

Written evidence submitted by Spotlight on Corruption

Spotlight on Corruption is an anti-corruption charity that works to end corruption within the UK and wherever the UK has influence. We undertake detailed, evidence-based research on the implementation and enforcement of the UK's anti-corruption laws. Our vision is for a society where strong, transparent, and accountable institutions ensure that corruption and associated economic crime is not tolerated.

Executive Summary

A. LEGISLATIVE LACUNAE

Spotlight on Corruption considers that there are ongoing legislative lacunae in the economic crime framework which need urgent attention including:

- corporate liability for economic crime;
- Criminal Finances Act 2017 (Unexplained Wealth Orders and Property Freezing Orders); and
- senior executive accountability for economic crime.

Recommendations:

Spotlight on Corruption recommends—

1. the immediate introduction of a failure to prevent economic crime offence to complement the current Law Commission review into the identification doctrine;
2. an urgent amendment to the costs regime for public authorities bringing Unexplained Wealth Orders (UWOs) under the Criminal Finances Act 2017 (CFA);
3. amendments to the CFA to ensure UWOs can effectively be used where property is held by trusts or by those who are not the ultimate beneficial owner;
4. consideration be given to putting Property Freezing Orders (PFO) on an evidential par with Account Freezing Orders (AFO);
5. consideration of an individual failure to prevent economic crime offence for senior managers in the event that a company is found guilty of such an offence, or enters into a Deferred Prosecution Agreement (DPA); and
6. the introduction of a power for prosecutors to apply to courts for director disqualification orders (DDOs) for directors where a company is convicted or enters into a DPA.

B. LACK OF CONSISTENCY IN ANTI-MONEY LAUNDERING SUPERVISION

Spotlight on Corruption has real concerns about the ongoing issues with the consistency of anti-money laundering (AML) supervision, including low rates of criminal and regulatory enforcement in relation to AML violations.

Recommendation:

Spotlight on Corruption recommends that an independent expert review of the effectiveness of the UK's supervision and criminal enforcement for AML is commissioned by the government in March 2021. This review should look at:

- whether the government has achieved its stated goal of enhancing AML supervision as outlined in the Economic Crime Plan,
- how the UK performs against international best practice on AML supervision,
- whether the current Professional Body Supervisor (PBS) model is working or needs to be replaced with a more effective and robust model of supervision,
- whether the PBSs are effectively referring suspicions of money laundering to law enforcement and whether law enforcement is appropriately responding to such suspicions, and
- the factors behind the low rates of supervisory and criminal enforcement for money laundering in the UK.

This review should be undertaken with stakeholder participation, and be published in a timely fashion and prior to the government undertaking the review of the Money Laundering Regulations (MLR) and Office of Professional Body Anti-Money Laundering Supervision (OPBAS) regulations which it has committed to do by June 2022.

C. ECONOMIC CRIME ENFORCEMENT RESOURCING

Spotlight on Corruption is concerned that the ongoing uncertainty and insufficiency of resourcing for tackling money laundering and economic crime creates an inequality of arms between law enforcement bodies and those who commit economic crime.

Recommendation:

Spotlight on Corruption recommends that a full analysis of law enforcement funding needs for economic crime be developed for the next multi-year spending review and that there is transparency about this analysis. Any analysis of funding needs must take into account:

- new resources needed for adequate enforcement of the sanctions regime;
- new resources needed to respond to the fraud crisis created by COVID-19;
- new resources that might be required as a result of the UK losing access to EU-wide security tools and databases at the end of the EU transition period;
- the need to enhance recruitment and retention of relevant staff from financial investigators to top prosecutors, including pay levels needed to ensure this; and
- the huge disparity in what law enforcement bodies can pay for legal advice from counsel compared to what defendants pay for such advice.

Evidence

1. **Legislative lacunae in the economic crime framework need urgent attention:**
 - **corporate liability for economic crime**
 - **Criminal Finances Act (Unexplained Wealth Orders); and**
 - **senior executive accountability for economic crime**

A. Corporate liability for economic crime

Spotlight on Corruption recommends the immediate introduction of a failure to prevent economic crime offence alongside the current Law Commission review into the identification doctrine, with extensive consultation of the private sector during the development of guidance for this offence, to ensure stronger corporate governance and to ensure the UK does not fall behind international standards.

1.1. In its last inquiry into economic crime, the Committee noted that *“there is clear evidence that legislative reform is required to strengthen the hand of law enforcement in the fight against economic crime”* and recommended that *“the Government sets out a timetable for bringing forward legislation to improve the enforcement of corporate liability for economic crime.”*

1.2. Since the Committee made this recommendation, two further court judgments have clarified the limits to the current legislative framework for holding large companies and financial institutions to account for economic crime:

- Serco: DPA (July 2019). The DPA had to be entered into with a subsidiary due to the fact that a ‘directing mind’ could not be found at the parent company, despite the parent company devising and benefitting from fraud in a public procurement contract with the Ministry of Justice.¹
- Barclays Bank: dismissal of charges of conspiracy to commit fraud (published January 2020). The only corporate prosecution for 2008 financial crisis-related misconduct was dismissed by a court on the basis of the ‘directing mind’ doctrine, in a judgment which imposes the narrowest interpretation to date of the current corporate liability rules. In the words of one legal commentator, the judgment: *“effectively removes companies with widely devolved management and functioning boards and sub committees from the reach of criminal prosecutors.”*² This judgment sets a high bar for corporate fraud prosecutions going forward and will result in even fewer prosecutions of large corporate actors.

1.3. In November 2020, the Law Commission announced that it had been asked by the government to review corporate crime rules and suggest options for reform. Its terms of reference focus primarily on the issues with the ‘directing mind’ or identification doctrine. This was the government’s response to its Call for Evidence on corporate liability for economic crime which has been in limbo within government since March 2017 and which the Committee rightly characterised in 2019 as having stalled.³

1.4. Spotlight on Corruption has serious concerns that the Law Commission review may not provide the impetus for reform that prosecutors have said is clearly needed, and as the two judgments since the closing of the Call for Evidence, noted above, have shown is clearly needed.⁴ The Law Commission is aiming to present its options for reform at the end of 2021. The government has not committed to implement any reforms proposed by the

¹ <https://www.judiciary.uk/wp-content/uploads/2019/07/serco-dpa-4.07.19-2.pdf>

² <https://www.dlapiper.com/en/netherlands/insights/publications/2020/03/barclays-sfo-trial/>

³ <https://publications.parliament.uk/pa/cm201719/cmselect/cmtreasy/2010/201007.htm>

⁴ <https://www.spotlightcorruption.org/the-uks-corporate-crime-rules-why-urgent-change-is-needed/>

Commission. Rather, it has said it will consider the Commission's proposals alongside a further evaluation of whether reform is needed. Legislative reform is therefore unlikely to be introduced as a result of the Law Commission review before 2023 at the earliest, if at all.

1.5. Spotlight on Corruption considers that a more urgent introduction of a failure to prevent economic crime offence (with a focus on money laundering, fraud and false accounting) is needed. This would complement rather than pre-empt the Law Commission review into the identification doctrine. The identification doctrine is not superseded by the introduction of a failure to prevent offence and continues to apply to the substantive offences under relevant legislation creating ongoing unfairness in the application of the law between small and large companies. Furthermore, review of the identification doctrine is a complex task that affects corporate criminality across the board, not just for economic crime. Our detailed reasoning on this is laid out in our written evidence to the Financial Services Bill Committee recommending an amendment to that bill.⁵

1.6. To summarise, an urgent introduction of a failure to prevent offence is necessary to:

- **Protect the integrity of UK markets** by promoting strong corporate governance and deterring wrongdoing in the financial sector after the UK leaves the EU;
- **Ensure fairness in how large and small companies** are held to account for economic crime, particularly in response to the burgeoning fraud crisis resulting from COVID-19;
- **Establish equivalence between the UK and its major allies** post-Brexit, particularly with regard to money laundering, to ensure that the UK does not fall behind international standards on prosecuting economic crime; and
- **Create consistency in the liability attached to companies across different economic crimes** within the UK by ensuring that companies can be held to account for fraud and money laundering on the same basis as bribery and tax evasion.

1.7. With regard to money laundering in particular, the introduction of the 6th EU Anti-Money Laundering (AML) Directive, in early December 2020, requiring member states to have corporate criminal liability for money laundering creates a particular risk that the UK will fall behind emerging practice at an EU level. This could result in financial services companies operating to lower standards of corporate criminal liability in the UK than when they operate at an EU level.⁶ The UK government has recognised that had it chosen to opt in to this Directive, it would have needed to amend the current corporate liability laws.⁷

1.8. Careful consultation with the private sector is essential. We believe this can be achieved through extensive consultation with businesses about guidance the government should develop on what procedures are necessary to provide a defence to the offence and how these will fit with existing regulatory compliance requirements. The Commission's terms of reference state that it must ensure that any suggested reforms do not impose "*disproportionate burdens on business.*"⁸ We recognise the need for the Commission to take

⁵<https://publications.parliament.uk/pa/cm5801/cmpublic/FinancialServices/memo/FSB06.htm>

⁶https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.284.01.0022.01.ENG

⁷<https://publications.parliament.uk/pa/cm201617/cmselect/cmeuleg/71-xxix/71-xxix.pdf>

“the legitimate interests of businesses ... into consideration”, but those interests – and the wider public interest – are best served by a robust framework for corporate liability that ensures proper accountability for corporations which engage in criminal conduct.

B. Criminal Finances Act: Unexplained Wealth Orders and Property Freezing Orders

Spotlight on Corruption recommends:

- **an urgent amendment be introduced to the CFA to align UWOs to the common practice in Account Freezing Order (AFO) applications that costs can only be awarded against a public authority that acts unreasonably or improperly in bringing an application;**
- **consideration be given to putting Property Freezing Orders on an evidentiary par with Account Freezing Orders; and**
- **that UWO legislation be revisited to improve its effectiveness in relation to trusts and other vehicles for holding property.**

1.9. In April 2020, a court discharged the National Crime Agency’s (NCA) second UWO involving a Politically Exposed Person (PEP) in *NCA v Baker*.⁹ An application by the NCA to appeal this decision was refused. The two decisions have dealt a significant blow to the UWO regime for PEPs. The decisions in this case and the estimated £1.5m in costs that the NCA incurred in seeking this order (quarter of the NCA’s annual international anti-corruption budget¹⁰) have made future use of UWOs in such cases virtually untenable.

1.10. Without legislative reform and careful consideration of costs where public sector bodies bring such cases, UWOs are likely to be seldom used and almost exclusively in domestic serious and organised crime cases. Given that the government continues to tout UWOs as a flagship policy for dealing with dirty money coming into the UK, this is a serious concern.

1.11. It is important to note that other tools introduced in the CFA such as AFOs and Disclosure Orders have on the other hand proved very useful to law enforcement and are actively used across law enforcement. For comparison, law enforcement bodies have obtained–

- 15 UWOs relating to four investigations, with an estimated value of £143 million; and
- 1,256 AFOs with a value of £273 million since the CFA was introduced.¹¹

The costs regime for AFOs operates to a different standard under which public authorities are protected in relation to costs unless they have acted unreasonably.

1.12. It is worth pointing out that the government’s impact assessment for the UWO regime calculated that there would be 20 UWOs per year at a cost of £800,000 to £1.5 million over 10 years.¹² An amendment tabled to the CFA to introduce cost caps was rejected by the

⁸ <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/11/CCL-ToR-FINAL.pdf>

⁹ <https://www.judiciary.uk/wp-content/uploads/2020/04/Approved-Judgment-NCA-v-Baker-Ors.pdf>

¹⁰ <https://www.spotlightcorruption.org/the-ncas-kazakh-unexplained-wealth-order-uwo-a-costly-decision/>

¹¹ <https://www.gov.uk/government/publications/anti-corruption-strategy-year-2-update>

¹² <https://www.spotlightcorruption.org/the-ncas-kazakh-unexplained-wealth-order-uwo-a-costly-decision/>

government. However, it appears that the government seriously underestimated the impact that costs would have on the appetite within law enforcement agencies to bring these cases.

1.13. In respect of UWOs, the Director-General of the NCA told the Intelligence and Security Committee (ISC) in January 2019, during its inquiry into Russian influence and money in the UK, that *“we are, bluntly, concerned about the impact on our budget because these are wealthy people with access to the best lawyers.”*¹³ The ISC noted in its report that *“the reality is that it is highly probable that the oligarchy will have the financial means to ensure their lawyers – a key group of professional enablers – find ways to circumvent this legislation.”*

1.14. The *Baker* judgment also exposed serious difficulties with regard to the effectiveness of the UWO legislation in relation to complex ownership structures.¹⁴ While the Court of Appeal had ruled in the first UWO case against Hajiyeva that *“the process by which an acquisition is made may be a legitimate starting point,”*¹⁵ the *Baker* judgment stated that *“there must be some additional evidential basis”* for believing that complex structures are being used for money laundering.¹⁶ Given that UWOs are designed as investigative tools whose purpose is precisely to get behind the complex offshore layering of property ownership, this sets a disappointingly high threshold for their use.

1.15. Furthermore, the judgments in the *NCA v Baker* case have highlighted some legislative lacunae and anomalies in the UWO regime in relation to trusts and other vehicles for holding property which will need to be addressed to ensure the effectiveness of the regime. Given that UWOs are likely to face seldom use in PEP cases due to the costs bar, case law particularly in relation to challenging and uncertain provisions of the regime is unlikely to be developed to ameliorate these issues. A legislative amendment is therefore necessary. In particular, the judgment has exposed issues with the way section 326B of the CFA is to be read in situations where property is held in trust by others than the beneficial owner of the property. Where beneficial ownership is obscured in relation to property through these kinds of arrangements, it is essential that law enforcement is able to get behind that and use UWOs to do so. Additionally, there are questions as to whether section 326B 6 (c) – which states that *“income is lawfully obtained if it is obtained lawfully under the laws of the country from where the income arises”* – imposes potential hurdles for law enforcement to challenge assertions of lawfulness of income made by those who owing to their position of power in effect control how laws are implemented within their countries.

1.16. Proper consideration meanwhile should in our view be given to putting the grounds for a Property Freezing Order on the same evidentiary basis as an AFO (that is reasonable grounds to suspect rather than having a good arguable case). Given the widespread

¹³ https://b1c9a9b3-a-5e6631fd-s-sites.googlegroups.com/a/independent.gov.uk/isc/files/20200721_HC632_CCS001_CCS1019402408-001_ISC_Russia_Report_Web_Accessible.pdf?attachauth=ANoY7cqUb4W8Zkh4otcQrOZgfDt7hd2xcWgePBuYQsSpnXfLXRuEZDq1IB_uMzX4CSPfeo4dW5be36cpAX-ZNiMv9JGFOIGSaQcgvULV8RmIS2cL2lwV3bMnloyzIEcC11P_vUb3EGhINHhkP6tJhRzX8-SuZLPeFOvwWo5YJ0EchSE3orbzi0wikdKJW8LQ-O_W1QxUum8gdOihRxLdit3LsKSBWvtPBFvK8riNC_Kc9lp2Tca1nzN2yIRFvNN_FMrBdsyUgrF2Hn9CEzEn8_V2CmdUO1XzveZzSWOhuHin2bBnLxY%3D&attredirects=0

¹⁴ <https://www.spotlightcorruption.org/from-hajiyeva-to-aliyev-where-next-for-unexplained-wealth-orders/>

¹⁵ <https://www.bailii.org/ew/cases/EWCA/Civ/2020/108.html>

¹⁶ <https://www.spotlightcorruption.org/from-hajiyeva-to-aliyev-where-next-for-unexplained-wealth-orders/>

recognition that the luxury property market has been a significant route for the laundering of the proceeds of corruption and crime, this could significantly strengthen law enforcement's hand in relation to confiscation of unlawfully obtained property.

C. Senior executive accountability for economic crime

Spotlight on Corruption recommends that–

- **serious consideration should be given to the introduction of an individual failure to prevent economic crime offence for senior managers in the event that a company is found guilty of that offence, or enters into a DPA in relation to such an offence; and**
- **prosecutors be given the power to apply to the courts for DDOs for directors who were in charge of a company at the time that criminal conduct occurred for which the company is convicted or where the company has entered into a DPA.**

1.17. Following the 2008 financial crisis, there was widespread outcry that senior executives of large financial institutions had escaped accountability for economic wrongdoing on their watch, particularly since those institutions were bailed out with public funds whilst austerity measures were imposed on public services. The lack of senior executive accountability at large financial institutions has also been raised in the context of the FinCEN files.¹⁷

1.18. In January 2020, judgments were released in relation to the only chief executive of a bank prosecuted in the UK for financial crisis related wrongdoing. The Court of Appeal upheld a ruling that former CEO of Barclays Bank, Mr John Varley, had no case to answer and that the Serious Fraud Office (SFO) had insufficient evidence to proceed. This followed a 7-year investigation that cost the SFO more than £15 million.¹⁸

1.19. The *Varley* judgment was the latest in a string of acquittals of senior executives of companies in cases brought by the SFO, including former executives from Tesco, Guralp and Sarclad. In the latter three cases, the companies had all signed DPAs with the SFO in which they admitted to alleged criminal misconduct in statements of agreed facts. Yet the SFO was unable to prosecute the executives for the underlying misconduct. Furthermore, serious concerns were raised when the SFO announced it would not be bringing any charges against individuals in relation to its DPA with Rolls Royce despite the seriousness of the allegations of corruption at the company.¹⁹

1.20. The introduction of the Senior Management and Certification Regime (SMCR) in 2016 in response to the financial crisis has been a welcome step. However, lack of real enforcement of the regime has exacerbated public perceptions that senior executives face no accountability in the UK. So far, the Financial Conduct Authority (FCA) has opened only 34 investigations under the SMCR, of which it has closed 11, with 21 still underway, and had one successful enforcement action, which resulted in a fine.²⁰ Another fine, imposed for

¹⁷ <https://www.icij.org/investigations/fincen-files/global-banks-defy-u-s-crackdowns-by-serving-oligarchs-criminals-and-terrorists/>

¹⁸ <https://www.ft.com/content/53ac7ca0-9413-11e9-aea1-2b1d33ac3271>

¹⁹ <https://www.theguardian.com/business/2019/feb/22/campaigners-condemn-closure-of-rolls-royce-bribery-inquiry>

²⁰ <https://www.financialreporter.co.uk/regulation/fca-secures-just-one-enforcement-action-under-smcr.html>;
<https://www.bovill.com/only-34-investigations-and-one-enforcement-action-after-four-and-a-half-years-of-smcr/>

misconduct in tax liability is being contested.²¹ Meanwhile, as at December 2019, senior managers accounted for only 4% of the FCA's investigations into individuals.²²

1.21. While the FCA continues to hail the SMCR for raising governance standards, others such as financial regulation specialists, Bovill, have questioned whether the regime is fit for purpose.²³ The repeated failure of the FCA to open investigations into whether 'approved person' status should be removed from senior managers in charge of units or financial bodies found to have engaged in wrongdoing, whether by the FCA itself or by enforcement bodies at home and abroad, raises real questions about the FCA's appetite to enforce senior executive accountability.

1.22. The current senior executive accountability gap needs to be addressed to ensure real deterrence and meaningful consequences for corporate economic crime and wrongdoing. Serious consideration should be given to addressing the gap by:

- introducing an individual failure to prevent economic crime offence in the circumstances which is triggered where a company is convicted of that offence or enters into a DPA for it, and
- giving prosecutors the power to apply for DDOs where a company is found to have breached economic crime laws – a power that the Competition and Markets Authority (CMA) already has for breaches of competition law.

2. There are ongoing issues with the consistency of Anti-Money Laundering (AML) supervision including low rates of criminal and regulatory enforcement in relation to AML violations

Spotlight on Corruption recommends that an independent expert review of the effectiveness of the UK's supervision and criminal enforcement for AML is commissioned by the government in March 2021. This review should look at:

- **whether the government has achieved its stated goal of enhancing AML supervision as outlined in the Economic Crime Plan,**
- **how the UK performs against international best practice on AML supervision,**
- **whether the current Professional Body Supervisor (PBS) model is working or needs to be replaced with a more effective and robust model of supervision,**
- **whether the PBSs are effectively referring suspicions of money laundering to law enforcement and whether law enforcement is appropriately responding to such suspicions, and**
- **the factors behind the low rates of supervisory and criminal enforcement for money laundering in the UK.**

This review should be undertaken with stakeholder participation, and be published in a timely fashion and prior to the government undertaking the review of the Money Laundering Regulations (MLR) and Office of Professional Body Anti-Money Laundering Supervision (OPBAS) regulations which it has committed to do by June 2022.

²¹ <https://financialinstitutionsnews.com/2020/07/23/boe-publishes-enforcement-update/>

²² <https://globalinvestigationsreview.com/senior-managers-make-4-of-fcas-investigations-individuals>

²³ <https://www.complianceweek.com/financial-services/study-questions-effectiveness-of-uk-management-oversight-regime/29668.article>

2.1. In 2018, the Financial Action Task Force (FATF) highlighted that the UK needed to take priority action on money laundering supervision to ensure that all supervisors, from the statutory ones (FCA and HMRC) to the 22 legal and accountancy sector supervisors impose proportionate, effective and dissuasive sanctions for violations of anti-money laundering violations. Additionally, the FATF urged the UK to address the “*significant weaknesses in supervision*” by the 22 legal and accountancy sector supervisors.²⁴

2.2. The FATF also noted the lack of high-end money laundering prosecutions in its evaluation and that it was “*difficult to determine whether the level of high-end ML prosecutions and convictions is fully consistent with the UK’s threats, risk profile and national AML policies.*”²⁵

2.3. In its 2019 Economic Crime Plan, incorporating the government’s response to the FATF report, the government committed to enhance supervision across the board, including at the FCA and HMRC, and to strengthen the consistency of professional body money laundering supervision by March 2021.²⁶

2.4. Ensuring that supervisors take action where non-compliance is identified, including imposing dissuasive and effective sanctions where violations of AML rules occur is essential to ensure proper deterrence. Spotlight on Corruption has serious concerns that:

- The level of criminal and regulatory enforcement of high-end money laundering under both the Proceeds of Crime Act 2002 (POCA) and the MLR is too low to provide real deterrent value and is not consistent with the UK’s risk profile on money laundering;
- Despite some improvements in supervisory enforcement actions, there are still serious inconsistencies between supervisors in relation to the frequency and value of regulatory fines imposed;
- There are ongoing serious weaknesses and lack of transparency in the supervision by the 22 legal and accountancy sector PBSs, despite the work of OPBAS, which suggest a more radical solution to supervision in these sectors may be required;
- The government’s target of enhancing supervision by March 2021 is unlikely to be achieved to a sufficient degree to ensure meaningful deterrence for money laundering.

Criminal AML enforcement – outsourcing enforcement to the US and little criminal enforcement of the MLR

2.5. Research we conducted in 2019 found that the UK was considerably behind the US in its imposition of criminal enforcement penalties for money laundering.²⁷ The research, which focused solely on New York- and London-based banks to allow a fair comparison, found that between 2008 and 2018, US prosecutors and regulators imposed nearly £3 billion in criminal fines for money laundering on New York based banks, whereas the UK authorities brought

²⁴ <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-Kingdom-2018.pdf>

²⁵ <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-Kingdom-2018.pdf>

²⁶ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/816215/2019-22_Economic_Crime_Plan.pdf

²⁷ Research by Corruption Watch UK, out of which Spotlight on Corruption grew, *Corporate Crime Gap: How the UK lags the US in Policing Corporate Financial Crime*, March 2019, <https://drive.google.com/file/d/1BGhhq2XdA8hrsZDeO0g6arDWC4ImHMby/view>

no criminal prosecutions.²⁸ This research raised questions as to whether the UK effectively outsources financial crime enforcement to the US.

2.6. The FinCEN files have further thrown into sharp relief the lack of action in the UK where banks have engaged in money laundering.²⁹ Two recent cases suggest that the UK continues to effectively outsource financial crime enforcement to the US despite criminality occurring in the UK. In October 2020, Goldman Sachs admitted in the US to conspiring to pay over \$1 billion of bribes to win lucrative bond deals in the 1MDB case in an enforcement action brought by the US Department of Justice.³⁰ Despite the fact that Goldman Sachs' London-based subsidiary, GSI, was "*the arranger, initial purchaser and underwriter*" of the 1MDB loans, the bank faced only regulatory action in the UK with fines imposed by the FCA and Prudential Regulation Authority of \$63 million, and it does not appear that any UK individuals have faced any regulatory action at all, such as review of approved person status, for the serious failings at GSI noted by the FCA in relation to the bribery.³¹ Similar bribery allegations involving bankers based at the London office of Credit Suisse for a bond deal in Mozambique have resulted in no criminal enforcement action in the UK, and the bankers being extradited to the US for prosecution.³²

2.7. Meanwhile, there appears to be very little criminal enforcement of the MLR 2017. As of September 2020:

- the FCA has yet to bring a single prosecution under the MLR, and has only one criminal investigation for breach of the MLR underway;³³
- HMRC has brought 5 prosecutions of individuals under the MLR 2017, 4 in the past two years and 1 in 2017/2018;
- no firm has ever been prosecuted for breaching the MLR;
- there does not appear to have been a corporate prosecution under the POCA for high-end money laundering for the past two years.

2.7. While only the FCA and HMRC can bring prosecutions under the MLR, other supervisors must refer allegations to the police. There is serious inconsistency between the supervisors in referring matters in this way:

- the Gambling Commission made 339 referrals to law enforcement between 2017-2019;
- the legal PBSs referred just 27 in this period;
- the accountancy PBSs did not refer a single case to law enforcement during that period.³⁴

²⁸ <https://drive.google.com/file/d/1BGhhq2XdA8hrsZDeO0g6arDWC4ImHMby/view>

²⁹ <https://www.spotlightcorruption.org/fincen-files-uks-failure-to-prosecute-high-end-money-laundering-shows-uk-banks-are-above-the-law/>

³⁰ <https://www.justice.gov/opa/pr/goldman-sachs-charged-foreign-bribery-case-and-agrees-pay-over-29-billion>

³¹ <https://www.fca.org.uk/news/press-releases/fca-pra-fine-goldman-sachs-international-risk-management-failures-1mdb>

³² <https://uk.reuters.com/article/us-credit-suisse-gp-mozambique-exclusive/exclusive-u-s-prosecutors-believe-credit-suisse-is-culpable-in-mozambique-scandal-sources-idUKKBN2130E3>

³³ <https://www.ft.com/content/fa6052d3-e738-4cfd-abe5-530405bbf045>

³⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/823551/Supervision_report_2017-2018_final_08072019.pdf;
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/685248/PU2146_AML_web.pdf

There is meanwhile no published data on what happens to such referrals which makes it virtually impossible to know how effective these referrals are and whether they result in prosecutions or other enforcement outcomes.

Regulatory AML enforcement

2.8. In our 2019 research, we also found a significant divergence in regulatory enforcement for money laundering between the US and UK. Between 2008-2018, US authorities imposed £6 billion in regulatory penalties for money laundering on banks. By comparison, the UK imposed just £260 million in regulatory penalties on London-based banks.³⁵

2.9. There are ongoing inconsistencies in how regulatory enforcement for money laundering if operating in the UK. Analysis of HM Treasury data alongside that of OPBAS suggests that there is a lack of consistency in the *number of fines* for AML breaches being imposed by different supervisors across the board. We have produced a visualisation of this data [here](#). The data shows that:

- the overall number of regulatory fines across all supervisors has declined over the past five years, from 1166 in 2015/2016, to 376 in 2018/2019;
- this decline has been largely driven by a significant drop in the number of fines being brought by HMRC despite a significant increase in the value of fines imposed by HMRC;
- while the PBSs increased the number of fines by 150% between 2017/2018 and 2018/2019, this rise was largely driven by the accountancy sector, where the number of fines increased from 85 to 226, compared to the legal sector, where the number of fines increased from just 9 to 11.³⁶

2.10. The data from HM Treasury and OPBAS also shows that there is also a lack of consistency in the *value of* fines being imposed as follows:

- while the accountancy sector has increased its number of fines, the value of fines issued is very low (on average £652);
- by comparison, the value of fines in the legal sector has increased from an average of £8,277 to £31,955 despite the low number of fines;³⁷
- the legal and accountancy PBSs are issuing the lowest average value of fines of all supervisors;
- in comparison to the PBSs, the Gambling Commission, which oversees a comparatively “low risk” population, issued fines in 2018/2019 worth almost 50 times that of the legal PBSs, and 115 times that of the accountancy PBSs.

2.11. In its 2018/2019 report, OPBAS noted that enforcement in relation to AML at the PBSs remains a real issue, with 41% of PBSs not bringing any enforcement action at all. OPBAS noted a “*stark contrast*” in the number of fines being issued by PBSs and “*inconsistencies of approach*.”³⁸ Spotlight on Corruption shares OPBAS’ concerns about the consistency with

³⁵ <https://drive.google.com/file/d/1BGhhq2XdA8hrsZDeO0g6arDWC4ImHMby/view>

³⁶ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/920209/200922_Supervision_report_18-19.pdf;

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/823551/Supervision_report_2017-2018_final_08072019.pdf;

³⁷ *ibid*

which non-compliance is handled by PBSs and whether PBSs are still routinely preferring engagement over enforcement where they come across non-compliance. In 2017/2018, OPBAS found that 86% of PBSs had expressed *“that they would rather offer support and guidance to members to improve their AML compliance over an extended period rather than issue penalties.”*³⁹ Examples that suggest this may still be the case include:

- that despite finding 60 instances of non-compliance in the last two years, the Council of Licenced Conveyancers has only brought one enforcement action (a strike off);⁴⁰
- that no further action was taken by the Solicitors Regulation Authority (SRA) against 26 firms it placed into disciplinary action following a May 2019 review of 60 legal firms providing Trust and Company Service Provider services.⁴¹

2.12. Ongoing and serious non-compliance issues within the legal sector have been further highlighted by the November 2020 publication of the SRA’s review of its AML visits to firms, which found that 64% of the 74 firms reviewed during 2019/2020 to assess compliance with the MLR needed further ‘engagement’ from the SRA to improve their procedures.⁴² The SRA found that in 53% of “matters” it reviewed, insufficient customer due diligence had been collected, and that in 21% of files the SRA reviewed the source of a client’s funds was not evidenced adequately or at all. 9 firms have been referred by the SRA as a result of this review to its AML Investigations Team.⁴³ The outcome of these referrals will be a critical test of the SRA’s appetite to take robust action.

2.13. These findings suggest that despite some improvements in the PBS sector, there is a long way to go. A more radical approach to enhancing supervision may be required than OPBAS to ensure real consistency in supervision and ensure that effective action is being taken where there is non-compliance with AML regulations. All options should be explored, including consolidating sector supervisors for the legal and accountancy sectors, transferring their powers to a statutory supervisor, and creating an Independent Commission on Regulatory Effectiveness (similar to the Independent Commission on Aid Impact).

2.14. These options should be fully explored in an independent review of whether the government has achieved its goal of enhancing supervision by March 2021 both at OPBAS and at the statutory supervisors. Spotlight on Corruption does not believe that it would be appropriate for the government to assess its own performance in this area. This review should also look at whether the PBS model of supervision is working; whether PBSs are effectively referring suspicions they come across to law enforcement; how the UK compares to best practice internationally and the factors behind low rates of regulatory enforcement and high-end money laundering prosecutions. This review should be undertaken before the government reviews the MLR and OPBAS regulations in June 2022.

³⁸ <https://www.fca.org.uk/publication/opbas/supervisory-report-progress-themes-2019.pdf>

³⁹ <https://www.fca.org.uk/publication/opbas/themes-2018-opbas-anti-money-laundering-supervisory-assessments.pdf>

⁴⁰ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/920209/200922_Supervision_report_18-19.pdf;

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/823551/Supervision_report_2017-2018_final_08072019.pdf;

⁴¹ <https://www.sra.org.uk/sra/how-we-work/reports/aml-thematic-review/>

⁴² <https://www.sra.org.uk/globalassets/documents/sra/research/anti-money-laundering-aml-visits-2019-2020.pdf?version=4ada2c>

⁴³ *ibid.*

3. Inequality of arms: law enforcement resourcing for tackling money laundering and financial crime remains insufficient and uncertain

Spotlight on Corruption recommends that a full analysis of the law enforcement funding needs for economic crime be developed for the next multi-year spending review and that there is transparency about this analysis. Any analysis of funding needs must take into account:

- **new resources needed for adequate enforcement of the sanctions regime;**
- **new resources needed to respond to the fraud crisis created by COVID-19;**
- **new resources that might be required as a result of the UK losing access to EU-wide security tools and databases at the end of the EU transition period;**
- **the recruitment and retention of relevant staff from financial investigators to top prosecutors, including pay levels needed to ensure this; and**
- **the huge disparity in what law enforcement bodies can pay for legal advice from counsel compared to what defendants pay for such advice.**

3.1. The FinCEN files raised very important questions about whether law enforcement is adequately funded to properly investigate and act on the leads provided by Suspicious Activity Reports (SARs). In 2019/2020 SARs once again increased, with a 20% increase on the year before, and an 81% increase in Defence Against Money Laundering (DAML) reports.⁴⁴ The latest figures show that just 3.3% of DAML requests were rejected by the Financial Intelligence Unit (FIU) and just 10.2% of SARs relating to Politically Exposed Persons (PEPs) were disseminated to law enforcement. The report does not make clear why this is, but it raises real questions about whether: firstly, the FIU itself is adequately resourced to evaluate the intelligence provided by SARs; and secondly, whether law enforcement more generally is adequately resourced to use the intelligence where SARs are disseminated.

3.2. It is highly likely that next year will see an even bigger increase in the number of SARs submitted owing to the explosion of fraud as a result of COVID-19 and in response to the COVID loan schemes being administered by banks. Spotlight on Corruption believes that more fundamental reform of the SARs regime is necessary to lower incidences of defensive reporting and increase the value of SARs. However, we also believe that addressing the issue of adequate resourcing for tackling economic crime is critical to making the SARs regime work better.

3.3. In its last economic crime inquiry, the Committee recommended that a cross-government assessment of public sector resources for economic crime be made and that shortfalls be rectified. In response, the government stated that the next Spending Review would be the occasion for assessing public sector resourcing. While a full multi-year spending review has been postponed as a result of the COVID-19 pandemic, the 2020 one-year spending review has committed *“an additional £63 million to tackle economic crime, including support for the National Economic Crime Centre (NECC), £30.5 million in resource and £32.5 million in capital funding in 2021-22 along with £20 million for Companies House reform.”*⁴⁵ This is alongside a potential £100 million that the government hopes to raise from the Economic Crime Levy.⁴⁶

⁴⁴ <https://www.nationalcrimeagency.gov.uk/who-we-are/publications/480-sars-annual-report-2020/file>

⁴⁵ <https://www.gov.uk/government/publications/spending-review-2020-documents/spending-review-2020#strengthening-the-uks-place->

3.4. It is very welcome that the government has shown its commitment to tackling economic crime by including additional resource in the budget. Spotlight on Corruption has long argued that any attempt to levy resources from the private sector needs to be matched by public sector funding.⁴⁷ However, it is not clear to us whether the resource announced in the spending review matches the needs identified by law enforcement during the process of preparing for the multi-year spending review or that they will be sufficient to adequately resource a law enforcement response to economic crime.

3.5. In May 2019, the Director General of the NCA estimated that a £2.7 billion investment in law enforcement was needed to combat serious and organised crime (of which money laundering and corruption are part) and that the NCA alone needed a 54% increase in funding to tackle the threat.⁴⁸ Between 2018/2019 and 2019/2020, the NCA budget increased by just 7% (or 4.9% when adjusted for inflation).

3.6. Meanwhile, the Mackey review into the law enforcement response to serious and organised crime which includes a review of funding,⁴⁹ and which was delivered to the Home Secretary in February 2020, has yet to be made public.⁵⁰ An earlier review by Sir Craig Mackey into Action Fraud noted that City of London police were planning to submit a bid to the spending review for £60 million to create 400 regional fraud investigators.⁵¹ The need for these investigators cannot be over-stated. Home Office statistics show that less than 1% of the UK's police force is dedicated to investigating financial crime and academic research has found that a majority of detectives that do investigate financial crime do not have sufficient knowledge to build a case.⁵²

3.7. Additionally, the National Audit Office found in 2019 that funding to tackle serious and organised crime, including money laundering, was “*uncertain and inefficient.*” It recommended that the Home Office “*should ensure any changes it makes in the forthcoming Spending Review will rationalise funding sources and give organisations longer notice over future funding to allow them to plan more effectively.*”⁵³ It is not clear to what extent the announcement in the spending review addresses these recommendations since there is as yet little detail on how the additional £63 million will be spent. Furthermore, it is not clear how the additional funds articulate with a desperately needed long-term funding solution for fraud and financial crime policing which has been chronically under-resourced for several decades.

3.8. The fraud crisis that has arisen from the COVID-19 pandemic is likely to place a huge strain on law enforcement and consume most economic crime enforcement funding and attention for the next few years. Estimates fraud and error by the NAO, British Business

[in-the-world-1](#)

⁴⁶https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/902445/Levy_Consultation_Document_-_FINAL_.pdf

⁴⁷ <https://www.spotlightcorruption.org/the-new-economic-crime-levy-is-it-enough/>

⁴⁸ <https://www.nationalcrimeagency.gov.uk/news/181-000-uk-offenders-fuelling-chronic-and-corrosive-threat-from-serious-and-organised-crime?highlight=WyJmdW5kaW5nliwiZnVuZCIsImZ1bmRzIiwuZnVuZGVkIIO=>

⁴⁹ <https://www.gov.uk/government/news/new-review-will-enhance-response-to-serious-and-organised-crime>

⁵⁰ https://www.theyworkforyou.com/wrans/?id=2020-06-08_56040.h

⁵¹ <https://www.cityoflondon.gov.uk/assets/About-us/action-fraud-report.pdf>

⁵² https://www.eurekalert.org/pub_releases/2020-11/uop-btp112420.php

⁵³ <https://www.nao.org.uk/wp-content/uploads/2019/03/Tackling-serious-and-organised-crime.pdf>

Bank and HMRC put the potential losses to the public purse at up to £41 billion in the COVID loan and furlough schemes.⁵⁴ To put this in context, such losses would be equivalent to the UK's defence budget for 2019/2020, and ten times the amount the government has saved through cuts to the aid budget. Urgent law enforcement action to tackle this fraud, some of which will need to be investigated and prosecuted as money laundering, is essential to ensure speedy recovery to funds lost to fraud before they are dissipated. And it is essential that law enforcement has the necessary resourcing to do this.

3.9. At the same time, new flagship initiatives such as the introduction of the corruption sanctions regime under the Sanctions and Money Laundering Act 2018, expected in 2021, are likely to require additional law enforcement input. To be effective, the corruption sanctions regime will need law enforcement to develop and share intelligence on potential designees. It will also require law enforcement to investigate and prosecute criminal sanctions breaches. It is not clear that additional resource has been dedicated to law enforcement to enable it to undertake this new role. However, the corruption sanctions regime will only be effective with proper resourcing and proper enforcement.

3.10. Spotlight on Corruption recommends that a full analysis of the funding needs for economic crime, including sanctions enforcement and tackling the COVID fraud crisis, be developed for the next multi-year spending review and that there is transparency about this analysis. Any analysis of funding needs should additionally take into account:

- the urgent need to recruit, retain and train relevant staff from financial investigators to top prosecutors;
- the need to consider whether financial investigation should become a recognised civil service profession in order to aid recruitment and retention; and
- the need to address the huge disparity in what law enforcement bodies can pay for legal advice from counsel compared to what defendants pay for such advice.

Finally, while we welcome the role of the NECC, we would like to see far greater clarity over its long-term role and the strategy behind it, which has yet to be published.

December 2020

⁵⁴ <https://www.nao.org.uk/press-release/investigation-into-the-bounce-back-loan-scheme/>; <https://www.gov.uk/government/publications/beis-annual-report-and-accounts-2019-to-2020>; <https://www.theguardian.com/uk-news/2020/sep/16/watchdog-warns-over-furlough-and-government-contracts>