

Expanding cost protection for law enforcement

The United Kingdom is a global epicentre for money laundering. According to the Government, over £100 billion is laundered through and within the UK each year. In 2021-2022, the UK recovered assets worth **£354 million** under the Proceeds of Crime Act, which despite being the highest on record, amounts to just 0.3% of the amount that is likely to be laundered each year.

Last year, Transparency International UK estimated that **£6.7 billion worth of UK property had been bought using suspicious wealth**. Of these, almost a quarter in value were “**bought by Russians accused of corruption or links to the Kremlin**”. This situation and the invasion of Ukraine prompted a swift legislative response by the Government, who introduced new laws aiming at curbing economic crime and encouraging prosecutions. The legislation, now known as the **Economic Crime (Transparency and Enforcement) Act 2022**, places a limit on enforcement agencies’ liability by protecting them from any costs which could be awarded against them in Unexplained Wealth Orders (UWOs) proceedings, unless the enforcement authority seeking the UWO has acted dishonestly, unreasonably, or improperly. This means that where a public authority is unsuccessful in bringing an application, no order for costs should be made unless the public authority acted unreasonably.

Recommendation: Lord Faulks intends to introduce an amendment to extend the cost protections to all types of civil recovery cases. Upholding this amendment would help protect the public purse and limit the risk that our agencies are incentivised to focus on easy targets or ‘low hanging fruit’.

A fragmented landscape in law enforcement costs

Part 5 of the Proceeds of Crime Act 2002 (POCA) enables law enforcement authorities to recover property that was obtained through unlawful conduct without the evidentiary difficulties of securing a prior criminal conviction. The effective exercise of these powers is essential if civil recovery is to fulfil its purpose of deterring criminals who are as concerned, if not more concerned, with losing their assets than they are with losing their liberty.

In 2017, the Government introduced **UWOs**, an investigatory tool which allows law enforcement to apply for a court order requiring a Politically Exposed Person from overseas, or someone suspected of involvement in serious and organised crime, to explain their interest in property and how they obtained it. If that person fails to provide satisfactory evidence for their wealth, law enforcement may then apply for the permanent seizure of suspected criminal property using a lower “civil” standard of proof. Despite being heralded as a silver bullet to seize ill-gotten gains, UWOs have been rarely used. This is in large part because if law enforcement is unsuccessful, they must pay the legal bill of the successful party – which in some cases amounted to the annual budget of the law enforcement agencies.

Since UWOs were introduced, the Government introduced **the Economic Crime Act 2022** which created **costs protection** to law enforcement agencies under Part 8 of POCA. This was in response to the low uptake in UWO applications (at the time, only **9 have been issued against 4 individuals**) and the sky-high costs of failed UWO applications, which may have deterred law enforcement in pursuing further cases. For instance, **following a failed UWO application against the Aliyev family** related to 3 properties worth £80 million, the family sought

costs of a staggering £1.5m. Though the Court ordered the NCA to make an interim payment of £500,000, these sums are a significant hit on the NCA's **anti-corruption work** budget which has been just over £4 million annually since 2015. This was deemed a good way to solve the problem, and has resulted in **two additional UWO applications** since March 2022.

While **costs protection** on UWOs are welcome first steps that will hopefully embolden law enforcement agencies to make more frequent use of this investigative tool, this is a piecemeal intervention. It does not address the chilling effect of adverse costs orders in the arguably more important context of civil recovery proceedings under Part 5 of POCA, which allow authorities to seize assets rather than just investigate them.

Why we need cost protection

The Amendment tabled by Lord Agnew and voted on in the House of Lords would extend the cost protections to all types of civil recovery cases – limiting the court costs that law enforcement agencies can be liable for.

High legal costs have a chilling effect on enforcement by public bodies. Investigating rich and powerful individuals such as kleptocrats, criminals, and politically exposed persons involves going against the best and most expensive lawyers, unpicking complex corporate structures and reams of evidence. Super-rich individuals have in the past relied on **simply racking up unaffordable costs to evade enforcement action**. The chilling effect of potentially losing an entire year's budget on one lost case is highly damaging to the fight against economic crime. Not to mention the drain it has on taxpayers money.

Costs skew enforcement towards 'low hanging fruit'. The existing 'loser pays' principle can hinder law enforcement, or skew efforts towards low-hanging fruit, also known as the assets of "*the fled and the dead*". In other words, **law enforcement will choose cases where they expect the least resistance**, and where targets cannot wear down law enforcement agencies in lengthy court battles. **Alun Milford**, a former prosecutor and now partner at law firm Kingsley Napley, said public sector budgets meant crime fighting agencies had "little capacity to pay a costs bill in the sum of seven figures", adding that "either the government needs to do something creative about financial support so that adverse costs are covered, or change the rules."

Legal fee rates differ. Furthermore, the inequality of arms between law enforcement agencies and super-rich suspects is nowhere clearer than in the different legal fee rates at which costs are awarded. When a law enforcement body such as the NCA loses, it faces private sector legal costs charged at **£800-900 an hour**. When a defendant loses it faces public sector legal costs **charged at £150-180 an hour**.

Why the Government isn't going far enough

The Government asserts that law enforcement agencies are not hindered by costs. Yet, law enforcement officials have shown a strong appetite for costs protection in civil recovery cases. The Chief Capability Officer of the Serious Fraud Office (SFO) **told** the Economic Crime Bill Committee that the SFO would like to see this while the head of the National Economic Crime Centre (NECC) told the same Committee that they find costs protection "**an attractive proposal**." Furthermore, evidence gathered by the organisation [Spotlight on Corruption](#) suggest that there is a considerable **number of potentially high-risk cases in the pipeline which bear significant costs risks**. These include **over 60 cases** being reviewed by one prosecution authority, and close to **£1 billion in assets frozen by an enforcement body**.

Government Ministers also raised concerns that this new cost protection scheme would threaten the 'loser pays principle' in civil litigation. However, this argument does not take into account that in other areas of law, the courts have far more discretion on whether or not to impose costs on public bodies, including law enforcement, that bring unsuccessful regulatory or enforcement actions. Courts in these areas are allowed to consider the 'chilling effect' that costs may have on the ability of public bodies to make reasonable enforcement decisions made in the public interest.

According to an analysis by [Spotlight on Corruption](#), introducing the ability for courts to have such discretion would not be changing the overall principle of 'loser pays' as the Government argues, but ensure courts can consider the chilling effect in very specific circumstances involving publicly funded law enforcement bodies. And it would still be for the Court to decide that law enforcement had acted unreasonably, or in the **words** of the minister, "*if they make a complete Horlicks of a case,*" or that it was in the interests of the justice to impose costs. This important check would reduce risks of spurious or weak cases being brought by law enforcement.