

## New enforcement tool enables authorities to recover proceeds of crime

Feb 26 2018 [Tim Harris](#)



From January 31, 2018 a number of new civil recovery provisions have become available to UK law enforcement. These powers provide substantial and potentially ground-breaking new powers to freeze and recover the proceeds of crime.



Much of the attention has been focused on unexplained wealth orders; however, it is a lesser-known provision concerning the freezing and forfeiture of money held in bank and building society accounts which may prove of more relevance to financial institutions.

Forfeiture of money held in bank and building society accounts

In summary, this is a process which allows enforcement authorities to freeze "money" (of a value over £1,000) held in bank accounts by order of the magistrates' court and which they suspect represents property obtained through unlawful conduct.

The authority is able to forfeit these funds administratively, i.e., without a final order from the court, where the recovery is unchallenged. Or alternatively, apply for a final order from the court where the forfeiture may be contentious.

For as long as the [Proceeds of Crime Act 2002](#) (PoCA) has been in force, UK banks have accumulated funds that they know or suspect may represent the proceeds of unlawful conduct.

Customer funds that a bank suspects may be the proceeds of crime (for instance, when put on notice by a third-party institution that a customer is engaged in fraud) are frozen pending further inquiry and suspicious activity report (SAR) filing.

In due course (and where no attempt is made to recover the funds), the account may be closed and funds transferred into a separate deposit account for funds linked to criminality. The government estimates that UK banks may hold between £30 to £50 million in these accounts, which grow by £2.5 million per annum. The true extent of the amount held by UK banks may be far higher.

The government has found it challenging to recover individual customer balances as well as the large residual pots of criminal property referred to above. Presently, Part 5 of PoCA contains two regimes for the forfeiture of property without a prosecution or conviction. The first regime is civil recovery in the High Court of any type of property (where the amount is above £10,000).

The second is forfeiture in the magistrates' court of cash (which includes cheques and bankers' drafts). The target of both of these regimes is "recoverable property", property obtained by or through crime (ss 241, 242, 304-306).

The High Court civil recovery route has been considered by law enforcement as a potential route to obtain the recoverable property "held" in accounts. Since proceedings for a recovery order can only be taken against a person who "holds recoverable property", however, a problem that has arisen when seeking to recover from these accounts is identifying who is the person holding the recoverable property (arguably this remains the fraudster account holder) and therefore who is the correct respondent to civil proceedings.

The government's impact assessment identified that that new powers (to be inserted into PoCA at Chapter 3B (ss 303Z1-303Z19)) will seek to address these concerns.

The process

An "officer" (employed by HM Revenue and Customs, the Serious Fraud Office, a constable, or an accredited fraud investigator) can apply to the magistrates' court for an account freezing order (AFO). The court may make such an AFO where it is satisfied that there are "reasonable grounds to suspect" money in the account is recoverable property or intended for use in unlawful conduct (s 303Z3).

The AFO will specify the period for which the account will be frozen but this cannot exceed two years. The AFO can be varied

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or set aside on an application to the court by either an officer or "any person affected by the order". The AFO can be varied to make allowance for reasonable living expenses and legal fees (s 303Z5).

While the account is subject to an AFO, the enforcement officer may either issue a notice to forfeit the credit balance without a court order (s 303Z9(2)) (the notice) or apply to the court for a forfeiture order (pursuant to s 303Z14). In both instances the officer or the court must be "satisfied" that the money is recoverable property or intended for use in crime.

If the officer chooses to pursue the administrative route, the notice must inform the recipient that the credit balance will be automatically forfeited unless objection is taken within 30 days starting after the notice is given. Where a notice is given, it should be given to every person to whom the AFO was given, so in practice the account holder and the bank.

If there is no objection from the account holder, then the bank "must transfer" the amount in the notice to an account nominated by the enforcement officer (s 303Z9(6)(b)). In terms of safeguards, if there is an objection during the 30-day notice period, then the notice lapses (s 303Z11).

If the authority still wants to pursue forfeiture, it must apply to the magistrates' court for a forfeiture order. In addition, "a person aggrieved" by the forfeiture (which may include beneficial interests or third parties) may apply to the magistrates' court for an order setting aside the forfeiture (s 303Z12). This application must be made within 30 days of the objection period ending or else be made in exceptional circumstances.

Unlike the administrative notice process, when an officer applies to the court for a forfeiture order there is no defined period for a party to object to the forfeiture. Any party to the proceedings who is "aggrieved by the order" may, however, appeal the magistrates' decision to the crown court.

Advantages of this process for the enforcement authorities

The new process is entirely heard in the magistrates' court. Using the summary cash forfeiture regime as a guide, if litigation is necessary, it will be far less complex than High Court proceedings: the Civil Procedure Rules do not apply, pleadings are minimal and there is generally no disclosure process. Further, there is little risk of exposure to a costs award if the enforcement authority's application fails in any particular aspect.

A significant potential advantage of the summary account seizure regime (as the government's impact assessment makes clear) is that the National Crime Agency is able to use the process to seize funds identified through the SAR disclosure regime.

Hitherto when a financial institution seeks consent to carry out a prohibited money laundering act (such as returning a credit balance to a customer), the NCA has had a limited 38-day window (seven plus 31 days), the moratorium period, to apply to the crown court for a PoCA restraint order to freeze credit balances identified through the disclosure.

A relatively detailed witness statement is required to support the application, there must be a risk of dissipation and a likelihood that criminal proceedings will be commenced (since a restraint order must be discharged if criminal proceedings are not commenced within a reasonable period).

While the Criminal Finances Act 2017 inserted a provision into PoCA that gives the court power to extend the moratorium period in applicable circumstances (s 336A), given the procedural challenges associated with applications for restraint orders, it can be expected that the summary account forfeiture regime will come to be readily used by enforcement authorities when seeking to freeze and recover credit balances in bank accounts.

Final comments

We expect that enforcement authorities will come to see this provision as an effective tool to forfeit credit balances linked to criminality and also a less evidentially onerous alternative to the criminal restraint order process presently required to freeze funds identified in a SAR notification.

There is a cautionary note, however. The sums involved are likely to be far in excess of the amount typically considered in magistrates' courts (there is presently no maximum credit balance above which the matter should be referred to the High Court).

No code of practice has as yet been created to guide parties on the process or indicate, for instance, whether High Court judges will be assigned to try potentially complex factual issues of very significant value.

In circumstances where forfeiture is contested, the regime may therefore present significant practical administrative challenges at a time of stretched resources in the magistrates' court, an issue not acknowledged in the government's impact assessment.

*This article is for general guidance only. It does not contain definitive advice.*

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