

Everybody, freeze! Account freezing orders under the Proceeds of Crime Act

In this article Macfarlanes and Outer Temple Chambers explore a new power introduced by the Criminal Finances Act 2017 (CFA) that has recently been used for the first time by UK authorities: Account Freezing Orders (AFOs).

The CFA also introduced Unexplained Wealth Orders (UWOs), which have received much more comment and attention, but the recent spate of AFOs show that they might in fact be the more significant development arising from the CFA and one that ends up affecting more people.

The very first AFOs were successfully used to seize criminal funds in the first few months of 2019. Interestingly, the UK authorities have taken a long time to use this new power, as was the case with UWOs, but these first cases give an interesting insight into how AFOs operate and how they are likely to be used in the future.

The landscape

The UK is one of the world's largest financial centres. An unfortunate consequence of this is the UK is the destination for a commensurately high level of economic crime. As the House of Commons Treasury Committee has recently made clear, the scale of money laundering and economic crime in the UK is very hard to quantify, but is likely to exceed £90bn a year and could well be in the region of hundreds of billions of pounds a year.¹

The enforcement problem

In 2015/2016, the UK Government identified a serious shortcoming in its arsenal of tools to target economic crime. Specifically, while authorities might have been able to identify bank accounts being used by criminals, they did not have the power to interfere with the accounts, so investigators and law enforcement officers would often hit a dead end when trying to stop the impact of criminal funds. This problem was described by Ben Wallace MP, the Minister of State for Security and Economic Crime, in a Parliamentary debate in November 2016:

"Criminals need to launder the proceeds of their crimes to carry on their criminal activity... we need to ensure that we are able to respond to that threat... POCA already contains provisions for the seizure of cash, but we do not have an equivalent power to take quick and effective action against funds held in bank accounts, and criminals know that. Given the use made by criminals of the banking system, we need to plug that gap".²

The solution

In an attempt to tackle this, as well as a number of other economic crime issues, the UK Parliament passed the Criminal Finances Act 2017 (CFA), which received royal assent on 27 April 2017. The explanatory notes to the CFA provide that its purpose is to:

"make the legislative changes necessary to give law enforcement agencies and partners new capabilities and powers to recover the proceeds of crime, and to tackle money laundering, corruption and terrorist financing".

The CFA introduced AFOs so to allow the freezing of bank and building society accounts, thereby giving law enforcement the necessary powers to address the issue identified above. The Minister for Security's aspirations for the introduction of AFOs was that:

"... it will be easier and quicker for law enforcement agencies to seize the illicit funds held by criminals who abuse the banking system to store and transfer the proceeds of their crime. Secondly, it will also make it clear to criminals that we can take immediate and effective action against their abuse of the financial system".³

The legal bit

Section 16 CFA amended Part 5 of the Proceeds of Crime Act 2002 (POCA) by adding sections 303Z1-303Z19 (Chapter 3B of POCA), which contain the relevant provisions for applying for AFOs and, crucially, the powers of enforcement agencies to subsequently apply to forfeit monies held in accounts subject to an AFO.

¹ House of Commons Treasury Committee, Economic Crime – Anti-money laundering supervision and sanctions

² House of Commons Hansard, Criminal Finances Bill (Fourth Sitting), Public Bill Committee, Thursday 17 November 2016 at 1415

³ Ibid

We set out below a series of questions to help unpack Chapter 3B of POCA and explain these new powers.

What is an AFO?

The effect of an AFO is to prohibit the withdrawal or payment from an account maintained with a bank or building society, by each person by or for whom such account is operated, to which the order applies (s303Z1(3)(a)).

Who “operates” an account?

An account is operated by, or for, any person who is the account holder or signatory or is identified as a beneficiary in relation to that account (s303Z1(3)(b)).

Who can apply for an AFO?

An “enforcement officer” can apply for an AFO (s303Z1(1)), which means an officer of Revenue and Customs, a constable, a Serious Fraud Office (SFO) officer, or an accredited financial investigator⁴ (s303Z1(6)).

The enforcement officer applying for an AFO must either be a “senior officer” or have authorisation from a “senior officer” to make the application (s303Z2(2)). The meaning of “senior officer” applicable to each relevant organisation is set out in s303Z2(4) and includes the respective Directors of the SFO and National Crime Agency (NCA).

What are the grounds for making an application for an AFO?

An enforcement officer must have *reasonable grounds* for suspecting that money held in a bank or building society account is “recoverable property” or is intended by any person for use in unlawful conduct (s303Z1(1)).

What is recoverable property?

“Recoverable property” broadly means property that is obtained through *unlawful conduct* (s304(1)).

The concept of “recoverable property” runs throughout POCA and is relevant to, for example, the listed asset powers contained in s303C and the seizure of cash provisions in s294.

Are there any restrictions to applying for an AFO?

Yes – the money subject to an AFO application must exceed £1,000, which is the “minimum amount” as defined in s303Z8(1). The application must also be made by a senior officer, as explained above.

Where is an application made?

An application for an AFO is made in the Magistrates’ Court, despite it being a civil order (s303Z1(6)). The process is very similar to cash forfeiture proceedings.

When will a Court make an AFO?

A Court may make an AFO 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 (s303Z3(2)).

When making an AFO the court may make provision for exclusions (s303Z5(2)). Such exclusions may be made to enable a person by or for whom the account is operated to meet reasonable living expenses or carry on any trade, business, profession or occupation (s303Z5(3)). Exclusion may also be made to allow the person to meet the legal expenses incurred in relation to the AFO proceedings. However, such applications are unlikely to be straightforward, and a lot of the case law under Part 5 civil recovery is likely to be relevant to such applications.

What is the length of an AFO?

The length of the AFO will be specified in the court order, but *cannot exceed 2 years* from the date on which the AFO was made (s303Z3(4)).

Can an order be varied or set aside?

Yes – the court may do so at any time on an application made by an enforcement officer or by *any person affected* by the order (s303Z4(1)).

The power to vary the AFO includes the power to make exclusions (s303Z5(1)), as discussed above.

⁴ Such investigator must fall within the description specified in an order made by the Secretary of State under section 453 POCA

Can the money that is subject to an AFO be forfeited?

Yes – there are two methods by which money in frozen accounts can be “forfeited” – meaning that it is seized and returned to HM Treasury to be added to the Consolidated Fund (ss303Z13 and 303Z17(1)(a)). Money held in frozen accounts can be forfeited by either:

- an Account Forfeiture Notice (AFN) (ss303Z9 – 303Z13); or
- a Forfeiture Order (ss303Z14 – 303Z17).

Account Forfeiture Notices (AFNs)

AFNs are governed by the provisions in ss303Z9 – 303Z13. Put simply, these provisions enable senior officers to serve an AFN on the people who were notified of the original AFO. Unless the AFN is objected to within a period of at least 30 days, and if it has not lapsed for any other reason (such as the original AFO being set aside), the money identified in the AFN will be forfeited and transferred to an account specified by the enforcement officer.

AFNs have not really been tested so far, but appear to be a relatively quick method of forfeiting money in frozen accounts, but one that is easy to challenge.

Forfeiture Orders

Money in frozen accounts can also be seized using Forfeiture Orders. These carry more weight than AFNs because they are obtained from the Magistrates Court (s303Z14). Interestingly, an application being made for a Forfeiture Notice is one of the grounds that can cause an AFN to lapse.

The test for Forfeiture Orders being granted by the court is similar to that for obtaining the AFO in the first place – with the difference being that the court may order the forfeiture if it is satisfied that the money is recoverable property or is intended by any person for use in unlawful conduct (s303Z14(4)). This represents a step-up from the initial AFO, where only *suspicion* is required.

The Forfeiture Order can be appealed under s303Z16, by any party to the proceedings who is aggrieved by an order, within 30 days of the Forfeiture Order being made.

If money subject to an AFO is not forfeited, is compensation payable?

Yes – but only if the relevant person can show that loss has been suffered.

The first examples of forfeitures using AFOs

During 2018 no funds were seized using these new AFOs and their associated forfeiture powers. However, some accounts were frozen.

As noted above, the first quarter of 2019 finally saw two AFOs develop into full Forfeiture Orders and about £2m be reclaimed for HM Treasury. A further £3.6m held across a wide range of accounts has recently also been frozen under AFOs.

The slow adoption of AFOs can be explained by a couple of reasons. In particular, the NCA and SFO appear to have relatively small teams of staff working in the units that will make use of these tools. As well as genuine unfamiliarity with how they operate, there has also been a reluctance to make mistakes with these new powers. An approach seems to have been adopted of waiting for the right cases to ensure the best use of AFOs for the first time, which was the same approach we saw with UWOs.

Once the right cases came along, the AFOs appear to have been used to great effect – as described below.

A new power: The NCA's first AFO

On 7 February 2019, the NCA announced that it used Forfeiture Orders to forfeit c£0.5m from three HSBC bank accounts operated by the son of a family member of an imprisoned high-level foreign public official.

The accounts had been subject to an AFO since May 2018. The basis for the AFO was that it was suspected that the subject's extravagant lifestyle and spending on luxury goods (including paying c£0.4m upfront in rent for a penthouse flat in Knightsbridge) was funded by a relative who is currently serving a 9-year sentence for his part in the disappearance of £646m from three national banks of a foreign state.

The forfeiture orders were granted at City of London Magistrates Court on 7 February 2019. The judge was satisfied that, on the balance of probabilities, the money in the accounts was derived from criminal conduct.

The first AFO

| Amount seized | When granted | Where granted | Reason |
|----------------------|---------------------|----------------------------------|-------------------------------------|
| £466,321.72 | 7 February 2019 | City of London Magistrates Court | Money derived from criminal conduct |

The SFO strikes back: the second AFO

A little over a month later, on 14 March 2019, the SFO secured a Forfeiture Order in the region of £1.5m against a convicted fraudster. The account with the relevant funds in it had also been subject to an AFO.

The basis of the criminality in this case was that the money came from two Birmingham properties that the subject sold, which he originally bought with the funds from a series of frauds.

The interesting twist in this case was that the subject fled the UK for Pakistan in the mid-2000s. Mark Thompson, SFO's Chief Operating Officer, commented:

“the subject’ decided to become a fugitive from justice instead of remaining in the UK to answer for his activities. Our actions send a clear message to anyone involved in fraud, bribery or corruption – that we will work tirelessly to get back the proceeds of your crimes.”

The second AFO

| Amount seized | When granted | Where granted | Reason |
|----------------------|---------------------|-------------------------------|-------------------------------------|
| £1,522,756.72 | 14 March 2019 | Westminster Magistrates Court | Money derived from criminal conduct |

Note: It is interesting that the two forfeiture orders that have been successfully obtained have both involved cases with foreign aspects to them and that they have been used to seize money derived from criminal conduct.

The return of the authorities: a more ambitious freeze

On 28 February 2019, a number of enforcement bodies, coordinated by the National Economic Crime Centre, applied to various courts around the country for AFOs in relation to some 95 accounts, containing approximately £3.6m of suspicious funds.

This is the most wide-spread use of the AFO tool to date, and a good example of why it was introduced by the CFA 2017.

The 95 accounts belong mainly to Chinese students, and it is believed that money was being 'cleaned' through the UK bank accounts by buying luxury goods and sending them back to China.

However, while the AFOs in relation to these accounts appear at first to be a great success, there were some revelations from them that will no doubt disappoint the enforcement officers. For many of the accounts, the amounts currently frozen do not come close to the total amount of money that it is suspected has been laundered through them. For example, more than £150,000 had passed through one account during 2018, yet it has been frozen with only £25,000 in it.

Note: The interesting feature of this case is that the account holders may not have had full knowledge of the criminality involved. Many of them are in full cooperation with the NCA and other agencies to show that the funds are legitimate. The issue of proving the relevant criminality – which was something of a foregone conclusion in the first two examples explored above – may prove much more difficult in this third case.

We will watch with interest to see how this matter develops, and whether any challenges or appeals go through the courts. Needless to say, AFOs have made a significant debut in 2019 and we can expect to see many more being used in the future; not least because the UK authorities have explicitly stated their intention to do so.⁵

⁵ See, for example, the NCA's Annual Plan 2019-2020, p15 (<https://www.nationalcrimeagency.gov.uk/who-we-are/publications/289-nca-annual-plan-2019-20/file>)

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