

## Introduction

This presentation is divided into two parts:

1. An outline of the domestic asset recovery regime;
2. An overview of the way in which the UK can assist overseas jurisdictions

There has been a confiscation regime in England and Wales since 1986 when the **Drug Trafficking Offences Act** came into force to confiscate the proceeds of drug trafficking. Since then there have been a number of subsequent pieces of legislation enacted with the intention of extending the powers available to the prosecutor to deprive criminals of their financial lifeblood.

The **Criminal Justice Act 1988** extended confiscation to cover the proceeds of non-drug crimes and the **Proceeds of Crime Act 2002** which is discussed in further detail below provided further powers.



A national law enforcement agency to target serious, organised cross-border crime (SOCA) was established in 2006 by the **Serious Organised Crime and Police Act 2005** and the Crown Prosecution Service Organised Crime Division, of which the Central Confiscation Unit is a part, was established in 2005 to provide legal services to SOCA.

The sum effect of this legislation has been to provide a range of powers to combat serious organised crime. What powers are now available in the prosecutor's armoury?

## **Criminal Confiscation**

Criminal Confiscation is an important scheme by which the UK deprives the offender of the value of the benefit obtained from his criminal conduct.

### ***Confiscation Proceedings***

These are available on **conviction only**. However, the Judge must, if asked by the prosecutor, consider whether the defendant has benefited from the proceeds of crime (ie. The process is **mandatory**).

It is a two-stage process. The judge must first decide to what extent the defendant has benefited from proceeds of crime. In doing so, he must first decide whether the defendant has a **criminal lifestyle**. He is deemed to have a criminal lifestyle if

- a. he is convicted of certain specified offences including drug trafficking, money laundering and human trafficking or
- b. he has committed 4 offences from which he has benefited in the same proceedings or
- c. he has committed a continuing offence over a period of at least 6 months from which he has benefited.

Once this has been satisfied certain **assumptions** apply in order to calculate the defendant's benefit. These are that any property held by the defendant at the date of his conviction and any transfers to or expenditure by the defendant

in the 6 years leading up to the commencement of proceedings were obtained or met from property obtained as a result of criminal conduct. It should be noted that once criminal lifestyle is established the benefit figure is not limited to the proceeds from the offences of which he has been convicted or asked to be taken into consideration.

The burden of establishing that the defendant holds the property or has made the transfer or expenditure is on the prosecution but it is on the **balance of probabilities**. Once this has been established, the onus shifts to the defendant to displace the assumption by showing it is not derived from criminal conduct and only clear and cogent evidence will suffice. As a safeguard for the defendant, the court must not apply the assumption if there would be a serious risk of injustice if it were made. Clearly triggering the assumptions greatly assists the prosecution in its task.

The next stage in the process is for the court is to decide on the **available amount**



- once the benefit has been assessed the court must make an order in that amount unless the defendant shows that the available amount is less.
- The available amount is the total value of all of the defendant's free property (any property in which the defendant has an interest) together with the value of any tainted gifts.
- The values of legitimately acquired assets are calculated as part of the available amount. It should be noted that in calculating the available amount (i) **there is no requirement on the prosecution to prove that those particular assets are acquired from criminal conduct** (ii) **assets can be taken into account wherever situated in the world** and (iii) **the difficulty in realising an asset is not a factor which is taken into account.**
- Once an order is made the defendant must satisfy it forthwith unless the court allows him time to pay (up to 6 months). It should be noted that the **order is made against the person and not against the property.** The defendant can therefore satisfy the order however he wishes. However if it is not paid on time, he will incur interest and will in addition be liable to serve a sentence of imprisonment in default. Furthermore this will not expunge the order which may be enforced by

other means eg. the prosecutor can apply for a receivership order over the defendant's free property.

- It is worth noting that because the confiscation order is an order against the defendant and does not confer property rights, third parties who may have an interest in that property do not have the right to be heard at the confiscation hearing. It is at the enforcement stage when the court is asked to make orders to realise property that they can assert their claim to the property.

## ***Restraint Orders***

Criminal confiscation is therefore a very powerful tool for the prosecution. It is further strengthened by the power to **restrain** property. Restraint orders freeze assets so that they are available to satisfy any confiscation order that may be (or has been) made against the defendant. They can be obtained when either a **criminal investigation** has started or **criminal proceedings** have commenced.

They are nearly always sought without notice to the defendant or third parties restrained although there is a right for any affected party to apply to have the order varied or discharged on giving notice.

They apply to any property in which the defendant has an **interest**. The property itself need not have been obtained as a result of the crimes under investigation. It applies to property wherever situated and it can be made over property held by a third party if that property is held jointly with the defendant or represents a tainted gift.

The restraint order protects the defendant's assets against claims by unsecured creditors, although provision must be made for reasonable living expenses, certain legal costs and in order to allow a business to continue or to prevent dissipation of an asset.

## *Restraint Orders: Ancillary Powers*

If assets require active management there is in addition a power to seek the **appointment of a receiver to take control of and manage an asset.**

The order can also seek **disclosure** from the defendant or third party to obtain information about further assets and their location upon the prosecution undertaking to use this information only for the purpose of restraint, confiscation and enforcement (or resulting contempt proceedings). The order can include a provision for **repatriation of assets** held abroad. Failure to comply with the order amounts to **contempt** of court for which the person in breach can be imprisoned.

## **Civil recovery**

In addition to the criminal confiscation regime outlined, which is conviction led, value based and is an order “in personam” ie against the defendant, there are further powers available to the prosecutor to **seize the proceeds of crime.**





These are directed against the asset itself – an order “**in rem**” and therefore **do not require a conviction** before they can be instituted.

Civil recovery powers initially exercised by the now abolished Asset Recovery Agency have been devolved by the Serious Crime Act 2007 (s74) to SOCA and the prosecuting authorities.

This enables us to adopt a **seamless approach to recovering criminal proceeds**. If we are unable to proceed by way of criminal confiscation, we can consider proceeding against the assets by way of civil proceedings. There is no requirement for an underlying criminal conviction and proceedings may be brought even where there has been an acquittal. The respondent will be the holder of the property who may or may not have acted unlawfully, for instance the executor of the estate of a deceased defendant where we have been unable to continue with criminal confiscation proceedings but can seek to pursue the assets by way of civil recovery.

The legislation enables us to recover property which is or represents property that has been **obtained through unlawful conduct**. The unlawful conduct

may have occurred outside the United Kingdom provided the conduct is unlawful both under the criminal law of the country where it took place and the UK.

Pending the making of a **Recovery Order** by the court, the prosecution can apply for an **Interim Receiving Order** to preserve the property and appoint an interim receiver. The interim receiver is given powers to obtain information or require a person to answer questions; power of entry to search for, inspect, copy or remove for evidence anything described in the order and power to manage the property including power of sale of a diminishing asset.

## Cash Seizures and Forfeiture

Summary civil proceedings are also available to recover cash. Police and Customs officers may **seize cash** (including cheques, banker's draft, bearer bonds and shares) of £1000 or more when they have reasonable grounds for suspecting that it is property obtained through unlawful conduct or intended for use in unlawful conduct and detain it for up to 48 hours before seeking a further detention order from a magistrates' court.

The cash may subsequently be **forfeited** by order of the magistrates' court if the court is satisfied on the balance of probabilities that the cash has been obtained through unlawful conduct of intended for use in unlawful conduct.

## Taxation

There is a further resort where we are unable to use criminal confiscation, civil recovery and cash seizure, that is where there are reasonable grounds to suspect that an income arising or gain accruing to a person has arisen or accrued as a result of criminal conduct, SOCA can raise a tax assessment on that income or gain.

## Investigative Orders

To assist in using these powers the legislation also provides powerful investigative tools. With the authority of the court a financial investigator can obtain

- Production Orders requiring someone in possession or control of information about a suspect's financial affairs to produce it to the financial investigator or give him access to it.



- Customer Information Orders requiring a financial institution to provide customer information eg. Account details, addresses, dates of birth of account holder etc.
- Account monitoring orders allowing the financial investigator to monitor transactions in an account for up to 90 days at a time.
- The prosecution may also issues disclosure notices requiring the person to whom it is given to answer questions, provide information and produce documents relevant to the investigation
- The prosecution may also seek financial reporting orders requiring an offender to make reports about their financial affairs on a regular basis for up to 15 years after conviction

As a result of criminal confiscation the CCU of OCD alone between March and December 2008 has been able to obtain restraint orders freezing over £105million worth of assets, Confiscation orders worth over £36,506,855 and collected over £13,647,310 of which nearly two million has been paid to victims of crime in compensation.

## Obtaining UK Asset Recovery Assistance

Having set out the basic process and tools of asset recovery on a domestic level, I will now give an overview of the way in which the UK can assist overseas jurisdictions. In fact, the UK is able to give a wide range of asset recovery assistance to judicial and prosecuting authorities in other jurisdictions for the purposes of criminal investigations and proceedings and, in certain cases, civil proceedings.

This part of the presentation is split in to two sections:

- The **first** section will give an overview of the **process** for requesting legal assistance from the UK.
- The **second** section will focus on **how the UK gives effect** to external requests for restraint and for the enforcement of external orders in relation to asset recovery.

(It should be remembered that the UK has three different judicial systems and there are some variations; when referring to the UK I will talk about the system in England and Wales)

## The Process

In the context of recovering the proceeds of crime, assistance falls broadly into three categories:

- (a) Identifying and tracing assets
- (b) Restraining (freezing) assets in the UK so they are available to pay the external order
- (c) Registering and enforcing the requesting States order against assets in the UK

Although it is party to a number of international treaties and conventions, the UK does not require reciprocity and can, depending on the type of assistance required, **assist any country in the world**, whether or not that country is able to assist the UK. Most forms of assistance can be provided without bilateral or multilateral agreements, conventions or treaties.

There are two mechanisms for obtaining assistance from the UK. The first is by way of informal '**police-to-police enquiries**'. Police can liaise with their counterparts in the UK (a line of communication having been set up usually through Interpol), requesting their assistance in obtaining evidence or information or undertaking enquiries. UK law enforcement agencies have

excellent working relationships with their counterparts in the vast majority of countries from requests are most frequently made and experience to date is that they will usually do everything they can to assist. It is impossible to provide a definitive list of the types of enquiries that can be made informally but, as a rule of thumb, if the enquiry is routine and does not require the use of coercive powers it may well be possible to make it using this approach.

Examples of such enquiries may include:

- obtaining public records (e.g. land registration documents, papers relating to company registration);
- contacting potential witnesses to see if they are prepared to assist UK enquiries voluntarily;
- taking a statement from a voluntary witness;
- locating missing persons;

The second mechanism for obtaining assistance is by means of formal **Letter of Request**. Most assistance in relation to asset restraint and confiscation will require a Letter of Request since it will usually involve a request for the freezing of assets or obtaining account information and documentary evidence from banks. That said, where possible it is often useful to conduct some informal police-to-police enquiries before sending the letter of request. This

will add precision to the request and increase the speed at which the request is effected in the UK.

Letters of Request must be sent to the **United Kingdom Central Authority** in London (or Crown Office in Scotland, DPP for Northern Ireland). The UKCA acts as a central point for the receipt of formal requests for assistance. It is responsible for:

- (a) Ensuring that requests for legal assistance conform to the requirements of UK law and the UK's international obligations.
- (b) Ensuring that execution of requests is not inappropriate on public policy grounds (for example, requests involving double jeopardy will not be executed, nor those which affect our national security or other essential interests).
- (c) Deciding how, and by which executing agency (police, courts, prosecuting authority) requests might most appropriately be executed.
- (d) Maintaining confidentiality of requests where necessary.
- (e) Transmitting evidence received to the requesting authorities when it is not returned directly.



Requests for restraint and confiscation assistance **must be made in writing**.

The request may be sent in advance by fax or e-mail but an undertaking should be given to send the original request within a reasonable time.

Requests and any supporting documents must be made in English or submitted with an English translation.

If the Central Authority accepts the request for execution it will authorize a **relevant prosecuting authority** to make the necessary application in court.

Court applications in international restraint and confiscation cases are presently dealt with in England and Wales by three prosecuting authorities:

- (a) The **Central Confiscation Unit** (of the Organised Crime Division of the Crown Prosecution Service)
- (b) The Asset Forfeiture Unit of Revenue & Customs Prosecution Office
- (c) The Serious Fraud Office (for serious and complex fraud)

## External Requests and External Orders

In order for the UK to effect a request for the restraint of assets or the enforcement of an asset recovery order, the external request or order must be recognised by UK legislation, and more specifically, the Proceeds of Crime Act 2002.

### *How are external requests and orders defined?*

External requests and orders are defined at section **447 of POCA**:

#### 447 Interpretation

- (1) An external **request** is a request by an overseas authority to prohibit dealing with relevant property which is identified in the request.
- (2) An external **order** is an order which –
  - (a) is made by an overseas court where property is found or believed to have been obtained as a result of or in connection with criminal conduct, and
  - (b) is for the recovery of specified property or a specified sum of money.

Some definitions:

- **Relevant property** is simply property which is needed to satisfy an external order which may be or has been made.
- An **overseas authority** includes any authority which has the responsibility for making a request to an authority to prohibit dealing with property or for carrying out an investigation into whether property has been obtained from criminal conduct.
- **Criminal conduct** is conduct which would constitute an offence in the UK if it occurred there.
- The external order must have been made by an **overseas court**. Non-court orders such as "administrative" confiscation orders made by police officers and similar authorities are excluded from this scheme.

The definition of an external request or order is therefore (deliberately) wide. So long as it is a **request or order in relation to the recovery of the proceeds of crime** it is immaterial what kind of court proceedings the external request or order is made in. The definition is apt to cover requests and orders arising out of criminal proceedings, civil proceedings or some other court proceedings. It would even include US civil forfeiture orders where the proceedings are unconnected to any criminal proceedings, subject of course

to the forfeiture order being made where property is believed or found to be the proceeds of crime. Furthermore, external orders falling within this definition may be effected, that is to say, enforced, whether they are orders for the recovery of particular tainted property or orders for specified sums of money that may be satisfied out of any property, legally or illegally obtained.

### ***Giving effect to external requests & orders arising out of criminal proceedings***

Part 2 of the 2005 Order deals with proceedings in England and Wales to give effect to external requests and orders in connection with **criminal investigations or proceedings**.

An application for a **restraint order** can be made pursuant to an external request arising out of criminal proceedings and is usually made ex parte and in Private. By Article 7 the 2005 Order the Crown Court in England & Wales may make a restraint order pursuant to an external request if the following conditions are satisfied:

- (a) **criminal investigation or proceedings** have been started (and not concluded) in the requesting country with regard to an offence; and
- (b) **Relevant property** in England and Wales is identified in the request; (i.e. property which may be required to satisfy an external order) and
- (a) there is reasonable cause to believe that the defendant named in the request has **benefited from his criminal conduct**

Although not set out in the legislation, the requirement in domestic restraint order applications to show a **risk of dissipation** of assets also applies to applications for restraint orders pursuant to an external request.

Furthermore, the UK courts are obliged to act compatibility with the **European Convention on Human Rights** and to interpret legislation in accordance with that Convention. Hence if there is no realistic prospect of a fair trial in the requesting state, so that, accordingly, there is no reasonable possibility of the UK court giving effect to an external (confiscation) order, the Court will use its discretion to refuse to grant the restraint order. However, it should be noted

that this situation will rarely arise: any Human Rights issues concerning the legal system in the requesting state will normally be considered at the confiscation (external order) stage, by which time the court can assess known facts rather than risks.

If granted, a restraint order may:

- (a) prohibit any specified person from dealing with relevant property
- (b) make provision for reasonable living expenses and legal expenses in connection with the restraint proceedings or the registration of an external order
- (c) include such order as the court believes is appropriate for the purpose of ensuring that the restraint order is effective (e.g. disclosure order) [Article 8].
- (d) Include an order for a management receiver [Articles 16-16]

However, the restraint order must be discharged if no external order is made, if no external order is registered within a reasonable time or if proceedings for an offence are not commenced in a reasonable time [Article 9].

Under Article 20 of the 2005 Order an application may be made to the court to **enforce an external order** by registering it with the court. The court must give effect to an external order by registering it where all the following conditions are satisfied:

- (a) The external order was made on the conviction of the person named in the order and no appeal is outstanding in respect of that conviction.
- (b) The external order is in force and no appeal is outstanding in respect of it.
- (c) Giving effect to the external order would not be incompatible with any of the Convention rights of any person affected by it.
- (d) Where the confiscation order confiscates specified property other than money, that property is not subject to a charge under UK asset recovery legislation.

The court also has the power to appoint an **enforcement receiver** to realise the property [Article 27]. The court must not confer the power to realise relevant property unless it gives persons holding interests in the property a reasonable opportunity to make representations to it.

## *Enforcement by means of civil recovery*

In addition to the criminal jurisdiction in the UK to restrain and enforce external orders there is also a jurisdiction to enforce external orders by means of **civil recovery**. This is clearly a useful option where criminal proceedings have not been instituted in the overseas territory and the external order is civil in nature.

However, a civil recovery order is only available in respect of external orders (as defined by section 447 POCA) where the court finds that the property specified in the external order is “**recoverable property**” – meaning property obtained as a result of or in connection with criminal conduct. This is the major difference with regard to effecting criminal external orders. Furthermore, the assistance in civil proceedings only relates to the **enforcement** of external orders.

Unlike requests arising out of criminal proceedings, there is no power to freeze assets to preserve them in anticipation of an external order which may be made in the future. However, where an external order has already been



made and it is necessary to secure the detention, custody or preservation of the property to which the external order applies it is possible to apply without notice for a **property freezing order** and/ or an **interim receiving order** appointing a receiver to manage and preserve the value of the recoverable property.

If the court determines following the recovery proceedings that any property or sum of money specified in the external order is recoverable property it must make a **recovery order** vesting the recoverable property in the **trustee for civil recovery**. The trustee is a suitably qualified **insolvency practitioner** whose function is to realise the recoverable property.

When an external order is enforced in the UK, the proceeds, in accordance with the international conventions, are **disposed of according to domestic law**. In the UK the net proceeds are paid into the Recovered Assets Incentivisation Fund and used to fund law enforcement initiatives and community projects.

The UK has asset sharing agreements with some countries and territories, for example, the UK has an agreement with the US that proceeds may be shared as and when agreed by the parties. If there is no formal agreement with a country or territory, there are administrative arrangements that allow assets to be shared on a case-by-case basis.

## Closing Thoughts

As at the end of January 2009, the CPS received 72 requests from 32 different countries, 15 of which are in the EU.

We, in turn, made 24 requests for restraint and confiscation assistance to 19 different countries. In addition many more requests for asset tracing were made on the back of requests for mutual legal assistance from our prosecuting units, which means that the actual number of outgoing requests relating to asset recovery is much higher than this figure would suggest.



Clearly, in light of the trans-national nature of crime and the ease with which money can be transferred between jurisdictions it is imperative that each state operates an effective asset recovery regime and, moreover, that co-operation between different jurisdictions “works”.

As prosecutors, it is now important for us to examine how we can use these powers to maximum effect.

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March 2009

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