

UK Leads Anti-Corruption Enforcement: Implications Of UWOs

Law360, New York (March 9, 2017, 5:40 PM EST) --During the Third Reading of the Criminal Finances Bill on Feb. 21, 2017, which includes amendments to the Proceeds of Crime Act 2002, provisions in connection with terrorist property, unexplained wealth orders, and the creation of corporate offenses or cases where a corporate/partnership facilitates the commission by another of a tax evasion offense, consensus broke out across British Parliament. Indeed Eric Pickles and Diane Abbott — not two members you would normally associate as close bedfellows — were very much in agreement:

Pickles:

[The Criminal Finances Bill] ... should help us to deal with bloodstained dictators and those on the take in kleptocracies around the world. I entirely agree that a posthumous conviction for dishonesty and theft is as ridiculous as the practice during the French Revolution of putting animals on trial. We have to understand that there are parts of the world in which Governments and private business move hand in hand, and they make the Tudor Court look like the epitome of puritan restraint. To those people, we are sending out a clear message that their assets will be seized and their lives interrupted, and that those who seek to buy expensive flats and jewellery will face a problem.

Abbott:

Tax avoidance and money laundering are the opposite of victimless crimes. In the first instance, there are inflated asset prices in the territories where the money is laundered, and there is no bigger example of that than the housing market in this country, particularly in London ... some of those properties are being used to launder money, and if this legislation can bear down on that, it will be of value not least to people who are victims of the wildly inflated London housing market.

One significant feature of the bill is what is being termed as the "unexplained wealth order" ("UWO"). The bill inserts new provisions into the Proceeds of Crime Act 2002 to allow for a court to make a UWO, which requires an individual to set out the nature and extent of their interest in the property in question, and to explain how they obtained that property in cases where such property is disproportionate to their income. An enforcement authority may apply for a UWO to the High Court, and such an order may be made only if the respondent is a "politically exposed person" ("PEP"), or if



Ian Hargreaves

there are reasonable grounds for suspecting that the respondent is, or has been, involved in serious crime. Other points to note:

- the obligation is on the respondent to explain the source of the asset within a time period that the court may specify
- the value of such property to be greater than £100,000
- there is no need to prove to a criminal standard (beyond reasonable doubt) that the respondent is involved in serious crime (as defined in sub-sections 3-4 of the Serious Crime Act 2007)
- there is no need to have reasonable grounds to suspect a PEP's involvement in serious crime
- if, following the expiry of the response period to the UWO, a respondent fails to comply without reasonable excuse, the property concerned is to be treated as "recoverable property"

If the trigger for the UWO was a proceeds of corruption "suspicious activity report" ("SAR"), the moratorium period for investigation into this SAR would be paused while the UWO was being responded to. If there is not a separate application to freeze the asset should the respondent not comply with a UWO, or has provided false or misleading information, the applicant enforcement authority may apply to the High Court to freeze the funds for a set period of time (e.g., six months), allowing time for further investigation. Simultaneously, such an application may also allow time for non-conviction based asset forfeiture ("NCBAF") proceedings to progress. The NCBAF seizure would be a civil standard of proof based on "the balance of probabilities" instead of the "beyond reasonable doubt" criminal standard. Although the U.K. has not generally sought to use civil forfeiture powers to target corrupt assets located in the U.K. or overseas, an exception was made in the Agidi case, which involved a formerly high-ranking Nigerian government official, and where the High Court deemed assets to be proceeds of crime.

It can be seen that 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," and as such justified and necessary in order to avail investigators of the chance to secure more evidence through the extended moratorium period to support the NCBAF action. Yet while it is seen to be a powerful tool, it has to be handled with care, especially when used in conjunction with PEPs.

This type of legislation or intended legislation is not unique to the U.K. though.

The Swiss case

In comparison, Switzerland has enacted a law called "Loi sur la restitution des avoirs illicites," or The Federal Law on the Restitution of Illicit Assets 2010 ("LRAI") as a result of the Duvalier case. The Duvalier case involved Haiti's former dictatorial ruler Jean-Claude Duvalier, in which Haitian authorities, after making a request of mutual assistance addressed to the Swiss Confederation in relation to assets located in Swiss territory and belonging to Duvalier, failed afterward to conduct criminal procedures against him. This lack of effective cooperation led to an introduction of the LRAI by the Swiss Parliament, aimed at complementing the current legal regime in relation to forfeiture and restitution of assets proven to have been misappropriated. The LRAI develops three procedures — freezing, forfeiture and restitution, with the aim of restituting to the country of origin assets located in Switzerland belonging to or under the powers of a PEP.

Comparison of the LRAI with the UWO

Many similarities may be drawn between the English UWO and the Swiss LRAI. Both can be seen as

attempts by the respective governments to shore up on the freezing, forfeiture and restitution of assets held by PEPs. Both extend the current powers of the government and widen their net in terms of the kind of people they are able to reach, while lowering the threshold needed to freeze and forfeit such assets. Both also have a presumption of forfeiture, which can be rebutted by showing clear evidence about how such assets have legally come into control by the respondent. There is also no need to prove criminality on the part of the PEP involved.

One significant difference pertains to the standard required to achieve the presumption of forfeiture: There is only a need for one of the requirements for a UWO — either that the respondent is a PEP, or a reasonable ground for suspecting that the respondent is, or has been, involved in serious crime. Under the LRAI, however, three requirements in total are needed: the respondent is a PEP, the wealth of the person with power of disposal over the assets experienced an exorbitant increase in relation to the exercise of the public functions by the PEP, and the corruption of the country of origin or that related to the PEP was notably high during his/her term in office. The LRAI requirements are seen to be much more stringent, and thus not as easy to achieve, as compared to the application of a UWO.

Other Regimes

New Zealand

New Zealand laws operate on the same basis as the United Kingdom, that the presumption is in favor of forfeiture. The Criminal Proceeds (Recovery) Act in 2009 introduces non conviction-based forfeiture of property, derived directly or indirectly from significant criminal activity, or unlawfully derived income. The statute empowers the Commissioner of Police to apply and the High Court to issue a restraining order related to specific tainted property if they are satisfied that there are reasonable grounds to believe that the property is tainted (s. 24), even if there is no respondent or if there are reasonable grounds to believe that the respondent has unlawfully benefited from significant criminal activity (s.25). The High Court may only issue a restraining order related to an instrument of crime under the circumstances that: (i) the respondent has been charged with a qualifying instrument forfeiture offense or (ii) the court is satisfied it has reasonable grounds to believe that the property referred to in the application is an instrument of crime used to facilitate the qualifying instrument forfeiture offense, or have reasonable grounds to believe that: (i) the respondent will be charged with a qualifying instrument forfeiture offense within 48 hours; and (ii) the property referred to in the application is an instrument of crime used to facilitate that qualifying instrument forfeiture offense. Subsequently, the commissioner may apply to the High Court for two types of forfeiture orders: (i) asset forfeiture order and (ii) profit forfeiture order.

Italy

The laws of Italy work slightly different from New Zealand and the U.K. Italy has historically always enforced UWO measures as tools to attack the financial base or organized crimes, such as the Sicilian Mafia. The burden of proof is on the defendant, and there are conviction-based confiscation laws; where confiscation orders are issued in the course of criminal proceedings (Article 240 of the Italian Penal Code). Nonconviction-based laws work as preventive measures enforced by law enforcement authorities under judicial supervision and under looser rules of evidence rather than the punitive conviction based counterpart. There are two conditions that have to be fulfilled before the court can order nonconviction-based confiscation: (i) the assets must be directly or indirectly at the disposal of the suspect; and (ii) there must be a discrepancy between the suspect's wealth and his income or sufficient evidence that the assets are the proceeds or crime or the use thereof. The burden of proof is on the

defendant, and he has to present sufficient evidence to justify otherwise. Conviction-based confiscation, however, requires the imposition of a conviction on the defendant, and that requires a "beyond reasonable doubt" test. While confiscation is not compulsory, a special mandatory confiscation exists solely for those criminal offenses associated with mafia-type extortion, kidnapping, money laundering and drug trafficking.

France

It is important to note that France recognizes only conviction-based confiscation, whereby conviction on the defendant is a prerequisite before confiscation of assets can happen. Confiscation in itself, however, is not mandatory for all types of crimes and is characterized as an additional optional measure. Confiscation is only mandatory for objects classified as "dangerous or harmful, instrumentalities, and things used or intended for the commission of the offense or its proceeds, except for articles subject to restitution." There is also a complete reversal of proof onto the defendant, and the amendments in 2003 and 2004 of the French Criminal Code stipulated that for all types of crime, should all persons who are not able to account for the lawful origin of their income and who are associated or in close contact with persons engaged in crime, they will be charged with the criminal offense of not being able to justify the legal origin of his or her income. It might be worth noting that Article 433-22 of the French Civil Code allows for the confiscation of unlawfully received gifts, relating to the corruption of public officials; the purpose of this article is to confiscate the proceeds of corruption attained by civil servants, particularly publicly exposed people. There is, however, no further explanation of what constitutes "unlawfully received gifts."

The UK Leads the Pack

As it is unlikely that there will be significant opposition to the Criminal Finances Bill in the House of Lords, it is likely to become law during the mid to late part of 2017. UWOs will be a new and powerful tool available to the criminal authorities to seize the assets of former dictators and lesser known civil servants and former ministers (in addition to serious criminals). As with the Proceeds of Crime Act, the U.K. Bribery Act and several other pieces of legislation, the U.K. really is leading the charge on introducing (if not enforcing) the toughest global laws on financial crime.

—By Ian Hargreaves, Covington & Burling LLP

Ian Hargreaves is a partner in Covington's London office.

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