

‘The financial war on terrorism: a critical review of the United Kingdom’s counter-terrorist financing strategies’

Dr. Nicholas Ryder,
Professor in Financial Crime,
Department of Law,
Faculty of Business and Law,
University of the West of England,
Bristol.

The greatest threat to the UK is assessed to be from Al Qaida Core, AQ Arab Peninsula, AQ Islamic Maghreb, Islamic State of Iraq and the Levant, Al –Nusrah Front and those affiliated to these groups. Terrorist attacks in the UK have required minimal finance, however a lack of funds can have a direct effect on the ability of terrorist organisations and individuals to operate and to mount attacks. Terrorists may use any means at their disposal to raise, store and move funds and this can be through use of legitimate means, self-funding, fraud, or other proceeds of crime.¹

Introduction

This chapter concentrates on the counter-terrorist financing² measures and policies adopted in the United Kingdom.³ The UK, unlike many other jurisdictions, has a long and established history of tackling terrorism and has implemented a wide range of legislative and policy measures. These legislative measures, which were originally enacted over a century ago, have been amended in response to the growing threat posed by international terrorism. The UK terrorist legislation was extended to include CTF provisions prior to the terrorist attacks in September 2001⁴ and the introduction of the International Convention on the Suppression of Terrorist Financing.⁵ The first part of the chapter seeks to define the ‘Financial War on Terrorism’ and it then moves on to briefly comment on the UKs CTF legislation that existed before 9/11. The next part of the chapter considers the impact of the ‘Financial War on Terrorism’ on the UKs CTF legislation after 9/11 and it concentrates on the criminalisation of terrorist financing, the ability to freeze the assets of terrorists, the confiscation or forfeiture of terrorist assets, the implementation of the United Nations⁶ sanctions regime and the use of

¹ HM Government, *UK national risk assessment of money laundering and terrorist financing* (2015) at 89.

² Hereinafter ‘CTF’.

³ Hereinafter ‘UK’.

⁴ Hereinafter ‘9/11’.

⁵ Hereinafter ‘International Convention’.

⁶ Hereinafter ‘UN’.

financial intelligence provided to the National Crime Agency.⁷ Therefore, the central theme of the chapter is to identify the impact of the ‘Financial War on Terrorism’ in the UK.

The Origins of the Financial War on Terrorism

Prior to 9/11, the UN had concentrated on tackling the proceeds of crime derived from the manufacture and distribution of narcotic substances and not the financing of terrorism. For example, the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, provided that signatories must criminalise the laundering of drug proceeds, implement instruments to allow for the determination of jurisdiction over the offence of money laundering, permit the confiscation of the proceeds of the sale of illegal drugs, the introduction of mechanisms to facilitate extradition and measures to improve mutual legal assistance.⁸ However, the scope of the Vienna Convention was narrow and it only applied to the proceeds of drug related criminal offences. This was rectified by the Convention against Transnational Organised Crime,⁹ which broadened the remit of the Vienna Convention to include the proceeds of serious crime.¹⁰ The European Union adopted a very similar approach and implemented three Money Laundering Directives, a fourth, must be implemented by June 2017.¹¹ The first Directive concentrated on ‘combating the laundering of drug proceeds through the financial sector’,¹² thus adopting a similar stance to the Vienna

⁷ Hereinafter ‘NCA’.

⁸ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), articles 3 to 7. Hereinafter ‘Vienna Convention’.

⁹ United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, U.N. GAOR, 55th Sess., Supp. No. 49, Vol. I, at 43, U.N. Doc. A/55/49. Hereinafter ‘Palermo Convention’.

¹⁰ It is important to note that the UN further extended the definition of money laundering to include corruption by virtue of the Corruption Convention General Assembly resolution 58/4 of 31 October 2003.

¹¹ Council Directive (EC) 2015/849 on the use of the financial system for the purposes of money laundering or terrorist financing [2015] OJ 141.

¹² Council Directive (EC) 91/308 on the prevention of the use of the financial system to launder money [1993] OJ 166.

Convention, while the second Directive introduced the use of suspicious activity reports.¹³ Additionally, it is important to note the '40 Recommendations' of the Financial Action Task Force,¹⁴ which were aimed at countering money laundering.¹⁵ The objective of the Recommendations was to 'provide a complete set of anti-money laundering procedures which covers the relevant laws and their enforcement'.¹⁶ It is important to emphasise that none of these measures addressed the financing of terrorism and it wasn't until 1999 that the UN approved the International Convention.¹⁷ This Convention was introduced after a series of Presidential Executive Orders were introduced by President Bill Clinton that targeted the finances of al Qaeda following the terrorist attack on two United States embassies in Kenya and Tanzania.¹⁸ The International Convention criminalised the financing of terrorism; permitted the freezing, seizing or forfeiture of funds used for supporting terrorist activities and financial institutions were required to report any terrorist related SARs.¹⁹ Prior to the terrorist attacks on 9/11, 'only four States had acceded to the Convention'.²⁰ However, at the time of writing the International Convention has been implemented by 186 nation states.²¹ The next measure was UN Security Council Resolution 1267,²² which provides that member states are required to 'freeze [the] funds and other financial resources controlled by the Taliban'.²³ Furthermore, this UNSCR created a sanctions regime that targeted individuals and

¹³ Council Directive (EC) 97/2001 on prevention of the use of the financial system for the purpose of money laundering [2001] OJ 344. Hereinafter 'SARs'.

¹⁴ Hereinafter 'FATF'.

¹⁵ Financial Action Task Force, *Financial Action Task Force Recommendations* (2003).

¹⁶ J Johnson, 'Is the global financial system AML/CTF prepared' (2008) 15(1) *Journal of Financial Crime*, (2008), 7, 8.

¹⁷ Hereinafter 'International Convention'. GA Res. 109, 9 December 1999, S. Treaty Doc. No. 106-49 (2000).

¹⁸ Nicholas Ryder, *The Financial War on Terrorism – a review of counter-terrorist financing strategies since 2001* (Routledge, 2015) 31. Hereinafter 'US'.

¹⁹ Hereinafter 'SAR'.

²⁰ Maria O'Neill, *The evolving EU counter-terrorism legal framework* (Routledge, 2012) 31.

²¹ United Nations 'United Nations Treaty Collection – International Convention for the Suppression of the Financing of Terrorism', (United Nations, n/d) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-11&chapter=18&lang=en> accessed November 11 2015.

²² Hereinafter 'UNSCR'.

²³ S.C. Res. 1267, 56th Sess., Art.4(b).

entities associated with al-Qaida, Osama bin Laden and the Taliban. This was soon followed by UNSCR 1269, which asked nation states to fully implement the UN's anti-terrorist conventions.²⁴ Despite this belated recognition from the UN towards the financing of terrorism, it wasn't until after 9/11 that President George Bush instigated the 'Financial War on Terrorism', which the chapter now considers.

In September 2001, President George Bush declared that 'a major thrust of our war on terrorism began with the stroke of a pen ... we have launched a strike on the financial foundation of the global terror network ... we will starve the terrorists of funding'.²⁵ This declaration was followed by the publication of an action plan to tackle terrorist financing by the G7 Finance Ministers and Central Bank Governors.²⁶ The response from the UN was instantaneous and controversial.²⁷ Terrorist financing was propelled from political obscurity and pushed towards the summit of the counter-terrorism agenda. UNSCR 1368 requires nation states to work together and target the 'sponsors' of terrorism.²⁸ Additionally, UNSCR 1373, which was introduced under chapter VII of the UN Charter, *compelled* nation states to implement four CTF measures: to avert and suppress terrorist financing;²⁹ criminalize the financing of terrorism;³⁰ freeze the funds of terrorist and their financiers³¹ and to stop people or entities from providing financial support to those seeking to commit acts of terrorism.³² Furthermore, UNSCR 1373 established the Counter-Terrorism Committee³³ which monitors

²⁴ S.C. Res, 1269, U.N. SCOR, 4053th Mtg. para. 4.

²⁵ United States Department of State, 'President Freezes Terrorists' Assets', (United States Department of State, 24 September 2001) <<http://2001-2009.state.gov/s/ct/rls/rm/2001/5041.htm>> accessed September 11 2014.

²⁶ United Nations, 'Statement of G-7 Finance Ministers and Central Bank Governors', (United Nations, 6 October 2001) <<http://www.un.org/esa/ffd/themes/g7-10.htm>> accessed October 3 2014.

²⁷ Clive Walker, *Terrorism and the law* (Oxford University Press, 2011) 229.

²⁸ S.C. Res. 1368, 56th Sess., 4370 Mtg.

²⁹ S.C. Res, 1373, U.N. SCOR, 56th Sess., 4385th Mtg. Art.1(a).

³⁰ S.C. Res, 1373, U.N. SCOR, 56th Sess., 4385th Mtg. Art.1(b).

³¹ S.C. Res, 1373, U.N. SCOR, 56th Sess., 4385th Mtg. Art.1(c).

³² S.C. Res, 1373, U.N. SCOR, 56th Sess., 4385th Mtg. Art.1(5).

³³ Hereinafter 'CTC'.

the levels of compliance with these provisions.³⁴ The remit of the CTC was extended by UNSCRs 1535³⁵ and 1566.³⁶ Therefore, the terrorist attacks in September 2001 fundamentally altered how the international community tackled the financing of terrorism. The UN measures heavily influenced the ‘Financial War on Terrorism’ and included the criminalisation of terrorist financing, the ability to freeze and confiscate/forfeiture terrorist assets.

Additionally, the EU has implemented a series of CTF measures, the most important of which was the extension of the third Money Laundering Directive to include the financing of terrorism.³⁷ Further measures included the publication of the European Council Common Position, which provides that the EU will ‘adopt financial sanctions ... that will ensure that funds, financial assets, economic resources or other related services will not be made available to designated terrorists’.³⁸ The EU published a Council Regulation that imposed a series of restrictive measures that were directed against certain persons and entities with a view to combating terrorism.³⁹ This Council Regulation also contained a ‘black list’ of terrorist sponsors that duplicated those designated by the UN Sanctions Committee. Additionally, the European Council introduced another Common Position that requires the EU to maintain a ‘public list of territories and terrorist organisations ... against which further sanctions ... [can] be taken’.⁴⁰ Therefore, the EU followed the sanctions regime of UN and extended the use of SARs from money laundering to the financing of terrorism. Additionally, the FATF extended its remit to include the financing of terrorism, and introduced the ‘Special

³⁴ C Warbrick, D McGoldrick, E Katselli and S Shah, ‘September 11 and the UK response’ (2003) 52(1) ICLQ, 245, 252.

³⁵ S.C. Res, 1535, U.N. SCOR, SC/408, 156th Sess., 1936 Mtg.

³⁶ S.C. Res, 1556, 5053 Mtg.

³⁷ Council Directive (EC) 2005/60 on prevention of the use of the financial system for the purpose of money laundering and terrorist financing [2005] OJ 309.

³⁸ [2001] OJ L344/93.

³⁹ Council Regulation (EC) 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism [2001] OJ L344/70

⁴⁰ 2001/931/CFSP.

Recommendations’ in October 2001.⁴¹ The Special Recommendations are important because prior to their introduction there were ‘no international standards on the prevention of terrorist financing’.⁴² In February 2012, the FATF published an amended set of Recommendations which ‘fully integrate counter-terrorist financing measures with anti-money laundering controls’.⁴³

The terrorist attacks on 9/11 resulted in a fundamental alteration of policy by the international community towards the financing of terrorism. Prior to 2001, the international community hadn’t considered the financing of terrorism a priority, despite the introduction of the International Convention. It wasn’t until 9/11 that an overabundance of legislative measures was unanimously implemented and as a result UNSCR 1373 has become the cornerstone of the ‘Financial War on Terrorism’. Therefore, the ‘Financial War on Terrorism’ can be defined as attacking, whether via criminalisation, confiscation, forfeiture, freezing, sanctioning the financial assets of known or suspected terrorists. Furthermore, the ‘Financial War on Terrorism’ also contains the use of preventative methods that have previously been used for money laundering and the collection of financial intelligence. The next section of the chapter briefly outlines the UK’s CTF measures that preceded 9/11.

Counter-terrorist financing before 9/11

The two legislative pillars of the UK’s counter-terrorist efforts before 9/11 were the Northern Ireland (Emergency Provisions) Act 1973 and the Prevention of Terrorism (Temporary

⁴¹ Financial Action Task Force, *FATF IX Special Recommendations* (2001).

⁴² Jimmy Gurule, *Unfunding terror: the legal response to the financing of global terrorism* (Edward Elgar 2008) 4.

⁴³ Financial Action Task Force, ‘FATF steps up the fight against money laundering and terrorist financing’, (Financial Action Task Force, 16 February 2012) <<http://www.fatf-gafi.org/topics/fatfrecommendations/documents/fatfstepsupthefightagainstmoneylaunderingandterroristfinancing.html>> accessed September 19 2014.

Provisions) Act 1974. The Northern Ireland (Emergency Provisions) Act 1973 was introduced following a Commission of Inquiry, chaired by Lord Diplock, and the publication of his report.⁴⁴ Of relevance here was the ability of the Crown to ‘seize anything which he suspects of being, has been or is intended to be used in the commission of a scheduled offence’.⁴⁵ Therefore, the Crown could seize money or assets that were intended to be used in the commission of an act of terrorism. The Prevention of Terrorism (Temporary Provisions) Act 1974, which was only debated for 17 hours, was introduced within a day of the Birmingham pub bombings.⁴⁶ The 1974 Act enabled the courts to forfeit assets which were ‘controlled by an individual convicted of membership, where such resources were intended for use in Northern Ireland terrorism’.⁴⁷ The next set of CTF legislative measures were heavily influenced by drug trafficking legislation.⁴⁸ For example, the Drug Trafficking Offences Act 1986 permitted the confiscation of the proceeds of drug trafficking offences.⁴⁹ This legislation was introduced following the ‘regretful’ decision of the House of Lords in *R v Cuthberston*,⁵⁰ and the subsequent recommendations of the Hodgson Committee.⁵¹ The scope of confiscation regime was extended to all ‘non-drug’ indictable offences and specific summary offences by the Criminal Justice Act 1988.⁵² Further amendments were introduced by the Drug Trafficking Act 1994⁵³ and the Proceeds of Crime Act 1995.⁵⁴ However, these were largely ineffective and the then Labour government commissioned a review of the UKs

⁴⁴ HM Government, *Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland* (London, 1972).

⁴⁵ Laura Donohue, L. *The cost of counterterrorism – power, politics and liberty* (Cambridge University Press: 2008) 130. See Northern Ireland (Emergency Provisions) Act 1973, s 11.

⁴⁶ B Dickson, ‘Northern Ireland emergency legislation - the wrong medicine?’ (1992) PL 592, 597.

⁴⁷ Prevention of Terrorism (Temporary Provisions) Act 1974, s 1 (7).

⁴⁸ Donohue (n 45) 123.

⁴⁹ Drug Trafficking Act 1986, s 1.

⁵⁰ [1981] A.C. 470 HL.

⁵¹ Derek Hodgson, *Profits of Crime and their Recovery: the report of a Committee Chaired by Sir Derek Hodgson* (London 1984).

⁵² Criminal Justice Act 1988, s 71–89.

⁵³ Drug Trafficking Act 1994, s 1–41.

⁵⁴ Proceeds of Crime Act 1995, s 1–2.

confiscation regime.⁵⁵ The review recommended that an Asset Confiscation Agency should be created and that both the money laundering and confiscation regime should be consolidated under one piece of legislation. These recommendations were eventually enacted via the Proceeds of Crime Act 2002. The drug related mechanisms also influenced the Prevention of Terrorism Act 1989 which criminalised contributions towards acts of terrorism,⁵⁶ contributions to resources of proscribed organisations,⁵⁷ assisting in retention or control of terrorist funds,⁵⁸ disclosure of information about terrorist funds,⁵⁹ penalties and forfeiture.⁶⁰ Furthermore, the 1989 Act ‘introduced forfeiture orders in respect of terrorist funds ... [which] replaced confiscation’.⁶¹ However, the effectiveness of these provisions was questioned in a review of the UK’s terrorism strategy in 1998.⁶² The Home Office concluded that it had identified ‘some weaknesses in the current provisions ... in relation to fund-raising by international terrorist groups and their supporters’.⁶³ Conversely, the same report also noted that authorities had been able to successfully obtain 169 convictions in Northern Ireland under the 1989 Act and that the police had ‘made it much more difficult for others, to raise money here and transfer it to those intent on using it to fund terrorist activities’.⁶⁴ However, the impact of the CTF offences in the 1989 Act has been criticised. For example Bell noted that ‘there have been no successful prosecutions for terrorist funding offences in Northern Ireland over the last 30 years and the forfeiture provisions ... have never

⁵⁵ Cabinet Office *Recovering the Proceeds of Crime—A Performance and Innovation Unit Report* (2000) 118-120.

⁵⁶ Prevention of Terrorism (Temporary Provisions) Act 1989, s 9.

⁵⁷ Prevention of Terrorism (Temporary Provisions) Act 1989, s 10.

⁵⁸ Prevention of Terrorism (Temporary Provisions) Act 1989, s 11.

⁵⁹ Prevention of Terrorism (Temporary Provisions) Act 1989, s 12.

⁶⁰ Prevention of Terrorism (Temporary Provisions) Act 1989, s 13.

⁶¹ D Feldman, ‘Conveyancers and the proceeds of crime’ (1989) *Conveyancer and Property Lawyer*, 389, 390-391.

⁶² Home Office *Legislation against Terrorism – A consultation paper* (1998) para 6.14.

⁶³ Lord Lloyd of Berwick, *Inquiry into legislation against terrorism* (1996).

⁶⁴ *Ibid.*

been utilised'.⁶⁵ The Home Office concluded that the scope of the existing terrorist financing provisions should be extended to include fund-raising for all terrorist purposes. As a result of the review, the Terrorism Act 2000 has become an integral part of the UK's CTF strategy.⁶⁶ The Terrorism Act defines terrorism,⁶⁷ it applies to domestic and international terrorism,⁶⁸ it maintained the concept of proscription,⁶⁹ a Proscribed Organisations Appeal Commission was created,⁷⁰ new seizure and forfeiture powers were introduced⁷¹ and financial institutions were required to detect accounts that could be relevant to terrorist investigations.⁷² The criminal offences created by the Terrorism Act 2000 include fund raising;⁷³ use and possession;⁷⁴ funding arrangements;⁷⁵ insurance against payments made in response to terrorist demands;⁷⁶ money laundering;⁷⁷ failing to disclose information about the occurrence of terrorist financing;⁷⁸ failure to disclose for the regulated sector;⁷⁹ the offence of tipping off.⁸⁰ Therefore, the UK CTF provisions permitted the seizure and forfeiture of terrorist assets and extended its money laundering reporting obligations to terrorism *before* 9/11. Therefore, the next part of the chapter concentrates on the impact of the 'Financial War on Terrorism' on these legislative provisions.

Counter Terrorist Financing after September 11 2001

⁶⁵ R Bell, 'The confiscation, forfeiture and disruption of terrorist finances' (2003) 7(2) *Journal of Money Laundering Control* 105, 113.

⁶⁶ Home Office (n 62).

⁶⁷ Terrorism Act 2000, s 1.

⁶⁸ J Rowe, 'The Terrorism Act 2000' (2001) *Criminal Law Review*, 527.

⁶⁹ Terrorism Act 2000, s 3-13.

⁷⁰ Terrorism Act 2000, Schedule 3.

⁷¹ Terrorism Act 2000, s 23, 23A and 23B.

⁷² Terrorism Act 2000, s 19.

⁷³ Terrorism Act 2000, s 15.

⁷⁴ Terrorism Act 2000, s 16.

⁷⁵ Terrorism Act 2000, s 17.

⁷⁶ Terrorism Act 2000, s 17A.

⁷⁷ Terrorism Act 2000, s 18.

⁷⁸ Terrorism Act 2000, s 19.

⁷⁹ Terrorism Act 2000, s 21A.

⁸⁰ Terrorism Act 2000, s 21D.

The UK responded to 9/11 by introducing a raft of draconian and controversial counter-terrorist legislation. For example, the Anti-terrorism, Crime and Security Act 2001 contained several CTF measures that permitted authorities and law enforcement agencies to forfeit terrorist cash,⁸¹ to impose freezing orders,⁸² seize terrorist cash anywhere in the UK,⁸³ to examine accounts that might be used to support acts of terrorism,⁸⁴ to impose restraint orders⁸⁵ and require the disclosure of information.⁸⁶ This legislation was followed the development and publication of the UKs first CTF strategy.⁸⁷ The FATF stated that the UKs CTF strategy is to deter, detect and disrupt the terrorist's financial infrastructures.⁸⁸ Additionally, the Home Office stated that the policy was aimed at limiting the ability of terrorists to move funds to and from the UK.⁸⁹ In 2007, the Labour government launched the 'Financial Challenge to Crime and Terrorism', which outlined how the 'public and private sectors ... would deter terrorists from using the financial system'.⁹⁰ In 2010 HM Treasury reiterated the importance of 'depriving terrorists and violent extremists of the financial resources and systems',⁹¹ which was subsequently supported by the publication the 'Strategy for Countering International Terrorism'⁹² and the publication of the National Security Strategy in 2010.⁹³ This was accompanied by the publication of the The Strategic Defence and Security Review,⁹⁴ and the publication of CONTEST, the UK's new counter-terrorism

⁸¹ Anti-terrorism, Crime and Security Act 2001, s 1.

⁸² Anti-terrorism, Crime and Security Act 2001, s 4.

⁸³ Anti-terrorism, Crime and Security Act 2001, Schedule 1, part 2, para 2.

⁸⁴ Anti-terrorism, Crime and Security Act 2001, Schedule 2, part 1, para 1.

⁸⁵ Anti-terrorism, Crime and Security Act 2001, Schedule 2, part 1, para 2.

⁸⁶ Anti-terrorism, Crime and Security Act 2001, Schedule 2, part 3.

⁸⁷ HM Treasury *Combating the financing of terrorism. A report on UK action* (2002).

⁸⁸ Financial Action Task Force *Third mutual evaluation report anti-money laundering and combating the financing of terrorism – The United Kingdom of Great Britain and Northern Ireland* (2007) 23.

⁸⁹ Home Office, 'Counter terrorist finance strategy' (Home Office, 5 June 2013) <<https://www.gov.uk/government/publications/counter-terrorist-finance-strategy>> accessed 15 July 2014.

⁹⁰ HM Treasury *The financial challenge to crime and terrorism* (2007).

⁹¹ *Ibid.*, at 5.

⁹² HM Government *The United Kingdom's Strategy for Countering International Terrorism* (2009).

⁹³ HM Government *A Strong Britain in an Age of Uncertainty: The National Security Strategy* (2010).

⁹⁴ HM Government *Securing Britain in an Age of Uncertainty: The Strategic Defence and Security Review* (2010).

strategy.⁹⁵ These strategy documents were followed by the introduction of the Protection of Freedoms Act 2012, the Terrorism Prevention of Investigations Measures Act 2011, the Justice and Security Act 2013, the Data Retention and Investigatory Powers Act 2014 and the Counter-Terrorism and Security Act 2015. What becomes clear is that UKs CTF strategy has undergone a radical period of extension following 9/11 and the next section illustrates the growing influence of the ‘Financial War on Terrorism’.

Criminalisation

The criminal offences created by the Terrorism Act 2000 include fund raising;⁹⁶ use and possession;⁹⁷ funding arrangements;⁹⁸ insurance against payments made in response to terrorist demands;⁹⁹ money laundering;¹⁰⁰ failing to disclose information about the occurrence of terrorist financing;¹⁰¹ failure to disclose for the regulated sector;¹⁰² the offence of tipping off.¹⁰³ If a defendant is convicted of one of these offences, they are liable to a maximum term of 14 years imprisonment and/or an unlimited fine.¹⁰⁴ The effectiveness of these criminal offences could be questioned because between 2000 and 2010 only 36 people have been charged with the terrorist financing offences,¹⁰⁵ and only 11 defendants were convicted.¹⁰⁶ Despite this penalty and the devastating effects of the crime, there have been very few UK prosecutions for terrorist financing. Between 11 September 2001 and 31 December 2007,

⁹⁵ HM Government *CONTEST – The United Kingdom’s Strategy for Countering Terrorism* (2011).

⁹⁶ Terrorism Act 2000, s 15.

⁹⁷ Terrorism Act 2000, s 16.

⁹⁸ Terrorism Act 2000, s 17.

⁹⁹ Terrorism Act 2000, s 17A.

¹⁰⁰ Terrorism Act 2000, s 18.

¹⁰¹ Terrorism Act 2000, s 19.

¹⁰² Terrorism Act 2000, s 21A.

¹⁰³ Terrorism Act 2000, s 21D.

¹⁰⁴ Terrorism Act 2000, s 22.

¹⁰⁵ Home Office *Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes and stops & searches Great Britain 2009/10* (2010) 16.

¹⁰⁶ Home Office *Operation of Police Powers under the Terrorism Act 2000 and Subsequent Legislation: Arrests, Outcomes and Stops & Searches, Great Britain 2008/09* (2009) 26.

only 74 CTF charges were made in Great Britain, making up only 17 per cent of all charges made under the Terrorism Act 2000.¹⁰⁷ Between September 2001 and 2009, only 11 people were convicted under sections 15-19 of the Terrorism Act 2000.¹⁰⁸ It is unclear why the prosecution rate has been so low, although one reason may be because in order to prove the offences under Part III of the Terrorism Act 2000 the prosecution has to prove the terrorist element. For instance for a section 17 offence, it is necessary to prove that the defendant not only became involved in a funding arrangement but that he knew or suspected that the proceeds of the arrangement were for the purposes of terrorism. Whilst the defendant may have suspected that the arrangement was illegal in some way, it is harder to prove that the suspicion was one of actual terrorism rather than drug trafficking, human trafficking or some other crime.¹⁰⁹ Due to the small numbers involved, there are no sentencing guidelines for these offences and no published cases relating to sentencing practice. The only guidance, to the authors' knowledge, is contained in section 30 of the Counter-Terrorism Act 2008, which states that if an offence has a terrorist connection, the court must treat that as an aggravating factor and sentence accordingly.

Examples of sentencing for section 15 offences include two Algerian men, Benmerzouga and Meziane, who were sentenced in 2003 to 11 years imprisonment for raising over £200,000 for purposes of terrorism through a credit card fraud.¹¹⁰ Similarly, in 2007, Hassan Mutegombwa received 10 years for inviting someone to provide money for the purposes of terrorism,¹¹¹ indicating that the judges involved thought that these two offences were serious enough to

¹⁰⁷ P. Sproat, 'Counter-terrorist finance in the UK: a quantitative and qualitative commentary based on open-source materials' (2010) 13(4) *Journal of Money Laundering Control*, 315, 318.

¹⁰⁸ HC Deb, 5 February 2010, c586w.

¹⁰⁹ R. Alexander, 'Money Laundering and terrorist financing: time for a combined offence' (2009) 30(7) *Company Lawyer* 200, 202.

¹¹⁰ The Guardian 'Al-Qaida terrorists jailed for 11 years', (The Guardian 1 April 2003) <http://www.theguardian.com/uk/2003/apr/01/terrorism.alqaida> accessed 1 February 2016.

¹¹¹ BBC News 'Top extremist recruiter is jailed', (BBC News, 26 February 2008) <<http://news.bbc.co.uk/1/hi/uk/7265704.stm>> accessed 1 February 2016.

warrant lengthy terms of incarceration. Despite these examples, more normal sentences would appear to be much shorter. For example, in March 2011, Rajib Karim was sentenced to three years imprisonment for an offence under section 15(3) of the Terrorism Act 2000.¹¹² Other convictions include Mujahid Hussain (four year custodial sentence), Rahin Ahmen (12 years), Amal El-Wahabi (2 years and four months), Ali Asim (1 year and nine months) and Hana Khan (21 months suspended sentence). This section of the chapter has demonstrated that terrorist financing was criminalised before the terrorist attacks in 2001 and the implementation of the 'Financial War on Terrorism'. However, the effectiveness of the provisions before and after 9/11 has been questioned due to the limited number of related prosecutions. Therefore, the influence of the 'Financial War on Terrorism' on these provisions in the UK is limited.

Asset Freezing

The UK is obliged to freeze the assets of individuals and organisations who were suspected of financing terrorism after the introduction of the UNSCR 1373. The Anti-terrorism, Crime and Security Act 2001 permits the granting of a freezing order if two conditions are fulfilled. Firstly, HM Treasury must reasonably believe that 'action to the detriment of the United Kingdom's economy (or part of it) has been or is likely to be taken by a person or persons'¹¹³ and 'action constituting a threat to the life or property of one or more nationals of the UK or residents of the UK has been or is likely to be taken by a person or persons'.¹¹⁴ The second condition is where 'one person is believed to have taken or to be likely to take the action the second condition is that the person is (a) the government of a country or territory outside the

¹¹² Metropolitan Police 'Man jailed for 30 years for terrorism offences', (Metropolitan Police 18 March 2011) <<http://content.met.police.uk/News/Man-jailed-for-30-years-for-terrorism-offences/1260268719101/1257246745756>> accessed 1 February 2016.

¹¹³ Anti-terrorism, Crime and Security Act 2001, s 4 (2) (a).

¹¹⁴ Anti-terrorism, Crime and Security Act 2001, s 4 (2) (b).

United Kingdom, or (b) a resident of a country or territory outside the United Kingdom'.¹¹⁵ Once a freezing order has been made it prevents all persons in the UK from making funds available to, or for the benefit of, a person or persons specified in the order.¹¹⁶ HM Treasury is required to keep the freezing order under review and to determine whether it should continually be enforced over a period of two years.¹¹⁷ The Al-Qaida and Taliban (Asset-Freezing) Regulations 2010,¹¹⁸ create a second asset freezing regime which applied to 'breaches of the EU Regulations which implements sanctions imposed by the UN Sanctions Committee'.¹¹⁹ A first regime has been created by the Terrorist-Asset Freezing Etc. Act 2010 which seeks to enforce UNSCR 1373 and Council Regulation 2580/2001.¹²⁰ The ability to freeze the assets of suspected terrorists has been criticised and these powers have been declared an inappropriate use of emergency legislation.¹²¹ Furthermore, these powers are the result of the 'headlong rush to drive the [2001] Act through Parliament with little or no time to consider whether a more appropriate and effective system ... could be devised'.¹²² Nonetheless, the former Labour government highlighted the *apparent* success of asset freezing and boldly stated that prior to 9/11 they have frozen the assets of over 100 entities and approximately 200 individuals totalling in excess of £100m.¹²³ It has also been suggested that 'asset freezes can have a deterrent and disruptive effect, and the fact that such effect is unquantifiable does not mean that it is trivial ... designation of a known terrorist organisation with a history of fundraising ... may be assumed to have useful disruptive effects'.¹²⁴ Conversely, it has crudely been suggested that success can be measured in the

¹¹⁵ Anti-terrorism, Crime and Security Act 2001, s 4 (3).

¹¹⁶ Terrorism Act 2000, s 5.

¹¹⁷ Terrorism Act 2000, s 7 and 9

¹¹⁸ S.I. 2010/1977.

¹¹⁹ David Anderson, *First report on the operation of the Terrorist Asset-Freezing Etc. Act 2010* (2011) 10.

¹²⁰ *Ibid.*

¹²¹ Hansard, HL col.357 (November 28, 2001).

¹²² P Binning, 'In safe hands? Striking the balance between privacy and security - anti-terrorist finance measures' (2002) 6 European Human Rights Law Review 737, 747.

¹²³ HM Treasury (87) 9.

¹²⁴ Anderson (119) 15.

actual amount of money frozen ‘and though the headline figure thus generated is doubtless politically satisfying to some, it is not a measure of effectiveness’.¹²⁵ Nonetheless, despite the ‘media friendly’ figures flaunted by the government, the amount of money frozen has drastically fallen. For example, it was reported in 2011 that the amount of assets frozen was £100,000,¹²⁶ £44,000 in 2012,¹²⁷ £102,000 in 2013¹²⁸ and £61,000 in 2014.¹²⁹ The House of Lord Select Committee on Economic Affairs stated that ‘the evidence suggests that the amounts of money frozen are so small, both in absolute terms and relative to the probable resources of the targets, that it is doubtful whether asset freezes are effective as a means of inhibiting or changing the behaviour of those who are targeted’.¹³⁰ This is a view supported by Brent and Blair who stated that ‘as far as the UK is concerned, the result of the imposition of sanctions regimes against Al Qaida and the Taliban has been to freeze £466,000 with 187 frozen bank accounts ... in the case of anti-terrorist sanctions, their effectiveness ... has been the subject of’.¹³¹ Therefore, it has been concluded that the freezing asset provisions are ‘an ancillary rather than a central part of the fight against terrorism’.¹³²

Any commentary of the freezing of terrorist assets must consider its relationship with Article 1 of the First Protocol of the European Convention of Human Rights, which provides for the entitlement of peaceful enjoyments of possessions.¹³³ Therefore, every person is entitled to the peaceful enjoyment of his possessions, except in the public interests and subject to the

¹²⁵ Anon, ‘Investigation and Enforcement’ (2003) 6(3) *Journal of Money Laundering Control* 275.

¹²⁶ Anderson (119) 10.

¹²⁷ David Anderson, *Second report on the operation of the Terrorist-Asset Freezing Etc. Act 2010* (2012) 11.

¹²⁸ David Anderson, *Third report on the operation of the Terrorist-Asset Freezing Etc. Act 2010* (2013) 11.

¹²⁹ David Anderson, *Fourth report on the operation of the Terrorist-Asset Freezing Etc. Act 2010* (0014) at 11.

¹³⁰ House of Lords Select Committee, *The impact of Economic Sanctions* (HL 2006-2007, 96-1) 26

¹³¹ Richard Brent and William Blair ‘UK Sanctions Regimes’ in Richard Brent and William Blair (eds) *Banks and Financial Crime – The International Law of Tainted Money* (OUP 2008) 232-233.

¹³² *Ibid.*

¹³³ Hereinafter ‘ECHR’.

principles of international law. Two decisions of the European Court of First Instance¹³⁴ offered some initial guidance as to whether the asset freezing provisions of the 2001 Act breached the ECHR. As outlined above, members of the UN were compelled to freeze the funds and other resources of suspected or known terrorist organisations as a result of UNSCR 1373. These resolutions were given legal effect within the EU in 2002.¹³⁵ The applicants in these cases requested that Council Regulation (881/20), which implemented UNSCR 1373, should be annulled. The claim failed on three grounds. Firstly, the Court of First Instance ruled that the European Council was competent to freeze the funds of individuals in connection with the fight against international terrorism. Secondly, that the EU was legally obliged to follow any obligations from the Charter of the UN. Thirdly, the freezing of the applicant's funds did not infringe the fundamental rights and the applicants had not been arbitrarily deprived of their right to property. Therefore, the Court concluded that there was no breach of Article 1 of the First Protocol of the ECHR. The Court of First Instance was given another opportunity to examine the legality of the EU's implementation of UN Security Council Resolution 1373 in *Organisation des Modjahedines du peuple d'Iran v. Council and UK*.¹³⁶ Here, the Court of First Instance determined that the European Council decision to list the applicant as an unproven terrorist breached their procedural rights.¹³⁷ This decision been approved in *Sison*¹³⁸ and *al-Aqsa*.¹³⁹ Within the UK, the ability of HM Treasury to freeze the assets of terrorists was considered by the Supreme Court in *A v HM Treasury*.¹⁴⁰ Here, the Supreme Court deliberated the legitimacy of the Terrorism (United Nations

¹³⁴ Case T-306/01 *Ahmed Ali Yusuf and Al Barakaat International Foundation v Commission* and Case T-315/01 *Yassin Abdullah Kadi v Council and Commission*.

¹³⁵ See Council Regulation (EC) N0 881/2002, 27 May 2002, Official Journal of the European Communities, L139/9.

¹³⁶ CFI 12 Dec. 2006, Case T-228/02.

¹³⁷ CFI 12 Dec. 2006, Case T-228/02.

¹³⁸ CFI 11 July 2007, Case T-47/03, *Sison v. Council*.

¹³⁹ CFI 11 July 2007, Case T-327/03, *al-Aqsa v. Council*.

¹⁴⁰ [2008] EWHC 869.

Measures) Order ¹⁴¹ and the Al-Qaeda and Taliban (United Nations Measures) Order 2006.¹⁴² The Supreme Court determined that both of the Orders were *ultra vires* and HM Treasury and implemented the Terrorist Asset-Freezing (Temporary Provisions) Act 2010. This was repealed by the Terrorist Asset Freezing etc. Act 2010 which imposed financial restrictions on known or suspected terrorists. The ‘Financial War on Terrorism’ has had a significant impact on this part of the UK’s CTF policy and has resulted in numerous legal challenges to the asset freezing regime. The decision in *A v HM Treasury* will restrict the ability of the UK to freeze the assets of known or suspected terrorists, yet protect and respect the legal rights of the accused under the European Convention of Human Rights.

Confiscation/Forfeiture

The ability of law enforcement agencies to confiscate the assets or profits of acts of terrorism is permitted by the Proceeds of Crime Act 2002 and the Terrorism Act 2000. A criminal confiscation order is imposed against a convicted defendant to pay the amount of the benefit from crime. In order to grant a confiscation order, the court must consider two questions.¹⁴³ Firstly, whether the defendant has a criminal lifestyle?¹⁴⁴ Secondly, has the defendant profited from their illegal behaviour?¹⁴⁵ A defendant is regarded to have had a ‘criminal lifestyle’ if one of the following three requirements are met, and there has to be a minimum benefit of £5,000 for the final two to be met. Firstly, it is a ‘lifestyle offence’ as specified in the Proceeds of Crime Act 2002.¹⁴⁶ Secondly, it is part of a ‘course of criminal conduct’.¹⁴⁷ Thirdly, it is an offence committed over a period of at least six months and the defendant has

¹⁴¹ S.I. 2006/2657.

¹⁴² S.I. 2006/2952.

¹⁴³ Proceeds of Crime Act 2002, s 6.

¹⁴⁴ Proceeds of Crime Act 2002, s 10 and 75.

¹⁴⁵ Proceeds of Crime Act 2002, s 307.

¹⁴⁶ Proceeds of Crime Act 2002, Schedule 2.

¹⁴⁷ Proceeds of Crime Act 2002, s 75 (2) (b).

benefited from it.¹⁴⁸ A person is regarded as having a criminal lifestyle if he is convicted of an offence under the Proceeds of Crime Act 2002. This includes for example, drug trafficking,¹⁴⁹ money laundering,¹⁵⁰ directing terrorism,¹⁵¹ people trafficking,¹⁵² arms trafficking,¹⁵³ counterfeiting¹⁵⁴ and intellectual property offences.¹⁵⁵ The second condition, ‘course of criminal conduct’, is a part of a criminal activity in two cases. The first case is where the defendant has benefited from the conduct and ‘(a) in the proceedings in which he was convicted he was convicted or three or more other offences, each of the three or more of them constituting conduct which he has benefited’.¹⁵⁶ The second instance is ‘(b) in the period of six years ending with the day when those proceedings were started he was convicted on at least two separate occasions of an offence constituting conduct from which he has benefited’.¹⁵⁷ Once the court feels that this criterion has been met, it will determine a ‘recoverable amount’ and grant a confiscation order that compels the defendant to pay.¹⁵⁸ The scope of the UKs regime was extended to include the forfeiture of terrorist cash at its borders.¹⁵⁹ The Terrorism Act 2000 permits forfeiture provided a person is convicted of one of the terrorist property offences as outlined above.¹⁶⁰ These forfeiture provisions were extended to the seizure of terrorist cash anywhere in the UK.¹⁶¹ These powers have been used, but the amount of money forfeited is small when compared with other types of criminal

¹⁴⁸ Proceeds of Crime Act 2002, s 75.

¹⁴⁹ See certain offences under the Misuse of Drugs Act 1971.

¹⁵⁰ This would include Proceeds of Crime Act 2002, s 327 and 328.

¹⁵¹ See Terrorism Act 2000, s 56.

¹⁵² This would include for example breaches of the Immigration Act 1971, s 25, 25A or 25B.

¹⁵³ See Customs and Excise Management Act 1979, s 68 (2) and 170. Also see Firearms Act 1968, s 3 (1).

¹⁵⁴ Forgery and Counterfeiting Act 1981, s 14–17.

¹⁵⁵ Copyright, Designs and Patents Act 1988, s 107 (1), 107 (2), 198 (1) and 297 (A). Also see Trade Marks Act 1994, s 92 (1)–(3).

¹⁵⁶ Proceeds of Crime Act 2002, s 75 (3) (a).

¹⁵⁷ Proceeds of Crime Act 2002, s 75 (3) (b).

¹⁵⁸ Proceeds of Crime Act 2002, s 7.

¹⁵⁹ For a definition of terrorist cash see Anti-terrorism, Crime and Security Act 2001 Schedule 1, paragraph 1(a) and (b).

¹⁶⁰ Terrorism Act 2000, s 23.

¹⁶¹ Anti-terrorism, Crime and Security Act 2001, Schedule 1.

activity—only £1.452m was forfeited between 2001 and 2006.¹⁶² The Home Office reported that between 2008 and 2009 £838,539.65 was forfeited. It is important to note that there are some problems with the collection of any accurate data for the amount of terrorist cash forfeited.¹⁶³ This part of the ‘Financial War on Terrorism’ has had minimal impact on the ability of UK authorities to confiscate the proceeds of directing terrorism as these powers already existed. However, the model that has been adopted by the ‘Financial War on Terrorism’ is geared towards tackling the proceeds of crime for organised criminals, drug cartels and other criminal offences is inappropriate for terrorism. This is due to the fact that terrorists do not seek to profit from their illegal activity. An example of this approach is ‘reverse money laundering’, which involves terrorists receiving clean money from misapplied charitable donations for example that then becomes illegal money when it is used for the purposes of a terrorist attack.

The Sanctions Regime

One of the most important and controversial parts of the ‘Financial War on Terrorism’ has been the expansion of the UNs sanctions regime, the legal origins of which can be found in UNSCRs 1267 and 1373. The domestic basis for their implementation can be found in the Terrorism (United Nations Measures) Order 2001,¹⁶⁴ Terrorism (United Nations Measures) Order 2006¹⁶⁵ and the Terrorism (United Nations Measures) Order 2009.¹⁶⁶ HM Treasury manages the financial sanctions regime by virtue of the Terrorist Asset-Freezing etc. Act 2010. The first part of the 2010 Act gives legal effect in the UK to UNSCR 1373 and 1452, while the second part amends Schedule 7 of the Counter-Terrorism Act 2008 and grants HM

¹⁶² HM Government (92).

¹⁶³ Home Office *Report on the operation in 2009 of the Terrorism Act 2000* (2010) 21.

¹⁶⁴ S.I. 2001/3365.

¹⁶⁵ S.I. 2006/2657.

¹⁶⁶ S.I. 2009/1747.

Treasury additional power to impose financial restrictions on ‘a country of concern’ in response to threats to the UK or where the FATF has advised that appropriate measures should be undertaken. The sanctions regime has attracted a great deal of criticism. For example, it has been suggested that banks have been unfairly targeted by the sanctions regime due to a significant increase in compliance costs.¹⁶⁷ The British Bankers Association¹⁶⁸ questioned the appropriateness of the use of sanctions and stated:

‘One of the major clearers estimated its direct staff costs associated with sanctions work as nearly £300,000 in 2004 but total systems costs exceeded £8m. The time of counter staff dealing with actual/potential customers affected by sanctions was not costed. In general terms, the large retail banks will be spending £10m per institution on systems and millions per year in running/staff costs’.¹⁶⁹

Additionally, Anderson stated that despite banks supporting the sanctions regime they are required to ‘operate highly elaborate control structures, because of what is perceived as the huge reputational and regulatory risk of being seen to assist in the financing of terrorism. As one [banker] put it to me, even an inadvertent association with the funding of an incident such as 7/7 could bring down a whole bank’.¹⁷⁰ Additionally, BBA asserted that ‘many banks have to screen millions of transactions per month in order to comply with the various sanctions regimes, and drew my attention also to uncertainties and ambiguities over the systems and controls that banks are expected’.¹⁷¹ However, this point must be treated with an element of caution as banks have a proven track record of complaining about an increase in compliance costs associated with meeting their anti-money laundering reporting obligations.

¹⁶⁷ Brent and Blair (131).

¹⁶⁸ Hereinafter ‘BBA’.

¹⁶⁹ House of Lords Select Committee (130) 116.

¹⁷⁰ Anderson (119) 61.

¹⁷¹ *Ibid.*

Indeed, Haines took the view that ‘Banks and financial intermediaries may argue that the costs of compliance with various country sanctions lists are insignificant compared with the loss of reputation and integrity: assets to which such organisations cannot attach a price tag’.¹⁷²

Financial Intelligence

The UK has a long history of imposing reporting requirements on financial institutions where there is a risk of money laundering or terrorist financing. For example, the first money laundering reporting requirements were contained in the Drug Trafficking Offences Act 1986, which was amended by the Criminal Justice Act 1993. These reporting obligations have since become mandatory and have been consolidated by the Proceeds of Crime Act 2002 and the Money Laundering Regulations 2007.¹⁷³ The Anti-terrorism, Crime and Security Act 2001 makes it a criminal offence of failure to disclose knowledge or suspicion that another person has committed an offence under the Terrorism Act 2000, which covers acts of terrorism.¹⁷⁴ An individual or organisation who suspects that an offence has been committed under the Terrorism Act 2000 is legally required to complete a SAR, which is then sent via a Money Laundering Reporting Officer to the NCA for processing, who will determine whether or not to pass the information on to the police for further investigation. There are a number of other weaknesses that are associated with the reporting of suspicious transactions and the financing of terrorism. For example, one of the most commonly referred to faults has been the unsatisfactory approach adopted by the courts toward the definition of

¹⁷² J Haines, ‘Embargoes and economic sanctions: does the hand fit the glove?’ (2006) 27(10) *Company Lawyer* 289, 290.

¹⁷³ S.I. 2007/2517.

¹⁷⁴ Anti-terrorism, Crime and Security Act 2001, Schedule 2 Pt III.

the term ‘suspicion’.¹⁷⁵ Some guidance has been offered by the courts under the money laundering reporting obligations imposed by the Proceeds of Crime Act 2002. For example, in the case of *R v. Da Silva*, the court stated that ‘it seems to us that the essential element of the word suspect and its affiliates, in this context, is that the defendant must think that there is a possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease would not suffice’.¹⁷⁶ Goldby noted that the interpretation of suspicion in *Da Silva* was followed by the Court of Appeal in *K v National Westminster Bank*.¹⁷⁷ Further guidance on the interpretation of suspicious activity is offered by the Joint Money Laundering Steering Group who stated that:

‘Suspicion has been defined by the courts as being beyond mere speculation and based on some foundation, for example ‘a degree of satisfaction and not necessarily amounting to belief but at least extending beyond speculation as to whether an event has occurred or not’; and ‘although the creation of suspicion requires a lesser factual basis than the creation of a belief, it must nonetheless be built upon some foundation’.¹⁷⁸

Another frequently cited criticism of the reporting obligations is that they have created a ‘fear factor’ among the regulated sector which has seen a dramatic increase in the number of SARs submitted to financial intelligence units across the world.¹⁷⁹ For example, it has been reported that between 1995 and 2002 the number of SARs submitted to the UK’s FIU

¹⁷⁵ Terrorism Act 2000, s 19 (1) (b).

¹⁷⁶ [2006] EWCA Cro., 1654. Also see *K v. National Westminster Bank, HMRC, SOCA* [2006] EWCA Civ 1039 and *Shah v HSBC* [2010] 3 All E.R. 477.

¹⁷⁷ [2007] 1 W.L.R. 311 CA (Crim Div) at 16 as cited in M Goldby, ‘Anti-money laundering reporting requirements imposed by English law: measuring effectiveness and gauging the need for reform’ (2013) 4 Journal of Business Law 367, 370.

¹⁷⁸ Joint Money Laundering Steering Group *Prevention of money laundering/combating terrorist financing 2011 Review Version Guidance for the UK Financial Sector Part 1* (2011) 132.

¹⁷⁹ Hereinafter ‘FIU’.

increased from 5,000 to 60,000.¹⁸⁰ More recently, it has been reported that the UK FIU received 210,524 SARs in 2008,¹⁸¹ in 2010 it received 240,582 SARs,¹⁸² in 2011 the figure increased to 247,601,¹⁸³ in 2012 the figure was 278,665¹⁸⁴ and in 2013 the figure was 316,527.¹⁸⁵ The number of suspected instances of terrorist financing in 2013 numbered 856 SARs, an increase of 23% from 2012, representing 0.27% of the total number of submitted SARs to the NCA.¹⁸⁶ In 2014, the NCA reported that it received 354,186 SARs and 1,342 were distributed to the National Terrorist Financial Investigation Unit, representing approximately a 57% increase.¹⁸⁷

In addition to the traditional means of gathering financial intelligence via the use of SARs, the Terrorism Act 2000 contained a number of statutory measures that related to financial information orders. For example, the Terrorism Act 2000 permits the use of orders that require a financial institution to provide customer information if it is related to a terrorist investigation.¹⁸⁸ An application for an order can be made by a police officer that could ‘require a financial institution [to which the order applies] to provide customer information for the purposes of the investigation’.¹⁸⁹ The order could apply to ‘(a) all financial institutions, (b) a particular description, or particular descriptions, of financial institutions, or (c) a particular financial institution or particular financial institutions’.¹⁹⁰ If a financial institution fails to comply with the financial information order it is guilty of a criminal

¹⁸⁰ KPMG *Money Laundering: Review of the Reporting System* (2003) 14

¹⁸¹ Serious Organised Crime Agency, *The Suspicious Activity Reports Regime Annual Report 2008* (2008) 15.

¹⁸² Serious Organised Crime Agency *The Suspicious Activity Reports Regime Annual Report 2010* (2011) 4.

¹⁸³ Serious Organised Crime Agency *The Suspicious Activity Reports Regime Annual Report 2011* (2012).

¹⁸⁴ Serious Organised Crime Agency *The Suspicious Activity Reports Regime Annual Report 2012* (2013).

¹⁸⁵ National Crime Agency *Suspicious Activity Reports (SARs) Annual Report 2013* (2014) 5.

¹⁸⁶ *Ibid.*, at 27.

¹⁸⁷ National Crime Agency *Suspicious Activity Reports (SARs) Annual Report 2014* (2015) 37.

¹⁸⁸ Terrorism Act, schedule 4.

¹⁸⁹ Terrorism Act 2000, Schedule 6, 1(1).

¹⁹⁰ Terrorism Act 2000, Schedule 6, 1(1)(a).

offence.¹⁹¹ However, the financial institution does have a defence to breaching the financial information order if they can illustrate that either the ‘information required was not in the institution’s possession, or (b) that it was not reasonably practicable for the institution to comply with the requirement’.¹⁹² Binning noted that financial information orders are ‘available for general criminal money laundering and criminal benefit investigations under the Proceeds of Crime Act 2002. They are also available for use in mutual assistance requests to enable information to be passed to overseas investigators without the knowledge of the account holder’.¹⁹³ Additionally, the Terrorism Act 2000 permits the use of account monitoring orders.¹⁹⁴ Leong stated that an account monitoring order ‘is an order that the financial institution specified in the application for the order must, for the period stated in the order, provide account information of the description specified in the order to an appropriate officer in the manner, and at or by the time or times, stated in the order’.¹⁹⁵ Account monitoring orders have been described as draconian¹⁹⁶ and their relationship with civil liberties has been questioned on several occasions. An account monitoring order can be granted by a judge if they are satisfied that ‘(a) the order is sought for the purposes of a terrorist investigation, (b) the tracing of terrorist property is desirable for the purposes of the investigation, and (c) the order will enhance the effectiveness of the investigation’.¹⁹⁷ Where an application is made for account monitoring, the order must contain information relating to accounts of the person who is subject to the order.¹⁹⁸

¹⁹¹ Terrorism Act 2000, Schedule 6, 1(3).

¹⁹² Terrorism Act 2000, Schedule 6, 1(3).

¹⁹³ Binning (122) 747.

¹⁹⁴ Terrorism Act 2000, Schedule 6A.

¹⁹⁵ A. Leong ‘Financial investigation: a key element in the fight against organised crime’ (2006) 27(7) *Company Lawyer* 218, 219.

¹⁹⁶ S Gentle, ‘Proceeds of Crime Act 2002: update’ (2008) 56 *Compliance Officer Bulletin*, 1, 31.

¹⁹⁷ Terrorism Act 2000, Schedule 6, 2A.

¹⁹⁸ Terrorism Act 2000, Schedule 6, 2A.

One of the most controversial pieces of CTF legislation is the Counter-Terrorism Act 2008. The Act ‘has added to those financial provisions in significant ways. The Act implements a new regime of financial directions in Schedule 7 ... the scheme is very wide-ranging in application and effect’.¹⁹⁹ Schedule 7 of the 2008 Act provides HM Treasury with the ability to give a direction where the FATF has requested actions to be pursued against a country due to the risk it presents of terrorist financing or money laundering.²⁰⁰ Furthermore, HM Treasury is permitted to impose an action if they reasonably believe that a country poses a significant risk to the UK’s due to terrorist financing or money laundering. Finally, HM Treasury may impose a direction where it believes there is substantial risk to the UK due to the development, manufacturing or facilitation of nuclear, radiological, biological or chemical weapons there, or the facilitation of such development. The second part of Schedule 7 outlines the people who can be subject to the direction and that it may be issued to people working in the financial sector. Schedule 7 of the Counter-Terrorism Act 2008 provides for the requirements of a direction and the obligations that can be imposed. For example, the obligations can be imposed on transactions, business relationships with a person carrying on business in the country, the government of the country, or a person resident or incorporated in the country. It is very likely that once a direction has been imposed by virtue of Schedule 7 of the Counter-Terrorism Act 2008 the recipient will be required to improve their due diligence measures. Part 5 of Schedule 7 permits the relevant enforcement agency to obtain information and part 6 permits the use of financial sanctions on those who fail to observe the directions. The powers of HM Treasury under Schedule 7 of the Counter-Terrorism Act 2008 were challenged in *Bank Mellat v HM Treasury (No.2)*.²⁰¹ Here, the Supreme Court

¹⁹⁹ G Rees and T Moloney ‘The latest efforts to interrupt terrorist supply lines: Schedule 7 to the Counter-Terrorism Act 2008’ (2010) *Criminal Law Review*, 127.

²⁰⁰ Counter-Terrorism Act 2008, schedule 7, part 1, paragraphs 1-4.

²⁰¹ [2013] UKSC 38 and 39; [2013] 3 W.L.R. 179.

determined that the directions authorised by HM Treasury under Schedule 7 breached Article 6 of the European Convention of Human Rights and the rules of natural justice.

Conclusion

‘There has been an increase in activity to counter the financing of terrorist activity since the events of 9/11. Despite a host of regulations having been introduced, identifying terrorist financing is still an area of limited success’.²⁰²

The UK has adopted a very robust CTF policy and has made every effort to implement the ‘Financial War on Terrorism’. Originally, the UKs CTF measures were aimed at tackling domestic and not international terrorism. These provisions permitted the seizure and forfeiture of items that had or were intended to be used for the purposes of supporting or committing acts of terrorism. However, these provisions were deemed ineffective and were replaced by the Terrorism Act 2000 and the Anti-terrorism, Crime and Security Act 2001 following the terrorist attacks in September 2001. These two legislative measures expanded the criminalisation of terrorist financing, required reporting entities to submit SARs, permitted the freezing of terrorist assets and complied with the UN sanctions regime. However, this chapter has presented evidence that questions the effectiveness of the implementation of the ‘Financial War on Terrorism’ in the UK. For example, since the introduction of the Terrorism Act 2000 and the extension of the criminalisation of terrorist financing there has not been a steady increase in the number of prosecutions or convictions. Furthermore, the ability of HM Treasury to freeze the assets of terrorists was dealt a significant blow following the decision of the Supreme Court in *A v HM Treasury*.

²⁰² Home Affairs Select Committee *Counter-terrorism* (HC 2013-14, HC 231) 9.

Furthermore, it is also noted that the amount of suspected terrorist money that has been frozen since 9/11 has significantly reduced since the initial inroads announced by the Labour government in 2000. The effectiveness of the UK's stance toward the financing of terrorism has also been limited by political infighting within the Coalition and current Conservative government over the creation of a single Economic Crime Agency.²⁰³ This was proposed by Fisher and was subsequently adopted by the Coalition government as part of their Coalition agreement.²⁰⁴ However, the idea was rejected by the Home Secretary, Teresa May MP, who opted to prioritise the creation of the NCA following the enactment of the Courts and Crime Act 2013. The role of the NCA is divided into four 'Commands', one of which tackles 'Economic Crime'. This disjointed approach towards establishing a single ECA that exclusively deals with all aspects of financial crime has adversely affected the ability of the UK to tackle the financing of terrorism. For example, the Home Affairs Select Committee stated that the effectiveness of the UK's CTF strategy is also adversely affected by 'the fact that in the UK, the responsibility for countering terrorism finance is spread across a number of departmental departments and agencies with no department in charge of overseeing the policy'.²⁰⁵ This was supported by Anderson who noted 'the fact that asset-freezing is administered by a different department from other counter-terrorism powers means however that extra effort may be required if asset-freezing is always to be considered as an alternative to or in conjunction with other possible disposals for those believed to be engaged in terrorism'.²⁰⁶ However, the largest threat to the effectiveness of the UK CTFs strategies and the 'Financial War on Terrorism' is the threat posed by Islamic State of Iraq and the Levant.²⁰⁷ ISIL has evolved into a self-sufficient non-state terrorist organisation that has thrived on the political uncertainty and insecurity in Iraq and Syria. The impact of the UK's

²⁰³ Hereinafter 'ECA'.

²⁰⁴ Policy Exchange *Fighting Fraud and Financial Crime* (2010).

²⁰⁵ Home Affairs Select Committee (202) 49.

²⁰⁶ Anderson (128) 29.

²⁰⁷ Hereinafter 'ISIL'.

CTF measures and the 'Financial War on Terrorism' on the funding activities of ISIL will be limited.