Unexplained wealth orders (UWOs) under the UK’s Criminal Finances Act 2017: The role of tax laws and tax authorities in its successful implementation

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Working Paper

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Abstract

On 30 September 2017, the United Kingdom implemented a powerful new investigative tool known as an “unexplained wealth order” in its Criminal Finances Act 2017. On 7-8 November 2017, London hosted the Fifth OECD Forum on Tax and Crime. Against this background, as well as other recent developments that have shown a spotlight on the interlinkages between tax and crime, this working paper researches the role that tax laws and tax authorities play in either helping or hindering unexplained wealth orders. In doing so, it derives some relevant considerations for United Kingdom authorities as they move forward in implementing this new law.

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Overview of research topic

On 30 September 2017, the Criminal Finances Act 2017 entered into force in the United Kingdom. The very first chapter of the law equips UK authorities with new investigative powers in the form of “Unexplained Wealth Orders” (UWOs). In doing so, it becomes one of the only countries in the world to implement a “full” UWO.

As the name implies, this grants the authorities the power to, in essence, order certain individuals to explain the source of their wealth that allowed them to buy valuable property in cases where the individuals’ known income would seem too low for the purchase in question. In the UK, it applies to “politically exposed persons”, yet excluding those from the UK or EEA, or to persons where there are “reasonable grounds for suspecting” a link with “serious crime”, and only to properties of 50,000 GBP or more in value. Because UWOs lower the threshold for evidence that leads to a reversal of the burden of proof, they are powerful and possibly controversial tools in the fight against crime.

In the wake of the well-publicized Panama Papers and Paradise Papers, among the biggest data leaks in history, that have revealed the ease with which money flows can be disguised, and especially reports by Transparency International that have revealed the extensive use of property in crowded real estate markets such as London for money laundering purposes, this new investigative tool has been celebrated by many. Others have already cautioned against some of the potential barriers to the successful implementation of UWOs, such as the possibility for suspected foreign politicians to escape UWOs by invoking immunity under international law, potential infringements of fundamental rights, and possible ambiguities in the rules on the statements required from the suspected individuals.

This paper proposes to add the tax law considerations to the above debate. Indeed, experience with UWOs in neighbouring Ireland and fellow Commonwealth country Australia indicate the potential importance of the tax laws and the tax authorities. For this reason, this paper would analyse the key elements of the scope of this new UWO law and, in particular, study the role that the tax laws and tax authorities could play in the successful implementation of the law.

Structure

To carry out this research objective, this paper is divided into two main parts. First, unexplained wealth orders will themselves require some explanation. A basic definition of UWOs is the natural starting point. Central to this part will be an understanding of the purpose of UWOs, or, in other words, the problem(s) they aim to remedy. Against this background, the UK UWO will be discussed, studying its scope of application, procedure and legal consequences. Second, research of already-existing tried-and-tested models of UWOs is undertaken with a goal to isolate the impact of tax laws. According to this research, two distinct areas of impact emerge: the role of the tax laws (questions of scope of application) and the role of the tax authorities (questions of effective enforcement). Of the few countries that have introduced “true” UWOs, the examples of Ireland and Australia are often selected as the most relevant

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2 Booz Allen Hamilton, Comparative Evaluation of Unexplained Wealth Orders, Prepared for the U.S. Department of Justice (31 Oct. 2011), at Executive Summary, p. 1, at Findings, p. 12, and at Appendix A-1 to A-3 [hereinafter Booz Allen Hamilton report for U.S. Department of Justice]; Transparency International UK, Empowering the UK to Recover Corrupt Assets, Unexplained Wealth Orders and other new approaches to illicit enrichment and asset recovery (Mar. 2016), at p. 24 (“Only three countries in the world – Ireland, Australia and Colombia – have UWOs where no proof of the property being connected to the crime is required and the burden of proof is reversed.”). See also, Shalini O Soopramanien, Explaining the Unexplained Wealth Orders: (Mauritius) Good Governance and Integrity Reporting Act, Statute Law Review, Volume 39, Issue 1, 15 February 2018, pp. 46-62, https://doi.org/10.1093 slr/lmw036 (Mauritius is also reported to have implemented a law on “unexplained wealth” in The Good Governance and Integrity Reporting Act 2015). For comparison purposes, see also Booz Allen Hamilton report for U.S. Department of Justice, at Introduction, p. 4 (Other countries have regimes that have some elements in common with unexplained wealth orders but nevertheless differ in key ways. This report
due to their legal systems being most similar to that of the UK, in that they too rely on a common law system.\textsuperscript{3} Throughout the analysis, the findings from this comparative research are applied to the UK context, where possible, to draw potential lessons and to consider the extent to which they could be transposed to the UK.

Based on research thus far, this particular intersection between tax law and UWOs is not yet emphasized in existing studies.\textsuperscript{4} This emphasis may bring a new angle, and thus fresh insights, to the analysis of UWOs. It appears to be all the timelier as the interlinkages between criminal law and tax law – historically treated as distinct domains – have become increasingly obvious and have taken centre stage in international policy discussions.\textsuperscript{5}

Part One: Unexplained Wealth Orders (UWOs)

The definition of UWOs and their potentially “radical” features

At its simplest, an “Unexplained Wealth Order” (UWO) is an order to explain one’s wealth. A government authority is charged with the responsibility and the power to compel certain individuals to produce a statement that explains their sources of wealth, under certain conditions. The main condition that must be present is a discrepancy between the value of property acquired by a given individual and the known sources of lawfully obtained income of this individual. In other words, where the value exceeds the known sources of income to such an extent that it would not seem possible to acquire this property without the presence of some unknown sources of income, the individual in question may have some explaining to do. These are the common denominators of any UWO law.

From the above, two “seemingly radical features” of UWOs emerge, according to a 2011 report published by Booz Allen Hamilton for the U.S. Department of Justice.\textsuperscript{6} First, since it is the above-mentioned discrepancy between known lawful income and potentially unknown unlawful income that triggers the suspicion or the basis for issuing an order, it follows that a UWO does not necessarily require

special measures.

categorizes regimes into four groups: “i) countries that have true UWOs;” “ii) countries with non-conviction based laws that have some form of UWOs;” “iii) countries with conviction based laws that have some elements of UWOs;” and “iv) countries that have introduced illicit enrichment provisions, targeting proceeds of corruption.”); see also Switzerland, the Restitution of Illicit Assets Act (An unofficial English translation of the Act was provided for a meeting on 16 August 2016 of the United Nations Office on Drugs and Crime, Forum for advancing practical aspects of asset recovery, including challenges and good practices, available at https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2016-August-26/V1605154e.pdf (accessed 7 Feb. 2018)); see also Transparency International UK, Anti-Corruption Pledge Tracker – Issue Area: Asset Recovery, available at https://www.anticorruptionpledgetracker.com/ (accessed 7 Feb. 2018) (This database tracks countries’ commitments to implement anti-corruption regimes, including unexplained wealth orders and various other measures for asset recovery. In the future, other countries, e.g. Jordan, Nigeria, and Bulgaria, reportedly plan to introduce unexplained wealth orders or similar non-conviction-based asset recovery regimes.). Please note that internal citations are omitted in all quotations in the text and footnotes.


\textsuperscript{4} For a related but slightly different angle of analysis, see Mathew Leighton-Daly, Taxation, civil forfeiture and unexplained wealth: Part 2, Taxation in Australia, Vol. 47, No. 9, April 2013, pp. 574-577 (accessed 27 March 2018).


\textsuperscript{6} Booz Allen Hamilton report for U.S. Department of Justice, at Executive Summary, p. 1.
a criminal charge. Second, since an order requires the individual to explain their sources of wealth, this amounts to a reversal of the burden of proof. Both can be considered departures from traditional laws on forfeiture, or asset recovery, as will be discussed below.  

Beyond these common denominators and characteristics, UWO laws are adapted to their respective legal context. Where UWO laws may differ from one another will be on the more detailed questions of scope, such as which individuals, which types of properties or assets, at which values, and what (amount of) discrepancy triggers suspicion. They will also differ on questions of procedure, such as which authorities, what evidentiary standards, when the burden of proof shifts, and what information the statement must contain. Finally, they may differ on some details of the legal consequences, such as the legal value/effects of the order and the statement produced under it.

In the UK, the UWO laws were passed as part of the “Criminal Finances Act 2017”. Its placement within this law is informative: it is situated under “Part 1: Proceeds of Crime” and further under “Chapter 1: Investigation”. Each title offers insight into the purpose of UWOs. To begin, it highlights a connection between UWOs and criminal law. Criminal law often brings to mind the laws that prohibit acts or activities, such as theft. The legal consequences for breaking these laws (e.g. possibility of prison), it is hoped, have a deterrent effect. Yet, crimes of course still happen. Thus, the deterrent effect is counterbalanced, it seems, in some instances by other incentives that pull in the opposite direction (e.g. possibility of financial gains). It is now widely accepted that, in most instances, criminals would not engage in certain activities prohibited by law if it did not pay. This drives corruption, black-market activities, tax evasion and fraud. In order to fully benefit from the financial gains from crime, these gains have to be disguised as legitimate, to cover up the tracks, so to speak, and hence this is where the very aptly named “money laundering” process enters the picture. For this reason, in addition to the criminal laws that prohibit certain behaviours, there are laws that target the “proceeds of crime”. In other words, they target the incentives. The less criminals can enjoy the ill-gotten gains, the less alluring the activities. Finally, as can be seen, UWOs serve as an “investigation” tool for the authorities. They can help in uncovering crimes. This partly explains the two aforementioned “radical” features. Rather than first having to definitively prove a crime before taking action regarding an asset (e.g. obliging cooperation

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9 To offer a precision here, theft-based crimes can have both civil and criminal elements. Accordingly, forfeiture laws, which seek to recover stolen property, may have both civil and criminal proceedings. For example, the UK Proceeds of Crime Act 2002 is categorized as “civil and criminal”. See e.g. Booz Allen Hamilton report for U.S. Department of Justice, at Appendix, A-6. All 3 countries that are deemed to have “full” UWOs have titles with the derivatives of the word “crime” in it, or are located in the Criminal Code (in Columbia), yet all are categorized in the table as “civil”. UWOs are thus related to criminal law in that they are an investigative tool that target the proceeds of crime. However, in most cases, civil proceedings are used to recover the ill-gotten property. See e.g. Booz Allen Hamilton report for U.S. Department of Justice, at Appendix, A-1 to A-3.
11 Anita Clifford, The Investigative Reach of UWOs, in White Collar Crime Centre, Unexplained Wealth Orders: thoughts on scope and effect in the UK, January 2017, at p. 11 (“The Explanatory Notes to the Criminal Finance Bill 2016 mention rather than address in any detail the investigative purpose of the proposed UWO regime. […] [T]he UWO Impact Assessment Report, published in November 2016 by the Home Office, expands upon this problem with clarity, setting out that the UWO regime creates “a new investigative power”, such that “if evidence is provided, it could be used by the investigative agency to further develop their case against the individual in a civil recovery investigation.””).
and explanation of this asset, and possibly even freezing or seizing the asset), the asset now serves as possible proof that a crime may have occurred and thus instigates further investigation.

Against this background, UWOs could also be described as falling under the category of “asset forfeiture” law or “confiscation” law, as it deals with the seizure, and possible recovery, of assets or property. This is the main possible legal consequence or effect of the order. Another common characterization is “non-conviction based asset confiscation”. The fact that a crime does not have to be proven before taking action constitutes a departure from “traditional in personam and in rem forfeiture”. It more easily creates a presumption in favour of recovering the assets in question. This is why UWOs can be seen both as a “powerful” investigative tool, but potentially “controversial”.

<table>
<thead>
<tr>
<th>Criminal forfeiture</th>
<th>Civil forfeiture</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Conviction-based confiscation</td>
<td>• Non-conviction-based confiscation</td>
</tr>
<tr>
<td>• Criminal proceedings/courts</td>
<td>• Civil proceedings/courts; can take place alongside ongoing criminal proceedings</td>
</tr>
<tr>
<td>• Action against a person <em>(in personam)</em></td>
<td>• Action against a property <em>(in rem)</em></td>
</tr>
<tr>
<td>• Establish conviction, then possible confiscation of property (1) used for crime or (2) obtained from proceeds of crime</td>
<td>• Establish link between property and crime, again either (1) instrument of crime or (2) proceeds of crime</td>
</tr>
<tr>
<td>• Evidentiary standard: criminal burden of proof, i.e. beyond a reasonable doubt, and possibly preponderance of the evidence standard in showing property was linked to crime</td>
<td>• Evidentiary standard: civil burden of proof, i.e. preponderance of the evidence or possibly clear and convincing evidence</td>
</tr>
</tbody>
</table>

**Unexplained Wealth Order (UWO)**

Hybrid elements
- Investigation that can lead to civil forfeiture proceedings
- Evidentiary standard: civil standard

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13 Regarding distinctions between these terms, see e.g. United Nations Office on Drugs and Crime (UNODC), United Nations Convention Against Corruption (2004), at Article 2(f) (“Freezing” or “seizure” shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority;”) and at Article 2(g) (“Confiscation”, which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority.”).

14 See e.g. UK, Proceeds of Crime Act 2002 (The Act contains rules on confiscation, civil recovery of the proceeds of unlawful acts, property freezing orders, etc. The UWO law will be inserted as a new Sec. 362A within this Act); Booz Allen Hamilton report for U.S. Department of Justice, at Introduction, p. 4, and at Executive Summary, p. 1 (“Recognizing that UWOs are a relatively new development in the area of forfeiture and confiscation laws,...”) and “Unexplained Wealth Order (UWO) laws, a relatively recent development in confiscation and forfeiture jurisprudence, target the proceeds derived from criminal activities.”).

15 Booz Allen Hamilton report for U.S. Department of Justice, at Findings, p. 11.

16 Booz Allen Hamilton report for U.S. Department of Justice, at Executive Summary, p. 1 (“Like traditional in personam and in rem forfeiture, their primary objective is to deprive criminals from acquiring or benefiting from unlawful activities. However by using UWOs the state does not have to first prove a criminal charge, as is the case with conviction based forfeiture. Likewise, the state does not have to first prove that the property in question is the instrument or proceed of a crime, as is generally the case in in rem asset forfeiture. UWO laws differ from traditional forfeiture laws in another important respect: they shift the burden of proof to the property owner who must prove a legitimate source for his wealth and the forfeiture proceeding is instituted against a person rather than against the property.”).


Positioning UWOs within the legal system – its relations to criminal law and confiscation/forfeiture law – is key to understanding the principles that govern UWOs, their unique features and possible concerns that have been raised about UWOs. For example, given the paramount role of the right to private property, a requirement to establish a criminal charge before the possibility arises to take private property has been viewed as an important constraint on “forfeiture” law. Consequently, concerns have been raised over potential infringements of property rights if UWOs allow too much room for authorities to abuse this power. Moreover, pointing out the link to criminal law helps create the context for further understanding why UWOs could be controversial, since at first glance there is a tension with well-known principles of criminal law, such as the principle of a presumption of innocence (innocent until proven guilty) and protections against self-incrimination.

19 See e.g. Booz Allen Hamilton report for U.S. Department of Justice, at Findings, p. 11 (“The first difference is that UWOs are an in personam forfeiture proceeding, whereby an action is brought against the person who owns or possesses the unexplained wealth or property.”). However, see e.g. Florence Keen, Unexplained Wealth Orders: Global Lessons for the UK Ahead of Implementation, RUSI Occasional Paper, Royal United Services Institute, September 2017, at p. 8 (“…from unexplained wealth provisions in the Republic of Ireland and Australia, both of which act in rem against property that constitute the proceeds of crime without the need for a predicate offence, and which reverse the burden of proof on to the respondent.”). For more on the debate, see e.g. Booz Allen Hamilton report for U.S. Department of Justice, at Country Focus – Ireland/Evaluating the Effectiveness, p. 138 (“There is an ongoing debate whether the PoCA is an in rem or an in personam forfeiture scheme. The Act has a requirement that to commence any proceeding, a person who is in control or possession of property must be identified. An exception is provided when the owner cannot be identified or has absconded. In all other cases, applications for any of the orders can be brought against the person/property owner and any property that the person owns or controls if he or she cannot show that the property was lawfully obtained. However, the Irish courts have held that the proceedings are in rem because they target the property and not the person, so no action is taken against the person and no sanction is imposed. Further, the absence of a requirement to establish a nexus between an offense and the property leads to the conclusion that the PoCA targets criminal conduct of a person and the property related to criminal conduct. Thus, the CAB does not have to prove that specific funds were derived from a specific offense and were transferred or used in acquiring a specific property. It requires only that it be shown that a person has been engaged in criminal conduct and that he or she has lived beyond his lawful means. These two elements are the key elements that make a proceeding an in personam proceeding, as the Act is not construed to deal with instruments of crime and the proceeds derived from commission of a specific offense. The Act is construed more broadly to target the property of the person engaged in criminal conduct. Although the argument of the courts that this is not a sanction imposed against the person is true, it is nonetheless a measure that is imposed against an individual.”).


21 See e.g. Booz Allen Hamilton report for U.S. Department of Justice, at Executive Summary, p. 3 (“Regarding the [unexplained wealth] concept, the U.S. has always required that the forfeited property be the proceeds or instrumentalities of a crime. A law that makes the mere lack of a valid explanation for the possession of property sufficient reason for government seizure would raise the concern of property rights advocates.”).

22 See e.g. Booz Allen Hamilton report for U.S. Department of Justice, at Country Focus – Australia/Evaluating the Effectiveness, p. 108 (“In the same report, the Law Council of Australia called these laws obnoxious and stated that they were offenses against common law and human rights principles. The Law Council presented its arguments against the unexplained wealth provisions as follows:

  • The reverse onus of proof undermines the presumption of innocence.

  • Establish an income or wealth discrepancy; UWO issued without need to establish link between crime and property, but establish potential link between person and crime on civil evidentiary standard

  • Debate over in personam nature or in rem nature; the order is brought against the person who owns the property, yet one potential eventual legal consequence is in rem civil proceedings


On a stand-alone basis, the basic idea of a UWO sounds reasonable – perhaps even desirable or obvious – yet placed in the context of certain criminal law and constitutional principles, the compromises emerge more clearly. In countries that have experience with “full” UWOs so far (Australia, Columbia, and Ireland), many court challenges have been mounted, but so far, UWOs have survived all these challenges. As will be seen in the next section, one important reason for their survival is that UWOs have been recognized for their ability to overcome the weaknesses of current laws in recovering the proceeds of crime.

The purpose of UWOs and the problems they aim to remedy

As seen above, the main purpose of UWOs is to serve as a new investigative tool to improve the ability of law enforcement agencies to strip criminals of the financial benefits of their crimes. Broadly speaking, UWOs have evolved out of a need to address two intertwined problems. First, UWOs result from the underperformance, or even failure, of traditional methods, such as civil forfeiture, to recover the proceeds of crime, especially in certain cases of organised crime and corruption. Second, this poor performance is in part caused by, what could be described as, the globalization of crime, which UWOs are better equipped to address.

Regarding the first problem, the main obstacle to the success of both civil and criminal forfeiture regimes is the difficulty, or impossibility in some cases, of first proving a crime. This is simultaneously the strength and weakness of these existing regimes. In the UK, these are found mostly in the Proceeds of Crime Act 2002.

The UK Proceeds of Crime Act 2002 was enacted to consolidate numerous provisions for forfeiture and other tools to recover the proceeds of crime that were scattered among different laws, repairing an

- Provisions infringe on the right to silence and exclude legal professional privilege. The WA and the NT provisions allow the DPP to use information obtained during examination for criminal prosecution.
- Appeal processes are inadequate.
- The potential for arbitrary application of the laws, with the use of the laws, can be politically motivated.”

23 See e.g. Natasha Reurts, Unexplained Wealth Laws: The Overseas Experience, in White Collar Crime Centre, Unexplained Wealth Orders: thoughts on scope and effect in the UK, January 2017, at p. 17 (“Common to both experiences have been a plethora of legal and constitutional challenges to the operation of UWOs, specifically the reversed burden and the argument that they are, in essence, a disproportionate punitive measure that infringes upon fundamental rights such as the presumption of innocence and the right not to self-incriminate. Despite the many challenges, and indeed an acknowledgement by the courts of their breadth, the UWO regime has survived extensive judicial scrutiny in both Australia and Ireland.”); Booz Allen Hamilton report for U.S. Department of Justice, at Country Focus – Ireland, p. 122 (“The constitutionality of PoCA has been challenged on many grounds by respondents but to date it has been upheld by the courts.”).
24 UK, Criminal Finances Act 2017, Explanatory Notes, Overview of the Act, at p. 5, No. 1 and No. 3 (“The Criminal Finances Act 2017 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.”) and “The Serious and Organised Crime Strategy 2013 and Strategic Defence and Security Review 2015 (SDSR) set a goal of working with the private sector to make the UK a more hostile place for those seeking to move, hide or use the proceeds of crime or corruption. The Criminal Finances Act is a part of achieving that objective.”)
25 Larissa Gray, Kjetil Hansen, Pranvera Recica-Kirkbride, Linnea Mills, Few and Far: The Hard Facts on Stolen Asset Recovery, (World Bank and OECD, Washington, DC, 2014), License: CC BY 3.0 IGO, at p. 37, available at https://openknowledge.worldbank.org/handle/10986/20002 (accessed 4 Jan. 2018) (“...obstacles commonly encountered in asset recovery cases, such as proving the link between the asset and the offense, the requirement for a criminal conviction, or the need for some degree of international cooperation from the foreign jurisdiction.”).
26 See e.g. Booz Allen Hamilton report for U.S. Department of Justice, at Findings, p. 41 (“The confiscation regime in the United Kingdom (U.K.) before consolidation by the Proceeds of Crime Act of 2002 was governed by various
inefficient patchwork of confiscation possibilities that were thus underutilized. A 2000 Report by Performance and Innovative Unit (PIU) of the U.K. Cabinet Office called for streamlining the regimes to make them more comprehensive and coherent.

“The Proceeds of Crime Act of 2002 provides four procedures or regimes for seizure, forfeiture, and confiscation of the proceeds of crime: (1) in criminal proceedings following conviction of the defendant; (2) in civil proceedings in front of the High Court, also known as civil asset recovery; (3) taxation of incomes or gains suspected of being derived from crime; and (4) confiscation by police or customs and excise of cash suspected of being the proceeds of crime.”

Regarding “criminal confiscation”, also known as conviction-based confiscation, a conviction is obviously needed before the property can be confiscated. In particular, this requires not only a conviction, but also proof that the convicted criminal benefited from its criminal activity, an estimate of this “benefit” and evidence of a “criminal lifestyle” (with its own set of 3 conditions to establish). For the purpose of these confiscation proceedings, generally speaking, the burden of proof remains with the court or the prosecutor and the civil standard, “balance of probabilities” (instead of the criminal standard, “beyond reasonable doubt”), applies.

Regarding “civil recovery”, also known non-conviction based confiscation, a conviction is not necessary, but the “illegal origin” of assets has to first be established before the burden of proof shifts to the individual. Again, a civil standard is used, meaning the authorities have the burden to prove on the balance of probabilities (i.e. that it is more likely than not) that the property was “obtained through unlawful conduct.” This lower evidentiary standard was, in part, justified by the fact that these are in laws such as the Drug Trafficking Act of (1986), which provided for mandatory confiscation of the proceeds from drug-trafficking offenses, which was amended and consolidated in 1994. Further, part VI of the Criminal Justice Act (1988), amended by the Criminal Justice Act (1993) and further developed by the Proceeds of Crime Act (1995), governed confiscation of the proceeds from indictable and other summary offenses.”).

See e.g. Booz Allen Hamilton report for U.S. Department of Justice, at Findings, p. 41 (“By 1999, it was noticeable that the confiscation track record in the U.K. was poor, despite these confiscation powers. Few confiscation orders were issued and even fewer of what was ordered was being collected. As a result, the government ordered a study to evaluate the confiscation system in the U.K. The Performance and Innovative Unit (PIU) of the U.K. Cabinet Office conducted the evaluation and published a report in 2000 identifying key weaknesses in the national confiscation regime and making a number of recommendations to enhance it, including enactment of cohesive and comprehensive legislation.”).

33 For further details, see e.g. Booz Allen Hamilton report for U.S. Department of Justice, at Findings, p. 43.
34 Booz Allen Hamilton report for U.S. Department of Justice, at Appendix A-6.
35 UK, Proceeds of Crime Act 2002, Explanatory Notes, at p. 66, para. 420; see also Booz Allen Hamilton report for U.S. Department of Justice, at Findings, pp. 43-44 (First, “[t]he burden of proof is on the ARA to prove on the balance of probabilities that the property is recoverable and was obtained through unlawful conduct.” Second, “[t]he respondent has the burden to prove the lawful source and to produce evidence that rebuts the allegation that his or her property is recoverable.”).

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rem proceedings against the property, not against the person.36 Also, additional safeguards were put in place. For example, only property valued at 10,000 GBP, or more, can be cause for investigation.37 This ensures that authorities do not go after petty cases, which also reduces the risk that state resources are unwisely or disproportionately spent.

This approach to recovering property was introduced for the first time by the 2002 Act38 since, although “considered more intrusive” than criminal forfeiture, civil forfeiture was considered “better suited to counter increasingly well organized and sophisticated criminal activity.”39 It rode in on a wave of growing international support for these types of regimes. The Financial Action Task Force (FATF) had recognized the role of well-designed confiscation regimes in depriving criminals of their gains.40 Provisions for targeting proceeds of crime through non-conviction based forfeiture regimes appeared in the United Nations Convention against Transnational Organized Crime (2000, Palermo) and the United Nations Convention against Illicit Traffics in Narcotics Drugs and Psychotropic Substances (1998, Vienna).41

Yet, when the numbers have been collected and analysed, the Proceeds of Crime Act 2002 has not proved as effective as hoped. A 2011 study reported that:

“only a small percentage of seized assets are actually recovered and collected by the agency. For example, for years 2004–2005, out of £15 million seized, only £5.6 million was recovered. Similarly, in 2005–2006, out of £85.7 million seized, only a small portion of the total £4.6 million was recovered.”42

36 Booz Allen Hamilton report for U.S. Department of Justice, at Findings, p. 14 (Discussing the experience in Columbia: “Further, the court held that shifting the burden of proof onto the respondent is acceptable because it is a civil proceeding and no penalty is imposed on the individual.”); Booz Allen Hamilton report for U.S. Department of Justice, at Country Focus – Ireland, p. 122 (“Introduction of civil asset forfeiture, in itself, does not mark a new chapter in the Irish common law tradition. It has been a longstanding principle of common law that nemodat quod non habet i.e., a thief cannot convey a lawful title to stolen property nor can any person into whose hands it comes resist a claim by the true owner for its return.”); Florence Keen, Unexplained Wealth Orders: Global Lessons for the UK Ahead of Implementation, RUSI Occasional Paper, Royal United Services Institute, September 2017, at p. 5 (“Despite this, the major challenges of the High Court, the House of Lords and the European Court of Human Rights (ECHR) against civil recovery on human rights grounds have been defeated.”).

37 UK, Proceeds of Crime Act 2002, Explanatory Notes, at p. 66, para. 419; see also Booz Allen Hamilton report for U.S. Department of Justice, at Findings, p. 43 (“Before an investigation is initiated by the ARA, certain criteria must be met: (1) the case must normally be referred by a law enforcement agency or prosecution authority; (2) recoverable property must be identified and have an estimated value of at least £10,000; (3) recoverable property must be obtained within last 12 years; (4) there must be significant local impact on communities; and (5) there must be evidence of the criminal conduct supported on the civil standard balance of probabilities.”).

38 UK, Proceeds of Crime Act 2002, Explanatory Notes, at p. 46, para. 287 (“This is an entirely new right of action, and is reserved to the enforcement authority.”).

39 Booz Allen Hamilton report for U.S. Department of Justice, at Findings, p. 43.


To add insult to injury, this low recovery rate – of less than 50% based on the above numbers – strains the public purse, as the investigative agency has difficulty covering its own costs of operation.43

The reasons for the lack of success are manifold. The cases often targeted are those of large organised crime and corruption, meaning they are complex. This leads to lengthy, resource-intensive investigations. The criminals themselves may be well-resourced for the legal battle. The suits can drag on even longer when, for the reasons discussed above, accusations are made that they infringe certain fundamental rights or constitutional principles.44 The sophistication of the criminals often implicated adds another layer of difficulty. The leaders of criminal organizations organize the crimes, but often do not personally carry them out. They have developed strategies for maintaining a distance between themselves and the crimes committed by the members of their organizations. In an interview with the Police Federation of Australia, the police claimed that they know who these leaders are, but often cannot gather sufficient evidence to directly link the leaders to the crimes in order to meet the necessary burdens of proof.45

This ties into the second overarching reason for the poor performance, namely the globalised nature of the crimes.46 Under the existing forfeiture regimes, the authorities must – and rightfully so – gather sufficient evidence to meet their respective burden of proof. Yet, in order to investigate crimes that cross borders, for the evidence gathering process, the UK must rely on the exchange of information and mutual legal assistance of other countries. This is particularly challenging if it involves “claims against assets in the UK derived from corrupt regimes”, which may be less cooperative,47 or if the legal system of the counterpart country simply does not allow it,48 or if the counterpart country is under-resourced.49 UWOs, by forcing the person to explain their own wealth, tries to overcome these obstacles.

From the above, the globalization of capital movements seems to be an exacerbating factor. It is increasingly easy to move cash and capital to all parts of the globe, leading to two intertwined trends: while it is easier for foreigners to invest into the domestic property market, it is harder to investigate those foreigners when needed. In other words, legal barriers to cross-border investment have largely tumbled, while both legal and practical barriers to cross-border cooperation remain and bridges between law enforcement agencies are still being built.

43 Booz Allen Hamilton report for U.S. Department of Justice, at Findings, p. 46.
44 Booz Allen Hamilton report for U.S. Department of Justice, at Findings, pp. 45-46.
45 Booz Allen Hamilton report for U.S. Department of Justice, at Country Focus –Australia/Evaluating the Effectiveness, p. 107 (citing “Inquiry into the legislative arrangements to outlaw serious and organized crime groups, Parliamentary Joint Committee on the Australian Crime Commission, August 2009”).
46 Florence Keen, Unexplained Wealth Orders: Global Lessons for the UK Ahead of Implementation, RUSI Occasional Paper, Royal United Services Institute, September 2017, at p. 5 (“Civil recovery has been justified not only by its in rem nature, but also by what is perceived to be the changing nature of international corruption and serious and organised crime.”).
48 Florence Keen, Unexplained Wealth Orders: Global Lessons for the UK Ahead of Implementation, RUSI Occasional Paper, Royal United Services Institute, September 2017, at p. 6 (“Moreover, even if the jurisdiction has the will to assist, it may be prevented from doing so constitutionally or legally. The majority of international money laundering conventions apply only to criminal matters, and most domestic regimes only contain criminal confiscation regimes, meaning that many jurisdictions simply do not have the legal architecture in place to recognise non-conviction based proceedings.”).
In the UK, a publication of Transparency International\textsuperscript{50} reported that London was a particularly attractive market for stashing the proceeds of crime. It unveiled some eye-catching figures, such as an approximate and conservative estimate of “4.2 billion [GBP] worth of properties bought with suspicious wealth”, calling London a “safe haven” for “illicit wealth and crisis capital”.\textsuperscript{51} Crucially, it made the case that this has negative impacts on ordinary UK citizens, by further distorting the property market that is already putting pressure on the budgets of people who struggle to afford housing.\textsuperscript{52} Notably, this has occurred despite the Proceeds of Crime Act 2002.

An indispensable component in passing and implementing new laws, especially those that are “radical” in some sense, is the political component. The balance has to be tipped, so to speak. Enough political pressure has to be generated to overcome (1) the natural inertia of people in their day-to-day tedium as regards getting to know about and care about an issue, especially one that has less visible victims, and (2) the well-financed forces of lobbying that maintain a status quo. It is essential to make a case that this is unfair and that these crimes of corruption and money laundering, in addition to their potential victims in other countries, are far from victimless at home, in the sense that ordinary UK citizens – citizens to which lawmakers are held democratically responsible – become indirect victims of wealthy criminals exploiting London’s property market. Indeed, both Ireland’s and Australia’s experiences attest to the importance of the political environment. As regards Ireland, its success hinged on strong public support (“This legislation was the direct product of public outrage over the murder of an investigative journalist and a police detective by drug dealers. To this day there is still strong public support for the laws.”)\textsuperscript{53} that was strategically harnessed and maintained (“The CAB also has been very selective in the cases it pursues choosing only those of the type which garner public support.”)\textsuperscript{54} and, as regards Australia, one of the reasons cited for the lower success rate of its UWO was an unfavourable political environment\textsuperscript{55} (brought about in part by a media debacle over applying the law in too harsh a way).

Political momentum has been further generated on the global stage by numerous leaks scandalized by the media, most notably Luxembourg Leaks,\textsuperscript{56} the Panama Papers,\textsuperscript{57} and the Paradise Papers.\textsuperscript{58} The perception is that the global elite and multinational enterprises, facilitated by an army of well-paid advisors and lawyers, are able to hide money and avoid paying taxes, by both legal and illegal


\textsuperscript{53} Booz Allen Hamilton report for U.S. Department of Justice, at Executive Summary, p. 1.

\textsuperscript{54} Booz Allen Hamilton report for U.S. Department of Justice, at Executive Summary, p. 2.

\textsuperscript{55} Booz Allen Hamilton report for U.S. Department of Justice, at Executive Summary, p. 2 (“Another factor in Australia that has stemmed the progress of UWOs is the downward public support most notably as a result of case in which an elderly couple had their house seized after their son was convicted of possessing cannabis concealed in the roof of the home.”) and at Country Focus –Australia/Evaluating the Effectiveness, pp. 110-111 (citing “Lorana Bartels, “Unexplained Wealth laws in Australia,” \textit{Trend and Issues in Crime and Criminal Justice, No.395, July 2010, Published by the Australian Institute of Criminology.”)."


means, while the rest were left paying the bills of the 2008/9 financial crisis and facing austerity. All of these leaks have led to calls for numerous reforms to counteract all versions of hiding money. They also raised greater awareness of the link between financial criminal laws and tax laws, which will boost policymakers’ efforts in this area. In this context that this paper finds it timely and worthwhile to shed more light on this link in the case of UWOs.

In sum, the UWO in the 2017 Act has emerged from the lack of success of the existing forfeiture regimes, which is largely blamed on the hurdles that law enforcement faces in meeting the requisite burden of proof, especially in cases of grand organized crime and corruption that spill across borders, and from the recognition of just how rampant crimes of corruption and tax evasion seem to be across the globe, brought about by reports from credible investigative journalists and international non-profit organizations.

The precise scope of the UK UWO

The analysis now turns to the scope of application, the procedural aspects and the legal consequences of the UK UWO law. To understand the scope of application, the analysis will be structured by references to questions of personal, material, territorial and temporal scope.

The personal scope answers the question as to which individuals UWOs may apply. According to the Criminal Finances Act 2017, under Sec. 362B(4), it covers three groups of people. A possible “respondent” may be (1) a person suspected on “reasonable grounds” of being involved in “serious crime”; (2) a “politically exposed person”; or (3) a person connected to either one of first two categories.


61 In this section of the paper, unless otherwise provided, all references to Sections (abbreviated “Sec.”) are references to the provisions of the UK, Criminal Finances Act 2017, available at http://www.legislation.gov.uk/ukpga/2017/22/contents (accessed 16 Dec. 2017).

62 Sec. 362B(4) (“(b) there are reasonable grounds for suspecting that—

(i) the respondent is, or has been, involved in serious crime (whether in a part of the United Kingdom or elsewhere), or

(ii) a person connected with the respondent is, or has been, so involved.”).

Sec. 362B(7) (The definition of a politically exposed person includes “(b) a family member of a person within paragraph (a),

(c) known to be a close associate of a person within that paragraph, or
Regarding the first category of “respondent”, the reference to “reasonable grounds” indicates that the evidentiary standard is a civil one, i.e. that on the balance of probabilities, it seems more likely than not that the person is, or was, involved in serious crime. Also, regarding the temporal scope, it covers past and present crimes, as indicated by the wording “is, or has been, involved in serious crime” (Sec. 362B(4)). Regarding the territorial scope, there is no geographical restriction on where the crime took place, as indicated by the wording “whether in a part of the United Kingdom or elsewhere” (Sec. 362B(4)), nor on the location of the person, since Sec. 362A(2)(b) explicitly states that “the person specified may include a person outside the United Kingdom”.

Regarding the second category of “respondent”, it is notable that no link to a “serious crime” is needed for a politically exposed person (PEP) to be a “respondent”. A PEP is defined, under Sec. 362B(7), as “(a) an individual who is, or has been, entrusted with prominent public functions by an international organisation or by a State other than the United Kingdom or another EEA State”. Again, the wording “is, or has been” broadens the temporal scope. It is not necessary that the person is currently serving in a public function. For defining some of the terms, such as “prominent public functions”, the law makes reference to the fourth EU Anti-Money Laundering Directive.63 Regarding the territorial scope, there is a restriction as regards PEPs. It applies only to non-UK and even non-EEA persons – in other words, only to certain foreign PEPs. This focus on PEPs under the UK UWO law is a unique feature of its scope compared to existing UWO laws. Neither the Australian regimes nor the Irish regime target PEPs in particular.64 It indicates the UK’s emphasis on fighting corruption. It may have taken inspiration for its scope from the United Nations Convention Against Corruption (2004), in particular its Article 20 on illicit enrichment which targets public officials.65 Considering that the greatest obstacles to gathering evidence occur in cases of foreign public officials, for the reasons discussed above, the UWO is a more suitable tool than standard civil forfeiture regimes. However, two aspects have been criticized. First, the fact that there is no need to link a PEP to any crime may give rise to court challenges on the basis of fundamental rights.66 Second, the effectiveness of targeting PEPs may be undermined by the possibilities under international law to claim sovereign immunity.67

The material scope answers questions as to which types of property or assets the UWO applies. It applies to “any property” (Sec. 362B(1)), the value of which is at least 50,000 GBP (Sec. 362B(2)(b)), that is held by the respondent (Sec. 362B(2)(a)). Regarding the first element of the scope, if it is inspired from existing regimes, then “any property” is broadly interpreted to include “assets of every kind”, movable or immovable, tangible or intangible.68 According to Sec. 362B(6)(e), this includes “an interest in other

(d) otherwise connected with a person within that paragraph.”.

(a) whether a person has been entrusted with prominent public functions (see point (9) of that Article),
(b) whether a person is a family member (see point (10) of that Article), and
(c) whether a person is known to be a close associate of another (see point (11) of that Article).”).


65 United Nations Convention Against Corruption (2004), at Article 20 (“Illicit enrichment” is defined as a “significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income”).


68 See e.g. Booz Allen Hamilton report for U.S. Department of Justice, at Findings, p. 47 (The Austrian legislation covers “…kinds of assets to which they can be applied (e.g., movable, immovable property, initial or converted proceeds, assets convoluted with legal income, transferred to third persons or relatives)”, citing the Council of Europe Group of States Against Corruption (GRECO); United Nations Convention Against Corruption (2004), at Article 2 (“(d) “Property” shall mean assets of every kind, whether corporeal or incorporeal, movable or
property” and, according to Sec. 362B(10), it can be comprised of “more than one item of property”.69 The second element of the scope, i.e. the value threshold, restricts the scope, ensuring that only property worth 50,000 GBP or more is covered. As mentioned above regarding civil forfeiture regimes, this acts as a safeguard against petty cases that could waste precious time and resources of the state and result in an overly-invasive regime, bogged down in court battles over fundamental rights. This value is also an indication that this regime aims at larger-scale crime. Indeed, in the initial 2016 proposal of the UK law, the threshold was 100,000 GBP.70 The third element of the scope requires that the property be held by the respondent – regardless of whether other people also hold it too (Sec. 362B(5)(a)) and regardless when the property was obtained, i.e. “before or after the coming into force” of the law (Sec. 362B(5)(b)). This last part broadens the temporal scope of the law. Moreover, the term “hold” should be interpreted broadly to include property held through a trust or through a complex corporate structure.71 Regarding the territorial scope, it also extends to cases “where property is registered in the name of an overseas company”.72

Another element of the material scope is the question as to what degree of discrepancy triggers suspicion. More specifically, what amount of discrepancy between the value of the property and the known sources of lawfully obtained income results in a UWO? This is not quantified or expressed numerically. Instead, the known lawful income must be “insufficient” for obtaining the property in question and the “reasonable grounds” standard applies again.7374 This places significant discretion in the hands of the authorities and Court.

Another element of the scope, which straddles both the personal and material scope of the law, is the meaning of “serious crime”. The respondents must have been (reasonably suspected to be) involved in, and thus the property is likely directly or indirectly the proceeds of, “serious crime”. This term includes some of the usual suspects, such as drug trafficking, organised crime and money laundering, and also certain tax crimes, or what are referred to as “offences in relation to public revenue”, which among

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69 Sec. 362B(10) (“Where the property in respect of which the order is sought comprises more than one item of property, the reference in subsection (2)(b) to the value of the property is to the total value of those items.”).
70 Anita Clifford, The Investigative Reach of UWOs, in White Collar Crime Centre, Unexplained Wealth Orders: thoughts on scope and effect in the UK, January 2017, at p. 10 (citing “Criminal Finances Bill 2016, s 362B(4)”).
71 UK, Criminal Finances Act 2017, Explanatory Notes, Overview of the Act, at p. 15, No. 71 (“Section 362H provides a broad definition of how an individual may “hold” property, for the purposes of sections 362A and 362B. The definition is specifically broad enough to address circumstances where property is held in trust or owned in a complex corporate structure arrangement.”).
72 UK, Criminal Finances Act 2017, Explanatory Notes, Overview of the Act, at p. 15, No. 72 (“Section 362H(5) clarifies that a UWO can be served in cases where property is registered in the name of an overseas company. This makes it explicit that the UWO provisions do extend to such cases.”).
73 Sec. 362B(3) (“The High Court must be satisfied that there are reasonable grounds for suspecting that the known sources of the respondent’s lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property.”); For more information, see Sec. 362B(6) (To make this determination, some assumptions are made regarding the value of the property and some definitions are provided. Under Sec. 362B(6)(b), “it is to be assumed that the respondent obtained the property for a price equivalent to its market value”. Under Sec. 362B(6)(c), “income is “lawfully obtained” if it is obtained lawfully under the laws of the country from where the income arises”. Under Sec. 362B(6)(d), ““known” sources of the respondent’s income are the sources of income (whether arising from employment, assets or otherwise) that are reasonably ascertainable from available information at the time of the making of the application for the order.”).
74 By comparison, see e.g. Far and Few, at p. 40 (“Switzerland’s Restitution of Illicit Assets Act, adopted in 2011, provides for a presumption of the illicit nature of the assets in cases in which the enrichment of the politically exposed person (PEP) is clearly exorbitant and the degree of corruption of the state or of the person in question is notoriously great (see box 5.1). Where successful, such presumptions allow for the freezing, forfeiture, and restitution of the proceeds of corruption in cases of failed states where mutual legal assistance (MLA) requests cannot succeed.” (emphasis added)).
others encompasses the “fraudulent evasion” of taxes. Regarding the territorial scope, it is global, taking into account serious crime “whether in a part of the United Kingdom or elsewhere” (Sec. 362B(4)(b)(i)).

Regarding the questions of procedure, the UK UWO procedure could be described as having three steps: the application, the order, and the statement. First, an “enforcement authority” applies to the “High Court”. The Court assesses the application to verify that the requirements of the UWO are fulfilled. There are five different agencies that are designated as “enforcement authorities” that can submit an application, including the tax authorities “Her Majesty’s Revenue and Customs”. Second, and provided that the Court is satisfied that the scope of the law is fulfilled, the Court issues an order. Third, the respondent must provide a statement. There are two possible scenarios. Depending on whether the respondent produces a statement in accordance with the order within the designated time or whether...

75 Sec. 362B(9) (“For the purposes of this section— (a) a person is involved in serious crime in a part of the United Kingdom or elsewhere if the person would be so involved for the purposes of Part 1 of the Serious Crime Act 2007 (see in particular sections 2, 2A and 3 of that Act”); Serious Crime Act 2007, Schedule 1 includes the following categories: Drug trafficking, Slavery etc., People Trafficking, Firearms offences, Prostitution and child sex, Armed robbery etc., Money laundering, Fraud, Offences in relation to public revenue, Bribery, Counterfeiting, Computer misuse, Intellectual property, Environment, Organised Crime, Financial sanctions legislation, Inchoate offences, Earlier offences.


77 Sec. 362A(1); see also Sec. 362A(2) (In addition to satisfying the Court that the scope of the law is fulfilled, “[a]n application for an order must— (a) specify or describe the property in respect of which the order is sought, and (b) specify the person whom the enforcement authority thinks holds the property (“the respondent”) and the person specified may include a person outside the United Kingdom.”).

78 Sec. 362A(7) (The “enforcement authority” refers to: “(a) the National Crime Agency, (b) Her Majesty’s Revenue and Customs, (c) the Financial Conduct Authority, (d) the Director of the Serious Fraud Office, or (e) the Director of Public Prosecutions (in relation to England and Wales) or the Director of Public Prosecutions for Northern Ireland (in relation to Northern Ireland).”).

79 Sec. 362A (The requirements of the order are the following: “(3) An unexplained wealth order is an order requiring the respondent to provide a statement— (a) setting out the nature and extent of the respondent’s interest in the property in respect of which the order is made, (b) explaining how the respondent obtained the property (including, in particular, how any costs incurred in obtaining it were met), (c) where the property is held by the trustees of a settlement, setting out such details of the settlement as may be specified in the order, and (d) setting out such other information in connection with the property as may be so specified. (4) The order must specify— (a) the form and manner in which the statement is to be given, (b) the person to whom it is to be given, and (c) the place at which it is to be given or, if it is to be given in writing, the address to which it is to be sent. (5) The order may, in connection with requiring the respondent to provide the statement mentioned in subsection (3), also require the respondent to produce documents of a kind specified or described in the order. (6) The respondent must comply with the requirements imposed by an unexplained wealth order within whatever period the court may specify (and different periods may be specified in relation to different requirements).”)

80 Sec. 362D “Effect of order: cases of compliance or purported compliance”.

Electronic copy available at: https://ssrn.com/abstract=3465485
the respondent does not produce a statement in accordance with the order within the designated time, different legal consequences will unfold, as will be discussed below.

Another element of the procedure is the question of the evidentiary standards that apply. As seen above, the terms used in the law are “reasonable cause” and “reasonable grounds”. This is described as a civil standard, rather than a criminal one. This is similar to the existing civil forfeiture law and to the existing UWO laws in Ireland and Australia. In theory, the standard in Ireland and Australia is the civil “burden of probable cause”; in practice, however, the authorities have applied a stronger one, i.e. a “clear and convincing standard”.

Regarding the legal consequences of the UK UWO, the effect of the order is, first, to legally compel a person to provide a statement. The respondent is obliged to provide a statement with the information requested regardless of “any restriction on the disclosure of information (however imposed)”. One exception to this, however, is legal privilege. In the end, the UWO may trigger civil recovery proceedings under the Proceeds of Crime Act 2002, under which the property could be confiscated.

As mentioned above, what happens next depends on whether the respondent complies with the order or does not. In “cases of compliance or purported compliance”, basically, the enforcement authority has to read the statement of the respondent and decide, based on the information and evidence provided therein, what action to take. It can either decide that no further action is needed or “some other action such as applying for a further UWO, beginning a civil recovery investigation or applying for a recovery order under section 266 of POCA”. Regarding the temporal element, there is no time limit. The wording of the law states that “enforcement authority may (at any time)” take this decision. There is one exception to this. If an “interim freezing order [is] in effect in relation to the property”, then a decision must be taken as soon as possible and, at the latest, within 60 days. Regardless, even if the authority decides to take no further action, it remains possible at any time in the future for proceedings to be taken again against the same property.

In “cases of non-compliance”, the effect of the order is that, automatically, the “property is presumed to be recoverable property” (emphasis added), thus instigating the civil recovery regime, potentially resulting in confiscation. Another possible legal consequence of non-compliance is to be declared in contempt of court, which brings along its own set of possible consequences including fines or jail time. In addition, if the reason for non-compliance is that the respondent made a “false or misleading”

81 Sec. 362C “Effect of order: cases of non-compliance”.
82 UK, Criminal Finances Act 2017, Explanatory Notes, Overview of the Act, at p. 14, No. 64 (“It is not necessary to prove to the criminal standard that the respondent, or other persons, are involved in such offences.”).
83 Booz Allen Hamilton report for U.S. Department of Justice, at Executive Summary, p. 3.
84 Sec. 362G(1).
85 Sec. 362G(2).
86 UK, Criminal Finances Act 2017, Explanatory Notes, Overview of the Act, at p. 15, No. 66.
87 Sec. 362D(5).
88 Sec. 362D(6) (“A determination under this section to take no further enforcement or investigatory proceedings in relation to any property does not prevent such proceedings being taken subsequently (whether as a result of new information or otherwise, and whether or not by the same enforcement authority) in relation to the property.”); see also Anita Clifford, The Investigative Reach of UWOs, in White Collar Crime Centre, Unexplained Wealth Orders: thoughts on scope and effect in the UK, January 2017, at p. 11.
89 UK, Criminal Finances Act 2017, Explanatory Notes, Overview of the Act, at pp. 14-15, No. 65 (“If following the expiry of the response period, a respondent fails to comply without reasonable excuse, the property concerned is to be treated as “recoverable property”. “Recoverable property” means property obtained through unlawful conduct. In this case, the enforcement authority must consider what action it intends to take against the property. This may include recovering the property using the civil recovery powers provided by Part 5 of POCA. If proceedings are commenced, the respondent can provide evidence to rebut the presumption that their property is recoverable.”).
statement, this is deemed a criminal offence.⁹⁰ These consequences confirm what a powerful tool the UWO is.

To show deference to the discretion that this grants to the authorities, it seems advisable that both the authorities applying for the UWO and the High Court deciding whether to grant the UWO should follow the example of Ireland in proceeding with caution and selectively pursuing only those cases that seem uncontroversial and where the evidence is basically incontestable. In addition to being selective in choosing significant cases, the Irish authorities imposed a higher burden of proof on themselves than the law required, as mentioned. To some extent, this undermines the point of UWOs serving as an additional investigative tool, i.e. one of their main benefits is that they ease the evidence-gathering process; otherwise there is less to separate UWOs from traditional forfeiture regimes. But, this caution is merited, given what powerful tool UWOs are, and is especially important in the beginning, in order to prevent public backlashes against the UWO regime, as happened in Australia. After trust in UWOs grows and their legitimacy becomes established, the approach of the authorities can be adjusted accordingly.

Part Two: Unexplained Wealth Orders and the tax system

Overview

There are at least three ways in which the tax system and UWOs are related. First, what UWOs and taxes have in common is that both can capture the proceeds of crime. In this way, they can be complementary tools in working toward this overarching goal. Second, the substantive scope of tax laws can either contribute to or undermine the success of UWOs. In this respect, the experience of Australia is instructive. Third, the tax authorities can play a crucial role in the evidence-gathering process of UWOs. In this respect, the experience of Ireland is instructive.

Thus, this section is divided into three parts to explore (1) the complementary function of tax laws, (2) the questions of the scope of application and (3) the questions of effective enforcement.

The complementary functions and goals

As has been made famous by the case of Al Capone during the Prohibition era in the United States,⁹¹ one effective way to target the proceeds of crime is to tax those proceeds. Conveniently, in addition to taking away a portion of those proceeds, such a case also creates grounds for throwing the people who generated those proceeds behind bars – if the authorities cannot gather enough evidence to convict them for their organised criminal activities, they can convict them of tax evasion.

The legal developments that eventually lead to the UK UWO law offer a case in point of the importance of tax laws in countries’ ability to target the proceeds of crime. One of the reasons for enacting the Proceeds of Crime Act 2002 was precisely because of a doctrine in UK law, developed by the Courts, according to which the proceeds of pure crime were not subject to tax. This was possible because of the structure of the UK income tax laws. The UK income tax laws are based on an exhaustive list of five

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⁹⁰ UK, Criminal Finances Act 2017, Explanatory Notes, Overview of the Act, at p. 15, No. 68 (“In addition to the specific criminal offence of making a false or misleading statement, a law enforcement agency may alternatively elect to bring contempt of court proceedings if an individual fails to comply with a UWO.”).
categories of income—sometimes referred to as a “schedular” concept of income—with the consequence that any income that falls outside of the listed categories is therefore not taxable, as it simply falls outside the scope of the income tax laws altogether. For comparison purposes, similarly, the Austrian Income Tax Act is also based on categories of income (in its case, seven categories). By contrast, the United States Internal Revenue Code is based on a “global” definition of income, meaning that all income is taxable “from whatever source derived” unless expressly exempt by provisions of the law. One consequence of the “schedular” approach to defining income has been that UK tax payers can try to claim that their income stems from a source or activity, such as gambling winnings, that is not covered by any of the categories under the income tax laws. In some cases, regarding unreported or illegally obtained income, it was discovered that the income in question stemmed from something stolen, for example. In wading through the listed categories of income, the only category that could potentially apply was income from a trade or business. Courts however have reasoned that pure crimes, such as burglary or extortion, cannot be considered a trade because it does not have a commercial character. Therefore, the income does not fall under the scope of any of the categories and, therefore, no taxes, interest, or penalties/fines can be levied by the authorities and no charges of tax evasion can be upheld. In other cases, though, income illegally obtained from drug trafficking or black-market activities, such as smuggling goods for sale, is taxable. In practice, this fine line can be a challenging one to draw for the tax administration.

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92 Belema Obuoforibo, *United Kingdom-Individual Taxation*, Country Analyses IBFD (accessed 28 Dec. 2017), at Sec. 1.2.1. (The categories are: “income from UK or overseas property businesses”; “savings and investment income”; “income from employment and pensions”; and “miscellaneous income”).


94 John Tiley, *The United Kingdom*, in Hugh J. Ault and Brain J. Arnold (principal authors), *Comparative Income Taxation: A Structural Analysis* (Kluwer Law International, 2010, 3rd edition), at p. 145 (“Thanks to the recent Tax Rewrite Programme (see further below sections 5 and 6), income tax is no longer expressed in a series of Schedules, lettered A to F. However, it remains a schedular system in substance. If income does not come within any particular part of the relevant Acts, then it is not chargeable to income tax.”).

95 See Einkommensteuergesetz 1988 (Austrian Income Tax Act), at Sec. 2(3).

96 See United States Internal Revenue Code, at Sec. 61.


98 See HM Revenue & Customs, HMRC Internal Manual, *Business Income Manual*, “Meaning of trade: exceptions and alternatives: illegal activities - what is a trade?” (published: 22 Nov. 2013; updated: 3 Oct. 2017), available at https://www.gov.uk/hmrc-internal-manuals/business-income-manual/bim22010 (accessed 21 Jan. 2018) (“What is lacking is the commercial character. They do not obtain their goods by normal commercial means such as buying or growing them. [...] The conclusion is that the test is simply whether the activity involves the acquisition and provision, on a commercial basis, of goods or services to a customer for reward? Pure crime (extortion or burglary) does not involve the commercial acquisition and provision of goods or services. Selling controlled drugs and smuggling goods for sale (as opposed to personal consumption) may well involve the commercial acquisition and provision of goods or services.”).

To overcome the challenges that this distinction posed upon discoveries of unreported or unexplained income or wealth, the Proceeds of Crime Act 2002 included as one of its four main regimes the possibility to tax the proceeds of crime. A study of the amount of income earned by criminal organizations served as another impetus for adding the new tax powers: “...it was estimated that criminal organizations have generated somewhere between £6.5M and £11B in 1996 alone...”\(^{100}\) Leaving such amounts untaxed not only leaves untouched the economic incentive for criminals (i.e. their profits), but it can also be perceived as unfair. While the money of honest hardworking UK citizens carried the full burden of taxation, millions earned by criminals were potentially tax free. It should be noted, though, that the tax authorities were not fully empowered by the 2002 Act; instead the “measure [was] introduced as an alternative to civil recovery” (emphasis added) and these powers were not given directly to the tax authorities but were given to the Director of the Assets Recovery Agency (or ARA, the special investigative agency created by the Act, which however is no longer in operation).\(^{101}\) In 2005, this changed. The increasing importance of taxation as a tool alongside forfeiture in capturing the proceeds of crime was recognized. New guidelines allowed civil recovery and tax investigations to take place simultaneously.\(^{102}\)

This recognition and empowerment of the role of taxation in depriving criminals of their profits will reinforce the UWO under the 2017 Act. In this regard, in Ireland, taxation proved one of the most powerful tools at its disposal. Either taxation laws can be applied alongside proceedings resulting from a UWO or, in case the UWO proceedings do not succeed, the proceeds of crime can still be reduced through taxation, since the information gathered throughout the process often uncovers various income, capital and transactions that were not reported for tax purposes. In this way, back taxes that should have been paid can now be collected, including interest and possibly penalties/fines. In Ireland, unpaid taxes were collected on “income, capital gains, value added tax (VAT), and corporation tax”.\(^{103}\) According to the 2011 Report, from 1998 to 2009, while USD 16 million was recovered from forfeiture orders, ten times more, or a total of USD 160 million, was recovered under tax laws.\(^{104}\)

In sum, this complementary function of tax laws and UWOs occurs in two ways. First, at the evidence-gathering stage, UWOs can be initiated on the basis of information received from tax authorities and tax authorities can use the information received from the proceedings initiated under UWOs.\(^{105}\) This inter-agency cooperation will be discussed further below. Second, as discussed above, both laws can be used to deprive criminals, to varying degrees, of the proceeds of their crimes and, especially where

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\(^{100}\) Booz Allen Hamilton report for U.S. Department of Justice, at Findings, p. 45.

\(^{101}\) See e.g. Booz Allen Hamilton report for U.S. Department of Justice, at Findings, p. 45. See also UK, Proceeds of Crime Act 2002, Explanatory Notes, Summary, at pp. 2-3, para. 9 “Part 6: empowers the Director of ARA to exercise functions of the Inland Revenue in relation to income, gains and profits arising or accruing as a result of criminal conduct.”

\(^{102}\) Booz Allen Hamilton report for U.S. Department of Justice, at Findings, p. 46 (“The intention of the legislature was to make confiscation the primary tool to deprive criminals of their profits, with the civil recovery remaining an alternative, and the taxation regime to be used as a last resort. However, this was later modified with the Revised Guidance issued by the Secretary of State to the Director of ARA in February 2005, indicating that criminal investigations, civil recovery, and taxation investigations and proceedings can be instituted at the same time, thereby modifying the alternative role of the civil recovery and taxation regime, and placing them at the forefront of the forfeiture regimes.”).

\(^{103}\) Booz Allen Hamilton report for U.S. Department of Justice, at Country Focus –Ireland/Evaluating the Effectiveness, p. 135.


\(^{105}\) Booz Allen Hamilton report for U.S. Department of Justice, at Country Focus –Ireland/Evaluating the Effectiveness, pp. 131-132 (“The CAB has initiated financial investigations based on information received from the Revenue authorities and the Revenue authorities have used information resulting from financial investigations conducted by the CAB.”).
proceedings resulting from UWOs do not succeed, tax laws can fill in some of the gap, acting as a back-up.

**The impact of the substantive scope of tax laws on UWOs**

Recall that one of the key, and possibly radical, features of UWOs is the reversal of the burden of proof onto the owners of property. Recall also that advocates of UWOs argue that this reversal of the burden of proof is precisely the point — that is, it is precisely what is needed in the face of grand corruption and organised crime, where cases grow complex and cross borders, as it helps surmount the barriers that hinder existing forfeiture regimes. Tax laws have a role to play here, as their scope can either create, or close, possible escape routes from the respondent’s burden of proof.

In Australia, one of the factors that undermined the success of the UWO regime (of the state of Western Australia) was described as follows:

> “Another factor is that the property owner can meet his evidentiary burden simply by stating that the funds in question were an inheritance or gambling winning. Since in Australia such income does not have to be reported to tax officials, there is no record that prosecutors can use to contradict the respondent’s claim. Consequently, this shifts the burden back to the government, but there is no paper trail evidence that these funds would create in many other countries making it difficult for the government to disprove the property owner’s claims.”

One author, Natasha Reurts, warned against the possibility that the same could happen in the UK “if an individual subject to a UWO proceeding says that their unexplained wealth is the result of successful trips to William Hill.”

What can be deduced from the Australian experiences is that this escape route runs on a combination of (1) the tax laws in connection with (2) the evidentiary burden. In Australia, taxes on gifts and inheritances were abolished and winnings from gambling or lotteries are not assessable income. Also, in Australia, how the burden of proof ended up applying in practice was influenced by a Court doctrine known as the “Brigenshaw standard” and by the detailed requirements for authorities’ collection of evidence in the Criminal Property Confiscation Act (CPCA), such that the burden that the authorities had to meet was higher than that of the respondent and the respondent was able to easily discharge its burden. With this in mind, the UK – or any country considering UWOs – should review both factors

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106 Booz Allen Hamilton report for U.S. Department of Justice, at Executive Summary, p. 2.
106 Booz Allen Hamilton report for U.S. Department of Justice, at Country Focus – Australia/Evaluating the Effectiveness, pp. 113-114 (“The DPP stated that one of the main reasons for so few unexplained wealth applications is the standard of evidence imposed on the prosecution. […] Furthermore, the Brigenshaw standard, mentioned previously, sets a standard of proof higher than the balance of probabilities to show that the person owns unexplained wealth. In contrast, the courts have accepted a lower burden of proof for the respondent, whereas a credible denial on oath would be considered sufficient to discharge the burden. A defense attorney corroborated the statement of the DPP that the standard of proof is higher for the state based on the Brigenshaw principle, while the standard of proof for the respondent is much lower. The unpredictable judicial process and the courts leaning or favoring the respondent has caused the DPP to shy away from bringing UWOs.”).
in the context of its legal system. First, as regards income tax laws in the UK, the scope of the problem is reduced. While gambling or lottery winnings are not taxed, inheritances and gifts are.\textsuperscript{111} Nevertheless, there should be some wariness as regards inheritance tax in the UK, since only very few estates actually pay any tax – often less than 4% since 2000\textsuperscript{112} – as most fall below the exemption threshold of 325,000 GBP (increased up to 850,000 GBP in some cases) or benefit from other exemptions.\textsuperscript{113} Second, as regards the evidentiary burden, the UK Courts are not constrained by a similar doctrine and, as the UWO regime in its infancy, the UK still has the opportunity to shape what precisely is required in a respondent’s statement before the burden of proof is discharged. In doing so, the UK should keep in mind the interaction between these two factors by ensuring, for example, that merely claiming that unexplained wealth stems from a lucky win in a foreign country should not suffice to discharge the burden of proof, but instead must be accompanied by documentation to substantiate the claim.

The impact of tax authorities on UWOs

Having looked at questions of scope, this section turns to questions of effective enforcement. Of course, in addition to the potential profits, another factor that also drives crime is the likelihood of getting caught. This underlines the fact that, in addition to well-designed laws, effective enforcement is crucial.

As with any law, a UWO is useless without proper mechanisms to carry it out and enforce it. To become more than promising words on paper, the institutional framework has to be sturdy. The OECD emphasizes inter-agency cooperation as an indispensable factor in the success of targeting financial crimes.\textsuperscript{114} Indeed, the complex global nature of financial crime requires an equally sophisticated response.\textsuperscript{115} For this reason, the OECD recommends a “whole-of-government approach” that involves

\textsuperscript{111} Belema Obuoforibo, United Kingdom-Individual Taxation, Country Analyses IBFD (accessed 28 Dec. 2017), at Sec. 6.


\textsuperscript{113} The author would like to thank Jonathan Leigh-Pemberton for bringing this statistic to her attention. Any inaccuracies or errors, of course, remain the author’s own. See UK, Inheritance Tax Act 1984, Sec. 7, referring to Schedule 1 of the Act. For more information on inheritance tax in the UK, see the official website GOV.UK, Inheritance Tax, Overview, available at https://www.gov.uk/inheritance-tax (accessed 21 Jan. 2018). See also UK, HM Revenue & Customs, Inheritance Tax Statistics 2014-15 (28 July 2017), at p. 4, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/632797/IHTNationalStatisticsCommentary.pdf (accessed 21 Jan. 2018) (It is also relevant that, according to the “Summary”, it appears that not all estates are subject to a reporting requirement: “The estates represented by the statistics are limited to those for which a grant of representation is required and do not represent estates from all deaths. A grant of representation is issued by the courts to appoint an executor so that an estate can be distributed. In England, Wales and Northern Ireland this is likely to be a grant of probate (if there is a will) or letters of administration (if there is no will), while in Scotland it is likely to be a confirmation of executors. Such estates represent about half of all deaths. A grant of representation may not be needed for low-value estates (generally those estates worth less than £5,000, though this figure can vary) or for estates which were held in joint names and which pass to the surviving spouse or civil partner. […] The 284,756 estates issued a grant of representation in 2014-15 account for approximately 48% of all deaths in that year.”).


“the tax administration, the customs administration, the FIU, the police and specialised criminal law enforcement agencies, the public prosecutor’s office, authorities responsible for corruption investigations and financial regulators”.

Ireland, which has a success rate at or near 100% in UWO-related proceedings, is often cited as a model.

“The single factor most important to the success of Ireland’s UWO (PoCA) law is the CAB. By forming an elite, well-resourced unit, with staff from not only police and prosecutors, but also tax and social welfare agencies, Ireland has been able to fully exploit the statute. Members of the CAB retain the powers and duties vested in them by their home agencies and also have the powers of their CAB colleagues, i.e., each is cross-deputized so, e.g., a CAB police agent also has the tax authority of a CAB revenue agent, and a CAB revenue agent has the arrest authority of a CAB police agent. Combining these resources, skills, and experience in one agency enables the CAB to attack the proceeds of crime not only from by way of UWO forfeitures but also by taxing these and denying social welfare payments to the respondents who own or control such property. Further, the CAB has access to a large database, Police Using Lead System Effectively (PULSE) which contains comprehensive information on all citizens’ criminal, traffic, tax, property, customs, social welfare and consumer credit records. This enables the CAB to gather large and comprehensive amounts of information to compare assets to income and thereby determine whom they should target.”

Ireland went beyond mere inter-agency cooperation; it created an entirely new multi-disciplinary agency bringing together the skills and personnel of the agencies in one place to recover the proceeds of crime. What can be deduced from the Irish experience is that the role of tax authorities in a successful UWO regime results from two forms of cooperation: (1) the sharing of information and (2) the sharing of powers.

Regarding the sharing of information, both legal and practical barriers have to be lifted to render this possible. The general rule is that tax authorities are obliged to respect the confidentiality of the


117 See e.g. Booz Allen Hamilton report for U.S. Department of Justice, at Country Focus – Ireland/Case Law, p. 148 (“The success rate of the implementation of civil confiscation to date is considered to be 100%.”); Booz Allen Hamilton report for U.S. Department of Justice, at Country Focus – Ireland/Evaluating the Effectiveness, p. 135 (“And finally it is important to note that the success rate of the implementation of civil forfeiture to date is almost 100 percent, with two cases not leading to forfeiture.”).

118 See e.g. Booz Allen Hamilton report for U.S. Department of Justice, at Country Focus – Ireland, p. 124 (“It also has served as a model for many other countries in designing and drafting forfeiture regimes. The Council of Europe Group for Evaluation of Corruption (GRECO) concluded in its annual report that Ireland had a solid legislative framework […]. In addition, the CAB, the agency established to implement the PoCA, played a major role in leading the development of the Camden Asset Recovery Inter-agency Network (CARIN). The CAB held the presidency of the CARIN network for several years and assisted in developing its professional and administrative capabilities.”).


taxpayers’ information provided in their tax returns. According to the OECD, this is a fundamental principle of many tax systems. In fact, in the UK, tax officials could be subject to imprisonment or fines for “wrongful disclosure”. Similar confidentiality laws existed in Ireland and, at first, were an obstacle for the UWO regime. Ireland quickly acted by passing a law to expressly allow the tax authorities to share information with the Criminal Assets Bureau. The UK, in codifying the duty of confidentiality in 2005, also enacted exceptions that allow disclosure for purposes such as “preventing or detecting crime”. Moreover, just last year, in April 2016, the UK announced its first steps towards what seems to be an Irish-PULSE-like system through the establishment of a “Joint Financial Analysis Centre (JFAC)” with new “software tools and techniques” and a “proactive acquisition of data”.

Regarding the sharing of powers, both establishing a dedicated specialized agency staffed with experts from the police and tax authorities and cross-deputizing the members of this agency contributed to a seamless sharing of powers in Ireland. The UK has so far had many stops and starts in this process. First, under the Proceeds of Crime Act 2002, it established the Assets Recovery Agency (ARA) and indeed granted “revenue functions to the Director of the ARA to assess a suspect’s income and taxes”. However, the ARA has since closed. Reasons cited include that the ARA could not independently instigate cases, but instead had to rely on referrals from other bodies; the lack of an organised central database for tracking cases; poor management and a high turnover of the Financial Investigators. In its place, the UK established the Serious Organised Crime Agency (SOCA). The SOCA has since closed. Reasons cited include that, despite the SOCA, the efforts for fighting crime in the UK remained fragmented among numerous national agencies, each with their own priorities and reporting standards, such that cooperation and information sharing remained inefficient. In its place, the UK

121 In the UK, Commissioners for Revenue and Customs Act 2005, Sec. 18.
122 OECD, Keeping It Safe: The OECD Guide on the Protection of Confidentiality of Information Exchanged for Tax Purposes (OECD 2012), at p. 5 (“Confidentiality of taxpayer information has always been a fundamental cornerstone of tax systems.”).
123 Commissioners for Revenue and Customs Act 2005, Sec. 19.
124 See e.g. Booz Allen Hamilton report for U.S. Department of Justice, at Country Focus –Ireland/Evaluating the Effectiveness, p. 140 (“An impediment the CAB faced at the onset was coordination and access to tax records. The revenue code limited the use of tax records for purposes of tax administration, preventing revenue officers from sharing them with CAB officers. However, the situation was remedied with the Disclosure of Certain Information for Taxation and Other Purposes Act in 1996, which amended the code to facilitate the assessment and collection of taxes by a body like the CAB. The most important amendment is the provision to the 1994 Act that permits the exchange of information between the Revenue Commissioners and the Irish police in appropriate circumstances.”).
125 See e.g. Booz Allen Hamilton report for U.S. Department of Justice, at Country Focus –Ireland, p. 126 (citing “the Disclosure of Certain Information for Taxation and Other Purposes Act in 1996”).
126 Commissioners for Revenue and Customs Act 2005, Secs. 20-21.
128 Booz Allen Hamilton report for U.S. Department of Justice, at Findings, p. 45.
organisations have emerged and have a role in tackling forms of organised crime (all with varying responsibilities for policy, prevention, investigation, for example). … With multiple approaches, fragmentation has developed producing inconsistencies in methodology, prioritisation and use of resources. Separate reporting lines, funding streams and governance structures, within and across agencies, have made sharing priorities, resources and producing inconsistencies in methodology, prioritisation and u

134 Sec. 362A(7).
135 Sec. 362A(7)(b).
136 See also UK, Criminal Finances Act 2017, Chapter 4 “Enforcement Powers and Related Offences” and “Extension of Powers”, at pp. 78 et seq.
tracing this income back to its alleged source with some documentation (receipts, tickets, etc.) before the burden of proof shifts back to the authorities, since otherwise the authorities are placed back at square one where they have to track down the information in foreign jurisdictions.

Second, the tax authorities can have a direct impact on the success of UWOs. Experience in Ireland and in Australia has concretely demonstrated the role of inter-agency cooperation in the success of UWOs. A law can only be as successful as its enforcement. The Irish experience, namely its Criminal Assets Bureau (CAB) that combined the knowledge and powers (by actually cross-deputizing the agents) of the police and tax authorities among others, should serve as a model for the institutional framework in the UK. As regards the involvement of the tax authorities, the UK recognizes their role by, inter alia, granting the HMRC the power to independently submit an application for a UWO and by, in turn, granting the NCA some revenue powers. As regards the overall institutional framework, the UK framework is still under construction, but laid the strongest foundation yet in April 2016 with the launch of a new multi-agency taskforce and Joint Financial Analysis Centre (JFAC).

Finally, operating separately but alongside one another, UWOs and tax laws can be powerful sidekicks in the effort to capture the proceeds of crime. In a mutually beneficial way, the information flows between the authorities helps enforce both sets of laws. Moreover, either they can apply simultaneously or, in cases where a UWO is not ultimately pursued or does not succeed, tax laws can provide an alternative route for recovering some of the proceeds through unpaid back taxes, interest and fees. In these ways, UWOs and tax laws share some complementary functions and goals.