Criminal Finances Bill
(Bill 75 of 2016-17)

By Joanna Dawson; Timothy Edmonds; Antony Seely; Jacqui Beard

Contents:
1. Introduction
2. Proceeds of Crime
3. Money Laundering
4. Terrorist Finance
5. Corporate offences of failure to prevent facilitation of tax evasion
6. The Bill
# Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Summary</strong></td>
<td>4</td>
</tr>
<tr>
<td>1. <strong>Introduction</strong></td>
<td>5</td>
</tr>
<tr>
<td>1.1 The Bill</td>
<td>5</td>
</tr>
<tr>
<td>1.2 Background</td>
<td>6</td>
</tr>
<tr>
<td>2. <strong>Proceeds of Crime</strong></td>
<td>8</td>
</tr>
<tr>
<td>Criticism of the scheme</td>
<td>8</td>
</tr>
<tr>
<td>3. <strong>Money Laundering</strong></td>
<td>10</td>
</tr>
<tr>
<td>3.1 The problem</td>
<td>10</td>
</tr>
<tr>
<td>3.2 Legislative measures</td>
<td>11</td>
</tr>
<tr>
<td>International</td>
<td>11</td>
</tr>
<tr>
<td>3.3 Professional measures</td>
<td>13</td>
</tr>
<tr>
<td>Suspicious Activity Reports (SARS)</td>
<td>13</td>
</tr>
<tr>
<td>3.4 Review of AML strategy</td>
<td>19</td>
</tr>
<tr>
<td>High End Money Laundering Strategy</td>
<td>19</td>
</tr>
<tr>
<td>UK National Risk Assessment</td>
<td>21</td>
</tr>
<tr>
<td>Action Plan for anti-money laundering and counter terrorism finance</td>
<td>22</td>
</tr>
<tr>
<td>4. <strong>Terrorist Finance</strong></td>
<td>24</td>
</tr>
<tr>
<td>Legislation</td>
<td>24</td>
</tr>
<tr>
<td>Policy developments</td>
<td>24</td>
</tr>
<tr>
<td>5. <strong>Corporate offences of failure to prevent facilitation of tax evasion</strong></td>
<td>26</td>
</tr>
<tr>
<td>5.1 The Government's strategy to reduce offshore tax evasion</td>
<td>26</td>
</tr>
<tr>
<td>5.2 Consultation on the new offence</td>
<td>28</td>
</tr>
<tr>
<td>The first consultation document</td>
<td>28</td>
</tr>
<tr>
<td>Initial reactions</td>
<td>32</td>
</tr>
<tr>
<td>Detailed responses to the consultation</td>
<td>36</td>
</tr>
<tr>
<td>5.3 Budget 2016 and the Panama Papers</td>
<td>38</td>
</tr>
<tr>
<td>5.4 Second consultation on the new offence</td>
<td>42</td>
</tr>
<tr>
<td>6. <strong>The Bill</strong></td>
<td>46</td>
</tr>
<tr>
<td>6.1 Introduction</td>
<td>46</td>
</tr>
<tr>
<td>6.2 Part 1</td>
<td>47</td>
</tr>
<tr>
<td>Investigations</td>
<td>47</td>
</tr>
<tr>
<td>Disclosure Orders</td>
<td>49</td>
</tr>
<tr>
<td>Money laundering</td>
<td>49</td>
</tr>
<tr>
<td>Civil Recovery</td>
<td>51</td>
</tr>
<tr>
<td>Enforcement powers</td>
<td>52</td>
</tr>
<tr>
<td>Assault and obstruction offences</td>
<td>52</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>53</td>
</tr>
<tr>
<td>6.3 Part 2: Terrorist Property</td>
<td>55</td>
</tr>
<tr>
<td>Disclosure of information</td>
<td>55</td>
</tr>
<tr>
<td>Civil recovery</td>
<td>56</td>
</tr>
<tr>
<td>Accredited financial advisers</td>
<td>56</td>
</tr>
<tr>
<td>6.4 Part 3: Corporate offences of failure</td>
<td>56</td>
</tr>
</tbody>
</table>
Tim Edmonds, Money Laundering, section 2
Joanna Dawson, Proceeds of crime, terrorist finance, sections 1 and 3
Antony Seely, Tax evasion, section 4
Jacqui Beard, Assault and obstruction offences,
Summary

The Criminal Finances Bill was introduced on 13 October 2016. It would provide for a number of measures aimed at improving the Government’s ability to target the revenue generated by organised crime, focusing in particular on money-laundering and terrorist finance. It follows the publication in April 2016 of an Action Plan for Anti-Money Laundering and Counter-Terrorist Finance.

The Bill would introduce Unexplained Wealth Orders, to require an individual or organisation suspected of involvement with serious criminality to explain the origin of assets, where their assets appears to be disproportionate to known income.

It would provide law enforcement agencies with seizure and forfeiture powers to target proceeds of crime stored in bank accounts, or as precious metals or jewels.

It would reform the rules governing Suspicious Activity Reports (SARs) provided by regulated companies (such as banks) to the National Crime Agency (NCA). The NCA would have additional time to gather evidence in relation to transactions that may involve the proceeds of crime, and the power to request further information. The Bill would also enable information sharing between regulated companies, enabling banks to build an intelligence case for suspected money laundering before submitting a report to the NCA.

And it would extend the use of disclosure orders, enabling law enforcement officers to require the disclosure of relevant information in money-laundering investigations.

The Bill would also make equivalent changes to the regime governing terrorist finance, so that the provisions on disclosure orders and seizure and confiscation powers also apply to investigations under the Terrorism Act 2000.

Finally, the Bill would introduce a new corporate offence where a corporation or a partnership fails to prevent someone who acts for it, or on its behalf, from criminally facilitating tax evasion. In its March 2015 Budget the Coalition Government announced that it would consult on measures to reduce offshore tax evasion, including this new corporate offence. In April 2016 the then Prime Minister David Cameron promised legislation on this later this year. This was one of a series of initiatives Mr Cameron announced following the publication of the ‘Panama Papers’ – a tranche of financial records obtained by the International Consortium of Investigative Journalists from Mossack Fonseca, a law firm with headquarters in Panama. The law firm had provided advice on establishing offshore companies to a wide variety of politicians, celebrities, and other wealthy individuals.

The Bill covers the whole of the United Kingdom but some clauses apply to selected parts only.
1. Introduction

1.1 The Bill

The Criminal Finances Bill was introduced on 13 October 2016, together with Explanatory Notes. Its second reading is on 25 October 2016.

The Bill consists of 50 clauses, but many of these contain lengthy amendments or additions to the Proceeds of Crime Act 2002 (POCA). POCA is the principal legislation aimed at preventing the use of funds derived from criminal activity or which is intended to be used to support other criminal activity. The Bill would also make equivalent changes to the Terrorism Act 2000, which provides for offences relating to terrorist finance.

The Bill covers the whole of the United Kingdom but some clauses apply to selected parts only. Annex C to the Explanatory Notes sets out the application of clauses to different parts of the United Kingdom and includes a note on subject matter and legislative competence of devolved administrations.

According to the Explanatory Notes:

The Criminal Finances Bill will make the legislative changes necessary to give law enforcement agencies, and partners, the capabilities and powers to recover the proceeds of crime, tackle money laundering and corruption, and counter terrorist financing.

The measures in the Bill aim to: improve cooperation between public and private sectors; enhance the UK law enforcement response; improve our capability to recover the proceeds of crime, including international corruption; and combat the financing of terrorism.

The main measures contained in the Bill are:

1. **Unexplained Wealth Orders.** The Bill will enable a court to make an Unexplained Wealth Order to require an individual or organisation who is suspected of direct involvement in or association with serious criminality to explain the origin of assets, where their assets appear to be disproportionate to their known income. A failure to provide a response would give rise to a presumption that the property was recoverable, in order to assist any subsequent civil recovery action. The Bill would also allow for this power to be applied to foreign politicians or officials or those associated to them, known as Politically Exposed Persons (“PEPs”), helping to tackle the issue of the proceeds of grand corruption overseas being laundered in the UK.

2. **Improved seizure and forfeiture powers.** Current legislation allows law enforcement agencies to take action against criminal cash, but they are unable to do so if criminals store the proceeds of crime in bank accounts or other means, such as precious metals and jewels. There is evidence that these moveable items are being used to move value, both domestically and across international borders. The Bill will create new civil powers, similar to the existing cash seizure and forfeiture schemes in current legislation, which would close this gap. The powers will be exercisable where
there is reasonable suspicion that the property is the proceeds of crime, or that it will be used in unlawful conduct in a manner similar to cash.

3 **Reform to the SARs regime.** The SARs regime provides a critical intelligence resource direct to the NCA from regulated companies, allowing the NCA the opportunity to approve or refuse consent to transactions that may involve the proceeds of crime. Where the NCA refuses consent, the Bill will extend the current 31 day moratorium period granted by a court, for up to six months so as to allow investigators sufficient time to gather evidence to determine whether further action, such as restraint of the funds, should take place. It will also create a power for the NCA to request further information following receipt of a SAR; or where they have received a request from a Financial Investigation Unit in another country.

4 **Information Sharing.** The Bill will provide for a legal gateway for the sharing of information between entities within the regulated sector (e.g. banks). This has already been happening under the Joint Money Laundering Intelligence Taskforce (JMLIT) pilot, helping the banks to build the intelligence case for suspected money laundering before they submit a report to the NCA.

5 **Corporate failure to prevent tax evasion.** At present, if an individual evades tax and this is facilitated by the advice or actions of those in a corporation, although the individual will have committed a crime and those directly facilitating it could be prosecuted, the corporate entity does not hold any liability. The Bill would create two new offences so that a corporation in this situation could be prosecuted – one to catch companies facilitating the evasion of UK taxes; another to cover evasion of foreign taxes facilitated by an entity that has some nexus with the UK (such as a UK-based office), and where there is dual criminality with the UK.

6 **Disclosure Orders.** The Bill would authorise a law enforcement officer by way of a Disclosure Order, to require someone who has relevant information in a money laundering investigation to answer questions and provide information or documents. Disclosure Orders are already used in confiscation investigations and by the Serious Fraud Office (SFO) in fraud investigations, and the Bill would extend their use to money laundering investigations.

7 **Combatting Terrorist Finance.** The Bill would also make complementary changes to the law enforcement and intelligence agency response to the threat of terrorist finance, by mirroring many of the provisions in the Bill on Disclosure Orders, and Seizure and Confiscation powers, so that they also apply for investigations into offences under the Terrorism Act 2000 (TACT).

1.2 **Background**
The Bill follows a number of consultations and announcements.

Within the last two years there has been a major review of Anti-Money Laundering strategy in the UK. The review has produced three
documents which have in varying degrees informed the current proposed legislation.

The first is the *High End Money Laundering Strategy and Action Plan* published by the National Crime Agency in December 2014.

The second is a follow-on Report published jointly between the Treasury and the Home Office in October 2015 - *UK national risk assessment of money laundering and terrorist financing*\(^1\)

These were supplemented in April 2016 by a further Treasury/ Home Office document, *Action Plan for anti-money laundering and counter-terrorist finance*.

With respect to tax evasion, the Coalition Government announced in its March 2015 Budget that it would consult on several measures to reduce offshore tax evasion, including the new corporate offence.


Subsequently in April 2016 the then Prime Minister David Cameron made a commitment that the Government would introduce legislation to this effect later this year. This was one of a series of initiatives Mr Cameron announced following the publication of the ‘Panama Papers’.

HM Revenue & Customs published draft legislation for the new corporate offence along with draft guidance on 17 April 2016. This second consultation closed on 10 July 2016, and on 13 October 2016 the Government published a summary of the responses it had had, with a revised version of its draft guidance, alongside the Bill.

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\(^1\) HM Treasury, Home Office; *UK national risk assessment of money laundering and terrorist financing*, October 2015
2. Proceeds of Crime

The Proceeds of Crime Act 2002 (POCA) sets out the legislative scheme for the recovery of criminal assets. It was intended to:

- ensure that criminals do not profit from their criminal activity;
- deter the commission of further offences; and
- reduce the monies available to criminals to fund further criminal enterprises.

Criminal confiscation is the most commonly used power and occurs after a conviction. The amount of the order is based on 'criminal benefit', which is either defined in terms of the specific crime, or based on a judgment that the offender has lived a criminal lifestyle.

The Act also enables the recovery of the proceeds of crime in the absence of a conviction via civil recovery, cash seizure and taxation powers.

POCA further provides for search and seizure powers; powers to apply for production orders and disclosure orders; and allows for the freezing or restraint of assets to prevent dissipation prior to a confiscation order being made.

£155m was collected by enforcement agencies under confiscation orders during 2014-15. However, the total debt outstanding from confiscation orders at September 2015 was £1.61bn. The estimated value of assets belonging to offenders with confiscation orders which are overseas was £300m.\(^2\) The National Audit Office estimates that the costs of administering the scheme is approximately £100m per year.\(^3\)

Civil recovery orders totalled £17.8 million in 2014-15. Receipts for cash forfeiture vary from £30-£50m per year.\(^4\)

Criticism of the scheme

The scheme has been subject to criticism that is it not effective and does not provide value for money.\(^5\)

The National Audit Office published a report in 2013\(^6\) which concluded that performance should be improved. This was followed by a report by the Public Accounts Committee in March 2014.\(^7\) Both made recommendations in the following areas:

- Better governance and strategy;
- More use and awareness of orders;

\(^3\) Ibid
\(^4\) Ibid
\(^5\) This criticism has mainly focused on the criminal confiscation scheme, with which this Bill is not concerned.
\(^6\) *Criminal Justice System: Confiscation Orders*, Session 2013-14. HC 738, National Audit Office, December 2013
\(^7\) *Public Accounts Committee report: Confiscation Orders*, March 2014
Better enforcement operations;
More effective sanctions;
Better performance and cost information; and
A more effective incentive scheme

In response to these criticisms, the Government published a new Criminal Finances Improvement Plan in June 2014. This set out objectives to improve governance, accountability and enforcement of confiscation orders.

The Serious Crime Act 2015 introduced a number of changes aimed at making the scheme more effective, including strengthening the sanctions regime for non-payers of confiscation orders.

However, a recent progress review by the National Audit Office concluded that the objectives set out in the Criminal Finances Improvement Plan had only partially been addressed.

The Home Affairs Select Committee published a report on proceeds of crime in July 2016.

Among other things, the report noted the scale of suspected money laundering in the UK. It suggested that the successful prevention of money laundering is particularly pertinent to effective recovery of proceeds of crime because, if a criminal is able to successfully hide their criminal proceeds within legitimate financial transactions it makes recovery impossible. The report concluded that the success of POCA and the standing of the UK as a global financial centre is dependent on proactively and effectively tackling money laundering.

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8 See Appendix 5 of National Audit Office, Confiscation Orders: progress review, HC 886, Session 2015-16, 11 March 2016
9 National Audit Office, Confiscation Orders: progress review, HC 886, Session 2015-16, 11 March 2016
3. Money Laundering

3.1 The problem

Money laundering (ML)\textsuperscript{11} describes the procedures used to make money which has been acquired from criminal activity appear to have been lawfully acquired. These procedures are typically highly complex and by design hard to trace. Funds, whether generated through organised crime, terrorism or drug trafficking, will be placed within the mainstream economy or financial sector and the source and origin of the funds will be progressively concealed with each transaction. These transactions must be carried out in such a way as to avoid attracting the attention of the authorities and with it the risk of detection, confiscation and criminal proceedings. Because of the laundering, the funds will appear to be lawful. The first ever EU Money Laundering Directive defined it thus:

\begin{quote}
The conversion or transfer of property, knowing that such property is derived from serious crime, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in committing such an offence or offences to evade the legal consequences of his action, and the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from serious crime.\textsuperscript{12}
\end{quote}

By its very nature, it is difficult to quantify what the scale of the ML problem is. The proceeds are hidden and often only come to light in the event of prosecutions. A report by Transparency International quoted the following (widely varying) estimates:

The scale of illicit financial flows around the world is vast. Given its inherently secretive nature, it is difficult to calculate the exact scale of global money laundering. However, while estimates vary, they provide a rough idea of the magnitude of the problem and of the necessity for the UK to effectively detect, restrain and deter the proceeds of corruption within its jurisdiction.

- Recent US estimates have put the scale of global cross-border flow of the proceeds of crime, including corruption, at US$1.6 trillion.

- The United Nations Office for Drugs and Crime (UNODC) assesses the total amount of money and assets laundered worldwide to be between US$800bn and US$2 trillion annually. Although the variance between these figures is very large, even the most conservative estimates indicate the massive scale of the problem.

\textsuperscript{11} or AML for anti-money laundering references

The European Commission estimates that corruption costs European Union member states around EUR120bn per year.\textsuperscript{13}

A Treasury/Home Office \textit{Action Plan} published in April 2016, said that:

There is no definitive measure of the scale of money laundering, but the best available international estimate of amounts laundered globally would be equivalent to some 2.7\% of global GDP or US\$1.6 trillion in 2009.\textsuperscript{14}

The \textit{Explanatory Notes} to the Bill give a range of estimates of amounts laundered and other criminal activity:

Financial profit is the driver for almost all serious and organised crime, and other lower-level acquisitive crime. The best available estimate of the amounts laundered globally are equivalent to 2.7\% of global GDP, or US\$1.6 trillion in 2009, while the National Crime Agency (NCA) assesses that billions of pounds of proceeds of international corruption are laundered into, or through the UK. Her Majesty’s Revenue and Customs (HMRC) estimate that over £4.4bn was lost to attacks against the tax system in 2013/14. The UK’s drug trade is estimated to generate revenues of nearly £4bn each year.\textsuperscript{15}

\section*{3.2 Legislative measures}

\subsection*{International}

There has been no shortage of attempts to prevent ML. Over time the focus for attention has shifted, often in response to events, from general criminality to drug enforcement and, lately, terrorist activity. Of necessity, money laundering legislation has an international aspect and the story of the development is largely one of an expanding and frequently revised body of law emanating from pan-national sources.

Pre-eminent among these is the \textit{Financial Action Task Force} (FATF), an inter-governmental body established in 1989 by Ministers of its Member jurisdictions. FATF sets standards and promotes effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system.

In the hierarchy of law making on ML, FATF stands at the apex and its recommendations flow down into pan-national law making bodies such as the EU, and from thence to national legislatures.

Reflecting the shifting focus of events the latest major FATF publication is \textit{Terrorist Financing} published in October 2016. A statement accompanying it said:

\begin{quote}
Combatting terrorist financing has been a priority for the FATF since 2001. However, in 2015, the scope and nature of terrorist threats globally intensified considerably, with terrorist attacks in many cities across the world, and the terrorist threat posed by the so-called Islamic State of Iraq and the Levant (ISIL/Da’esh), and by
\end{quote}

\begin{enumerate}
\item Transparency International; \textit{Empowering the UK to Recover Corrupt Assets}, May 2015;
\item Home Office/ HM Treasury; \textit{Action Plan for anti-money laundering and counter-terrorist finance}, April 2016;
\item Criminal Finances Bill; \textit{Explanatory Notes}.
\end{enumerate}
Al-Qaeda and their affiliated terrorist organisations, and by other terrorist organisations also becoming more significant. In December 2015, the FATF agreed that further concerted action urgently needs to be taken to strengthen global counter-terrorist financing regimes to combat the financing of these serious terrorist threats, and contribute to strengthening the financial and economic system, and security.\textsuperscript{16}

**EU and UK**

Within the UK current regulations were made under the *Proceeds of Crime Act 2002* (POCA), which consolidated various money laundering offences. They have been amended at various stages due to European directives and the guiding legislation is now the *Money Laundering Regulations 2007 (SI 2007/2157)*. These regulations were themselves amended by Regulations in 2012 – the *Money Laundering (Amendment) Regulations 2012 (SI 2012/2298)*.

An excellent summary account of the existing legislative background can be found in chapter 2 of the *UK national risk assessment of money laundering and terrorist financing* published by the Treasury and Home Office in October 2015. Alternatively Library Paper *Money Laundering Law* provides a more detailed historical review of successive measures.

POCA contain the three principal money laundering offences:

- **Section 327** - An offence is committed if a person conceals, disguises, converts, transfers or removes from the jurisdiction property which is, or represents, the proceeds of crime which the person knows or suspects represents the proceeds of crime.

- **Section 328** - An offence is committed when a person enters into or becomes concerned in an arrangement which he knows or suspects will facilitate another person to acquire, retain, use or control criminal property and the person knows or suspects that the property is criminal property.

- **Section 329** - An offence is committed when a person acquires, uses or has possession of property which he knows or suspects represents the proceeds of crime.

The history of ML law development has largely been that of expanding its reach to a broader range of targets, economic agents and transactions.

The *Serious Organised Crime & Police Act 2005* made several amendments which, though minor, were welcomed by the professions. For example, section 102 allowed that if the source of the funds is criminal in this country but not in the country of origin then the funds are ‘clean’. For example, proceeds of bullfighting remitted to the UK are ‘clean’ despite the fact that bullfighting is a criminal act in the UK.

\textsuperscript{16} Financial Action Task Force; [website](http://www.fatf-gafi.org)
All three of the principal money laundering offences contain certain defences. For example, in each case, it is a defence to have made an authorised disclosure to, and obtain ‘appropriate consent’ from, the authorities before doing the act which would constitute the offence (see sections 335 and 338 of the Act).

### 3.3 Professional measures

An ever present fact is that enforcement of the Anti-Money Laundering (AML) regime relies heavily on non-law enforcement officers. The administration, the procedures, responsibilities and requirements are, in the first instance, laid onto a variety of ordinary individuals ranging from bankers, accountants and solicitors to car dealers and other sellers of high value goods.

Under the legislation, a variety of professional and other staff are required to check on the veracity of transactions of customers or clients. In the real world, ordinary individuals most often come up against this when they try to open bank accounts, or are in the process of buying a house, or where a transaction involves large amounts of cash. Recently, Members of Parliament have been made more aware of the impact of the Politically Exposed Person’s regime which is part of the ML panoply of law by virtue of the fourth Money Laundering Directive.

The use of non-law enforcement staff has not been without its problems. A balance has had to be struck between individuals’ rights to privacy, the expectation of client confidentiality and, at times, balancing the desire to make things like bank accounts generally available whilst, at the same time proving things like identity or source of funds.

The interaction between non-law enforcement staff and law enforcement agencies has come largely through the procedures and forms known as suspicious activity reports or SARS.

**Suspicious Activity Reports (SARS)**

Although complex, the existing ML rules have at their heart a simple requirement, namely that, after careful procedures have been followed, if a worker or institution in the financial services or related sectors (the regulated sector), has suspicions about a transaction it should be reported to the relevant authorities.

The reports of suspect activity are officially called Suspicious Activity Reports or, more commonly SARS. They have to be made in a prescribed manner on a special form.

Given the nature of what accountants, lawyers, bankers, estate agents etc. are asked to report upon, i.e. ‘suspicions’, and the severity of the penalties if they failed to report something that turned out to be criminal, from the start there had been a continual tension between the tendency to report anything on the ‘better safe than sorry’ principle and the ability of regulators to be able to process information.

Practitioners have been concerned that for the effort they put in to SARS, very little emerged from it and they were worried about the use of SARS related findings, especially the confidentiality of reported data.
Regulators were almost as keen to ‘punish’ over-zealous reporters as those who failed to do so.

These concerns lead to a review which reported in March 2006 Review of the suspicious activity reports regime (The SARS Review) written by the then Head of the Serious Organised Crime Agency (SOCA) Sir Stephen Lander. With respect to the ML aspects it noted these criticisms:

There is a perception in the regulated sectors that the SARS regime is broken: that institutions are spending some millions of pounds complying with burdensome legal obligations, yet Government is not similarly committed and there are virtually no results in terms of crimes prosecuted and the seizure of terrorist or criminal funds as a consequence of their efforts. This perception is principally focussed on the AML arrangements, but similar concerns, while muted by a reluctance to criticise post the events of 7 July 2005, were expressed during the review about the parallel CTF arrangements.

While it is understandable that these perceptions may have arisen, they are, however, inaccurate. Not only is Government itself also spending sizeable sums on the regime, but there have continued to be significant SAR-related law enforcement successes and intelligence gains from its operation, albeit usually out of sight of those who provided the original lead information. However, as the KPMG, Jill Dando Institute and HMIC reports referred to already have all indicated, and as NCIS as the current FIU itself accepts, there is significant room for improvement in the way the regime functions.

Information about the workings of the regime can be found in the National Crime Agency (NCA) annual report – and a SARS-specific Annual Report, which includes activity numbers. The table below gives recent figures:

<table>
<thead>
<tr>
<th>Year end September</th>
<th>Total SARs</th>
<th>Consent SARs</th>
</tr>
</thead>
<tbody>
<tr>
<td>2010</td>
<td>240,582</td>
<td>14,334</td>
</tr>
<tr>
<td>2011</td>
<td>247,601</td>
<td>13,662</td>
</tr>
<tr>
<td>2012</td>
<td>278,665</td>
<td>12,915</td>
</tr>
<tr>
<td>2013</td>
<td>316,527</td>
<td>14,103</td>
</tr>
<tr>
<td>2014</td>
<td>354,186</td>
<td>14,155</td>
</tr>
<tr>
<td>2015</td>
<td>381,882</td>
<td>14,672</td>
</tr>
</tbody>
</table>

SARS Activity Annual Report (various)

17 The Sars Review: Sir Stephen Lander; March 2006
18 Ibid para 25
**Box 1: Consent SARs**

POCA allows persons and businesses to avail themselves of a defence against ML charges by seeking the consent of the authorities (effectively via the UKFIU) to conduct a transaction or undertake other activity (a ‘prohibited act’) about which they have concerns. The decision to refuse or grant consent is made by the UKFIU in consultation with the appropriate law enforcement agency.

The range of institutions and ‘agents’ involved in the enforcement of the regime is reflected in the statistics on SARs returns in the table shown below:

**SARS submitted by Sector**

<table>
<thead>
<tr>
<th>Volumes</th>
<th>% of total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Credit institution – banks</td>
<td>318,445</td>
</tr>
<tr>
<td>Credit institution – building societies</td>
<td>15,806</td>
</tr>
<tr>
<td>Credit institution – others</td>
<td>11,828</td>
</tr>
<tr>
<td>Financial institution – MSBs</td>
<td>11,120</td>
</tr>
<tr>
<td>Financial institution – others</td>
<td>6,835</td>
</tr>
<tr>
<td>Accountants and tax advisers</td>
<td>4,618</td>
</tr>
<tr>
<td>Independent legal professionals</td>
<td>3,827</td>
</tr>
<tr>
<td>Trust or company service providers</td>
<td>101</td>
</tr>
<tr>
<td>Estate agents</td>
<td>355</td>
</tr>
<tr>
<td>High value dealers</td>
<td>135</td>
</tr>
<tr>
<td>Gaming (including casinos)/leisure (including some not under ML regulations)</td>
<td>1,431</td>
</tr>
<tr>
<td>Not under ML Regulations</td>
<td>7,381</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>381,882</strong></td>
</tr>
</tbody>
</table>

Source: NCA; Suspicious Activity Reports (SARs) Annual Report 2015

The SARs work is now undertaken by the UK Financial Intelligence Unit (UKFIU) which sits within the NCA and was a requirement of the third Money Laundering Directive. Its activity is described in the SARs Annual Report:

The UKFIU continued to perform daily checks using specific key words in order to identify SARs for potential fast-tracking to law enforcement agencies (LEAs), thereby giving end users more opportunities for intervention/disruption.

Daily searches are run on all incoming SARs against those subjects identified as causing the most harm to the UK from serious and organised crime. This involves matching SARs against key nominal1 information. Over the reporting period the UKFIU disseminated 50 intelligence packs relating to high priority crime groups and 420 relating to NCA subjects of interest.

A total of 269 ‘suspect based’ SARs were fast-tracked to police forces over the reporting period – these are SARs which law enforcement had requested early sight of relating to specific
individuals. The UKFIU also continued its process of identifying and fast-tracking SARs relating to vulnerable members of society, thereby giving law enforcement partners opportunities to prevent fraud or further losses. In this reporting period 915 vulnerable person intelligence packages were disseminated to LEAs.

Over the reporting period the UKFIU disseminated 72 SARs relating to politically exposed persons (PEPs).\(^{319}\)

In October 2015, the Treasury/Home Office National Risk Assessment Report (see below) commented on the SARs regime. It said:

> The suspicious activity reports (SARs) regime obliges entities in the regulated sector to report suspicions of money laundering or terrorist financing to the UK Financial Intelligence Unit (UKFIU), which is part of the Economic Crime Command in the NCA. Last year, over 350,000 SARs were filed with the UKFIU, the vast majority of them submitted by the financial sector. SARs form a critical intelligence resource, and enable law enforcement agencies to intervene to prevent suspicious transactions. The SARs regime also provides SARs reporters with a mechanism to obtain a statutory defence from a money laundering or terrorist financing prosecution when they report suspicion.\(^{20}\)

In its short analysis of the Bill, the law firm Eversheds described the provisions as “SuperSars me” focussing on the provisions that would enable multiple firms to report concerns about the same individual or transaction or series of transactions (see Bill section below). It continued “It should also be noted that it is expected that the SAR regime will be subject to further improvements in due course.”

Does money laundering regulation work?

ML legislation has had a major impact upon business and individuals in the UK in terms of cost and time to set up systems and in the inconvenience faced by people struggling to find adequate identification to prove to their banks or solicitors who they are, often when they have been customers for years.

As noted above there is, perhaps inevitably, a feeling (by the public sector) that prosecutions do not sufficiently match private industry’s considerable efforts. Another concern is that where companies have operations in a multiple jurisdictions, efforts made in the UK are undone by lower requirements overseas.\(^{21}\)

Compliance does not come cheap though. The British Bankers Association estimate that its members are collectively spending at least £5 billion annually on core financial crime compliance.\(^{22}\)

On a technical level – is the regime generally accepted and found workable by industry and practitioners - the answer seems to be (broadly) yes. The response to the reforms introduced by the fourth

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20 HM Treasury, Home Office; UK national risk assessment of money laundering and terrorist financing, October 2015
21 Unofficial briefing Association of Foreign Banks
22 Home Office/ HM Treasury; Action Plan for anti-money laundering and counter-terrorist finance, April 2016
Money Laundering Directive have been generally positive. The Finance & Leasing Association stated:

We believe that, on the whole, these draft regulations are a positive response to most of our feedback and more generally to industry input. The Treasury has accepted most of the minor amendments we requested and generally reacted positively to most of our key concerns.23

The Electronic Money Association responded that “overall the AML regime is workable” although

There is some frustration over the investment put into combating financial crime by the public sector however, when the private sector’s compliance requirements are increasing. Law enforcement resources and ability to address industry concerns could be improved significantly.24

The assessment of Transparency International (TI) is mixed:

While the UK performs well relative to other international peers, even at the highest estimate, asset freezing and asset recovery are very small in relation to the vast scale of the activity. Based on highly conservative estimates of the scale of proceeds of corruption, the UK is unlikely to have frozen any more than 0.75 per cent of global corrupt financial flows per annum for the period covering 2010-2012.

This is disproportionately low considering London’s role as a global financial centre, a professional services centre and an investment hub for luxury property and high-value goods.25

In July 2016 the Home Affairs Select Committee produced a report following its inquiry into proceeds of crime.26 The particular focus of the report was on the use of powers to seize assets acquired as a result of criminal activity. it was therefore looking at a broader set of issues than simply money laundering although there are obvious links.

It highlighted an assessment by the NCA which tried to put the problem into context:

Some of our witnesses encouraged caution and perspective. Donald Toon of the NCA agreed that the value of money laundered through the UK was likely to be “hundreds of millions of dollars” a year. He went on to highlight, however, that this figure represented a tiny fraction of financial transactions going through the city every day:

It is critical to put that in context when we are talking about a financial system that, in some areas of trading, can involve £1.5 trillion to £2 trillion a day in terms of transactions. It sounds like a large figure, but it has to be put against a very large volume and value of transactions.27

23 Unofficial briefing
24 Unofficial briefing
25 Transparency International; Empowering the UK to Recover Corrupt Assets, May 2015
26 Home Affairs Committee Fifth Report; Proceeds of Crime, HC25 2016/17, 15 July 2016
At a broader policy level – does the legislation work to prevent crime – the answer is less clear.

In the *SARS Annual Report 2015*, UKFIU gave figures for sums disrupted or seized in the latest year (to September 2015) through the ‘consent’ system.

**Interventions arising from refused consent requests Oct 2014 to Sept 2015**

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Restraint sums</td>
<td>£43,079,328</td>
</tr>
<tr>
<td>Cash seizure sums</td>
<td>£1,313,437</td>
</tr>
<tr>
<td>Funds indemnified by HMRC</td>
<td>£376,035</td>
</tr>
<tr>
<td>Funds recovered by HMRC</td>
<td>£369,040</td>
</tr>
<tr>
<td>Total</td>
<td>£45,137,840</td>
</tr>
<tr>
<td>Cases with arrests recorded 16 (17 arrests)</td>
<td>16 (17 arrests)</td>
</tr>
</tbody>
</table>

*Source: NCA; Suspicious Activity Reports (SARs) Annual Report 2015*

But, as commentators point out, these figures have to be seen in the context of London as a major financial centre.

A Transparency International ‘taskforce’ examined its efficacy in May 2015:

The Taskforce made five key findings:

1. The levels of asset recovery by the UK are very small compared to the likely amounts of corrupt wealth being laundered
2. Only a small minority of suspicious activity reports relating to grand corruption are acted on by law enforcement agencies
3. The timeframe “moratorium period” of 31 days for responding to suspicious activity reports is generally inadequate to investigate and achieve asset restraint for grand corruption cases
4. Non-conviction based asset forfeiture (NCBAF) civil powers are under-used in cases of grand corruption
5. The current framework for asset recovery is overly reliant on a conviction in the origin country

The July 2016 Home Affairs Committee Report commented on oral evidence from Robert Barrington, the Executive Director of TI UK:

“It seems likely that in terms of money laundering going through the UK system every year, it is at least £100 billion”. That is a staggering figure, equivalent to twice the size of Panama’s whole economy. Mr Barrington went on to explain why the UK was such a target for money launderers:

Clearly one of the things that makes the UK attractive as a centre for money laundering is its historic links with the Overseas Territories and Crown Dependencies, because you can move money very quickly to jurisdictions that are very well-linked and for whom your bank of lawyers and accountants will have very...

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28 Transparency International; *Empowering the UK to Recover Corrupt Assets*, May 2015
close connections and can easily set up shell companies and so on.29

SOCA defined success in one of its early Action Plans as:

The broad performance framework identified for SOCA by the Home Secretary is designed to reflect the reality of what it has been tasked to achieve. The SOCA Board has determined that, in response to that framework set by the Home Secretary, SOCA will be governed by a performance regime that bears as closely as possible to the reality of outcomes that matter to the people of this country. Its main measures will be:

- the quality of knowledge and understanding of serious organised crime;
- criminal asset performance, where SOCA will contribute to Government wide asset recovery targets. These targets, and SOCA’s contribution to them, are currently under review elsewhere within Government;
- dislocation of criminal markets, assessed through evaluation of the impact of SOCA’s activity, with an aim of generating evidence of that impact in the form of upward pressure on the price of criminal goods or services, a reduction in UK availability or quality, or evidence that criminals are finding the UK a less attractive market; and
- the quality of SOCA’s relationships with others, which will be measured through regular structured surveys.30

3.4 Review of AML strategy

Within the last two years there has been a major review of AML in the UK. Together the review has produced three documents which, together, have, in varying degrees, informed the current proposed legislation.

The first is the High End Money Laundering Strategy and Action Plan published by the National Crime Agency in December 2014.

The second is a follow-on report published jointly between the Treasury and the Home Office in October 2015 - UK national risk assessment of money laundering and terrorist financing.31

These were supplemented in April 2016 by a further Treasury/ Home Office document - Action Plan for anti-money laundering and counter-terrorist finance.

High End Money Laundering Strategy

High end money laundering relates mainly to major frauds and overseas corruption work, where the raw material of the crime is electronic and cash is only used further down the laundering process to disguise audit trails or extract profits. In this respect, it can be distinguished from the laundering of street cash generated by the activities of organised criminal groups (OCGs).

29 Home Affairs Committee Fifth Report; Proceeds of Crime, HC25 2016/17, 15 July 2016
30 SOCA Annual Plan 2006/07, p 12
31 HM Treasury, Home Office, UK national risk assessment of money laundering and terrorist financing, October 2015
The report starts with a gloomy observation about current strategy:

There is a contrast between the current response to the laundering of OCG-linked street cash, which is relatively well understood and addressed, and high end money laundering, where there is no comprehensive response. A range of different organisations and agencies do look at this aspect of the threat but it is almost always a subordinate part of their investigations into predicate offences, such as fraud and bribery. Moreover, there is no agency with overall responsibility for leading the strategic response to high end money laundering.32

The broad thrust of the report is that the good picture and knowledge of cash-based, low-end ML, needs to be replicated at the other end. To this aim the following streams of work will begin:

i) Improving the intelligence picture and cross-agency intelligence flows to better direct the targeting of our multi-agency investigation capability

ii) Improving relationships and levels of co-operation with the private sector and relevant professional/regulatory bodies

iii) Developing a multi-agency taskforce approach and delivering quality law enforcement interventions

iv) Upskilling financial investigators to enable them to undertake complex and high end money laundering casework 33

Under the heading of improved intelligence there will be a new unit focussed simply on this area:

The creation of a new Money Laundering & Corruption Threat Desk within the NCA’s Intelligence Hub will mean that, for the first time, there will be a dedicated team of analysts which can draw together the hitherto fragmented intelligence picture around this kind of money laundering and ensure that gaps identified through the National Intelligence Requirements are properly addressed.

This will require close working with cross-sector experts, including the new Centre for Financial Crime and Security Studies, which was established by the Royal United Services Institute (RUSI) in December 2014.34

With respect to intelligence sharing there is a new emphasis on sharing of data with the financial sector:

The Government has established a new Law Enforcement Financial Sector Forum, which is co-chaired by the Home Office, National Crime Agency and British Bankers Association. This group provides an opportunity to drive a shift in the relationship between law enforcement and the financial sector. For example, we can look to develop a joint approach to data sharing both within the financial sector and also between the financial sector and law enforcement.

21. The Forum has agreed the concept of a physically co-located information sharing mechanism, capable of being operational in early 2015. The aim is to deliver benefits for both private sector and law enforcement, including enabling better management of risk across banks’ customer bases (for example allowing them to deny services to criminal customers), and to allow law enforcement to better target and undertake intervention activity. The initial focus of the mechanism will be on money laundering.

UK National Risk Assessment

The National Risk Assessment built on many of the themes of the December document. The report’s ‘Key Findings included:

The size and complexity of the UK financial sector mean it is more exposed to criminality than financial sectors in many other countries.

UK law enforcement agencies want to know more about the role of the financial and professional services sectors (banks, legal, accountancy and trust and company service providers) in money laundering. They judge the threat in these sectors to be significant, and are still establishing the strength of understanding needed in this area.

The effectiveness of the supervisory regime in the UK is inconsistent. Some supervisors are highly effective in certain areas, but there is room for improvement across the board, including in understanding and applying a risk-based approach to supervision and in providing a credible deterrent. The large number of professional body supervisors in some sectors risks inconsistencies of approach. Data is not yet shared between supervisors freely or frequently enough, which exposes some supervised sectors where there are overlaps in supervision.

The majority of those working in the regulated sector are not complicit in money laundering or terrorist financing. However those working in the regulated sector may aid those involved in money laundering, either unwittingly, or through negligence or non-compliance. Non-compliant or negligent professionals have the potential to cause significant harm by facilitating money laundering and causing reputational damage to their profession.

The law enforcement response to money laundering has been weak for an extended period of time. It has not been a priority for most local police forces (although the metropolitan forces appear to provide a more effective response). Since 2012, the government has invested in developing the capabilities of Regional Organised Crime Units (ROCUs).

Supervisors and private sector representatives consulted in the course of producing the NRA voiced repeated criticism of the SARs regime. In December 2014 the government committed to reviewing the regime. This will provide an opportunity for individuals and firms in the regulated sector, supervisors and law enforcement agencies to make proposals for improvements to the regime, and in particular to ELMER, the database for suspicious activity reports. ELMER is now reaching the end of its life, which

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may create risks to the effectiveness of the UK’s anti-money laundering regime, and will need to be replaced soon.  

The priorities for action are identified as:

- plugging intelligence gaps, particularly those associated with ‘high end’ money laundering through the financial and professional services sectors
- enhancing our law enforcement response to tackle the most serious threats
- reforming the suspicious activity reports (SARs) regime, and upgrading the capabilities of the UK Financial Intelligence Unit (UKFIU)
- addressing the inconsistencies in the supervisory regime that have been identified through this assessment
- working with supervisors to improve individuals’ and firms’ knowledge of money laundering and terrorist financing risks in key parts of the regulated sector to help them avoid getting drawn into money laundering
- transforming information sharing between law enforcement agencies, the private sector and supervisors, building on the progress already made through the JMLIT

Action Plan for anti-money laundering and counter terrorism finance

This document was published in April 2016. It outlined Government measures intended to be “the most significant change to our anti-money laundering and terrorist finance regime in over a decade”.  

It includes a long list of action points distributed amongst the two lead departments, crime agencies, industry groups and other public agencies. A summary of these can be found on pages 5-6. The plan has four priority areas:

A stronger partnership with the private sector

Law enforcement agencies, supervisors and the private sector working in partnership to target resources at the highest money laundering and terrorist financing risks.

New means of information sharing to strengthen the application of the risk-based approach and mitigate vulnerabilities.

A collaborative approach to preventing individuals becoming involved in money laundering.

Enhancing the law enforcement response

New capabilities and new legal powers to build the intelligence picture, disrupt money launderers and terrorists, recover criminal proceeds, and protect the integrity of the UK’s financial system. For example, the Government has established a Task Force, led jointly by the NCA and HMRC, to investigate all forms of illegality stemming from the data related to Mossack Fonseca, the law firm based in Panama.

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36 HM Treasury, Home Office, UK national risk assessment of money laundering and terrorist financing, October 2015
Improving the effectiveness of the supervisory regime

Investigate the effectiveness of the current supervisory regime, and consider radical options for improvement to ensure that a risk-based approach is fully embedded, beginning with the understanding of specific risks, and the spotting of criminal activity, rather than a focus on tick-box compliance.

Increasing our international reach

Increase the international reach of law enforcement agencies and international information sharing to tackle money laundering and terrorist financing threats. The international leadership being shown by the UK through the Prime Minister’s Anti-Corruption Summit will lead to greater disruption of money laundering and terrorist financing activities, the prosecution of those responsible and increased recovery of the proceeds of crime, and a greater protection of the UK financial system. The Summit will galvanise the international response and address issues including corporate secrecy, government transparency, the enforcement of international anti-corruption laws, and the strengthening of international institutions.  

38 Home Office/ HM Treasury; Action Plan for anti-money laundering and counter-terrorist finance, April 2016
4. Terrorist Finance

Countering terrorist financing forms a key part of the Government’s CONTEST counter-terrorism strategy.39 The Government’s aim is to reduce the terrorist threat to the UK and its interests overseas by depriving terrorists of the financial resources required for terrorism-related activity.40

Legislation

Part 3 of the Terrorism Act 2000 (TACT) contains a number of offences concerning terrorist property. These included offences relating to terrorist fund raising; the use and possession of property for terrorist purposes; becoming concerned in the arrangement of property or money for the purposes of terrorism; and money laundering in relation to terrorist property. It also imposes a duty on a person in the course of their employment to disclose information where they suspect a person has committed an offence under the Act.

Part 2 of the Anti-Terrorism, Crime and Security Act 2001 made provision for the Treasury to make freezing orders where it reasonably believes that a person’s actions will be a detriment to the UK economy or that they constitute a threat to the life or property of UK citizens. The order may prohibit the subject from making funds available to or for the benefit of named persons. Schedule 1 of the Act allows an authorised officer to seize any cash they have reasonable grounds for suspecting is terrorist cash.

Policy developments

The 2015 National Risk Assessment for Money Laundering and Terrorist Financing identified the most significant terrorist financing threats as:

- The raising of terrorist funds through the exploitation of vulnerabilities in the financial sector and the movement of funds for the financing of terrorism; and
- The abuse of the charitable sector for raising and moving funds for terrorist purposes.

In April 2016 the Government published an Action plan for anti-money-laundering and counter-terrorist finance, which had three priorities:41

1. An enhanced law enforcement response to the threats we face – that means building new capabilities in our law enforcement agencies and creating tough new legal powers to enable the relentless disruption of criminals and terrorists;

2. Reform of the supervisory regime to ensure that it is consistent, effective and brings those few companies who facilitate or enable money laundering to task; and

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39 HM Government, CONTEST: The United Kingdom’s Strategy for Countering Terrorism, 2011
40 Home Office, Action plan for anti-money laundering and counter-terrorist finance, April 2016
41 Home Office Press Release, Biggest reforms to money laundering regime in over a decade, 21 April 2016
3 Increase the international reach of law enforcement agencies and international information sharing to tackle money laundering and terrorist financing threats.

Following a consultation on aspects of the plan, the Government put forward specific proposals. Alongside a raft of measures aimed at addressing organised crime and money laundering generally, these included the introduction of measures to facilitate the exchange of data on suspicions of terrorist financing between private sector firms and to provide more effective civil recovery powers to enable the seizure and forfeiture of portable high value items used to store and move the proceeds of crime.
5. Corporate offences of failure to prevent facilitation of tax evasion

5.1 The Government’s strategy to reduce offshore tax evasion

Over the last few years there has been a great deal of debate, and a series of important policy initiatives, to tackle tax avoidance. Arguably much less attention has been given to tax evasion.\(^42\) Although the terminology used in this area is also the subject of considerable debate and not a little controversy, in broad terms tax evasion occurs when someone acts against the law, while tax avoidance involves compliance with the letter but not the spirit of the law.\(^43\)

In recent years HM Revenue & Customs (HMRC) has produced estimates of the ‘tax gap’ - the difference between tax that is actually collected and that which is ‘theoretically due’.\(^44\) In its description of the different types of activity that create this gap, HMRC distinguishes between tax evasion - illegal activity, where registered individuals or businesses deliberately omit, conceal or misrepresent information in order to reduce their tax liabilities – and avoidance – exploiting the tax rules to gain a tax advantage that Parliament never intended. Tax avoidance will often involve contrived, artificial transactions that serve little or no commercial purpose other than to produce a tax advantage.\(^45\)

HMRC estimates the size of the tax gap in 2014/15 at £36bn – 6.5% of total tax liabilities, with evasion and avoidance activity accounting for £5.2bn and £2.2bn respectively.\(^46\) HMRC identifies several other causes of the tax gap: for example, non-payment arising from insolvency; simple taxpayer error; and the hidden economy. This last category refers to undeclared economic activity that involves ‘ghosts’ – whose entire income is unknown to HMRC, and ‘moonlighters’ – who are known to the tax authorities in relation to part of their income, but have other sources of income that the authorities do not know about. HMRC sees a difference between this and evasion, as the first is where a declared net source of income is deliberately understated, while the hidden economy is where an entire source of income is not declared. HMRC’s estimate is that the hidden economy contributed £6.2bn to the tax gap in 2014/15.

In March 2013 HMRC published a new strategy – No Safe Havens - to tackle offshore tax evasion. The document explained what this type of

\(^42\) Tax avoidance – its definition, its scale, and Government efforts to tackle it – is discussed at length in, Tax avoidance : a General Anti-Abuse Rule, Commons Briefing paper SN6265, 19 April 2016.

\(^43\) For more details see, HM Treasury, Tackling tax evasion & avoidance, Cm 9047, March 2015 p5 (Box 1.A: Clarifying tax terminology).

\(^44\) The department’s work on the tax gap is collated on Gov.uk

\(^45\) HMRC, Measuring tax gaps 2016 edition, October 2016 pp20-1 (Table 1.7), see also, HMRC press notice, UK tax gap falls to 6.5% as HMRC targets the dishonest minority, & HMRC, Calculating the 2014 to 2015 tax gap, 20 October 2016.

\(^46\) op.cit. p5.
evasion consisted in, and how serious a problem it posed to the UK Exchequer:

What is offshore evasion?

Offshore evasion is using a non-UK jurisdiction with the objective of evading UK tax. This includes moving UK gains, income or assets offshore to conceal them from HMRC; not declaring taxable income or gains that arise overseas, or taxable assets kept overseas; and using complex offshore structures to hide the beneficial ownership of assets, income or gains.

How big is the problem?

The hidden nature of the problem and the way that information is currently recorded mean that there is no clear view of the cost of offshore evasion. However, HMRC’s recent progress in tackling offshore evasion through exchange of information agreements and disclosure facilities indicates that it has a significant cost to the UK. That is why we are undertaking innovative new work to use a wide range of data sources and engage experts and academics to develop a comprehensive evidence base on the scale and nature of offshore evasion.

HMRC set out a number of objectives of its new strategy …

• there are no jurisdictions where UK taxpayers feel safe to hide their income and assets from HMRC
• would-be offshore evaders realise that the balance of risk is against them
• offshore evaders voluntarily pay the tax due
• those who do not come forward are detected and face vigorously enforced sanctions
• there will be no place for facilitators of offshore evasion.

… and a series of actions to achieve these objectives:

• reducing the opportunities to evade offshore through initiatives to ensure compliance, international agreements, and multilateral action
• increasing the likelihood of evaders, and those who make offshore evasion possible, being caught, by investing in the skills of specialist staff, using the data generated by international agreements, and investing in improved tools, technology and customer understanding to identify, understand and profile high risk customers
• strengthening the severity of the punishments for those who are caught, with tough penalties, the possibility of criminal investigation and publishing the names of the most serious evaders.47

A follow-up report was published in 2014, giving details of developments in the ‘automatic exchange’ of information between the UK and the tax authorities of other countries, and HMRC’s approach to

47 No safe havens: Our offshore evasion strategy 2013 and beyond, March 2013, pp2-3
In March 2015 the Coalition Government proposed four new measures to tackle offshore evasion:

- A new criminal offence for corporations that fail to take adequate steps to prevent the facilitation of tax evasion by their agents
- Tougher financial penalties for offshore evaders, including the possibility of a penalty based on the value of the asset on which tax was evaded as well as wider public naming of offshore evaders
- A new penalty regime for those who enable tax evasion, based on the tax they have helped taxpayers to evade and naming of enablers
- A new simpler criminal offence to make prosecution of offshore evaders easier

Consultation documents on each of these measures were published in July, and in December 2015 the Government confirmed it would bring forward legislation for three of these in 2016:

- a new criminal offence for tax evasion
- new civil penalties for offshore tax evaders
- new civil penalties for those enabling offshore evasion

In turn provision was included in the Finance Bill 2016 presented after the Budget, well as for an additional penalty for serious cases of deliberate offshore evasion, equivalent to up to 10% of the underlying asset value.

5.2 Consultation on the new offence

The first consultation document

In its consultation document on the new criminal offence for corporations, the Government argued that “under the existing law it can be extremely difficult to hold the corporations to account for the criminal actions of their agents, because of the need under the existing law to prove the involvement of the most senior members of the corporation.” In the past the liability of corporations for the actions of its agents has been attributed in two ways: through vicarious liability or,
more commonly, through the ‘identification doctrine’, also known as the ‘directing mind theory’:

Under vicarious liability a corporation would be liable for the conduct of its agent … English criminal law has not tended to favour this approach.\textsuperscript{53}

The identification doctrine, sometimes referred to as the “directing mind theory”, attributes to the company the acts or omissions of its agents, so that the criminal act of the agent becomes the act of the corporation. No issue of vicarious liability arises. The question of which agent’s acts will be attributed to the corporation has been answered by the English common law by what is often referred to as the “Directing mind and will test”. Under this test, those employees who can be shown to be the directing mind and will of the company will have their acts attributed to the corporation.

The employees who can be said to fall into the directing mind category include, ‘the board of directors, the managing directors and perhaps the senior officers of a company who carry out functions of management and speak and act as the company’.\textsuperscript{54} In other words, the directing mind will be ‘a person in control of the operations of a company or of part of them and which is not responsible to another person in the company for the manner in which he discharges his duties’.\textsuperscript{55}

However, using this method of attribution for acts of offshore tax evasion was likely to be difficult:

Where offshore tax evasion has been facilitated by individuals, they may be based in a number of different jurisdictions, operating at various levels within the structure of a corporation where management decisions are not centralised. These individuals may be operating in a number of ways for which, under the current method of attribution, the company cannot easily be held responsible.

For example:

\begin{itemize}
  \item The individual(s) may be operating without the knowledge of the senior members of the company and due to a lack of supervisory controls and culture of compliance their criminal acts are undetected and unreported. For example, individuals may be deliberately turning a blind eye or falsifying documents when conducting tax due diligence requirements and the corporation’s supervisory controls do not pick this up.
  \item The individual(s) may be operating with the knowledge and implied approval of senior members of the company and steps are deliberately taken to conceal this knowledge and approval. For example, individuals may be privately marketing structures designed to circumvent tax transparency agreements to clients in order to retain business, and this is wilfully overlooked or tacitly approved by senior management.
  \item The facilitation may be solely directed by senior members of the company and be a deliberate part of the corporation’s business model, but individuals at the lower levels of the company are used to disguise the involvement of senior members of the company.
\end{itemize}

\textsuperscript{53} see \textit{Meridian Global Funds Management Asia Ltd v Securities Commission Respondent} \cite[1995][]{500, 506}.

\textsuperscript{54} Lord Reid, \textit{Tesco Supermarkets Ltd v Nattrass} \cite[1972][]{153, 171}.

For example, the creation and marketing of complex structures to circumvent tax reporting requirements may be actively marketed to existing and potential clients, and senior management encourage this activity to be undertaken by staff at the lower levels of the organisation, but deliberately distance themselves from these activities.\(^{56}\)

Given these difficulties, the Government argued that the best model for the new offence would be the offence for a commercial organisation to fail to prevent bribery by a person associated with that organisation – established by section 7 of the Bribery Act 2010:

The difficulty in holding commercial organisations to account for the criminal acts or omissions of their agents has been addressed in the area of bribery by criminalising the commercial organisation for failing to prevent bribery on its behalf. The introduction of s.7 of the Bribery Act 2010 made it a criminal offence for a commercial organisation to fail to prevent bribery by a person associated with the commercial organisation. The s.7 model has been recognised as an effective response to corporate commercial bribery. It incentivises companies to put in place adequate procedures and promotes corporate good governance.

In the same way that a professional who dishonestly assists a customer to evade tax is guilty of the tax offence in which he or she becomes complicit, the Government believes that the corporation which employs this professional and fails to take reasonable steps to prevent their offending should also face prosecution. Many of the corporations that will be affected by this new legal requirement will be familiar with the Bribery Act. We believe that the Bribery Act s.7 offence offers the best model for a new failure to prevent the facilitation of tax evasion offence, and it will help to ensure consistency and minimise the burdens on corporations.\(^{57}\)

The consultation document went on to ask for views on the scope of the new offence: specifically, which taxes and duties it would apply to; which countries it would extend to; and, what aspects of non-compliance it would cover. The Government proposed that the offence should apply to the evasion of all taxes and duties, and extend to evasion of UK taxes by both UK and non-UK corporations as well as to criminal tax evasion in other countries if facilitated by UK-based commercial organisations. In the latter case this would apply when a UK corporation failed to prevent its agent from criminally facilitating tax evasion overseas, where the jurisdiction suffering the tax loss had equivalent laws in place, ie, where there was dual criminality.

There are several criminal offences associated with tax evasion, and, it should be noted, individuals who have facilitated one of these offences would be guilty of them as well:\(^{58}\)

There is no single criminal offence of committing offshore tax evasion. Prosecutions for tax evasion are usually brought under:

\(^{56}\) op.cit para 2.15

\(^{57}\) op.cit. paras 2.18-19. The introduction of the s7 offence is discussed in, Bribery Bill [HL], Commons Briefing paper Rp10-19, 1 March 2010. For details on its application see, Ministry of Justice, Bribery Act 2010: Guidance to help commercial organisations prevent bribery, February 2012.

\(^{58}\) Tackling offshore tax evasion – consultation document, July 2015 para 3.4-6
The principal offence for evading tax is cheating the public revenue, a common law offence. Typically this offence is only charged in the most serious cases of evasion. The offence is defined as:

The offence of making a false statement tending to prejudice the Queen and the Public Revenue with the intent to defraud the Queen is, and always has been, a common law misdemeanour, and includes the offence of causing to be delivered to an inspector of taxes accounts relating to the profits of a business which falsely and fraudulently state the profits to be less than they actually were.\(^59\)

Those who aid, abet, counsel or procure the above offences are also guilty of them.\(^60\) It is also an offence to attempt the above offences, conspire to commit them, or to perform an act capable of encouraging or assisting the commission of one of these offences, intending to encourage or assist in the offence, or believing that the offence will be committed and that the act will encourage or assist its commission.\(^61\)

The consultation asked for views on whether the new offence should apply to all of these criminal offences or not. It went on to ask what kinds of act should constitute facilitation. The paper gave a series of illustrative examples, where an agent had criminally facilitated another person’s tax evasion, and their corporation had failed to take reasonable steps to prevent this having happened. In broad terms, the paper gave five examples of how criminal facilitation might occur:

1. **Acting as a broker/conduit** – arranging access to others in the “supply” chain and providing introductions
2. **Providing planning and advice** on the jurisdictions, investments and structures which will enable the taxpayer to hide their money
3. **Delivery of infrastructure** – e.g. setting up companies, trusts and other vehicles which are used to hide beneficial ownership; opening bank accounts; providing legal services and documentation which underpin the structures used in the evasion such as notary services and powers of attorney
4. **Maintenance of infrastructure** e.g. providing professional trustee or company director services including nominee services; providing virtual offices, IT structures, legal services and

\(^59\) *R v Hudson* [1956] 2 QB 252, 40 Cr App R 55, cited with approval in *R v Mavji* [1987] 1 WLR 1388, 1391; (1987) 84 Cr App R 34

\(^60\) Section 8 of the *Accessories and Abettors Act 1861*: Whoever shall aid, abet, counsel, or procure the commission of any indictable offence, whether the same be an offence at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender.

\(^61\) Section 45 of the *Serious Crime Act 2007*. 
documentation which obscures the true nature of the arrangements such as audit certificates

5  **Financial assistance** – helping the evader to move their money out of the UK, and/or keep it hidden by providing ongoing banking services and platforms; providing client accounts and escrow services; moving money through financial instruments, currency conversions etc.

As noted, at present an agent found guilty of facilitating tax evasion would be guilty of the same offence of tax evasion as the taxpayer:

In all the [examples given above], the agent of the corporate organisation (for example, the lawyer, advisor, or member of banking staff) would currently be guilty of the same offence of tax evasion as the taxpayer, by virtue of facilitating the offence. Currently, their employer (for example, the bank, law firm, or trust company) may not be guilty of an offence, as the criminal act of their agent is not attributed to the commercial organisation unless the agent is the organisation’s directing mind. The new offence will enable the organisation to be held criminally responsible where it has failed to take reasonable steps to prevent its agent criminally facilitating the tax evasion.62

Stakeholders were also asked what provision should be made for an appropriate defence to the new offence – such as the company having taken ‘reasonable steps’ to prevent facilitation; and, what kind of guidance should be given on complying with the new regime.

**Initial reactions**

There was some comment on the Government’s announcement of measures to tackle offshore evasion in Budget 2015, though the main focus was on the proposed criminal offence for offshore evaders, and, in particular, the fact that the offence would not require the prosecutor to prove intent.63

Writing in the *Tax Journal*, Jason Collins and Fiona Fernie at the law firm Pinsent Masons, highlighted the fact that the new corporate offence would potentially apply to the facilitation of non-UK tax evasion by UK corporations: “whilst a bold move, it is of concern that the UK is trying to extend the reach of this offence without seeking to do this as part of a wider international effort; thereby putting [these corporations] … at a disadvantage over others by imposing additional obligations on them.”64 Subsequently the Chartered Institute of Taxation (CIOT) argued that the new corporate offence should be “phased in gradually to allow businesses time to familiarise themselves with the regime” and, should be “subject to appropriate defences being available”:

We suggest that a threshold size with different obligations for different sized organisations would help make the compliance burden more manageable for smaller entities. We ask for more clarity about the additional compliance obligations that a UK firm

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63  see, for example, [Chartered Institute of Taxation press notice](#), [New offence risks penalising careless mistakes, warns Tax Institute](#), 19 March 2015. Statutory provision for this offence was included in [Finance Act 2016 – specifically s166](#).
would have to meet when referring a client to an adviser located outside the UK, in order to protect itself from the risk of a criminal prosecution. We also suggest that HMRC consult further on a definition of ‘agent’ to make the proposals workable in practice.\textsuperscript{65}

In a second article in the \textit{Tax Journal}, Peter Kiernan and Manraj Somal at KPMG highlighted the proposal for a due diligence defence, to ensure that corporations who had taken reasonable steps to put in place adequate compliance procedures to prevent the criminal facilitation of tax evasion by their agents would not face prosecution:

The issue remains that the standard to be regarded as ‘reasonable’ or ‘adequate’ is unclear. ‘Reasonable procedures’ to prevent is a much lower bar, but it is also a much looser concept … By contrast, ‘adequate procedures’ to prevent is a very high bar and has yet to be tested in court under the Bribery Act. The ordinary dictionary meaning of the word would imply that, for the corporation’s procedures to be ‘adequate’, they would normally have been sufficient to prevent the tax evasion had they operated normally but that they were deliberately subverted by the agent.\textsuperscript{66}

Writing in \textit{Taxation} magazine, Helen Adams and Claire Shelemay from the law firm BDO LLP, concluded, “cumulatively, the proposals contained in the consultation documents would, if included in legislation as drafted, result in a significant tightening of the rules on evasion.” The writers went on to suggest that “the challenge would then be for HMRC to show they are using these new tools to tackle evasion”, observing that “the public tends to judge HMRC’s success … on the number of successful prosecutions.”\textsuperscript{67} Notably in November 2015 the Public Accounts Committee argued that the number of criminal prosecutions for offshore evasion was “woefully inadequate”:

HMRC’s investigations do not lead to sufficient prosecutions to provide an effective deterrent, particularly for wealthy individuals who hide their assets offshore. In December 2013, we argued that HMRC needed to demonstrate that it deals robustly with individuals and companies who deliberately mislead it and that HMRC should be more willing to pursue prosecutions against both individuals and businesses. Regrettably, since then HMRC appears either to have ignored our recommendation or to have made little progress. Incredibly, there have been only 11 prosecutions in relation to offshore tax evasion since 2010 …

HMRC told us … that offshore tax evasion is one of the toughest areas to prosecute, with people deliberately disguising their activities, while those who facilitate this form of tax evasion were careful not to enter the United Kingdom. HMRC has offered disclosure facilities with reduced penalties for people who come forward and provide information on assets held offshore. We are in no doubt that the use of these disclosure facilities is not an adequate substitute for the deterrent effect of prosecution.\textsuperscript{68}

\textsuperscript{65} CIOT press notice, \textit{The Chartered Institute of Taxation wants clarity on future of law on corporate tax evasion}, 14 October 2015

\textsuperscript{66} “The Q&A: Proposed criminal offence for failing to prevent tax evasion”, \textit{Tax Journal}, 23 October 2015

\textsuperscript{67} “Criminal factor”, \textit{Taxation}, 17 September 2015

\textsuperscript{68} \textit{HMRC performance in 2014-15}, HC 393 of 2015-16, 4 November 2015 pp6-7
The Committee went on to recommend that HMRC should “strengthen its capability to investigate offshore tax evasion and make tougher the criminal and civil sanctions it can apply.”\(^{69}\) In its response, published in January 2016, the Government noted HMRC would “seek to triple the number of criminal investigations into serious and complex tax crime, including offshore evasion”:

Historically, it has been difficult for the Department to obtain details of offshore accounts, due to a lack of data and powers. To counter this, the Department has consistently been at the fore in driving International Agreements and other offshore initiatives, collecting over £2.7 billion in unpaid tax, interest and penalties since 2007.

Unprecedented global cooperation now takes the Department further, beginning with the receipt of automatic offshore account and trust information from over 95 jurisdictions by 2018, with some information already received and more arriving in 2016. Alongside this, continued investment in analytics measures and sanctions, announced by the Chancellor in the 2015 Autumn Statement, will strengthen civil and criminal sanctions for evaders and their enablers. This moves from a lack of credible overseas data and fewer civil and criminal powers to a time where the Department can detect and robustly tackle those who continue to hide their cash offshore.

At the end of 2015, the Department will close the existing disclosure facilities and replace them with more robust arrangements, which do not offer exemptions from criminal investigation. As part of investment secured in the 2015 Summer Budget, the Department will seek to triple the number of criminal investigations into serious and complex tax crime, including offshore evasion.\(^{70}\)

The Committee reiterated these concerns in April 2016, following an enquiry into HMRC’s efforts to tackle tax fraud by the National Audit Office:\(^{71}\)

The perception that HMRC does not tackle tax fraud by the wealthy needs to be addressed … HMRC told us it investigates around 35 wealthy individuals for tax evasion each year, but did not know how many wealthy individuals it had successfully prosecuted. We welcome the fact that HMRC has sought and received funding to increase the number of investigations it undertakes into corporates and wealthy individuals to 100 a year by 2020, indicating that the current level is insufficient.

**Recommendation**: HMRC must do more to tackle tax fraud and counter the belief that people are getting away with tax evasion. It needs to increase the number of investigations and prosecutions, including wealthy tax evaders, and publicise this

\(^{69}\) op.cit. p7


\(^{71}\) NAO, *Tackling tax fraud: how HMRC responds to tax evasion, the hidden economy and criminal attacks*, HC 610, December 2015. Part 3 of the report discusses HMRC’s approach to prosecutions, but does not discuss those relating to offshore evasion in detail.
work to deter others from evading tax and to send out a message that those who try will not get away with it.\textsuperscript{72}

The Government has said that over the next few months HMRC will be exploring how it can publicise this part of its work more effectively, as well as increasing “the impact of the range of civil and criminal sanctions it uses”:

The Department is exploring how it can better publicise both its criminal and civil investigation outcomes and increase the impact of the range of civil and criminal sanctions it uses. This work will be completed by winter 2016-17.

The Department uses its wide range of compliance activities to tackle serious tax frauds including the ability to levy highly punitive civil penalties and civil fraud investigation procedures. Criminal investigations can be lengthy, expensive and uncertain and so are reserved for a small, but important, number of cases to send a strong deterrent message. In 2014-15 1,288 people were charged by UK’s prosecuting authorities as the result of the Department’s criminal investigations. This protected more than £2 billion in revenue from being lost to criminal activity. Over 40% of convictions were of people engaged in evading more than £50,000 – almost twice the UK median salary.

As part of the Summer Budget 2015, the Department will go further and triple its criminal investigations into serious and complex tax crime, focusing particularly on wealthy individuals and corporates, including cases with offshore evasion risks; adjusting its resource accordingly.\textsuperscript{73}

As noted, in the Autumn Statement in November 2015 the Government confirmed that it would proceed with all of its proposals regarding offshore evasion, including the new corporate criminal offence. Jon Preshaw, Chairman of the CIOT’s Management of Taxes Sub-Committee commented that the Institute remained sceptical about whether the new offence was needed:

“Of course anyone who helps a person deliberately evade tax deserves punishment, but there is already plenty of law in this area. If a bank employee, for example, has knowledge of or suspects (or has reasonable grounds for knowing or suspecting) money laundering, which can include tax evasion, they can already be liable to a criminal offence under the \textit{Proceeds of Crime Act 2002}. Additionally, they commit an offence if they are involved in any arrangements which they know or suspect facilitate money laundering by another person.

“Practically this is going to be a challenging offence to draft. It is very difficult to hold companies to account for actions of individuals. Clear guidance will need to be provided to help give certainty over how the proposals will work and what organisations must do to ensure compliance.”\textsuperscript{74}

In submissions to the Treasury Committee on the Autumn Statement both the CIOT and the Institute of Chartered Accountants raised

\textsuperscript{72} Tackling tax fraud, HC 674 of 2015-16, 15 April 2016, pp5-6
\textsuperscript{73} HM Treasury, \textit{Treasury Minutes} Cm 9323, July 2016, p2
\textsuperscript{74} CIOT press notice, \textit{Tax evasion – advisers question need for new offences}, 27 November 2015
concerns over the Government’s decision to proceed with these proposals, though the Committee did not comment on the issue in its final report, and it has not been something raised very often in the House.

**Detailed responses to the consultation**

In December 2015 the Government published draft legislation for the new corporate offence for comments, as well as a summary of the responses it had had to the first consultation exercise. In general stakeholders and respondents had been “broadly understanding of the need for greater corporate responsibility in relation to the acts carried out by those who represent the corporation.” The proposal to follow the Bribery Act model of corporate liability “was welcomed by stakeholders who broadly understand how the Bribery Act operates and the type of due diligence required by that Act.” However, “some respondents, particularly financial institutions and advisory firms, questioned the need for the new offence, preferring instead the current model of liability – i.e. that an offence is carried out by the “directing mind or will” of the corporation, though they noted that due to the limitations of the current law there had been no prosecutions.”

Overall, while it acknowledged that there could be practical difficulties in investigating and prosecuting cases of offshore evasion, the Government took the view that it should introduce the new offence:

> As with any investigation and prosecution across borders, investigations and prosecutions under the new offence will require international co-operation and will inherently be more complex than one that is purely domestic. Whilst these are factors to consider when investigating and prosecuting a corporation under the new offence, the Government does not believe that the potential for practical difficulties is a justification for not proceeding with the new offence. The Government intends to consult on draft legislation and guidance at the beginning of 2016 to ensure that the new offence strikes the correct balance.

Respondents raised specific concerns about three aspects of the new offence:

- the range of persons that a corporation would be liable for;
- the geographical scope of the offence, and,
- the procedures that a corporation would be expected to have in place to prevent evasion being facilitated.

On the first of these questions, “many stakeholders stressed that how the term “agent” is defined within the offence will be key to the extent and practicality of supervisory mechanisms affected corporations put in

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76 The new corporate offence appears to have come up in only two PQs, which asked more generally about making companies liable for fraud and tax evasion committed by their employees: PQ38562, 8 June 2016; PQ38677, 10 June 2016
77 *Tackling offshore tax evasion: a new corporate criminal offence of failure to prevent the facilitation of tax evasion - Summary of Responses*, December 2015 paras 2.4-5
78 *op.cit.* para 2.11-12
Clearly corporations will have a variety of interactions with third parties, often making and receiving referrals to partner organisations and independent bodies. “Feedback has consistently stressed that a corporation should not be held liable for the actions of an individual over whom they cannot exercise control.”79 Recognising these concerns, the Government proposed that corporations would be liable for all persons providing services on their behalf:

This would exclude those acting entirely independently from the corporation. This would bring into scope third parties providing services to a client of the entity where that entity has an element of control in the provision of those services. For example where the entity agrees that someone not ordinarily employed by the entity will provide services to its customers on its behalf.80

On the question of geographical scope, there was agreement that UK and non-UK corporations should be treated the same, though some respondents suggested there would be major obstacles to investigating and prosecuting the second category. However there was a mixed response on the offence applying to tax evasion in another country:

Some respondents were strongly supportive of the new offence being used in pursuit of this objective and felt that it would be particularly beneficial in relation to combating the facilitation of tax evasion in developing countries. In contrast, other respondents felt that criminal liability under UK law was not the most effective means of holding corporations to account, and the UK should instead focus on providing intelligence, evidence and assistance to overseas tax authorities.81

The Government took the view that it should be open for the UK to hold UK corporations to account in this case, “should it be in the public interest to do so”:

Whilst the preference will always be for the jurisdiction suffering the tax loss to take the criminal or civil response that it feels most appropriate, if this is not possible due to, for example, corruption in that jurisdiction, the Government believes that it should be open to the UK to hold the UK based corporation to account, should it be in the public interest to do so.

It would be wrong for a UK based corporation to escape liability for acts which, if conducted in the UK would be criminal, because the country suffering the tax loss was unable to bring an action against that corporation due to corruption within that jurisdiction’s legal system. The prosecution in the UK would of course still need to show to the criminal standard that the predicate offences had been committed and that there was dual criminality.82

Third, on the question of defences to the new offence, some respondents argued strongly that the test should be that a corporation had put “reasonable procedures” in place:

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79  op.cit. para 3.25, 3.28
80  op.cit. para 3.35
81  op.cit. para 3.88
82  op.cit. para 3.94
[Some] were supportive of a defence that mirrored the “adequate procedures” defence contained within section 7(2) of the Bribery Act 2010 … [Others] expressed concerns that where their procedures do not prevent a representative from criminally facilitating tax evasion they may be automatically deemed to be inadequate.83

In turn the Government agreed that the defence should be one of “reasonable procedures”, and underlined that it would consult on this test, to prevent corporations being overburdened:

[The procedures that corporations will be expected to have in place must be] be proportionate to the risk faced and not excessively burdensome. The Government intends to consult to ensure that the right balance is struck between ensuring corporations can effectively prevent and detect criminal wrong doing by their representatives whilst not requiring overly burdensome supervision that unduly hinders their activities.84

Finally, as noted, one of the questions raised in the consultation was whether the new offence should apply to the evasion of all taxes. The majority of respondents agreed with the principle - though some qualified this by underlining they thought the new offence was unnecessary. The Government concurred, underlining the point that individuals cannot commit this type of offence by mistake:

The offences that the corporation will be alleged to have failed to prevent relate to the evasion of all taxes. Mens rea would be required of both the taxpayer and the corporation’s representative.85 A (legal or natural) person cannot be guilty of these criminal offences (or criminally facilitate its commission) by mistake, i.e. because of a misunderstanding as to the tax due or by innocently providing a service which is abused by a taxpayer. It is therefore unnecessary to exclude certain categories of taxation on the basis that they are “too complex”.

There is no prospect of a corporation committing the new offence where its client is accidently or innocently non-compliant with their tax obligations, or where its representative is unaware that a fraud is being committed. The new offence is only committed where both the taxpayer and the representative are involved in a fraud.86

5.3 Budget 2016 and the Panama Papers

In the 2016 Budget the Government confirmed that the Finance Bill 2016 would include provision for the first three elements of its offshore strategy announced the year before. In addition Finance Bill 2017 would include provision for a new legal requirement to correct past offshore non-compliance within a defined period of time with new sanctions for

83 op.cit. para 3.96
84 op.cit. para 3.101
85 [As noted in the original consultation - see fn11- someone found guilty of criminally facilitating tax evasion would have to: intend to do the act of facilitation; believe that his act is capable of assisting the perpetrator to commit the offence; and, know the essential matters that constitute the perpetrator’s offence.]
86 op.cit. para 3.54
those who failed to do so. In the latter case, a consultation exercise on a ‘requirement to correct’ was launched in the summer.

The Budget report made no mention of the new corporate offence, but the then Prime Minister, David Cameron, reiterated the Government’s plans to introduce it in a statement on 11 April 2016. This followed the publication a few days before of the ‘Panama papers’ – a leak of financial records from Mossack Fonseca, a law firm that had provided advice on establishing offshore companies to a wide variety of politicians, celebrities, and other wealthy individuals. Mr Cameron also confirmed that a joint taskforce would be established to investigate potential cases of evasion revealed by the leak, led by HMRC and the National Crime Agency – and gave details of ongoing efforts to improve the provision of financial information by Crown dependencies and British overseas territories to the revenue authorities.

Part of Mr Cameron’s statement to the House is reproduced below:

We are taking three additional measures, to make it harder for people to hide the proceeds of corruption offshore, to make sure that those who smooth the way can no longer get away with it and to investigate wrongdoing.

First, let me deal with our Crown dependencies and overseas territories that function as financial centres. They have already agreed to exchange taxpayer financial account information automatically, and will begin doing so from this September …

Today I can tell the House that we have now agreed that they will provide UK law enforcement and tax agencies with full access to information on the beneficial ownership of companies. We have finalised arrangements with all of them except for Anguilla and Guernsey, both of which we believe will follow in the coming days and months. For the first time, UK police and law enforcement agencies will be able to see exactly who really owns and controls every company incorporated in those territories …

Next month we will seek to go further still, using our anti-corruption summit to encourage consensus not just on exchanging information, but on publishing such information and putting it into the public domain, as we are doing in the UK…

Next, we will take another major step forward in dealing with those who facilitate corruption. Under current legislation it is difficult to prosecute a company that assists with tax evasion, but we are going to change that. We will legislate this year for a new criminal offence to apply to corporations that fail to prevent their representatives from criminally facilitating tax evasion.

87 Budget 2016, HC 901, March 2016 para 2.200-3
89 No.10 Downing Street press notice, PM: Companies to be liable for employees who facilitate tax cheating, 11 April 2016
90 “What are the Panama Papers? A guide to history’s biggest data leak”, Guardian, 5 April 2016
91 HMT press notice, UK launches cross-government taskforce on the ‘Panama Papers’, 10 April 2016. See also, HMRC press notice, HMRC’s response to the ICIJ story on offshore tax evasion, 4 April 2016
Finally, we are providing initial new funding of up to £10 million for a new cross-agency taskforce to swiftly analyse all the information that has been made available from Panama, and to take rapid action. That taskforce will include analysts, compliance specialists, and investigators from across HMRC, the National Crime Agency, the Serious Fraud Office, and the Financial Conduct Authority.92

The Government’s second consultation on the new corporate offence is discussed below. The following paragraphs look briefly at the two other initiatives Mr Cameron mentioned in his statement.

With regard to **beneficial ownership**, the Government had introduced provisions for this country as part of the [Small Business, Enterprise & Employment Act 2015](https://www.parliament.uk/briefing_papers/SB20150173).93 In April 2014 the Prime Minister wrote to the Crown dependencies and British overseas territories to encourage them to follow the UK’s example. The speed with which individual territories responded to this appeal has often been raised in the House – though, as noted by the Foreign Office Minister, James Duddridge, in February, “this is a matter of direction, rather than an ultimate destination.” The Minister said that he wished to see “significant progress” ahead of the anti-corruption summit in May.94

On 14 April 2016, the Chancellor announced that the UK had agreed with Germany, France, Italy and Spain for the automatic exchange of information of data on company beneficial ownership between tax and law enforcement agencies.95 The five participants also made a commitment to establish new registers of trusts. Details were given in a public letter to G20 Finance Ministers:

On beneficial ownership, it is essential that all jurisdictions apply enhanced standards of transparency. In this spirit, we commit to establishing as soon as possible registers or other mechanisms requiring that beneficial owners of companies, trusts, foundations, shell companies and other relevant entities and arrangements are identified and available for tax administration and law enforcement authorities. We call on all other jurisdictions to do so.

In addition, as a first step we are launching a pilot initiative for automatic exchange of such information on beneficial ownership. This will give our tax and other relevant authorities full knowledge on vast amounts of information and help them track the complex offshore trails used by criminals.

The intention is that this will mirror the ground-breaking steps we have taken on tax evasion under the Common Reporting Standard (CRS). Automatic exchange of beneficial ownership information will, as with the CRS, be subject to the usual data and confidentiality protections and to any appropriate exceptions. We will look to ensure that this information is in a fully searchable

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92 HC Deb 11 April 2016 cc23-26
93 For more details see, [Small Business, Enterprise and Employment Bill](https://www.parliament.uk/briefing_papers/SB20150173), Commons Briefing paper RP14-39, 14 July 2014.
94 HC Deb 23 February 2016 cc145-6. The Prime Minister had first announced this summit in a speech, *[Tackling Corruption](https://www.gov.uk/government/speeches/tackling-corruption)*, in Singapore last year (No.10 Downing Street, 28 July 2015).
format and that it also contains information on entities and arrangements closed during the relevant year.96

Subsequently, just before the anti-corruption summit, the Government announced that the UK had completed a series of bilateral agreements with the Crown dependencies and overseas territories on sharing beneficial ownership information. Details are collated on Gov.uk, but, as underlined in a written answer, generally this information is to be shared with the relevant legal and tax authorities only:

Jonathan Ashworth: To ask the Secretary of State for Foreign and Commonwealth Affairs, what plans the Government has to force Overseas Territories and Crown Dependencies to establish public central registers of beneficial ownership.

Answered by: Sir Alan Duncan: While the Overseas Territories (OTs) and Crown Dependencies (CDs) are separate jurisdictions, and are responsible for their own fiscal matters, we are working closely with them on their role on company transparency. Our priority has been for them to establish a central register of beneficial ownership information (or a similarly effective system) where they do not already have one, and for UK law enforcement and tax authorities to have full and automatic access to that information.

Bilateral arrangements to this effect have now been concluded with all the relevant OTs and with the CDs, and these will enter into effect by June 2017. The registers will, with one exception, not be public, but these measures will place our Crown Dependencies and Overseas Territories well ahead of other similar jurisdictions and represent a significant step forward in our ability to counter criminal activity.97

Further details on the anti-corruption summit, which was held on 12 May, and on beneficial ownership, are in two other Library briefing papers:

- The international anti-corruption summit in May 2016, CBP 7580, 20 May 2016

With regard to the new task-force, in a press notice following the announcement the CIOT’s Tax Policy Director, John Cullianane, said, “This is a sensible, joined-up approach from the Government. There is a huge amount of data to work through, and this is an extremely complex area, with a number of different criminal offences in scope, with different expiry periods and burdens of proof. So it makes sense to bring together specialists from HMRC, the National Crime Agency and elsewhere in a dedicated, focused taskforce.”98

In a debate on tax avoidance just after Mr Cameron’s statement to the House, Treasury Minister David Gauke said the following:

96 HM Treasury, G5 letter to G20 counterparts regarding action on beneficial ownership, 14 April 2016. Several countries joined this initiative some days later:

97 PQ43422, 2 August 2016

98 CIOT press notice, 11 April 2016
The taskforce will report to my right hon. Friends the Chancellor of the Exchequer and the Home Secretary on the strategy for taking action, and we will update Parliament later this year. I stress that the taskforce will have total operational independence. If it finds people to prosecute, it will prosecute them. If it finds information about illegality, it can act on it. In addition, the independent FCA has written to financial firms asking them to declare their links to Mossack Fonseca. If the FCA were to find any evidence that firms have been breaking the rules, it, too, has strong powers to take punitive action.99

To date the taskforce has not published its first progress report:

Jonathan Ashworth: To ask Mr Chancellor of the Exchequer, who in Government is responsible for overseeing the cross-agency taskforce set up to examine the Panama Papers.

Answered by: Mr David Gauke: The taskforce will report jointly to the Chancellor and to the Home Secretary. It will provide a progress report later this year which will set out the taskforce’s initial assessment of the information in the Panama papers and proposed actions for further analysis and strategy for pursuing any evidence found of wrongdoing and regulatory breaches.

The taskforce is jointly led by HM Revenue and Customs (HMRC) and the National Crime Agency (NCA), with other partners including the Serious Fraud Office (SFO) and Financial Conduct Authority. The NCA, HMRC and others already regularly work together to tackle serious and organised financial crime of many types.

The UK multi-agency taskforce has begun analytical work on all the data published by the International Consortium of Investigative Journalists (ICIJ), in addition to continuing to develop a wide range of other intelligence which includes more than 700 HMRC leads with a connection to Panama. As part of this work, the task force is currently analysing and reviewing the names and addresses published by the ICIJ with alleged links to the UK and Mossack Fonseca.

While the sensitivity of the work means that it will not be possible to give a running commentary on any investigations, or number of investigations, Parliament will be kept updated on any significant developments.100

5.4 Second consultation on the new offence

HM Revenue & Customs published draft legislation for the new corporate offence along with draft guidance on 17 April; responses were invited by 10 July.101 The paper summarised the Government’s policy objectives for the new offence as follows:

1.3 The new corporate offence aims to overcome the difficulties in attributing criminal liability to corporations for the criminal acts of those who act on their behalf. Whilst this consultation refers to the application of the new offence to “corporations”, the draft

99 HC Deb 13 April 2016 c374. See also, PQ33514, 18 April 2016
101 Tackling tax evasion: a new corporate offence of failure to prevent the criminal facilitation of tax evasion, April 2016
legislation refers to a “relevant body” to encompass the broad range of legal persons to which the new offence will apply.  

1.4 Attributing criminal liability to a corporation normally requires prosecutors to show that the most senior members of the corporation were involved in and aware of the illegal activity, typically those at the Board of Directors level. This has a number of impacts:

1. In large multinational organisations decision making is often decentralised and may be taken at a level lower than that of the Board of Directors, with the effect that the corporation can be shielded from criminal liability. This also makes it harder to hold such organisations to account compared to a smaller organisation where decision making is centralised.

2. The existing law can act as an incentive for the most senior members of a corporation to turn a blind eye to the criminal acts of its representatives in order to shield the corporation from criminal liability.

3. The existing law can act as a disincentive for internal reporting of suspected illegal activity to the most senior members of the corporation.

1.5 The cumulative effect is an environment that does not foster corporate monitoring and self-reporting of criminal activity. The criminal law currently renders corporations that refrain from implementing good corporate governance and strong reporting procedures hard to prosecute, and offers no incentive to invest in such procedures. It is those corporations that deliberately turn a blind eye to wrongdoing and preserve their ignorance of criminal activity within their organisation that the current criminal law most advantages.

HMRC did not provide an estimate of the projected revenue gain from this measure, noting that the impact on corporations “will depend on the precise scope of the offence and the nature of the reasonable procedures defence … We will continue to consult with stakeholders on the impact of the new corporate offence following publication of finalised draft legislation.”

At the time there was some comment on the amended proposal. A short piece in the Tax Journal noted that the new draft had three changes: an expansion in the definition of the facilitation of foreign tax evasion; an amendment to clarify the definition of facilitation of UK tax evasion; and, an expansion in the defence to be available to a corporation. In the latter case corporations would be able to claim no offence had been committed if it was held reasonable for the corporation not to have had prevention procedures in place. The authors noted that “this late addition may have the potential to offer smaller entities some escape from liability and release them from the

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102 “Relevant body” is defined within section 1(2) of the new draft clauses.

103 Tackling tax evasion: a new corporate offence of failure to prevent the criminal facilitation of tax evasion, April 2016 pp6-2. The consultation has a case study of how the offence would work “to help inform stakeholder feedback” (see para 3.6, pp24-26).

104 op. cit. p45
unduly burdensome compliance procedures.” Subsequently, when the Queen’s Speech confirmed that this provision would be included in a forthcoming Criminal Finances Bill, the CIOT reiterated its call for the new offence to be phased in gradually. The CIOT gave more details of its concerns in its formal response to the second consultation paper, which it published in late July. In a press notice issued alongside this submission, Glyn Fullelove, chair of CIOT’s Technical Committee, argued that HMRC should seriously consider delaying implementation, and that this new criminal sanction should only be applied in “significant cases”:

“We support the intention behind this legislation, which is to ensure that companies take measures to prevent their staff helping clients of the company or indeed anybody else, evade tax. At the same time, we do not wish to see the serious nature of a criminal prosecution downgraded by prosecutions in relatively small cases that simply add an extra fine on top of civil penalties and are a long way distant from the behaviours that have spurred the introduction of the offence.

“If the Government believes that criminal sanctions need to be strengthened in this area, then it would be sensible to apply it only in significant cases where large organisations have failed to take their obligations seriously. Prosecuting a small company for failing to prevent the evasion of, for example, a small amount of VAT, where the company can already be subject to heavy tax penalties, and where the staff who actually perpetrated the evasion can themselves be prosecuted, could be seen as one punishment too many for the small firm involved and is unlikely to affect the conduct of the management and the overseas staff of a major multinational bank.”

As noted, this second consultation closed on 10 July 2016 and on 13 October 2016 the Government published a summary of the responses it had had, with a revised version of its draft guidance, alongside the Bill.

In general responses had been positive, and the Government did not announce any fundamental changes to the draft clauses, though it confirmed “substantial additions” had been made to the draft guidance “following the submission for stakeholders of illustrative case studies and examples.” Some of the specific points that were made are picked up in the discussion of the Bill’s clauses in the next section of this paper. Of more general interest, the Government had asked for evidence on that the financial impact of the new corporate offence might be:

No written feedback was provided with an estimate of costs to business. However a number of stakeholders discussed on a one
to one basis the likely impacts on their business and the changes they would be making.

Many corporations highlighted that they were already required by regulation to have in place financial crime prevention procedures, many of which they could leverage and bring into an overarching governance structure to form part of their reasonable procedures for the purposes of preventing their associated persons from deliberately facilitating tax evasion.

Businesses highlighted that they may face additional costs where they are required to exercise oversight over the actions of the third parties who are providing services on their behalf, where they have typically chosen not to exercise oversight or control and have instead relied on the assumed good governance of the corporate entity that contractually employs those individuals.\footnote{HMRC, \textit{Tackling tax evasion - summary of responses}, 13 October 2016 para 2.69-71}
6. The Bill

6.1 Introduction
The Bill’s overview in the Explanatory Notes includes this:

The Criminal Finances Bill will make the legislative changes necessary to give law enforcement agencies, and partners, the capabilities and powers to recover the proceeds of crime, tackle money laundering and corruption, and counter terrorist financing.

The measures in the Bill aim to: improve cooperation between public and private sectors; enhance the UK law enforcement response; improve our capability to recover the proceeds of crime, including international corruption; and combat the financing of terrorism. […]

The Bill is in 4 parts.

Part 1 deals with the proceeds of crime, money laundering, civil recovery, enforcement powers and related offences and creates a range of new powers for law enforcement agencies to request information and seize, monies stored in bank accounts and mobile stores of value.

Part 2 will ensure that relevant money laundering and asset recovery powers will be extended to apply to investigations under the Terrorism Act 2000 (TACT), as well as the Proceeds of Crime Act 2002 (POCA).

Part 3 will create two new corporate offences of failure to prevent facilitation of tax evasion.

Part 4 includes minor and consequential amendments to POCA and other enactments.

There have been relatively few responses to the Bill from outside bodies. What comments there have been have been included in the Paper above. However, a general point made by the law firm Eversheds included comments on what the Bill did not include:

Notable omission in the Bill

One interesting aspect of the Bill is what it does not include. In May 2016, the Government had announced plans to introduce new corporate criminal liabilities arising from “failure to prevent economic crimes” such as fraud, money laundering and false accounting. Whilst it was anticipated that this Bill would implement those plans, the current provisions of the Bill do not do so. However, it should be noted that unlike the proposed corporate criminal offence for failure to prevent facilitation of tax evasion (which is included in the Bill), there is yet to be any public consultation on corporate criminal offence for “failure to prevent economic crimes”.112

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112 Eversheds; press release SuperSars me October 2016
6.2 Part 1
Investigations
Unexplained Wealth Orders

Clauses 1-6 would create Unexplained Wealth Orders (UWOs). These would require a person who is suspected of involvement in, or association with, serious criminality to explain the origin of assets that appear to be disproportionate to their known income.

Unexplained Wealth Orders are aimed at addressing a perceived lacunae in POCA. The Explanatory Notes state:

> Law enforcement agencies often have reasonable grounds to suspect that identified assets of [persons suspected of involvement in serious criminality] are the proceeds of serious crime. However, they are unable to freeze or recover the assets under the current provisions of POCA due to an inability to obtain evidence (often due to the inability to rely on full cooperation from other jurisdictions to obtain evidence).

Clause 1 would insert a number of new sections into POCA (362A-362H) providing for a court to make an UWO. Applications would be made to the High Court by an enforcement authority such as the NCA, the Serious Fraud Office (SFO), Crown Prosecution Service (CPS).

The person on whom the order is served – the respondent – must either be suspected of involvement in serious criminal activity, or they must be a “Politically Exposed Person” (PEP). A PEP is defined as an individual who has been entrusted with prominent public functions by an international organisation or a State outside of the UK or the EEA. There is no requirement of suspicion of serious criminality with respect to such a person. The Explanatory Notes explain that these provisions –

> [R]eflect a concern about those involved in corruption overseas laundering the proceeds of crime in the UK; and the fact that it may be difficult for law enforcement agencies to satisfy any evidential standard at the outset of such a investigation given that all relevant information may be outside of the jurisdiction.

There is no need to prove involvement in serious criminality to the criminal standard, and it is sufficient that a person associated with the respondent is suspected of such involvement.

The Order would place a requirement on the respondent to explain the source of the assets within a specified time period.

If the respondent fails to respond within this period without reasonable excuse the property in question would be treated as property obtained through unlawful conduct, known as “recoverable property”. In these circumstances the enforcement authority would then consider whether to take action to recover the property.

It would be an offence under new section 362E for the respondent to knowingly or recklessly make a false or misleading statement in

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113 Para 12
114 Para 13
response to a UWO. An enforcement authority may also bring contempt of court proceedings against a respondent who fails to comply.

A statement made in response to a UWO may not be used against the respondent in criminal proceedings.

**Clause 2** would insert further new sections into POCA (362I-362P) providing for the freezing of property identified in an UWO.

**Clause 3** would insert new sections into POCA to provide for the enforcement of a UWO overseas. The enforcement authority would be able to request assistance from overseas authorities via the Secretary of State.

**Clauses 4-6** would insert new sections 396A-396S into POCA in order to make equivalent provision in Scotland. These reflect differences in the legal framework, for example, in Scotland an application for a UWO would be made by the Scottish Ministers to the Court of Session.

**Reaction**

Transparency International (TI) have suggested that the principle of UWOs is strongly supported by leading anti-corruption experts in the UK. According to TI they are necessary because

There are important gaps in the UK legal framework which are being exploited by corrupt individuals and companies. This means, for example, that a corrupt official who has stolen his country’s healthcare budget can buy a house in London with the proceeds - and at present nothing can be done unless there is a legal conviction in the country of origin, which simply never happens. Although some older legislation exists, it badly needs updating to close these loopholes, and lawyers who practice in this area are clear that this additional legislation is required.

TI’s research has shown that huge amounts of illicitly gained wealth are laundered through the UK each year – at least £10 billion and according to the National Crime Agency possibly as much as £100 billion annually.

However, the current system allows barely any assets to be seized and restored, even in the rare cases when they have been identified. During the London Anti-Corruption Summit in May, when President Buhari of Nigeria was asked if he demanded an apology from David Cameron for his “fantastically corrupt” claim, he said he did not need an apology. He said, “What I am demanding is the return of the assets”. Even when the political will is there, the legal framework is not good enough.\(^{115}\)

However TI has also noted that there are “important civil liberties, privacy and human rights considerations inherent in the use of such instruments.”\(^{116}\) In particular, such powers would need to comply with Article 8 of the Human Rights Act 1998, which protects the right to private and family life, and Article 6, which protects the right to a fair trial.

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\(^{115}\) Transparency International UK Press briefing: Unexplained Wealth Orders

\(^{116}\) Transparency International: Empowering the UK to recover corrupt assets: Unexplained Wealth orders and other new approaches to illicit enrichment and asset recovery. March 2016
Disclosure Orders

Clauses 7 and 8 modify the existing disclosure order system for England, Wales & Northern Ireland and Scotland respectively. Disclosure orders give powers to law enforcement agents to require:

- anyone that they think has relevant information to an investigation, to answer questions, provide information or to produce documents. They are used to gather the information required for a successful criminal investigation, although the compelled evidence may not be used in criminal proceedings against the person who gave the information.117

These are currently used by the SFO in fraud or corruption investigations. These two clauses extend these powers to ML investigations. Clause 7 (England, Wales & Northern Ireland) additionally shifts the power to issue an order from the courts to “an appropriate officer” of the investigating authority.

Money laundering

Clauses 9 – 11 modify the existing SARs regime.

As stated above, regulated agents - solicitors, accountants, estate agents and others - have to make judgements about proposed transactions. If a company or individual think that a transaction is suspicious, reporting it to the National Crime Agency (NCA) under the SARs regime provides it with a defence against prosecution.

This clause gives the NCA potentially more time to investigate suspicious transactions reported to them.

Under section 335 of POCA, the NCA can allow or refuse consent to the transaction continuing. If it refuses, the reporting company loses the statutory defence provided to the money laundering offences (sections 327 – 329 of POCA) for a period of 31 days from the date of the refusal which (normally) means that the transaction stops. This gives the NCA, or other investigators, time to gather evidence to determine whether further action, such as restraint of the funds, should take place. This period, called a moratorium period, is not currently renewable, and often does not allow sufficient time for the NCA to take appropriate action.

The Bill (clause 9) would amend this provision (introducing a new Section 336A into POCA) to allow for extensions of up to 31 days, totalling a period of no more than 186 days from the end of the initial 31 day moratorium period. The extension would be made by court order on conditions that:

- The court may, on an application under this section, grant an extension of a moratorium period if satisfied that—
  - (a) an investigation is being carried out in relation to a relevant disclosure (but has not been completed),
  - (b) the investigation is being conducted diligently and expeditiously,

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117 Explanatory Notes para 14
(c) further time is needed for conducting the investigation, and
(d) it is reasonable in all the circumstances for the moratorium period to be extended.

(2) An application under this section may be made only by a senior officer

Other new sections of POCA (sections 336B and 336C) introduced by clause 9 set out further provisions and conditions surrounding court hearings to extend the moratorium period.

Clause 10 includes new Sections in POCA designed to enable information to be shared within the regulated sector.

The new Sections would enable a company in the regulated sector ‘A’ to divulge information it has through its normal business, to other regulated companies at their request or at the request of an official at the NCA. The information must relate to:

- the disclosure of the information will or may assist in determining any matter in connection with a suspicion that a person is engaged in money laundering.

According to the Explanatory Notes:

Although existing data protection legislation allows for the sharing of information for the prevention and detection of crime, regulated companies are concerned that there should be express legal cover that is directly related to the anti-money laundering regime, in order to reduce the risk of civil litigation for breach of confidentiality.\(^\text{118}\)

It continues:

This measure will enable the submission of "super SARs", which bring together information from multiple reporters into a single SAR that provides the whole picture to law enforcement agencies. To begin with, this measure will extend to financial sector organisations – some of which are already part of the JMLIT – but will be extended to all of the regulated sector in due course.\(^\text{119}\)

Subsequent proposed new Sections of POCA contained in this clause concern the form in which the information should be made available, the manner and use of the disclosed information and provisions about the civil law protection afforded to those who take advantage of it.

Clause 11 introduces new procedures and powers called ‘further information notices and orders’. On the basis of information disclosed under the new freedoms to disclose given in Clause 10,

An NCA authorised officer may give a further information notice under this section to—

(a) the person who made the disclosure, or

(b) any other person carrying on a business in the regulated sector.

\(^{118}\) Explanatory Notes para21

\(^{119}\) Explanatory Notes para22
A further information notice under this section is a notice directing the person to whom it is given to provide to the NCA authorised officer further information in relation to anything contained in the disclosure.120

Similar provisions are contained in a further new Section (Section 339ZI POCA) in relation to requests from overseas authorities.

Civil Recovery

Clauses 12 and 13 would create new civil powers to enable the forfeiture of money stored in bank accounts and items of personal property such as jewellery and precious metals.

These powers are similar to existing powers contained in Part 5 of POCA governing the cash seizure and forfeiture scheme. Part 5 establishes an extended regime of civil recovery of the proceeds of unlawful conduct. These procedures provide an alternative to confiscation after conviction if it can be shown on the balance of probabilities that there are “reasonable grounds” for suspecting that the assets to be forfeited are the proceeds of unlawful conduct.

Clause 12 would insert a new Chapter 3A into Part 5 of POCA providing for the seizure and recovery of “listed assets” that are proceeds of unlawful conduct or intended for use in such conduct.

Listed assets include precious metals; precious stones; watches; artistic work; vouchers and postage stamps. This list may be amended by the Secretary of State in consultation with the Scottish Ministers.

New sections 303C-F set out the conditions under which a search for such items may be conducted.

If found, listed assets may be seized if there are reasonable grounds for suspecting that they are recoverable property (that is, property obtained through unlawful conduct) or intended for use in unlawful conduct, provided the value exceeds a minimum threshold (currently £1000, subject to amendment by the Secretary of State).

The property may be detained up to a maximum of two years (with judicial approval) if required for an ongoing criminal investigation or proceedings.

The assets may be released to the person from whom they were seized if they are able to satisfy a judicial authority that they are not recoverable assets or intended for use in unlawful conduct.

A judicial authority may order forfeiture of the property if satisfied that it is recoverable property or intended for use in unlawful conduct.

Clause 13 would insert further new sections into Part 5 of POCA (303Z1-303Z19) to make provision for the freezing and forfeiture of bank and building society accounts that contain the proceeds of unlawful conduct.

An application for an account freezing order (AFO) may be made where there are reasonable grounds for suspecting that the money contained

120 Clause 11 (New Section 339ZH POCA)
in the account is recoverable property or is intended for use in unlawful conduct. The application must be made to a magistrates’ court in England, Wales and Northern Ireland and to the Sheriff in Scotland. The court would set a timeframe for the AFO of no longer than two years.

A number of exclusions would be permitted, for example to cover living costs and legal expenses.

A “senior officer” (as defined in new section 303Z2(7)) may seek forfeiture of the contents of the account, provided they are satisfied that the contents are recoverable property or intended for use in unlawful conduct. A notice would then be issued providing a period for objections to be made. The amount stated in the notice would be forfeited at the end of that period if no objections are received.

Money may also be forfeited under a court order.

Enforcement powers

Clauses 14 - 16 includes various means by which the enforcement powers of the Serious Fraud Office, HMRC and the Financial Conduct Authority (FCA) are extended.

In clauses 15 and 16, HMRC and the FCA are given powers of civil recovery of assets. Either organisation can initiate civil proceedings against people they suspect of illegal activity. Since these are civil cases, the higher standard of proof for criminal cases does not have to be met so both bodies will have a greater chance of recovering property they believe has been acquired illegally.

Assault and obstruction offences

The Explanatory Notes\(^{121}\) state that the Bill would bring consistency in terms of the protection for officers exercising powers under POCA. The notes state that currently there are criminal offences of assault and obstruction that apply in respect of some officers but others are not included. For example, section 453A of POCA provides for an offence of assaulting or wilfully obstructing an accredited financial investigator who is acting in the exercise of a relevant power.

Clause 17 would insert a new section into POCA to make it an offence to assault or wilfully obstruct an appropriate person who is acting under the authority of a search and seizure warrant issued under section 352 of POCA. The definition of an appropriate person would include a NCA officer discharging a warrant in connection with a civil recovery investigation or an exploitation proceeds investigation and an officer of the FCA, Crown Prosecution Service or Public Prosecution Service for Northern Ireland in relation to civil recovery investigations.

Clauses 18 and 19 would each insert a new section into POCA to create an offence of assaulting or obstructing an officer of the SFO (clause 18) or an immigration officer (clause 19) who is exercising a relevant POCA search and seizure power. The relevant powers are set out in the clauses.

\(^{121}\) Explanatory Notes, para 26
Clause 20 would create an offence of assaulting or obstructing an accredited financial investigator exercising powers concerning external (overseas) requests and orders under section 444 of POCA.

Miscellaneous
Chapter 5 of the Bill includes various miscellaneous provisions.

Clauses 21 and 22 define ‘bank’ in England & Wales and Northern Ireland respectively. This is a technical amendment necessary following the repeal of the Banking Act 1987 which provides the current definition.

Miscellaneous provisions relating to Scotland
Clauses 23, 24 and 25 extend only to Scotland. The Explanatory Notes state that they would make amendments to POCA to reflect the nuances of the Scottish criminal justice system.122

Clause 23 would insert a new section into POCA intended to replicate existing provisions which apply in England and Wales and Northern Ireland. It would provide for the High Court of Justiciary or the sheriff to order any realisable property in the form of money held in a bank or building society, or money which has been seized from an accused person, to be paid to the appropriate clerk of the court in satisfaction of all or part of a confiscation order. The new section would only apply to bank or building society accounts which are maintained by the person against whom the confiscation order is made, not accounts in the name of third parties. Wilful failure to comply with such an order would be dealt with as a contempt of court.

The new section would confer on Scottish Ministers the power to amend it by regulations to include money held in other kinds of accounts or products. Such regulations would be subject to the affirmative procedure.

Clause 24 would amend POCA to give the Court of Session the power to grant the trustee for civil recovery a decree of removing and a warrant for ejection to recover possession of heritable property. The Explanatory Notes state that this provision aims to remove existing jurisdictional and procedural barriers that can delay the recovery of possession of heritable property (e.g. a house, flat or commercial premises) to which a recovery order applies.123

Clause 25 is a technical amendment to POCA concerning the definition of “bank” in Scotland.

Accredited Financial Investigators
Clause 26 would allow civilian Accredited Financial Investigators (AFIs) to receive approval to use search and seizure powers from a senior police officer. Currently, the Explanatory Notes state, they can only obtain authorisation from a senior civilian AFI.124

122 Explanatory Notes, para 33
123 Explanatory Notes, para 165
124 Explanatory Notes, para 30
Confiscation investigations and determination of the available amount

Clause 27 would allow for the use of POCA investigation powers for testing claims made about the amount available to an individual to satisfy a confiscation order and for investigation of the financial position of the individual in cases of a reconsideration of the amount available.

Annex B of the Explanatory Notes briefly explains confiscation under POCA as follows:

Confiscation orders are made following conviction for an offence. A confiscation order does not provide for the confiscation of particular property, but rather orders the defendant to pay a set amount of whatever resources are available to him or her.

The amount available to a defendant to satisfy a confiscation order is called the “available amount”. The Explanatory Notes explain that this is:

… the value of all the defendant’s property, minus certain prior obligations of the defendant such as earlier fines, plus the value of all tainted gifts made by the defendant (see section 9 of POCA). In considering the value of the confiscation order made against a defendant, the court will set an amount equivalent to the defendant’s benefit from their crime(s) unless the “available amount” is shown to be less, and in those cases the defendant is ordered to pay that lesser amount.125

It is for the defendant to prove to the court that the available amount is less than the benefit figure.

POCA contains provision (section 22) for the available amount to be reconsidered or re-visited in certain circumstances.

Currently, the financial investigation powers in POCA are not available for investigations linked to these reconsiderations. Clause 27 would extend investigation powers in Part 8 of POCA so that they can be used to investigate claims made by the defendant about the available amount and to obtain evidence in support of any reconsideration of the amount.

Minor amendments

Clause 28 would make minor amendments:

- to clarify the definition of “free property” in section 82 of POCA;
- to update the concept of “distress” in POCA so that it is consistent with changes in other legislation;
- to extend the non-exhaustive list of situations in which “mixed property” can be recovered to include property that has been used to redeem a mortgage; and
- to extend the provisions that allow for writing-off orders to include orders made under the Drug Trafficking Offences Act 1988.

125 Explanatory Notes, para 173
6.3 Part 2: Terrorist Property

Clauses 29 – 35 would extend a number of powers in the Bill to investigations into terrorist property and terrorist financing.

Disclosure of information

Clause 29 and Schedule 2 amend the Terrorism Act 2000 (TACT) by inserting a new Schedule 5A to provide for a disclosure order regime (for background on disclosure orders see commentary on clauses 7 & 8 above).

A disclosure order is defined as an order authorising an officer to give anyone he thinks has relevant information a written notice requiring that person to answer questions, provide information or to produce documents on any matter that is relevant to the confiscation investigation.

Under the new Schedule, a disclosure order may be granted by a judge where there are reasonable grounds for suspecting that a person has committed a relevant offence under the Act, or that property specified in the application is terrorist property. There must also be reasonable grounds for believing that the information sought is likely to be of substantial value to the terrorist financing investigation concerned.

Failure to comply with an order without reasonable excuse would be an offence.

Paragraph 12 of the new Schedule would provide that a statement made in response to a disclosure order may not be used in evidence against the statement maker in criminal proceedings.

Paragraph 13 would provide that an order may not be used to require a person to provide information subject to legal professional privilege.

Part 2 of the Schedule makes equivalent provision for Scotland. The Explanatory Notes state that the approach in Scotland varies in some respects from that in England, Wales and Northern Ireland, for example, applications for disclosure orders in Scotland are made to the High Court of the Justiciary.

Clause 30 inserts new clauses 21CA-21CF into TACT, which would make provision for the voluntary sharing of information between bodies in the regulate sector, and between those bodies and the police or NCA, in connection with suspicions of terrorist financing or the identification of terrorist property or its movement or use. These mirror equivalent provisions with respect to money laundering under clause 10 (for discussion of which see above).

Where information is shared in accordance with these provisions, regulated sector businesses would not breach any restrictions on the disclosure of information.

Clause 31 would insert further new sections into TACT (22B-22G), which would make provision for a law enforcement officer to request and then require further information following a disclosure from the
regulated sector. This mirrors provisions in clause 11 in relation to money laundering.

Where an initial request is not complied with, a court order may be obtained requiring provision of the information. Failure to comply with an order may result in a fine of up to £5000.

Civil recovery

Clause 32 and Schedule 3 would insert a new Part 4A into Schedule 1 of the Anti-terrorism, Crime and Security Act 2001 (ATCSA) to enable the seizure and recovery of certain types of moveable or personal property. The property may be seized where there is a reasonable suspicion that it is intended to be used for the purposes of terrorism, or consists of resources of a proscribed organisation, or where it is property “earmarked as terrorist property” (under Schedule 5 of ATCSA). These powers mirror the new civil recovery powers under POCA provided for by clause 12 (for discussion of which see above) and cover the same listed assets, namely: precious metals; precious stones; watches; artistic works; vouchers; and postage stamps.

A judicial authority may order the forfeiture of the property if it is satisfied that it is of the nature suspected.

Clause 33 and Schedule 4 insert a new Part 4B into Schedule 1 of ATCSA. These provisions would enable the freezing and forfeiture of bank and building society accounts where they contain money intended for use in terrorism, the resources of a proscribed organisation or money earmarked as terrorist property. These powers mirror the new civil recovery powers under POCA provided for by clause 13 (for discussion of which see above) and the conditions under which they operate are largely the same.

Accredited financial advisers

Clauses 34 and 35 would extend a number of powers currently available to constables under TACT and ATCSA to civilian Accredited Financial Investigators (AFIs). The Explanatory Notes state that

Counter-terrorism policing indicate that the extension of these powers to AFIs will increase the capacity of the police to apply for the orders in question by over 50%. AFIs are currently used frequently in proceeds of crime investigations.126

This means that AFIs will have the power to apply for various types of court order for the purposes of an investigation relating to terrorist property.

Clause 35 would provide for various offences of assaulting or obstructing an AFI. These reflect similar protections for officers exercising powers under POCA (see discussion of clauses 17-20 above).

6.4 Part 3: Corporate offences of failure

Clauses 36-44 provide for the new corporate failure to prevent facilitation of tax evasion.

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126 Para 35
It may be helpful to note that the Government’s second consultation has a three page case study of how the offence is intended to work in practice (see para 3.6, pp24-26). The final version of the Government’s draft guidance has much more detail – and as an introduction, it underlines the point that there are three stages to the new offence:  

![Diagram showing three stages of the new offence]  

127 Clause 36 defines certain essential terms that would underpin the new offence: specifically, the “relevant body” to which the offence would apply, and the “associated person” whose facilitation the corporation had failed to prevent. “Relevant body” is defined as “a body corporate or partnership (wherever incorporated or formed)”, so that it would apply to “all legal persons, eg, companies, partnerships, LLPs, regardless of whether they operated commercially or for other reasons (such as a charity).”  

128 In responses to the Government’s second consultation the majority of respondents expressed themselves content with this definition, but there were a series of concerns raised in relation to ‘associated persons’. For these purposes a person is associated with a relevant body if he or she performs services on behalf of that relevant body. The capacity in which the person acts is not determinative – they may be acting as an employee, agent, contractor, subcontractor, or consultant. Some stakeholders argued that the corporate offence should only apply if the corporation had directly benefited from the person’s actions. In its earlier consultation the Government had strongly opposed such a test, and it remains of this view.  

129 Some respondents raised concerns as to whether this brought into scope persons who a corporation had little realistic opportunity to control. In turn the Government has underlined that the level of control a corporation has over someone will be a factor in determining their defence:  

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128 Tackling tax evasion: a new corporate offence, April 2016 para 2.9  
129 Tackling tax evasion – summary of responses, 13 October 2016 para 2.28, para 2.8  
130 Explanatory Notes para 255  
The level of control a corporation has over the associated person who has committed the illegal act of facilitating tax evasion will be a factor taken into account when considering what procedures are reasonable. The guidance includes the concept of “proximity”. Corporations can be expected to control those most closely proximate to them, such as employees, quite closely by way of training, procedures and disciplinary processes. However, a corporation can reasonably be expected to do less to control those less closely proximate, such as the staff of a sub-contractor. Here a term in the contract requiring the subcontractor to control their staff might suffice.\(^{122}\)

**Clause 37** would create an offence to prevent facilitation of **UK** tax evasion offences. **Clause 38** would create an offence to prevent facilitation of **foreign** tax evasion offences. Initially the draft legislation had presented these elements together, but in its second consultation document the Government asked if it would be clearer to separate them. Respondents “unanimously agreed” that having two separate distinct offences was better.\(^{123}\)

In this context, the individual who facilitates tax evasion must be doing so when “acting in the capacity of a person associated with” the relevant body: **clause 37(1)** and **clause 38(1)**. The Explanatory Notes to the Bill underline this point:

The associated person must commit the tax evasion facilitation offence in the capacity of associated person. Where an employee criminally facilitates his or her partner’s tax evasion in the course of their private life and as a frolic of their own, they commit a tax evasion facilitation offence but not in the capacity of person associated with their employer. Therefore the employing relevant body does not commit the new offence.\(^{134}\)

Some respondents to the second consultation had raised the concern that the legislation, as drafted, would not “exclude instances where a person was acting in a private capacity, i.e. where that individual was using their professional skills to facilitate tax evasion in their private life.”\(^{135}\) Although the Government had underlined its view that the legislation, as drafted, met this test,\(^{136}\) in its response document it confirmed that “further language” on this issue had been added to the guidance, as well as the Explanatory Notes to the Bill.\(^{137}\)

**Clause 37(2)-(3)** establishes what a defence may be in these circumstances: that the corporation has reasonable prevention procedures in place, or, that it is not reasonable to expect these procedures to be in place. Equivalent provision with regard to a foreign revenue offence is made by **clause 38(3)-(4)**. As the Explanatory Notes comment, “it is only reasonable or proportionate procedures, as opposed to fool-proof or excessively burdensome procedures, that are required.”\(^{138}\)

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132  Tackling tax evasion – summary of responses, 13 October 2016 para 2.21  
133  op.cit. para 2.46  
134  Explanatory Notes para 258  
135  Tackling tax evasion – summary of responses, 13 October 2016 para 2.22  
136  Tackling tax evasion: a new corporate offence, April 2016 para 2.4  
137  Tackling tax evasion – summary of responses, 13 October 2016 para 2.23  
138  Explanatory Notes para 260
The offence regarding foreign tax evasion, set out by clause 38, is broadly similar to the offences set out by clause 37, though slightly narrower in scope. It may only be committed if the relevant body is incorporated under the law of the UK, the relevant body carries on part of its business from the UK, or where the associated person does the facilitating criminal act in the UK, under clause 38(2). Some respondents to the consultation raised concerns that UK branches might be hit by the compliance behaviour of their foreign parent – something the Government acknowledged was a “real possibility”:

Some stakeholders expressed the view that their overseas corporations, particularly those based in countries with a weaker compliance culture, would not put in place procedures to prevent their representatives from facilitating tax evasion. They felt that a UK branch could be negatively impacted by the inaction of the wider corporate structure and its refusal to put in place procedures to prevent its representatives from facilitating tax evasion. This is a real possibility.

Much in the same way that a UK branch could be negatively impacted where the corporate entity is prosecuted in the country suffering the tax loss. It is up to each corporation to decide what, if any, procedures it wishes to put in place to guard against criminal prosecution and HMRC have and continue to make resource available to support corporations who ask for assistance in developing their procedures.\(^{139}\)

The Government went on to draw the important distinction between branches of a single company, and separate subsidiary companies:

This flows from the fact that a company is a legal person … Where a single company has various offices or branches, these various offices and branches are part of the company but have no separate legal identity … A subsidiary is another entirely separate and distinct company: it is a separate legal person … It is correct that [a] the subsidiary … would not be criminally liable for a “sister” corporation or a parent corporation’s action or omissions … It is for each corporation to balance the benefits and duties that come with having a presence in the UK as either a branch or as a subsidiary, depending on their own circumstances.\(^ {140}\)

An important element to the foreign revenue offence is the requirement that there be “dual criminality”, both with regard to the taxpayer committing criminal tax evasion, and that offence being criminally facilitated by a person associated with the relevant body (by clause 38(5),(6)). This was an issue that some respondents raised specific concerns about; in particular, if this would require corporations to have detailed tax knowledge of other countries’ tax regimes. In answering these concerns the Government underlined that the level of knowledge to be expected from a corporation would depend on the particular circumstances of the case:

It is not the case that the overseas tax evasion offence requires a corporation, or an individual within a corporation, to have a detailed knowledge of any country’s tax regime. The overseas tax evasion offence does not require corporations to prevent tax evasion (which does not, in any event, include inadvertent non-

\(^{139}\) *Tackling tax evasion – summary of responses*, 13 October 2016 para 2.66

\(^{140}\) *op.cit.* para 2.67-8
compliance with detailed and technical rules due to ignorance), rather it requires corporations to put in place reasonable procedures to prevent those providing services for or on its behalf from criminally facilitating tax evasion. This requires corporations to have a knowledge of fraud that is proportionate to the risks they face of having their service providers deliberately and dishonestly facilitate tax evasion. That it is a crime to lie or fake documents in order to escape tax liabilities is an idea common to very many tax regimes.

The level of knowledge that is expected of a corporation will depend on the facts, including its particular circumstances. For example, if a corporation’s main or sole business is providing advice to its UK clients on their French tax liabilities and obligations, it would be reasonable to expect that corporation to have a more detailed understanding of the French tax system than a firm which does not offer tax advice, or a firm with no presence in France and few clients with a known French tax liability. It could be reasonable for this corporation, based on its risk assessment, to have more detailed procedures in relation to the criminal facilitation of French tax evasion as the bulk of its business relates to French taxes, and lesser procedures in relation to tax evasion in other jurisdictions which form little or no part of its business activity.

It went on to underline how the concept of dual criminality would work:

It is important to remember that, if the proposed act would be lawful if committed in the UK in relation to UK tax, then the new offence will not be committed regardless of the foreign country’s laws, as the requirement of dual criminality will not be fulfilled. There is only a need to consider the foreign criminal law where the proposed acts would be a crime if committed in the UK.

Clause 39 would require the Chancellor to publish guidance about the procedures corporations would be expected to put in place, a requirement “similar to the requirement in Bribery Act 2010 to publish guidance on how to prevent bribery.” Notably the clause would allow the Chancellor to endorse guidance prepared by third parties, “such as a trade association addressing the particular risks arising within that sector of industry.” As noted above, an updated, expanded draft version of the Government’s guidance was published at the same time as the Bill. The Government has made clear that this will not be finalised “until the legislation has been passed by Parliament.”

Clauses 40-2 make provision regarding offences. Of particular note, clause 40 would allow for cases involving a foreign revenue offence to be tried by courts in the UK. In these cases, clause 41 would require the personal consent of the DPP, Director for Public Prosecution in Northern Ireland, or Director of the SFO before any prosecution is brought for the foreign revenue offence. “Such a prosecution may raise complex issues

141 op.cit. para 2.52-3
142 op.cit. para 2.55
143 Explanatory Notes para 266
144 Explanatory Notes para 266-7
146 Tackling tax evasion – summary of responses, 13 October 2016 para 1.4
around the public interest and the relationship of the United Kingdom with other countries necessitating this safeguard.\textsuperscript{147}

Finally, \textbf{clauses 43-4} deal with consequential amendments and interpretation.

\textsuperscript{147} Explanatory Notes para 271
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