

ANTI-CORRUPTION HELPDESK

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UNEXPLAINED WEALTH ORDER AS AN ANTI-CORRUPTION TOOL

QUERY

Can you please provide an overview of the use and good practices regarding unexplained wealth orders?

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SUMMARY

Unexplained wealth orders (UWOs) are part of non-conviction based asset confiscation, but contain some specificities: they do not require criminal convictions; they shift the burden of proof to the property owner who must prove a legitimate source for his wealth; and the forfeiture proceeding is instituted against a person rather than against the property.

Provided that the law establishing UWOs provides for enough guarantees to avoid the mechanism to be abused and to ensure constitutional guarantees, such as due process and presumption of innocence, are respected, they can be considered an effective anti-corruption tool in the recovery of stolen assets. Their success also depends to a great extent on the existence of an independent body tasked to investigate and request such orders.

1 UNEXPLAINED WEALTH ORDER: AN ANTI-CORRUPTION TOOL?

What is an unexplained wealth order?

Unexplained wealth orders (UWOs) are part of non-conviction based asset confiscation (civil forfeiture). Similar to other traditional *in personam* (directed to a person) and *in rem* (directed to a property) forfeiture, they aim to deprive criminals from acquiring or benefiting from unlawful activities (Maxwell 2015). However, UWOs do not require criminal convictions and also do not require the state to prove that the property in question is the proceed of a crime. The forfeiture procedure is instituted against a person rather than against the property. Moreover, another specificity of UWOs is that they shift the burden of proof to the property owner who must prove a legitimate source for his/her wealth (Hamilton 2012; Maxwell 2015).

The literature on unexplained wealth orders (UWO) is relatively scarce as this is quite a new (or at least not widespread development) in confiscation and forfeiture jurisprudence. Currently, only three countries, namely Australia, Colombia and Ireland have such mechanism in place. The majority of countries still rely on the “regular” confiscation regimes where confiscation is subsequent to conviction and therefore requires more evidence.

Other countries uses some elements of the UWO in illicit enrichment regulations, such as in France where an amendment to the criminal code introduced reversed burden of proof forfeiture measures targeting certain specific criminal offenders but it is still a post-conviction method (Hamilton 2012).

While some consider UWOs as useful mechanisms to ensure that at least part of the proceeds of crime are recovered, critics believe that it violates basic constitutional principles and guarantees, such as presumption of innocence and due process. The constitutionality of laws establishing such mechanisms have been challenged in Ireland and Australia, but so far they have survived.

UWO as an anti-corruption tool

Civil forfeiture may be particularly advantageous in grand corruption cases as it helps to overcome many of the challenges encountered when trying to locate, seize and recover stolen assets. Firstly, as a criminal conviction is not a precedent condition, the confiscation of assets through civil forfeiture cannot be frustrated by immunities, the inability to extradite the high-level officials involved or in the event of the death of the official, among others.

It has a lower standard of proof than criminal proceedings. Generally, criminal conduct must be established on a balance of probabilities. A lower standard of proof eases the burden on the government and means that it may be possible to obtain forfeiture when there is insufficient evidence to support a criminal conviction where the standard of proof is much higher (Council of Europe 2013; StAR 2009).

UWOs are particular interesting as they combine the above mentioned characteristics of civil forfeiture regimes with illicit enrichment regulations by shifting the burden of proof to the asset owner who needs to provide evidence that the assets were legally acquired. Practice has shown that it is often challenging to establish that a crime has occurred, link the assets to the crime and proceed with confiscation due to the burden of proof on the prosecution for showing that corruption offences, such as bribery or embezzlement, have occurred. The acts are often hidden, as are the money trails connected with them (Fagan 2012). The reverse burden of proof in UWOs certainly helps to overcome the evidentiary difficulty of proving ill-gotten wealth through corruption.

For instance, a recent analysis undertaken by Transparency International UK on asset recovery measures in the country shows that the adoption of UWO in the UK could be an effective response to the low rate of asset recovery in grand corruption cases in the country (TI UK 2015).

This answers provides an overview of how UWOs have been used in practice, focusing on the cases of Ireland and Australia.

2 UNEXPLAINED WEALTH ORDERS IN PRACTICE

Currently, only three countries use UWO mechanisms: Australia, Colombia and Ireland. This answer provides an overview of the UWO framework in Australia and discusses in more detail the case of Ireland, often referred as the most successful case.

Australia

In Australia, the Proceeds of Crime Act (PoCA) provides for four types of confiscation orders: (i) forfeiture orders; (ii) pecuniary penalty orders; (iii) unexplained wealth orders; and (iv) literary proceeds orders. UWOs have been included among the confiscation measures by a 2010 amendment to the act (Koren 2013).

PoCA sets out the general rules and steps to be followed in a UWO, including the freezing order (not mandatory), a preliminary UWO and the unexplained wealth declaration. However, detailed requirements and rules are defined in state legislation.

For instance, in New South Wales, a UWO shifts the burden of proof to the property owner, but the Crown has to show a nexus between an offence and the property when making a UWO to the court. The court has broad discretion when making an order. On the other hand, in the Northern Territory, while the burden of proof is also shifted to the property owner, the Crown does not need to show a connection between an offence and the property (Koren 2013). Annex 1 provides a brief overview of the rules applied in different states.

Since the introduction of UWOs in Australia, almost AUD\$61 million (US\$43.95 million) has been recovered. The confiscated money and money derived from other types of confiscated assets are paid into the Confiscated Assets Account pursuant to Part 4(3) of the PoCA 2002. Nevertheless, relatively little forfeiture has been achieved via UWOs in Australia, particularly if compared to other countries such as Ireland. Several factors are responsible for this, including a push-back by the Australian courts, caution on the part of prosecutors

to bring actions under these new laws, disagreements between police and prosecutors over how strenuously to use the law, a lack of forensic accounting staff and strict forfeiture laws for drug crimes that in some cases preclude the need for UWOs (Hamilton 2012).

Finally, and not least among the reasons for the lack of quantifiable success of UWOs in Australia and distinct from Ireland, is the absence of a Criminal Assets Bureau (CAB) like agency. There is no centralised effort at the federal level to coordinate UWO actions in Australia and there is not the level of cross-agency buy-in or cooperation like that observed in Ireland (see below) (Hamilton 2012).

Ireland

Hamilton (2012) provides a good overview of the Irish system of UWOs. According to the author, out of the three countries that currently use such mechanisms, Ireland is considered the most successful. The Proceeds of Crime Act (PoCA) of 1996 and the 2005 amendment set the rules for the application of unexplained wealth orders. The act also defined the establishment of an independent and specialised body responsible for implementing the rules, the Criminal Assets Bureau (CAB).

According to PoCA, unexplained wealth orders can be used to confiscate any property constituting proceeds of crime, and there is no need to establish a nexus between an offence and the property. The act contains clear definitions of what is understood to be proceeds of crime and also a set of guarantees to prevent the mechanism from being misused.

The first step in the process of submitting a unexplained wealth order to is the request a freezing/interim order, this is followed by an interlocutory-restraining order and finally by the disposal order.

Freezing/interim order

CAB, the body responsible for investigating cases of unexplained wealth, needs to apply for a freezing order to the court. In this initial stage, CAB needs to

show, based on the civil standard of proof, that: (i) a person is in possession or control of the property; (ii) that the property constitutes directly or indirectly the proceeds of crime and; (iii) that its value is greater than US\$18,000. The civil standard of proof takes into account the balance of probabilities, it does not require proof beyond a reasonable doubt as in criminal cases. If the court is convinced that it is more probable than not that the property in question is a result of the proceeds of a crime, it will issue an interim order freezing the property for a period of 21 days. During this period, the law ensures that the respondent or any other person claiming ownership of the property can challenge the decision. In this case, the respondent needs to prove that the property subject to the freezing order is not the result of the proceeds of crime.

Interlocutory-restraining order

In the second phase, CAB applies to the court for an interlocutory order. Similar to the freezing order outlined above, CAB needs to demonstrate that a person is in possession or control of a specified property and that the property is constituted directly or indirectly from the proceeds of crime and that the value of the property is not less than US\$18,000. The court will make an order if it is satisfied that the particular property constitutes the proceed of crime. In any of these processes (interim order or interlocutory order), the court may request the defendant to provide information specifying the source of the property and any income acquired during the previous ten years. However, the court does not need to hear the defendant and can decide on the order based on the information provided by CAB.

Once the interlocutory order is granted, it remains in effect for seven years before CAB can make an application for a disposal order and the assets can finally be returned to the state. Amendments to the law adopted in 2005 provide that the interlocutory order can expire before seven years if the parties agree to dispose of the property at an earlier stage, but not earlier than four years.

This legal requirement of having the interlocutory order in place before the final forfeiture is considered an important safeguard. This helps to

prevent abuses and also acts discouragement for authorities to take unnecessary UWOs as a revenue stream.

The law also provides for other safeguards: the respondent or any other third person claiming ownership of the property may apply to the high court to discharge the interlocutory order. In this case, the burden of proof lies with the defendant. Moreover, if an interim or interlocutory order was wrongfully issued, the defendant can be granted compensation.

Disposal order

The final phase is the disposal order or forfeiture, which is the final confiscation of the property. The forfeiture deprives the respondent of his or her property and transfers the title to the Ministry of Finance.

As mentioned previously, the forfeiture can only take place if an interlocutory order has been in place for seven years (or otherwise agreed by the parties).

In 2005, a provision specifically aimed at addressing corruption was introduced. The court may issue an order directing the respondent suspected of corruption to pay the minister of finance or another entity an amount of money equivalent to the suspected value of the enriched corruption. The court will issue an order for instance if it is satisfied that the respondent has benefited from his position.

The Criminal Assets Bureau

The success of UWO in Ireland is largely attributed to CAB, which is an independent agency dedicated to investigate and process civil forfeiture of the proceeds of criminal activity.

CAB is composed a multidisciplinary team with members from the Garda (police), tax and customs and from the Department of Social, Community and Family Affairs. They operate under the guidance of the chief bureau officer (CBO) selected from the ranks of senior Garda. The CBO is appointed by the commissioner of the Irish police. Representatives

from the revenue authorities, police and social welfare are nominated by their respective organisations and appointed by the Ministry of Justice.

Members of CAB continue to perform the duties and remain employees of their originating offices while also performing their tasks as members of CAB. However, they must exercise their powers and functions under the direction and control of the chief bureau officer. They bring to CAB the powers of and access to the body of information of their respective agencies. For example, the police have access to the police databases and the revenue officers have full access to tax records, and they use their respective information for CAB needs.

To ensure independence and security, the CAB Act provides that all CAB officers operate under anonymity, except for the chief bureau officer and the bureau's legal officer, and that all measures should be taken to not reveal the identity of the officers. Even in situations when an officer of CAB is exercising his or her duties under the act, he or she will not disclose his or her identity, but will be accompanied by a member of the police. In addition, whenever a task is performed in writing, documentation is signed on behalf of CAB.

The CAB Act also grants the body a wide range of investigative powers. As such it is authorised to search, seize and detain any property if there are reasonable grounds to suspect the property may constitute the proceeds of crime.

CAB conducts investigatory work on all civil confiscation cases. Cases can be referred to them by the regular police. The results of their investigations are shared with the public prosecutor's office that will decide whether or not to initiate criminal proceedings. Further, CAB has access to a large database, Police Using Lead System Effectively (PULSE), which contains comprehensive information on all citizens' criminal, traffic, tax, property, customs, social welfare and consumer credit records. This enables CAB to gather large and comprehensive amounts of information to compare assets to income and thereby determine who they should target.

CAB collects and publishes information on forfeiture of assets annually.

3 ANNEX

Figure 1: Key features of Unexplained Wealth Orders in different parts of Australia²⁸

<i>Commonwealth</i>	<i>New South Wales</i>	<i>Western Australia</i>	<i>Northern Territory</i>
<ul style="list-style-type: none"> • Enacted in 2010 • <i>in Personam</i> – action brought against the person • The burden of proof shifts to the property owner 	<ul style="list-style-type: none"> • Enacted in 2010 • <i>in Personam</i> – action brought against the person • The burden of proof shifts to the respondent and property owner 	<ul style="list-style-type: none"> • Enacted in 2000 • <i>in Personam</i> – action brought against the person • The burden of proof shifts to the property owner 	<ul style="list-style-type: none"> • Enacted in 2002 • <i>in Personam</i> – action brought against the person • The burden of proof shifts to the property owner
<ul style="list-style-type: none"> • The Crown has to show a nexus between an offence and the property • Court has broad discretion when making an order 	<ul style="list-style-type: none"> • The Crown has to show a nexus between an offence and the property • Court has broad discretion when making an order 	<ul style="list-style-type: none"> • No requirement to show a nexus between an offence and property • No court discretion 	<ul style="list-style-type: none"> • No requirement to show a nexus between an offence and property • Court has discretion to decide if making of an order is done on ‘just terms’

Source: Koren, 2013.

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