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Guidance

## Asset recovery powers for prosecutors: guidance and background note 2009

Guidance for prosecutors and investigators on their asset recovery powers under Section 2A of the Proceeds of Crime Act 2002.

From:

[Attorney General's Office](#)

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Wales, England, and Northern Ireland

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## Introduction

This guidance is given by the Secretary of State to the Serious Organised Crime Agency (SOCA), and by the Attorney General to the Director of Public Prosecutions, the Director of Revenue and Customs Prosecutions, the Director of the Serious Fraud Office and the Director of Public Prosecutions for Northern Ireland, in accordance with section 2A of the Proceeds of Crime Act 2002.

In the case of the Director of Public Prosecutions for Northern Ireland, the guidance is given by the Attorney General in her capacity as Attorney General for Northern Ireland. In this guidance, as in section 2A, SOCA and the Directors are referred to as 'relevant authorities'.

In any case where proceeds of crime have been identified but it is not feasible to secure a conviction, or a conviction has been secured but no confiscation order made, relevant authorities should consider using the non conviction-based powers available under the Act.

1. The reduction of crime is in general best secured by means of criminal investigations and criminal proceedings. However, the non-conviction based asset recovery powers available under the Act can also make an important contribution to the reduction of crime where (i) it is not feasible to secure a conviction, (ii) a conviction is obtained but a confiscation order is not made, or (iii) a relevant authority is of the view that the public interest will be better served by using those powers rather than by seeking a criminal disposal.
2. In any case where proceeds of crime have been identified but it is not feasible to secure a conviction, or a conviction has been secured but no confiscation order made, relevant authorities should consider using the non conviction-based powers available under the Act.
3. In any case where it appears that a conviction might be secured, relevant authorities will consider whether or not it is in the public interest to conduct a criminal investigation and (at a later stage, if sufficient evidence is obtained) a prosecution. In these circumstances relevant authorities may also consider whether or not the public interest might be better served by using the non conviction-based powers available under the Act, applying the principle that a criminal disposal will generally make the best contribution to the reduction of crime.
4. Any assessment of where the public interest lies should include consideration of all relevant factors. The Code for Crown Prosecutors (in Northern Ireland, the Code for Prosecutors) lists some of the factors that might be relevant in deciding whether or not a prosecution is in the public interest. The same factors might also be relevant in considering, at any stage, whether or not the non conviction-based powers should be used. A vital underlying consideration is the need to retain public confidence in the criminal justice system as a whole, and in the fair and proper use of the non conviction-based powers. In particular, care must be taken not to allow an individual

or body corporate to avoid a criminal investigation and prosecution by consenting to the making of a civil recovery order, in circumstances where a criminal disposal would be justified under the overriding principle that the reduction of crime is generally best served by that route, and in accordance with the public interest factors in the relevant prosecutors' Code.

5. For illustrative purposes only, the following is a non-exhaustive list of circumstances in which use of the non-conviction based powers might be appropriate because it is not feasible to secure a conviction: \* the only known criminality is overseas, and there is no extra-territorial jurisdiction to pursue a criminal case in the courts of England and Wales or Northern Ireland \* there is no identifiable living suspect who is within the jurisdiction or realistically capable of being brought within the jurisdiction \* proceeds of crime can be identified but cannot be linked to any individual suspect or offence \* a law enforcement authority considers that an investigation could not generate sufficient evidence to create a realistic prospect of conviction \* a criminal investigation has been conducted but the prosecuting authority considers that there is insufficient evidence to create a realistic prospect of conviction \* a prosecution has been conducted but has not resulted in a conviction
6. Again for illustrative purposes only, the following is a non-exhaustive list of circumstances in which a conviction is feasible, but use of the non conviction-based powers might better serve the overall public interest: \* using non-conviction based powers better meets an urgent need to take action to prevent or stop offending which is causing immediate harm to the public, even though this might limit the availability of evidence for a future prosecution \* it is not practicable to investigate all of those with a peripheral involvement in the criminality, and a strategic approach must be taken in order to achieve a manageable and successful prosecution \* civil recovery represents a better deployment of resources to target someone with significant property which cannot be explained by legitimate income. \* the offender is being prosecuted in another jurisdiction and is expected to receive a sentence that reflects the totality of the offending, so the public interest does not require a prosecution in this country
7. These are examples, and are not intended to include all of the circumstances in which the non conviction-based powers may be used. Every case is different, and must be decided by the relevant authority on its own facts. SOCA is able to seek advice from the relevant prosecuting authority before making a decision, where necessary.
8. In using the non conviction-based powers, relevant authorities must have regard to, and seek to minimise, any potential prejudice to a related or potential criminal investigation or criminal proceedings. So far as it is practicable to do so, the relevant authority should: \* liaise with any relevant law enforcement and/or prosecuting authorities before exercising any of its operational functions (other than the seizure of cash), in order to enquire whether doing so would prejudice a criminal investigation or criminal proceedings, and give due weight to any advice so received \* keep under review the extent to which taking, continuing or refraining from any course of action has a potential to prejudice a criminal investigation or criminal proceedings and avoid such prejudice where possible; and \* ensure where possible that information relevant to a criminal investigation or criminal proceedings is disclosed to the relevant law enforcement or prosecution authority at the earliest practical opportunity
9. This guidance does not prohibit a criminal investigation by a law enforcement authority being carried out at the same time as a civil recovery and/or tax investigation. Nor does it prevent civil recovery and/or tax proceedings being instituted where a criminal investigation by a law enforcement authority is being

carried out at the same time into unrelated criminality, subject to the duty on relevant authorities to seek to minimise prejudice to criminal investigations and proceedings. Similarly this guidance does not prohibit criminal proceedings being instituted or carried on by a prosecuting authority at the same time as a civil recovery and/or tax investigation is carried out.

10. In no circumstances may criminal and civil/tax proceedings be carried on at the same time in relation to the same criminality. Where criminal proceedings have been stayed by a court, or cannot progress for example because the defendant has absconded, they are not being carried on for the purposes of this prohibition.
11. A relevant authority may agree to accept a reduced sum in satisfaction of a civil recovery claim if satisfied that: \* the sum is reasonable, having regard to all relevant circumstances including the chances of recovering the full amount claimed and the time and public funds likely to be expended in attempting to do so; and \* accepting the reduced sum would not damage public confidence

## **Background and summary**

The following gives the statutory background and purpose of the guidance ‘Asset recovery powers for prosecutors’ - it is not part of the guidance itself.

### **Section 2A**

Section 2A of the Proceeds of Crime Act 2002 requires the Serious Organised Crime Agency and specified prosecuting authorities to exercise their functions under the Act in the way which they consider is best calculated to contribute to the reduction of crime. In accordance with section 2A, the Home Secretary and the Attorney General have given guidance to SOCA and the prosecuting authorities respectively to assist them in exercising their functions. They must have regard to the guidance in considering what action is best calculated to contribute to the reduction of crime.

The scale of organised crime in the UK is such that law enforcement and prosecuting authorities need to deploy all the legal powers at their disposal intelligently in order to maximise the impact of asset recovery on crime reduction. SOCA and the prosecuting authorities have a wide discretion as to how they do this, and it is essential that they retain the flexibility to take the best approach to each individual case as it arises. However, there is also a need to ensure that decisions are taken in a principled fashion, with the public interest as the primary consideration. Now that several authorities are entitled to use the civil recovery powers under the Act, there is further benefit in providing a framework of guidance to encourage consistency of approach.

### **The powers**

The Act creates 4 asset recovery regimes each of which has its own features which are relevant in considering the best approach to take in any given case:

### **Confiscation**

Confiscation follows conviction for an offence. In making an order the court must decide whether the defendant has a ‘criminal lifestyle’, based on a number of legislative triggers,

including specific types of offences. In cases which trigger the criminal lifestyle provisions, the court applies assumptions about property transferred to the defendant in the 6 years up to the day proceedings were commenced when assessing the 'recoverable amount', unless the assumptions are shown to be incorrect by the defendant or there would be a serious risk of injustice if they were applied. Applying the assumptions may mean that a confiscation order is made in a larger sum than the proceeds of the specific crime for which the offender was convicted.

Where the court decides that the offender does not have a criminal lifestyle the court must decide whether the offender has benefited from his particular criminal conduct - the specific crime for which he was convicted.

Where the offender fails to pay the confiscation order they may be subject to a sentence of imprisonment (the 'default sentence'). This is not an alternative to paying the order, and the order remains extant despite the serving of the default sentence.

### **Civil recovery**

Civil recovery is a form of non conviction-based asset forfeiture which allows for the recovery in civil proceedings before the High Court of property which is, or represents, property obtained through unlawful conduct. Importantly, the proceedings are against the property itself (in rem) rather than against an individual (in person).

These proceedings are civil litigation and the civil standard of proof (the balance of probabilities) applies. The court, however, will still require cogent evidence in order to be satisfied that property is on balance more likely to be the proceeds of unlawful conduct than not. To prove that property was obtained through unlawful conduct, it is not necessary to prove the commission of a particular criminal offence by a particular person on a particular occasion. It is sufficient to prove that the property was obtained through offending of a particular type (drug trafficking, fraud etc). This cannot be done solely on the basis that the person holding the property has no identifiable lawful income to warrant their lifestyle. However, the absence of any evidence from the person to explain their lifestyle, or the giving of a false explanation, allows the court to infer that the source of the income was unlawful. As the action is against the property and not the person, the person who holds the assets which are the subject of the order might not be the person who carried out the unlawful conduct, and a civil recovery order is not a conviction or a sentence.

The cost and duration of civil recovery proceedings varies from case to case depending on the circumstances and complexity of the case. Civil recovery proceedings are often, due to their nature, contested and may in certain circumstances involve protracted litigation. In other cases however, an order can be obtained quickly and simply where the other party consents to it.

### **Cash forfeiture**

Cash forfeiture generally provides a simple and speedy non conviction-based magistrates' court procedure for recovering seized criminal cash. Any party wishing to contest the forfeiture must demonstrate to the court that the cash comes from a legitimate source.

Cash forfeiture usually sits outside criminal proceedings. However, a person knowingly having possession of criminal property commits a money laundering offence, so a cash seizure creates the potential for a criminal investigation which may result in the making of a confiscation order in a larger sum than the seized cash.

## **Criminal taxation**

Criminal taxation is also a non conviction-based power, but it does not result in criminal property being recovered. Instead it allows tax to be charged on a person's income, profits or gains where there are reasonable grounds to suspect that they arise or accrue from criminal conduct on the part of that person or another.

Only SOCA is entitled to exercise the criminal taxation powers under the Act, but HMRC retains all its usual powers in respect of taxation. HMRC can issue tax assessments against taxpayers who may be linked to criminal activity as a means of disrupting their activity, without making any assertions regarding the link between the income or gain and the criminality. The issuing of a tax assessment by SOCA or HMRC is based on income or gain over a period of up to 20 years.

## **The guidance**

As is required by section 2A, the guidance indicates that the reduction of crime is in general best secured by means of criminal investigations and criminal proceedings. The benefit of investigation with a view to prosecution should always be considered by a law enforcement agency faced with suspected criminality. Where offenders are tried and convicted in the criminal courts, and sentenced in line with the seriousness of the offence, this is generally the best and fairest way to serve the public interest and secure public confidence in the system of justice.

However, the guidance recognises the contribution to harm reduction that can be made by proper use of the non-criminal powers available under the Act. The guidance requires SOCA and the prosecuting authorities to consider using these powers where a criminal disposal is not feasible, and gives examples of the circumstances in which this might occur.

In cases where criminal investigation and prosecution is feasible, it may be deemed by the relevant authority that a non-conviction based approach is more desirable, taking into account the overriding considerations of harm reduction and the public interest. This is consistent with the approach taken in the [Code for Crown Prosecutors](#) to the decision whether or not to prosecute. The Code provides that a prosecution will usually go ahead unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour, or it appears more appropriate in all the circumstances of the case to divert the defendant from prosecution.

The guidance is intended to remove any perception that the use of civil recovery can only ever be considered after a full criminal investigation has been completed and a decision not to bring a prosecution has been taken. There are circumstances in which the public interest may be best served by an early decision to use civil recovery powers rather than to pursue a criminal investigation. Again, the guidance gives examples. In a case where many people have played a part in a complex criminal enterprise, for instance, the need to ensure that the investigation and any future prosecution is manageable may mean that strategic decisions

have to be taken at an early stage about the scope of the investigation. It may better serve the public interest to use civil recovery against peripheral participants who have enabled or facilitated the crime, rather than including them in the criminal investigation. Special care is needed to ensure that any decision not to pursue the normal criminal process can be regarded as reasonable. This is particularly the case where an individual or company consents to the making of a civil recovery order, as the impression might be created that they have avoided criminal liability solely because of their ability to pay the order.

In addition to discussing the circumstances in which use of the non conviction-based powers under the Act might be appropriate, the guidance sets out the circumstances in which the different powers may be used concurrently. It also sets out the principles that authorities should apply in considering whether or not to settle civil recovery proceedings for a sum less than that claimed.

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