MAYER | BROWN

September 2019

Legal Update

The UK National Crime Agency freezes a record £100m

On 14 August 2019 the National Crime Agency (the "**NCA**") announced that it had obtained account freezing orders ("**AFOs**") on eight bank accounts containing more than £100 million which the NCA considered to contain funds "suspected to have derived from bribery and corruption in an overseas nation". AFOs allow the NCA and the Serious Fraud Office (the "**SFO**") to apply to freeze and potentially subsequently forfeit funds held in bank accounts suspected to contain illicit funds, through the use of Forfeiture Orders or Account Forfeiture Notices.

The NCA declined to identify the individual or individuals involved but noted that £20 million held in accounts by a linked individual was frozen as a result of a previously unreported hearing in December 2018. This latest round of AFOs is the largest amount of money frozen since the powers were introduced in the Criminal Finances Act 2017 (the "**CFA**"), which received royal assent on 27 April 2017.

Between April 2010 and March 2018, a total of £1.6 billion has been seized through use of powers contained in the Proceeds of Crime Act 2002 ("**POCA**"), where the AFO powers are now contained. Despite the relative lack of media attention, the use of AFOs in particular has been enthusiastically embraced and this latest case brings the total amount frozen by AFOs in 2018/19 to more than £260 million through the use of around 650 separate orders.[1]

The introduction of the Criminal Finances Act 2017

In addition to AFOs, the CFA also introduced unexplained wealth orders and the offence of failure to prevent facilitation of tax evasion. These measures were introduced in response to the UK Government's identification of shortcomings in UK law enforcement's ability to target economic crime, especially with regard to the authorities' inability to freeze or otherwise interfere with bank accounts or other assets where it was suspected they were being used to channel criminal funds.

Although POCA had earlier successfully introduced a civil forfeiture framework through which illicit cash could be seized, the procedure for money held in bank accounts was limited to restraint orders under s.40 POCA; a potentially lengthy and expensive procedure for law enforcement authorities. The CFA was therefore introduced to attempt to make it easier and quicker for law enforcement to seize illicit funds contained in suspect accounts, particularly where, in the case of foreign-source illicit funds, there was no conviction in the origin state[2].

1 See: Economic Crime Plan 2019-22, HM Government, July 2019. See also Mayer Brown's recent update: "UK Government's Economic Crime Plan – where are we going?" – 15 August 2019

2 See: "Empowering the UK to recover corrupt assets: Unexplained Wealth Orders and other new approaches to illicit enrichment and asset recovery", Transparency International UK, March 2016

How do AFOs work?

Under s.303Z1 of POCA, an enforcement officer may apply to the Magistrates' Court for an AFO if the officer has reasonable grounds to suspect that money held in that account is "recoverable property" or is intended for use in unlawful conduct. "Recoverable property" is defined in s.304 of POCA as "property obtained through unlawful conduct". The money subject to any AFO application must exceed £1,000, which is the minimum amount defined in s.303Z8(1).

The Court may make the order if it is satisfied that there are reasonable grounds for suspecting that money held in the account is recoverable property or is intended by any person for use in unlawful conduct. The length of the AFO will be specified in the court order but cannot exceed a period of two years from the date of the order (s.303Z3(4)). The Court may also vary or set aside an order at any time on application made by an enforcement officer or by any person affected by the order (s.303Z4(1)).

The procedure for forfeiture

Following the successful imposition of an AFO over an account there are two methods of forfeiture, whereby the forfeited funds will be delivered up to the Consolidated Fund at HM Treasury:

i. Account Forfeiture Notices ("AFNs")

An enforcement officer may issue an AFN to the person or persons originally notified under the AFO. The AFN operates by forfeiting all or part of the funds in a frozen account. If no objection to such a notice is received within 30 days, the balance of funds in the frozen account must be transferred to a nominated account at the end of the objection period.

ii. Forfeiture Orders

An application may be made to the Magistrates' Court for forfeiture of money in an account subject to an AFO. The test for Forfeiture Orders has a higher threshold than that needed for the initial grant of an AFO. Under a Forfeiture Order the Court must be satisfied that the funds are either recoverable property or are *intended* for use in unlawful conduct rather than merely needing "reasonable grounds for suspicion". The test is subject to the civil, rather than criminal, standard of proof: the balance of probabilities. The standard of proof required here is a further advantage over the restraint orders under the pre-CFA regime, which used the more onerous criminal standard of proof.

A Forfeiture Order can be appealed by any party to the proceedings, within 30 days of the order being made. Where funds have been subject to an AFO but an appeal against a Forfeiture Order was successful, compensation may be available to affected persons. An application for compensation can be made where the applicant can satisfy the Court that they have: i) suffered a loss, and ii) that there are "exceptional circumstances". The amount of compensation awarded will be what the court considers reasonable given the loss suffered and any other relevant circumstances and will be payable by the relevant enforcement authority.

Repatriation of forfeited funds

Despite a trend globally to ensure that assets and monies stolen overseas are returned to their countries of origin, POCA contains no automatic mechanism for doing so. Instead, ss.303Z13 and 303Z17 POCA provide that monies forfeited under AFNs or Forfeiture Orders are paid into the Consolidated Fund at HM Treasury. The Criminal Finances Bill did propose a new clause at s266A of POCA which envisaged the repatriation of monies seized under recovery orders, but this was rejected following a vote[3] and no equivalent provision was adopted in the CFA as passed.

The UK and other countries, most notably Switzerland, have instead adopted an ad-hoc approach which has included various bi-lateral agreements with countries such as Kenya and Nigeria to cooperate on matters concerning the repatriation of funds stolen from the government or state owned enterprises of these states. To date, the agreements, most recently between Kenya and the UK in August 2018, have commonly taken the form of a 'declaration of intent' to cooperate on matters concerning the repatriation of stolen assets and have dealt with individual matters on a case-by-case basis.

3 See: https://publications.parliament.uk/pa/bills/cbill/2016-2017/0075/amend/criminal_rpro_pbc_1122.pdf

Use of forfeitures to date

The first quarter of 2019 saw the first two examples of AFOs develop into full forfeiture, both through the use of court granted Forfeiture Orders. The first Forfeiture Order was granted by the City of London Magistrates' court on 5 February 2019 in relation to c. £500,000 contained in three bank accounts held by the son of a foreign high-level public official currently serving a nine-year conviction for fraud for the disappearance of nearly £700 million from banks in his home country.

The accounts in question had been subject to the AFOs since May 2018, on the basis that the son was unable to account for the source of funds for his lavish lifestyle, including spending c. £400,000 upfront in rent for a Knightsbridge apartment and the purchase of a c. £200,000 luxury car, despite being a student at a London university and having no declared income. After an investigation, the NCA were satisfied that the funds could be traced back to the father, and the proceeds of the crimes for which he had been convicted in his home country.

The second successful Forfeiture Order was granted on 14 March 2019 in relation to £1.5 million held in the accounts of a convicted fraudster who had fled from Britain to Pakistan in the 2000s. The money held in the accounts subject to the AFOs was believed to be derived from the sale of two Birmingham properties which had originally been purchased using funds related to the frauds committed under to the original conviction.

Prospects for forfeiture and the future of AFOs

The NCA will currently be focussed on gathering evidence to support an application for a Forfeiture Order in relation to the £100 million frozen under the AFO earlier this month. Given the relative novelty of this procedure, and their effectiveness so far, the NCA will be keen to ensure that any application is successful and is likely to take great care in ensuring that the evidence gathered is sufficient for a successful application.

For the application to be successful, the court will have to be satisfied that the funds constitute recoverable property (i.e. were derived from criminal conduct), rather than the mere suspicion, as was required for the granting of the AFOs in the first instance. Given the use of the civil standard of proof, this is not as onerous an evidential burden as it was under the pre-CFA regime.

The use of the AFOs and the other measures available to law enforcement since the passage of the CFA have been embraced enthusiastically by the authorities and are an important tool in furthering the government's own stated in aims in both the Economic Crime Plan 2019-2022 and the Anti-Corruption Strategy 2017-2022[4]. Given this, it seems likely that we will see an increase in the use of AFOs in the future, perhaps over even greater numbers of accounts and ever larger amounts, as the authorities get to grips with the procedures and practices available under the new powers.

If you have any questions about the issues raised in this legal update, please get in touch with your usual Mayer Brown contact or:

Sam Eastwood

Partner, London
E: seastwood@mayerbrown.com
T: +44 20 3130 3087

Paul Whitfield-Jones

Senior Associate, London
E: pwhitfield-jones@mayerbrown.com
T: +44 20 3130 3204

Findley Penn-Hughes

Associate, London
E: fpenn-hughes@mayerbrown.com
T: +44 20 3130 3839

4 See: United Kingdom Anti-Corruption Strategy 2017-2022, HM Government, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/667221/6_3323_Anti-Corruption_Strategy_WEB.pdf

Mayer Brown's Team & Capabilities

Mayer Brown has lawyers in offices in all the world's major financial centres, and throughout the Americas, Europe, and Asia, who offer clients an all-encompassing solution to ensure compliance with an increasingly global legal and regulatory framework as regards all matters pertaining to financial regulation, financial crime, and management of financial crime risks. Our team includes former government prosecutors and compliance lawyers with experience in every facet of regulation and enforcement.

With regard to money laundering in particular, our team has extensive experience in counselling a wide array of financial institutions, including banks, brokerage firms, insurance firms, money transmitters, and Fintech firms on their anti-money laundering compliance obligations. Relying on our knowledge of the financial services industry and experience before supervisors around the globe, we seek to assist clients in developing appropriately-tailored compliance programs that satisfy their legal obligations. In the event that a compliance issue arises, we assist clients to isolate the problem, remediate it, and to contend with potential supervisory fall-out. If ongoing enforcement occurs, we are experienced in negotiating the terms of deferred prosecution agreements and assisting institutions to manage monitorship programmes. This has involved:

- *preparation or review of financial crime related training programmes and materials*
- *responding to specific inquiries regarding typologies that may indicate money laundering or related financial crime risk*
- *enhancement or review of internal policies and procedures relating to the management of financial crime risk*
- *advising on regulatory and law enforcement reviews of all aspects of compliance programmes, including reviews of various transaction monitoring, screening, and payment alert systems*
- *analysing applicable data privacy laws across various jurisdictions for regulatory or law enforcement requests and investigations, intra-group information sharing, and other financial crime risk management purposes.*

Our global team offers comprehensive guidance and counselling, including the following services:

Corporate Compliance Programs

We advise clients on the development and implementation of internal compliance programs to reduce the risks of a violation of applicable laws, regulations, and guidance. We conduct compliance assessments to identify strengths and weaknesses in existing compliance programs. Additionally, we help companies formulate compliance policies, address specific implementation issues in the context of particular corporate cultures and multinational operations, and prepare training and other educational materials, among other key practices, to ensure compliance.

Prospective Transactions

We help clients assess prospective transactions with respect to compliance, and we advise on structuring transactions to satisfy the requirements of the applicable laws and regulations. We help clients engage in effective due diligence with respect to the engagement of foreign agents, consultants, representatives and joint-venture partners, and we counsel on appropriate contractual provisions to address financial crime compliance and risk. In addition to advising on particular international transactions, we also counsel clients on acquisitions of companies engaged in international businesses.

Investigations

We have extensive experience in handling internal and external corporate investigations, including those addressing possible violations of the books-and-records, internal controls and financial crime related laws generally. We have worked with inside counsel, internal auditors and external auditors to assemble and review documents, interview directors and current and former employees, and advise management, boards of directors, and audit committees on the results of investigations. We are familiar with the complexities of multinational investigations, including sensitivity to issues raised by local data protection, financial privacy, and employment laws, as well as blocking and sovereignty statutes, and coordinating the work of foreign counsel when needed.

Mayer Brown is a distinctively global law firm, uniquely positioned to advise the world's leading companies and financial institutions on their most complex deals and disputes. With extensive reach across four continents, we are the only integrated law firm in the world with approximately 200 lawyers in each of the world's three largest financial centers—New York, London and Hong Kong—the backbone of the global economy. We have deep experience in high-stakes litigation and complex transactions across industry sectors, including our signature strength, the global financial services industry. Our diverse teams of lawyers are recognized by our clients as strategic partners with deep commercial instincts and a commitment to creatively anticipating their needs and delivering excellence in everything we do. Our "one-firm" culture—seamless and integrated across all practices and regions—ensures that our clients receive the best of our knowledge and experience.

Please visit mayerbrown.com for comprehensive contact information for all Mayer Brown offices.