

A Critical Analysis and Evaluation of the Key Changes Introduced by the Criminal Finances Act 2017 and their likely Impact in Combatting Financial Crime and Terrorist Financing

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This essay critically analyses key legislative provisions introduced by the Criminal Finances Act 2017 aimed at recovering the proceeds of crime and preventing terrorist financing. In particular, it evaluates provisions implementing unexplained wealth orders, amendments to the Suspicious Activity Report regime, account freezing orders, unlawful conduct through human rights abuse outside the United Kingdom ("UK") and the creation of corporate offences of failure to prevent facilitation of tax evasion. It considers the effect of the new measures on the UK's ability to effectively combat financial crime and terrorist financing, highlighting the unsatisfactory state of the UK's anti-money laundering ("AML") and counter-terrorist financing ("CFT") regime. Not only does this necessitate a holistic review of

the UK's AML/CFT regime; it reinforces the requirement for a far more effective framework that penalises and deters money laundering and terrorist financing whilst simultaneously maintaining the integrity and viability of the UK's financial system.

I. Introduction

The terror attacks in London¹ and Manchester² and the continued threats posed by Al-Qaeda and the Islamic State have once again 'seen fresh emphasis placed by financial regulators around the world on countering terrorist financing and money laundering'.³ In light of this, the Financial Action Task Force has:

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¹ Jason Hanna, 'London Train Blast: Latest Of 5 UK Terror Incidents In 2017' (*CNN*, 15 September 2017) <<https://edition.cnn.com/2017/09/15/world/uk-terror-events-2017/index.html>> accessed 6 April 2018.

² 'Manchester Arena Attack | UK News | The Guardian' (*The Guardian*, 2017) <<https://www.theguardian.com/uk-news/manchester-arena-explosion>> accessed 6 April 2018.

³ David Miller, 'Financial Crime And Counter Terrorist Financing Updates' (*Regtechfs.com*, 4 March 2016)

[...] highlighted the need to increase levels of communication and information sharing, to put in place legal frameworks to penalise and deter money laundering and terrorist financing and develop a detailed understanding of how technology and the evolution of financial services is changing how people can transfer and hide funds and launder money.⁴

The Home Office estimates that 'amounts laundered globally are equivalent to 2.7% of global GDP, or US \$1.6 trillion in 2009, while the National Crime Agency (NCA) assesses that billions of pounds of proceeds of international corruption are laundered into, or through the UK'.⁵ In 2017, '40% of terrorist plots in Europe are believed to be at least partly financed through crime, especially drug dealing, theft, robberies, the sale of counterfeit goods, loan fraud, and burglaries'.⁶ The Serious and Organised Crime Strategy 2013⁷ and Strategic Defence and Security Review 2015⁸ aim to collaborate with

<<https://regtechfs.com/financial-crime-and-counter-terrorist-financing-updates/>> accessed 6 April 2018.

⁴ Ibid.

⁵ Explanatory Notes to the Criminal Finances Act 2017.

⁶ '2017 EU Terrorism Report: 142 Failed, Foiled And Completed Attacks, 1002 Arrests And 142 Victims Died' (*Europol*, 15 June 2017) <<https://www.europol.europa.eu/newsroom/news/2017-eu-terrorism-report-142-failed-foiled-and-completed-attacks-1002-arrests-and-142-victims-died>> accessed 6 April 2018.

⁷ 'Serious And Organised Crime Strategy - GOV.UK' (*Gov.uk*, 7 October 2013)

<<https://www.gov.uk/government/publications/serious-organised-crime-strategy>> accessed 6 April 2018.

⁸ 'National Security Strategy And Strategic Defence And Security Review 2015' (*Gov.uk*, November 2015)

the private sector to increase the UK's hostility towards those criminals seeking to launder the proceeds of crime or corruption.⁹ Proponents advocate that the Criminal Finances Act 2017 ("CFA") ("the Act")¹⁰ is key to achieving this objective.¹¹

The Act,¹² given stimulus following the revelations of the Panama Papers scandal,¹³ received Royal Assent on 27 April 2017. It symbolises the latest attempt to secure and uphold the integrity of the UK's financial sector,¹⁴ representing the 'largest overhaul of the UK's anti-money laundering regime in more than a decade and the largest expansion of corporate criminal liability since the Bribery Act 2010'.¹⁵ The CFA¹⁶

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/555607/2015_Strategic_Defence_and_Security_Review.pdf> accessed 6 April 2018.

⁹ Explanatory Notes to the Criminal Finances Act 2017 (n 5).

¹⁰ Criminal Finances Act 2017 (CFA 2017).

¹¹ Explanatory Notes to the Criminal Finances Act 2017 (n 5).

¹² CFA 2017 (n 10).

¹³ CMS, 'The Criminal Finances Act 2017: Key Legal Changes' (CMS, 15 June 2017) <<http://www.cms-lawnow.com/publications/2017/06/the-criminal-finances-act-2017>> accessed 6 April 2018.

¹⁴ Justin du Rivage, 'UK Criminal Finances Act: Are You Ready?' (*Exiger*, 13 September 2017) <<https://www.exiger.com/perspectives/uk-criminal-finances-act-are-you-ready>> accessed 6 April 2018.

¹⁵ 'The Criminal Finances Act: A Guide for The Financial Services Sector' (*Allen & Overy*, 6 November 2017) <<http://www.allenoverly.com/publications/en-gb/Pages/--The-Criminal-Finances-Act-A-guide-for-the-financial-services-sector.aspx>> accessed 6 April 2018; hereafter to be referenced as A&O CFA.

¹⁶ CFA 2017 (n 10).

comprises of four Parts, 'all of which seek to strengthen the law on recovering the proceeds of crime, tackling money laundering and corruption, and countering terrorist financing'.¹⁷

This Article will critically analyse and evaluate the key changes introduced by the CFA¹⁸ and their likely impact in combatting financial crime and terrorist financing. In particular, it will assess provisions implementing unexplained wealth orders ("UWOs"), amendments to the Suspicious Activity Report ("SAR") regime, account freezing orders, unlawful conduct through human rights abuse outside the UK, and the creation of corporate offences of failure to prevent facilitation of tax evasion. Such an examination will highlight the unsatisfactory state of the UK's anti-money laundering ("AML") and counter-terrorist financing ("CFT") regime,¹⁹ supporting the conclusive theme of this Article: legislative changes introduced by the CFA²⁰ have failed to enhance the UK's ability to effectively combat financial crime and terrorist financing. Not only does this necessitate a holistic review of the UK's AML/CFT regime,²¹ it reinforces the requirement for a far more effective framework that penalises and deters money laundering and terrorist financing whilst simultaneously maintaining the integrity and viability of the UK's financial system.

¹⁷ N Padfield, 'The Criminal Finances Act 2017' (2017) 7 *Crim LR* 505, 505-06.

¹⁸ CFA 2017 (n 10).

¹⁹ S Kebell, "'Everybody's Looking at Nothing' - the Legal Profession and the Disproportionate Burden of the Proceeds of Crime Act 2002' (2017) 10 *Crim LR* 741.

²⁰ CFA 2017 (n 10).

²¹ Kebell (n 19).

II. UWOs

From 31 January 2018, the CFA²² implemented UWOs as a new mechanism²³ to recover property using the civil recovery proceedings under Part 5 of the Proceeds of Crime Act 2002 (“POCA”).²⁴ Laird advocates that UWOs establish the most important modification made to the POCA regime for many years.²⁵

Defined as ‘an order granted by the High Court at the application of an enforcement authority relating to specific property,’²⁶ a UWO ‘requires the respondent to explain the nature and extent of their interest in the property and how they obtained the property.’²⁷ Moreover, ‘UWOs may only be issued in respect of politically exposed persons’ (“PEPs”) or ‘where the respondent is suspected to have been involved in serious crime (or is connected to someone who is)’.²⁸ Further, the High Court possesses the ability to issue interim freezing orders (“IFOs”) in circumstances where ‘it believes that the respondent is uncooperative or might frustrate a subsequent recovery order.’²⁹

²² CFA 2017 (n 10).

²³ A&O CFA (n 15).

²⁴ Proceeds of Crime Act 2002 (PCA 2002).

²⁵ K Laird, ‘The Criminal Finances Act 2017 - An Introduction’ (2017) 12 Crim LR 915, 929.

²⁶ Calum Macdonald, ‘The Criminal Finances Act’ (*Allen & Overy*, 9 May 2017)

<<http://www.aoinvestigationsinsight.com/the-criminal-finances-act/>> accessed 6 April 2018.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Rivage (n 14).

2.1 How will UWOs be used?

It is evident that UWOs are likely to be primarily used for the purposes of exposing and recovering illicit wealth.³⁰ However, Macdonald opines that ‘information obtained via a UWO may be used in “any legal proceedings,” with the only exception being that information obtained via a UWO cannot be used in criminal proceedings against the respondent (with limited exceptions in cases of perjury).’³¹ Consequently, information provided via this mechanism ‘may be kept for an indefinite period and shared with other enforcement agencies’.³² This demonstrates significant scope for UWOs to be utilised as a wider mechanism in relation to the investigation of cases involving money laundering and terrorist financing,³³ providing weight to the notion that measures implemented by the CFA³⁴ have enhanced the UK’s ability to combat financial crime and terrorist financing.

However, a number of commentators³⁵ challenge this notion, pioneering the more appropriate view that ‘UWOs may run into trouble in the courts on the basis that the reversed burden of proof infringes human rights relating to privacy and property.’³⁶ Indeed, it is accepted that in straightforward

³⁰ Macdonald (n 26).

³¹ *Ibid.*

³² *Ibid.*

³³ A&O CFA (n 15).

³⁴ CFA 2017 (n 10).

³⁵ Calum Macdonald, ‘Unexplained Wealth Orders (and remainder of the Criminal Finances Act) come into force’ (*Allen & Overy*, 31 January 2018)

<<http://www.aoinvestigationsinsight.com/unexplained-wealth-orders-and-remainder-of-criminal-finances-act-come-into-force/>> accessed 6 April 2018.

³⁶ *Ibid.*

cases where ‘a Respondent has been linked to serious crime, the likelihood of an UWO application being rejected or struck down for these reasons appears remote’.³⁷ However, in circumstances where the nexus to criminality is weaker,³⁸ for example ‘where a UWO is sought simply because a Respondent is a politically exposed person and there is an unexplained disparity in their income and assets,’³⁹ such arguments could displace the imposition of a UWO,⁴⁰ reinforcing the more appropriate view that the CFA⁴¹ has failed in its primary aim of strengthening the UK’s AML/CFT regime.

2.2 Extraterritorial Effect of UWOs

Macdonald emphasises that ‘the international reach of UWOs is striking’⁴² due to the fact that ‘a Respondent does not need to reside in the UK’⁴³ and ‘their property does not need to be located in the UK (POCA applies to property located outside the UK)’.⁴⁴ In circumstances where the respondent is a PEP, they must be located outside of the European Union (“EU”) to be caught within the scope of the Act.⁴⁵ Moreover, if the individual in question is connected to ‘serious crime,’⁴⁶ it is irrelevant where the crime occurred, provided it would amount to an offence in the UK.⁴⁷

³⁷ Macdonald (n 35).

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ CFA 2017 (n 10).

⁴² Macdonald (n 35).

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

On the other hand, commentators⁴⁸ demonstrate that practical limits exist on the territorial scope of a UWO.⁴⁹ Evidence supports this as 'enforcement authorities are unlikely to expend resources seeking UWOs where neither the Respondent nor the property has a UK nexus'.⁵⁰ Moreover, in circumstances where 'a UK enforcement authority may seek assistance from foreign authorities to enforce a UWO (and an interim freezing order) (...) the willingness of foreign authorities to assist in enforcing this novel tool will be a key factor in UWOs' practical geographical research'.⁵¹ Further, 'state immunity for foreign officials may also blunt their impact in many jurisdictions',⁵² reinforcing the inability of the CFA⁵³ to enhance the UK's ability to combat financial crime and terrorist financing.

2.3 Commercial Implications

Issues concerning UWOs and IFOs are not just limited to their extraterritorial applicability.⁵⁴ Macdonald pioneers the view that they will 'pose new challenges for financial institutions' compliance departments'⁵⁵ due to the disproportionate burden now placed upon firms.⁵⁶ Although UWOs are designed to target individuals and not financial institutions,⁵⁷ commentators⁵⁸ assert that 'regulators may act

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

⁵³ CFA 2017 (n 10).

⁵⁴ A&O CFA (n 15).

⁵⁵ Rivage (n 14).

⁵⁶ Kebbell (n 19).

⁵⁷ Macdonald (n 35).

against firms that fail to collect accurate source of wealth information or whose customers are subject to a disproportionate number of UWOs'.⁵⁹ Consequently, firms operating within this sector will be required to maintain 'robust know your customer ("KYC") programmes,'⁶⁰ exemplifying the significance of legislative changes implemented by the CFA.⁶¹ However, commentators⁶² highlight that this is not an easy task given that 'many countries lack centrally held property registers and the proliferation of assets held by shell companies, trusts and other anonymising vehicles makes compiling accurate beneficial ownership information difficult'.⁶³ Additionally, 'cultural stigma often prevents frontline employees from enquiring about their customers' source of wealth'.⁶⁴ Further, firms 'wishing to retain foreign clients should make sure that their KYC procedures are robust enough to stand up to the heightened regulatory scrutiny,'⁶⁵ reinforcing the more appropriate view that changes made by the CFA⁶⁶ place a disproportionate burden on financial institutions operating in the UK.⁶⁷

2.4 Comparative Analysis of UWOs

⁵⁸ *Ibid.*

⁵⁹ Rivage (n 14).

⁶⁰ *Ibid.*

⁶¹ CFA 2017 (n 10).

⁶² Rivage (n 14).

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ CFA 2017 (n 10).

⁶⁷ Kebbell (n 19).

Furthermore, the Impact Assessment⁶⁸ that accompanies the CFA estimates that there will be 20 cases per year that will rely upon a UWO and that asset recovery will run into the millions of pounds.⁶⁹ Laird asserts that such an estimate could prove 'over-optimistic'.⁷⁰ Indeed, a comparative analysis of jurisdictions that have adopted UWOs concluded that Ireland has had notable success in utilising them.⁷¹ The study attributes this success to both the Irish Criminal Asset Bureau, which is described as an 'elite, well-resourced unit, with staff from not only the police and prosecutors, but also tax and social welfare agencies',⁷² and the Irish High Court, who is 'assisted by a special registrar, to work solely on confiscation cases for a period of at least two years'.⁷³ Indeed, this combination ensures that Ireland has enjoyed significant success through the implementation its UWO regime.⁷⁴ Consequently, Laird emphasises that 'the success of UWOs in Ireland seems to be attributable not only to legislative developments, but also to the expertise and resources of the enforcement authority'.⁷⁵ Therefore, UWOs cannot be viewed in isolation as a panacea; they must be accompanied by appropriate and effective means of enforcement.⁷⁶ Given that

⁶⁸ 'Criminal Finances Act – Overarching Impact Assessment' (Gov.uk, 20 June 2017)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/621192/Impact_Assessment_-_CF_Act_Overarching.pdf> accessed 6 April 2018.

⁶⁹ Ibid.

⁷⁰ Laird (n 25) 916.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

the Act⁷⁷ is 'not the first time a Government has taken steps to strengthen the provisions in POCA with a view to ensuring that those suspected of involvement in crime do not retain their ill-gotten gain,'⁷⁸ it is highly doubtful that this latest amendment will prove successful in strengthening the UK's AML/CFT regime.⁷⁹

III. Amendments to the SAR Regime

With effect from 31 October 2017, the CFA⁸⁰ implemented legislative changes⁸¹ to the UK's money laundering reporting regime which was previously outlined in POCA.⁸² Prior to the CFA,⁸³ POCA⁸⁴ 'required firms operating in the regulated sector (including financial services firms) to disclose knowledge or suspicion of money laundering to the NCA'.⁸⁵ Disclosures were made by way of SARs. Macdonald opines that two significant amendments have been made to the SAR regime under the Act.⁸⁶

3.1 Extended Moratorium Period

Under the previous reporting regime,

⁷⁷ CFA 2017 (n 10).

⁷⁸ Laird (n 25) 916.

⁷⁹ Ibid.

⁸⁰ CFA 2017 (n 10).

⁸¹ Ibid s 10-11; PCA 2002 (n 24) s 335-336, s 336A-C, s 339ZB-ZG.

⁸² PCA 2002 (n 24).

⁸³ CFA 2017 (n 10).

⁸⁴ PCA 2002 (n 24).

⁸⁵ A&O CFA (n 15) 20.

⁸⁶ Macdonald (n 26).

A firm that submitted a SAR to the NCA was deemed to have received the NCA's consent to engage in activity relating to property that it suspected to constitute the proceeds of crime if: (a) after seven working days, the NCA did not notify the firm that consent had been refused, or (b) the NCA notified the firm within seven working days that it had refused consent, but had taken no further action in relation to the matter after a further 31 calendar days.⁸⁷ This period of 31 days was known as the moratorium period.⁸⁸

During the drafting stage of the Criminal Finances Bill,⁸⁹ there had been calls to end the consent-based regime relating to SARs, with proposals to 'replace it with an "entity" rather than "transaction" based reporting system. Such a system would require SARs to be made in respect of organisations and individuals, as opposed to each transaction undertaken by them'.⁹⁰ Despite this, the Government expressly reinforced their intention to retain the consent regime during the publication of the Criminal Finances Bill in 2016.⁹¹

As a result, 'the consent regime under POCA outlined above has survived and exists in the Criminal Finances Act'.⁹² Kebbell criticises this development as a wasted chance to tackle the uneven encumbrance placed upon those operating within the legal sector.⁹³ Evidence supports this notion as the

⁸⁷ A&O CFA (n 15) 20.

⁸⁸ *Ibid.*

⁸⁹ Criminal Finances Bill HC Bill (2016-17) [75].

⁹⁰ Kebbell (n 19) 744.

⁹¹ Criminal Finances Bill (n 89).

⁹² A&O CFA (n 15) 20.

⁹³ Kebbell (n 19) 744.

UK failed to act ‘upon an alternative proposal set forth by the Law Society whereby a “tiered” reporting system could apply to the legal sector. Under this system, lawyers would simply “grade” the importance of the SARs they submit’.⁹⁴ The limitations of the legislative changes made by the CFA⁹⁵ are clear; reinforcing the notion that the CFA⁹⁶ has failed to enhance the UK’s AML/CFT regime.

However, commentators⁹⁷ challenge this view, arguing that the CFA⁹⁸ ‘makes 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’.⁹⁹ Evidence supports this notion as the CFA¹⁰⁰ enables enforcement authorities to ‘apply to the Crown Court extend the moratorium period for 31 days on up to six occasions’.¹⁰¹ Fisher QC and Clifford opine that the rationale underpinning the new regime ‘is to give the NCA more time to consider a SAR and, where a matter might be more complex, sufficient space to conduct further investigations and gather the necessary evidence in support of property freezing’.¹⁰² In doing so, the aim is that government agencies will be in a much stronger position to utilise information contained in a

⁹⁴ Ibid.

⁹⁵ CFA 2017 (n 10).

⁹⁶ Ibid.

⁹⁷ Explanatory Notes (n 5).

⁹⁸ CFA 2017 (n 10).

⁹⁹ Explanatory Notes (n 5).

¹⁰⁰ CFA 2017 (n 10).

¹⁰¹ A&O CFA (n 15) 20.

¹⁰² Jonathan Fisher, ‘Suspensions, Privacy & Money Laundering’ (*New Law Journal*, 2017)

<<https://www.newlawjournal.co.uk/content/suspensions-privacy-money-laundering>> accessed 6 April 2018.

SAR.¹⁰³ Indeed, 'the case for giving enforcement authorities more time to properly consider them and act is strong'.¹⁰⁴

3.1.1 Commercial Implications

Although it is accepted that the mechanism for submitting a SAR has not been modified,¹⁰⁵ Macdonald emphasises that 'a potential six-fold increase in the moratorium period for SARs should cause firms to pause and give careful thought as to whether the test for filing a SAR has been met,'¹⁰⁶ further exacerbating the disproportionate burden placed upon firms operating in the regulated financial services sector.¹⁰⁷ Evidence supports this as 'the ability of the NCA (or other authorities) to extend the moratorium periods may cause significant issues in relation to large and/or time-critical transactions'.¹⁰⁸ Given that '95.78% of all SARs filed between October 2015 and March 2017 were filed by financial services firms,'¹⁰⁹ the 'potential for a long moratorium period may mean that control functions are more routinely challenged by front line staff as to whether submitting a SAR is absolutely necessary in a given situation'.¹¹⁰ As '634,113 SARs were filed between October 2015 and March 2017,'¹¹¹ greater weight can be attached to the notion that the enactment of the CFA¹¹²

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ A&O CFA (n 15) 20.

¹⁰⁶ Kebbell (n 19).

¹⁰⁷ A&O CFA (n 15) 20.

¹⁰⁸ Ibid 21.

¹⁰⁹ Ibid 20.

¹¹⁰ Ibid 21.

¹¹¹ Ibid.

¹¹² CFA 2017 (n 10).

represents a wasted chance to tackle the 'disproportionate burden'¹¹³ imposed on the UK's financial system.¹¹⁴

3.2 Information Sharing

Heralded as a significant development,¹¹⁵ the CFA¹¹⁶ 'allows for information sharing between firms where there is a suspicion of money laundering; either on the firms' own initiative or at the request of the NCA'.¹¹⁷ Moreover, it outlines the requirements for such a request and 'provides for a joint SAR to be submitted following information sharing that would fulfil both firms' reporting obligations'.¹¹⁸ A notable advantage of this mechanism is that firms which collaborate and share information under these measures are additionally 'protected from civil liability for breach of any confidentiality obligations or other disclosure restrictions, provided that any information shared is provided in good faith'.¹¹⁹

Although well-placed and utilised in some circumstances,¹²⁰ Burnett et al dispute the significance of this development given that 'in reality there may be little appetite on the part of firms to share or request information relating to suspected money laundering from each other'.¹²¹ Despite the power proving theoretically useful where firms' interests align,¹²²

¹¹³ Kebbell (n 19).

¹¹⁴ *Ibid* 741.

¹¹⁵ A&O CFA (n 15) 22.

¹¹⁶ CFA 2017 (n 10).

¹¹⁷ A&O CFA (n 15) 22.

¹¹⁸ *Ibid*.

¹¹⁹ *Ibid*.

¹²⁰ *Ibid*.

¹²¹ *Ibid*.

¹²² *Ibid*.

firms 'may wish to take different approaches to an issue and one firm may feel it is in practice obliged to submit a SAR simply because the other is intending to'.¹²³ Another significant criticism that furthers the inadequacy of the power is that institutions are 'likely to be reluctant to share client confidential information with each other, even if doing so will not attract the risk of civil liability for breaching confidentiality obligations'.¹²⁴ The same rationale is applicable to 'data that constitutes personal data for the purposes of the Data Protection Act 1998',¹²⁵ reinforcing the inadequacy of legislative amendments introduced by the CFA¹²⁶ to enhance the UK's AML/CFT regime.

IV. Corporate Failure to Prevent Facilitation of Tax Evasion

Sahota emphasises that the UK Government has often reiterated its intention to combat those that facilitate tax evasion.¹²⁷ For this reason, Part 3 of the CFA¹²⁸ has inevitably attracted the most attention and commentary.¹²⁹ Indeed, the creation of two new criminal offences of corporate failure to prevent a tax evasion facilitation offence – either domestic¹³⁰

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ CFA 2017 (n 10).

¹²⁷ Roger Sahota, 'Criminal Finances Act 2017' (*Law Society Gazette*, 22 May 2017) <<https://www.lawgazette.co.uk/legal-updates/criminal-finances-act-2017/5061170.article>> accessed 6 April 2018.

¹²⁸ CFA 2017 (n 10).

¹²⁹ A&O CFA (n 15) 6.

¹³⁰ CFA 2017 (n 10) s 45.

or foreign¹³¹ - has been described as ‘one of the most significant elements’¹³² of the CFA.¹³³ Further, ‘the foreign tax evasion carries a dual criminality requirement (i.e. the offence must also be a crime under English law) and ‘it is a defence to both offences to prove that a firm had in place “reasonable prevention procedures”’.¹³⁴

However, commentators¹³⁵ highlight that these new tax offences have received much scrutiny and criticism.¹³⁶ This is because prior to the CFA,¹³⁷ ‘to hold a company liable for the illegal acts of directors, employees or agents it was necessary to show that the individuals responsible represented its “directing mind or will”’.¹³⁸ However, critics highlighted that this approach made it ‘too difficult to prosecute companies, particularly large or medium-sized ventures where the directors are some distance removed from the day-to-day actions of employees’.¹³⁹

Although the CFA¹⁴⁰ aims to ameliorate this issue through the expansion of the scope of criminal liability for companies accused of facilitating tax evasion, opposing commentators¹⁴¹

¹³¹ CFA 2017 (n 10) s 46.

¹³² ‘The Criminal Finances Act 2017’ (*Grant Thornton*, 2017) <<https://www.grantthornton.co.uk/globalassets/1.-member-firms/united-kingdom/pdf/publication/the-criminal-finances-act-2017.pdf>> accessed 6 April 2018.

¹³³ CFA 2017 (n 10).

¹³⁴ A&O CFA (n 15) 6.

¹³⁵ Sahota (n 127).

¹³⁶ *Ibid.*

¹³⁷ CFA 2017 (n 10).

¹³⁸ Sahota (n 127).

¹³⁹ *Ibid.*

¹⁴⁰ CFA 2017 (n 10).

¹⁴¹ Sahota (n 127).

assert that ‘the Government has swung the pendulum too far the other way’.¹⁴² Instead of ‘focusing on attributing the criminal act to the company, the offences focus on and criminalise the company’s failure to prevent those who act for or on its behalf from facilitating tax evasion’.¹⁴³ Due to the broad drafting of the CFA, it is widely applicable and therefore possesses the potential ‘to criminalise inadvertent facilitation in cases where senior management were unaware of and uninvolved in any criminal conduct by employees’.¹⁴⁴ Additionally, Sahota asserts that ‘liability arises even where no benefit has accrued to the company,’¹⁴⁵ strengthening the argument that measures implemented by the CFA¹⁴⁶ are wholly misplaced. Evidence supports this as the legislative changes add further to the disproportionate burden imposed on firms operating within the UK’s financial system¹⁴⁷ and represents a ‘wasted opportunity’¹⁴⁸ to adequately strengthen the UK’s AML/CFT regime.¹⁴⁹

V. Account Freezing Orders (“AFOs”)

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ CFA 2017 (n 10).

¹⁴⁷ Kebbell (n 19).

¹⁴⁸ Ibid 741.

¹⁴⁹ Ibid.

Although the CFA's¹⁵⁰ provision of UWOs and two new criminal offences of corporate failure to prevent a tax evasion facilitation offence have sparked significant debate, little focus has been given to what may prove to be its most significant legacy: AFOs.¹⁵¹

The CFA¹⁵² inserts provisions into Part 5 of POCA.¹⁵³ It provides that, 'on an application by an "enforcement officer," a magistrates' court may make an AFO if it is satisfied that reasonable grounds exist for suspecting that money held with a bank or building society: (i) is recoverable property; or (ii) is intended by any person for use in unlawful conduct'.¹⁵⁴ The effect of an AFO is that 'funds held in a bank account can be frozen for an initial period of up to 6 months, that period extendable on a six-monthly basis up to a maximum of two years.'¹⁵⁵

Although the provisions appear robust, Nakhwal and Querée assert that the scheme 'is objectionable in terms of the overarching principle of the scheme, and its practical application'.¹⁵⁶ In an attempt to strengthen the UK's AML/CFT regime, the UK Government has hastily

¹⁵⁰ CFA 2017 (n 10).

¹⁵¹ 'The Criminal Finances Act 2017: Account Freezing and Forfeiture Provisions' (*Criminal Law and Justice*, 2017) <<https://www.criminallawandjustice.co.uk/features/Criminal-Finances-Act-2017-Account-Freezing-and-Forfeiture-Provisions>> accessed 6 April 2018.

¹⁵² CFA 2017 (n 10) s 16.

¹⁵³ PCA 2002 (n 24) pt 5.

¹⁵⁴ CMS (n 13) 15.

¹⁵⁵ *Ibid.*

¹⁵⁶ 'The Criminal Finances Act 2017: Account Freezing and Forfeiture Provisions' (n 151).

implemented a highly confusing and questionable regime.¹⁵⁷ Therefore, it is submitted that the CFA¹⁵⁸ has failed to implement measures that enhance the UK's ability to combat financial crime and terrorist financing.

VI. The Magnitsky Amendment

The Magnitsky amendment was inserted less than two months prior to the enactment of the CFA.¹⁵⁹ In short, the amendment 'expands the civil recovery powers for unlawful conduct under Part 5 of POCA to property obtained by or in connection with a gross human rights abuse'.¹⁶⁰ Qureshi et al opine that 'the amendment's roots lie in news of the alleged torture and subsequent death in police custody in 2009 of the lawyer Sergei Magnitsky, who made a complaint of a \$230m fraud against Russian public officials in 2007 only to be arrested himself on corruption-related charges'.¹⁶¹

As the Criminal Finances Bill¹⁶² made its way through Parliament, 'Dominic Raab MP tabled an amendment that would enable the Government and private parties to apply to the High Court to freeze assets within the UK that belong to those involved in or profiting from gross human rights abuses in any country'.¹⁶³ The rationale underpinning the amendment was to ensure that 'people with blood on their

¹⁵⁷ Ibid.

¹⁵⁸ CFA 2017 (n 10).

¹⁵⁹ Ibid.

¹⁶⁰ A&O CFA (n 15) 26.

¹⁶¹ CMS (n 13) 13.

¹⁶² Criminal Finances Bill (n 89).

¹⁶³ FT, 'UK MPs Vote For Power To Freeze Assets Of Human Rights Abusers' (*Financial Times*, 2017)

<<https://www.ft.com/content/a02a4c60-f85c-11e6-9516-2d969e0d3b65>> accessed 6 April 2018.

hands for the worst human rights abuses should not be able to funnel their dirty money into the UK'.¹⁶⁴

The corresponding provisions can now be found in section 13 of the Act,¹⁶⁵ which amends section 241 of POCA¹⁶⁶ and inserts a new definition at section 241A.¹⁶⁷ Although it is universally accepted that these provisions permit the 'recovery of property that is obtained as a result of conduct which constitutes gross human rights abuses or violations,'¹⁶⁸ commentators¹⁶⁹ envisage the possibility of 'a dispute arising as to whether the property that is sought to be recovered was obtained as a result of the conduct that is described below, even if it is established that the respondent is someone who has engaged in such conduct'.¹⁷⁰ Laird furthers this notion, emphasising that 'the evidential difficulty in establishing a causal link between the conduct and the property has the potential to undermine the effectiveness of these provisions,'¹⁷¹ adding weight to the argument that their impact is 'more symbolic than substantive'.¹⁷² Further, 'the Impact Assessment to the Criminal Finances Act 2017 provides no estimate of the assets expected to be recovered pursuant to these provisions,'¹⁷³ which lends weight to the notion that the CFA¹⁷⁴ fails to implement legislative changes

¹⁶⁴ Ibid.

¹⁶⁵ CFA 2017 (n 10) s 13.

¹⁶⁶ PCA 2002 (n 24) s 241.

¹⁶⁷ Ibid s 241A.

¹⁶⁸ Laird (n 25) 929.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² A&O CFA (n 15) 27.

¹⁷³ Laird (n 25) 929.

¹⁷⁴ CFA 2017 (n 10).

that enhance the ability of the UK to combat financial crime and terrorist financing.

As inserted by the CFA,¹⁷⁵ the definition of 'unlawful conduct'¹⁷⁶ now incorporates conduct which: 'i) occurs in a country or territory outside the UK; ii) constitutes, or is connected with, the commission of a gross human rights abuse or violation; and iii) if it occurred in a part of the UK, would be an offence triable on indictment only or is an either way offence'.¹⁷⁷ Recovery proceedings can be commenced once these conditions are satisfied.¹⁷⁸ Moreover, 'there is no need for the conduct to be a criminal offence in the country in which it occurred, but it must be an offence in the UK'.¹⁷⁹ Laird emphasises the significance of this as 'generally speaking, property is only recoverable if the principle of dual criminality is satisfied'¹⁸⁰ and 'the amendments introduced by the CFA constitute an exception to this rule'.¹⁸¹ Indeed, the amendment aims to have a deterrent effect,¹⁸² demonstrating that the UK remains a hostile place for those criminals who undertake human rights violations abroad,¹⁸³ reinforcing the viability of provisions implemented by the CFA¹⁸⁴ in combatting financial crime and terrorist financing.

¹⁷⁵ *Ibid.*

¹⁷⁶ PCA 2002 (n 24) s 241A.

¹⁷⁷ Laird (n 25) 929.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ CFA 2017 (n 10).

6.1 What Constitutes the Commission of a Gross Human Rights Abuse or Violation?

Conduct constitutes the commission of a gross human rights abuse or violation if:

the conduct constitutes the torture of a person who has sought: (i) to expose illegal activity carried out by a public official or a person acting in an official capacity; (ii) to obtain, exercise, defend or promote human rights and fundamental freedoms; or (iii) the conduct otherwise involves the cruel, inhuman or degrading treatment or punishment of such a person; the conduct is carried out in consequence of that person having sought to do anything in (i) or (ii) in the first condition (above); and the conduct is carried out by a public official, or a person acting in an official capacity, in the performance or purported performance of his or her official duties (or at their instigation or consent/acquiescence while acting in such capacity).¹⁸⁵

Although the legislation fails to define the term 'torture'¹⁸⁶ with explicit reference to an international convention,¹⁸⁷ Laird advocates that 'conduct that involves the intentional infliction of severe pain or suffering on another person is conduct that constitutes torture for the purposes of s.241A(2)(a)'.¹⁸⁸ Furthermore, it is irrelevant whether the

¹⁸⁵ CMS (n 13) 13.

¹⁸⁶ PCA 2002 (n 24) s 241A(2)(a).

¹⁸⁷ Laird (n 25) 930.

¹⁸⁸ *Ibid.*

pain or suffering is either mental or physical or whether it is caused by an omission or an act.¹⁸⁹ Proponents welcome the inclusion of mental suffering.¹⁹⁰ Notwithstanding the fact that the terms ‘cruel, inhuman or degrading treatment’ are not defined, such conduct is prohibited by the European Convention on Human Rights.¹⁹¹ In light of this, ‘case law provides a useful interpretative aid if a dispute arises as to whether the conduct in question constitutes cruel, inhuman or degrading treatment’.¹⁹²

Furthermore, ‘the extent to which the provisions have retrospective effect depends upon the conduct it is alleged the respondent has engaged in’.¹⁹³ If the action ‘constitutes or is connected with torture, then they apply irrespective of whether the conduct occurs before or after the coming into force of the provisions,’¹⁹⁴ reinforcing the robust nature of the provisions implemented by the CFA¹⁹⁵ in strengthening the UK’s AML/CFT regime.

However, commentators¹⁹⁶ note that proceedings must be brought within a 20-year period of the torture occurring.¹⁹⁷ Moreover, Laird asserts that ‘if the conduct involves, or is connected with the cruel, inhuman or degrading treatment or punishment of a person, then the new provisions only apply

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art 3.

¹⁹² Laird (n 25) 930.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

¹⁹⁵ CFA 2017 (n 10).

¹⁹⁶ Laird (n 25) 930.

¹⁹⁷ Ibid.

if the conduct occurs after they come into force'.¹⁹⁸ Crucially, authorities will be required to 'pay particular attention to the relevant limitation period when invoking these new provisions',¹⁹⁹ strengthening the argument that the success of these new provisions is dependent not only on legislative developments but also on the expertise and resources of the relevant authority. These provisions are therefore not a panacea and must be accompanied by effective enforcement.²⁰⁰

6.2 Impact

With respect to the effectiveness of the provisions implemented by the Act,²⁰¹ Wallace asserts that they will send 'send a "major signal" around the world that the UK could not be used as a base to hide ill-gotten gains'.²⁰² Further, Browder emphasises the 'historic and ground-breaking'²⁰³ nature of the provisions as they provide the UK Government with the ability to breathe 'the fear of God into every torturer and murderer from dictatorships that all have houses in London'.²⁰⁴

Although the provisions appear to be robust at first glance, their 'potential effectiveness is undermined, however, by the fact that they only allow for the recovery of property that is obtained *as a result* of conduct which constitutes a gross

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ Kebbell (n 19).

²⁰¹ CFA 2017 (n 10).

²⁰² FT (n 163).

²⁰³ Ibid.

²⁰⁴ Ibid.

human rights abuse or violation'.²⁰⁵ Laird furthers this notion, asserting that 'proving the causal link could be very difficult'.²⁰⁶ Even in circumstances where the enforcement agency is able to demonstrate that an individual's conduct constituted a gross human rights abuse or violation, 'proving that the house they own in Belgravia was obtained as a result of that conduct could prove impossible'.²⁰⁷ Consequently, the provisions may be viewed merely as a 'politically symbolic change,'²⁰⁸ reinforcing the inadequacy of legislative changes implemented by the CFA²⁰⁹ in combatting financial crime and terrorist financing.

VII. Terrorist Financing

The Home Office emphasises that 'countering terrorist finance is an important part of the Government's response to terrorism and financial investigation is a key tool in the investigation of a number of terrorism offences'.²¹⁰ Moreover, 'the vulnerabilities in the financial sector which are at risk of being exploited are broadly the same as those for the proceeds of crime'.²¹¹ In light of this, the CFA²¹² extends the following powers to investigations undertaken under the Terrorist Act 2000 ("TACT")²¹³ in relation to terrorist

²⁰⁵ Karl Laird, 'UK "Magnitsky Provisions" - Time For A Change?' (*The 6KBW Blog*, 14 March 2018)

<<http://blog.6kbw.com/posts/uk-magnitsky-provisions-time-change>> accessed 6 April 2018.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ A&O CFA (n 15) 27.

²⁰⁹ CFA 2017 (n 10).

²¹⁰ Explanatory Notes (n 5) 10.

²¹¹ *Ibid.*

²¹² CFA 2017 (n 10).

²¹³ Terrorism Act 2000 (TA 2000).

property and financing,²¹⁴ and ‘to the civil recovery of terrorist property under the [Anti-terrorism, Crime and Security Act 2001] (“ATCSA”), as well as POCA: i) disclosure orders; ii) information sharing; iii) the powers to enhance the SARs regime; and iv) seizure and forfeiture powers – for bank accounts and moveable stores of value’.²¹⁵ The extension of such powers reinforces the view that the CFA²¹⁶ implements changes to ensure government agencies are provided with the necessary investigatory powers to effectively tackle terrorist financing.²¹⁷

Furthermore, the CFA²¹⁸ ‘provides the power to designate civilian staff employed by the police as Counter Terrorism Financial Investigators (“CTFIs”) and extends a number of investigatory powers under TACT and civil recovery powers under ATCSA, which are currently only available to constables, to CTFIs’.²¹⁹ This is significant as indications show that the extension of these powers to CTFIs ‘will increase the capacity of the police to apply for the orders in question by over 50%’.²²⁰ Lastly, the Act²²¹ ‘amends TACT to create a power so that court orders made in one part of the UK, for the purposes of or in connection with the investigation of terrorist financing, can be enforced in another part,’²²² meaning relevant court orders made in England can be enforced by courts in Scotland or Northern Ireland and vice

²¹⁴ *Ibid.*

²¹⁵ Explanatory Notes (n 5) 10; CFA 2017 (n 10) s 35-43; TA 2000 (n 213).

²¹⁶ CFA 2017 (n 10).

²¹⁷ Explanatory Notes (n 5) 5.

²¹⁸ CFA 2017 (n 10).

²¹⁹ Explanatory Notes (n 5) 10.

²²⁰ *Ibid.*

²²¹ CFA 2017 (n 10).

²²² Explanatory Notes (n 5) 10.

versa,²²³ further strengthening the viability of measures implemented by the Act²²⁴ in respect of enhancing the UK's CFT regime.

Clearly, the main focus of these amendments is to provide enforcement agencies with new capabilities to tackle terrorist financing. In this respect, it is difficult to see how the CFA²²⁵ adds materially to the inadequacies of the existing CFT regime.²²⁶ Indeed, during a period where combatting the financing of terrorism has risen to the forefront of the security agenda,²²⁷ even a superficial examination of the UK's contemporary CFT regime reveals that 'the Government is failing to harness the full potential that financial intelligence has to offer, necessitating an urgent reassessment of how precisely terrorist finance should be most effectively tackled'.²²⁸

VIII. Conclusion

Proponents advocate that the CFA²²⁹ represents the 'latest in a number of aggressive measures to fight tax evasion, money laundering, and terrorist financing, shifting the UK to the

²²³ Ibid.

²²⁴ CFA 2017 (n 10).

²²⁵ Ibid.

²²⁶ Tom Keatinge, 'Tackling Terrorist Finance Starts at Home' (*RUSI*, 22 January 2016)

<<https://rusi.org/publication/newsbrief/tackling-terrorist-finance-starts-home>> accessed 6 April 2018.

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ CFA 2017 (n 10).

forefront in the fight against global financial crimes'.²³⁰ However, an evaluation of the substantive provisions of the Act²³¹ reveals that the CFA²³² fails to make the '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'.²³³ Consequently, it is submitted that the CFA²³⁴ fails to add materially to the unsatisfactory state of the UK's existing AML/CFT regime,²³⁵ necessitating an urgent review of how precisely financial crime and terrorist financing should be most effectively tackled.²³⁶ Nevertheless, it is advocated that a far more effective AML/CFT framework is required to penalise and deter money laundering and terrorist financing whilst simultaneously maintaining the integrity and viability of the UK's financial system.

²³⁰ 'UK Criminal Finances Act 2017 Commences With New Tax Evasion Offences, Anti-Money Laundering Rules, And Asset Forfeiture Provisions' (*Cadwalader*, 10 October 2017) <<http://www.cadwalader.com/resources/clients-friends-memos/uk-criminal-finances-act-2017-commences-with-new-tax-evasion-offences-anti-money-laundering-rules-and-asset-forfeiture-provisions>> accessed 6 April 2018.

²³¹ CFA 2017 (n 10).

²³² *Ibid.*

²³³ Explanatory Notes (n 5) 5.

²³⁴ CFA 2017 (n 10).

²³⁵ Kebbell (n 19).

²³⁶ Keatinge (n 226).

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