



Royal United Services Institute
for Defence and Security Studies

Occasional Paper

The Big Payback

Examining Changes in the Criminal Confiscation
Orders Enforcement Landscape

Helena Wood



The Big Payback

Examining Changes in the Criminal Confiscation Orders Enforcement Landscape

Helena Wood

RUSI Occasional Paper, February 2016



Royal United Services Institute
for Defence and Security Studies

Over 180 years of independent defence and security thinking

The Royal United Services Institute is the UK's leading independent think-tank on international defence and security. Its mission is to be an analytical, research-led global forum for informing, influencing and enhancing public debate on a safer and more stable world.

Since its foundation in 1831, RUSI has relied on its members to support its activities, sustaining its political independence for over 180 years.

London | Brussels | Nairobi | Doha | Tokyo | Washington, DC

The views expressed in this publication are those of the author(s), and do not reflect the views of RUSI or any other institution.

Published in 2016 by the Royal United Services Institute for Defence and Security Studies.



This work is licensed under a Creative Commons Attribution – Non-Commercial – No-Derivatives 4.0 International Licence. For more information, see <<http://creativecommons.org/licenses/by-nc-nd/4.0/>>.

RUSI Occasional Paper, February 2016. ISSN 2397-0286 (Online); ISSN 2397-0278 (Print).

Royal United Services Institute
for Defence and Security Studies
Whitehall
London SW1A 2ET
United Kingdom
+44 (0)20 7747 2600
www.rusi.org

RUSI is a registered charity (No. 210639)

Acknowledgements

The analysis and information within this paper draws heavily on the experience of a wide range of current and former practitioners from the investigative, prosecutorial, policy and enforcement spheres. Their commitment to promoting the message that real justice for the wider public is founded not only on prison sentences, but in ensuring that criminals cannot enjoy the financial gains of their actions, is both inspiring and commendable.

I would like to thank all of those who took time out of their increasingly busy and pressured working days to share their views and expertise with me. I hope that this paper both accurately reflects their views and shows the importance of the work they do.

My thanks also go to my colleagues at the Centre for Financial Crime and Security Studies at RUSI who helped to structure and deliver the messages contained within this paper and without whom this paper would not have been possible.

Executive Summary

THE UK LEGISLATION for removing the proceeds of crime from the hands of convicted criminals, governed by the Proceeds of Crime Act 2002 (POCA), is viewed as particularly punitive due to its ability to capture a wide pool of income and assets, some of which are not linked to the indictable offence.¹ While this is desirable in policy terms, the broad framing of the law has created unintended consequences for those charged with enforcing the orders and the system has faced increasing criticism, most prominently in a 2013 report of the National Audit Office (NAO),² regarding the disparity between the levels of orders made in the courts and the amounts eventually collected from the criminal.

The NAO's report and some of the wider media coverage could be criticised for their focus on revenue-raising and 'value for money'³ rather than the impact on criminals, and for their failure to highlight the complexity of the law and the extent to which this (and not administrative failures) has led to the backlog of uncollected confiscation orders – currently £1.6 billion and rising.⁴ However the report did make a number of valid points, including on multi-agency co-ordination, and provided a catalyst for the government to recognise the centrality of the enforcement process to the success of the confiscation-orders regime as a whole.

This paper examines the legislative and systemic changes to the confiscation-order enforcement process introduced by the government in 2014 and 2015, and examines the extent to which these offer the needed shift in priority towards enforcement to reduce the current backlog and to prevent a future build-up. This paper makes recommendations for consideration by policy-makers.

The paper firstly examines recent amendments to the POCA made under the Serious Crime Act 2015, including changes to the pre-order process, changes to the incentives to pay, the clarification of judicial discretion and changes to the ability to write-off orders.

Regarding the pre-order process, this paper welcomes the moves to introduce third-party claims on assets prior to the enforcement stage, but cautions the effect these may have on the overall time taken to reach the stage of making the order. This paper then challenges the evidence base for lowering the burden of proof in the seeking of a restraint order and recommends that the Criminal Finances Board, the Home Office-led cross-government strategy body, examine two issues

-
1. Helena Wood, 'Enforcing Confiscation Orders: From Policy to Practice', *RUSI Occasional Paper*, February 2016.
 2. National Audit Office, *Confiscation Orders*, HC 738 (London: The Stationery Office, December 2013).
 3. *Evening Standard*, 'Confiscation Order Overhaul Urged', 22 March 2014.
 4. HM Courts and Tribunals Service, *Annual Trust Statement 2014–15*, HC 326 (London: The Stationery Office, July 2015).

highlighted by this study as being more pertinent to asset restraint: institutional risk-appetite within the Crown Prosecution Service (CPS); and the dissipation test set by case law.

The Serious Crime Act 2015 also makes changes to the incentives provided in law to pay confiscation orders in a timely fashion. This paper broadly welcomes the new compliance orders, which offer considerable discretion to the court to set restrictive conditions which can be invoked as a result of non-payment and, if policed properly, could offer a real incentive to pay. However, this paper points to the lack of a clear understanding of what incentivises an individual to pay (or not), and challenges the evidence that increasing the default sentence will increase payments. This paper recommends that the Criminal Finances Board examine the issue of compliance incentives in broad terms, including the effect of the default sentence. This will ensure that future policy and legislation is based on hard facts rather than supposition.

The case of *R v Waya* led to a landmark 2012 ruling in the Supreme Court on the concept of judicial discretion which was later incorporated into primary legislation. This paper concludes that this is a positive development. If put into practice with due care and consideration, judicial discretion should balance the need to ensure that confiscation orders are sufficiently punitive, while being enforceable in practice. However, this report points to the minimal and non-compulsory judicial training in this complex field and recommends that the judiciary consider implementing more comprehensive, compulsory training on confiscation orders.

Finally, this paper examines the new ability in law to write-off orders where the offender is deceased. This paper welcomes this practical measure which reflects the realities of the enforcement process. However, this paper concludes that this measure does not go far enough. While any measures to widen the category of assets available to write-off must be balanced with the message this sends to criminals and the wider public, this paper urges the Criminal Finances Board to critically examine whether a further category of assets may be suitable for write-off or, alternatively, 'parking' to ensure that non-collectable orders do not distort the discourse in this field and distract the enforcement authorities from collecting those orders which are practical to collect.

This paper concludes that, while many of the recent legislative amendments are welcome and stand up to critical analysis, some lack a firm evidence base; they are not a panacea. This paper notes that the workings of the law alone cannot account fully for the backlog; systemic and structural issues have also played their part. Therefore this paper considers some of the systemic changes to the enforcement process.

A key problem with the enforcement of confiscation orders has been the large number of bodies with a stake in the process, from investigators to prosecutors to the court service. Co-ordination among these bodies has previously been poor and long-term ownership of the enforcement process by investigating agencies has been lacking. This paper therefore welcomes efforts to increase strategic co-ordination, through the Multi-Agency Enforcement Group, and at a practical level, through the Asset Confiscation Enforcement (ACE) teams. These ACE teams – multi-agency practitioner teams focused on using collective powers and expertise to enforce uncollected orders – are already having

a positive impact. This paper, however, points to the unstable funding model on which they are based and recommends that these be funded in a more sustainable way.

This paper highlights the increasingly multinational nature of criminal confiscation and points to some of the new measures put in place to address this. This paper welcomes the deployment of asset-recovery advisors – CPS personnel based overseas to aid asset-confiscation initiatives – and the increase in asset-sharing agreements, a type of memorandum of understanding with other countries agreeing to the sharing of assets where they aid the UK with their enforcement efforts. This paper, however, notes that these measures should be supplemented with a programme of overseas technical assistance, perhaps funded from the overseas aid budget.

In concert with changes in the public-sector approach to confiscation-order enforcement, there has been an increased focus on the potential role of private-sector assistance. The private sector offers a number of skills currently unavailable in government and the greater use of enforcement receivers, court-sanctioned private individuals with powers to seize and sell assets, should be considered, as long as costs can be balanced. Furthermore, the lack of a searchable public database of unpaid confiscation orders means that the authorities fail to harness the potential of the financial sector, in particular, to identify assets available for enforcement.

However this paper questions the viability of ‘selling off’ £1.6 billion of uncollected payments to the private sector, a measure suggested in recent Treasury communication with Parliament; given the framing of the law, examined in the RUSI paper ‘Enforcing Confiscation Orders: From Policy to Practice’, this idea may not be commercially viable. This is because there is no clear asset base for a high proportion of the uncollected orders.

In conclusion, this paper welcomes the renewed emphasis on the enforcement process as part of a holistic approach to the confiscation-orders regime. Indeed, measures taken by the government in this respect could be seen to go further than any efforts in this field to date. However, some do not go far enough and others appear to have a precarious future. The lack of focus on the enforcement process during the drawing up of the law and in the subsequent twelve years of its operation has created a legacy that the government must now seek to tackle in the long term – recent changes should be seen as a starting point and not as an end.

Recommendations

Recommendation 1: To improve understanding of the field, the Home Office Criminal Finances Board should commission a study of restraint orders with the following aims:⁵

- To empirically investigate the link between restraint orders and enforcement success
- To understand whether concerns raised by investigators regarding the perceived reticence of the CPS to apply for restraint orders are well founded

5. The Criminal Finances Board is a Home Office-chaired policy body which aims to set the strategic direction for criminal-finances work, including asset recovery. It has representatives from the policy, law-enforcement, prosecutorial and judicial sectors.

- To examine the effect of case law in this field and the potential to provide clarification in future primary legislation.

Recommendation 2: The Criminal Finances Board should commission a study examining which measures incentivise offenders to pay. This study should examine the effectiveness of current compliance incentives, after they have had time to have an impact, including compliance orders, default sentences and interest. It should also identify and examine other options, perhaps drawing on experiences in other fields of debt enforcement.

The study should further assess the effects of compliance incentives across a range of values for confiscation orders and across a range of predicate offences. This study should consider the effect of the sanction on both those who did not pay the confiscation order and on those who did.

Recommendation 3: To ensure that judicial discretion is exercised with due consideration to the intent of the legislation, this study recommends a more comprehensive and compulsory training programme on criminal confiscation for judges.

Recommendation 4: The Criminal Finances Board should reconsider the issue of orders which are deemed to be uncollectable. It should further examine whether there is evidence to support wider categories of orders being subject to mechanisms allowing them to be written-off. Alternatives, such as a system for ‘parking’ orders to prevent further accrual of interest, should also be examined. It should examine this issue in the widest sense, giving due consideration to issues of practicality, as well as the policy and political implications of such a decision.

Recommendation 5: ACE teams should be a permanent fixture of the criminal-confiscation landscape. The funding for these teams should be made on a multi-year basis and taken from a core budget, rather than unstable Asset Recovery Incentivisation Scheme top-slicing. This will allow for investment and stable staff recruitment and retention.

Recommendation 6: To complement asset-sharing agreements, the government should consider prioritising capacity-building across a range of priority jurisdictions in asset-tracing, through technical-assistance programmes. Consideration should be given to meeting the cost of this technical assistance from the government’s overseas-aid budget given existing pressures on law-enforcement resources.

Recommendation 7: The Criminal Finances Board should commission a study, once the new strategy has had time to take effect, to examine whether the new CPS Receivership Strategy is having a positive effect on the use of enforcement receivers, and whether this use is in line with the guidance given that case-selection decisions should include consideration of harm and crime reduction.

Recommendation 8: The Criminal Finances Board should explore the potential for maintaining a central public register of unpaid confiscation orders. It should consider making the register available in a format which is easily accessible and searchable by private-sector institutions.

Examining Changes in the Criminal Confiscation Orders Enforcement Landscape

THE PROCEEDS OF Crime Act 2002 (POCA) consolidated previous legislation governing the state's ability to take the proceeds of crime out of the hands of criminals, and expanded the ability of law enforcement to reach a wider category of criminal assets than ever before.¹ The legislation is widely viewed as particularly punitive as it, in some cases, reverses the burden of proof onto the defendant and seeks reparations even from legitimate income. While this measure was not new, its broader application meant that, at its inception, the POCA was heralded as a solution to the problem of 'traditional' law-enforcement tactics – arrest and commodity seizure – failing to tackle more complex organised criminal networks.²

However, while desirable in policy terms, the author's research in this field suggests that the broad framing of the law allows courts to make confiscation orders which often far outstrip the asset base available to pay them; this has unintended consequences for those charged with enforcing those orders.³ This paper, based on around twenty-five semi-structured interviews with current and former public- and private-sector practitioners working in the policy and executive bodies between July and November 2015, concludes that in drafting the law, the practicalities of enforcing orders based on such broad assumptions were, at best, an afterthought. The combination of orders outstripping assets and a failure to consider practicalities has led to the much-reported figure of '£1.6 billion' in uncollected confiscation orders as at April 2015.⁴

The disparity between the payable amounts issued to convicted criminals in confiscation orders and the eventual payment actually received has generated widespread criticism of the regime. In December 2013, this situation culminated in the National Audit Office (NAO) – the parliamentary auditor of government activity – criticising the government's confiscation-order regime.⁵

1. For example, POCA took an 'all crimes' approach to criminal confiscation and introduced civil powers to seize and forfeit cash suspected to be the proceeds of crime.

2. Cabinet Office, 'Recovering the Proceeds of Crime', June 2000, <<http://webarchive.nationalarchives.gov.uk/+http://www.cabinetoffice.gov.uk/media/cabinetoffice/strategy/assets/crime.pdf>>, accessed 1 October 2015.

3. See Helena Wood, 'Enforcing Confiscation Orders: From Policy to Practice', *RUSI Occasional Paper*, February 2016.

4. National Audit Office, *Confiscation Orders*.

5. *Ibid.*

The NAO report raises a number of overarching criticisms, given below, with those particularly relevant to the enforcement process highlighted:

- The lack of a coherent strategy for confiscation orders
- A flawed incentive scheme of payments back to contributing agencies,⁶ and weak accountability of the incentivisation system which compounds the problem
- The absence of good performance data or benchmarks across the system, which weakens decision-making processes
- Insufficient awareness throughout the criminal-justice system of both the impact of and mechanisms to recover the proceeds of crime
- **Outdated, slow ICT systems, poor data and poor joint-working which hamper enforcement efficiency and effectiveness**
- **The fact that the main sanctions for not paying orders – default sentences of up to ten years and an additional 8 per cent interest on the amount owed – do not work.**

The NAO report and subsequent media coverage of the issue could be criticised for their sole focus on revenue-raising and ‘value for money’. Arguably, this is an unfair measurement of success for a criminal-justice process which is, in this case, retributive and not commercial. Moreover, due to its limited focus and parameters, such a measurement does not highlight the wider criminal-justice value of the confiscation-order regime. Nevertheless, the report does make a number of valid points in relation to some of the perceived failures in the enforcement process. This has provided a useful catalyst for the government to rethink the priority given to the enforcement process within the regime as a whole.

Throughout 2014 and 2015, policy-makers and practitioners have put in place a number of legislative and systemic changes that aim to reduce the backlog of unenforced orders and restrict future disparities between the amounts set by the confiscation orders made in court and the amounts actually collected.

This paper builds on the analysis of another RUSI paper, ‘Enforcing Confiscation Orders: From Policy to Practice’, which examines the framing of the law and practice around the enforcement of confiscation orders. The current paper first examines the key legislative changes to the POCA confiscation-order enforcement process made recently under the Serious Crime Act 2015. Second, it analyses some of the systemic enforcement developments.

The overarching aim of this paper is to assess whether the changes made mark the required shift in emphasis towards the enforcement process, and to evaluate the utility and durability of these changes. The paper will do so by examining the following questions:

- To what extent will the amendments to POCA primary legislation brought in by the Serious Crime Act 2015 solve some of the issues surrounding the enforcement of confiscation orders? Do these go far enough?

6. Under the current arrangements, law enforcement, prosecutors and court-enforcement teams receive a percentage of enforcement receipts to reinvest in their agencies.

- What systemic changes have been made to the enforcement process since the critical NAO report? What is their potential impact? How durable are these changes?

Legislative Changes: Serious Crime Act 2015

In 2015, the government amended the POCA through the Serious Crime Act 2015 in order to address, among other things, some of the concerns surrounding the enforcement process. This section critically analyses some of the most significant legislative amendments to ascertain whether these are likely to have the desired effect on enforcement results. These changes can be grouped into five categories:

1. Pre-order changes (that is, changes to the process *prior* to the confiscation order being made)
2. Incentives to pay (that is, measures to encourage defendants to pay, on time, the full amount as stipulated in their confiscation order)
3. Judicial discretion (that is, allowing the court more latitude to set confiscation orders at a level it deems 'appropriate' rather than following a strict legislative formula)
4. Extension of investigatory powers to the enforcement process
5. The ability to write-off orders.

Pre-Order Changes

Third-Party Interests

As stated in the government's 2013 *Serious and Organised Crime Strategy*,⁷ criminals often introduce third-party claims (such as by a spouse or family member) against assets at the enforcement stage to frustrate efforts to enforce confiscations orders. These often include claims by spouses on the family home – which may or may not be legitimate. While there are clearly instances of third parties having legitimate interests in property, a significant proportion of claims are judged by financial investigators and court enforcement staff to be vexatious and disruptive.⁸ Such claims can considerably lengthen enforcement proceedings.

Prior to the recent POCA amendments, third parties had no right to make a claim for their share in the defendant's alleged assets until the enforcement stage. This led to legitimate interests in property only coming to light following the making of the confiscation order. This has often led to protracted disputes over the 'available amount' following the imposition of the order; in turn, this has hindered efforts to collect the funds detailed in the confiscation order in a timely fashion.

Amendments made by the Serious Crime Act 2015 seek to rectify this issue. The new powers aim to force third-party interests to the fore *before* the confiscation order is made, both in the prosecutor's statement on 'criminal benefit' and by giving the court powers to require information on third-party interests before determining the level of the confiscation order. This amendment

7. HM Government, *Serious and Organised Crime Strategy*, Cm 8717 (London: The Stationery Office, October 2013).

8. Interviews with officials, June and July 2015

will not, however, completely eradicate this disruption to the enforcement process. In relation to the amendments, a Home Office Circular published in May 2015 notes that:⁹

It is likely that the Crown Court will only make determinations under new section 10A where the defendant's interest in a particular property can be established without too much difficulty. In more complicated cases, it is anticipated that the defendant's interest in property will be determined as it is now, at the enforcement stage.

Furthermore, interviews carried out during this study raised concerns over the introduction of third-party deliberations at this stage,¹⁰ which may slow down the hearing process for confiscation orders. Despite this, this paper concludes that this amendment is likely to reduce some of the protracted deliberations *at the enforcement stage*; the court is likely to be less forgiving of defendants and third parties if they have had the opportunity available to represent their interests at an earlier stage.¹¹

Use of Restraint Orders

A restraint order is the primary tool used during the investigation stage to prevent the dissipation of assets before a confiscation order is made. A prosecutor can apply to the court for a restraint order at any time after the start of an investigation, as long as the case meets the criteria set out in the law.¹² Practitioners interviewed during the course of this study deemed that restraint orders have a significant effect on the overall success of enforcement after a confiscation order has been made.¹³

The Serious Crime Act 2015 reduces the burden of proof for seeking a restraint order from 'reason to *believe*' to 'reason to *suspect*'. The burden of proof for restraint orders is now the same as the burden for powers of arrest. As stated in the Home Office Circular, '*Belief* is a high threshold which is normally formed in later stages of an investigation. Consequently, many applications are unsuccessful and assets that could be used to satisfy a confiscation order are at risk of being dissipated.'¹⁴

However, practitioners interviewed during this study questioned the value of this amendment, citing their view that only a minimal proportion of applications for restraint orders are turned down on grounds of failing to meet evidential thresholds, once applied for (though no statistics

9. Home Office, 'Amendments of the Proceeds of Crime Act 2002 by: The Serious Crime Act 2015, The Policing and Crime Act 2009, The Crime and Courts Act 2013', 22 May 2015, <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/429570/HO_Circular_-_Amendments_to_the_Proceeds_of_Crime_Act_2002.pdf>, accessed 1 October 2015.

10. Interview with official, June 2015.

11. The law specifically allows the court to draw an inference from non-compliance with pre-order enquiries.

12. Section 41 of POCA.

13. Although it should be noted that this is based on opinion and not based on empirical evidence.

14. Home Office, 'Amendments of the Proceeds of Crime Act 2002'.

were available to support this view).¹⁵ Instead, research indicated that there were two possible alternative (and opposing) reasons why restraint applications either failed or were not sought – on the one hand, the risk appetite of the Crown Prosecution Service (CPS),¹⁶ and on the other, case law establishing the dissipation test.

According to prosecutors, established case law explains the low numbers of restraint orders applied for and granted.¹⁷ Prosecutors cited case law which established that restraint may only be applied for if a real, rather than ‘fanciful’, risk of dissipation can be established.¹⁸ For example, the judicial case against the imposition of a restraint order often centres on the time lag between arrest and the application for an order in cases where no evidence can be presented that the defendant has sought to dissipate his or her assets in the meantime.

The prevailing view of law-enforcement practitioners was that the issue stemmed from the perceived organisational reticence of the CPS (in cases where it is the prosecuting authority) to apply for restraint orders. It was felt that this was due to the potential cost implications to the organisation should the case fail.¹⁹

Irrespective of the explanation offered, practitioners interviewed in this study believed that the number of restraint orders being sought is too low, and that this has an effect on the availability of assets at the enforcement stage (though no statistics were available to support this view). The NAO’s 2013 report makes a similar claim, citing the low number of restraint orders sought during the investigation phase as having a direct impact on the subsequent ability to enforce confiscation orders, particularly orders relating to ‘hidden assets’.²⁰ The report states, ‘Within law enforcement and prosecution agencies, few officers and staff have good understanding about proceeds of crime legislation. In many cases effective powers, such as restraint orders, are applied late or not used at all’.²¹

The conflicting views put forward in this study demonstrate that this is a poorly understood area lacking an empirical evidence base and that the recent changes made are deemed unlikely to have a significant effect on the number of restraint orders sought and issued and the eventual impact on success of enforcement measures.

15. Interviews with officials, June and July 2015

16. The CPS are the main prosecuting authority for cases investigated by the police and the National Crime Agency.

17. England and Wales Court of Appeal (Criminal Division) Decisions, EWCA Crim 1374, Case No: 2008/01221/C5, 2008, <<http://www.bailii.org/ew/cases/EWCA/Crim/2008/1374.html>>, accessed 1 October 2015.

18. Much of the case law established in the Lord Justice Moses ruling on *R v B*, for example, centred on the time lag between the arrest and making the application for restraint, the argument being that if the defendant did not seek to dissipate the assets immediately after arrest, then a real risk of dissipation can hardly be proven.

19. Interviewees cited *CPS v Eastenders Group* as an example of where an ultimately failed investigation led to the CPS picking up extensive costs relating to the restraint of a business under Section 42 of POCA.

20. Helena Wood, ‘Enforcing Confiscation Orders’.

21. National Audit Office, *Confiscation Orders*.

Recommendation 1: To improve understanding of the field, the Home Office Criminal Finances Board should commission a study of restraint orders with the following aims:²²

- To empirically investigate the link between restraint orders and enforcement success
- To understand whether concerns raised by investigators regarding the perceived reticence of the CPS to apply for restraint orders are well founded
- To examine the effect of case law in this field and the potential to provide clarification in future primary legislation.

Incentives to Pay

Confiscation orders are, in effect, akin to a debt (rather than an order confiscating actual property) and are, as such, the responsibility of the defendant to pay by any means he or she sees fit, by realising property to the value of the order. Prior to changes made in the Serious Crime Act 2015, the only two means to incentivise compliance were through the imposition of a ‘default sentence’ to be served in the event of non-payment (explored further below) and through the charging of interest of 8 per cent once the order becomes overdue. The act contains a number of provisions to increase the incentives to pay on time, which are analysed below.

Compliance Orders

The Serious Crime Act 2015 introduced a significant, wide-ranging power available to the court at the time of making the confiscation order, called a ‘compliance order’. Under this new power, the court may issue *any* compliance measure it deems fit to encourage payment of the confiscation order, though it is duty bound to consider putting in place a travel ban on the defendant. As stated in the explanatory note to the legislation:²³

The Court is at liberty to impose any restrictions, prohibitions or requirements as part of a compliance order provided they are considered appropriate for the purpose of securing that the confiscation order is effective, *but it must consider whether to impose a ban on the defendant’s travel outside the UK.* [Emphasis added]

While the court is duty bound only to consider the imposition of a travel ban on the defendant, it *may*, under the new powers, apply any restrictions it deems necessary where this is ‘considered appropriate’ to making the confiscation order effective.

Outside of the travel ban, it is worth exploring other analogous powers and the ways in which they have been used to have an impact on criminal behaviour. It could be argued that a compliance order, given its broad nature, is somewhat analogous to the civil sanctions available

22. The Criminal Finances Board is a Home Office-chaired policy body which aims to set the strategic direction for criminal-finances work, including asset recovery. It has representatives from the policy, law-enforcement, prosecutorial and judicial sectors.

23. Explanatory Notes to the Serious Crime Act 2015, <<http://www.legislation.gov.uk/ukpga/2015/9/Notes>>, accessed 27 October 2015.

under Serious Crime Prevention Orders brought in under the Serious Crime Act 2007.²⁴ These orders were introduced to deter a return to criminality by ‘lifetime criminals’ and, for example, have been used to restrict access to the financial system, to limit access to the Internet and to restrict ownership of companies.²⁵

Given its wide-ranging applicability, if used proportionately and policed properly, compliance orders could offer real incentives to defendants to pay their confiscation orders as it gives the court significant latitude to limit the defendant’s personal freedoms until he or she pays. Moreover, if used by the courts in innovative ways, this power has the potential to have a significant impact on levels of payment. This is a view supported by the majority of responses provided in the interviews undertaken for this study.²⁶

Default Sentences

As noted above, the imposition of a ‘default sentence’ to be served in the event of non-payment of a confiscation order was previously one of the few tools available in the legislation to encourage payment. It should be noted that the serving of the default sentence does not extinguish the confiscation order – it remains – but that once the sentence is served, no additional sentence can be imposed if payment is still not forthcoming.

The Serious Crime Act 2015 extended the default sentences in order to encourage payment. The legislation has introduced new payment bands which are not directly comparable with those set previously. However, the tables below show the previous default sentences for reference. For example, for confiscation orders over £1 million, the maximum default sentence has been extended from ten to fourteen years.

Table 1: Maximum Default Sentences for Non-Payment of Confiscation Orders under the Serious Crime Act 2015.

Amount	Maximum Term
£10,000 or less	6 months
£10,001–£500,000	5 years
£500,001–£1 million	7 years
More than £1 million	14 years

24. Though it should be noted that these are orders sought through the court by law-enforcement agencies rather than sanctions sought by the court themselves.

25. Matthew Cloughton, ‘Increased Use of Serious Crime Prevention Orders’, Olliers Solicitors, 22 April 2011, <<http://www.olliers.com/latest-news/increased-use-serious-crime-prevention-orders.html>>, accessed 1 October 2015.

26. Interviews with officials, June and July 2015.

Table 2: Maximum Default Sentences for Non-Payment of Confiscation Orders Prior to the Serious Crime Act 2015.

Amount	Maximum Term
£200 or less	7 days
£201–£500	14 days
£501–£1,000	28 days
£1,001–£2,500	45 days
£2,501–£5,000	3 months
£5,001–£10,000	6 months
£10,001–£20,000	12 months
£20,001–£50,000	18 months
£50,001–£100,000	2 years
£100,001–£250,000	3 years
£250,001–£1,000,000	5 years
More than £1 million	10 years

The effect of this extension is yet to be seen. However, a number of studies conducted prior to these changes have questioned the value of the default sentence as an incentive to pay the order. For example, the Home Office confiscation orders attrition study of 2009 states that:²⁷

The default sentence, while a crucial weapon in the enforcement armoury, was not seen by respondents as a panacea. Court enforcement staff thought that the threat seemed to work with some offenders, particularly those serving relatively short sentences who were keen to get out of custody as quickly as possible. However, it was seen as less useful in the case of offenders serving longer sentences as the default sentence then posed little proportionate risk to them.

Furthermore, the NAO's 2013 report finds that only 2 per cent of confiscation orders were paid off in full following the serving of a default sentence.²⁸ Moreover, the Public Accounts Committee 2013–14 Session on confiscation orders notes that £490 million was still owed by criminals who have served or were, at the time, serving their default sentence.²⁹

Although these reports are based on the previous levels of default sentence, studies such as the Home Office attrition study note that non-payment largely correlates with the larger confiscation orders (often linked to those serving longer sentences).³⁰ It is therefore debatable whether the new

27. Karen Bullock et al., 'Examining Attrition in Confiscating the Proceeds of Crime', Home Office Research Report 17, July 2009.

28. National Audit Office, *Confiscation Orders*.

29. House of Commons Committee of Public Accounts, *Confiscation Orders: Forty-Ninth Report of Session 2013–14*, HC 942 (London: The Stationery Office, March 2014).

30. Karen Bullock et al., 'Examining Attrition in Confiscating the Proceeds of Crime'.

level will have any more effect than the previous ten-year default sentence for confiscation orders over £1 million, which was reasonably punitive but failed to have the desired effect.

This paper therefore questions the value of this measure, given the lack of evidence that increasing the default sentence has any greater effect of reducing incidences of non-payment over and above previous levels. This is a view supported by a number of practitioners interviewed for this study.³¹

This issue also highlights the lack of wider understanding of what incentivises individuals to pay orders. For example, 8 per cent interest is levied on overdue orders. Yet there is no published evidence that this has any impact on the individual to pay. In fact, most respondents in this study questioned the incentive value of this interest: in April 2015, £432 million of the £1.6 billion in uncollected debt from confiscation orders represented interest alone.³²

Recommendation 2: The Criminal Finances Board should commission a study examining which measures incentivise offenders to pay. This study should examine the effectiveness of current compliance incentives, after they have had time to have an impact, including compliance orders, default sentences and interest. It should also identify and examine other options, perhaps drawing on experiences in other fields of debt enforcement.

The study should further assess the effects of compliance incentives across a range of values for confiscation orders and across a range of predicate offences. This study should consider the effect of the sanction on both those who did not pay the confiscation order and on those who did.

Judicial Discretion

The original framing of the legislation deliberately put in place measures to curtail the discretion available to judges to set the amount of a confiscation order and to link this to the facts of the case.³³ The level at which the order was set was instead dictated by a strict set of criteria set out in the legislation. This has long been a criticism of the confiscation-order process,³⁴ especially from defence barristers and latterly conceded by some practitioners, due to the potential for ‘disproportionate orders’. A number of interviewees in this study noted that this had ‘knock-on’ effects for both the ability of the courts to enforce the confiscation order and the ‘willingness’ of the defendant to pay.

Recent case law, such as Supreme Court rulings in *R v Ahmad and Ahmed* and *R v Waya*,³⁵ explained in the text box, has redressed the balance. These rulings led the Home Office to propose changes

31. Interviews with officials, June and July 2015.

32. HM Courts and Tribunals Service, *Annual Trust Statement 2014–15*.

33. This is thought to have been to ensure that judges were obliged to consider as wide a pool of criminal assets as possible, rather than setting the order depending on what they perceived to be the severity of the offence.

34. See Jonathan Lennon and Aziz Rahman, ‘Taking the Profit out of Crime, or Just Taking the Mickey?’, Rahman Ravelli Solicitors, 20 February 2013, <<http://www.rahmanravelli.co.uk/articles/confiscation-3/>>, accessed 1 October 2015.

35. United Kingdom Supreme Court Judgement, *R v Waya*, UKSC 51, 2012, <<http://www.bailii.org/uk/cases/UKSC/2012/51.html>>, accessed 1 October 2015; United Kingdom Supreme Court Judgement,

Box 1: Case Law Demonstrating the Principle of Proportionality.**R v Ahmad and Ahmed**

In this case, Shakeel Ahmad and Syed Ahmed had been convicted of a complex Missing Trader Intra-Community (MTIC) fraud, which had resulted in the company for which they were both responsible obtaining a 'benefit' from VAT rebates amounting to £16.1 million. According to the strict interpretation of the law, they could be seen to have *each* 'benefited' to the tune of £16.1 million and were therefore each given a confiscation order of this amount; this meant that the total amount owed to the Crown was £32.2 million (rather than the original £16.1 million, which was the *actual* proceeds of the crime).

The Supreme Court ruling made a judgement that this was in fact disproportionate and held them to be jointly responsible for payment of the £16.1 million. The ruling stated:¹

It is true, as has been said many times, that the legislation is directed towards the proceeds and not the profits of crime, but it would not serve the legitimate aim of the legislation and would be disproportionate for the state to take the same proceeds twice over.

R v Waya

In 2003, Terry Waya purchased a flat for £775,000 with £310,000 of his own money and with a £465,000 mortgage. He lied about his income when applying for the mortgage. In April 2005 he re-mortgaged the flat with a different lender, paying off the original loan in full with no loss to the original lender.

In July 2007, Waya was convicted of obtaining money by deception in relation to the false statements made when applying for the original mortgage. In January 2008, he received a confiscation order to the value of £1.54 million. This was calculated by deducting Waya's contribution of £310,000 from the increased market value of the flat.

This ruling was appealed, and the Court of Appeal reduced the value of the confiscation order to £1.11 million, based on 60 per cent of the flat's increased market value (this was the percentage of the value of the flat provided by the mortgage originally).

The case was then taken to the Supreme Court, which reduced the confiscation order to £392,400. The court held that the benefit obtained by Waya from his crime following completion of the purpose was 60 per cent of any *increase* in the flat's market value over its acquisition price (as the original loan had been 60 per cent of the purchase price).

In making this judgement the Supreme Court introduced the condition of proportionality into the POCA regime. In the ruling, the court stated that the POCA must be interpreted in such a way as to be conducive to Article 1, Protocol 1 of the European Convention on Human Rights (the right to property). The rulings stated that the court must, in making the final confiscation order, follow the letter of the law 'except insofar as such an order would be disproportionate and thus a breach of Article 1, Protocol 1.'² This ruling adds a significant element of judicial discretion into the process.

Source: Précis by the author based on the judgements.

-
1. United Kingdom Supreme Court Judgement, *R v Ahmed and Ahmad*.
 2. United Kingdom Supreme Court Judgement, *R v Waya*.

via the Serious Crime Act 2015,³⁶ which enshrine the fundamental concept of proportionality in the making of confiscation orders.

While it is not the role of judges to consider whether the confiscation order issued is enforceable in practice – rather, it is to ensure they interpret the law in the way it was intended by Parliament – this measure may be cautiously welcomed insofar as it may lead to the setting of confiscation orders at levels which better reflect the actual proceeds received from the crime committed (rather than those amounts which have been set following inflexible formulæ). Linking the confiscation order to the real gain from the offence may make some orders more enforceable in practice as more assets may be realistically available to fulfil the order.

Yet to take full advantage of this development, judges will require further training in this complex area of criminal law. Currently, training is non-compulsory and only two hours in length. While judges are clearly proficient in criminal law, this legislation departs in some ways from standard rules of criminal procedure – for example, in its reversal of the burden of proof in ‘lifestyle’ cases.³⁷ Many respondents in this study therefore raised concerns that some judges, with discretion but minimal experience in the field of proceeds of crime, might make judgements that undermine the original intention of the legislation – namely, that ‘crime shouldn’t pay’.

Recommendation 3: To ensure that judicial discretion is exercised with due consideration to the intent of the legislation, this study recommends a more comprehensive and compulsory training programme on criminal confiscation for judges.

Extension of Investigative Powers

Part 8 of the POCA contains a number of financial-investigation tools, such as production orders, account monitoring orders and customer information orders, which allow financial investigators to apply to the courts for access to key personal financial information. These powers, prior to changes in the Serious Crime Act 2015, were only available to investigators at the pre-sentencing phase – they could not be used when the order was made in order to search for assets with which to fulfil unpaid orders. Interviewees for this paper noted that this proved a significant barrier to trace assets that could be used to pay confiscation orders.

Section 38 of the Serious Crime Act 2015 seeks to rectify this anomaly by extending these powers to the post-order stage. While this measure is not yet operational, due to the need for the Home Office to amend the POCA Codes of Practice (expected to be completed in early 2016),³⁸ practitioners

R v Ahmed and Ahmad, EWCA Crim 391, 2012, <<http://www.bailii.org/ew/cases/EWCA/Crim/2012/391.html>>, accessed 1 October 2015.

36. Section 19, Schedule 4, Serious Crime Act 2015.

37. Where certain trigger offences, such as drug trafficking, are the predicate offence, the legislation allows for presumptions to be made about the entirety of the defendant’s income, which the defendant must then rebut. This is unusual in criminal proceedings, where the onus of proof is usually on the prosecution.

38. The POCA Code of Practice covers the details of how law-enforcement officers should use the powers in practice. See Attorney General’s Office, ‘Code of Practice Issued Under Section 377A of

interviewed during this study viewed this as a significant step forward and believed it should allow them to identify previously unknown bank accounts and financial products held by those with outstanding confiscation orders. In cases where defendants are seeking to challenge the order under appeal by asserting that they do not have assets available to fulfil the order, this change will provide essential evidence to challenge these assertions in enforcement proceedings.

Ability to Write-off

Prior to the changes made in the Serious Crime Act 2015, there was limited ability to write-off a confiscation order deemed not to be collectable by enforcement authorities. This has contributed to the backlog of cases and rising debt by keeping orders on the balance sheet, against which practitioners view no chance of enforcement and against which interest continues to accrue at a rate of 8 per cent per annum. For example, the HM Courts and Tribunals Service (HMCTS) Annual Trust Statement 2014–15 notes that of the £1.6 billion of outstanding debt, only £203 million may be realistically collectable.³⁹ Interviews for this paper highlighted this as the main area where practitioners would like to see a more rational debate.

Deceased Defendant

The Serious Crime Act 2015 amends the POCA to allow courts to write-off an order against a defendant who has died before the full payment has been made and where it is not feasible to seek further payment from his or her estate. Published figures note that, as at December 2013, £24 million of the uncollected total might be attributed to deceased offenders;⁴⁰ these cases, despite a proportion of them having no chance of being enforced, have, until now, had to remain on the balance sheet continuing to accrue interest.⁴¹ This measure should therefore be viewed as a practical response, recognising that there are categories of orders which serve no purpose by remaining on the balance sheet continuing to accrue interest.

However, does this measure go far enough? Interviewees in this study highlighted a number of older cases which enforcement staff judge to be unenforceable in practical terms for a variety of reasons – such as orders being made which do not reflect the available assets, or orders where low amounts are outstanding but where the offender has been deported. These orders continue to accrue interest and require regular administrative review by enforcement staff in the HMCTS, thus distracting personnel from concentrating on those orders which are potentially enforceable.

Opening up a wider category of uncollected orders to write-off could be politically unpalatable and should be considered carefully in terms of the message this would send to offenders. However, continuing to hold orders on the balance sheet which are deemed by experienced staff to be

the Proceeds of Crime Act 2002', 29 November 2012, <<https://www.gov.uk/guidance/proceeds-of-crime-act-2002-code-of-practiceunder-section-377a>>, accessed 18 November 2015.

39. HM Courts and Tribunals Service, Annual Trust Statement 2014–15, p. 9.

40. *Hansard*, House of Commons, 'Confiscation Orders', Column 688W, Written Answers, 2 April 2014.

41. There is, however, an opportunity for some of these cases to be enforced against the deceased's estate in certain circumstances.

uncollectable distracts from wider examination of the impact and efficacy of the system overall. When questioned on the one change they would like to see to the enforcement process, the vast majority of interviewed practitioners highlighted the ability to move orders deemed to be uncollectable from the balance sheet to ensure that the uncollected total is a true reflection of the actual asset base available to enforce.

It may be, for example, that a process can be developed, with strict, publicly available criteria, which practitioners could use to assess whether an order is eligible and appropriate to be written-off. To ensure transparency and propriety, written-off orders could be audited by an external body, such as the NAO or a private company, on an annual basis to ensure the criteria are being strictly followed.

Alternatively, or perhaps in tandem, a system could be developed whereby orders could be 'parked' off the balance sheet where they are currently deemed uncollectable, such as in the case of deported defendants (as at December 2013, £86 million was owed by defendants who had been deported⁴²), but which, for deterrent objectives, may be useful to keep 'open'. This would prevent currently uncollectable orders from creating an administrative burden while also keeping enforcement options open.

This paper suggests that the measures in the Serious Crime Act 2015 are a starting point. While it may be politically difficult to discuss the issue of write-offs or the parking of orders, the measurement of the regime's real effects remains difficult where uncollectable orders remain on the balance sheet in perpetuity.

Recommendation 4: The Criminal Finances Board should reconsider the issue of orders which are deemed to be uncollectable. It should further examine whether there is evidence to support wider categories of orders being subject to mechanisms allowing them to be written-off. Alternatives, such as a system for 'parking' orders to prevent further accrual of interest, should also be examined. It should examine this issue in the widest sense, giving due consideration to issues of practicality, as well as the policy and political implications of such a decision.

Summary

Some of the measures aimed at improving the enforcement success of confiscation orders contained within the Serious Crime Act 2015 offer a pragmatic and evidence-based response to some of the issues identified during the twelve years since the powers came into operation. However, others do not stand up to analysis and lack a firm empirical basis. Taken together, these legislative changes are a welcome start, but do not mark the end of necessary reform.

Systemic Changes in the Enforcement Landscape

While a high proportion of the total uncollected orders backlog can be attributed to the unintended consequences of the law, this does not solely account for the £1.6 billion of uncollected orders.⁴³ As

42. *Hansard*, House of Commons, 'Confiscation Orders', Column 688W, Written Answers, 2 April 2014.

43. Helena Wood, 'Enforcing Confiscation Orders'.

highlighted in the NAO's 2013 report, a number of systemic and structural issues, such as lack of multi-agency co-ordination, play a contributory role. The government responded to some of these issues by implementing a number of measures and initiatives in 2014 and 2015. This section examines whether these, coupled with legislative changes, represent the necessary long-term shift in focus towards the enforcement process to tackle both the backlog of uncollected orders and to ensure that a future build-up does not occur. Broadly, these systemic and structural changes fall into three categories: domestic co-ordination; international asset confiscation; and the use of the private sector.

Domestic Co-ordination

Given the large number of bodies with a stake in the enforcement process, including law enforcement, prosecutors and HMCTS, until recently domestic co-ordination was poor. Symptoms of this included the lack of a 'cradle-to-grave' approach to confiscation (from investigation to enforcement) and the previous lack of support offered to the enforcement authorities by the investigating agency. The 2013 NAO report highlighted the need for better cross-government co-ordination and the formulation of a mutually agreed strategy.⁴⁴ Following the NAO report, a renewed focus on the enforcement process has led to a better understanding of the potential gains of improved co-ordination. Efforts in this regard are explored below.

The Multi-Agency Enforcement Group

Some welcome steps to align the disparate activities relating to the enforcement process have been made since 2013. Interviewees in this study pointed to the Multi-Agency Enforcement Group chaired by the National Crime Agency (NCA) and attended by the CPS, HMCTS, the Regional Asset Recovery Teams (RARTs⁴⁵) and others. Prior to the formation of this group, there had been no forum to highlight and discuss solutions to common high-level legislative and policy challenges, or to seek senior-level support for cross-agency initiatives. This group provides this forum, and meets regularly to discuss strategic cross-agency issues relating to the enforcement process. It reports on its findings to the Criminal Finances Board, chaired by the Treasury. This includes making recommendations for policy and process changes.

A number of interviewees in this study saw this as a positive measure,⁴⁶ especially as a means of seeking common solutions to legislative and procedural issues, and for establishing shared principles for prioritising historical, uncollected cases. The author understands that this new group is now considered an essential long-term component of the enforcement landscape.

Asset Confiscation Enforcement Teams

Adding to the NAO's wider concerns regarding co-ordination, a 2012 Home Office study examined the use of financial investigation. On the enforcement process, it found that 'fragmentation of

44. National Audit Office, *Confiscation Orders*, p. 18.

45. The RARTs sit within the 'Regional Organised Crime Units' (ROCUs) and lead cross-county (level 2) asset-confiscation and money-laundering investigations.

46. Interviews with officials, June 2015.

the process across different agencies was considered to reduce effectiveness'.⁴⁷ To rectify this weakness, in 2015 the Home Office established Asset Confiscation Enforcement (ACE) teams with the responsibility of assisting in the enforcement of outstanding uncollected confiscation orders. There are currently nine ACE teams aligned with Regional Organised Crime Units.⁴⁸ The NCA and HM Revenue and Customs also have their own in-house ACE-style teams.

ACE teams are financial-investigator-led units which are co-located with HMCTS enforcement staff and CPS representatives in the same facility. Their express purpose is to use their collective knowledge, powers and skills to enforce orders. Unpublished performance data seen during this study show that this multi-agency approach is already bearing fruit and is increasing the systematic return to older uncollected confiscation orders. Previously, financial investigators had no formal role in supporting the enforcement of orders once they were made. This resulted in some orders being sought by investigators which did not reflect the potential amount that could be collected in practice. Now, financial investigators routinely attend enforcement hearings to support HMCTS colleagues in their enforcement efforts. For example, they are able to use financial intelligence and evidence gathered during a case to rebut the excuses put forward by the offender for non-payment.

The author understands from interviews that this approach is helping to reduce delays in the process and increase enforcement success. All of the interviewees for this paper emphatically supported this new model for enforcement and viewed it as a common-sense initiative,⁴⁹ facilitating the return to older uncollected orders with a new collective approach. As a result, it fulfils the policy intention behind the legislation that 'crime shouldn't pay'.

While the success of the teams should be judged according to the impact that they have on crime rather than revenue generation, they do appear to be cost-effective. For example, between December 2014 and July 2015, the RART-based ACE teams finalised 682 cases and enforced £12 million; the *annual* running cost for these teams was only £1.5 million.⁵⁰ These were, by and large, older orders, which would not have necessarily been prioritised under the previous single-agency approach.

In addition to their work in enforcing previously uncollected orders, the disruptive effect of ACE teams – maintained by the pressure they place on non-compliers through doorstep visits, chasing letters and financial investigation – should not be disregarded. Even when these teams are not successful in fully enforcing older uncollected orders, interviewees noted the potential disruptive effect that they have on the financial activities of offenders, especially 'career criminals'.⁵¹ Before the ACE teams were in place, this deterrent effect of leaving outstanding orders open was rarely evident, given the more limited reach of HMCTS working alone.

47. Rick Brown et al., *The Contribution of Financial Investigation to Tackling Organised Crime: A Qualitative Study*, Home Office Research Report 65, September 2012.

48. There are ten multi-agency ROCUs in England and Wales, charged with increasing operational activity against regional organised crime.

49. Interviews with officials, June and July 2015.

50. Figures received via Freedom of Information request from the National RART Coordinator's office.

51. Interviews with officials, September and October 2015.

However, the funding base for ACE teams is currently uncertain.⁵² The nine ACE teams attached to the RARTs are currently funded from a proportion of the Asset Recovery Incentivisation Scheme (ARIS),⁵³ which represents the annual 'returns' from the POCA asset-confiscation regime.⁵⁴ This funding is currently on a trial basis and only covers the 2015/16 financial year. As a result, it is not certain whether this funding will be available in the future.

While the Home Office, based on the results to date, has voiced its support for the model and considers funding for the next financial year to be likely,⁵⁵ interviewees in this study have cited the lack of clarity on long-term funding as leading to difficulties in investing in the model and in recruiting and retaining quality staff to take forward this important initiative. Furthermore, a number of interviewees in this study voiced concerns about repeating past mistakes; in 2003 an enforcement task force was established,⁵⁶ based on a similar model, to aid the enforcement of uncollected confiscation orders made under pre-POCA legislation. This task force was widely noted as being highly successful. However, it was disbanded once the backlog was reduced, rather than being retained in a more limited form to ensure that a future build-up did not occur under the new legislation.

Recommendation 5: ACE teams should be a permanent fixture of the criminal-confiscation landscape. The funding for these teams should be made on a multi-year basis and taken from a core budget, rather than unstable ARIS top-slicing. This will allow for investment and stable staff recruitment and retention.

International Asset Confiscation

The HMCTS 2014–15 Trust Statement notes that £211 million of the uncollected total is deemed as 'hidden assets' against which no enforcement action is likely. Practitioners note that a high proportion of this is likely to be based overseas but is currently untraceable. A further £9 million of the outstanding debt is known to be overseas but currently deemed to be uncollectable. Outside of this total, an unquantified number of overseas assets will be currently subject to ongoing enforcement efforts.⁵⁷

In practice, a financial investigator's efforts to trace assets across borders are often frustrated either by criminals leaving minimal traceable financial footprints or by the limitations of the international

52. It should be noted that the HMRC and NCA ACE-style teams are funded separately for those housed within the RARTs, with funding taken from the NCA/HMRC core budget.

53. Under the ARIS scheme asset-forfeiture receipts are paid into a central fund controlled by the Home Office. Police, law enforcement and the CPS then receive back a proportion of the funds to reinvest in further asset-forfeiture activity.

54. For their efforts, those bodies operating in the system are offered a share of the takings to reinvest in further initiatives to counter activity relating to the proceeds of crime.

55. Interview with officials, September 2015.

56. Criminal Justice Portal, 'Taking the Profit out of Crime – Assets Recovery Agency Goes Live', 24 February 2003, <<http://www.cjp.org.uk/news/archive/taking-the-profit-out-of-crime-assets-recovery-agency-goes-live-24-02-2003/>>, accessed 30 September 2015.

57. A total figure of overseas assets was not available to the author at the time of writing.

asset-tracing system⁵⁸ – including the lack of adequate tracing mechanisms, non-existent beneficial-ownership records in the host country and a lack of property-ownership registers.

With increasing knowledge of the workings of the POCA, criminals are frequently seeking to move their assets overseas to evade detection during confiscation investigations.⁵⁹ Even if these assets can be traced during the financial-investigation stage, enforcing these assets following the instatement of a confiscation order is a much more difficult prospect, especially where domestic legislation in the host country is lacking, or where mutual legal assistance (MLA⁶⁰) treaties are not present.

In sum, while intelligence may suggest that assets exist overseas, finding them and enforcing orders to recover them is difficult, especially in instances when these are in countries with limited property registers and with limited capacity to trace assets, or where the political environment obstructs effective legal and judicial co-operation. These issues are not specific to developing countries; interviewees in this study suggested that, despite the legal frameworks being in place to encourage co-operation, even tracing assets believed to be held in EU countries can be problematic.⁶¹ In recognition of this issue, efforts are being made at a practical and political level to increase the chances of successful international enforcement.

Asset-Recovery Advisors

At a practical level, the CPS is in the process of deploying six specialist asset-recovery advisors (ARAs) overseas. It is planned that these ARAs will be deployed to priority countries to work directly with local criminal-justice agencies in the asset-tracing process. The first ARAs are based in Spain and the UAE – two well-known destinations for British criminals to locate their assets.⁶²

This move is welcome – often the barrier to international asset recovery is simply a lack of understanding of the local legislation and MLA processes – and is already having an effect. For example, in 2014 the CPS secured its first-ever enforcement for the recovery of assets in the UAE in support of an unpaid confiscation order. The work of the CPS ARA secured the sale of a £300,000 property owned by an individual convicted in 2011 of drug-importation offences. The confiscation order against the individual was therefore paid off in full.⁶³ Given the historic challenges of co-operating in this field with the UAE this success should be viewed as significant.

58. For example, some countries do not have property registers in place and/or do not have skilled financial investigators in place to assist with the tracing of assets overseas.

59. Interview with official, June 2015.

60. MLA is a method of co-operation between states for obtaining assistance in the investigation and prosecution of offences.

61. Interview with official, June 2015.

62. This view is based on the author's experience in the Financial Action Task Force (FATF) International Asset Tracing project during summer 2009.

63. Solicitors Journal, 'Crown Prosecution Service Completes First Ever Asset Recovery in UAE', 27 August 2015, <<http://www.solicitorsjournal.com/news/crime/property/crown-prosecution-service-completes-first-ever-asset-recovery-uae>>, accessed 27 October 2015.

However, while these postings are believed to be for an initial period of two years,⁶⁴ recent media reporting on the impact of the funding cuts to the CPS which represent 25 per cent of the organisation's budget, and the lack of protection from future cuts,⁶⁵ lead to questions on the viable longevity of this response.

Additionally, interviewees in this study cited the UK's track record in enforcing confiscation orders from other jurisdictions against assets in the UK as a potential issue.⁶⁶ Interviews for this paper suggested that a number of international partners view the UK response, via MLA channels, as slow and cumbersome. This may have an impact on the priority given by host nations to the requests of ARAs. This is an issue which must be considered when looking to solutions to the challenge of international asset-tracing to support UK enforcement cases.

International Asset-Sharing Agreements

Further to this initiative, the Treasury Minute responding to the 2013 NAO report notes that the Home Office plans to increase the use of asset-sharing agreements with priority countries.⁶⁷ These agreements essentially commit to sharing a proportion of the realised proceeds with the country which has assisted with their enforcement. The UK has asset-sharing agreements in place with a number of countries already, including the US, Canada and Jamaica.⁶⁸

An increase in the numbers of asset-sharing agreements is a welcome addition to a range of measures aimed at creating a more conducive international environment for criminal confiscation. However, it relies on positive relations with, as well as good domestic legislation and practices in, the country in question. Moreover, criminals have an increasing tendency to hide their assets in jurisdictions which are either beyond the reach of UK diplomatic efforts or where domestic asset-tracing capabilities are limited.⁶⁹ In effect, they recognise the barriers that these present to the enforcement process.

The UK has a strong track record in delivering technical assistance to developing countries in relation to the framing of their domestic proceeds-of-crime legislation, and in relation to the skills base required to trace and confiscate assets. Assistance is provided through a range of fora, including the UK's international-aid programme.⁷⁰ Asset-sharing initiatives should therefore be complemented by efforts to increase technical assistance on asset-tracing to priority jurisdictions where capacity is low.

64. Interview with official, September 2015.

65. The CPS is funded by the Attorney General's Office (AGO). The AGO is not ring-fenced from the government's austerity cuts.

66. Interviews with officials, June 2015.

67. HM Treasury, *Treasury Minutes: Government Responses on the Forty Fifth to the Fifty First and the Fifty Third to the Fifty Fifth Reports from the Committee of Public Accounts: Session 2013–14*, Cm 8871 (London: The Stationery Office, October 2013).

68. House of Lords, European Union Committee, 'Money Laundering and the Financing of Terrorism', Nineteenth Report of Session 2008–09, 2009, Chapter 3.

69. Based on author's previous experience.

70. Department for International Development, 'Caribbean Criminal Asset Recovery Programme', Development Tracker [GB-1-2-3478], <<http://devtracker.dfid.gov.uk/projects/GB-1-203478/>>, accessed 27 October 2015.

Recommendation 6: To complement asset-sharing agreements, the government should consider prioritising capacity-building across a range of priority jurisdictions in asset-tracing, through technical-assistance programmes. Consideration should be given to meeting the cost of this technical assistance from the government’s overseas-aid budget given existing pressures on law-enforcement resources.

Role of the Private Sector

The skills needed to manage and enforce the recovery of complex assets, such as businesses, are not always available within government and law enforcement. For this reason, the subject of private-sector involvement in the enforcement process is one which is currently subject to considerable debate. In the context of this paper, the three areas which merit particular attention are:

- Proposals to sell off the £1.6-billion backlog to the private sector
- Use of enforcement receivers
- Proactive private-sector notification regarding confiscation orders.

Selling off the Debt

This author understands that, following the criticism received in the NAO report, one idea mooted within Whitehall was the potential to sell off a proportion of the £1.6-billion debt to private-sector firms to enforce and keep any returns. Reporting to Parliament on the plans to progress the NAO recommendations, the Treasury Minute states ‘This will be achieved by operational agencies working together to analyse the stock of unenforced orders, *and through the Ministry of Justice exploring options for selling off unenforceable debt to the private sector* [Emphasis added].’⁷¹

Detailed examination of the legal criteria used to determine the level at which a confiscation order is set demonstrates that a large proportion of the uncollected amount is not related to an evident asset base.⁷² For this reason, this study concludes that the selling off of the debt is an unrealistic prospect, which, once analysed by private-sector partners, would not provide a reasonable expected return for the investment. Furthermore, were the debt to be sold, those buying the debt would lack the legal and investigatory powers available in the public sector, such as access to POCA investigatory powers or MLA channels, to aid enforcement.

The majority of interviewees in this study saw this proposal, on these grounds, as wholly unachievable and questioned the value for the private sector in taking on debt that UK authorities with the full weight of the law behind them had been unable to enforce. Respondents in this study noted that, since making this statement to Parliament, the concept had not progressed. No information was available during this study which supported the viability of this concept in practice.

71. HM Treasury, *Treasury Minutes: Government Responses on the Forty Fifth to the Fifty First and the Fifty Third to the Fifty Fifth Reports from the Committee of Public Accounts: Session 2013–14*, Cm 8871 (London: The Stationery Office, 2014).

72. Helena Wood, ‘Enforcing Confiscation Orders’.

Use of Enforcement Receivers

Where an individual subject to a confiscation order has proved unwilling to settle a debt in the time allotted by the order, one of the few means available to the authorities to seek to collect the order is through the appointment of external enforcement receivers. Enforcement receivers may also be useful in cases where there are complex businesses or properties to manage in the enforcement process, as the receiver may have the specialist skills available to achieve the best value. Under the POCA, the prosecutor has the power to apply to the court for the appointment of an enforcement receiver – a privately contracted individual, often aligned to one of the larger accountancy firms, who has the power to take control of, and disperse assets to, the value of the confiscation order. The enforcement receiver then remits the value of the assets to the court, after taking payment for his or her services from the proceeds.

Interviews for this paper suggest that authorities are often hesitant to use enforcement receivers, even when these may be the only means left available to enforce the confiscation order following the serving of the default sentence.⁷³ This hesitance is thought by a number of practitioners to be due to the costs associated with their use. Private-sector interviewees noted that the reluctance to apply for the appointment of an enforcement receiver at an early stage can lead to the dissipation or depreciation of available assets on which the confiscation order was originally based, leaving them with limited options once appointed.

The 2013 NAO report highlighted that in 2012, thirteen enforcement receivers were used in 112 cases, collecting £15.1 million at a cost of £3.2 million.⁷⁴ The NAO was unable, however, to assess whether the use of enforcement receivers offered ‘value for money’ in relation to other enforcement options and criticised the CPS for the absence of a strategy on receivers. The CPS has now published a Receivership Strategy which acknowledges that ‘private sector receivers bring specialist skills and experience that may not be generally available in the public sector’.⁷⁵ The guidance states that ‘the CPS will generally only apply for the appointment of an enforcement receiver if the convicted defendant cannot or will not voluntarily realise his assets and the sale of the assets will cover the receivers [*sic*] costs.’

It also acknowledges that the decision on whether to appoint an enforcement receiver is not solely a balance-sheet concern; it notes that ‘value for money is not just a question of how much may be recovered, but should also take into account issues, such as harm and crime reduction and the Government and CPS strategies on serious and organised crime and asset recovery.’ This point is pertinent: achieving the policy aim of ‘crime shouldn’t pay’ by taking the proceeds of crime out of the hands of the criminal should be at the forefront of decision-making when looking at whether to appoint an enforcement receiver in cases where the skills are not available in-house – rather than whether the appointment returns a ‘profit’ to the exchequer.

73. Interviews with officials, June and July 2015.

74. National Audit Office, *Confiscation Orders*, p. 34.

75. Crown Prosecution Service, ‘Proceeds of Crime’, Chapter 5, <http://www.cps.gov.uk/legal/p_to_r/proceeds_of_crime_act_guidance/index.html#a78>, accessed 1 October 2015.

It is too early to consider what impact the guidance is having on the levels of appointments of enforcement receivers and, if so, whether this impact is desirable. This, however, should be a future consideration.

Recommendation 7: The Criminal Finances Board should commission a study, once the new strategy has had time to take effect, to examine whether the new CPS Receivership Strategy is having a positive effect on the use of enforcement receivers, and whether this use is in line with the guidance given that case-selection decisions should include consideration of harm and crime reduction.

Proactive Private-Sector Notification Regarding Confiscation Orders

Given the considerable time it takes between initiating a confiscation investigation and the final issuing of the confiscation order (often years), it is difficult for private-sector institutions to keep track of case progress – this is particularly pertinent for them when a restraint order is in place under which they are holding assets. There is currently no proactive process for notifying the private sector that a confiscation order has been made. Although the issuing of an order is a public matter, these are notified on an individual, court-by-court basis; there is no central database which can be checked or data-mined.

Interviews with individuals working within the banking sector suggest that many of the larger institutions may be willing to use their technical abilities to run systematic checks on confiscation orders to aid authorities to keep track of assets subject to restraint. The lack of such a process misses a potentially valuable intelligence stream and risks restrained assets being missed during the enforcement process.⁷⁶

To help achieve this aim, lessons can be learnt from other areas of the court service: the process by which County Court Judgments are available in a public register and routinely used by credit-reference companies as a source of information on the credit-worthiness of an individual is an example. This process is managed by Registry Trust, a not-for-profit private company, established by the Register of Judgments, Orders and Fines Regulations 2009, which maintains the public register. Maintaining a similar public register of unpaid confiscation orders may offer potential to harness the capabilities of regulated-sector institutions to highlight potential funds and assets on a time-sensitive basis, although this would have to be properly managed to ensure its compliance with the principles of the Rehabilitation of Offenders Act 1974.

Recommendation 8: The Criminal Finances Board should explore the potential for maintaining a central public register of unpaid confiscation orders. It should consider making the register available in a format which is easily accessible and searchable by private-sector institutions.

76. Even where assets have been subject to a restraint order and the bank are holding these funds on this basis, there is still a lack of process to highlight to those banks the existence of the confiscation order. This process may improve under the current ACE team model.

Summary

In sum, a number of welcome steps have been taken to address some of the systemic and structural issues that have previously hindered the effective operation of the enforcement process. These measures are a step on the road towards ensuring the enforcement process is viewed as an intrinsic, rather than optional, part of the confiscation-orders regime. However, the long-term basis and impact of some of these measures are yet to be seen. The Criminal Finances Board has a role to play in ensuring that these efforts are put on a long-term footing and that their impact is regularly reviewed.

Conclusion

The NAO's criticisms of the confiscation-order regime, while missing the wider value to criminal justice in some regards, have provided a useful and timely catalyst for the government to reassess the priority given to the enforcement process and its centrality to the success of the regime.

This paper argues that the legislative and systemic changes made by the government in 2014 and 2015 go further than any previous effort to ensure that the enforcement of orders is given the priority it is due. However, these efforts should be seen as a starting point and not as an end. Analysis demonstrates that some of the amendments to the system made under the Serious Crime Act 2015 stand up to critical analysis and are welcomed by practitioners; others, however, lack a firm evidence base.

Some additions, such as the ability to introduce third-party interests during confiscation hearings and the extension of POCA investigatory powers to the enforcement stage itself are welcome and may have a significant impact on the process. Furthermore, the clarification in primary legislation of the introduction of judicial discretion may prevent orders being set at levels which are inappropriate for the circumstances; this has the unintended, but welcome, potential consequence of making enforcement more achievable.

In relation to incentives to pay, the picture is more mixed. On the one hand, the introduction of compliance orders, while untested, introduces a level of creative thinking to the process and, subject to their proper use and policing, offers an arguably stronger incentive to comply than measures such as default sentences and interest penalties.

The case for the increase in the default sentences for non-payment is not certain and the evidence base for the change is minimal. This paper recommends further work to increase understanding of what incentivises payment to ensure that any future policy or legislation in relation to this is evidence-based rather than speculative.

Furthermore, legislative changes relating to the evidential threshold for restraint orders do not solve the problems according to the interviews conducted for this study. Respondents in this study widely questioned whether this measure would have an effect, and pointed to both case law and institutional risk appetite as two possible reasons for the low number of restraint orders. This paper recommends further work to understand their impact and the barriers to their wider use.

Perhaps most importantly, while the introduction of the ability to write-off orders relating to deceased offenders is a pragmatic and welcome measure in a politically sensitive area, arguably it is insufficient and fails to address other practicalities. While mindful of the potential messages that may be inadvertently given to the criminal fraternity, to ignore the issue and to allow the uncollected debt figure (in particular the interest) to continue to mount is a mistake. Only by making difficult decisions on this matter will the front-line staff be able to concentrate on those orders which are achievable, rather than being distracted by those which are not.

Changes in the legislative landscape are, however, only one part of the shift in emphasis towards the enforcement process, and these have been complemented by changes in the systemic and structural landscape. The most recent round of systemic changes to the enforcement process, covering domestic and international co-ordination and the use of the private sector, is welcome insofar as these changes recognise the centrality of the enforcement process to the success of the overall regime. However, there are aspects of these changes which require wider consideration.

In relation to domestic co-ordination, particular credit should be given for the establishment of the strategic-level co-ordination mechanism of the Multi-Agency Enforcement Group and, at a practical level, for the ACE teams which are already having an impact on the number of orders enforced. Past experience of the Enforcement Taskforce, as highlighted in this paper, suggests that these teams should be a permanent fixture of the enforcement landscape. However, concerns have been raised that the funding model for the ACE teams is unstable and is hampering efforts to recruit and retain the best staff. This paper recommends putting this model on a proper footing.

At an international level, in recognition of the increasing multijurisdictional nature of asset confiscation, the establishment of overseas CPS asset-recovery advisors is a positive move. However, this study is concerned that the further 25 per cent cut to the CPS budget may have an impact on the sustainability of this initiative.

Within the diplomatic sphere, the extension of asset-sharing agreements to a wider set of countries sets a positive context for co-operation. They are, however, one means of increasing the willingness of various parties to co-operate in this field. Increasingly, criminals are moving their assets to countries outside of the diplomatic reach of the UK or to areas where the local technical and legislative ability to trace and seize assets is more limited. On this basis, this paper proposes that the UK should extend its programme of overseas technical assistance to include a specified set of priority countries.

This paper also highlights the growing debate on the role of the private sector in the enforcement process. Based on the framing of the law and knowledge of the composition of the £1.6 billion in uncollected orders, this paper concludes that proposals to sell off the debt are impractical and uncommercial. However, it is noted that there is a need to reconsider the utility of enforcement receivers and their unique ability to aid authorities in enforcement. It further recommends creating a publicly available database of unpaid orders to allow the private sector to keep track of assets which are subject to restraint.

Looking at the legal and systemic changes, it is clear that the government is learning some of the lessons of the early operation of the POCA confiscation-orders regime. The extent to which further changes are predicated on the continued parliamentary and media spotlight remains to be seen. What is clear, however, is that the Criminal Finances Board has a role to play in keeping momentum. There has been strong progress in recent years, yet the reform process is by no means complete.

About the Author

Helena Wood is an Associate Fellow at RUSI. Her research focuses on the efficacy of the powers of the Proceeds of Crime Act 2002 in the fight against organised crime and on the UK's anti-money-laundering architecture and its compliance with the Financial Action Task Force standards.

Now working as an independent consultant on criminal-justice matters, Helena has over a decade of public-sector and law-enforcement experience, with a particular focus on the proceeds of crime and international law-enforcement co-operation.

During her public-service career, Helena had a variety of intelligence, strategy and policy roles in a number of UK government departments, including the National Crime Agency, the Serious Organised Crime Agency, the Treasury and the Charity Commission.