

# UNEXPLAINED WEALTH ORDERS 2.0

## Changes to the law do not overcome problems UK has in recovering claimed criminal property

Unexplained Wealth Orders (UWOs) are back in the news after the Economic Crime (Transparency and Enforcement) Act 2022 ("the Act") received Royal Assent on 15 March 2022. The Act, which in January had been shelved by the Government amid protests from NGOs and the Government's own ministers, was fast tracked through parliament as part of the UK Government's measures against Russia but has wider application. The Act contains a number of provisions aimed at strengthening the UK's anti-money laundering regime and enable more effective law enforcement action to be taken against those who seek to launder funds in the UK.

This article focuses on the measures contained in the Act which are aimed at strengthening UWOs.

### UWOs - the changes at a glance:

- Reduced criteria for obtaining a UWO make them more likely
- Reduced risk of adverse costs ordered against law enforcement
- Investigators given more time to investigate
- Existing Civil Recovery Regime remains the same

## What are UWOs?

UWO's are often misrepresented by government and are frequently misunderstood. UWO's are an investigative tool which force a recipient to explain the source of wealth used to acquire property/assets located in the UK. UWO's do not strip assets from those whom they are made against.

If, in response to a UWO, no explanation of wealth is given, or the explanation which is given is not believed by the relevant law enforcement agency, then further steps may be taken to recover the relevant property.

UWOs were introduced in 2017, by amendments to the Proceeds of Crime Act 2002 (POCA), as a tool to assist targeting property in the UK acquired with illicit funds. They became available to five specific "enforcement authorities"<sup>1</sup> on 31 January 2018. Despite the fanfare at the time of their introduction as of February 2022 only nine UWOs (relating to four cases) had been obtained (all by the NCA) and none of those were since the end of 2019<sup>2</sup>. The lack of use of UWOs in recent years is in part due to the difficulties in obtaining information where the target's assets are held in complex corporate structures or where evidence is located in jurisdictions which are uncooperative with the UK and in part due to the high costs which have been awarded against the NCA where the UWO's have been successfully challenged.

## Who might receive an UWO?

There are currently two main categories of persons (hereafter referred to as "the respondent") who may be targeted by UWOs, they are:

- politically exposed persons (PEPs) outside of the UK and EEA, including their family members, close associates or other persons connected to the PEP; and
- individuals involved in organised crime and those connected to them.

<sup>1</sup> National Crime Agency, HM Revenue and Customs, Financial Conduct Authority, the Director of the Serious Fraud Office and the Director of Public Prosecutions

<sup>2</sup> See government briefing note - <https://commonslibrary.parliament.uk/research-briefings/cbp-9098/>

Where the law enforcement authorities can show that the property specified in the UWO is worth at least £50,000 and there are "reasonable grounds for suspecting" that the known lawful income of the respondent would have been insufficient to acquire that property they can apply, without notice, to the High Court for a UWO.

## What does a UWO do?

A person who receives a UWO is required in a specified time period to provide details about any property named in the order. This includes explaining the nature and extent of their interest in the property and an explanation of how they obtained it.

The enforcement authority then has a period of time to review any explanations and supporting material provided in response to the UWO and decide whether to take further action, such as issuing a further UWO, commencing a civil recovery investigation or applying for a civil recovery order under the provisions contained in part 5 of POCA.

## Interim Freezing Orders

Most UWOs will be accompanied with an interim freezing order ("IFO") to preserve the property. To obtain an IFO the court must be satisfied that there is a risk that any subsequent recovery order would be frustrated unless the property is preserved.

If an IFO is granted the enforcement authority can also apply for the appointment of an interim receiver, who has the power to manage the property. The powers of the interim receiver include the ability to sell property where the value might diminish and managing, or appointing someone else to manage, any business which is subject to the proceedings.

Some exclusions to IFOs apply to allow, for example, for reasonable living expenses, the carrying on of the person's business and to allow for reasonable legal expenses in respect of the proceedings.

## What happens if a UWO is not complied with?

Failure to comply with a UWO results in a presumption that the property named in the order is "recoverable property". In other words, it is property that was obtained through "unlawful conduct". This means that the enforcement authority can commence civil recovery proceedings under part 5 of POCA to recover the interest that the person holds in that property. It is a defence if the respondent can show that there was a reasonable excuse for the non-compliance.

In addition, failure to comply with the UWO can also result in the recipient being held in contempt of court, which can result in imprisonment, a fine or seizure of assets.

As with other powers of compulsion it is an offence to make a false or misleading statement in response to a UWO.

## What are the changes proposed by the Economic Crime (Transparency and Enforcement) Act?

Part 2 of the Act contains a number of provisions relating to UWOs which:

- expand the persons who may be respondents to a UWO to include "specified responsible officer", thereby ensuring that targets cannot hide behind complex ownership structures.
- extend the grounds for applying for an order to include where "the property has been obtained through unlawful conduct".
- allow for a longer extension for IFOs from 60 days up to 186 days after a UWO has been complied with, giving the enforcement authority more time to review material it receives in response to the UWO and make a determination on whether there are grounds to proceed to a civil recovery.

Finally the new provisions include protections for the enforcement authorities. Importantly, under the new law Courts' ordered costs against the enforcement authority are less likely.

## What is the practical effect?

The explanatory notes to the Act state that one of the purposes of the Act is to "Counter the inability or unwillingness of kleptocratic foreign states to provide reliable support to enforcement authorities investigations." However, it remains unclear how the new provisions will do that in practice. Having additional time to investigate is not much help if the evidence resides in another jurisdiction where law enforcement co-operation is patchy or non-existent. Nor does the widening of the respondent to include a specified responsible officer assist if they themselves do not have access to the required information.

Finally, the Act does not address the elephant in the room, which is that there are insufficient resources within the relevant enforcement agencies to properly take advantage of the powers they already have let alone these new ones. It is anticipated that targets of UWO's will continue to challenge them.

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