

The Confiscation Investigation: Investigating the Financial Benefit Made from Crime

Karen Bullock *

Abstract

The court-ordered confiscation order is the primary means of recovering a defendant's financial benefit from crime. Whilst becoming more prominent within the police service, little is known about the role of the financial investigator and the operational processes which lead to a confiscation order. This paper examines the role of the financial investigators in confiscation proceedings along with their day-to-day tasks, training, status and profile within the police service. It identifies how cases are selected for financial investigation, distinguishing between proactive and reactive referrals. It sets out the powers that financial investigators have to investigate defendants' financial affairs and the information that they draw on in practice. The paper examines the difficulties in integrating confiscation investigations with mainstream policing activities, highlighting the role of competing targets, the performance management regime and potentially perverse incentives. The paper ends with a call for the development of a proactive rather than reactive asset recovery regime

Introduction

Background

Concern for investigating and confiscating the financial benefits made from crime is increasingly evident within the policing agenda. The justification being that to do so will deter offenders, prevent the funding of further criminal activity and – through removing the goods acquired through crime - communicate the message that crime does not pay.

The genesis of the proceeds of crime regime in England and Wales can be found in the Report of the Hodgson Committee in 1984 that recommended the introduction of confiscation powers. The Drug Trafficking Offences Act (1986) introduced confiscation provision for drug traffickers that was extended to non-drug cases by the Criminal Justice Act (1988). The provision for drugs cases was consolidated by the Drugs Trafficking Act (1994), and the Proceeds of Crime Act (1995) strengthened provision further and further aligned non-drug confiscation powers with drug powers. The system did not work well and the implementation of the powers was erratic (Levi and Osofsky, 1995). Reflecting this, in 2000 the Cabinet Office's Performance and Innovation Unit published an influential report recommending, amongst other things, that a legislative framework to strengthen the criminal confiscation regime, remove anomalies and enhance investigative powers was called for (Cabinet 44 Office, 2000). The subsequent 2002 Proceeds of Crime Act brought together a number of financial investigation techniques aimed at maximizing the opportunities for law enforcement personnel to recover the proceeds of crime. Financial investigations are primarily concerned with the seizure of cash; the use of anti-money laundering powers or with confiscating the proceeds of crime through the court-ordered confiscation order. The confiscation order is the primary means of recovering the criminal benefit from

offending and this paper focuses specifically on the processes which lead to obtaining one.

The confiscation investigation is not a main stream policing activity. HMIC (2004) noted that despite the increased interest and investment in recovering the proceeds of crime, the provisions of the 2002 Proceeds of Crime Act remain a mystery to many within the police. Indeed in terms of volume, confiscation orders are relatively few: according to the national criminal justice board, at the time of writing, police services in England and Wales had obtained 3,977 orders in the financial year 2007–08. Attempts have, however, been made to mainstream and strengthen the confiscation investigation.

- The Home Office made resources available for police services to recruit financial investigators (HMIC, 2004).
- The Assets Recovery Agency (now amalgamated as part of the Serious Organised Crime Agency) was set up to coordinate more complex cases.
- Regional Asset Recovery Teams were established to coordinate cross-border, multi-agency asset recovery cases (www.rart.gov.uk/).
- Training for substantial numbers of financial investigators was made available through the Assets Recovery Agency's Financial Investigation Centre of Excellence (www.assetsrecovery.gov.uk/).
- Further impetus has been generated through the Home Office incentive scheme which allows police services (and other law enforcement agencies) to keep a share of any money recovered.

This paper

This paper is concerned with de-mystifying the confiscation investigation. The role of the financial investigators in confiscation proceedings is examined along with their day-to-day tasks, training, status and profile within the police service. It looks at how cases are identified as suitable for financial investigations. It sets out the powers that financial investigators have to investigate defendants' financial affairs and the information that they utilize in practice. The paper looks at how financial investigations link to mainstream policing activities and examines attempts to mainstream the confiscation investigation. Aspects of the management of confiscation investigations are examined, including performance management and the role played by the incentive system.

This paper draws on the limited literature available on confiscation investigations and on qualitative interviews with financial investigators and others involved in confiscation investigations. Interviews were conducted with approximately 100 financial investigators in Surrey, Lancashire, South Yorkshire, Merseyside, Kent and Greater Manchester police services and with practitioners in the North West Regional Asset Recovery Team in May and June 2007. A small number of supplementary interviews were conducted with a purposefully selected sample of practitioners involved in other areas of the confiscation processes, including Crown Prosecution Service staff both in regional officers and central branches, Revenue and Customs prosecution staff, prosecution and defence counsel, the judiciary, HM court service staff responsible for enforcement, the enforcement taskforce (ETF) and a member of the Association of Chief Police Officers.

The confiscation investigation

The majority of confiscation investigations occur within a financial investigation unit that in turn is usually a branch of the economic crime unit in a police service (HMIC, 2004). The size and structure of financial investigation units have changed substantially since the introduction of 2002 Proceeds of Crime Act, due to the additional funding from the Home Office, the incentive scheme and efforts to raise awareness of the legislation (HMIC, 2004). Indeed, respondents in this study reported interesting and varied work loads, high levels of autonomy, enthusiastic and professional colleagues and decent levels of pay.

Confiscation investigations are conducted by financial investigators (who can be police officers or civilian staff) and have been trained and accredited by the Assets Recovery Agency. Although other officers are involved in the asset recovery process, confiscation investigations are most likely to be conducted by financial investigators - rather than other officers or civilian staff---because of the training and expertise that they have (Centrex/ACPO, 2006). Financial investigators must have appropriate accreditation or delegated powers to exercise some of the powers of financial investigation. They are trained to various levels and training covers, for example, legal and procedural requirements, the information that can be utilized in investigations, how to prepare and make applications for orders and the management of risk (see www.assetsrecovery.gov.uk/).

The primary role of the financial investigator with respect to confiscation proceedings is to determine whether a defendant has benefited from his or her criminal conduct, the monetary amount of that benefit and the assets that are available for recovery. Financial investigators also assist with the execution of warrants, they liaise with the Crown Prosecution Service with respect to restraining defendants' assets (if appropriate), they are involved in gaining permission to access information regarding a defendant's finances, they liaise with the court for listing of financial hearings and they might assist with enforcing orders (Centrex/ACPO, 2006).

Triggering a confiscation investigation: proactive versus reactive investigations

Confiscation investigations can be started in two sets of circumstances:

1. *An investigation into the financial benefit from 'specific criminal conduct':* a confiscation order could be granted to recover the monetary benefit of any crime.

2. *An investigation into the general criminal conduct, 'the criminal life style' of a defendant:* The 2002 Proceeds of Crime Act sets out certain crimes from which a defendant is assumed to have led a 'criminal life style': for example, drug, arms and people trafficking, money laundering, directing terrorism, counterfeiting and intellectual property right crimes, pimping and brothel keeping and blackmail.

Criminal life style investigations can also be triggered in certain sets of circumstances: where four or more offences are heard in the same proceedings and benefit exceeded £5,000; a single offence committed over a period of at least 6 months where the total benefit exceeded £5,000 or where a defendant has two or more similar convictions on separate occasions over the previous 6 years where the total benefit exceeded £5,000.

This study identified that cases come to the attention of financial investigators in a variety of ways which can broadly be categorized as reactive or proactive. In some circumstances, financial investigations commenced proactively via national intelligence model tasking or district-level intelligence packages. The ratio of

proactive to reactive investigations appeared to vary widely, with some financial investigators reporting that the majority of their work was proactive with others suggesting that they were brought into investigations reactively. This reflects the findings of HMIC (2004) who noted that 'in some police forces visited there were good links between proactive officers and the FIU. Equally, it was apparent that in some police forces that there was little consideration of POCA during proactive investigations' (HMIC, 2004, p. 60).

Financial investigators reported that cases were referred to them via national intelligence model tasking, particularly through level 2 tasking where offenders were operating across borders thus committing crimes in more than one basic command unit. Proactive operations were also generated through district-level intelligence packages. Respondents noted how intelligence was generated and developed by district intelligence officers who put together packages of information for the financial investigation teams. In both these sets of circumstances, the confiscation investigation would be conducted alongside the criminal investigation, prior to a defendant's arrest. Cases were also referred reactively, considered by the financial investigation unit on a case-by-case basis and commenced after the defendant had been arrested. Such cases were identified in a variety of ways:

1. *Ad hoc referrals from the police officers* : financial investigators described how arresting officers - along with custody officers - may contact the financial investigation unit if they believed that a case was suitable for confiscation proceedings. This was commonly where drugs or cash had been seized from the offender or from premises. In these cases, a supervisory officer in the financial investigation unit - usually a sergeant – would make the ultimate decision whether that case was suitable for financial investigation or not. Interviewees reported that referrals from police officers occurred much more regularly than they had in the past.

2. *Financial investigator searches* : financial investigators reported searching the police service crime information systems looking to identify cases that might be suitable for asset recovery. Investigators explained that they would trawl through police information systems, identify cases and check to see if they are suitable by following them up with the police officers who are responsible for them.

3. *Crown Prosecution Service referrals* : attempts have been made to increase the number of cases referred from the Crown Prosecution Service and respondents identified that cases are certainly referred this way. The Crown Prosecution Service has introduced a form that encourages duty prosecutors to consider financial investigations in all the cases that they deal with. Interviewees reported that many prosecutors are familiar with these forms and with the requirements of financial investigation. Nevertheless, financial investigator respondents noted that a referral at this stage is not always straightforward. Firstly, whilst it was apparent that many prosecutors were familiar with asset recovery, awareness varied between prosecutors and areas. Secondly, procedural problems were also apparent. Interviewees identified how prosecutors sometimes referred cases with little supporting information. Prosecutors might only have a summary of a case limiting the information available on which to make a decision regarding the suitability of the case. In addition, sometimes referral from the CPS was too late. A prosecutor might not receive the file on a defendant until well into a case, giving the defendant an opportunity to dissipate assets.

4. *Referrals at sentencing* : some cases are identified as suitable for confiscation by judges for financial investigation at the sentencing stage. This was reportedly increasingly common as judges are more aware of and likely to apply the provisions of the 2002 Proceeds of Crime Act. Again, financial investigators reported that in some cases this was too late. Firstly, as mentioned above, a defendant might have dissipated his or her assets by this stage. Secondly, judges sometimes make referrals to financial investigation units when a basis of plea has already been accepted. Whilst referring after plea is clearly legitimate, in certain circumstances this can limit the scope of a subsequent confiscation investigation. Financial investigators consistently reported that it is integral to an effective confiscation investigation that finances are considered early on, a point also made by the Centrex/ACPO (2006) practice guidance and HMIC (2004).

Determining the criminal benefit and available assets

Financial investigators have wide powers to determine a defendant's benefit from crime and, if he or she is found guilty, to recover that benefit (set out in ACPO/Centrex, 2006). Police officers may become aware that certain individuals are living a life style that would seem to be beyond their obvious means. Officers may come across detailed financial information about offenders in their day-to-day duties. For example, they may find bank accounts, cheque books, credit cards, evidence about expenditure on utilities, receipts and so on in house or car searches. Financial investigators also have certain powers that allow them to access more detailed information about defendants' financial affairs. Financial investigators can apply to the court for production orders to access any information held by the regulated sector or service providers (e.g., bank statements, credit and debit, insurance schemes, pensions, mortgages, etc). Account monitoring orders provide live information on a person's bank account for 90 days at a time. Other agencies and companies can also be required to disclose information held about a defendant.

Utilizing these powers, the role of the financial investigators is to estimate the financial benefit the defendant has made from crime and the amount that they have available for recovery. This is worked out in one of two ways depending on whether the case is a specific criminal conduct case or a life style case (ACPO/Centrex, 2006). In specific criminal conduct cases, a guilty defendant will be ordered to pay a sum equivalent to the monetary benefit of that crime. In life style cases, financial investigators assume that all property transferred to (e.g. credits into bank accounts), held by (e.g. property) or expended by (e.g. money spent including that spent on drugs) the defendants for 6 years prior to the offence for which they are charged was obtained as a result of criminal activities. Utilizing these assumptions in life style cases and the monetary value of acquisitive crimes in specific criminal conduct cases, the financial investigator will work out the defendant's criminal benefit. If the defendant is found guilty, the judge makes a confiscation order to that amount unless the defendant can show – on the balance of probabilities - that it should be less. Usually, the original benefit amount will not be available. If so, a confiscation order is made to reflect the assets that the defendant does have available. The original benefit amount, however, is retained and if in the future the defendant is found to have acquired assets, the financial investigator can apply to the court to recoup the original benefit figure.

The confiscation investigation and mainstream policing

Specialism versus mainstreaming

Financial investigators are usually concentrated in specialist central teams although teams are also found in divisions. Confiscation investigations are certainly conducted by specialists rather than incorporated as a mainstream policing activity. This was noted by the ACPO/Centrex (2006) guidance which points to the technical and specialist nature of the work. As noted in the introduction, there has been some concern that the confiscation investigation is not a mainstream policing activity, the implication being that it should be. HMIC (2004), for example, noted that despite a perception within the police service that asset recovery is aimed at the 'top end' of criminals, the identification of defendants for financial investigation could fall within everyday policing (HMIC, 2004). HMIC were not suggesting that all police officers conduct financial investigations (because it is a technical and specialist task) but that police officers look for opportunities to collect financial information during routine activities, identify suitable defendants and link to financial investigators where appropriate.

Generally, respondents considered that raising awareness of the proceeds of crime legislation was potentially beneficial because additional information about criminal expenditure and assets is gathered and opportunities for financial investigations are opened up. However, respondents reported mixed views with respect to the likelihood that financial investigations would be mainstreamed by police officers in this way. Financial investigators suggested that outside of the financial investigation unit, recovering criminal assets was not likely to be a priority. Police officers have too many responsibilities and too many things to consider whilst conducting their day-to-day business. Respondents felt that for many officers, confiscating defendants' assets was unlikely to be foremost in their minds. Financial investigators noted that at the point of arrest, police officers have many legal and practical issues to consider. Interviewees considered that many officers may not consider the possibility of confiscation at this stage and that if they do not, then the opportunity to recover assets will be gone.

Top-level versus low-level offending

Respondents noted that highly visible but relatively low-level drug dealers and/or users are routinely swept into the radar of confiscation proceedings. Financial investigators highlighted that these offenders are often living hand to mouth and have very little that could realistically be recovered. It should be stressed that confiscating the assets of low-level criminals (drug dealers or otherwise) is quite legitimate within the proceeds of the crime framework. Reflecting their concern to mainstream confiscation investigations, targeting this group of low-level offenders has indeed been encouraged by HMIC (2004). An outcome is however that large numbers of nominal (where defendants have no available assets, a nominal order is made for £1) and small orders are incorporated into the asset recovery regime. Whilst it could be argued (though it should be stressed that there is no evidence to show it is the case) that this acts as a deterrent against further offending, this tactic is time consuming and costly with little in return.

Incentives versus mainstream funding

Respondents felt that it was unlikely that asset recovery would become mainstreamed if it remains reliant on funding from the incentive scheme. On the one hand, these arrangements were considered to heighten the vulnerability of financial investigations as there is a risk that should the incentives be withdrawn, the activities would come to an end. Related, respondents indicated that, because of the incentive scheme, there was potential for asset recovery to be seen as means of raising revenue rather than reducing the harm caused by crime. On the other hand, and somewhat in contrast, other respondents noted that any money recouped from the incentive scheme represents a very small proportion of the overall police budget. They felt that this money might not be enough of an incentive to motivate senior police officers to allocate resources in this area. The full costs of running a financial investigation unit are probably not recovered through the scheme and there are nevertheless opportunity costs as investing staff in this area clearly means that fewer staff are available for other kinds of policing and crime reduction activity. The implication is that whilst the incentive scheme may entice police services and encourage senior officers to invest staff in asset recovery work, strong endorsement from senior officers remains important if asset recovery is to become mainstream policing activity.

Local targets versus mainstreaming

Respondents reported that linking confiscation investigations with mainstream policing had been problematic where there were perceived to be differing and potentially competing targets. Within a financial investigation unit, reaching the incentive scheme target was an important one as was maximizing the number of confiscation orders granted. At the time of writing, the National Criminal Justice Board set local targets for both volume and value of confiscation orders. For a chief superintendent at the basic command unit level, the most pressing targets may be different, for example, to reduce burglary or increase public confidence in policing. It clearly could be argued that in principle, asset recovery could help district commanders achieve their acquisitive crime targets. In practice, respondents identified that two types of targets were seen by officers as rather distinct and as a result financial investigations were not prioritized at the local level. This was a point made by HMIC (2004) who observed that ‘. . . full integration of confiscation investigations into force-level priorities and objectives is the exception rather than the rule’ (HMIC, 2004, p. 6).

Conclusion: mainstreaming confiscation investigation in the police

Official documentation has tended to highlight the potential for instigating confiscation investigations in the police service. HMIC (2004) argued that ‘. . . in theory, everyone who is convicted of acquisitive crime can be the subject of a confiscation order and anyone living above their means on ill-gotten gains is committing a money laundering offence’ (HMIC, 2004, p. 8). The ACPO/Centrex (2006) practical advice on financial investigations similarly noted ‘. . . the main principle is that confiscation opportunities can arise **in any crime where an offender has benefited**, directly or indirectly, or gained a pecuniary advantage’ (ACPO/Centrex, 2006, p. 53, emphasis in the original). The message that confiscation investigations should occur more routinely is being reinforced by, for example, the

introduction of a form that requires prosecutors and investigators to state that they have considered the potential of a case for financial investigation.

At the time of writing, there is little evidence regarding the effectiveness of asset recovery as a deterrent to crime. However, it is very difficult to disagree with the notion that acquisitive criminals should be parted from the financial benefits of their crimes. Issues nevertheless remain about the most appropriate and proportionate ways of managing financial investigations within the police service. On the basis of findings from this study, it is suggested that pursuing ad hoc investigations following defendants' arrest is not always the most effective means of triggering confiscation investigations. Instead, it is contended that investigations should be incorporated into intelligence-led investigations aimed at disrupting the activities of prolific or serious offenders or groups of offenders or into broader, proactive strategies to reduce acquisitive crime. Clearly, there will be occasions where a referral following an arrest is appropriate but it is suggested that this should not be the primary source of cases for confiscation proceedings. Drawing on the findings of this study, there are a number of reasons why an intelligence-led or problem-oriented approach to confiscation investigations should be endorsed:

1. *Timing and risk of dissipation*: where confiscation investigations are commenced following a defendant's arrest, there is a risk that assets will already have been dissipated. This clearly reduces what can realistically be recovered. Conducting confiscation investigations alongside an ordinary criminal investigation leading up to an arrest could be more effective in maximizing the amount ultimately available for confiscation.

2. *Targeting and costs* : both HMIC (2004) and ACPO/Centrex (2006) noted that in principle, a defendant convicted of any acquisitive crime could be pursued for confiscation. Given this scope, financial investigators themselves are not going to be able to pursue all those acquisitive crime cases that potentially are suitable for financial investigation. It is also a specialist function that is not the remit of all police officers by virtue of the training that they must receive and the technical nature of the job. Choices are inevitably going to have to be made with respect to which cases prioritize.

3. *Resource management*: recovering the proceeds of crime is not a priority for many officers, who have many other tasks and responsibilities to juggle on the point of arresting offenders. Focusing specialist attention on proactively identified offenders may offer a more effective way of managing police officer (and other) resources.

4. *Proportionality*: despite the official rhetoric of the asset recovery regime, many offenders have little that can realistically be recovered and it may be more proportionate to focus confiscation resources on higher level offenders. Large numbers of low-level drug users who deal with drugs to fund their habits appear to be routinely swept into confiscation proceedings. This is quite legitimate within the provisions of the 2002 Proceeds of Crime Act. However, targeting low-level criminals who have very little in the way of assets results in large numbers of very small orders that are costly and time consuming to obtain and result in minimal return, very often only the cash and drugs they are arrested with. As was noted in the introduction of this paper, the 2002 Proceeds of Crime Act gives officers powers to seize cash and to

detain it if appropriate. There may be cases where it would be more proportionate to pursue cash forfeiture proceedings rather than a confiscation order.

5. *Harm reduction*: much official documentation related to policing makes reference to the reduction of 'harm' caused by crime at the community level. The 2008 policing green paper, for example, set out a number of national standards for policing. The first of which refers to keeping neighbourhoods safe from harm. Drawing asset recovery into proceedings into intelligence-led or problem-oriented approach to tackling crime problems may offer an effective and fair means of doing so.

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