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THE FCA'S FIRST FORAY INTO ACCOUNT FORFEITURE ORDERS

On 21 April 2022, the Financial Conduct Authority ('FCA') secured its first account forfeiture order for a sum of £2,000,000 against QPay Europe Limited ('QPay')

Available to law enforcement since 2018 these forfeiture powers have been the subject of some controversy. In this article we provide an overview of account freezing and forfeiture orders, how they work and what to do if you are affected by one.

Non-conviction based asset recovery

Account freezing and account forfeiture orders are an increasingly popular tool used for asset recovery under Part 5 of Proceeds of Crime Act 2002 ('POCA'). Like the other civil asset recovery powers¹ available to law enforcement under POCA they do not require a conviction and the standard of proof is a civil one, based on the "balance of probabilities", rather than the more onerous criminal standard of proof of "beyond reasonable doubt".

The purpose of account freezing and forfeiture orders is to allow investigatory authorities to target monies held in bank or building society accounts which they believe to be the proceeds of "unlawful conduct" or intended for use in unlawful conduct.

They have been subject to some criticism as they lack the safeguards that other methods of asset recovery are subject to. Unlike the other civil recovery powers under POCA, which require an application to be made in the High Court, account freezing orders and the subsequent forfeiture order may be granted following an application made in already overburdened Magistrates' Courts often before a lay panel of Magistrates who are unfamiliar with POCA.

In the FCA's case, they made their applications before a District Judge at Westminster Magistrates' Court, which is a Court that is more familiar with fraud cases, and POCA, than most.

What is the trigger for an account freezing order?

There can be many triggers for an enforcement authority to make an application for an account freezing order, including the use of intelligence received from suspicious activity reports ('SARs') about unusual activity on an account which is suspected of being linked to unlawful conduct, most commonly money laundering. Where a SAR is submitted, it often includes a request for consent to proceed with a transaction, known as a defence against money laundering ('DAML') or terrorist financing ('DATF') request. Such requests have a moratorium period of 7 days, during which the bank cannot process the transaction and cannot tell the customer why (to do so would be committing an offence of "tipping off"). This moratorium period can be extended initially to 31 days and up to a maximum of six months, thus giving the enforcement authority time to conduct enquiries and decide on whether to use their civil recovery powers or launch a criminal investigation.

In the case of the FCA's recent action, their press release indicates that concerns were raised following an application by QPay, which purported to be a fintech start-up company offering due diligence and underwriting services, to become an FCA regulated firm. QPay received money from software firm, Fintech International Q Software WLL, allegedly as an investment. However, the FCA observed QPay moved the money repeatedly to different bank accounts in several countries and none of the transactions appeared to be related to legitimate business. The FCA therefore applied for account freezing orders in October and December 2020.

The process

An enforcement officer can apply to the Magistrates' Court, without notice, for an account freezing order over bank accounts with a balance of at least £1,000 if they have reasonable grounds for suspecting that money held in the

¹ These include cash forfeitures, listed asset forfeitures, unexplained wealth orders and civil recovery orders

account is 'recoverable property', that is, property obtained through unlawful conduct, or is intended by any person for use in unlawful conduct. If the magistrate is satisfied with those grounds, they can make an order for a period of up to two years.

Once an account freezing order is granted, the enforcement officer can then give notice for an account forfeiture order at any point during the period the freezing order is in force. This will usually follow a period of investigation but if no objection to the account freezing order is received, they could proceed to the forfeiture stage much sooner.

Once a notice of forfeiture is issued the account holder, or anyone else affected by the order, has 30 days to object. If no objection is made the amount stipulated in the account forfeiture notice is automatically forfeited without further need for the enforcement authority to involve the Court. In those circumstances an "aggrieved" person has 30 days in which to make an application to the Magistrates Court for the forfeiture of the funds which are the subject of the forfeiture notice to be set aside.

Where an objection is received, the enforcement authority then has 48 hours within which to apply for either an extension of time for the account freezing order or the account forfeiture order. Should an application not be made within this time frame, the account freezing order will cease to have effect.

Where the Magistrates' Court grants a forfeiture order an aggrieved party has a right of appeal to the Crown Court. Again, there is a 30 day period within which the appeal must be made. Likewise, the enforcement authority can appeal a decision not to grant a forfeiture order.

In the case of QPay, the FCA applied for the account forfeiture order in October 2021, alleging that the money was the proceeds of illegal activity connected to criminal proceedings in the United States of America concerning an alleged conspiracy to commit wire fraud against banks, credit card companies and other financial service providers in the USA. The FCA did not allege that QPay was involved in this conspiracy. The press release indicates that QPay consented to the Order, which was granted on 21 April 2022, which may suggest that there was an initial objection followed by a period of negotiation before the order was finally granted.

Increasing use

Until now these powers have primarily been utilised by regional police forces and the National Crime Agency and to lesser extent by Her Majesty's Revenue and Customs and the Serious Fraud Office. However, the FCA stated in their recently published 3 year strategy that they plan to use their *"enforcement and intervention powers more actively, pushing the boundaries"*. They set out a number of ways they plan to do this, one of which is to test the limits of their powers by *"relying more on tools that have an instant effect when there's immediate harm, rather than launching fuller, longer investigations"*. Account freezing and forfeiture orders are one such tool and as Mark Steward, Executive Director of Enforcement and Market Oversight at the FCA, stated when commenting on the QPay case, they are seen by law enforcement as *"an important means of intervening and capturing illegal money"*.

An additional incentive in their use is that, under the Asset Recovery Incentivisation Scheme (**'ARIS'**), enforcement authorities benefit directly from the forfeited funds. Generally 50% of the funds recovered under POCA are distributed to enforcement authorities so providing a valuable source of additional funding. So, it's clear we can expect to see the FCA and others making further use of them in the future.

How to respond to an account freezing order

For individuals or businesses, the low threshold for obtaining an account freezing order creates a risk that unusual but legitimate banking transactions may lead to them being deprived of access to their own funds.

While there are often arguments that can be made about the sufficiency of the information relied upon to obtain the account freezing order, in practice, once an account freezing order is obtained, the burden is on the account holder to demonstrate that the funds which are subject to the order are legitimate. This can be a time consuming and, depending on the enforcement authority in question, often frustrating process. However, in our experience once sufficient proof is provided the enforcement authority has quickly applied for the order to be lifted. Proactive engagement is therefore vital so that these orders may be resisted at the earliest stage.

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