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Occasional Paper

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From Policy to Practice

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RUSI Occasional Paper, February 2016



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



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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](http://www.rusi.org)  
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# 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 enforcement process for criminal confiscation orders operating under the Proceeds of Crime Act 2002 (POCA) has faced considerable criticism from both parliamentary and media commentators. The POCA was indeed a significant step forward and addressed the need to adopt effective measures to tackle the proceeds of criminal activity. However, the criminal-confiscation regime has a number of flaws, particularly in the practical challenges of enforcement. These were most prominently highlighted by the 2013 review conducted by the National Audit Office which led to calls for the development of a more effective system. The headlines make for stark reading: £1.6 billion in unenforced confiscation orders, an amount which is continuing to rise.

This paper is structured around two key issues. First, it examines how the law has been framed and applied. It provides a detailed analysis of the process, shedding light on some of the weaknesses of the current legislative environment. In addressing the second issue – unenforced confiscation orders – the paper specifically examines the assets on which these orders are based. The paper's overall purpose is to assess the extent to which the law, rather than administrative failings, is the root cause of the large value of uncollected orders. In short, to what extent do real assets exist against which the authorities can take enforcement action?

Terminology is one of the first problems encountered in analysing the law in this area. The term 'confiscation order' is misleading as these orders do not directly confiscate particular assets; rather they represent a value-based assessment of an offender's 'benefit' from their criminal activity – in essence, a debt which must be repaid by the offender to the state.

In determining the level at which to set the confiscation order, the court first decides whether the offender has benefited from 'general criminal conduct' – the so-called 'criminal lifestyle provisions' – or from 'particular criminal conduct' (from a specific offence). The court does not exercise discretion in this part of the process; assessment is by a set of legislative triggers based on a list of offences, or on the frequency or number of offences.

There are wide-reaching implications for the level at which the order is eventually set if an offender is judged to have a criminal lifestyle. Such a determination allows the court to deem all income and expenditure from the previous six years, as well as all currently held assets, as criminal benefit without having to link these to the offence. The burden of proof is then reversed onto the offender to demonstrate that income derives from legitimate sources. This can be problematic if record-keeping for any legitimate business has been inadequate. In turn, this can lead to fully legitimate income being assessed as criminal benefit.

Following the assessment relating to the criminal benefit the court must then assess the ‘available amount’. This is the figure upon which the court then determines the amount of the final confiscation order. Contrary to common understanding, the court does not have to base this on assets which are actually proven to exist; it is for the defendant to *prove* that his or her assets are not valued at levels which allow them to satisfy the payment of the full amount of the criminal benefit. In the event that the offender is either unwilling or unable to prove this, the court must set the order at the full amount of the criminal benefit; this may exceed the value of the assets that are practically available to pay the order and, in many cases, means that confiscation orders are made which can neither realistically be paid by the offender nor collected by the authorities.

Once the court sets the order, the offender must pay the debt in any way he or she deems fit within the time specified by the order. To incentivise timely payment, the order contains two provisions: the first on default sentences; and the second on interest rates. On default sentences, the offender is liable to serve an additional sentence, based on the amount of the order, in the event of non-payment. If an offender serves a default sentence, the amount owed is not extinguished. However, once served, no further sentence is available. Interest is also applied – at a rate of 8 per cent – to the outstanding amount once the order becomes payable. This continues to accumulate even in cases where orders have not been met for a number of years and are deemed by enforcement authorities to be uncollectable. It is noteworthy that (at the time of writing) interest accounts for £432 million of the £1.6 billion of unenforced confiscation orders.

Unpaid confiscation orders are, in theory, treated like any other court-issued debt; HM Courts and Tribunals Service (HMCTS) is responsible for enforcement if these are not paid. In practice, however, HMCTS leads on the enforcement of the lower-value orders and prosecuting authorities – given their access to more extensive powers and sanctions – lead on enforcing the more complex cases (accounting for approximately 60 per cent of the case load).

To aid enforcement, authorities have access to a number of measures. For example, prosecutors may, through application to the court, seek the appointment of an enforcement receiver. Due perhaps to the high costs associated with them, enforcement receivers are applied for sparingly and only in cases where the receiver’s costs are covered by the assets in view. In cases where the prosecutor is unable to enforce a case, however, the case reverts back to HMCTS – it then often sits on its books, sometimes in perpetuity, as the legislation only allows orders to be written-off in very limited circumstances.

After examining the law in this area, this paper then examines the composition of the £1.6-billion of unenforced orders to highlight the extent to which this is (or is not) based on real and tangible assets, against which authorities can take enforcement action.

‘Hidden assets orders’ are a sizeable share of the £1.6-billion figure. Yet, recovering funds from these orders is problematic. This paper explains that many of these orders may simply occur when an offender is unwilling or unable to offer a strong rebuttal during the assessment of the available amount. This again leads to orders being set which have little or no asset basis, and are thus practically unenforceable. In sum, the enforcement authorities cannot take action against

assets which do not, or perhaps never did, exist. These orders, despite the minimal chance of enforcement, remain on the balance sheet accruing 8 per cent interest per annum.

Furthermore, this paper highlights the difficulties of enforcement when an offender is in another jurisdiction; this may occur when the offender absconds or is deported, with the latter accounting for £86 million of the unenforced total in 2013. While having an order hanging over an absent offender in perpetuity is arguably a strong disruptive tool, keeping these cases on the balance sheet merely serves to increase the mounting levels of interest.

The paper examines the unintended effect of previous government targets set in this field, which were based on the value of the orders and not on whether they could be enforced. This led to investigators and prosecutors seeking orders which followed the strict letter of the law, but were unable to be enforced. The removal of these targets seems to be having a positive impact; however, the legacy of the previous approach is still something enforcement authorities must tackle.

Despite the high levels of *un*-enforced debt, examination of the annual enforced figures reveals that the totals actually recovered are increasing, with a record £154 million enforced in the 2014/15 financial year. Unfortunately the ever-increasing interest on the unenforced total mask these achievements. This paper therefore argues that evaluating the success of the regime solely in terms of the unenforced total is unfair and misleading. Increasing year-on-year enforcement totals should be considered as a benchmark alongside a range of other non-financial measures, such as the impact of invoking measures such as the default sentence.. This does not imply that the recovery of funds is unimportant: there is clearly a proportion of the £1.6-billion unenforced total which has been neglected and should be prioritised.

The current legal framework was framed to be punitive and cover as much of the criminal economy as possible. This paper, by examining the law and available data, concludes that the enforceability of assets was, at best, an afterthought. It is clear that there is a limited, and often absent, asset base against which authorities can take action, and that the impact of this has not been adequately tackled until recently. This explains why HMCTS's figures estimate that successful enforcement is only achievable for a small proportion of the £1.6 billion (around £200 million).

The factors set out above help commentators and observers to understand the reality of a significant share of the total of unenforced orders. Yet, it does not account for the full total. Particular consideration should be given to the previous inadequacies of the enforcement process and the methods used to recover funds. Until 2015, the government had not focused on this issue. It is only now that policy-makers are considering enforcement measures as part of a holistic approach to confiscation orders. A complementary RUSI study, 'The Big Payback: Examining Changes in the Criminal Confiscation Orders Enforcement Landscape', examines recent efforts to rectify this situation and makes a number of recommendations to enhance the operation of the current system.



# Enforcing Criminal Confiscation Orders

Prison is seen as an ‘occupational hazard’ for many criminals and not always the feared sanction needed to deter further criminality. However, as demonstrated by Home Office-commissioned research, evidence exists to show that criminals are far more worried about being deprived of the proceeds of their crimes than they are about being sent to prison: ‘For significant numbers of dealers the risk of prison was not considered a serious deterrent to their involvement in the illegal drugs trade. In contrast, asset recovery measures caused difficulties to all dealers discussing the issue.’<sup>1</sup> Government reports argue that as well as deterring crime, an effective system of identifying and removing the proceeds of crime from perpetrators also has a retributive effect and may serve to undermine the criminal economy by limiting the amounts available for reinvestment.<sup>2</sup> These arguments form the basis of the UK’s regime for targeting the proceeds of crime, which has actively sought to embody the premise that ‘crime shouldn’t pay’ and to ground this concept in UK legislation.

The UK has had legislation in place in various guises since the 1970s to allow law-enforcement officials to pursue the proceeds of crime through the courts.<sup>3</sup> These powers were rationalised into a single act under the Proceeds of Crime Act 2002 (POCA), which also added additional powers around the forfeiture of cash. The POCA remains the primary legislative tool available to UK law-enforcement agencies to remove proceeds from the criminal economy. In 2000, the POCA’s founding policy document, ‘Recovering the Proceeds of Crime’, produced by the government’s Performance and Innovation Unit, noted that ‘traditional’ law-enforcement tactics alone were unable to dismantle ever-more complex, globalising, organised-crime networks, and heralded these consolidated and additional powers as an essential addition to the law-enforcement toolbox.<sup>4</sup>

To an extent, they were right: the POCA and its precursor legislation, like the 1994 Drug Trafficking Act, have had a significant impact, with more than £1 billion removed from the hands of criminals since 1987.<sup>5</sup> On this basis, successive governments have driven through a number

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1. Matrix Knowledge Group, ‘The Illicit Drug Trade in the United Kingdom’, 2nd edition, Home Office Online Report 20/07, June 2007, <<http://webarchive.nationalarchives.gov.uk/20110220105210/rds.homeoffice.gov.uk/rds/pdfs07/rdsolr2007.pdf>>, accessed 1 October 2015.
  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. Section 27 of the Misuse of Drugs Act 1971 was the first instance of asset-forfeiture legislation in the UK.
  4. Cabinet Office, ‘Recovering the Proceeds of Crime’.
  5. National Audit Office, *Confiscation Orders*, HC 738 (London: The Stationery Office, December 2013).

of amendments to strengthen the POCA,<sup>6</sup> and have made the tackling of the proceeds of crime a priority in a number of government strategies – most recently in the Serious and Organised Crime Strategy of 2013.<sup>7</sup>

However, the government’s regime for targeting the proceeds of crime has not been without controversy, much of which has centred on the enforcement of criminal confiscation orders – the focus of this paper. This process has received persistent media criticism due to the chasm between the value of confiscation orders issued by the courts and the amount actually recouped from offenders by enforcement authorities, such as the HM Courts and Tribunals Service (HMCTS).<sup>8</sup>

**Box 1:** Asset Confiscation Elements of the Proceeds of Crime Act (2002)

POCA contains four distinct means of confiscating the proceeds of crime, namely:

- Criminal confiscation: Part 2 of the POCA sets out powers to confiscate the proceeds of crime *following* a criminal conviction as part of the sentencing process
- Civil recovery: Part 5 (Chapter 2) of the POCA sets out a system for confiscating the proceeds of crime *in the absence of* a criminal conviction through the civil courts
- Cash forfeiture: Part 5 (Chapter 3) of the POCA sets out powers to seize and forfeit cash, through a civil process, where there are *reasonable grounds to suspect* that it is the proceeds of crime
- Criminal taxation: Part 6 of the POCA allows the National Crime Agency to access revenue powers to tax income which it has reasonable grounds to suspect are the proceeds of crime.

The headlines make for stark reading: £1.6 billion in unenforced confiscation orders with only £203 million deemed to be enforceable;<sup>9</sup> so-called ‘Mr Bigs’ paying £44,000 in private school fees while ignoring the outstanding £4 million confiscation order still owed to the state;<sup>10</sup> and criminals ‘choosing’ to serve ‘default sentences’ instead of paying back the proceeds of their crimes. A highly unfavourable report by the National Audit Office (NAO) – the parliamentary auditing body – in 2013 on the confiscation-orders process has reinforced this negative perception.<sup>11</sup> It has been the catalyst for a fundamental shake-up of the enforcement process,

6. Including via the Serious Organised Crime and Police Act 2005, the Serious Crime Act 2007 and the Serious Crime Act 2015.

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

8. *Evening Standard*, ‘System to Grab Profits from Crime Bosses is a Shambles, Say MPs’, 21 March 2014.

9. HM Courts and Tribunals Service, *Annual Trust Statement 2014–15*, HC 326 (London: The Stationery Office, July 2015).

10. *Evening Standard*, ‘Crime Boss Goes on Spending Spree as he Ignores £4 million Confiscation Order’, 1 October 2009.

11. National Audit Office, *Confiscation Orders*.

which is examined in the RUSI Occasional Paper, 'The Big Payback: Examining Changes in the Criminal Confiscation Orders Enforcement Landscape', a complementary study to this paper.

### **The National Audit Office's Report on Confiscation Orders**

In December 2013, the National Audit Office (NAO), issued a scathing report on the confiscation-order regime as a whole, including the enforcement process – the focus of this paper. The overarching criticisms are set out below, with the last two relating to enforcement:

- There is no coherent strategy for confiscation orders
- This problem is compounded by a flawed incentive scheme (whereby law-enforcement officials and prosecutors receive a percentage of the enforcement receipts to reinvest in their agencies) and a lack of accountability
- An absence of good performance data or benchmarks across the system weakens decision-making
- Throughout the criminal-justice system there is insufficient awareness of the proceeds of crime and their potential impact
- **Outdated and slow ICT systems, data errors and a lack of joint-working has led to inefficient and ineffective enforcement**
- **The main sanctions for not paying orders – default sentences of up to ten years and an additional 8 per cent interest placed on the amount owed – do not work.**

### **A Counter-view**

The NAO report focused solely on the 'value for money' of the confiscation-orders system. It could be argued that this is an unfair measurement for a criminal-justice process, which is designed to be retributive and not commercial. Arguably, what matters is not the 'balance sheet' value of the regime, but the impact on the criminal economy and the perceptions of wider society on the use of this sanction as a tool of justice.

Due to the limited focus of the NAO report, it failed to highlight the disruptive effect and value of obtaining a confiscation order, even in cases where the ability to actually collect the order was limited. For example, if a confiscation order is not paid, then the authorities can impose a further prison sentence. The report did not explain the full complexity and nuance of the law and the effect this has on the ability of authorities to collect orders.

In February 2015, the director general of the National Crime Agency (NCA), Keith Bristow, attempted to counter these criticisms:<sup>12</sup>

The outstanding debt on unenforced confiscation orders has been estimated by HM Courts Service as worth £1.46 billion. The figure is still rising. But if the asset doesn't exist you can't confiscate it. It

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12. Martin Bentham, 'We'll Never Seize £1.3bn Owed by Crime Bosses, Says Head of "British FBI"', *Evening Standard*, 25 February 2015.

may be that a criminal made £10 million out of criminality, but unless they've got £10 million assets, it's unrecoverable.

Without wider explanation and an understanding of the fundamental principles of the law and process governing confiscation orders, these headlines may leave even the informed reader bewildered.

### Aims and Scope

This paper, based on a review of the legislation, literature and available statistics, as well as interviews with a wide range of current and former practitioners in the field, explains the legislation to inform the reader of some of the nuances of the UK's confiscation-order process and the extent to which the framing of the law can, wholly or in part, offer an explanation of the high level of uncollected confiscation orders. It does so by addressing the following questions:

- How is the level at which a confiscation order is set determined, and by whom?
- What incentives are in place to encourage the payment of confiscation orders?
- How does the enforcement process work? Who is responsible for collecting confiscation orders?
- What powers are available to enforcement authorities should these incentives not work?
- To what extent can the uncollected total be attributed to the framing of the law rather than government failings?

As noted, criminal confiscation is only one of the means available in the POCA to deny criminals the gains from their activity. Whilst this paper recognises that the UK's success in tackling criminal finances cannot be judged solely on the use of one of the available powers, it deliberately concentrates on examining criminal confiscation, given the lack of balanced debate in this field.

## Criminal Confiscation Orders Explained

The first thing to be aware of in any explanation of the POCA confiscation-orders regime is that the term itself is a misnomer. A confiscation order is a post-conviction court order, which is value-based rather than asset-based.<sup>13</sup> It does not *confiscate* property, but is an order of the *value* of 'criminal benefit' and is, in effect, akin to a debt. The framing of the law in this way negates the need for the prosecution to link a particular asset to specific criminality.<sup>14</sup> This section sets out the basic principles of the UK's criminal-confiscation legislation under the POCA and explains the factors that determine the amount at which the confiscation order is set. Recent changes to the legislation, as set out in the Serious Crime Act 2015, are more fully examined in the RUSI paper, 'The Big Payback'.

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13. This is different to the US and Australian systems, which are asset-based.

14. This is in contrast to the civil confiscation regime, under Part 5 of the POCA, which is an *in rem* system against specific property.

The legislation is much more complex in practice than that set out below, particularly due to the plethora of case-law decisions affecting its operation. This paper deliberately takes the most simplified view possible of the legislation to give the general reader an illustrative understanding of the system and inform this paper's assessment of the extent to which the framing of the law contributes to the high value of uncollected orders highlighted in the media.

### **Criminal-Lifestyle Provisions**

The starting point of any criminal-confiscation hearing is for the court to decide whether the defendant has benefited from 'general criminal conduct' (so-called 'criminal lifestyle' provisions) or 'particular criminal conduct' (from an individual offence). It is these criminal-lifestyle provisions, and the broad presumptions they trigger, which have often been cited as one of the root causes of the problems encountered at the enforcement stage.<sup>15</sup>

#### *Legislative Triggers*

Assessing whether a defendant has led a criminal lifestyle is not a matter decided at the discretion of the court, but by a set of formulaic criteria laid out in the legislation. According to the POCA, a defendant is deemed to have a criminal lifestyle if:

- They are convicted of an offence set out in Schedule 2 of the POCA, namely drug trafficking, money laundering, directing terrorism and other 'serious' offences
- They are convicted of an offence which 'constitutes conduct forming part of a course of criminal activity', namely multiple offences over a period of time
- They are convicted of one offence conducted over a period of six months or more.

It is notable that this is a 'box ticking' assessment rather than a qualitative assessment of the seriousness of the crime and its impact. In sum, the court is not afforded any discretion to decide whether they view the defendant as having lived a criminal lifestyle in substantive terms.

#### *Implications*

The invocation of these provisions is significant and has wide implications. If the defendant hits any of these legislative trigger points, the court is *bound* to consider that *all* of their income *and* expenditure over the previous six years, as well as the assessed value of any property they currently hold, is criminal benefit.<sup>16</sup> Therefore, where these provisions are invoked, there is no need for the prosecution to prove that said income, expenditure or assets are linked to the indictable offence.

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15. Interviews with officials, June and July 2015.

16. It should be noted that the criminal-lifestyle provisions do not limit the order amount to the previous six years; however, income prior to this period must be shown by the prosecution to be 'criminal benefit' to the civil standard of proof.

## Assessing ‘Criminal Benefit’

Once an assessment has been made as to whether the criminal-lifestyle provisions apply, the court must make a judgement as to the level of the ‘criminal benefit’. This is based on an assessment, put forward by the prosecutor and the financial investigator,<sup>17</sup> of the defendant’s alleged ‘benefit’ from criminal conduct, whether on the basis of ‘general’ or ‘particular’ criminal conduct.

In basic terms, a criminal ‘benefits’ from criminal conduct if he or she ‘obtains property as a result of or in connection with the conduct’.<sup>18</sup> The assessment of ‘benefit’ is largely determined by the now famous ‘three questions’ as set down in the House of Lords review of confiscation principles in *R v May*. These are:<sup>19</sup>

- Has the defendant benefited from relevant criminal conduct?
- If so, what is the value of the benefit obtained (general or particular criminal conduct)?
- What is the sum recoverable from the defendant?

A further important principle was established in the House of Lords ruling in the *May* case. This was to firmly establish that the assessment of ‘benefit’ is not to be confused with criminal ‘profit’. As stated by the House of Lords in *R v May*:

The legislation is intended to deprive defendants of the benefit they have gained from relevant criminal conduct, whether or not they have retained such benefit, within the limits of their available means. It does not provide for confiscation in the sense understood by schoolchildren and others, but nor does it operate by way of fine. The benefit gained is the total value of the property or advantage obtained, not the defendant’s net profit after deduction of expenses or any amounts payable to co-conspirators.

### Criminal Lifestyle – Rebuttable Presumptions

In cases where the criminal-lifestyle provisions are triggered, the POCA then reverses the burden of proof, putting the onus on the defendant to rebut these assumptions and to prove, on the balance of probabilities, that any identified income, expenditure or assets are derived from a legitimate source.<sup>20</sup> If the defendant is able to prove that the expenditure is legitimately gained, then that income/asset is removed from the ‘benefit’ figure. However, it is problematic for the defendant when criminal proceeds are interspersed with proceeds from a legitimate business for which proper accounts and receipts have not been kept (see Box 2). Here again case law has

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17. A financial investigator is a person employed by a body statutorily authorised under the POCA (such as the police, trading standards or HM Revenue and Customs) and trained by the National Crime Agency’s Proceeds of Crime Centre to use specific powers of investigation under the legislation.

18. Section 76(4) of POCA.

19. House of Lords, Judgements, *R v May*, Session 2007/08, para 8.

20. In criminal cases the burden of proof usually lies with the prosecution and not the defendant.

clarified the intention of the law: in *R v Singh*, a judgement was made that 'if people keep no records, they have to face the consequences'.<sup>21</sup>

The stringent effect of this provision is having an impact on those who are unable to rebut these presumptions. By way of example, in the 2007 Matrix Group Study of the UK drugs market, conducted on behalf of the Home Office, one criminal protested: 'People who are arrested are losing everything that they have – even the things they acquired through honest means.'<sup>22</sup> Put simply, the calculation of criminal benefit results in a total amount often far outstrips the actual amount the defendant ever gained in real terms as a result of his or her criminal conduct, especially when criminal-lifestyle provisions are invoked. Where adequate explanation of the source of the income cannot be offered, this calculation often includes legitimate income and assets. These factors contribute to the law's draconian reputation and, arguably, offer the strong deterrent effect that was intended when the POCA was drafted.

### **The Available Amount**

Following the evaluation of criminal benefit, the court must then assess the 'available amount' – the total assessed value of assets held by the defendant which can be realised to pay the order. If the available amount is shown to be lower than the criminal-benefit figure, then the order will be made to the lower amount.

It is a common misconception that the court can only take into account assets that are *proven* to exist. This is not the case. The onus is on the defendant to prove, on the balance of probabilities, that the available amount is less than the criminal-benefit figure. If the defendant is unable or unwilling to put forward a case – for example, he or she may not wish to reveal other aspects of their criminal enterprise by doing so, or the case may not meet the balance-of-probabilities test – then the court is bound to make an order to the full value of assessed criminal benefit.

It is important to note that the amount deemed to be 'available' is not based on assets deemed to be the proceeds of crime, but *any* assets the defendant currently holds, regardless of whether the assets were gained legitimately or not. This is the deliberate intention of the law. For example, an offender may have spent his criminal proceeds on day-to-day living expenses, with the family home purchased with legitimate business income. Regardless of this, the family home will be seen as an 'enforceable asset' and will be included in an assessment of the available amount.

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21. *R v Singh* [2008] 2 Cr.App.R.(S.) 387(69).

22. Matrix Knowledge Group, 'The Illicit Drug Trade in the United Kingdom', p. 49.

**Box 2: Calculating Criminal Benefit**

Joe Bloggs has been convicted of importing a package of cocaine to the UK. His criminal benefit is deemed to be £38,000. This is made up of the following amounts:

- Joe was convicted of importing a quantity of cocaine (seized by the police) with an assessed street value of £1,000. This commodity value counts towards his 'benefit' figure, despite its sale never being effected and actually only having a wholesale cost of £400. Criminal benefit – **£1,000**.

The offence triggers the criminal-lifestyle provisions (drug trafficking) and thus an assessment of income, expenditure and assets over the past six years is made.

- The defendant received £36,000 in cash receipts into his bank account in the previous six years; however, much of this has been dissipated and the balance is now only £150. He explains that the cash deposits are largely from his 'legitimate' business (a fast-food outlet), but is only able to provide receipts for £2,000 of this income (inheritance from a relative), but not the rest. Criminal benefit – **£34,000**
- The defendant owns a car, which is judged to be worth £1,000. He explains that the vehicle was paid for in cash earned from his legitimate business but cannot provide receipts to support this. Criminal benefit – **£1,000**
- Receipts from a house search and travel checks show that the defendant has just been on a £2,000 holiday, which was not paid for out of his known bank account. Again he states that the holiday was paid for in cash and cannot demonstrate its legitimate source. Criminal benefit – **£2,000**

Total benefit figure: **£38,000**.

Total explicitly linked to the offence: **£1,000**.

Total potential profit from the indictable offence: **£600**.

**Payment of the Order: Incentives to Pay**

As noted, the confiscation order is a debt that the offender must pay in any way they deem fit by realising assets to the level of the value of the order. It is for the offender to decide which assets to realise, unless an enforcement receiver is put in place (see below). A confiscation order is payable immediately, unless the offender can prove to the court that time is needed to realise assets – such as the sale of a house – to fulfil the order.

To encourage payment of confiscation orders on time, two main sanctions are available in the order itself. Firstly, when drawing up the confiscation order, the court determines a 'default

sentence' to be served in the event of the order not being paid.<sup>23</sup> It should be noted that the default sentence cannot be served in lieu of payment of the order – an order remains payable even after the offender has served the default sentence (although no further default sentence is available if it is subsequently not paid). However, the invocation of the default sentence could be seen as offering law-enforcement agencies a further disruptive and punitive tool. Secondly, once the order becomes payable, the defendant is liable to pay interest, currently at the rate of 8 per cent annually, on top of the sum of the original order. Particularly in the case of large 'hidden assets' orders (see below), this can, over the years, add a considerable sum onto the debt.

### The Enforcement Process

In basic terms, an unpaid confiscation order is treated like any other court debt and is the responsibility of HMCTS to enforce when the defendant fails to pay of their own accord. The best-case scenario involves the defendant voluntarily liquidating their assets and paying the confiscation order in full and on time. As the £1.6 billion in uncollected confiscation orders demonstrates, this scenario is often not the case. Where the compliance incentives (default sentence and interest) are not effective in providing an incentive to pay, it is incumbent on the enforcement authorities to seek alternative means to recoup assets to the value of the confiscation order.

However, although the *ultimate* responsibility rests with HMCTS, in practice, given the limited powers available to the body, enforcement is shared between HMCTS and prosecuting authorities under a service-level agreement (SLA) between them. In reality, HMCTS leads on enforcing the low-value orders, where non-payment is a lesser risk, with other enforcement agencies, using the powers available to them, responsible for enforcing the higher-level, more complex orders. In its Trust Statement for 2014–15, HMCTS notes that 45 per cent of confiscation orders by value are enforced by agencies other than HMCTS. These agencies include the Crown Prosecution Service (CPS), Serious Fraud Office, Department for Work and Pensions and local authorities.<sup>24</sup>

When the incentives to pay have failed to trigger payment, then the primary powers available to enforce the order lie with the prosecutor. In cases where the 'time to pay' has run out, the prosecutor can, under the POCA, apply to the court for the appointment of an 'enforcement receiver'.<sup>25</sup> An enforcement receiver is a privately contracted individual, often aligned to one of the large accounting firms, who has powers to take control of any identified assets held by the defendant and realise their sale to meet the value of the confiscation order. In its confiscation-enforcement guidance to prosecutors, the CPS states that:<sup>26</sup>

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23. The default sentence parameters are set out in legislation. The length of default sentences for confiscation orders has recently been extended by the Serious Crime Act 2015.

24. HM Courts and Tribunals Service, *Annual Trust Statement 2014–15*, p. 5.

25. Section 50 of POCA.

26. Crown Prosecution Service, 'Proceeds of Crime Act 2002: Enforcement', <[https://www.cps.gov.uk/legal/d\\_to\\_g/enforcement/](https://www.cps.gov.uk/legal/d_to_g/enforcement/)>, accessed 1 October 2015.

As the Magistrates' Court is best equipped to recover sums of money from bank accounts or other straight forward cases, it will fall upon the prosecutor to enforce cases involving the realisation of the defendant's assets. Fortunately, this task may be easily achieved by the prosecutor applying to the Crown Court for the appointment of an enforcement receiver.

The cost of appointing an enforcement receiver can, however, be considerable due to the specialist skills they offer. Their cost is netted from the realised assets, making the appointment a balancing act between the policy imperative of removing assets from the hands of criminals and the effect on receipts to the Treasury. As stated in the CPS Guidance:<sup>27</sup>

Clearly, if the remuneration and expenses of the receiver are likely to be in excess of the amount that is likely to be realised, a receiver should not be appointed. This may be a particularly pertinent issue in cases where there has been no restraint order, as some assets may have been dissipated prior to the appointment of the receiver.

Ultimately, however, when the prosecutor and financial investigator have not been able to trace assets in the UK and overseas, and/or an enforcement receiver (if appointed) has been unsuccessful in enforcing the order, the case is remitted back to HMCTS under the terms of the SLA between HMCTS and their partners. This then sits on the balance sheet accruing interest.

Whilst the legislation, under Sections 22 and 23 of the POCA, allows for the prosecutor to vary the assessed available amount both up and down – based on evidence on available assets which comes to light following the making of the order – until recently these powers to revisit the order were, according to practitioners interviewed during the course of this study, seldom used.<sup>28</sup> It should also be noted that the legislation only allows the order to be written off in very limited circumstances, even when all authorities involved agree that it is not collectable in practice.<sup>29</sup> This presents a problem: if prosecutors and financial investigators with their available tools and resources have been unable to trace and enforce assets, what chance do HMCTS, with their more limited powers, have?

## Consequences for the Enforcement Process

As set out above, the law was intended to be punitive and wide in its reach to enable investigators and prosecutors to capture as broad a category of criminal finances as possible. This was meant to achieve two overriding policy aims: achieving maximum impact on the criminal economy and deterring those operating inside or on the margins of it. This broad framing, whilst perhaps desirable in policy terms, can be shown on closer examination to call into question the

27. 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](http://www.cps.gov.uk/legal/p_to_r/proceeds_of_crime_act_guidance/index.html#a78)>, accessed 1 October 2015.

28. Interview with official, August 2015.

29. Prior to June 2015, writing-off was confined to orders with less than £50 to pay and orders with less than £1,000 to pay where this could be attributed to currency fluctuations. Since the commencement of the Serious Crime Act 2015, prosecutors have been able to apply to the court to write off the orders of deceased defendants where it is not deemed possible to meet the order from the deceased's estate.

achievability of enforcing a significant proportion of the £1.6 billion in unenforced confiscation orders. In this regard, statistics from the HMCTS 2014–15 Annual Trust Statement are particularly revealing.<sup>30</sup> Whilst some of the categories are straightforward – the £431 million in interest alone for example – some need further explanation (Table 1).

**Table 1:** Breakdown of Confiscation-Order Debt (£ thousands).

	<b>2014/15</b>	<b>2013/14</b>
Interest (historically challenging to enforce)	431,854	361,654
Assets assessed as hidden with no other assets against which enforcement action can be taken	211,970	229,886
Offenders deceased, deported or cannot be located	141,415	108,925
Orders subject to appeal and cannot be enforced	30,180	63,986
Assets overseas	9,052	9,066
<b>Sub-total</b>	<b>824,471</b>	<b>773,517</b>
Remaining confiscation order balance	749,294	680,170
<b>Total outstanding debt</b>	<b>1,573,765</b>	<b>1,453,687</b>

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

### Hidden Assets Orders

As noted above, the framing of the law puts the onus on the defendant to prove, on the balance of probabilities, that their asset base (the available amount) is worth less than the criminal-benefit figure. This reliance on the defendant to co-operate and, indeed, be present, can create intrinsic difficulties in setting the order at an achievable level in terms of enforcement. Where the defendant is either unwilling or unable to demonstrate the availability of assets, the court is bound by law to make an order to the tune of the full recoverable amount, regardless of whether that is realistic or not in terms of enforceability. These orders are called ‘hidden assets orders’. These cases often leave HMCTS with a large order which, if not paid, accrues high levels of interest, but which does not link to a realistic asset base from which the order can be paid or against which enforcement activity can be taken. Whilst these orders are in keeping with the intention of the legislation, they do cause particular issues in relation to enforcement, as stated in the 2014 CPS Asset Recovery Strategy:<sup>31</sup>

It is important to stress that the value of a confiscation is not always a true measure of the amount that is actually recoverable ... Defendants are often unable or unwilling to explain what they have done with their proceeds and, as a result, confiscation orders are made in circumstances when there may be few or no identified assets against which enforcement action may be taken. Such orders are known as hidden assets orders, and organised criminals will often have hidden their assets overseas ... There are risks in not knowing the true level of enforceable debt: it raises false expectations about the range and value of assets that are actually recoverable; and it obscures the real amounts that we should be pursuing.

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

31. Crown Prosecution Service, ‘CPS Asset Recovery Strategy’, June 2014, p. 6.

In short, the term ‘hidden assets’ may be a misnomer: in some cases no assets exist to the level of the order, especially when the defendant spent their criminal income on day-to-day expenses and luxuries (the so-called ‘offend to spend’ lifestyle).

### **Deceased, Deported, Cannot be Located**

The framing of the criminal-confiscation provisions in the POCA relies heavily on the defendant being physically present to liquidate their assets and thereby meet the value of the order. It is often the case, however, that an individual does not remain in the jurisdiction following the serving of their sentence and no assets can be identified against which to take action. This may be due to the defendant absconding, dying or being deported before the payment of the confiscation order.

As of December 2013, £86 million was owed by defendants who had been deported.<sup>32</sup> Although the enforcement authorities will continue, in theory, to pursue the assets of deported offenders to meet the confiscation order, they are invariably unable to invoke the persuasive tools, such as the default sentence, in order to trigger payment and cannot call individuals to the enforcement courts. Research in the course of this study suggests that it is often the case that individuals are deported by the Home Office without prior notification being given to HMCTS and without due consideration of the impact of this action on the unenforced order. It should be noted that government-sanctioned deportation is not grounds for writing off the order.

Whilst the presence of an unpaid confiscation order and the threat of a default sentence may provide a disincentive to deported offenders who may wish to return to the UK, these orders are in practice unlikely to be enforced and continue to inflate the total of the unenforced orders, especially as interest accruing continues to rise year-on-year.<sup>33</sup>

By December 2013, £24 million of the uncollected total could be attributed to deceased offenders.<sup>34</sup> Until new powers were introduced in the Serious Crime Act 2015, this was not grounds for writing off these orders and they continued to accrue interest, despite no opportunity to enforce them. This and other new powers are explored further in another RUSI paper: ‘The Big Payback: Examining Changes in the Criminal Confiscation Orders Enforcement Landscape’.

### **Assets Overseas**

According to the HMCTS Annual Trust Statement 2014–15, around £9 million of the outstanding debt is definitively known to be overseas and currently deemed unenforceable. The real amount of assets overseas is likely to be much higher, but is included in the ‘hidden assets’ figures, or is currently subject to ongoing enforcement efforts.<sup>35</sup> This means that, whilst intelligence or even

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32. *Hansard*, House of Commons, ‘Confiscation Orders’, Column 688W, Written Answers, 2 April 2014.

33. As of December 2013, £372 million of the unenforced-orders total was interest alone.

34. *Hansard*, House of Commons, ‘Confiscation Orders’, Column 688W, Written Answers, 2 April 2014.

35. HM Courts and Tribunals Service, *Annual Trust Statement 2014–15*, p. 9. Although a significant caveat should be added to this figure – it comes from the JARD database (the central repository of

evidence may exist to suggest assets exist outside of the UK, these assets are out of the reach of the enforcement authorities because of the limitations in the international asset-tracing system or complications in the mutual legal assistance process.<sup>36</sup>

As criminals become increasingly aware of the workings of the POCA, they frequently move their assets out of the UK to evade detection during confiscation investigations and complicate enforcement following the making of the order. Even where established mutual legal assistance channels exist for confiscation-order enforcement, such as within the EU, interviews carried out for this paper suggest that asset enforcement can be complex and problematic.

### Effect of Targets

The broad scope of the criminal-lifestyle provisions led, certainly at the beginning, to orders being set at levels which far outweighed the assets available to fulfil them. This issue was further compounded by historic targets – based on the value of confiscation orders rather than enforcement value – set for law-enforcement agencies and prosecutors by previous governments. This led to orders initially being actively sought by investigators and prosecutors at levels which were unenforceable. In sum, target-setting led to unintended consequences which still burden the enforcement authorities today.

These targets have since been removed. This is to be welcomed, and interviews carried out during this study suggest that investigators and prosecutors are starting to learn the lessons of the early operation of the scheme. The majority are now seeking orders at a more realistic level, aware of the problems of enforceability.

### Results to Date

Breaking down the uncollected total into its constituent parts reveals how potentially misleading the figures can be in relation to the real impact of the legislation. On this basis, the unenforced total should be considered in conjunction with the actual enforcement figures to date.

**Table 2:** Enforcement Figures, 2009/10–14/15 (£ millions).

Year	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15
Total collected	108	111	120	133	137	154

*Source: HMCTS response to Freedom of Information Request.*

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information on asset confiscation in the UK) and relates only to assets which have been identified but which cannot be enforced for a variety of reasons. The actual figure is likely to be much higher and to be contained within figures for 'hidden assets' which are currently subject to enforcement proceedings.

36. Mutual legal assistance is the international process for gaining co-operation in gathering evidence in criminal proceedings or in enforcing court orders, such as confiscation orders.

As Table 2 demonstrates, year-on-year enforcement figures continue to rise, although this has little impact on the unenforced total, partly due to the increasing levels of interest accruing on older orders. For example, the HMCTS annual trust statements show that the amount attributed solely to interest increased from £362 million in 2013/14 to £432 million in 2014/15 *despite* the enforcement total increasing by £17 million in the same timeframe. In sum, to judge the success of the system on the uncollected total is to misrepresent the results and to ignore the wider disruptive effect of invoking other measures under the regime, such as default sentences.

Despite the greater success in enforcing orders, a number of interviewees in this study conceded that the previous lack of focus on the enforcement process – in particular on financial investigators returning to older, unpaid orders to identify assets – meant that a certain level of orders exist which, with due effort, may be collectable. Efforts put in place since the unfavourable 2013 NAO report are examined and assessed in the RUSI paper, ‘The Big Payback’.

## Conclusion

The framing of the law on confiscation orders was intended to be punitive and wide-reaching for disruptive and retributive effect. This was the intention of the government’s policy and was meant to ensure that as wide a pool of the criminal economy as possible was under the purview of the POCA regime. This paper does not make a judgement as to whether the draconian nature of the measures is desirable – its influence on criminal behaviour is arguable. However, when judging the successes or failures of the regime, the effect of these measures must be considered in the context of the difficulties this creates for the enforcement process.

Whilst the framing of the law – in particular the criminal-lifestyle triggers and the reversal of the burden of proof – may have been desirable in policy terms, the practical effect these provisions would have on the enforcement process was, at best, an afterthought. For example, the framing of the law allows for confiscation orders to be made which far outstrip the assets available to fulfil the order when no rebuttal of the benefit figure or the available amount is put forward. Whilst this allows investigators, in theory, to revisit the case in the future to assess any newly discovered assets, this has not routinely been the case until recently. Furthermore, the system is designed for situations where the defendant remains in the jurisdiction, but, as this paper shows, this does not always happen.

When the HMCTS statistics detailing the £1.6 billion of unenforced confiscation orders are disaggregated, the extent to which the framing of the law – rather than other factors – may contribute to this high figure is revealed. It shows that at least half of the outstanding figure is either not based on real and existing asset values, or is based on assets which cannot be realised for other reasons (appeals, absent offenders, overseas assets, and so on) and thus is unlikely to be collected in the medium term.

When uncollectable orders are left on the balance sheet, they continue to accrue interest at 8 per cent annually. This interest figure alone has now reached close to £432 million and is rising, skewing the figures and the related discourse, despite the enforcement results going up year-

on-year. This gives an unrealistic view of both the achievements and the potential of the system. To judge the system on the basis of the uncollected total is both misleading and unfair. A more reliable measure of the impact of the system would be to examine the annual enforcement total alongside the real impact of other measures invoked under the regime, such as the default sentence and its effect on criminal behaviour.

However, whilst the broad parameters of the law go some way to explaining the disparity between the levels of orders made and those eventually collected, they do not give a full explanation. Interviewees conceded that a proportion of this amount is a legacy of the previous lack of focus on the enforcement process. It must therefore be assumed that other potentially remediable causes are at fault. Since the critical NAO report in 2013, the government has put in place a number of legislative and systemic changes to the system to rectify this and to give the enforcement process the emphasis and consideration it is due. The potential efficacy of these measures to tackle the proportion of potentially collectable orders are considered in 'The Big Payback'.



# About the Author

Helena Wood is an Associate Fellow of RUSI. Her research focuses on the efficacy of the powers of the Proceeds of Crime Act 2002 (POCA) in the fight against organised crime and on the UK's anti-money laundering architecture and its compliance with the Financial Action Task Force (FATF) 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 performed a variety of intelligence, strategy and policy roles in a number of UK government departments, including the National Crime Agency, Serious Organised Crime Agency, HM Treasury and the Charity Commission.