

# Confiscation and recovery

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This section describes the process of investigating criminal assets with a view to confiscating them. Its purpose is to inform the non-specialist investigator how a confiscation investigation is conducted. There is an assumption that, where possible, confiscation investigations are conducted by financial investigators.

## Confiscation

Investigating the origins of seized cash and money laundering offences often leads to confiscation investigations. Confiscation applies in every case of acquisitive crime and is not just used to tackle serious criminality.

The primary objective of confiscation is to protect and recover assets so that they can then be used to compensate victims if appropriate.

The secondary objectives of confiscation are to:

- stop criminals enjoying the proceeds of their crimes
- remove capital from the criminal economy so it cannot be used to fund other criminality
- impact on negative role models within communities

Compensation orders can be generated from confiscation orders, see [section 13](#) of POCA 2002 and [section 130](#) of Powers of Criminal Courts (Sentencing) Act 2000.

For further information see [Home Office Circular \(024/2003\) Criminal Confiscation Orders, England and Wales: parts 2, 9 and 11 of the Proceeds of Crime Act 2002](#).

## Confiscation investigation

Section 341(1) of POCA defines a confiscation investigation as an investigation into whether a person has benefited from his criminal conduct, or the extent or whereabouts of his benefit from his criminal conduct.

Therefore the objectives of a confiscation investigation are to determine:

- whether the defendant has benefited from their crime
- the amount of their benefit
- the amount of realisable money, property or assets the person holds

## What is confiscation?

Confiscation is a process by which the benefit from criminality is calculated and an equivalent amount (where recoverable) is returned to the State.

Under **POCA**, confiscation is possible in cases where the offender has benefited directly or indirectly from their crime. A confiscation order requires the offender to pay back the equivalent of their benefit from their criminal conduct. If the amount is not repaid, a default sentence is served consecutively with any sentence already imposed, and the amount of the outstanding confiscation order remains to be paid.

## Who can conduct a confiscation investigation?

All police investigators can contribute to successful confiscation investigations. However, they are usually conducted by financial investigators (FIs) because there are certain resources used in the process that are available only to FIs. These resources include suspicious activity reports (SARs), the Financial Investigation Support System (FISS) and the Joint Asset Recovery Database (JARD). (FISS is managed by the NCA Proceeds of Crime Centre and acts as a professional register, and provides resources and tools for FIs.)

FIs have good links with financial institutions and work closely with the CPS. This enables them to keep abreast of the case law surrounding confiscation as this is ever-changing and adds to the complexity of this type of work.

When considering or starting a confiscation the investigator should contact the Financial Investigation Unit (FIU) to discuss the suitability of the case. **Assets should be restrained** at the

earliest possible opportunity to prevent the offender from dissipating the assets in question.

## When is a confiscation investigation appropriate?

The investigator should consider at an early stage whether a confiscation investigation is appropriate, taking into account whether:

- the offence has been proved to the criminal standard (that is, beyond reasonable doubt) and the defendant committed to court for sentence (or are they likely to be?)
- the offender guilty of a **criminal lifestyle offence**
- (if the offender does not have a criminal lifestyle) they have nevertheless benefited from their **particular criminal conduct**, such as by committing a theft or burglary?

As part of the documentation requirements associated with the arrest of the offender, the officer in the case will be required to fill in the MG17 Confiscation Review Sheet. This contains questions that will also assist the investigator in deciding whether a confiscation investigation is appropriate in the circumstances. The question of suitability for confiscation proceedings should also be discussed with the CPS when charges are considered.

### An abuse of trust (case study)

A social worker employed by a local authority social services department pleaded guilty to 10 counts of theft from an 83-year-old client who had been diagnosed with advanced dementia. The offences were committed over a 14 month period and more than £64,000 had been stolen.

The social worker had stolen the cash from the victim's bank accounts, stolen her car, and had even sold her home. The defendant was sentenced to a total of three years and three months' imprisonment. The defendant appeared again before the crown court for a confiscation hearing.

The court found that the defendant had a criminal lifestyle and had benefited from their criminal conduct by £67,599. A confiscation order was made in that sum. The court also made a compensation order in the sum of £67,599 and ordered that £54,081.72 of it must be paid from monies recovered in satisfaction of the confiscation order.

Both orders have now been settled.

## Time considerations

A confiscation investigation usually takes place in parallel with the related criminal investigation, although there must be a conviction in the criminal case before the confiscation proceedings can be instituted. There is a two year time limit on completion of the confiscation process from the date of conviction, but there are certain exceptions.

Note – was the offence committed on or after 24 March 2003?

This is the date from which the relevant parts of POCA apply, and asset recovery may still be considered. Confiscation may still be possible if the offence was committed before that date, under earlier legislation. Investigators should contact their FIU for advice in this area.

## What are criminal lifestyle offences?

A confiscation investigation is mandatory under [section 75](#) of POCA. A full list of criminal lifestyle offences is available in Schedule 2 of POCA, some of which are:

- drug trafficking (but not simple possession or cultivation of cannabis)
- money laundering (but not section 329 – acquisition, use and possession)
- directing terrorism
- people trafficking (assisting illegal entry under the Immigration Act 1971, offences under the Asylum and Immigration Act 2003, offences under the Gangmasters (Licensing) Act 2004)
- arms trafficking
- counterfeiting
- intellectual property (copyright)
- pimping, brothel keeping (under the Sexual Offences Act 1956) and child sex offences (under the Sexual Offences Act 2003)
- blackmail
- inchoate offences (attempts, conspiracies and incitement in respect of these offences)

Otherwise, a person is considered to have a criminal lifestyle in the following circumstances:

- an offence that was committed over a period of at least six months (for example, fraud offence or a series of thefts) to the value of £5,000 or more
- there is conduct forming part of a course of criminal activity – this applies when a person is charged with four or more other offences in the current proceedings, in addition to the offence being heard, where the total benefit is £5,000 or more

- there is one offence in the current proceedings, and a conviction for a minimum of two separate offences in the last six years with a benefit of £5,000 or more

## What is particular criminal conduct?

Under [section 76\(1\)](#) of POCA the term criminal conduct is defined as conduct which:

1. constitutes an offence in England and Wales, or
2. would constitute such an offence if it occurred in England and Wales.

However, the term particular criminal conduct refers to the actual offences that are proved in the current proceedings. It is used when there is no criminal lifestyle label but the offender has to pay a confiscation order to the monetary value connected with:

- the offence(s) they are convicted of, and/or
- any others taken into consideration (TICs) under [section 76\(3\)\(C\)](#) of POCA

## Role of the financial investigation unit

In addition to providing advice on the suitability of cases, on restraint, and on investigative strategy, in most forces the FIU:

- records the opening of a confiscation investigation on the JARD
- provides assistance or advice regarding the execution of search warrants
- conducts confiscation investigations
- liaises with the CPS regarding their application to court for restraint orders
- applies to court for production orders or account monitoring orders, customer information orders and warrants
- gathers specific financial information on a defendant (subject to force policies and criteria)
- calculates the benefit amount
- identifies how much the defendant has available to pay back (the available amount)
- prepares statements of information
- liaises with court for timing of financial hearings
- attends the confiscation hearing(s)
- conducts follow-up actions

- assists with enforcement of any confiscation orders (liaise with the courts and officers who may have recovered assets, such as cash or jewellery, during the course of the criminal investigation)
- conducts international enquiries concerning assets that have been hidden or held overseas
- regularly revisits outstanding confiscation orders
- to follow up cases of non-payment and ensures that the default sentence is applied

## The benefit amount

### Further information

The case of [R v Waya \(2012\) UKSC 51](#) provides direction to investigators and prosecutors when calculating of benefit amount. The results of this case concern proportionality of ownership and issues associated with the accumulation of interest.

The benefit amount is the value of the property that the person obtained either from their particular criminal conduct or from their general criminal conduct (criminal lifestyle). If the court finds that the defendant has a criminal lifestyle, it will decide whether he or she has benefited from their general criminal conduct and, if he or she has benefited, calculate the benefit amount. If however, the court finds that the defendant does not have a criminal lifestyle, it will decide whether he or she has benefited from their particular criminal conduct and, if he or she has benefited, calculate that benefit amount.

If the offender is found guilty of any criminal lifestyle offence such as drug trafficking, money laundering or brothel keeping, the court must make certain assumptions about the offender's wealth and assets, and how they earned those assets. However under [section 10\(6\)](#) of POCA, the court must not make a required assumption in relation to particular property or expenditure if:

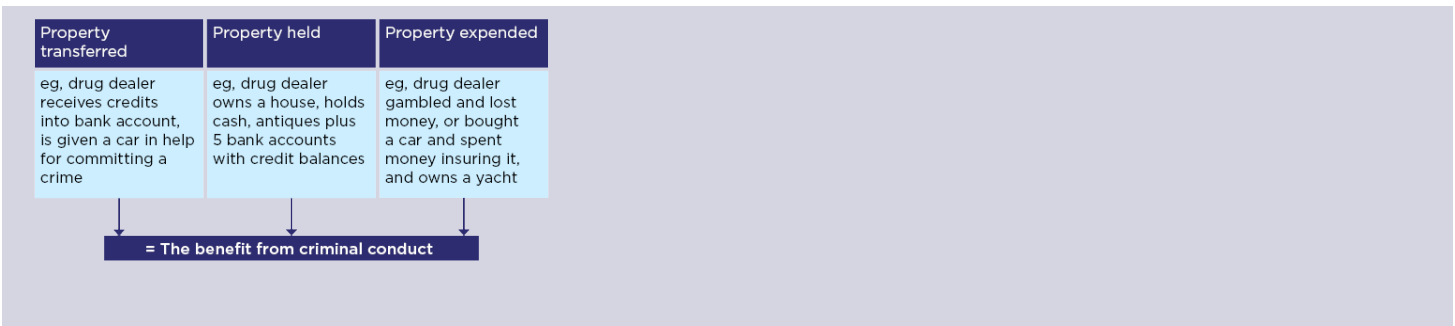
1. the assumption is shown to be incorrect, or
2. there would be a serious risk of injustice if the assumption were made.

The court assumes that up to a maximum of six years before the defendant was charged, indicted or summoned for an offence, any property transferred to, held by, or expended by them was obtained as a result of general criminal conduct.

Note: property held would include assets that have increased in value over the period of time. Expenditure includes all actual expenditure incurred at the time of spending within the period of six

years, irrespective of whether assets purchased had decreased in value since the date of the initial purchase. Additionally, there is a fourth assumption that the property is free of other interests such as joint ownership (by an innocent party) or a mortgage.

The flow chart shows how the assumptions are used to calculate this benefit amount in general criminal conduct cases.



## Calculating the benefit amount (case study)

At a small, local car boot sale, security investigators employed by the music sector investigated the sale of counterfeit music media. The operation resulted in the arrest of three people identified as selling counterfeit goods. The individuals were found to have a large number of counterfeit goods in their vehicle. Simultaneous searches of their houses found multi-burners set up to copy music and film media.

An average day's takings were established and multiplied by the number of car boot sales operated on site. These were cross-referenced to dates when industry investigators had visited the site. The assumption made was that one seller had visited the site on every occasion that it was open.

A £30,000 benefit was declared at court and a confiscation order made for that amount. The defendant pleaded guilty to counterfeit offences and money laundering.

## The confiscation hearing

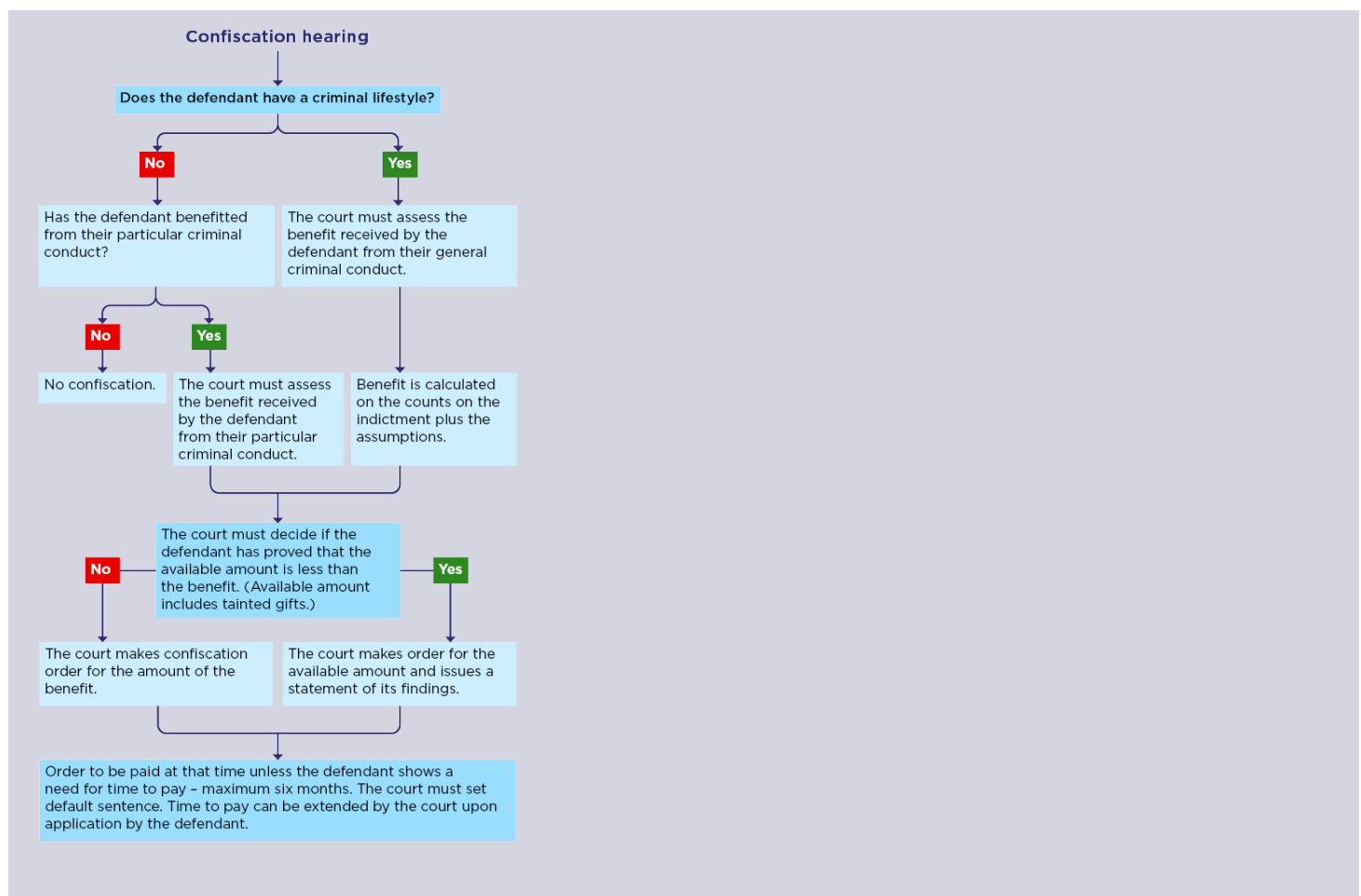
A confiscation hearing is part of the sentencing procedure and is not a trial. At the confiscation hearing the judge sets the amount of the benefit in the case.

If the defendant wishes to challenge the amount of benefit under consideration, the onus is on them to prove, on the balance of probabilities, that the benefit figure should be less than the amount being considered. Once the amount of the benefit has been set, the judge then imposes a

confiscation order in either the total amount of the benefit, or in the available amount, depending upon whether the benefit figure exceeds the available amount. The available amount is the total value of all the defendant's existing assets.

The FI who conducted the confiscation investigation is responsible for:

- attending all confiscation hearings
- liaising with counsel
- the direct presentation of evidence, and
- the provision of technical advice if necessary



## No assets held

There is no lower minimum amount for triggering a confiscation investigation. Some police forces apply for a nominal confiscation order in cases where a minimal amount of assets has been identified. The nominal confiscation order could be for as little as £1 as there is no lower limit.

However, these nominal orders should only be obtained only if there is a realistic chance that assets may be found in the future. Speculative orders should be avoided.

A case can be revisited at any time in the future when the offender has acquired wealth. This is used mainly as a preventive measure as a disincentive to the convicted person to commit further crime.

Outstanding benefit amounts should be added to the offender's PNC record with an asset marker (shown as 'AS'). When the offender comes to the notice of the police in a newly acquired vehicle, for example, the previous confiscation proceedings may be revisited, depending on cost implications (for example, the cost involved in recovering a low value car).

### **Eventual payback (case study)**

The police revisited a case of two persistent offenders previously convicted of low level crime and drug dealing. Their mother died and an insurance premium was paid out. As a nominal confiscation order had been made, the police were able to reapply the confiscation proceedings and ensure that the offenders paid back their benefit from crime using their recently acquired wealth.

## **Revisiting a case**

If the amount that a criminal made from their activity is higher than the amount they had available at the time the confiscation order was made, they will remain liable for confiscation proceedings in the future. The police can apply for a further confiscation order to recoup the value of the original criminal benefit. Equally, if the person has not paid the entire sum of their confiscation order, they remain liable for it.

If it comes to the attention of the authorities that a person has acquired new wealth (such as inheritance or through a lottery win), the remainder of the confiscation order will be enforced. Some forces have adopted a policy of reviewing outstanding confiscation cases once every three months, where resources permit.

Trigger points for revisiting cases include:

- PNC entry regarding outstanding benefit in respect of a confiscation case ('AS' asset markers)
- local intelligence system entry regarding outstanding benefit in respect of a confiscation case

- a suspicious activity report (SAR) is received, indicating that a person has assets that can be cross-checked to see if there is an outstanding confiscation order against the person

## Next steps

Investigators should contact their FIU whenever they discover that a person who has had confiscation proceedings against them has gained new assets.

The confiscation process may be reviewed in the following circumstances:

- no order made – reconsideration of case
- no order made – reconsideration of benefit
- order made – reconsideration of benefit
- order made – reconsideration of available amount

If the first three points apply, the application must be made within 6 years of the date of the conviction. The available amount can be reconsidered at any time. The assumptions regarding expenditure according to section 10 of POCA do not apply at this point.

## Referral to the financial investigation unit

Confiscation case referral policies and procedures vary from force to force. Investigators should consult their FIU when referring a case. Most FIUs will ask the officer in the case to conduct a financial interview in order to provide the following essential information:

- full name, date of birth, address and telephone numbers of the defendant and their spouse or partner
- if they are a tenant or a home-owner, and if so, the amount of rent or mortgage per month, to whom that sum is payable and the method of payment (cheque or cash or direct debit)
- amount of time at current address
- other property owned or rented
- occupation
- employer
- salary or income (including benefit)
- national insurance number
- other income

- the offence
- the date and time of arrest
- the nature and value of the crime committed
- details of cash in the possession of the suspect
- who it was retained by or reasons for not retaining it
- details of bank and building society accounts of the defendant and spouse or partner including account number, sort code and bank address
- debit or charge cards held, including the company and account number
- credit or charge cards held, including the company and account number
- a list of assets, for example, property, stocks and shares, endowments, assurance and insurance policies, jewellery and antiques, along with estimates of value and location
- details of vehicle, whether owner or keeper, type, registration number, date purchased, purchase price
- any periods in prison over the last six years, with dates from and to
- officer's notes (including any facts of interest or personal knowledge)

## Confiscation investigation process

The process of a confiscation investigation may be described in the following stages:

1. Instigate a confiscation investigation.
2. Develop an investigative strategy.
3. Restrain assets.
4. Gather financial information.
5. Develop a financial tasking profile of the suspect.
6. Calculate the benefit amount.
7. Prepare the statement of information.
8. Confiscation hearing held and confiscation order issued.
9. Order enforced.
10. Case revisited.

## Restraining assets

The power to restrain assets is an essential tool in the confiscation process. Restraint is necessary to stop a person who has benefited from their crime from being able to dissipate or spend their

money, or sell, transfer or hide their assets or property before it can be confiscated from them. A confiscation order is ineffective if there are no assets left to confiscate, so action is required at the earliest possible moment.

A restraining order can be obtained by an accredited financial investigator (AFI). The order requires a superintendent's authority, and can be requested before criminal charges are applied.

Advice should be sought from the CPS as soon as the criminal investigation begins. The investigator should approach a senior CPS lawyer at an appropriate level in accordance with their local protocol. FIUs normally consult the CPS on behalf of the police in matters of restraint.

Restraint orders are generally applied for by the CPS. The application is supported by a statement made by an AFI.

Note – when considering restraint, investigators should be aware that this will alert the suspect to the existence of the investigation.

## Order enforcement

If the CPS makes an application to the court to appoint a receiver, the police will provide assistance within the timescale agreed. This includes obtaining any information or evidence needed to progress the application, such as obtaining an up-to-date valuation of current assets, and attendance at court to assist in the proceedings if required by the CPS.

Police actions to support confiscation order enforcement include assisting with:

- provision of information about assets available to the enforcement agency
- up-to-date values for assets such as houses and vehicles, and providing bank account balances
- tracing a person if they have left prison
- realising sums held by the police in bank accounts, which may have been seized during the investigation process
- the disposal of assets held by the police in compliance with any restraint in the case

## Non-compliance

The offender is responsible for paying the confiscation order amount to the enforcement agency. After non-compliance, however, the magistrates can either grant the defendant more time to pay, or

order them to serve the default sentence as indicated below:

Amount	Maximum term
£10,000 or less	6 months
More than £10,000 but no more than £500,000	5 years
More than £500,000 but no more than £1 million	7 years
More than £1 million	14 years

Note – even when a default sentence is served, the outstanding amount is still owed.

See Guidance for Stakeholders – [Amendment of the Proceeds of Crime Act 2002 by the Serious Crime Act 2015](#).

## Tags

Investigation