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EMPOWERING THE UK TO RECOVER CORRUPT ASSETS

Unexplained Wealth Orders and other new approaches to illicit enrichment and asset recovery

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Empowering the UK to recover corrupt assets

Unexplained Wealth Orders and other new approaches to illicit enrichment and asset recovery

Glossary

Anti-Money Laundering (AML)

Asset Recovery Agency (ARA)

Asset Recovery Incentivisation Scheme (ARIS)

Crime and Courts Act (CCA)

Criminal Assets Bureau (CAB)

Criminal Justice Act (CJA)

Deferred Prosecution Agreements (DPAs)

European Convention on Human Rights (ECHR)

European Union (EU)

Financial Action Task Force (FATF)

Financial Conduct Authority (FCA)

Financial Services Authority (FSA)

Her Majesty's Revenue and Customs (HMRC)

Interest and Asset Disclosures (IADs)

International Covenant on Civil and Political Rights (ICCPR)

International Monetary Fund (IMF)

Mutual Legal Assistance (MLA)

National Crime Agency (NCA)

Non-conviction based asset forfeiture (NCBAF)

Organisation for Economic Cooperation and Development (OECD)

Politically Exposed Persons (PEP)

Proceeds of Crime Act (POCA)

Serious and Organised Crime Agency (SOCA)

Serious Fraud Office (SFO)

Serious Organised Crime and Police Act (SOCPA)

Stolen Assets Recovery initiative (StAR)

Suspicious Activity Reports (SARs)

The Metropolitan Police Proceeds of Corruption Unit (POCU)

Unexplained Wealth Order (UWO)

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United Nations Office for Drugs and Crime (UNODC)

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Executive summary

The available research and a consensus of expert assessments suggest that a very large amount of corrupt wealth, stolen from around the world, is invested in the UK. However, only a handful of suspicious transactions and assets related to "grand corruption" have been frozen in the UK.[1]

This discussion paper aims to initiate and inform a much needed debate about what level of power should be available to the UK Government in order to provide a proportionate response to the laundering of the proceeds of corruption and the harm caused by grand corruption.

At present, TI-UK believes that the UK's asset recovery regime is not fit for purpose, in part, because it is overly reliant on achieving a conviction against individuals in the country from which the money was stolen.

Laundering of the proceeds of grand corruption is not unique to the UK, and a number of other major global financial and investment centres are also vulnerable and attractive to the corrupt. However, the UK is well placed to lead international efforts to recover the proceeds of grand corruption using its position as a leading global financial, real estate and luxury goods centre, the quality and expertise of its law enforcement agencies and the reach of its civil jurisdiction.

The UK's performance in freezing, seizing and recovering those assets, while relatively strong compared to other countries, is undeniably very limited compared to the scale of the threat. The National Crime Agency (NCA) estimates that around £100bn could be laundered through the UK each year.[2] Typical detection rates of money laundering around the world by law enforcement agencies are believed to be in the region of 1 per cent; seizure rates are much lower.[3]

New data, published in this paper for the first time, indicate that, in 2014, UK law enforcement agencies were only able to take action on 7 individual reports of suspicious financial transactions that were identified as the possible proceeds of international corruption. Every year, there are around 14,000 suspicious activity reports requesting consent from law enforcement in order to transact[4], across all financial crime, and there are several studies that suggest poor performance from the private sector in even raising suspicions in the first place.

Under current legal powers in the UK, there is very limited prospect of restraining suspicious transactions, unless there is already a pre-existing conviction against the individual. As a result, large amounts of unexplained suspicious wealth enter the UK each year and are invested in our financial system, in property, in luxury goods or in other areas of the economy.

[1] The UN defines grand corruption as corruption that pervades the highest levels of a national Government, leading to a broad erosion of confidence in good governance, the rule of law and economic stability. See: http://www.unep.org/training/programmes/Instructor%20Version/Part_2/Activities/Interest_Groups/Decision-Making/Supplemental/UN_Anti_Corruption_Toolkit_pages_10to16.pdf [Accessed: 16 Feb 2015

[2] http://www.lawgazette.co.uk/news/solicitors-prickly-economic-crime-chief/5045241.fullarticle [Accessed: 26 May 2015]

[3] UNODC *Estimating illicit financial flows resulting from drug trafficking and other transnational organized crimes* (Oct 2011, UNODC) http://www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf [Accessed: 16 Feb 2015]

[4] Referring to 'consent' SARs, which request consent from law enforcement in order to process the transaction in question.

This discussion paper represents a summary of the findings of a Taskforce of experts, convened by TI-UK from across academia, legal practice and investigators. Given the very large amounts of proceeds of corruption likely to be flowing into the UK, the very low asset recovery rates and the unrealistic timeframe for achieving a successful restraint from a suspicious activity report, the Taskforce examined a range of legislative options to improve asset recovery rates and considered their appropriateness, effectiveness and proportionality.

In this paper we publish analysis of a proposal for UK law enforcement agencies to have the power to serve an Unexplained Wealth Order (UWO), as a civil tool to support asset recovery, on suspects of grand corruption.

Suspects issued with a UWO would be **required to explain legitimate and legal sources of wealth** for suspicious UK assets or transactions, provided there was enough initial suspicion of criminality. If the trigger for the UWO was a suspicious activity report, then **the timeframe for refusing consent for a suspicious transaction would be paused while the UWO was being responded to.** Failure to respond to a UWO, or an inadequate response, together with the initial grounds for suspicion, could then be used to facilitate a civil recovery process against the asset.

We recommend that an appropriate governing body, such as the Law Commission or a Parliamentary Committee, consider this discussion paper as the basis for a more wide ranging review of powers to tackle grand corruption and the money laundering of grand corruption in the UK. We believe that broader discussion is now required within government, in Parliament and in society about what steps the UK should take to stem the flow of corrupt money into the UK and what is a proportionate response to the scale of the threat and the harm.

These questions go to the heart of what society and economy we want to have in the UK.

1. What is the scale of the problem?

When corrupt individuals and other criminals obtain illicit funds, they seek out ways to disguise the illegal origin of the money and to store the value somewhere secure. This means that all manner of investment products could be used to launder the proceeds of corruption. Through this laundering process, illegally acquired wealth, such as bribes, kick-backs, illicit political contributions, embezzled funds and loans – as well as the proceeds of trafficking, frauds and tax evasion for example – are given an appearance of legitimacy. The assets can then be ready to be enjoyed by the corrupt or further moved on for other legal or illegal purposes. Law enforcement and anti-money laundering (AML) professionals attempt to identify instances of money laundering and to investigate whether assets or transactions are the proceeds of crime.

The UK is an attractive location to launder, hide or enjoy the proceeds of corruption from around the world. The individuals who perpetrate these crimes are often engaged in grand corruption – corruption that pervades the highest levels of a national government and leads to a broad erosion of confidence in good governance, the rule of law and economic stability and enables the theft of very large amounts of wealth.[5]

To deter money laundering in the UK, the rate of prosecutions and asset recovery should be high enough to present an effective deterrent against those who would steal and launder millions and billions of pounds worth of wealth from some of the poorest countries in the world into the UK.

1.1 The scale of money laundering of corrupt wealth

The scale of illicit financial flows around the world is vast. Given its inherently secretive nature, it is difficult to calculate the exact scale of global money laundering. However, while estimates vary, they provide a rough idea of the magnitude of the problem and of the necessity for the UK to effectively detect, restrain and deter the proceeds of corruption within its jurisdiction.

- Recent US estimates have put the scale of global cross-border flow of the proceeds of crime, including corruption, at US$1.6 trillion.[6]
- The United Nations Office for Drugs and Crime (UNODC) assesses the total amount of money and assets laundered worldwide to be between US$800bn and US$2 trillion annually.[7] Although the variance between these figures is very large, even the most conservative estimates indicate the massive scale of the problem.
- The European Commission estimates that corruption costs European Union member states around EUR120bn per year.[8]
- Prior to its abolition in early 2013, the UK Financial Services Authority (FSA), using an International Monetary Fund (IMF) methodology, estimated that £23-57bn was being laundered within and through the UK each year.[9]

[5] The UN defines grand corruption as corruption that pervades the highest levels of a national Government, leading to a broad erosion of confidence in good governance, the rule of law and economic stability. See :http://www.unep.org/training/programmes/Instructor%20Version/Part_2/Activities/Interest_Groups/Decision-Making/Supplemental/UN_Anti_Corruption_Toolkit_pages_10to16.pdf [Accessed: 16 Feb 2015]
[6] http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-140429.html [Accessed: 2 May 2015]
[7] https://www.unodc.org/unodc/en/money-laundering/globalization.html [Accessed: 16 Feb 2015]
[8] http://europa.eu/rapid/press-release_IP-14-86_en.htm [Accessed: 2 June 2014]

A recent TI-UK report found that since 2004, over £180m worth of property in the UK has been brought under criminal investigation for being the suspected proceeds of international corruption. However, this was described by a senior police officer as "only the tip of the iceberg".[10]

Case studies provide a further indication of the scale of illicit funds flowing through the UK:

- In the case of General Sani Abacha and his conspirators, an estimated £780m of money stolen while he was dictator of Nigeria is believed to have been laundered through UK banks.[11]

- James Ibori, former Governor of Delta State in Nigeria from 1999 to 2007 who pleaded guilty to ten counts of money laundering, is estimated by UK law enforcement agencies to have embezzled £150m of Nigerian public funds.[12] Reporting around the Ibori court case revealed that he bought a house in Hampstead, north London, for £2.2m, and a property in Shaftesbury, Dorset, for £311,000.[13]

- Saadi Gadaffi owned a £10m home in Hampstead, London via a company named Capitana Seas Ltd. After his father Muammar Gadaffi was deposed, the transitional government in Libya was granted a default judgment against Capitana Seas Limited for the value of the property.[14]

- Diepreye Alamieyeseigha, governor of Bayelsa State in Nigeria from 29 May 1999 to 9 December 2005, was detained in London on charges of money laundering in September 2005. At the time of his arrest, Metropolitan police found about £1m in cash in his London home.[15] He was found to own properties in London worth an alleged £10m.[16]

> "Everyone accepts that money-laundering is a major issue… in the developing world in particular there is a constant, never-ending haemorrhage back into the developed world and our banking system of money that should be going to the poor. Something should be done about it" - **Lord Brennan**[17]

Money laundering of grand corruption is not unique to the UK, and a number of other major global financial and real estate investment centres are likely to be similarly vulnerable to being the target of such criminal activity. TI-UK believes the UK to be one of a small number of global financial centres that play a key role in processing substantial levels of corrupt capital and also that the UK has a leading opportunity to play a role in deterring the money laundering of grand corruption.

[9] http://www.transparency.org.uk/publications/closing-down-the-safe-havens/, p.5 [Accessed: 2 May 2015]
[10] Transparency International *UK Corruption On Your Doorstep: How corrupt capital is used to buy property in the UK* (March 2015)
[11] http://www.theguardian.com/business/2001/oct/05/warinafghanistan2001.afghanistan1 [Accessed: 2 May 2015]
[12] http://www.globalpost.com/dispatches/globalpost-blogs/africa/nigerian-ex-governor-admits-guilt-money-laundering[Accessed: 2 May 2015]
[13] http://www.bbc.co.uk/news/world-africa-17739388 [Accessed: 2 May 2015]
[14] http://www.globalwitness.org/library/%C2%A310m-house-expensive-london-suburb-recovered-libya [Accessed: 2 May 2015]
[15] http://news.bbc.co.uk/1/hi/world/africa/4462444.stm [Accessed: 2 May 2015]
[16] http://www.theguardian.com/world/2005/nov/23/hearafrica05.development [Accessed: 2 May 2015]
[17] http://www.publications.parliament.uk/pa/ld201314/ldhansrd/text/131209-0003.htm#13120942000679) [Accessed: 13 April 2015]

1.2 Understanding grand corruption

Most cases of grand corruption are likely to feature public officials and politicians, or politically exposed persons (PEPs). This is because the power and access that public office can afford can be abused by those who commit corruption and embezzle public funds. The vast majority of PEPs will not likely be corrupt, but they represent a specific risk category of persons under UK and international anti-money laundering rules.

Who is a PEP?

UK Money Laundering Regulations (2007), in accordance with internationally-agreed rules, define a PEP as an individual who is, or has, at any time in the preceding year, been entrusted with a prominent public function by:

- a state other than the United Kingdom
- a Community [EU] institution
- an international body

Close associates or family members of PEPs are also considered PEPs.

The Fourth EU Anti-Money Laundering directive is expected to eliminate the exclusion of domestic PEPs from the definition, although they will be subject to less stringent checks than foreign and international ones.

The 2009 Financial Action Task Force (FATF) Strategic Surveillance Survey noted that PEPs are considered to be one of the largest categories of high-risk customers for money laundering purposes. By the nature of their position, their access to public funds and the knowledge and ability to control budgets, public companies and contracts, corrupt PEPs may abuse their positions to award contracts in return for personal financial reward, or simply to create structures to embezzle government funds.

In view of this, FATF's Recommendation 6 stipulates that financial institutions should take steps to understand and more closely monitor the financial transactions of PEPs as well as their families and associates. The recommendation requires systems to determine whether a customer is a PEP, to reasonably determine the source of the funds and to engage in enhanced ongoing monitoring of the relationship.

This recommendation was implemented by Regulation 14 of the UK Money Laundering Regulations 2007 in regard to foreign PEPs. As such, regulated entities are required to determine the source of a PEP's wealth, as well as the intended nature and purpose of the account. Banks must also determine the source of funds for deposits into the account and monitor the relationship closely. The basis for a bank's suspicion will therefore be determined by what they anticipate the likely activity should be on a PEP's account.

However, the criminals behind grand corruption may not be PEPs. A focus exclusively on PEPs may fail to capture key individuals who have never held public office, but have acquired wealth corruptly. They can be business people or organised criminals who have never held any sort of public office (or been 'close associates' with those who have), but yet have benefited from state capture, embezzlement and grand corruption.

A key issue within this discussion paper is to consider how far the obligations of transparency should go and what scope of classes of persons should be covered by such obligations. Those in public office have higher transparency requirements in general than average citizens, but focussing only on such individuals will likely miss a very large number of those who are engaged in grand corruption, or create loopholes for the corrupt to exploit.

1.3 How are the proceeds of corruption laundered?

According to the FATF, the most prevalent forms of proceeds of grand corruption are those arising from bribe-taking or kickbacks, extortion, self-dealing, conflicts of interest, and embezzlement from the country's treasury by a variety of fraudulent means.[18]

There are many different methods for laundering the proceeds of corruption. The FATF's 2011 report on laundering the proceeds of corruption concluded that:

- Corrupt PEPs use a broad array of techniques to hide their proceeds, disguising their ownership through corporate vehicles and trust companies and by using professional gatekeepers to launder proceeds through the domestic and foreign financial institutions.
- They have used their power to acquire state assets, to control police authorities and to capture banks for the purpose of money laundering.
- AML standards are not always being implemented by financial institutions; nor are AML laws and regulations being enforced by regulatory authorities or supervisors. Historic case studies show how financial institutions have failed to follow AML procedures – even where those procedures called for only a basic risk-based approach – and have thereby given corrupt PEPs continued and unabated access to the global financial system.[19]

The FATF reveal several common themes that reoccur in cases of money laundering of the proceeds of grand corruption:

- **Foreign bank accounts.** Foreign accounts hold the advantage of being harder to investigate for the victim country and are likely to be perceived as more stable and safer. They can also be more easily accessed than accounts held in the PEPs home country.
- **The use of shell companies, trusts and non-profit or charitable entities.** Sham legal entities can provide anonymity for the corrupt PEP.
- **Use of nominee directors.** Nominee directors and other types of front-persons are used to mask the fact that the ultimate beneficiary of a shell company is a corrupt PEP.
- **Using offshore accounts.** Many 'front' entities established by corrupt PEPs or their associates (such as shell companies and trusts) are likely to be based offshore to the jurisdiction where the actual funds are invested.
- **Self-dealing.** A corrupt PEP can ensure that a corporate entity, which they part-control, profits from the state and that those funds can then be laundered into the wider financial system.
- **Bank accounts which belong to, or are controlled by the state.** Sovereign wealth funds, and other state controlled funds, can be manipulated to launder the proceeds of grand corruption. Corruption also can manifest in false funding requests, for their private benefit, which are approved by a corrupt PEP.

[18] FATF Laundering the Proceeds of Corruption (2011), available at: http://www.fatf-gafi.org/media/fatf/documents/reports/Laundering%20the%20Proceeds%20of%20Corruption.pdf
[19] FATF Laundering the Proceeds of Corruption (2011)

- **Using family members or close associates.** It is common in cases of grand corruption for some, or all, of the funds to be laundered through family members, complicit lawyers and accountants. The use of accounts belonging to professional intermediaries reduces suspicion, disguises the flow of financial transactions and may circumvent disclosure obligations.
- **Re-routing money back.** PEPs may require accounts in their own country to fund their lifestyles, and there have been examples in which the PEP, after laundering money overseas, moves the money back to their home country.

1.4 Why does it matter?

Corruption and the impunity achieved by perpetrators of corruption through money laundering is a major contributor to global poverty. Money lost from corrupt officials embezzling large amounts of state funds considerably reduces the resources available to those governments. This has a negative impact on their ability to provide social services or invest in infrastructure and economic development in order to help their citizens lift themselves out of extreme poverty and move their countries towards greater prosperity.

For example, in 2014, the ONE Campaign estimated that at least US$1 trillion is being taken out of developing countries each year through a web of corrupt activity that involves the use of anonymous shell companies, money laundering and illegal tax evasion. The same research quantified the human cost of this financial loss by suggesting that as many as 3.6 million deaths could be prevented each year in the world's developing countries if action were taken to end the secrecy that allows corruption and criminality to thrive and the recovered revenues were invested in health systems.[20] Other studies in the past decade, particularly those from the World Bank, have made broadly similar assessments.

If the UK remains a safe haven for corrupt assets, politicians and officials from around the world, then it will continue to support global poverty and insecurity. It may also leave the UK vulnerable to the malign influence of corrupt billionaires and millionaires who are known to engage in influencing media and politics in the UK.[21]

When the proceeds of corruption are laundered through the UK, it is a criminal issue, a moral issue, an aid-effectiveness issue, a reputational issue for the City of London and it can be a national security issue to detect, seize and recover those assets.

[20] https://s3.amazonaws.com/one.org/pdfs/Trillion_Dollar_Scandal_report_EN.pdf [Accessed: 16 Feb 2015]

[21] Two case studies exemplify the point: Dmitry Firtash, Ukrainian Oligarch, currently facing charges in the US for corruption in international business, and James Ibori, State Governor in Nigeria who pleaded guilty to 10 counts of money laundering in the UK, both made use of UK public relations companies and UK political engagement to attempt to manage their own reputation and build connections with the UK establishment.

2. TI-UK Taskforce Objectives and Findings

Given the very large amounts of proceeds of corruption likely to be flowing into the UK, TI-UK established a Taskforce of experts to review the appropriateness of legislation in place to deter grand corruption and recover stolen assets that have made their way into or through the UK.

The Taskforce was composed of eminent experts from academia, civil society and the legal profession (see Annex A). It was joined and assisted by observers from UK government departments and law enforcement agencies.

The Taskforce considered three questions:

1. Is current legislation for asset recovery fit for purpose?
2. If not, what options exist to address the weaknesses in UK law and are they proportionate?
3. What would be the appropriate scope of such powers?

2.1 Is current legislation for asset recovery fit for purpose?

The Taskforce made five key findings:

1. The levels of asset recovery by the UK are very small compared to the likely amounts of corrupt wealth being laundered
2. Only a small minority of suspicious activity reports relating to grand corruption are acted on by law enforcement agencies
3. The timeframe “moratorium period” of 31 days for responding to suspicious activity reports is generally inadequate to investigate and achieve asset restraint for grand corruption cases
4. Non-conviction based asset forfeiture (NCBAF) civil powers are under-used in cases of grand corruption
5. The current framework for asset recovery is overly reliant on a conviction in the origin country

2.1.1 The levels of asset recovery are very small compared to the scale of the likely amounts being laundered

When the proceeds of corruption are invested into or through the UK, an effective AML regime should allow for corruptly acquired assets to be identified, recovered and returned, and where possible for guilty parties to be brought to justice. An effective AML regime for corrupt capital should restrict and prevent the flow of proceeds of corruption into the UK. Private sector regulated entities[22] refusing suspicious transactions should be the first line of defence in this system, and law enforcement agencies should have effective penalties and asset recovery measures to deter the corrupt using the UK as a safe haven for corruptly acquired assets.

Asset recovery results for grand corruption in the UK, though strong relative to other countries, are extremely low compared to the likely scale of illicit funds and the impacts of the underlying corruption. This strongly suggests the UK's AML regime is failing to tackle laundering of the proceeds of grand corruption in the UK.

In 2011, the UNODC estimated that the global detection rate of illicit funds by law enforcement agencies is as low as 1 per cent for criminal proceeds, and the seizure rate is possibly 0.2 per cent.[23] In 2014, the Organisation for Economic Cooperation and Development (OECD) published analysis on illicit financial flows across 30 countries, covering the period 2010-12. During this period, OECD countries froze US$1.4bn (an average of US$0.7bn per annum), and returned US$147m (an average of US$73.5m per annum).[24] The report also quotes figures produced jointly by the Stolen Assets Recovery initiative (StAR) and OECD on the proceeds of corruption for the same period, revealing that the UK froze US$451m (32 per cent of the total reported by OECD countries, and averaging at US$225.5m per annum), and returned US$67m (45 per cent of the total, averaged at US$33.5m per annum).[25] The UK was one of only four countries that returned frozen assets, according to the survey.

While the UK performs well relative to other international peers, even at the highest estimate, asset freezing and asset recovery are very small in relation to the vast scale of the activity. Based on highly conservative estimates of the scale of proceeds of corruption, the UK is unlikely to have frozen any more than 0.75 per cent of global corrupt financial flows per annum for the period covering 2010-2012.[26]

This is disproportionately low considering London's role as a global financial centre, a professional services centre and an investment hub for luxury property and high-value goods.

[22] Regulated entities under UK Money Laundering Regulations 2007 include those in the financial, legal, accountancy, property and high-value goods sectors

[23] UNODC Estimating illicit financial flows resulting from drug trafficking and other transnational organized crimes (Oct 2011, UNODC) http://www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf [Accessed: 16 Feb 2015]

[24] http://www.oecd.org/corruption/Illicit_Financial_Flows_from_Developing_Countries.pdf, p.14 [Accessed: 16 Feb 2015]

[25] http://www.oecd.org/corruption/Illicit_Financial_Flows_from_Developing_Countries.pdf, p.91 [Accessed: 16 Feb 2015]

[26] Calculated by taking the 2010-2012 STAR/OECD figure of UK asset freezing (US $225.5 million per annum) as a percentage of the mid-point of the Baker et al's 2003 estimate for corrupt global flows (referenced in Closing Down the Safe Havens), US $30 billion which is highly conservative compared to other common assessments.

2.1.2. Only a small minority of suspicious activity reports relating to grand corruption are acted on by law enforcement agencies

Under the Proceeds of Crime Act 2002 (POCA), Suspicious Activity Reports (SARs) must be filed with the NCA every time that a designated staff member for a regulated business, across a range of sectors, suspects – or has reasonable grounds for knowing or suspecting – that a person is engaged in money laundering.

The Metropolitan Police Proceeds of Corruption Unit (POCU) SARs data indicate the proportion of funds where the private sector was refused consent to complete the transaction due to suspicion of involvement in international corruption or money laundering in the UK. New data that TI-UK can publish in this paper sheds light on the scale of SARs relating specifically to grand corruption.

The Metropolitan Police's Proceeds of Corruption Unit

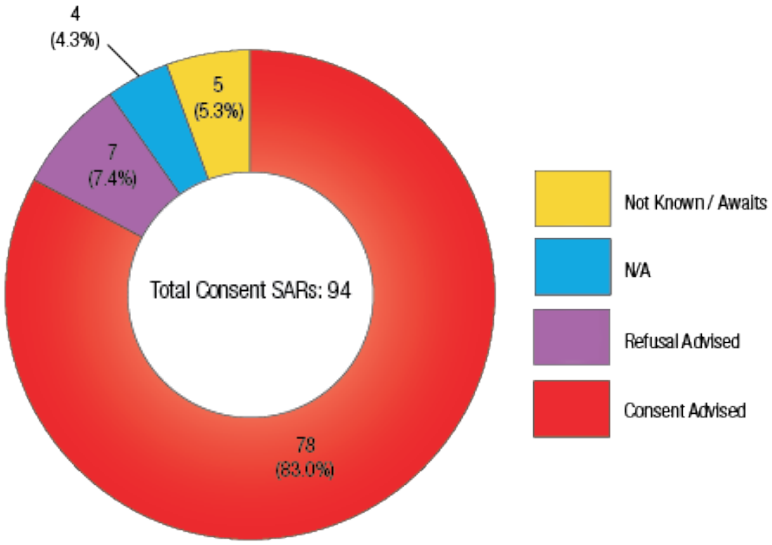
The Metropolitan Police's POCU operated under a unique model for funding of anti-corruption law enforcement. The unit was fully funded by the UK Department for International Development since 2007 as a financial crime unit under the Specialist and Organised Crime Command of the Metropolitan Police Service. The unit specialises in the investigation of the theft of assets by foreign politicians, public officials, their family members and associates from the developing world who launder these funds into and through the UK. As of April 2015, as part of the re-organisation of UK policing of corruption, POCU has been reformed under the Economic Crime Command of the NCA.

In the year of 2014, 94 'consent' SARs were referred to POCU as potentially linked to the proceeds of grand corruption and 18 SARs were submitted by the private sector for intelligence value only. Consent SARs are submitted in cases where the private sector is requesting consent by law enforcement agencies for the transaction to be passed because their levels of suspicion are so high that they consider themselves open to regulatory or criminal money laundering sanctions if they were to complete the transaction without first submitting a SAR. Of these 94 consent SARs, seven SARs (worth £113.3m or 54.7 per cent of the total value of SARs received in 2014) were deemed so suspicious by law enforcement agencies as the potential proceeds of corruption that the POCU refused consent for them to be completed by the private sector.

However, this is recognised by law enforcement experts as only a very small proportion of the wider threat. Of all SARs that have been submitted to POCU as suspicious from the private sector, only 7.4 per cent (by volume), or 7 individual reports, were refused consent by POCU. The Taskforce's consultations with experts indicated that a large proportion of SARs are not refused consent simply due to lack of resources to investigate each SAR within the available timeframe.

Figure 1: Proceeds of Corruption Unit – Consent SAR Actions

01/01/2014 – 31/12/2014



This SARs data suggests that POCU have prioritised the high value SARs over lower value transactions that have been deemed suspicious by the private sector. The 2014 data indicates that the total level of SARs relating to grand corruption is low, at 94 reports out of approximately 14,000 total consent SARs for all financial crime per year[27], and only a small minority of these (7 reports) were able to be acted on within the available timeframe.

Another shortcoming in the AML system is that these figures rely on the current level of SARs reporting by the private sector, which is known to be deficient. The FSA's 2011 thematic review of banks' management of high money laundering risk situations revealed systemic failings in AML compliance by financial institutions with high risk customers and PEPs.[28] The report found that three quarters of the banks reviewed, including a number of major banks, were not managing AML risk effectively. Over half the banks failed to apply meaningful enhanced due diligence (EDD) measures in higher risk situations and more than a third of the banks visited failed to put effective measures in place to identify customers as PEPs. Around a third of the banks dismissed serious allegations about their customers without adequate review. The FCA's June 2014 Anti-Money Laundering Report restated the failure of banks to prevent the proceeds of corruption filtering through their systems. The 2014 report found some improvements since the 2011 report, but major failings remained widespread.[29]

[27] http://www.nationalcrimeagency.gov.uk/publications/464-2014-sars-annual-report/file [Accessed: 19 May 2015]
[28] FSA, Banks' management of high money-laundering risk situations, (June 2011 http://www.fsa.gov.uk/pubs/other/aml_final_report.pdf [Accessed: 19 May 2015]
[29] https://www.fca.org.uk/static/documents/thematic-reviews/tr13-09.pd and https://www.fca.org.uk/static/documents/corporate/anti-money-laundering-annual-report-13-14.pdf [Accessed: 19 May 2015]

2.1.3 The moratorium time period of 31 days for suspicious activity reports is generally inadequate to investigate and achieve asset restraint for grand corruption cases

The UK's present SAR regime gives investigators seven days within which to refuse its consent to a suspicious financial transaction. If they refuse consent, law enforcement investigators have a period of 31 days to obtain a court order to freeze the account by meeting a legal threshold of establishing that there is 'a reasonable cause to suspect' that the account contains the proceeds of crime.[30] This period of 31 days is known as the 'moratorium period' for SARs.

Taskforce discussion with a range of law enforcement and legal experts highlighted that a period of 31 days is insufficient time in which to investigate complex corruption cases, with international requests for information and typically requiring law enforcement agencies to prove a corrupt criminal act in the origin country. Unless there is compelling evidence for a case already contained within a SAR, it is highly unlikely that a SAR will be refused consent.

When the initial time period is up, the transaction is effectively approved, providing a rubber stamp of approval over a transaction that law enforcement agencies may believe is suspicious. Such approval generally provides the private sector with protection from sanction or punishment from handling the transaction, even if it is later found to be criminal. In contrast, other authorities can maintain indefinite periods of 'refusal of consent'. Since 2009, Guernsey has retained a 'refusal of consent' relating to the son of former Indonesian dictator Tomi Suharto, allowing time for Indonesian authorities to complete a case.

In the UK, the moratorium time period means that, in practice, when a foreign official with a declared wage of – for example – US$100,000 per annum transacts £20m through a UK bank account, current UK legislation does not allow for this transaction to be restrained. There is no power in UK law to require the foreign public official to explain legitimate sources of wealth for such suspicious transactions beyond declared and official sources of wealth. Without evidence of a predicate crime, the mere fact of a suspicious unexplained transaction would not allow for further action to be taken against the suspect in question.

UK law enforcement agencies may have grounds for suspicion that an individual is laundering the proceeds of corruption, but require more time than the SAR moratorium allows to collect evidence of the criminality – including in the origin country – to meet a standard of 'reasonable cause to suspect' that the transaction is the proceeds of corruption. In such cases, UK law enforcement agencies will be unlikely to be able to prevent transaction within the SAR moratorium period.

Typically, this is the case. SARs are not used in grand corruption cases to prevent or restrain the transactions, unless there is already a predicate offence or charge against the suspect. The vast majority of SARs that are used by investigators are likely to be used retrospectively, or used to support intelligence for a prospective case. Such low utility of SARs may contribute to low levels of confidence within the private sector that SARs will be acted on, or that they deserve investment and high levels of effort. The amount of proceeds of corruption invested in the UK is believed to be very large, and, in practice, suspicious transactions and assets in the UK of foreign PEPs appear to be unrestrained apart from in a handful of cases.

[30] http://www.legislation.gov.uk/ukpga/2015/9/enacted [Accessed: 19 May 2015]

2.1.4 Non-conviction based asset forfeiture is underused in cases of grand corruption

The UK has a powerful legal tool in NCBAF, where the civil standard of proof is based on 'the balance of probability', which is lower than the criminal standard of 'beyond reasonable doubt'. The UK has not generally sought to use civil forfeiture powers to target corrupt assets located in the UK or overseas. Only one case of this seizure option being used in the UK to target corrupt assets was identified during the course of this research, that of *SOCA V Agidi.*

The Agidi case[i]

In February 2011, a formerly high-ranking Nigerian government official was ordered by the High Court to hand assets worth £1.25m to the former Serious and Organised Crime Agency (SOCA). The order was granted by the High Court in London against Christopher Orumgbe Agidi from Lagos in Nigeria, trading as Orion Worldwide Consult Limited.

Mr Agidi was a life-long civil servant holding various positions with the Nigerian Government from 1967 until 15 March 2002 when he retired from his post as Director of Public Affairs in the Executive Office of the President. SOCA submitted that Mr Agidi had derived the majority of his assets through corruption over a five year period and that he used his consultancy firm in London as a front to launder the cash. SOCA's investigation identified that Mr Agidi had received bribes from two international companies whilst he was in post.

The Court found, in summary, that:

- Mr Agidi earned a modest salary whilst in office.
- Mr Agidi was not allowed to hold a UK bank account under Nigerian law.
- Vast sums flowed through Mr Agidi's bank accounts in the UK in the amount of millions of pounds and large sums were withdrawn in cash by him.
- Mr Agidi entered into five written agreements with a company which was contracting to do business with the Nigerian State (which the Judge found to be a "corrupt relationship" and a conflict of interests as a senior civil servant).
- Mr Agidi had not disclosed payments from this company in his Asset Declaration Form and he had no credible explanation as to the legitimacy of those amounts.

His Honour Mr Justice Sweeney deemed Mr Agidi's UK assets, which included a house (valued at £548,391) in Golders Green, London, and a bank account containing over £650,000, to be the proceeds of crime. Assets in this case were traced and frozen using civil recovery powers under the POCA, Part 5; namely a Disclosure Order and a Property Freezing Order. In addition, funds held in an investment bond in Ireland were returned to the UK using a Repatriation Order to enable their eventual recovery. The Judge described Agidi's business and financial arrangement as having the "stench of corrupt bribes or rewards".[ii]

[i] Serious Organised Crime Agency v (1) Christopher Agidi and (2) Angela Agidi [2011] EWHC 175 (QB) http://www.unodc.org/unodc/treaties/CAC/country-profile/profiles/GBR.html [Accessed: 19 May 2015]

[ii] Serious Organised Crime Agency v (1) Christopher Agidi and (2) Angela Agidi [2011] EWHC 175 (QB) http://www.unodc.org/unodc/treaties/CAC/country-profile/profiles/GBR.html [Accessed: 19 May 2015]

The complexity of civil recovery

However, it should be noted that, because of low adoption of NCBAF around the world, the UK may lack the requirements for mutual legal assistance from other jurisdictions to take forward NCBAF cases with international dimensions.[31] TI-UK understands that the UK has pushed for EU-wide consensus on the availability of NCBAF as part of the proposed EU Confiscation Directive, but some EU member states have resisted such an approach.

In terms of money laundering, UK POCA criminal case law appears to have granted authority to restrain assets through a money laundering offence without explicitly identifying a predicate offence. The landmark POCA case *R v Anwoir [2008]* held that prosecutors can prove that property derives from crime "by evidence of the circumstances in which the property is handled which are such as to give rise to the irresistible inference that it can only be derived from crime*".* This case could be seen to be potentially valuable in the targeting of corrupt funds from both a criminal and NCBAF perspective.

The Crime and Courts Act 2013 expressly extended the power of the UK court to grant orders freezing property held outside the UK and imposing disclosure orders on persons outside the UK in relation to applications under Part 5 POCA, coming into force in June 2015.[32] This extra-territoriality was extended where there is "connection" between the case and the UK. This may include the unlawful conduct occurring in the UK; the property in question having been in the UK at a relevant time; a person linked to the case being a British citizen or national, resident or domiciled here; or a company linked to the case being incorporated in the UK.[33] Therefore, NCBAF represents a powerful option for law enforcement agencies.

However, the *ARA v Green* case showed that unexplained wealth in itself is not sufficient for the purposes of civil recovery. The case showed that '*A claim for civil recovery could not be sustained solely upon the basis that a defendant had no identifiable lawful income to warrant the lifestyle and purchases of that defendant.'*[34] This barrier would need to be overcome with sufficient supporting material to indicate suspicion, or by amending the existing legislation.

The value of civil recovery for law enforcement agencies tackling grand corruption

Recently, the Stolen Asset Recovery Initiative (StAR) has stressed that a criminal conviction is not always the most effective method for recovering the proceeds of corruption, and recommend that states should employ multiple avenues for asset recovery, including NCBAF and Unexplained Wealth Orders when tackling grand corruption.[35]

[31] The MLA process is the bi-lateral channel by which nations make formal requests for law enforcement activity, to obtain orders or to collect evidence from other jurisdictions.

[32] This legislative measure, which come into force in on 1 June 2015, was provided in response to Perry & Ors v Serious Organised Crime Agency in 2013, which had limited the extra-territoriality of NCBAF under POCA http://ukscblog.com/case-comment-perry-perry-ors-no-2-v-serious-organised-crime-agency-2012-uksc-35/ [Accessed: 19 May 2015]

[33] http://www.linklaters.com/Insights/Crime-Courts-Act-2013-impact-financial-crime-enforcement/Pages/Index.aspx [Accessed: 19 May 2015]

[34] http://lexisweb.co.uk/cases/2005/december/director-of-the-assets-recovery-agency-v-green-and-others [Accessed: 16 Feb 2015]

[35] http://star.worldbank.org/star/sites/star/files/few_and_far_the_hard_facts_on_stolen_asset_recovery.pdf [Accessed: 2 May 2015]

Importantly, NCBAF proceedings are against the assets themselves, rather than against an individual.[36] The powers are designed for cases where the proceeds of crime have been identified but it is not feasible to secure a conviction, or where a conviction has been secured but no confiscation order made.[37]

The UK Government's guidance and background note (2009) provide a non-exhaustive list of circumstances in which NCBAF is feasible, and where the use of the NCBAF powers might better serve the overall public interest: [38]

- The only known criminality is overseas, and there is no extra-territorial jurisdiction to pursue a criminal case in the courts of England and Wales or Northern Ireland.
- There is no identifiable living suspect who is within the jurisdiction or realistically capable of being brought within the jurisdiction.
- Proceeds of crime can be identified but cannot be linked to any individual suspect or offence.
- A law enforcement authority considers that an investigation could not generate sufficient evidence to create a realistic prospect of conviction.
- A criminal investigation has been conducted but the prosecuting authority considers that there is insufficient evidence to create a realistic prospect of conviction.

Again for illustrative purposes only, the following is a non-exhaustive list of circumstances in which a conviction is feasible, but use of the non-conviction-based powers might better serve the overall public interest:[39]

- Using non-conviction based powers better meets an urgent need to take action to prevent or stop offending which is causing immediate harm to the public, even though this might limit the availability of evidence for a future prosecution.
- It is not practicable to investigate all of those with a peripheral involvement in the criminality, and a strategic approach must be taken in order to achieve a manageable and successful prosecution.
- Civil recovery represents a better deployment of resources to target someone with significant property which cannot be explained by legitimate income.
- The offender is being prosecuted in another jurisdiction and is expected to receive a sentence that reflects the totality of the offending, so the public interest does not require a prosecution in this country.

As a result, NCBAF appears to be a valuable tool in addressing grand corruption assets in the UK. However, despite the Anwoir case, the use of the NCBAF regime tends to rely on a conviction in the origin state as the predicate offence and basis to take civil action in the UK.

[36] https://www.gov.uk/asset-recovery-powers-for-prosecutors-guidance-and-background-note-2009 [Accessed: 19 May 2015]
[37] https://www.gov.uk/asset-recovery-powers-for-prosecutors-guidance-and-background-note-2009 [Accessed: 19 May 2015]
[38] https://www.gov.uk/asset-recovery-powers-for-prosecutors-guidance-and-background-note-2009 [Accessed: 19 May 2015]
[39] https://www.gov.uk/asset-recovery-powers-for-prosecutors-guidance-and-background-note-2009 [Accessed: 19 May 2015]

2.1.5 The current framework is overly reliant on a conviction in the origin country

From a UK prosecutor's perspective, an ideal scenario for tackling the proceeds of corruption is to develop an asset recovery case in the UK from a basis of a criminal conviction either in the UK or in the origin country. This process, often facilitated by a government-to-government diplomatic process called mutual legal assistance (MLA), is fraught with cultural, language and legal difficulty, and can take a long time.[40]

The FATF notes "in nearly all recent cases of grand corruption, the detection and investigation of the criminal activity of heads of government occurred only after there was a change of government, specific corrupt individuals fell out of favour, or there was widespread public outcry after wrongdoing was publicly exposed. Whilst the PEPs were in power, there was no real opportunity for domestic law enforcement agencies to investigate their financial crimes."[41]

The UK has exhibited a preference in asset recovery attempts for grand corruption to focus on active and supportive origin states. This is where a collaborative investigation between UK and the origin country law enforcement authorities leads to a process of MLA for an international transfer of evidence and a confiscation following a criminal conviction. Following both the Ukraine revolution and the Arab Spring revolutions, the UK engaged in surging UK prosecutors and law enforcement advisers in to support origin country corruption and asset recovery investigations.[42]

SARs that refer to individuals who have such a conviction against them can then potentially be used to secure a restraint order within the 31 day moratorium period. However, this scenario – of a conviction already being in place in the origin state – is very rare.

A difficulty in waiting for a cooperative regime to emerge in an origin state is the time that has passed between the act of corruption and any investigation, sometimes only emerging decades after the crimes and money laundering has taken place. Once a supportive regime does eventually emerge in the origin state, a substantial amount is expected of law enforcement agencies and the judiciary in the origin country if they are to conduct an independent and robust international financial crime investigation.

[40] For detailed review of the challenges of the Mutual Legal Assistance process for international cooperation on grand corruption cases see TI-UK *Closing Down The Safe Havens: Ending Impunity For Corrupt Individuals By Seizing And Recovering Their Assets In The UK* (Dec 2013) http://www.transparency.org.uk/publications/closing-down-the-safe-havens/

[41] FATF *Specific Risk Factors in Laundering the Proceeds of Corruption: Assistance to Reporting Institutions* (Jun 2012) http://www.fatf-gafi.org/media/fatf/documents/reports/Specific%20Risk%20Factors%20in%20the%20Laundering%20of%20Proceeds%20of%20Corruption.pdf

[42] http://www.transparency.org.uk/publications/ti-uk-response-to-the-uk-national-risk-assessment-of-money-laundering-and-terrorist-financing/ [Accessed: 19 May 2015]

To initiate a MLA process for gathering evidence in a cross-border asset recovery investigation, a criminal offence needs to have been committed, possibly followed by a conviction in the original state. This can prove impossible, or extremely difficult, due to a number of reasons:

- The wrongdoer is dead or has fled.
- The wrongdoer has immunity and/or his family or close associates have continuing significant influence within government preventing or derailing any criminal investigation.
- The judiciary is inexperienced in dealing with asset recovery matters, and in some instances its lack of independence prevents cases reaching a positive, or even any conclusion.
- The investigating and prosecuting authorities do not have the capacity or legal framework to investigate complex corruption cases.
- The evidence establishing some form of predicate crime has been destroyed or lost, perhaps due to the wrongdoer's many years in power.
- The enforcement of confiscation orders can be difficult, sometimes impossible, particularly when assets are owned by corporate vehicles and trusts located in foreign jurisdictions which successfully mask the beneficial ownership of such assets.

Even if an origin state can demonstrate that there is a predicate offence and secure a criminal conviction, which has historically been shown to be very difficult, there is no guarantee that a domestic conviction would meet the due process and legal requirements of a requested state, like the UK. The greater risk is an acquittal due to some form of political reconciliation in the origin state. This leaves a requested state, such as the UK, which may have seized the assets, in a position where it may need to lift the freeze and be subject to damages claims.

Where a state has been the victim of corruption and it has the political will to pursue the wrongdoers and their assets, a criminal conviction in the origin state can be the most effective means of obtaining justice. However, because of all the difficulties referred to in this section, an exclusive focus on this criminal justice outcome and an over-reliance on the origin state will mean that the levels of asset recovery are not likely to be effective against the scale of the corrupt funds. Success will require targeting the assets themselves in parallel with, or in place of, pursuing the individual where a conviction is not possible. As Australia's Federal Justice Minister recently put it, which may equally apply to corruption: "Arguably the most effective way to combat organised crime is to seize the funds and the assets that they make from their criminal behaviour".[43]

A reliance on supportive origin states and bi-lateral political support for criminal prosecutions and asset recovery is believed to be at the heart of a system which is not sufficient to meet the scale of the problem.

Waiting for political will on both sides, and for well-resourced and independent investigative and judicial capacity in the origin state, is producing a mere trickle of results against a torrent of corrupt illicit funds. This approach is allowing the corrupt to steal with impunity; enabling only a tiny proportion of assets to ever be seized, let alone repatriated; creating considerable difficulties in recovery and return, even in prominent cases with guilty pleas; failing to deter those who have

[43] http://www.heraldsun.com.au/news/law-order/new-laws-to-grab-the-unexplained-wealth-of-bikies-and-mr-bigs/story-fni0ffnk-1226735677516 [Accessed: 2 May 2015]

laundered the money through their financial or professional institutions; and, ultimately, facilitating the severe harm caused by corruption, often directed at the most vulnerable citizens around the world.

Overall, the evidence indicates that current UK legislation is limiting the effective use of the SAR and NCBAF systems and preventing the UK achieving substantial effective asset recovery rates in grand corruption cases. Chiefly, the general reliance on a conviction in the origin country and the limited ability for the UK to take an independent and proactive approach to civil recovery was assessed to be the principal barrier to tackling the proceeds of grand corruption laundered into the UK.

3. UK legislative options to address weaknesses in asset recovery

Grand corruption is exceptionally harmful and the international investigation of grand corruption is exceptionally difficult.

Given the very large amounts of proceeds of corruption likely to be flowing into the UK, the very low asset recovery rates and the limited and unrealistic timeframe for achieving a successful restraint from a SAR, the TI-UK Taskforce took forward considerations about what proposals could reduce or end the reliance on a conviction in the origin country.

The starting point for the Taskforce was to evaluate the provision that exists within the United Nations Convention against Corruption (UNCAC) for illicit enrichment legislation (Article 20.). The Taskforce considered a range of mechanisms that could be used, and the implications of establishing various models of illicit or corrupt enrichment offences.

Illicit Enrichment – Article 20 of UNCAC

Article 20 of the United Nations Convention against Corruption sets out an illicit enrichment commitment, that requires signatory nations to consider implementing criminal offences for public officials who cannot reasonably explain legitimate sources for large increases in their wealth.

In the national review for the UK's implementation of UNCAC, the UK government reported that it had not implemented Article 20, as a criminal offence, out of concern for due legal process.[i]

A 2012 World Bank and UNODC study found that 44 jurisdictions have criminalised illicit enrichment, most of them in developing countries.[ii] However, only a limited number of these jurisdictions regularly investigate or prosecute the offence. The study found that a key issue subject to ongoing debate relates to the compatibility of illicit enrichment with human rights principles and related concerns regarding the perceived reversal of the burden of proof. Apart from substantive aspects of the offense, research conducted for this study revealed that the design and implementation of governance structures for the relevant authorities are critical in order to ensure full respect of Article 2 of the International Covenant on Civil and Political Rights (ICCPR).

The TI Anti-Corruption Helpdesk review of illicit enrichment in early 2012 identified regional and international agreements which encourage state parties to criminalise illicit enrichment as part of efforts to combat corruption, money laundering and organised criminal networks. The response also summarises challenges for criminalising illicit enrichment, chiefly around human rights considerations, and MLA requests.[iii] The paper does not conclude on effectiveness of existing legislation and points to the significance on Interest and Asset Disclosures (IADs) systems to flag unjustified/extreme changes in public officials' or politicians' wealth, using them as evidence to file corruption charges.[iv]

[i] http://www.unodc.org/unodc/treaties/CAC/country-profile/profiles/GBR.html [Accessed: 2 May 2015]
[ii] STAR/Worldbank/UNODC On the Take: Criminalizing Illicit Enrichment to Fight Corruption (2012)
[iii] http://www.transparency.org/files/content/corruptionqas/Helpdesk_answer_illicit_enrichment.pdf [Accessed: 16 Feb 2015]
[iv] Marie Chêne, Foreign exchange controls and assets declarations for politicians and public officials, U4 Expert Answer (June 2011), http://www.transparency.org/whatwedo/answer/foreign_exchange_controls_and_assets_declarations_for_politicians_and_publi

After review of a range of options, the Taskforce took forward detailed evaluation of a civil power policy option of Unexplained Wealth Orders. The Taskforce also considered, as a secondary option, amendments to cash seizure powers under POCA to create 'corrupt enrichment seizure powers'.

It is important to note that an Unexplained Wealth Order and any other civil power would fall short of the commitment in Article 20 of UNCAC, which refers to the establishment of a criminal offence of illicit enrichment. However, the Taskforce considered that the proposed shifting of the burden of the proof should only apply at the civil level, not a criminal one; at least while civil routes remain under-developed in addressing grand corruption.

Analysis of the strengths and weaknesses and remaining research issues for both options are highlighted in this discussion paper. They are selected as potential options worthy of further consideration to improve the UK's ability to deter and disrupt the proceeds of grand corruption flowing through the UK, without relying on a predicate criminal offence in the origin state.

3.1 A review of Unexplained Wealth Orders (UWOs)

Introduction to UWO powers

UWO laws are a relatively recent development in confiscation and forfeiture jurisprudence. Like traditional *in personam* (directed towards a person) and *in rem* (directed towards property) forfeiture, their primary objective is to deprive criminals from acquiring or benefiting from unlawful activities. However, by using UWOs the state does not have to first prove a criminal charge, as is the case with conviction-based forfeiture. Likewise, the state does not have to first prove that the property in question is the instrument or proceed of a crime, as is generally the case in *in rem* asset forfeiture. UWO powers differ from traditional forfeiture powers in another important respect: they shift the burden of proof to the asset owner who must prove a legitimate source for his wealth.

Only three countries in the world – Ireland, Australia and Colombia – have UWOs where no proof of the property being connected to the crime is required and the burden of proof is reversed. Research sponsored by the US Department of Justice indicates that the effectiveness of the UWO regime varies significantly across of these three nations, with Ireland having used these orders to greatest effect, largely due to:

- An adequately-resourced and cross-deputised Criminal Asset Bureau (CAB), which has access to comprehensive databases of financial, tax and other data on all citizens
- Two-year tenure for judges on forfeiture cases presiding over public interest cases.[44]

Conversely, the Australian regime has been less successful. The Australian UWO regime has faced push-back by the courts, caution on the part of prosecutors, disagreements between the police and prosecutors and a lack of the required forensic accounting staff and expertise. There has not always been a central authority with cross agency cooperation like the Irish CAB. In both countries, in practice, the prosecutors are believed to tend to produce significantly more evidence than is required in order to meet the civil standard of guilt.[45]

[44] Booz, Allen, Hamilton *Comparative Evaluation of Unexplained Wealth Orders* (January 2012) pp.1-4
[45] Ibid

3.1.1 A UK legislative proposal for an Unexplained Wealth Order regime

Overview

A UWO power could be conferred on law enforcement agencies such that, in response to having grounds for suspicion that an asset represents the proceeds of corruption and a sufficiently high value-threshold of asset, a suspect could be issued a UWO. Suspects issued with a UWO would be **required to explain legitimate and legal sources of wealth** for any designated asset or transaction.

If the trigger for the UWO was a proceeds of corruption SAR, then **the moratorium period would be paused while the UWO was being responded to**, stopping the flight of the asset or transaction in question. Failure to respond to a UWO, or an inadequate response, together with the initial grounds for suspicion, could then be used to facilitate a NCBAF civil recovery process against the asset.

The civil test would therefore be that on 'the balance of probabilities' that the asset in question represents the proceeds of corruption. The penalty would be civil, and not criminal, and, as such, the case would be brought against the assets, rather than pursuing criminal charges against an individual.

Pre-existing suspicion and evidence would be required, but, crucially, not a conviction in the origin country. The UWO response would potentially provide investigators with more material to support the NCBAF case, and the paused SAR moratorium clock would enable law enforcement agencies to collect further evidence directly, potentially in the origin country, without the transaction being completed or the asset leaving UK jurisdiction.

Table 1: Example cases to illustrate the proposed UWO power on receipt of a proceeds Scope

Initial level of evidence	Case context	Action under current powers	Action under proposed UWO power
Low	1. UK law enforcement agencies have no pre-existing grounds for suspicion and no open source reports indicate corruption or reason to suspect that the transaction represents the proceeds of corruption	UK law enforcement agencies have no grounds to refuse consent for the transaction, but may seek to develop further intelligence and evidence against the individual if there is political or law enforcement will	No difference
Moderate	2. UK law enforcement agencies have grounds for suspicion that an individual is laundering the proceeds of corruption, but require more time than the SAR moratorium allows to collect evidence of the criminality of the suspect in the origin country, to meet a standard of 'reasonable cause to suspect' that the transaction is the proceeds of corruption.	UK law enforcement agencies are unlikely to be able to prevent transaction within the SAR moratorium period and may continue to monitor for intelligence purposes or attempt to build further evidence, depending on political and law enforcement will.	**(Cases where a new UWO power would have most significance):** UK law enforcement agencies may issue a UWO, the response/lack of response to which may strengthen the case for asset recovery, and the paused moratorium period for a SAR trigger allows more time for investigators to secure additional evidence to support 'reasonable cause to suspect' that the trigger transaction represents the proceeds of corruption.
High	3. UK law enforcement agencies have gathered large amounts evidence to indicate that a suspect has committed grand corruption in an origin country and that there is reasonable cause to suspect that the trigger represents additional proceeds of grand corruption.	UK law enforcement agencies may withhold consent for transaction and may initiate non-conviction based asset forfeiture.	If UK law enforcement decide to pursue a non-conviction based civil forfeiture option, then they may issue a UWO, the response/lack of response to which may strengthen the case for asset recovery, and the paused moratorium period for a SAR trigger allows more time for investigators to secure additional evidence to support 'reasonable cause to suspect' that the trigger transaction represents the proceeds of corruption.
High	4. Conviction or charges for corruption exist in the origin country, in a situation where a UK court would have no doubt as to the veracity and credibility of any evidence of criminality used in the origin country trial, outstanding orders for asset confiscation possibly exist.	UK law enforcement agencies withhold consent for transaction and initiate POCA criminal proceedings, or post-conviction asset recovery process, or non-conviction based asset forfeiture depending on the merits of the case.	If UK law enforcement agencies (likely in liaison with their counterparts in the origin country) decide to pursue a non-conviction based civil forfeiture option, then a UWO may be issued against the suspect to support the asset recovery case.

There would need to be provisions to prevent the UWO's use for purposes other than those intended, and to prevent other government agencies co-opting this instrument to their own ends – in the way that anti-terror surveillance legislation has been used by local authorities to assist with parking enforcement.[46]

The recipients of these orders would, at least, include public officials or PEPs as defined by FATF.

Consideration should also be made for including 'oligarchs' within the scope of the power. While an additional obligation for transparency required by a UWO appears reasonable for serving public officials, it becomes less proportionate the more widely the net is drawn for the potential suspects that could be issued a UWO. However, a narrow interpretation of the scope will likely not capture the illicit wealth of non-PEPs, such as so called 'oligarchs', and also leaves a PEP with the opportunity to use agents or secret corporate structures to evade the scope of any narrowly-defined UWO.

To serve public and policy discussion, more information on the advantages and disadvantages of differing levels of scope are included below. A PEP-only scope is therefore likely to be the minimum effective coverage for a UWO, and is used throughout the remainder of this discussion paper to refer to the category of persons who could potentially receive a UWO.

Triggers and process

The trigger for a UWO would typically (although not exclusively) be a consent SAR relating to a transaction or asset of a PEP. Banks and other regulated entities are legally obliged to file SARs to the NCA when they suspect money laundering. Banks file the vast majority of SARs. UWOs being served on the back of a bank SAR may be considered beneficial from an asset recovery perspective because UK banks would be in possession of the funds, rather than the suspect.

The SAR consent moratorium period would be paused until the UWO is returned. If law enforcement agencies are not satisfied that the funds are legitimate, and need more time to progress NCBAF proceedings, then they can apply to a judge for an order to serve on the bank, requiring the bank to continue to freeze the customer's funds after 31 days.

There may however be other scenarios which trigger the law enforcement agencies to issue a UWO, without a SAR having been made, such as:

- Whistleblower intelligence received by any competent authority under the Money Laundering Regulations 2007 (such as Her Majesty's Revenue and Customs (HMRC) or the Financial Conduct Authority). Public Interest Immunity must be considered in these circumstances.

- Any corruption-related law enforcement investigation which isn't the outcome of a SAR, especially one where a successful criminal justice outcome is unlikely.

The initial level of suspicion required for a UWO should be a matter of further debate. However, using the civil standard of an 'arguable case' has considerable logic. See Annex B for a flowchart identifying how UWOs might be triggered.

[46] http://www.telegraph.co.uk/news/uknews/3333366/Half-of-councils-use-anti-terror-laws-to-spy-on-bin-crimes.html [Accessed: 19 May 2015]

Proposed judicial oversight

Law enforcement agencies would need to apply to a High Court judge under two circumstances:

1. When they decide to issue a UWO, effectively pausing the moratorium period. The rationale for this pausing of the moratorium period would be that new and significant information was being sought by law enforcement agencies.

2. If they decide to pursue NCBAF and require a bank, for example, to hold funds for a set period of time after the moratorium period (existing law stipulates that the bank would not commit a money laundering offence if after 31 days the NCA have failed to raise any objections to the transaction and they pay away funds).

Sanction (using NCBAF)

Should a UWO recipient not comply with a UWO, or be considered to have provided false or misleading information, law enforcement agencies can make an application for a High Court Judge to order the bank to continue to freeze the funds for a set period of time. This would allow sufficient time for enquiries to be made to progress NCBAF proceedings against the UWO recipient's funds. The application would stipulate a reasonable period of time, for example 6 months, for law enforcement agencies to pursue these enquiries. Therefore, on the 31st day of the (extended) moratorium period, law enforcement officers would need to officially refuse consent to a financial institution and serve them with an order to maintain a freeze on the funds.

Non-compliance with a UWO order, or provision of false or misleading information, would lend weight to the inference that the SAR funds are the proceeds of corruption. In contrast, UWO responses which are to the NCA's satisfaction would mean that the moratorium period freeze is lifted, and the transaction continues.

An amendment to the threshold for NCBAF may be considered to bring it in line with Serious Crime Act 2015 amendments, such that 'reasonable cause to suspect' replaces the need to prove an 'irresistible inference'.

Jurisdiction

The National Crime Agency should be granted the UWO powers extra territorially, when there is a UK connection (as with the Crime and Courts Act 2013 orders) – for instance when a suspect of grand corruption resides abroad but uses the UK financial system. Under these circumstances, a suspect residing abroad is not exempt from the obligation to respond to a civil UWO power.

Usage

It is not possible to estimate precisely how often these powers would be exercised. However, due to their limited scope, and the focus on high net worth foreign PEPs and oligarchs, it is envisaged that they would only be used sparingly. Furthermore, a High Court Judge would need to consider that the exercising of these powers is proportionate, reasonable and necessary and that a sufficient level of suspicion is warranted on the part of law enforcement of the corrupt nature of a PEPs predicate conduct.

No requirement to rely on income and asset declarations

It should not matter if a PEP resides in a country without a formal IAD regime, against which to compare actual and declared wealth. This is because the UWO is effectively shifting the burden onto the individual to explain their wealth. It might be expected that suspects would refer to interest and asset disclosures to provide assurance in the legitimate sources of their wealth, and may therefore strengthen the value and use of IAD regimes around the world.

An alternative model, which may merit further consideration, is requiring foreign PEPs who are holding assets in the UK to provide a comprehensive interest and asset declarations for legitimate wealth, thereby providing transparency at the point of investment, rather than in response to a UWO.

Human rights considerations

There are important civil liberties, privacy and human rights considerations inherent in the use of such instruments. Such powers must be exercised in accordance with the provisions of the Human Rights Act, and not violate rights to privacy or family life under Article 8 of the European Convention on Human Rights (ECHR). Any new powers would need to adhere to the principle of legality, which requires that offences are clearly defined under the law so that the individual can know from the relevant provision what acts and omissions make him or her liable.

Similar to Criminal Justice Act Section 2 notices, any UWO order would require full compatibility with Article 6 of the ECHR for use in procuring information, not criminal evidence. The right to silence does not therefore arise and is not infringed by use of the proposed UWO powers, which are civil not criminal.[47] The potential breach of Article 6 of ECHR was the primary point made by the UK government in explaining why it had not implemented the criminal illicit enrichment Article 20 provision in UNCAC in its 2011 internal review.[48]

Accordingly, a UWO would not require a person to supply information if in doing so would disclose evidence of the commission of a separate offence, and that disclosure would expose the person to proceedings for that offence.[49] If an individual incriminates themselves when responding to a UWO, investigators would have to consider the admissibility of this information from an evidentiary perspective in any separate or subsequent criminal proceedings.

Recovered funds and repatriation

The focus of this paper is not the repatriation of recovered proceeds of corruption, which is a highly complex issue. However, a robust system of repatriation to victim nations should be developed which provides confidence in the anti-corruption measures in place to manage the funds, and that a level of accountability is achieved that provides assurance on the effectiveness of those anti-corruption measures.

For standard criminal confiscation, once the victims and receivers have been paid, recovered money under POCA is paid to the Home Office for distribution under the Asset Recovery Incentivisation Scheme (ARIS). The money is then made available to the agencies responsible for

[47] http://www.sfo.gov.uk/media/106634/s2%20powers%20re%20notices%20web%201%200310.pdf [Accessed: 16 Feb 2015]
[48] http://www.unodc.org/unodc/treaties/CAC/country-profile/profiles/GBR.html [Accessed: 19 May 2015]
[49] However, the ECHR and UNCACs legislative guide accepted, in principle that it may be appropriate in certain circumstances to shift some of the evidentiary burden of proof to the accused

having investigated, obtained and enforced the order.[50] A balance should be struck between providing sufficient resources to law enforcement agencies to pursue complex expensive financial crime investigations against grand corruption, and ensuring that maximum resources return to victims in a way that builds their confidence in anti-corruption measures. Care should also be taken that the recovery of policing costs from corrupt assets that are recovered does not skew decision making, or create perverse incentives, within those law enforcement agencies.

Value of a UWO order to improve effective action rate on SARs

The table on the following page indicates the circumstances in which a UWO power could be expected to improve performance. Using limited data available from POCU consent SARs data, it is possible to illustrate where a UWO power may have most expected impact on the types of SARs received. A UWO is likely to enhance performance most in cases with a moderate degree of evidence available at the time of an initial suspicious report. In such cases a UWO could be justified (based on previously acquired evidence or open source intelligence) and required (in order to secure more evidence through both the UWO process and the paused moratorium period) to support a NCBAF action.

The table illustrates the potential UWO value, particularly for cases where 'moderate' initial suspicion exists on receipt of the SAR trigger. These may be cases where UK law enforcement agencies have grounds for suspicion that an individual is laundering the proceeds of corruption, but when they require more time than the SAR moratorium allows to collect evidence of the criminality of the suspect in the origin country in order to meet a standard of 'reasonable cause to suspect' that the transaction is the proceeds of corruption.

It is important to be aware that screening of individuals of interest referenced in SARs by law enforcement agencies may require more effective liaison with corruption investigators in origin countries, including non-law enforcement investigators (such as investigative journalists and investigative lawyers). In many cases it is possible that civil society investigators have levels of evidence of corruption that could meet the initial threshold of 'moderate', whereby a UWO action would be plausible for law enforcement agencies. In such cases, the UK would then be in a position to take forward civil action against assets in the UK without the need for support from law enforcement agencies or the ruling political forces in the origin country. Such an approach could enable the UK, or any other leading financial centre, with the opportunity to take a proactive and independent approach to asset recovery that is independent of a conviction in the origin state.

Our model also illustrates plausible example cases that may be appropriate for better use of existing NCBAF powers. In such cases (high levels of evidence at the time of receiving the report, and no pre-existing conviction or charges), existing NCBAF powers and the (Anwoir case) use of "irresistible inference" of criminality (in contrast to the existence of a known and convicted predicate crime) may be appropriate and a UWO would merely provide prosecutors with an enhancement that may further support a civil recovery case. However, based on 2014 POCU SARs it is possible to infer that such cases (together with those cases where a pre-existing conviction and support from the origin country law enforcement already exists) account for no more than 7.4% of total reports.[51]

[50] http://www.cps.gov.uk/publications/docs/foi_disclosures/2013/disclosure_22_supporting_data_2.pdf [Accessed: 16 Feb 2015]

[51] The Serious Crime Act provisions to lower the POCA threshold from "reasonable case to believe" to "reasonable cause to suspect" that a transaction represents the proceeds of crime is likely to significantly improve this ratio.

3.1.2 Taskforce summary assessment table of the UWO option:

Table 2: Cases improved by a UWO power and typical SAR rates

Initial level of evidence	Conviction or charges already exists	Percentage of consent SARs by volume, using 2014 Proceeds of Corruption data, based on simplified examples	Action under proposed UWO power
Low	No	83% of corruption SARs currently result in consent to transact being granted	No change. UK law enforcement has no grounds to refuse consent for the transaction, but may seek to develop further intelligence and evidence against the individual if there is political or law enforcement will
Moderate	No		Significantly improved performance. UK law enforcement may issue a UWO, the response/lack of response to which may strengthen the case for asset recovery, and the paused moratorium period for a SAR trigger allows more time for UK law enforcement to secure additional evidence to support 'reasonable cause to suspect' that the trigger transaction represents the proceeds of corruption.
High	No	7.4% of corruption SARs currently result in withheld consent	Improved performance. If UK law enforcement decide to pursue a non-conviction based civil forfeiture option, then they may issue a UWO, the response/lack of response to which may strengthen the case for asset recovery, and the paused moratorium period for a SAR trigger allows more time for UK law enforcement to secure additional evidence to support 'reasonable cause to suspect' that the trigger transaction represents the proceeds of corruption.
High	Yes		Improved performance. If UK law enforcement (likely in liaison with origin country law enforcement) decide to pursue a non-conviction based civil forfeiture option, then a UWO may be issued against the suspect to support the asset recovery case.

Pros	• **The potential for significant deterrent effect.** The threat of UWOs and greater scrutiny of PEP financial behaviour in the UK (and with the support of other jurisdictions, then also other financial, investment and luxury goods markets) could incentivise PEPs to (a) not commit corruption and (b) not launder the proceeds of corruption through the UK • **Compatible with human rights law and principle of legality.** An UWO does not require a person to supply information if, in doing so, would disclose evidence of the commission of a separate offence, and that disclosure would expose the person to proceedings for that offence.[52] If an individual incriminates themselves when responding to an UWO, law enforcement would have to consider the admissibility of this information from an evidentiary perspective in any separate or subsequent criminal proceedings. • **No 'right to silence'.** Similar to Criminal Justice Act Section 2 notices, any UWO order would require full compatibility with Article 6 of the ECHR for use in procuring information, not evidence. The right to silence does not therefore arise and is not infringed by use of the powers, which are civil not criminal.[53] • **Consistent with other legislation which requires the provision of information.** Within POCA, the Serious Organised Crime and Police Act, the Criminal Justice Act, and the Crime and Courts Act, there are similar orders which require the recipient to disclose information. See annex 4 for more information on relevant legislative orders. Therefore there is precedent in terms of compelling an individual to provide information. • **Lower burden.** The proposal would relay on restraining funds by using the NCBAF civil test for asset recovery, not the criminal one.
Cons	• **Costly.** The process of NCBAF through the high courts can be costly and lengthy. Even with cogent evidence of non-compliance with a UWO, it would be a challenge to obtain a civil recovery order within an extended moratorium period (for example 6 months). • **Bank objection.** Financial institutions may object to UWO moratorium extensions due to fears of being sued whilst holding funds potentially longer than 31 days, and by being exposed as the originator of a SAR. This may also deter banks from reporting suspicions in the first place. • **Lack of link to predicate criminal conduct.** Nevertheless, the major obstacle with NCBAF, even with cogent evidence of non-compliance with an UWO, will be linking the SAR funds to corrupt conduct. The ARA v Green case showed that unexplained wealth in itself is not sufficient for the purposes of civil recovery. The case showed that '*A claim for civil recovery could not be sustained solely upon the basis that a defendant had no identifiable lawful income to warrant the lifestyle and purchases of that defendant.'*[54] This barrier would need to be overcome with sufficient supporting material to indicate suspicion, or by amending this case law through legislation.

[52] However, the ECHR and UNCACs legislative guide accepted, in principle that it may be appropriate in certain circumstances to shift some of the evidentiary burden of proof to the accused

[53] http://www.sfo.gov.uk/media/106634/s2%20powers%20re%20notices%20web%201%200310.pdf [Accessed: 19 May 2015]

[54] http://lexisweb.co.uk/cases/2005/december/director-of-the-assets-recovery-agency-v-green-and-others [Accessed: 16 Feb 2015]

	• **Scope.** The appropriate scope of the law remains uncertain. While an additional obligation for transparency required by a UWO appears reasonable for serving public officials, it becomes less proportionate the more widely the net is drawn for the potential suspects that could be issued a UWO. However, a narrow interpretation of the scope will likely not capture the illicit wealth of non-PEPs and so called 'oligarchs'. • **Enforceability.** Significant challenges remain to be resolved in order to assess the enforceability of a UWO regime: o Law enforcement will still face the challenge of disentangling illicit wealth that has been mixed over many years with legitimate earnings. o Law enforcement may be faced with a deluge of information in response to UWO requests, at significant expense from the suspect and to law enforcement to process. This may pose a legal liability for the suspects' costs if law enforcement can prove no wrong doing. o The threshold for a 'satisfactory' response from any suspect would need to be established.

3.1.3 How do UWOs differ from other powers

Within POCA, added to or amended by the Serious Organised Crime and Police Act, the Criminal Justice Act, and the Crime and Courts Act, there are similar types of orders which require the recipient to disclose information. See Annex F for more information on relevant legislative orders.

The most similar order within existing legislation can be found in the Crime and Courts Act 2013, Schedule 19, which comes into force in on 1 June 2015. This provision amended POCA such that law enforcement can serve disclosure notices during civil recovery investigations on a specified individual in order to determine their recoverable property.[55] Section 34 and Schedule 18 of the Crime and Courts Act 2013 amend the definition of a civil recovery investigation to clarify that the focus of an investigation can be a person or property and also to clarify that there can be an investigation into property that has not yet been clearly identified.[56]

For these disclosure orders, an NCA officer has to satisfy the judge that a civil recovery investigation is ongoing and the order is sought for the purposes of supporting that investigation. The officer must also satisfy the judge that there are reasonable grounds for suspecting that the property specified in the application is recoverable property or associated property, the person named holds recoverable property or associated property or has held such property (in the case of a civil recovery investigation) or the person has obtained exploitation proceeds from a relevant offence by reason of any benefit derived by that person (in the case of an exploitation proceeds investigation), that the information which may be provided is likely to be of substantial value (whether or not by itself) to the investigation and that there are reasonable grounds for believing that it is in the public interest to require the provision of such information.[57]

Where UWOs would differ is that they could be served in response to a consent SAR (or other trigger), and not necessarily as part of an existing civil recovery investigation. Rather than being used to determine recoverable property (like a disclosure order), UWOs would require an individual to explain the legitimacy of illicit wealth. UWOs also bring the additional power to pause the SAR moratorium clock.

[55] http://www.legislation.gov.uk/ukpga/2013/22/schedule/19 [Accessed: 19 May 2015]
[56] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211523/2013_07_Code_Annex_C.PDF [Accessed: 16 Feb 2015]
[57] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211523/2013_07_Code_Annex_C.PDF [Accessed: 16 Feb 2015]

3.1.4 How should a UWO be realised in legislation?

There are several ways in which this could be done. Most efficiently, the POCA could be amended to:

- Create the UWO power.
- Modify the SAR regime to pause the moratorium period when serving a UWO.
- Create the power to require a bank to continue to freeze funds after the moratorium period.

The Home Office would also need to build a framework for the training, monitoring and accreditation of Financial Investigators within the competent authorities under this power. [58]

The table below indicates where amendments would be made:

Power	Destination
The creation of, and powers associated with, UWOs	Part 5 (Civil recovery of the proceeds etc. of unlawful conduct), possibly Part 8 (*Investigations*)
The offence and defences for non-compliance.	Part 5 (Civil recovery of the proceeds etc. of unlawful conduct), possibly Part 8 (*Investigations*)
The power to pause the moratorium period whist the subject completes and returns the UWO.	Parts VII Section 335-336 (*Confiscation: England and Wales & Money Laundering - Consent*)
The Power to extend the moratorium period to progress NCBAF. This would mean that the originating bank continue to hold in the suspicious funds in an administrative freeze	Parts VII Section 335-336 (*Confiscation: England and Wales & Money Laundering - Consent*), possibly Part 8 (*Investigations*)
An amendment to the threshold for NCBAF may be considered to bring it in line with Serious Crime Act 2015 amendments, such that 'reasonable cause to suspect' replaces the need to prove an 'irresistible inference'.	Parts VII Section 335-336 (*Confiscation: England and Wales & Money Laundering - Consent*), possibly Part 8 (*Investigations*)
Broadening of the definition of recoverable property to include suspicious or unexplained wealth due to non-compliance with an UWO	Part V, Chapter 4 (*General, Recoverable Property)*

[58] The Home Office would conduct a thorough impact assessment, taking this into account, as well as other factors such as the impact on courts, prisons etc. Any proposal would likely be sponsored by the Home Office and would be subject to the normal procedural processes and consultations.

3.2 A second option – Corrupt Enrichment Seizure powers: Extending cash seizure powers and applying them to PEP assets

This option revolves around extending the powers that currently exist to seize cash from suspected organised crime, to seizing a wider range of assets, specifically relating to a grand corruption suspect. The seizure would apply at a higher threshold of value, with judicial oversight on reasonable grounds for suspicion and that the continued asset restraint is justified for the purposes of investigating its origin or intended use. The suspect may make applications to the court explaining the legitimate sources of wealth for any restrained assets in order to secure their release.

Under existing powers, POCA provides for powers to seize cash derived from, or intended for, use in crime and to secure its forfeiture in magistrates' court proceedings. No conviction is required for the forfeiture of the cash to be ordered. Cash forfeiture proceedings are civil proceedings and the civil standard of proof applies. There must be reasonable grounds for suspecting that the cash is the proceeds of, or intended for, use in crime, and that it is not less than the current minimum amount: £1,000.

Under existing powers a magistrate may make a cash seizure order if satisfied that there are reasonable grounds for the officer's suspicion and that the continued detention is justified for the purposes of investigating its origin or intended use. The magistrate may also make an order for continued detention if consideration is being given to the bringing of criminal proceedings, or if such proceedings have been commenced and not concluded. Furthermore, a magistrates' court may release the cash in response to an application by the person from whom the cash was seized on the grounds that it is not recoverable property and is not intended for use in unlawful conduct.[59]

This option effectively broadens the cash seizure powers under POCA to include funds held in financial institutions and commercial assets held by suspects of grand corruption. It is a civil option, targeted at the assets and does not attempt to secure a criminal case against any individual. This option would require an amendment to increase the coverage of 'recoverable property' to property and other commercial assets as well as bank accounts. This option would confer upon law enforcement the power to seize funds (potentially triggered by a SAR) held in an account based solely on suspicion raised by the financial institution and through preliminary investigations in the moratorium period. There would be no prerequisite that an individual will have been convicted of a predicate offence. In order to prevent overuse of the power, there should also be a *de minimis* threshold of £100,000 for seizure.

Using this route to obtain cash seizure would involve a magistrate's court, as opposed to the High Court, therefore being quicker to acquire.

A public official who has been subject to cash seizure must be afforded the opportunity to make representations to the magistrate to explain the legitimate source(s) of the funds; however there is no legal obligation for them to do so.

[59] http://www.cps.gov.uk/legal/h_to_k/investigative_powers_and_cash_siezure/ [Accessed: 16 Feb 2015]

Pros	• This route to obtaining cash seizure would involve a magistrate's court, as opposed to the High Court, and would be faster to acquire. However, the power would need to apply to monies held in account, and would therefore require an amendment to existing laws. • Whilst not a standalone offence against an individual, the cash seizure option would allow law enforcement to target suspicious or unexplained funds belonging to a foreign public official. • The cash seizure option would not rely on a definite link being drawn between SAR funds and a predicate offence, provided that the recoverable property is amended to include cash on account. • These powerful measures could play a prevention role by incentivising PEPs to (a) not commit corruption and (b) to not launder the proceeds of corruption through the UK. • This option relies on the SAR regime working as normal in so far as banks report SARs when they know or suspect money laundering, and after 7 days, the NCA decide whether to give consent. Should the NCA not consent, the moratorium period of 31 days begins as normal.
Cons	• In this model, the pre-emptive seizure of assets takes place before the suspect has an opportunity to explain legitimate sources of wealth for any such transaction. As a result, it is both more powerful and more intrusive and therefore more open to criticism and abuse of human rights than the UWO option. • The model essentially scales up the approach taken to cash seizure of relatively low level criminals. It is not likely that a magistrates' decision will carry the appropriate level of judicial oversight for grand corruption cases, which are often highly political and involve litigious high net worth individuals. • One of the challenges with the UWO will be to limit their usage against public officials who are suspected of laundering of corruption, as opposed to other forms of serious or organised crime. Law enforcement officers and magistrates would need to consider this issue so as to avoid exercising powers inappropriately. • As with the UWO option, the appropriate scope of the law remains uncertain. While an additional obligation for transparency required by a UWO appears reasonable for serving public officials, it becomes less proportionate the more widely the net is drawn for the potential suspects that could be issued a UWO. However, a narrow interpretation of the scope will likely not capture the illicit wealth of non-PEPs and so called 'oligarchs'.

4. A review of relevant civil liberties considerations

According to the StAR initiative, it has long been recognised that "effective anticorruption measures and the protection of human rights are mutually reinforcing and that the promotion and protection of human rights is essential to the fulfilment of all aspects of an anticorruption strategy."[60] Because an illicit enrichment offence requires a partial reversal of the burden of proof, it has not been universally adopted by signatories to UNCAC. Some countries have viewed the presumption of illicit enrichment as a reversal of the burden of proof and a relaxation of the presumption of innocence, both considered fundamental principles of their legal systems.[61] Other countries, however, consider it as fully compliant with human rights principles, given the existence of similar presumptions in criminal law and the general principle that no fundamental right is absolute beyond public interest.[62]

The "principle of legality" requires that offences be clearly defined under the law so that the individual can know from the relevant provision what acts and omissions make him or her liable. It has been argued that the offence of illicit enrichment may not provide sufficiently clear guidelines on which conduct is prohibited, and some authors emphasise the need for offences associated with illicit enrichment to be clearly defined under the law to ensure that public officials cannot claim they were unaware of the prohibited conducts.

At the time of the StAR Initiative's 2012 study *On the take: Criminalizing Illicit Enrichment to Fight Corruption,* 44 countries, predominantly from the developing world, had created an offence of illicit enrichment. The study indicated that those countries that actively prosecuted the offence found it to be a valuable tool in combating corruption. The report states, "experience in several jurisdictions that have overcome these challenges shows that illicit enrichment offences can be defined and implemented in a manner that fully respects the rights of the accused. Human rights clearly delineates that the presumption of innocence does not prevent legislatures from creating criminal offences containing a presumption by law as long as the principles of rationality and proportionality are duly respected".[63] See Annex D for a review of how illicit enrichment, or similar, offences operate in a range of other jurisdictions.

Furthermore, the European Court of Human Rights has accepted, in principle (though not in jurisprudence related to illicit enrichment), that it can be appropriate to shift some of the evidentiary burden of proof to the accused where the legislature has decided that this would be in the public interest, as determined by the court, taking into account the facts of the case and being within reasonable limits that respect the rights of the defence.[64]

Discussions on the balance of effectiveness in tackling corruption with civil liberties issues have taken place within UNCAC for many years. In November 2009, the third session of the Conference of State Parties of UNCAC adopted Resolution 3/3 which urged "further study and analysis of, inter alia, the results of asset recovery actions and, where appropriate, how legal

[60] StAR *On the Take: Criminalizing Illicit Enrichment to Fight Corruption,* p27 (Dec 2012)
[61] Protected under Article 6(2) of the European Convention on Human Rights
[62] StAR p7 (Dec 2012)
[63] StAR (Dec 2012)
[64] ECHR Salabiaku v. France (1988), Application no. 10519/83, Section 28.

presumptions, measures to shift the burden of proof, and the examination of illicit enrichment frameworks could facilitate the recovery of corruption proceeds."[65]

Both the UK and Australian POCAs, permit the burden of proof to be placed on the defendant to demonstrate that the assets in question have not been acquired illicitly, provided a criminal conviction has been obtained in relation to certain offences such as drug trafficking and money laundering and the prosecution can demonstrate that the defendant has a "criminal lifestyle". These powers have been largely used in connection with narcotics offences.[66] In the Netherlands, the country modified its criminal code (Article 36e) through the "Pluk-ze" ("Squeeze 'em") Act in 1993 to allow the partial reversal of the burden of proof in cases associated with illicit proceeds that are the product of committing a specific set of crimes, such as drug trafficking. The Dutch Supreme Court also has upheld that the provision does not violate the ECHR, which declares the presumption of innocence (Article 6(2)).[67]

It should be noted that public officials and politicians already face enhanced money laundering monitoring, on account of FATF AML recommendation relating to PEPs. There is already enhanced financial disclosure for public officials and politicians, through IAD registers, although their use is patchy and they are produced to different standards in different countries. As such, a move towards shifting in the burden of proof for substantial unexplained wealth, specifically for public officials and politicians, is not a radical departure from the direction of AML regulations and is arguably proportionate and appropriate when considering the power and responsibility that comes with choosing public office. For this reason, experts have argued that an illicit enrichment offence should be restricted to public officials and politicians.[68] Annex E provides a review of other existing UK laws which provide a duty to report on citizens.

While some commentators have argued that illicit enrichment challenges fundamental human rights, European Court of Human Rights jurisprudence has provided for judgements that conclude that not all rights are absolute and can be qualified to serve the interests of both the public and justice.[69] In order to protect human rights it is important to consider the rationality of the offence and the proportionality of the sanction.[70] For these reasons, that Taskforce propose in this paper a civil UWO option, rather than a criminal illicit enrichment option.

[65] This was again reflected in the Resolution 4/4 following the fourth session of the Conference of State Parties of UNCAC in 2011 http://www.unodc.org/documents/treaties/UNCAC/COSP/session3/V0988538e.pdf [Accessed: 19 May 2015]
[66] http://www.transparency.org/whatwedo/answer/illicit_enrichment_regulations [Accessed: 19 May 2015]
[67] http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205401377_text [accessed: 5 Dec 2014]
[68] U4 *The accumulation of unexplained wealth by public officials: Making the offence of illicit enrichment enforceable* (Jan 2012), http://www.u4.no/publications/the-accumulation-of-unexplained-wealth-by-public-officials-making-the-offence-of-illicit-enrichment-enforceable/downloadasset/2638
[69] StAR *On the Take: Criminalizing Illicit Enrichment to Fight Corruption,* p39 (Dec 2012)
[70] StAR, p27 (Dec 2012)

5. Conclusion and recommendations

The existing UK legal framework does not adequately address the scale of money laundering of the proceeds of corruption from around the world through and into the UK.

The work of Transparency International and other civil society and government organisations around the world has indicated how corruption, and the impunity achieved by perpetrators of corruption through money laundering, is a major contributor to global poverty and suffering. The UK, as a major global financial centre, attracts corrupt funds for many of the same reasons that it attracts legitimate investment. But when corrupt funds are laundered through the UK, it undermines faith in the UK justice and the rule of law, damages the UK's moral power in international affairs and international development, and it tarnishes the reputation of the UK's financial services sector.

Article 20 of the UN Convention against Corruption, to which the UK is a signatory, commits nations to consider putting in place an "illicit enrichment" power. The power, originally developed to address narcotics barons, provides law enforcement with the right to request owners of suspicious and unexplained wealth to explain what their legitimate sources of wealth are. While a criminal Article 20 power was viewed as disproportionate by the Taskforce, greater use of civil powers against assets in the UK was considered viable.

This discussion paper provides a detailed review of a UWO civil proposal.

The option can provide an enhancement to some cases faced by law enforcement (where law enforcement authorities already have a high degree of evidence of corrupt criminality when they receive the suspicious report or other trigger). Most importantly, however, the UWO option appears to open up an entire class of potential grand corruption cases to law enforcement action; where no effective action is possible under current laws and powers. These cases revolve around where UK law enforcement have grounds for suspicion that an individual is laundering the proceeds of corruption, but require more time than the SAR moratorium allows to collect evidence of the criminality of the suspect in the origin country, to meet a standard of 'reasonable cause to suspect' that the transaction is the proceeds of corruption.

Such a power, applicable for cases where moderate levels of evidence of criminality exist or credible civil society allegations of corruption are apparent, but no support or conviction from law enforcement in the origin country is likely, could address the most significant weakness in the UK's asset recovery approach – the over reliance on a conviction in the origin state.

We also highlight a potentially more powerful tool in the form of 'corrupt enrichment seizure powers'.

Our intention is that these options serve to inform policy discussion around the appropriate balance of effectiveness in recovering corrupt assets, and with the civil liberties concerns over extending law enforcement powers.

Given the complexity of the discussion on proportionality, we recommend that an appropriate authority – such as the Law Commission or a relevant Parliamentary Committee – consider this discussion paper as the basis for a more wide ranging review of powers to tackle grand corruption and the money laundering of grand corruption in the UK.

Annex A
Taskforce members and terms of reference

Standing members:

Jeremy Carver CBE (Chair) – Global board member, Transparency International

Sue Hawley – Corruption Watch

Sam Eastwood – Trustee, Transparency International UK; Partner, Norton Rose Fulbright LLP

Professor Jeremy Horder – Professor of Criminal Law, London School of Economics

James Maton– Partner, Cooley (UK) LLP

Stuart McWilliam – Global Witness

Colin Nicholls QC – Three Raymond Buildings

Dr Bill Peace – Senior Visiting Research Fellow, Kings College

Transparency International UK:

Robert Barrington – Executive Director

Nick Maxwell – Head of Research

Matthew Race – Researcher and secretariat to the Taskforce, on secondment from the Financial Conduct Authority

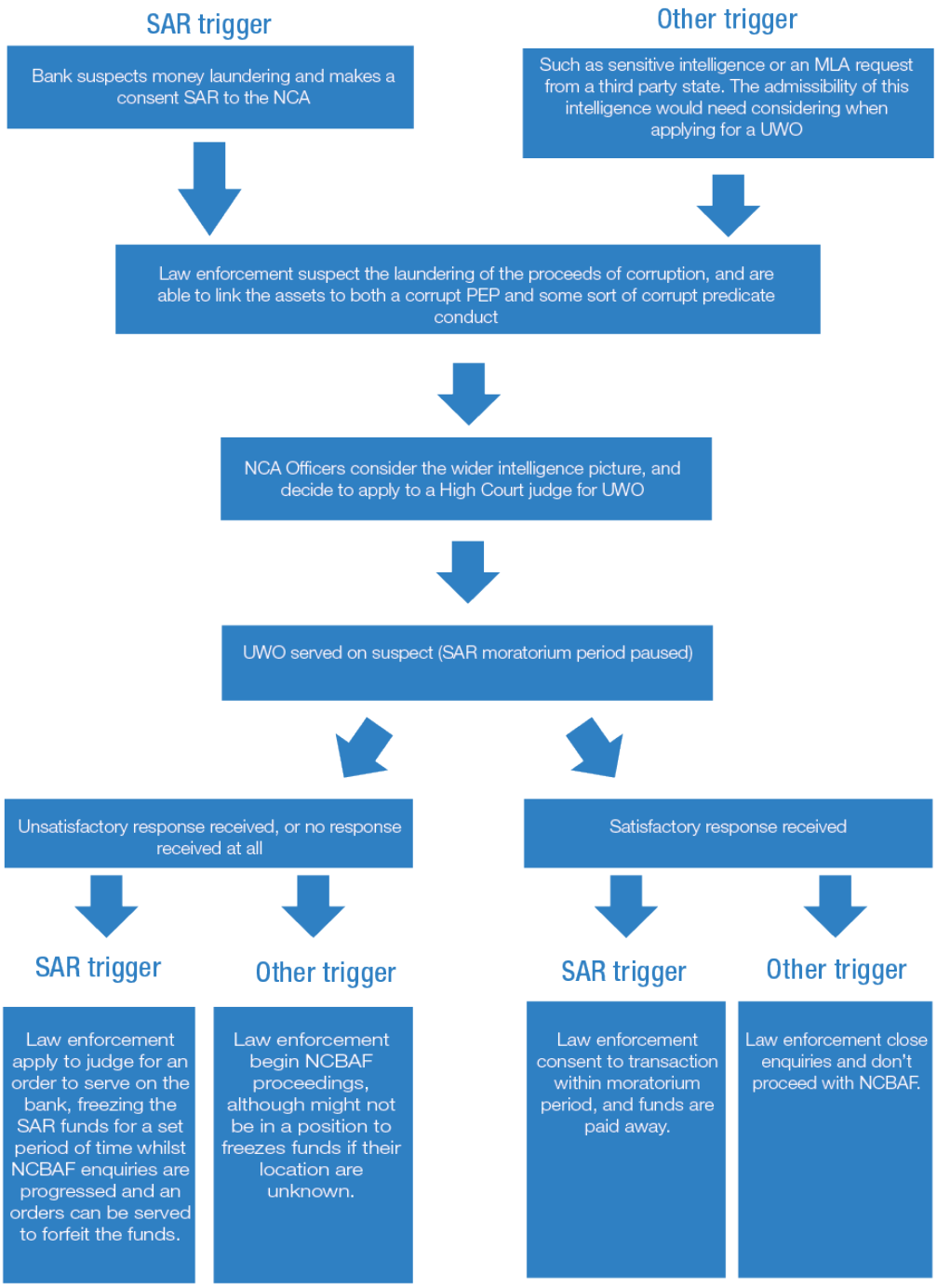
Terms of reference

Taskforce objectives

To examine whether a new law is needed against corrupt enrichment and develop new legislation if required.

- **Consider the basis for a new 'corrupt enrichment' criminal offence** – for instance substantial, suspicious and unexplained funds belonging to public office holders, far beyond their declared official income and assets (in line with article 20 of UNCAC)
- **Establish the jurisdictional parameters of a new offence** – applicable to relevant funds passing through the UK financial system, but with extra-territorial reach (like the Bribery Act). An extra territorial law would end the over-reliance on convictions in the origin state and to empower the UK to take an assertive role in fighting corruption as it flows through the UK financial system.
- **Determine the burden of proof** – whether the corrupt enrichment offence should reverse the burden of proof, upon reasonable suspicion, specifically for those individuals who have chosen the responsibility and power of public office.

Annex B
How the UWO power would work in practice



Annex C
Flowchart of the Corrupt Enrichment Seizure and UWO process

The UWO option and corrupt enrichment seizure

Annex D
Approach to illicit enrichment in other Common Law countries

Australia	• No specific law, but has legislation for offences listed in its POCA 2002 that reverses burden on defendant to demonstrate assets have not been illicitly gained. • Lower civil burden than conviction based forfeiture.
Canada	• Illicit enrichment considered as circumstantial evidence (not a standalone offence) which can be introduced at trial when and if the prosecutor has charged a person with one of the existing corruption offences. It may help prosecutor prove the corruption offence beyond a reasonable doubt.
Ireland	• POCA (1996) established the Criminal Assets Bureau (CAB), a specialised unit within the Irish police that can secure a High Court order to freeze and seize the proceeds of crime. • Confiscation possible without criminal conviction, although the burden rests with CAB to prove that the assets in question were acquired unlawfully. • In 2005, public officials were brought under the same legislation. • CAB needs a conviction on corruption before pursuing action on related illicit enrichment charges against public officials. However, the burden of proof can be reversed through a predicate offence if well-argued by the prosecution. Moreover, the Ethics in Public Office Act (1995) requires specific grades of public officials to declare their assets annually. The failure to do so can open up the way for further action.
United States	• The legal system in the United States does not permit the reversal of burden of proof for cases of illicit enrichment (presumption of innocence for the accused) • There has been an adoption of other statutes to target public officials who have profited from illicit gains. For example, the Ethics in Government Act requires employees of the executive, legislative and judicial branches to file financial disclosure reports which can then be used as evidence to pursue cases and confiscate these proceeds. • As with Australia, there is a difference in thresholds for criminal and civil proceedings. Criminal confiscation happens post- conviction. In civil cases, once the prosecution demonstrates that there is probable cause to bring a case, then the defence must show that the property or assets in question were legally acquired.

Annex E
A description in UK law of duties to report

In trying to determine if income and assets have been illegally obtained, a defendant may risk self-incrimination for either other criminal acts or for remaining silent. Although the ECHR holds that "the right to remain silent under police questioning and the privilege against self-incrimination […] lie(s) at the heart of the notion of a fair procedure", [71] it is not an absolute right. It accepted that those accused may be required to provide evidence overriding this right against self-incrimination when in the public interest.[72] And various pieces of legislation in UK law already contain elements of a duty to report (which may conflict with the right against self-incrimination):

- **Duty to report suspicions of money laundering under POCA 2002** - Part 7 of POCA provisions requiring businesses within the regulated sector to report suspicions of money laundering. The offence of failing to report a suspicion of money laundering by another person carries a maximum penalty of 5 years imprisonment and/or a fine. Furthermore, the 'tipping off' offence means that the regulated sector expose themselves to civil penalties from claimants.[73] Law enforcement officers are not subject to the offence of tipping under s.333A POCA (para 4.1.1).

- **Deferred Prosecution Agreements (DPAs) under UK Bribery Act** - The DPA regime is intended to encourage self-reporting and to provide companies with a secure framework for plea bargains negotiated with the SFO or other prosecuting body which will be upheld by the court, and to avoid the expense and uncertainty of a protracted criminal trial. Following criticism from the OECD that companies who self-reporting should not receive more lenient (i.e. civil) penalties, SFO guidance now states that 'Self-reporting is no guarantee that a prosecution will not follow' and that the decision to prosecute in any given bribery case will turn on its own facts.[74] Furthermore, a failure to report '*properly and fully the true extent of the wrongdoing [will be] a further public interest factor in favour of a prosecution.*' [75]

- **Failure to declare a pecuniary interest as defined under the Localism Act** - In the drive for greater transparency across local government, since 2011 all councillors have been required to register certain pecuniary interests, including trade union dealings on a publicly available local register. Under section 34 of the Act, an offence has been created arising from a failure to declare pecuniary interests.

[71] StAR *On the Take: Criminalizing Illicit Enrichment to Fight Corruption,* p32 (Dec 2012)
[72] In *O'Hallaran and Francis v. the United Kingdom*, the UK courts accepted that they may draw adverse inferences where the accused has chosen to remain silent.
[73] Although precedent in favour of regulated institutions has been established in Shah & Anor v HSBC Private Bank (UK) Ltd
[74] http://www.sfo.gov.uk/bribery--corruption/corporate-self-reporting.aspx [Accessed: 19 May 2015]
[75] http://www.traverssmith.com/media/1141257/bribery_uk_guide_self-reporting.pdf [Accessed: 19 May 2015]

- **Parliamentary register of financial interests in the Code of Conduct** - Every Member of the House of Commons is required to disclose financial interests, including (but not limited to): Directorships; remunerated employment; sponsorships; gifts, benefits and hospitality; overseas visits; overseas benefits and gifts; land or property; and shareholdings. The Register is available for inspection by the public and such disclosure is mandatory for any member taking part in any division of the House or in any of its Committees. The House may impose a sanction on the Member where it considers it necessary, upon investigation and recommendation from the Commissioner.

Annex F
Other ways in which information is requested under POCA, SOCPA, and CJA and CCA

Proceeds of Crime Act 2002[76]

- **Production Order**- These allow financial investigators to obtain information about the financial affairs of a person subject to a confiscation, money laundering or civil recovery investigation, most usually in relation to his or her bank accounts. A production order (see section 345) requires the person in possession or control of the material to produce it to an appropriate officer to take away, or give an appropriate officer access to it within the period stated in the order. This is usually seven days unless the judge decides that a longer or shorter period is appropriate. An application for a production order must be made by an "appropriate officer". In relation to money laundering investigations, accredited financial investigators, constables and officers of HMRC are appropriate officers. As to civil recovery investigations, members of NCA's staff, the Director of Public Prosecutions and the Director of the Serious Fraud Office (SFO) are appropriate officers (See section 378 (3) and section 352 (5A) of POCA).

- **Customer Information Orders**- Appropriate authorities may make a section 363 customer information order that a financial institution on receipt of a notice in writing provide the customer information requested. Customer information in relation to a person and a financial institution is information about whether a person holds or has held account(s) at a financial institution solely or jointly with another.

    - **Individual's Accounts** - If such accounts are or have been held, the definition of customer information is set out in section 364 (2) and will include the account number or numbers; the person's full name and date of birth; the most recent and any previous address; the date or dates of account opening and/or closing; such evidence of identity obtained by the financial institution for the purpose of the money laundering regulations; the personal details (name, date of birth, addresses) of joint account holders; the account numbers of any other accounts to which the individual is signatory and the details of the other account holders. There are also powers under POCA to acquire information on customers who is a company, limited liability partnership or similar body incorporated or established outside the UK.

[76] http://www.cps.gov.uk/legal/h_to_k/investigative_powers_and_cash_siezure/#Toc39629386# [Accessed: 19 May 2015]

- **Non-compliance by a financial institution is a criminal offence** - A financial institution commits an offence contrary to section 366(1) if without reasonable excuse it fails to comply with a requirement imposed on it under a customer information order punishable on summary conviction to a fine not exceeding level 5 on the standard scale. A financial institution commits an offence contrary to section 366(3) if, in purported compliance with a customer information order, it makes or recklessly makes a statement which it knows to be false or misleading in a material particular punishable on summary conviction to a fine not exceeding the statutory maximum, or on conviction on indictment to a fine.

- **Account Monitoring Orders** - An account monitoring order (see section 370) allows law enforcement agencies to observe/monitor the transactions in an account for up to 90 days at a time. The order is available for both confiscation and money laundering investigations, and will specify the manner and timescale for the information to be given. As with customer information orders, account monitoring orders may be made on the application of a constable, an officer of HMRC, member of staff of NCA or an accredited financial investigator (or immigration officer).

- **Disclosure Orders** - Section 357 of POCA, as originally enacted, gave the Assets Recovery Agency power to apply to for disclosure orders. The Serious Crime Act 2007, which abolished the Assets Recovery Agency, transferred the powers to obtain disclosure orders to the Director of Public Prosecutions and the Director of the Serious Fraud Office in relation to confiscation investigations and additionally to the NCA in respect of civil recovery investigations. Whilst applications for disclosure orders may not be made in relation to money laundering investigations (see section 357 (2)), a description is outlined below so as to inform this proposal document.

    - **What is a Disclosure Order?** - The law defines a disclosure order as an order authorising the relevant authority to give any person notice in writing requiring him to do any of the following in relation to any matter relevant to the investigation in which the order was made:

        - answer questions, either at the time specified in the notice or at once, at a place so specified;

        - provide information specified in the notice, by a time and in a manner so specified;

        - produce documents, or documents of a description specified in the notice, either at or by a time so specified or at once, and in a manner so specified.

Once a disclosure order has been made, there is no limit to the number of notices the prosecutor may issue or the persons to whom they may be issued. The requirements that must be satisfied before an order can be made are set out in section 358 and are identical to those in relation to customer information orders and account monitoring orders. A person commits an offence under section 359 if he fails to comply with a disclosure order or knowingly or recklessly makes a false or misleading statement in response to such an order.

- **The right against self-incrimination and restriction on the use of information provided in response to orders** - By section 360 (1) a statement made by a person in compliance with a requirement made under a disclosure order may not be used in evidence against him in criminal proceedings. However this prohibition does not extend to confiscation proceedings after conviction, to prosecutions for perjury or to a prosecution for some other offence where, in giving evidence, the person makes a statement inconsistent with a statement made pursuant to a disclosure order: see section 360 (2).

Code of Practice - Section 377 of POCA imposed an obligation on the Secretary of State to prepare a code of practice as to the use of these powers by the Director General of NCA and his staff, accredited financial investigators, police officers, officers of HMRC and immigration officers. This code was brought into force by virtue of SI 2003.334 on 24th March 2003. Section 377A imposes a similar obligation on the Attorney General to prepare a code of practice as to the exercise of the section 357 powers by the Director of Public Prosecutions and the Director of the Serious Fraud Office. By section 377 (6) a failure to comply with the Code does not of itself constitute a criminal offence but, by section 377 (7), the code will be admissible in evidence and the court is entitled to take into account any failure to comply with its provisions in determining any issue in the proceedings. Strict compliance with the requirements of the Codes is therefore of critical importance. An updated code of practice was due to be published imminently by HMG at the time of writing this research.

Serious Organised Crime and Police Act 2005

- Part 2 (S62) gives the power to serve a disclosure notice in writing requiring the person to whom it is given to do all or any of the following things in accordance with the specified requirements, namely:
    - Answer questions with respect to any matter relevant to the investigation;
    - Provide information with respect to any such matter as is specified in the notice;
    - Produce such documents, or documents of such descriptions, relevant to the investigation as are specified in the notice. [77]

Criminal Justice Act (CJA) 1987

- Section 2 powers are designed to obtain information to assist an investigation. They are not designed to obtain evidence for direct use in court. Even so, material obtained using s2 powers may subsequently be produced as evidence in the proper form. S2 powers are known as “compulsory” powers because:
    - S2(2) CJA 87 - power to require a person to answer questions or otherwise furnish information;
    - S2(3) CJA 87 - power to require production of documents;
    - S2 (4) CJA 87 - power to apply to Justices for a search warrant;
    - A failure to comply with an s2 Notice, without a reasonable excuse, is an offence (s 2(13) CJA 87);
    - Giving false or misleading information in response to a Notice is an offence (s 2(14) CJA 87);
    - The “right to silence” does not apply to information obtained under s2 (2) CJA 87 because it cannot be used in evidence unless a formal witness statement is obtained.

[77] http://www.legislation.gov.uk/ukpga/2005/15/contents [Accessed: 19 May 2015]

Crime and Courts Act 2013

- Section 34 and Schedule 18 of the Crime and Courts Act 2013 amend the definition of a civil recovery investigation to clarify that the focus of an investigation can be a person or property and also to clarify that there can be an investigation into property that has not yet been clearly identified.[78]

  Schedule 19 amended POCA such that law enforcement can serve disclosure notices during Civil Recovery investigations on a specified individual in order to determine their recoverable property. These powers come into force on 1 June 2015.

  Disclosure orders may be served in the case of a civil recovery investigation where:

  - The person specified in the application for the order holds recoverable property or associated property,
  - That person has, at any time, held property that was recoverable property or associated property at the time, orThe property specified in the application for the order is recoverable property or associated property.[79]

[78] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211523/2013_07_Code_Annex_C.PDF [Accessed: 2 May 2015]
[79] http://www.legislation.gov.uk/ukpga/2013/22/schedule/19 [Accessed: 16 Feb 2015]

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