasion of tax by another person; (b) aiding, abetting, counselling or procuring the commission of a UK tax evasion offence; or (c) being involved *"art and part"** in the commission of an offence of being knowingly concerned in, or taking steps with a view to, the fraudulent evasion of tax.
- A "foreign tax evasion facilitation offence" means conduct which: (a) amounts to an offence under the law of a foreign country; (b) relates to the commission by another person of a foreign tax evasion offence under that law; and (c) would, if the foreign tax evasion offence were a UK tax evasion offence, amount to a UK tax evasion facilitation offence (the dual criminality requirement).

This stage requires that the associated person must deliberately and dishonestly take action to facilitate the taxpayer-level evasion. If the associated person is only proved to have accidentally, ignorantly or even negligently facilitated the tax evasion offence, then the new offence is not committed by the relevant body.**

Where Stages One and Two are met, the relevant body will be guilty of the offence unless it can demonstrate that, when the tax evasion facilitation offence was committed:

- It had in place such prevention procedures as were reasonable in all the circumstances of the case; or
- It was not reasonable in the circumstances for there to be any prevention procedures in place.

* This being the Scottish equivalent of aiding and abetting under English law.

** HM Revenue & Customs, "Tackling tax evasion: Government guidance for the corporate offence of failure to prevent the criminal facilitation of tax evasion" (Draft Government Guidance; Updated October 2016).

Notably, the requirement for prevention procedures appears somewhat less burdensome than the corresponding "adequate procedures" requirement under the Bribery Act 2010. The relevant body must only show that it had "reasonable" (rather than "adequate")[4] prevention procedures in all the circumstances which occurred, whereas whether procedures are "reasonable" may be judged more from the standpoint of the business. UK prosecutors could conceivably argue against an "adequate procedures" defence on the basis that that any procedures which failed, in fact, to prevent an instance of bribery to occur were demonstrably inadequate. By contrast, the term "reasonable" is much more subjective, and would appear to offer greater discretion to a court or prosecutor when considering whether a relevant body's prevention procedures were in fact proportionate to the risks faced, and would thus appear to offer a greater opportunity to relevant organisations to run this defence. A court could consider that the term "reasonable" is equivalent to the phrase "reasonably practicable", a phrase which is commonly used in health and safety law (for example, section 2 of the Health and Safety at Work etc. Act 1974 uses the term "so far as is reasonably practicable" in relation to the general duties of employers to their employees).

4 The language used to describe both (i) "reasonable prevention procedures" in the draft government guidance for the corporate offence of failure to prevent the facilitation of tax evasion and (ii) "adequate procedures" in the Bribery Act 2010 Guidance is very similar (both state that such procedures will be "proportionate" to the risk the relevant body faces). UK courts have not yet considered the term "adequate procedures" under the Bribery Act 2010 but it could be argued that whether procedures are "adequate" may be judged by their capacity to prevent the

circumstances, and the Act even envisages that, in some circumstances, it may not be reasonable to expect the relevant body to have any prevention procedures in place at all. This argument is only likely to be deployed after the event where it was not envisaged that there was a risk of tax evasion being facilitated by an associated person. Where a company has identified a risk and sought advice to mitigate that risk, it is difficult to envisage circumstances in which it would be appropriate to advise that no procedure at all should be deployed.

Prudent corporates should undertake a risk assessment in relation to their business operations.

Section 47 of the Act requires that the Chancellor of the Exchequer prepare and publish guidance about procedures that relevant bodies can put in place to prevent persons acting in the capacity of an associated person from committing UK tax evasion facilitation offences or foreign tax evasion facilitation offences. This has not yet been issued, but the Draft Government Guidance published in October 2016 (the "Draft Guidance") sets out six "guiding principles" for relevant bodies designing their own "bespoke prevention procedures", which mirror the six principles in the Bribery Act 2010 Guidance issued by the Ministry of Justice:

- Risk assessment.
- Proportionality of risk-based prevention procedures.
- Top-level commitment.
- Due diligence.
- Communication (including training).
- Monitoring and review.

In order to encourage corporates to disclose relevant wrongdoing, the Draft Guidance states that "timely self-reporting will be viewed as an indicator that a relevant body has reasonable procedures in place". The Act and Draft Guidance do not specify to whom a corporate should self-report wrongdoing, nor the consequences for failing to do so, though the Draft Guidance states that the UK tax offence will be investigated by HMRC, with prosecutions brought by the Crown Prosecution Service ("CPS"), whilst the foreign tax offence will be investigated by the Serious Fraud Office ("SFO") or National Crime Agency, with prosecutions brought by either the SFO or CPS. It will also be possible for relevant bodies to enter into a Deferred Prosecution Agreement with the relevant prosecutor in relation to the offence.[5]

Impact

It is unlikely that there will be very many prosecutions for these new offences, which will each require two underlying offences to be proved to the criminal standard (see Stages One and Two on the previous page). The UK also has a poor track record for convictions for tax evasion, not least due to the difficulty of distinguishing (illegal) tax evasion from (legal) tax avoidance. Prosecuting authorities may also struggle to demonstrate that the dual criminality requirements for the foreign failure to prevent offence are satisfied. Expert evidence will be required to establish the application of foreign law and is likely to provide fertile ground for argument.

Nonetheless, the potential impact of the new offences on entities which carry on at least part of their business in the UK is far-reaching and burdensome. A conviction on indictment can result in an unlimited fine and may lead to debarment from bidding on public contracts. The extra-territorial effect of the offences further means that relevant entities, which may be headquartered abroad, will be criminally liable if they do not have reasonable procedures in place to prevent an associated person abroad from committing an offence of tax evasion abroad.

With that in mind, prudent corporates should undertake a risk assessment in relation to their business operations and should implement such prevention procedures (including any related enhancements to compliance policies and procedures) as are necessary to mitigate the risks to their business as soon as possible.

5 Our recent Dechert OnPoint, "Every Little Helps with a DPA", examines recent developments in relation to Deferred Prosecution Agreements.

Part Two: "For a Few Days More"

Reform of the Suspicious Activity Reporting Regime

In order to minimise the risk of serious disruption to their day-to-day business, entities in the UK regulated sector must be prepared to take a more considered approach to analysing whether a suspicious activity report is genuinely required, rather than routinely filing suspicious activity reports as a "belt and braces" measure.

Under the current money laundering regime, where an organisation in the regulated sector (e.g. a financial services firm, accountancy firm or law firm) suspects that it may be involved in a possible money laundering offence[6] it is obliged to submit a suspicious activity report ("SAR") to the National Crime Agency ("NCA"), seeking consent to proceed with the relevant transaction. It is an offence to fail to report money laundering but, in the event that a transaction involves the proceeds of crime, consent from the NCA to proceed with the transaction provides an absolute defence to money laundering offences for the reporting organisation and its officers.

If the reporting organisation alerts a relevant individual — for example, the person suspected of laundering money or a close associate of his or hers — that it has made a relevant disclosure to the NCA or that an investigation into the suspected money laundering is either in progress or pending, it will commit a "tipping off" offence. The reporting organisation therefore cannot make any disclosure to a third party, including a client that might prejudice an investigation.

The reporting organisation obtains such "consent" to proceed with a transaction:

- Through express consent from the NCA;
- Through silence from the NCA for seven working days from the day after submission of the SAR; or
- Where the NCA refuses to give consent but is then silent for 31 calendar days from the refusal.

This 31-day-period is known as the "moratorium period", which is intended to allow law enforcement agencies time to gather evidence to determine whether further action, such as restraint of the funds, is appropriate.

The Home Office believes that the current moratorium period does not allow sufficient time to develop evidence or obtain information required to undertake proper analysis and make an informed decision on whether to investigate the SAR. This is even more acute where investigators need to obtain evidence from overseas authorities, or to undertake complex asset-tracing enquiries.[7]

To address those perceived deficiencies, the Act introduces two new powers for law enforcement agencies in relation to the SARs regime:

- A power to extend the moratorium period to allow agencies further time for investigation.
- A power to obtain further information from the reporter of the SAR or another person carrying on a business in the regulated sector.

6 The three primary money laundering offences are: (i) the "basic money laundering" or "concealing" offence, where a person conceals, disguises, converts, transfers or removes from the jurisdiction property which is, or represents, the proceeds of crime and which the person knows or suspects represents the proceeds of crime; (ii) the "aiding and abetting" or "arranging" offence, where a person enters into (or becomes concerned in) an arrangement that he knows or suspects will facilitate another person to acquire, retain, use or control criminal property; and (iii) the "handling stolen goods" offence, where a person acquires, uses or has possession of property that he knows or suspects represents the proceeds of crime. The primary offences relating to failure to report money laundering are: (i) failing to disclose; (ii) tipping off; and (iii) prejudicing an investigation.

7 Home Office, Criminal Finances Bill Fact Sheet.

A Power to Extend the Moratorium Period to Allow Agencies Further Time for Investigation

On application to the Crown Court ("the Court") from a "senior officer" at a relevant agency,[8] the Court may extend the moratorium period in increments of 31 days, up to a total of 186 days (approximately six months) from the end of the initial 31 day moratorium period.

The Court may extend the moratorium period where it is satisfied that:

– An investigation is being carried out in relation to a relevant disclosure (but has not been completed).
– The investigation is being conducted diligently and expeditiously.
– Further time is needed for conducting the investigation.
– It is reasonable in all the circumstances for the moratorium period to be extended.

An extended moratorium period could pose significant risks to the conduct of business. For example, a SAR submitted by a bank or advisor in the context of a corporate transaction, or by auditors preparing end of year accounts, which results in an extended moratorium period lasting months, could derail the transaction entirely, and leave professional advisors "holding the baby". This is likely to cause considerable practical difficulties for regulated entities submitting SARs. For example, a bank or law firm that has submitted a SAR will be unable to either proceed or explain to their client why they cannot take action as instructed. The longer the moratorium period is extended, the more difficult this will become.

Notably, the party that has submitted the SAR and anyone representing that person may be excluded from any part of the relevant court hearing, and the officer applying to extend the moratorium may apply for an order that specified information on which he or she intends to rely be withheld from the submitter of the SAR and his or her representative(s). The fairness and practicality of extensions will largely depend on the rigour of judges, who may have little experience of such applications or the corporate context.

The need for an applicant to establish that the investigation is being conducted expeditiously and that an extension is reasonable should, in theory, prevent applications for extensions as a matter of course where little investigation has been done in the initial period. However, such terms are always open to interpretation and raise questions: for example, what degree of expedition is reasonable in the context of scant resources? Such questions, and the increased stakes for regulated entities and clients unable to progress transactions, are likely to result in an increase in litigation regarding applications to extend the moratorium period.

A Power to Obtain Further Information

An authorised NCA officer may apply to a magistrates' court for an order requiring the reporter of the SAR or another person carrying on a business in the regulated sector to disclose information to the officer. The application must: (a) specify or describe the information sought under the order; and (b) specify the person from whom the information is sought.

The court may make the "further information order" where:

– The information required to be given relates to a matter arising from a SAR.
– The information would assist in investigating whether a person is engaged in money laundering or in determining whether an investigation of that kind should be started.
– It is reasonable in all the circumstances for that information to be provided.

A magistrates' court may also make such an order where the NCA has received an "external request" from an authority of a foreign country, which has responsibility in that country for carrying out investigations into whether a corresponding money laundering offence has been committed.[9] The further information order cannot

8 "Senior officer" for this purpose includes: the Director General of the NCA (and other NCA officers authorised by the Director General for this purpose); a police officer of at least the rank of inspector; appropriately ranked immigration officers, officers of HM Revenue & Customs and officers of the Financial Conduct Authority; the Director of the Serious Fraud Office ("SFO") (and other authorised SFO officers); and certain accredited financial investigators.

9 A "corresponding money laundering offence" means an offence under the law of the foreign country concerned that would, if done in the United Kingdom, constitute an offence specified in paragraph (a), (b) or (c) of section 340(11) of the Proceeds of Crime Act 2002.

require the respondent to disclose information protected by legal professional privilege and the information provided by the respondent cannot generally be used as evidence against him or her in criminal proceedings. An application for a further information order may be heard and determined in private. The application is made to the magistrates' court with a right of appeal by any party to the Crown Court.

If a person fails to comply with a further information order, the magistrates' court may order the person to pay an amount not exceeding £5,000. It is unclear what lengths the respondent of a further information order will be required to go to in order to obtain information which is the subject of an order. Will respondents be expected only to provide information which is readily accessible? Or will they be expected to search for information to which the NCA believes they have access? The Act does not specify what action will be "reasonable in all the circumstances", and this is likely to cause uncertainty and disputes in relation to further information orders. For example, in the context of a corporate merger or acquisition, would a respondent be expected to trawl through documents in a data room to identify information which might reasonably be expected to be contained somewhere in the documents? Could a respondent even be expected to request information from a client, who may be the subject of the order itself? (This would seem unlikely, given the risk of tipping off the client in such circumstances and the additional conflict of interest this would create.) Firms in the regulated sector should seek advice regarding how to respond to further information orders.

Sharing of Information Within the Regulated Sector

The Act also includes provisions which allow for the sharing of information between entities in the regulated sector.

A person in the regulated sector ("A") may disclose information to one or more other persons carrying on a business in the regulated sector where:

- The information on which the disclosure is based came to A in the course of carrying on its business in the regulated sector.
- Either an NCA authorised officer or (at least one of) the person(s) to whom the information is to be disclosed has requested that A make the disclosure.
- Before A makes the disclosure, the required notification has been made to an NCA authorised officer (see below for a description of the "required notification").
- A is satisfied that the disclosure of the information will or may assist in determining any matter in connection with a suspicion that a person is engaged in money laundering.

A person may disclose information to A for the purposes of making a disclosure request if, and to the extent that, the person has reason to believe that A has in A's possession information that will or may assist in determining any matter in connection with a suspicion that a person is engaged in money laundering.

The disclosure request must:

- State that it is made in connection with a suspicion that a person is engaged in money laundering.
- Identify the person (if known).
- Describe the information that is sought from the recipient of the request.
- Specify the person or persons to whom it is requested that the information is disclosed.

Where the disclosure request is made by the person to whom the information is to be disclosed, the request must also:

- Set out the grounds for the suspicion that a person is engaged in money laundering; or
- Provide such other information as the person making the request thinks appropriate for the purposes of enabling the recipient of the request to determine whether the information requested ought to be disclosed.

A "required notification" must be made to the NCA before the recipient of the request can disclose the information as requested:

- Where an NCA authorised officer made the request for the sharing of information, the person who is to disclose information must notify the NCA that information is to be disclosed under section 339ZB(1) of the Proceeds of Crime Act 2002 ("POCA").
- Where the person to whom information is to be disclosed made the request, the person who made

- The request must submit the required notification, which must:
  - State that a disclosure request has been made.
  - Specify the person to whom the request was made.
  - Identify any person (if known) suspected of being engaged in money laundering in connection with whom the request was made.
  - Provide all such other information that the person giving the notification would be required to give if making the required disclosure for the purposes of section 330 of POCA.

An intra-entity disclosure made in good faith will satisfy the existing legal obligation to make a SAR disclosure (under sections 330 and 331 of POCA).[10]

The Act also provides for the making of joint disclosure reports to the NCA, and associated provisions which govern the inter-relationship between joint SARs and the provisions requiring disclosure.

This information-sharing model was piloted through the Joint Money Laundering Intelligence Taskforce, which the Government has lauded as a success. The above changes reflect a growing willingness on the part of law enforcement agencies in the UK to effectively "outsource" the detection and, in many cases, the initial investigation of, suspected financial crime. Indeed, the Home Office describes the SAR information-sharing changes as "transforming the relationship between public and private sectors […] helping to ensure that [regulated companies] provide the best possible intelligence for law enforcement agencies to investigate."[11] Banks and other firms in the regulated sector (and their designated Money Laundering Reporting Officers in particular) should therefore be prepared to take a more active role in identifying sources of information relevant to determining whether a money laundering offence has taken place, and will need to be prepared to respond to requests for information received from other regulated firms.

10 This is subject to a number of conditions, which vary according to which person is making the disclosure request or required notification, and so such disclosures should be considered on a case-by-case basis

11 https://www.gov.uk/government/collections/criminal-finances-bill.

Unlike a further information order, disclosures under the information-sharing provisions are voluntary and the Act does not provide any penalties for non-compliance with a request. However, firms will clearly be motivated to maintain good relations with the NCA and this will act as a strong incentive for firms in the regulated sector to do what they can to comply with such requests, particularly requests received from the NCA.

Impact

The Home Office's motivation for the reforms to the SARs regime is clear: the NCA is inundated with SARs[12] and the reforms are an attempt to reduce the burden on the NCA. The combined effect of the reforms should assist in this respect, and lead to improved information flows within the regulated sector, and between the regulated sector and law enforcement agencies. As the Home Office says, this should both (i) generate better intelligence for law enforcement agencies, and (ii) help firms better protect themselves.

Regulated entities may previously have opted to take a cautious and formulaic approach to SARs, whereby they submitted a SAR whenever a warning sign appeared and waited for NCA "consent" (explicit or otherwise) as a means of legal protection. Whilst the Act does not alter the standard of "suspicion" for a protected SAR disclosure or the definition of "proceeds of crime", under the new regime there is a risk that a lightly-reviewed SAR disclosure could lead a law enforcement agency to apply to extend the moratorium period to investigate the disclosure further. The delays that this would cause to the business of clients of the disclosing party, and the associated difficulties that the disclosing party (i.e. firms in the regulated sector) would face when trying to explain such delays to clients, are likely to encourage firms in the regulated sector to devote more resources to analysing transactions in context before they determine whether an SAR is required, in order to minimise the risk of serious disruption to normal business activity. The risk of disruption to business activity is also likely to make firms more willing to resort to litigation to challenge applications to extend the moratorium period.

12 In 2014-15 (the latest year for which such statistics are available), the NCA received over 380,000 SARs, including 14,672 SARs with requests for consent to proceed with the relevant transactions.

Firms should invest in appropriate training to ensure their Money Laundering Reporting Officers are fully equipped to deal with these latest changes.

Regulated firms will be able to use the new information-sharing provisions in the Act to help them determine whether a money laundering offence has taken place but will equally need to be prepared to respond to requests for information received from other regulated firms. Firms should invest in appropriate training to ensure their Money Laundering Reporting Officers are fully equipped to deal with these latest changes.

The changes to the SARs regime come at a time of heightened focus on the approach to financial crime in the UK, and the approach to money laundering in particular. The Money Laundering Regulations 2017 ("MLR 2017") — which came into force on 26 June[13] — require firms in the regulated sector to further review and update their policies, controls and procedures in relation to customer due diligence. The £163 million fine which the Financial Conduct Authority imposed on Deutsche Bank in January for serious anti-money laundering controls failings provides a clear example of the incentive for firms to carefully consider their responsibilities in this area.

13 The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.

Part Three: "The Good, The Bad and The Wealthy"

The New Unexplained Wealth Order

Unexplained Weath Orders ("UWOs") may place onerous requirements on individuals or companies to explain the source of their assets in the UK and beyond. It is not presently clear how UWOs will operate in practice, and multiple challenges in the UK courts can be foreseen.

Unexplained Wealth Orders

Individuals who are involved in grand corruption overseas or in serious crime may seek to launder the proceeds of their crime in the UK. Transparency International UK's December 2016 report, "London property: A top destination for money launderers", found that there was no data available on the real owners of more than half of the 44,022 land titles owned by overseas companies in London, whilst 91% of these properties were owned via secrecy jurisdictions, such as those named in the Panama Papers.

Law enforcement agencies often have reasonable grounds to suspect that assets identified during criminal or civil recovery investigations are the proceeds of serious crime. However, according to the Home Office, it is often not possible to take action because law enforcement agencies are unable to obtain sufficient evidence to reach the current civil or criminal burden of proof, particularly if they need evidence from overseas (where the individual may benefit from political support). The Act contains provisions which seek to fill this gap by creating a new investigative power to require respondents to explain the source of their wealth.[14] The Act creates the new UWO: a court order which will require an individual or company suspected of involvement in or association with serious criminality to explain (within a time period specified by the court) the origin of assets that appear to be disproportionate to their known income.[15] Neither the property[16] nor the respondent needs to be within the UK. If the individual or company is not able to provide a response to the UWO, enforcement agencies can seek to recover the property through existing civil recovery powers (e.g. interim receiving orders, recovery orders or orders for the detention or forfeiture of seized cash).[17] The High Court may, on an application made by an enforcement authority,[18] make a UWO in respect of any property if the court is satisfied that:

– There is reasonable cause to believe that the respondent holds the property, which must be of a value greater than £50,000.

14 Home Office, Factsheet – Part 1 Chapter 1 – Unexplained Wealth Orders.

15 Specifically, a UWO will require the respondent to provide a statement: (a) setting out the nature and extent of the respondent's interest in the property in respect of which the order is made; (b) explaining how the respondent obtained the property (including, in particular, how any costs incurred in obtaining it were met); (c) where the property is held by the trustees of a settlement, setting out such details of the settlement as may be specified in the order; and (d) setting out such other information in connection with the property as may be so specified.

16 The Act includes provisions which allow the UK enforcement authority to send a request for assistance in relation to the property, via the Secretary of State, to the government of the receiving country.

17 Under Part 5 of the Proceeds of Crime Act 2002.

18 "Enforcement authority" for this purpose means the National Crime Agency, Her Majesty's Revenue and Customs, the Financial Conduct Authority, the Director of the Serious Fraud Office or the Director of Public Prosecutions (in relation to England and Wales) or the Director of Public Prosecutions for Northern Ireland (in relation to Northern Ireland).

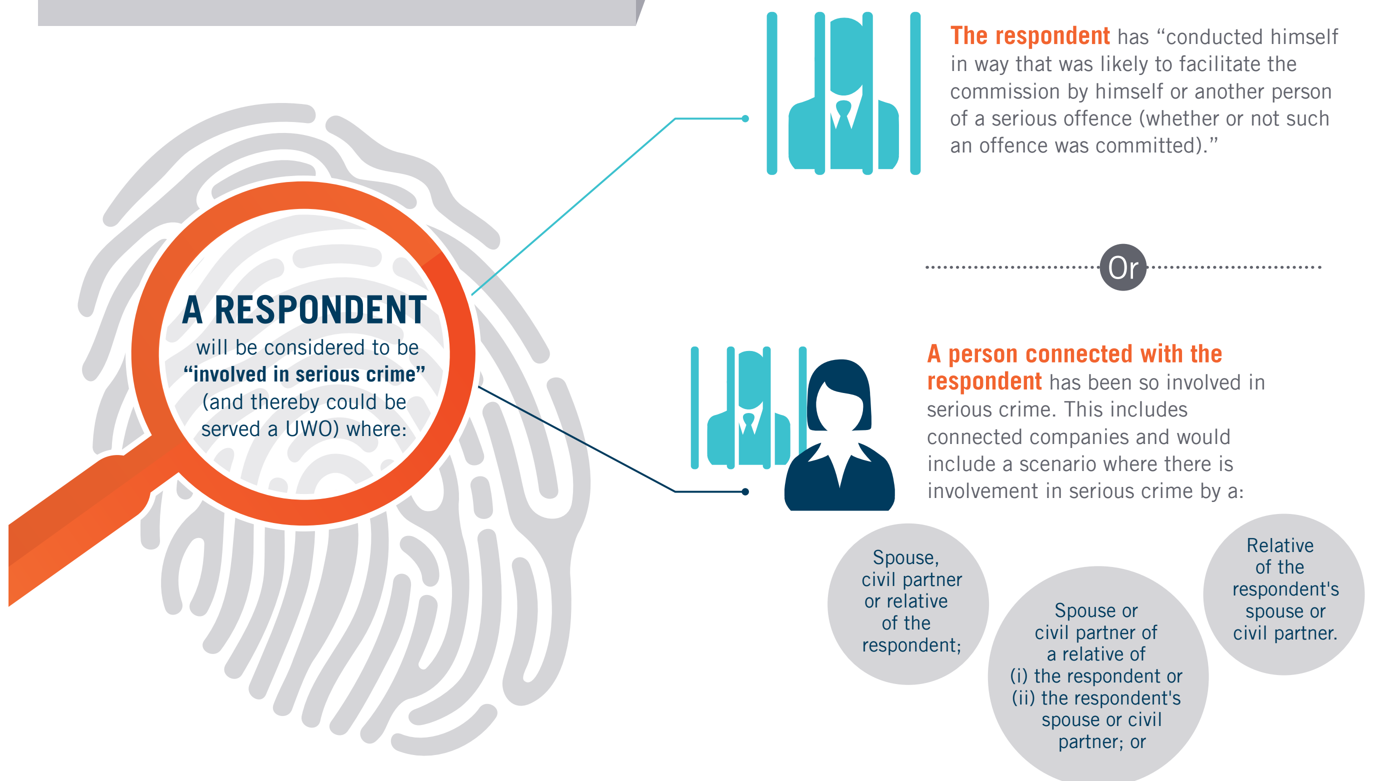
- There are reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property.
- The respondent is a politically exposed person (see below), or there are reasonable grounds for suspecting that:
  - The respondent is, or has been, involved in serious crime (whether in a part of the UK or elsewhere), or
  - A person connected with the respondent is, or has been, so involved.

An application for a UWO may be made without notice to the subject of the order.

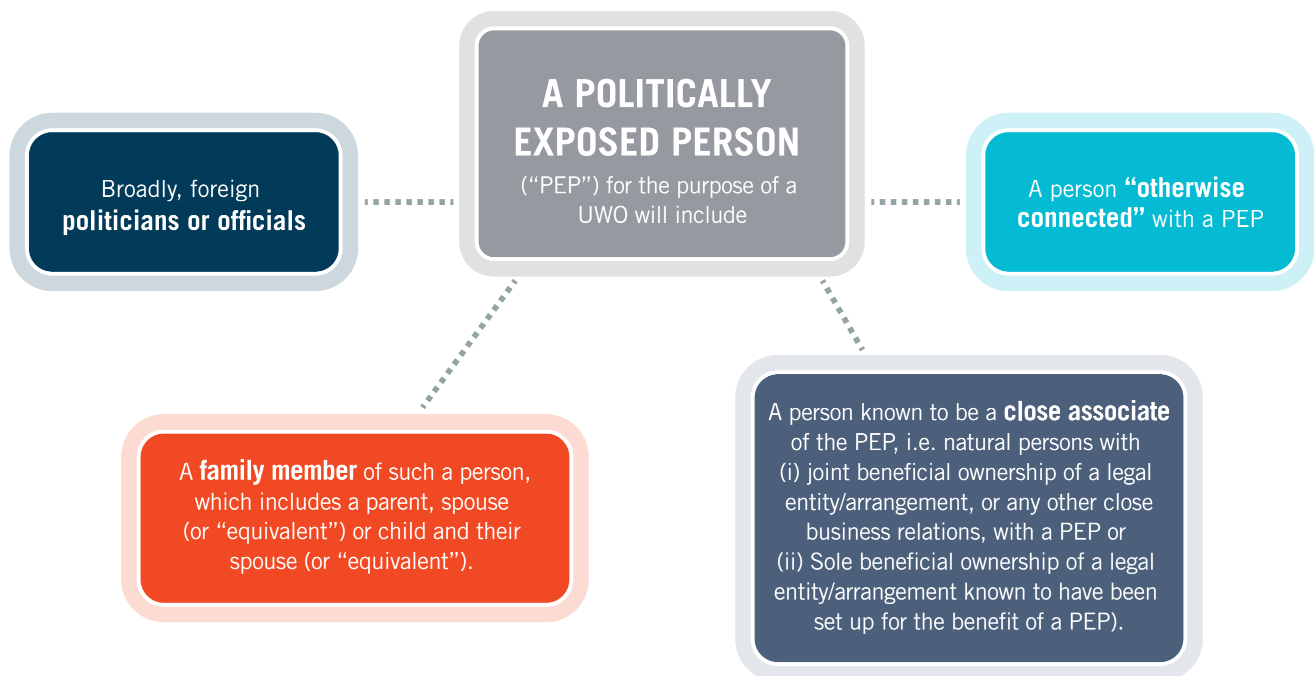
Where the High Court makes a UWO, it may also make an interim freezing order in respect of the property (which will prohibit the respondent from dealing with the property in any way) if it considers it necessary to do so to avoid the risk that any recovery order that might subsequently be obtained might be frustrated.

The wide definitions of relevant terms — such as "respondent" and "politically exposed person" ("PEP") as illustrated on this page and the next — mean that this criteria will permit enforcement authorities to apply for UWOs (and ultimately seek to apply powers of confiscation) against a respondent who may have only a very tenuous connection to a crime, or indeed where it is not established that a crime has been committed by anyone. This wide definition of PEP is significant, not least because the enforcement authority making the application does not need to suspect the PEP of involvement in any criminality in order to obtain a UWO. Provided the other requirements are satisfied (i.e. that (i) there is reasonable cause to believe that the respondent holds the property, which is of a value greater than £50,000; and (ii) there are reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property), the authority will only need to show that the respondent is a PEP. This affords the

DEFINITION OF A RESPONDENT



DEFINITION OF A POLITICALLY EXPOSED PERSON (PEP)



various UK enforcement authorities[19] a wide discretion to demand information from influential foreign figures whom it believes hold property in the UK beyond their legitimate means.

If the respondent complies (or purports to comply) with the UWO, the applicant has 60 days in which to determine what enforcement or investigatory proceedings, if any, it considers ought to be taken in relation to the property. If no interim freezing order is in place, there is no time limit on the enforcement authority, which may decide on next enforcement or investigatory steps at any time. Similarly, a determination by an enforcement authority to take no further enforcement or investigatory proceedings in relation to any property does not prevent the authority from taking such proceedings at a later date. Information obtained can simply be retained for future reference and action.

If the respondent fails to comply with each of the requirements in the UWO, this will give rise to a rebuttable presumption that the property is "criminal property", and will mean law enforcement agencies could try to recover the property through existing civil recovery powers, without having any further evidence of criminality. Interestingly, a respondent who "purports" to comply with the requirements imposed by a UWO is not to be taken to have failed to comply with the order. However, it is an offence to respond dishonestly to a UWO (i.e. to knowingly or recklessly provide misleading information), punishable by up to two years' imprisonment. Therefore, care should be taken when responding to a UWO.

Impact

UWOs will represent a significant new weapon in the arsenal of the UK enforcement authorities. UWOs are intended to target PEPs and, as considered above, a UWO may be issued against a PEP even where there is no reason to suspect that the PEP has any involvement in criminality. The risk that UK enforcement authorities will apply for too many such orders is likely to be

19 See footnote 18.

mitigated by considerations of the political ramifications of applying for UWOs where there is no suspicion of criminality by the PEP himself.

UWOs break controversial new ground in the criminal law sphere. They place the burden of proof on the respondent to explain how property was obtained, and will provide grounds for the confiscation of property.

During the passage of the Criminal Finances Bill through Parliament, the value of the property which may be the subject of a UWO was reduced from £100,000 to £50,000 in response to concerns raised by Scottish MPs that the £100,000 threshold could disadvantage law enforcement agencies in certain parts of the country, particularly where property values may be lower or the proceeds of crime more evenly shared out. This reduction in the threshold may allow the UK Government to use UWOs more readily to pursue domestic criminals suspected of drug trafficking or organised crime offences, and not solely to pursue high value property held by foreign individuals or entities. Such steps would be politically attractive and in many cases would represent "low-hanging fruit".

There are a number of question marks in relation to how UWOs will work in practice. As such, the imposition of UWOs is likely to be contested in UK courts. Some issues which may arise include:

- How much detail does the respondent have to provide in order to be deemed to have complied with a UWO?
- Where is the line between "purported" compliance and recklessly providing misleading information?
- To what extent might arguments over whether the order is properly granted delay compliance with the order itself?
- How will the information obtained be used?

In addition, UWOs break controversial new ground in the criminal law sphere. They place the burden of proof on the respondent to explain how property was obtained, and will provide grounds for the confiscation of property from a respondent who has not been convicted of an offence, in a case where it has not been established that a crime has been committed by anyone at all. The controversial nature of the new orders means that legal challenges are likely, and could encourage recipients of UWOs to seek to challenge the orders on a fundamental basis. For example, a respondent may claim that a UWO violates the right to peaceful enjoyment of property under the European Convention on Human Rights (at least for so long as such rights remain protected by UK legislation).

How Dechert Can Assist

Dechert has considerable experience advising individuals and companies in connection with interactions with UK law enforcement agencies.

Dechert provides compliance services founded on the design, implementation and enforcement of effective compliance programmes. Our lawyers draft policies and procedures to train personnel, conduct due diligence and assist with risk management across a range of topics. We can help companies to identify business-specific risks related to economic crime compliance issues and implement solutions to mitigate those risks in numerous jurisdictions. Our team assists clients in all phases of their compliance and risk mitigation approach, from evaluating existing programmes to developing new policies and procedures, and, crucially, with decisions regarding how to respond should a problem be uncovered.

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