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# Unexplained wealth orders and account freezing orders



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In the criminal arena, confiscation proceedings and restraint orders are well-known tools that facilitate the recovery of the proceeds of crime. This article will consider the latest tools introduced to fight fraud, money laundering, corruption and terrorist financing. The Criminal Finances Act 2017 inserted various sections into the Proceeds of Crime Act 2002 (POCA), including unexplained wealth orders (UWOs) and account freezing and forfeiture orders or (AFOs). These tools have provided law enforcement agencies with new capabilities and powers to recover illegitimate funds.

UWOs and AFOs have attracted significant media attention since their introduction. While there have been a handful of high-profile UWOs, they have not been utilised frequently. AFOs have been much more prominent. What are these tools and what impact have they had since their introduction?

BY

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Corporate fraud &  
corruption

## UWOs

A UWO is a civil investigation tool requiring either a politically exposed person (PEP) or a person suspected of involvement in serious crime, or association with it, to disclose assets that appear disproportionate to their known legitimate income. A UWO is only available to enforcement authorities that are identified in the 2017 Act and include the National Crime Agency (NCA) and the Serious Fraud Office (SFO).

### How is a UWO obtained?

An enforcement authority will make an application to the High Court provided it has reasonable cause to believe that a person holds unexplained property in excess of £50,000 and they are either any non-EU PEP or a person closely associated or connected with a PEP, or that there are reasonable grounds for suspecting that a person is or has been involved in serious crime in the UK or elsewhere or is connected with such a person.

The enforcement agency must prove that there are reasonable grounds for suspecting that the known sources of the individual's lawfully obtained income would have been insufficient for the purposes of enabling them to obtain the property in question.

### Who and what can a UWO apply to?

UWOs can be made in respect of any property or asset, regardless of where in the world it is located, and against any individual, whatever their place of residence or business; there is no requirement to demonstrate a connection to the UK.

### Requirements of a UWO

A UWO requires the respondent to provide a statement setting out: (i) the nature and extent of the respondent's interest in the property; (ii) how the respondent obtained the property; (iii) if the property is held in trust, details of the settlement; and (iv) any other requested information.

The only exception to not providing the requested information is if the respondent has a 'reasonable excuse'. Unhelpfully, this is not defined in the legislation and no examples are provided in the explanatory note to the legislation. However, it is likely to only apply in very limited circumstances such as, for example, where documents have been destroyed or lost.

If a respondent provides false or misleading information in response to a UWO they will commit a criminal offence. The maximum penalty for this is imprisonment for a term not exceeding two years, a fine, or both. Failure to comply with a UWO will result in a rebuttable presumption that the property is recoverable for the purposes of civil recovery action under the POCA.

### Other aspects to consider

The High Court may prohibit a respondent to a UWO (and any other person with an interest in the property) from dealing with the property specified in the UWO by issuing an interim freezing order (IFO). An IFO will only be granted if deemed necessary, due to the risk that any subsequent civil recovery order might be frustrated.

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Enforcement authorities can also apply to the High Court for a subsequent civil recovery order in order to recover criminal property. To achieve this, an authority must prove, on the balance of probabilities, that the specified property was obtained through unlawful conduct and that it is recoverable, as defined in the POCA.

#### **AFOs**

AFOs prohibit the withdrawal or payment of funds from a bank or building society. In order for an AFO to be granted, an enforcement officer must have reasonable grounds for suspecting that money held in a bank or building society account is 'recoverable property' (property which represents the proceeds of 'unlawful' or criminal conduct) or is intended by any person for use in 'unlawful conduct'. The minimum amount that can be subject of an AFO is £1000 and the length of the order must not exceed two years.

AFOs are available to a broad range of law enforcement bodies, including a Revenue and Customs officer, the police and the SFO. The application is to the Magistrates Court and can be made without notice, however it must be made or authorised by a senior officer. An AFO is granted if the court is satisfied (to the civil standard) that the officer has reasonable grounds for their suspicion.

#### **What is the process?**

While the AFO is in place, further enquiries will be made into the source of the funds. Once the investigation is complete an application can be made to set the order aside if the officer is satisfied that the funds are not recoverable property or intended for use in unlawful conduct. If the officer is satisfied the funds are recoverable property or intended for use in unlawful conduct, they can seek forfeiture by an account forfeiture notice (AFN) or a forfeiture order.

#### **AFN**

A senior officer may issue an AFN if satisfied that all or part of the monies in the bank account are recoverable property or intended for use in unlawful conduct. Notice will be provided to the respondent. If the respondent does not oppose the forfeiture within the specified time frame, the money held in the account will be forfeited. If no objection is made, the amount is deemed forfeited and the AFO ceases to have effect. If an objection is made, the AFN lapses. The AFO ceases to have effect 48 hours after the objection is made unless a further application is made, either to vary the AFO or to forfeit the funds.

#### **Forfeiture order**

The Magistrates Court can order forfeiture, provided it is satisfied, on the balance of probabilities, that the monies in the account are recoverable property or intended for use in unlawful conduct. If the forfeiture hearing has concluded and the court has not made an order for forfeiture, the AFO ceases to have effect immediately. However, the person who applied for forfeiture may apply to the court for the AFO to continue for a further 48 hours, allowing time for the consideration of an appeal. If an appeal is brought within the initial 48 hours, the AFO will continue until the appeal has been determined.

**Application to set aside or vary**

Both an enforcement officer or any person affected by the order can make an application to vary or set aside an AFO, and this can be done at any time. There is no guidance as to what criteria the court should consider when deciding whether to exercise this discretion. However, as the test is 'suspicion', the bar is very low. Applications to vary the AFO include the ability to ask the court to make 'exclusions' to what the AFO covers. Exclusions include reasonable living expenses and carrying on of any trade, business, profession or occupation. Reasonable legal expenses can also be paid, pursuant to an exclusion.

**Compensation**

If an AFO is made but the money is not forfeited, it is possible to apply to either the Magistrates' Court, or the Crown Court on appeal, for compensation. The court will only order compensation if it is satisfied that the person applying for compensation has suffered loss as a result of the making of the AFO, and that the circumstances are exceptional. The court will order compensation in the amount that it thinks is reasonable, with regard to both the amount of the loss and any other relevant circumstances.

**UWOs and AFOs – what have we learnt so far?**

AFOs have been much more common than UWOs and have been utilised by a number of agencies, including the NCA and the SFO. In 2018, AFOs were used over 650 times to freeze over £110m of illicit funds. They have addressed a range of underlying criminality including: (i) UK fraud; (ii) overseas bribery and corruption; (iii) breach of sanctions; and (iv) laundered funds from overseas and the UK. They have also been used in a coordinated manner.

In contrast, despite the media attention the cases attract, the NCA is the only authority to have sought UWOs. They have only obtained 15 orders across four cases. UWOs do not appear to be the cure-all solution that was first envisaged. PEP cases are less complicated, however proving connections to serious organised crime has been more difficult. Resources, both in terms of funding and manpower, are stretched at various authorities and UWOs tend to require external legal spend, whereas AFOs do not, at least at the early stages. As UWOs are a precursor to a civil recovery action, which can be expensive and take considerable time, it seems that AFOs are, at present, a favoured option.

**Conclusion**

The introduction of the new powers enables funds to be frozen, forfeited or recovered on a civil basis and ensures this can be done in an efficient and rapid manner. Their introduction marks a significant shift in terms of law enforcement strategy in the area of financial crime, which has moved away from a 'prosecution model' to what may be termed as a 'disruption model'. The cost and time to properly investigate and bring a criminal prosecution for financial crime can be prohibitive. The reduction in resources and pressure

to prosecute other areas, such as terrorism, means that there is a desire to consider UWOs and AFOs as a means of recovering illegitimate funds. This creates its own tensions, including the balance to be struck between effective disruption to crime and the need for the public to see open, transparent justice in action. Many of the public would regard that as a prosecution of individuals in a criminal trial.

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