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**Crown Office and
Procurator Fiscal Service**



of Northern Ireland

Assistance by UK Prosecutors in Proceeds of Crime Casework

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Foreword

This guidance, which is a UK interagency product, has been designed for the benefit of those who wish to recover proceeds of crime held within the UK jurisdiction.

It is primarily directed to those who are resident outside the UK and thus may not be familiar with the legislation and the relevant procedures and authorities; however it will no doubt also be of benefit to those operating within the UK.

It is intended that this guidance will be widely distributed to interested parties, particularly criminal justice practitioners, and the International Association of Prosecutors, which is the only world-wide association of Prosecutors, will assist in this regard.

It will be regularly reviewed and updated and will be available electronically at www.iap-association.org.

It is hoped that the availability of this publication will inspire other jurisdictions to produce similar guidance so that the cross jurisdictional recovery of criminally obtained assets can be more readily achieved.

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UK System – An Overview

The UK's confiscation procedure is **conviction-led**. The system is **value-based**, which involves assessing the value of the defendant's proceeds of crime and making an order against the offender to pay that amount.

It is a **mandatory system**. If an offender is convicted of any offence from which he has benefited in proceedings before the court and the prosecutor asks the court to proceed with confiscation, the court must follow the scheme laid down by the Proceeds of Crime Act 2002 (PoCA).

PoCA requires the court to determine at the outset whether the offender has a **criminal lifestyle**. If not, then his confiscation order is determined by calculating the benefit he derived from the offences he committed and then in making an order in that amount, unless the offender can establish, on the balance of probabilities, that he does not have the means to pay such an order. In such a case, the confiscation order is made in a sum equivalent to his means.

If the offender has a **criminal lifestyle**, then his benefit from his offending is calculated by reference not just to the offences he has just been convicted of but also to assumptions about his property holdings, his income and his expenditure.

A defendant is deemed to have a criminal lifestyle if any of the following conditions are satisfied:

- He is convicted of certain specified offences including drug trafficking, money laundering and people trafficking; or
- He has been convicted in the same proceedings of four or more offences from which he has benefited to a combined amount of £5,000 (£1,000 in Scotland) or more; or
- He has, over a six year period, committed three offences from which he has benefited to a combined amount of £5,000 (£1,000 in Scotland) or more; or
- He has committed a continuing offence over a period of at least 6 months from which he has benefited, by £5,000 (£1,000 in Scotland) or more.

The assumptions which can then be drawn when calculating his benefit where the offender has a criminal lifestyle are that:

- any property held by the offender at the date of his conviction was obtained as a result of his general criminal conduct
- any property transferred to the offender in the 6 years leading up to the commencement of proceedings was obtained as a result of his general criminal conduct
- any expenditure by the offender in the 6 years leading up to the commencement of proceedings was made from the proceeds of his general criminal conduct.

It is for the prosecution to prove to the **civil standard** (on the balance of probabilities) that there is property held by the offender or that was transferred to the offender or that the offender has incurred expenditure. The onus is then on the offender to displace the

assumption by showing it is incorrect, i.e. that the property or expenditure is not derived from criminal conduct. The offender must provide clear and cogent evidence and cannot simply make unsubstantiated assertions. As a safeguard, the court must not make an assumption if it is satisfied that there would be a serious risk of injustice if it were made.

Types of Assistance

The UK is able to provide a wide range of legal assistance to judicial and prosecuting authorities in other countries in proceeds of crime cases. It should always be remembered that the UK has three main judicial systems: England and Wales; Scotland; and Northern Ireland.

Although the systems are similar, there exist some variations between them. This guide provides an overview of arrangements in all three jurisdictions.

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

- Identifying and tracing assets. Such assistance is provided, through conventional channels, by law enforcement and is not covered further in this guide.
- Protecting assets in the UK from dissipation so they are available to pay the requesting State's order. This assistance is provided by prosecutors and is covered further below.
- Registering and enforcing the requesting State's order against assets in the UK. This assistance is provided by prosecutors and is covered further below.

The UK does not require reciprocity and can, depending on the type of assistance required, assist any country or territory in the world, whether or not that country is able to assist the UK. Most forms of legal assistance can be provided without bilateral or multilateral agreements, conventions or treaties.

Central Authorities

The UK Central Authority (“UKCA”) acts as a central point for the receipt of formal requests for assistance in England and Wales, in Northern Ireland and, in some cases, in Scotland. It is responsible for:

- Ensuring that requests for assistance conform to the requirements of UK law and the UK’s international obligations.
- Ensuring that execution of requests is not inappropriate on public policy grounds (for example, requests involving double jeopardy will not be executed, nor those which affect our national security or other essential interests).
- Deciding how, and by which agency (police, courts, and prosecuting authority) requests might most appropriately be executed.

Requests for restraint and confiscation assistance must be made by a Letter of Request. The request may be sent in advance by fax or e-mail but an undertaking should be given to send the original request within a reasonable time. Requests and any supporting documents must be in English or submitted with an English translation.

If the UKCA accepts the request for execution it will refer the request to a relevant agency to represent the requesting State in court proceedings.

In Scotland, the Crown Office’s International Co-operation Unit (“ICU”) performs a similar function to UKCA where the requesting State recognises Scotland as having a separate central authority.

Determining the Prosecutor

The UK gives effect to overseas requests for restraint and confiscation through modified domestic legislation contained in the **Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005** (“the Order”).

(i) England and Wales

Under Articles 6 and 18 of the Order, the UKCA may refer an external request or order concerning relevant property in England and Wales to the Director of Public Prosecutions (Head of the Crown Prosecution Service)

Where it appears to the UKCA that the request:

- is made in connection with criminal investigations or proceedings which relate to an offence involving serious or complex fraud, and
- concerns relevant property in England and Wales,

the UKCA may refer the request or order to the Director of the Serious Fraud Office to act on it.

(ii) Scotland

Requests for assistance where the accused has property in Scotland should be submitted either to UKCA or the ICU directly, depending on who the requesting State recognises as the appropriate central authority.

Where a request is submitted to UKCA, it will forward it to the ICU. Once the ICU has received the request, it will refer it to the Lord Advocate (the Head of the Crown Office and Procurator Fiscal Service). Articles 56 and 66 of the Order empower the Lord Advocate to act on such requests. In practice, the Lord Advocate will assign the Serious and Organised Crime Division, Proceeds of Crime Unit to act on it.

(iii) Northern Ireland

Under Articles 93 and 104 of the Order, UKCA may refer an external request or order concerning relevant property in Northern Ireland to the Director of Public Prosecutions for Northern Ireland (the Head of the Public Prosecution Service) to process it.

Where it appears to the UKCA that the request:

- is made in connection with criminal investigations or proceedings which relate to an offence involving serious or complex fraud, and
- concerns relevant property in Northern Ireland, the UKCA may refer the request or order to the Director of the Serious Fraud Office to act on it.

Protecting Property from Dissipation

Restraint Orders

The UK court may make a restraint order prohibiting any specified person from dealing with relevant property which is identified in the external request or order if the following conditions are satisfied:

- the request identifies relevant property of the defendant/accused (in Scotland, the accused) in the UK jurisdiction from whom assistance is sought;
- either a criminal investigation has been started in the country from which the external request was made with regard to an offence or proceedings for an offence have been started in the country from which the external request was made and not concluded; and
- there is reasonable cause to believe that the defendant/accused named in the request has benefited from his criminal conduct.

In addition, the courts will not make orders unless they are satisfied they are necessary. This means that the court will need to be satisfied that, unless the order is made, there is a risk that the property identified in the request would be dissipated.

Property is relevant property if there are reasonable grounds to believe that it may be needed to satisfy an external order which has been or which may be made. Only property in the UK may be restrained; the courts have no jurisdiction to restrain a defendant from dealing with assets held overseas following an external request.

A restraint order may:

- be made only on an application by the person to whom the request was referred or a prosecutor to whom he has delegated the power to make the application;
- be made without notice to the defendant/accused on an application to a judge in a private sitting;
- make provision for the defendant's/accused's reasonable living expenses and his reasonable legal expenses only in connection with the restraint proceedings or the registration of an external order;
- (in England and Wales and in Northern Ireland only) include such orders (e.g. disclosure, repatriation) as the court believes is appropriate for the purpose of ensuring that the restraint order is effective.

The restraint order will continue in force until it is **varied or discharged** by a further order of the court. The court must discharge the order if the requesting state's criminal proceedings end without a confiscation order being made, if a confiscation order is not registered here for enforcement within a reasonable time, or if the requesting state's criminal proceedings are not started within a reasonable time.

England and Wales and Northern Ireland

As the application is made without notice, the person making the application (the applicant) is under a duty to give full and frank disclosure of any defence or other facts which mitigate against the grant of an order. This duty extends to facts within the applicant's knowledge and facts which would have been known on the making of reasonable inquiries.

The duty of full and frank disclosure is a continuing one which does not come to an end when the restraint order is made. The requesting country must let the UK prosecutor know immediately of any material developments. In particular, the UK prosecutor should be told immediately if the prosecution or investigation is discontinued, if there are any changes in the charges he faces, if he is acquitted or if no external confiscation order is made in the proceedings.

The court may also make any ancillary orders it considers necessary to ensure the restraint order is properly enforced. For example, the court may require the defendant to make a witness statement (in Northern Ireland, an affidavit) listing all the assets in the UK in which he has an interest and specifying their current location.

If granted, the order and witness statement in support must be served as soon as is practicable on the defendant and any other person affected by the order. It is therefore likely that the prosecutor dealing with the request will contact you to discuss the best way of effecting service.

If a restraint order is granted, the accused, or anyone else who is affected by the order can apply to the court to for it to be varied or discharged. These applications can be made on as little as two days notice to the UK prosecutor. It is therefore important that requesting countries respond promptly to any requests from the UK prosecutor for information or assistance to oppose such an application.

If any person served with or notified of a restraint order disobeys its terms, they may be sent to prison for up to two years or receive an unlimited fine. In Northern Ireland, such a person may be sent to prison, fined or have his or her assets seized.

Scotland

The prosecutor sets out in his application to the court a summary of the accused's criminality and why the Crown believes the accused has benefitted from his criminality. If granted, the order must be served as soon as is practicable on the accused and any other person affected by the order. It is therefore likely that the prosecutor dealing with the request will contact you to discuss the best way of effecting service. If a restraint order is granted, the accused can apply to the court to vary or revoke the order.

Management Receivership Orders

If the court makes a restraint order in respect of assets which are particularly complex or which require active management, the court may, on the application of the prosecutor, appoint a **management receiver** (in Scotland, a **management administrator**) to take control of and manage assets specified in the restraint order.

Management receivers/administrators may be given the following powers in relation to any property which is specified in the restraint order:

- power to take possession of the property;
- power to manage or otherwise deal with the property;
- power to start, carry on or defend any legal proceedings in respect of the property;
- power to realise so much of the property as is necessary to meet the receiver's remuneration and expenses.

In addition the receiver/administrator may be given power to enter any premises in the relevant UK jurisdiction to do any of the following:

- search for or inspect anything authorised by the court;
- make or obtain a copy, photograph or other record of anything so authorised;
- remove anything which the receiver is required or authorised to take possession of in pursuance of an order of the court.

A receiver/administrator is paid from the property under his control.

The prosecutor and UK receiver must comply with strict court imposed guidelines to ensure the costs of the receivership are reasonable and do not get out of hand.

Enforcing an External Order

An external order is an order which:

- is made by an overseas court where property is found or believed to have been obtained as a result of or in connection with criminal conduct, and
- is for the recovery of specified property or a specified sum of money.

The definition is broad enough to cover orders relating to specified property, orders made in a monetary amount and orders made outside criminal proceedings. In construing similar definitions in the pre-PoCA legislation, UK courts have focused on the purpose of the order rather than the nature of the proceedings in which it was made.

An application may be made by the UK prosecutor to the UK court to give effect to an external order by registering it with the court.

- Any authenticated overseas order, judgment or related document is admissible as evidence.
- The application shall include a request to appoint the person dealing with the request as the enforcement authority.
- The application may be made without notice to the defendant/accused to a judge in a private sitting.
- The court must order that any person affected by registration must be given notice of it.

The court must give effect to an external order by registering it where all the following conditions are satisfied:

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

If an external order is registered and not satisfied voluntarily, the prosecutor may ask the court to appoint an **enforcement receiver** (in Scotland, an enforcement administrator) to take possession of and to sell the defendant's property in such manner as the court may specify.

The court must not confer the power to sell property unless it gives any person who may hold interests in the property a reasonable opportunity to make representations to it.

The receiver pays the proceeds of realisation to the relevant prosecutor (in Northern Ireland, to the relevant Chief Clerk of the Crown Court) towards satisfaction of the external order. The prosecutor's / Chief Clerk's receipt of the proceeds reduces the amount payable under the order but he must apply the sums received as follows:

- In payment of the remuneration and expenses of a management receiver /administrator appointed, to the extent they have not been met out of the realisation of property during the management receivership.
- In payment of the remuneration and expenses of the enforcement receiver/administrator.

When an external order is enforced in the UK, the proceeds, in accordance with most international conventions, are disposed of according to domestic law.

The UK has asset sharing agreements with several countries. The UK believes that asset-sharing agreements are an excellent way to promote international co-operation and is happy to explore entering into asset sharing agreements with any interested states.

If there is no formal agreement with a country or territory, there are administrative arrangements that allow assets to be shared on a case-by- case basis.

A request for asset sharing may be made through law enforcement, prosecutorial or judicial co-operation channels.

Content of the Request

The content of the request will vary depending on the type of assistance required. Whilst UK prosecutors would welcome an opportunity to advise on the contents of a letter of request seeking their assistance, the following list is indicative of the type of information and material the UK will require before it can take forward restraint, receivership or enforcement proceedings on behalf of a foreign jurisdiction.

- Full details of the defendant (in Scotland, the accused) – including aliases, residence, nationality, date and place of birth;
- Details of the criminal investigation – details of suspected offences and nature and circumstances of investigation;
- Details of the criminal proceedings – offences charged and summary of evidence to support each offence charged;
- Grounds for belief that the defendant/accused has benefited from their criminal conduct;
- Identify relevant property in UK – including details of link to the defendant/accused and any third party interests;
- Authenticated copies of restraint, confiscation or other relevant orders;
- The basis upon which the external order will be calculated and the maximum amount in which it can be made;
- Details of property restrained in other jurisdictions together with their values.
- Grounds for belief that there is a risk of dissipation of the assets located in the UK.

. Civil Recovery

In addition to the conviction based confiscation regime, the 2005 Order also provides for the civil recovery of the proceeds of crime in cases where, for whatever reason, it is not possible to obtain a criminal conviction.

Civil recovery involves an application to the civil courts for the recovery of property obtained through unlawful conduct. "Unlawful conduct" includes conduct which occurs outside the UK and which is unlawful under the criminal law of that country.

The advantage of civil recovery proceedings is that they are not dependent on a criminal conviction and, indeed, may be brought even after the person holding the property has been acquitted of a criminal charge. Further, the standard of proof required is proof on a balance of probabilities.

The UK is also able to offer a wide range of assistance to colleagues in overseas law enforcement agencies in relation to civil recovery proceedings by obtaining property freezing orders and enforcing civil recovery orders against assets held in the UK. Requests should be made to the UK Central Authority and will be referred to the Crown Prosecution Service (CPS), the Serious Fraud Office (SFO) or to the Serious Organised Crime Agency (SOCA) to progress on behalf of the requesting country.

Obtaining Evidence

Under the Crime (International Co-operation) Act 2003 courts in the UK have power to make customer information orders and account monitoring orders for the purpose of providing evidence about banking transactions for use in criminal investigations and prosecutions overseas.

A customer information order is an order requiring a financial institution to provide information relating to a person who holds or has held an account or accounts at that institution and includes-

- The account number or numbers;
- The account holder's full name;
- His date of birth;
- His most recent address and any previous addresses;
- The date or dates on which he began to hold the account or accounts and the date or dates on which he closed them;
- The evidence of identity obtained by the financial institution in compliance with their duties under money laundering legislation;
- The same details in relation to any person who holds, or has held, the account or accounts jointly with him; and
- Details of any other accounts at that financial institution to which he is a signatory.

An account monitoring order is an order requiring the financial institution, for a specified period, not exceeding 90 days, to provide account information of a description specified in the order. The particular advantage of an account monitoring order is that it imposes an on-going duty on the financial institution to provide information about the conduct of the account throughout the period the order is in force.

Participating countries

Requests for customer information orders or account monitoring orders may only be made to the UK Central Authority by participating countries. For this purpose participating countries are defined as EU members states or any other country designated for the purpose by the Secretary of State.

Points of Contact

Central Authorities

England and Wales/Northern Ireland/ Scotland (some cases)

UKCA

5th Floor, Fry Building
Home Office
2, Marsham Street
London SW1P 4DF

Fax: +44 (0) 207 035 6985

Casework queries –

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Useful Websites

Proceeds of Crime Act 2002, c29	www.opsi.gov.uk/acts/acts2002/20020029.htm
Explanatory Notes to POCA 2002	www.opsi.gov.uk/acts/en2002/2002en29.htm
CPS Legal Guidance – money laundering and proceeds of crime work	www.cps.gov.uk
Anti-Money Laundering Strategy (HMT)	www.hm-treasury.gov.uk
The European Convention on Human Rights	www.conventions.coe.int
UKBA – MLA Guidelines	<a href="http://www.police.homeoffice.gov.uk/operationalpolic
ing/mutual-legal-assistance/?version=1">www.police.homeoffice.gov.uk/operationalpolic ing/mutual-legal-assistance/?version=1
International Association of Prosecutors	www.iap-association.org