

‘To confiscate or not to confiscate? A comparative analysis of the confiscation of the proceeds of crime legislation in the United States of America and the United Kingdom’.

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“A new crime control strategy surfaced in the 1980s. It is designed to confront the phenomenon of the proceeds of crime. The framework of this strategy originates in international law with national actors shaping the global model to suit national legal imperatives. In responding to the international call, many states have begun to shift from a criminal legal strategy to a civil model: the national architecture assumes the shape of civil actions as opposed to criminal prosecutions”.¹

Introduction

The origins of the international community’s policy and legislative measures towards confiscating the proceeds of crime can be traced back to the instigation of the ‘War on Drugs’.² The scope and remit of these confiscation powers were extended following the al-Qaeda attacks in September 2001 to include terrorism.³ Over a decade later these confiscation mechanisms have been used to target ‘white collar criminals’⁴ as a result of their illegal activities during the ‘Credit Crunch’.⁵ Therefore, the confiscation of the proceeds of crime has become an integral part of the battle against drug cartels, organised criminals, terrorists and white collar criminals in the United States of America (US) and the United Kingdom (UK).⁶ Both of these countries have reacted to the global financial crisis by increasing the amount of civil liability on responsible “market participants”.⁷ For example, the ability to forfeit the proceeds of crime has been used by US authorities to tackle ‘rouge traders’ who have profited from their unauthorised and fraudulent transactions during the ‘Credit Crunch’. This includes for example Bernard Madoff who was convicted of architecting a pyramid fraud scheme, sentenced to 150 years imprisonment⁸ and ordered to

¹ Gallant, M. *Money laundering and the proceeds of crime* (Edward Elgar: Cheltenham, 2005) at p. 1.

² For an interesting discussion of the ‘War on Drugs’ see Stuart, S. ‘War as metaphor and the rule of law in crisis: the lessons we should have learnt from the war on drugs’ (2011) *Southern Illinois University Law Journal*, Fall, 36, 1-43.

³ For a general discussion of the terrorist attacks and the subsequent ‘financial war on terror’ see the excellent commentary by Donohue, L. K. *The cost of counterterrorism – power, politics and liberty* (Cambridge University Press: New York, 2008) at pp 122-181.

⁴ The term ‘white collar criminal’ was first used by Edwin Sutherland, a criminologist in 1939 in his presidential lecture to the American Sociological Society. See Sutherland, E. (1940) ‘The White Collar Criminal’, *American Sociological Review*, 5(1), 1-12, at 1.

⁵ For a discussion of the link between the credit crunch and financial crime see Tomasic, R. (2011) ‘The financial crisis and the haphazard pursuit of financial crime’ (2011), *Journal of Financial Crime*, 18(1), 7 – 31.

⁶ The importance of a confiscation regime was heralded by the Lord Chief Justice Wool in the Court of Appeal in *R v Benjafield* [2001] 3 WLR 74, at para. 43. This decision was affirmed by the House of Lords [2002] UKHL 2.

⁷ Fisher, J., Cregan, C., Di Giulio, J. and Schutze, J. ‘Economic crime and the global financial crisis’ (2011) *Law and Financial Markets Review* 5(4) 276-289, at 284.

⁸ See Frank, R. and Efrati, A. ‘Evil Madoff Gets 150 Years in Epic Fraud’, *Wall Street Journal*, 30 June 2009, available from <http://online.wsj.com/article/SB124604151653862301.html>, accessed 5 July 2012.

forfeit \$170m.⁹ In the UK, the Serious Organised Crime Agency (SOCA) has increased the amount of money and assets confiscated by over 250% since 2007.¹⁰ Therefore, the purpose of this article is twofold. Firstly, it seeks to determine a ‘confiscation typology’ based on a review of the international confiscation legislative instruments and the ‘soft law’ Recommendations of the Financial Action Task Force (FATF). Secondly, the article reviews the implementation of the ‘confiscation typology’ in the US and UK.

Confiscation and Forfeiture

An integral part of a country’s criminal justice system is its ability to deprive criminals of their illegal earnings. Nelen famously stated that “by dismantling their organisations financially, criminals must be hit at their supposedly more vulnerable spot: their assets”.¹¹ The most common mechanisms used to deprive criminals of the financial benefit of their illegal activities are confiscation or forfeiture.¹² Confiscation is a penalty measure that results in the permanent dispossession, or removal of finances, or other resources by an order of a competent authority or court as a result of criminal or civil proceedings.¹³ There are three types of confiscation mechanisms:

1. confiscation of the proceeds of the *instrumentum sceleris*, or instrumentalities of crime,
2. confiscation of the *objectum sceleris*, or the subject of crime, and
3. *fructum sceleris*, or fruits of crime.

⁹ NY Daily News, ‘Judge orders Madoff to forfeit \$170B; prosecutors want 150 yrs for Bernie’, 26 June 2009, available from http://articles.nydailynews.com/2009-06-26/news/17924425_1_ruth-madoff-bernie-madoff-peter-chavkin, accessed October 29th 2011.

¹⁰ The statistical data can be obtained from Serious Organised Crime Agency *Annual report 2008/2009* (Serious Organised Crime Agency: London, 2011) at p. 32 and Serious Organised Crime Agency *Annual report 2010/2011* (Serious Organised Crime Agency: London, 2011) at p. 16.

¹¹ Nelen, H. ‘Hit them where it hurts most? The proceeds of crime approach in the Netherlands’, (2004) *Crime, Law & Social Change*, 41(5), 517-534, at 517. This is a view supported by Smellie, A. ‘Prosecutorial challenges in freezing and forfeiting proceeds of transnational crime and the use of international asset sharing to promote international cooperation’, (2004) *Journal of Money Laundering Control*, 8(2), 104-114, at 104.

¹² Financial Action Task Force *Financial Action Task Force Guidance Document – Best Practices Confiscation (Recommendations 3 and 38)* (Financial Action Task Force: Paris, 2010) at p. 3.

¹³ The United Nations and European Union have adopted similar definitions. See for example United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances Dec. 20, 1988 1582 U.N.T.S. 165, 170, Article 1(f) and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime Approved in 1990, art. 1, para b, item d.

An important part of a confiscation regime is the forfeiture of the proceeds of crime. Forfeiture can be defined as “the surrender or loss of property or rights without compensation”.¹⁴ It was traditionally used to deprive “a traitor or felon of all his personal property”,¹⁵ and it permits the court to “take property that is immediately connected with the [criminal] offence”.¹⁶ There are four types of forfeiture mechanisms:

1. criminal forfeiture,
2. the forfeiture of items related to convictions,
3. the forfeiture of objects *malem in se*, this ensures the removal of dangerous and prohibited goods from the public domain, and
4. civil forfeiture.¹⁷

What becomes clear is that the terms confiscation and forfeiture are very similar and often interchangeable. This point was recognised by the Hodgson Committee who stated that “there was no generally accepted terminology to describe the various situations which we should have to examine. To some extent we have had to invent our own vocabulary and we have consequently attributed discrete meaning to terms which in ordinary speech might be treated as synonymous. The four words we use are forfeiture, compensation, restitution and confiscation”.¹⁸ For the purpose of this article, the term forfeiture will be used during the discussion of the US measures and confiscation when referring to the UK.

The Confiscation Typology

The international legislative measures that allow the confiscation of the proceeds of crime are extensive. The United Nations (UN) Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,¹⁹ provides that signatories should adopt the measures to enable the restraint, seizure and confiscation of the proceeds and instruments of drug trafficking and

¹⁴ See Gallant above, n 1 at 54.

¹⁵ Young, S. ‘Introduction’, in S Young (ed.), *Civil forfeiture of criminal property – legal measures for targeting the proceeds of crime*, (Edward Elgar: Cheltenham, 2009) at p. 1.

¹⁶ Hodgson, D. *Profits of Crime and their Recovery: the report of a Committee Chaired by Sir Derek Hodgson* (Cambridge Studies in Criminology: London, 1984)

¹⁷ Gallant argued that there is a fifth type of forfeiture called “contractual forfeiture”. See Gallant above, n 1 at 55.

¹⁸ As cited in Broadbridge, S. *Proceeds of Crime Bill* (House of Commons Library: London, 2001) at p. 9.

¹⁹ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances Dec. 20, 1988 1582 U.N.T.S. 165, 170. Hereinafter the Vienna Convention.

connected money laundering.²⁰ In particular, the Vienna Convention stipulates that each participant should introduce measures to enable the relevant authorities to “identify, trace, and freeze or seize proceeds, property, instrumentalities” for the purpose of confiscation.²¹ This measure has been described as a “major breakthrough in attacking the benefits derived from drug trafficking activities and [they] are a forceful endorsement of the notion that attacking the profit motive is essential if the struggle against drug trafficking is to be effective”.²² However, the scope of the Vienna Conventions confiscation provisions were narrowly construed and limited to the laundering of drug proceeds and *not* to the proceeds of other criminal offences.²³ The confiscation measures of the Vienna Convention were extended by the UN Convention against Transnational Organised Crime, to include the proceeds of serious crime.²⁴ Serious crime was defined as including “conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty”.²⁵ The extension of the confiscation provisions to include ‘serious crime’ was necessary as it broadened the scope of illegal activity that could be subjected to a court order and recognised that this was an effective tool against drug cartels and organised crime. The international confiscation measures were further extended by the UN Convention against Corruption to include for example the bribery of national officials,²⁶ the bribery of foreign public officials and officials of public international organizations,²⁷ embezzlement, misappropriation or other diversion of property by a public official,²⁸ trading in influence,²⁹ abuse of functions,³⁰ illicit enrichment,³¹ bribery in the private sector and laundering the proceeds of bribery.³²

²⁰ UN Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, or the Vienna Convention (1988), article 5. The first UN provisions that permitted the confiscation of “tools and devices” used in committing drug offences were contained in the Single Convention on Narcotic and Drugs 1961 and the Convention on Psychotropic Substances 1971.

²¹ UN Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, or the Vienna Convention (1988), article 5(1)(a) and (b).

²² Sproule, D. and Saint-Denis, P. *The UN Drug Trafficking Convention: an ambitious step Canadian year book of international law*, 1989, 263, at 281-282.

²³ Stessens, G. *Money laundering a new international law enforcement model* (Cambridge: New York, 2000) at 23.

²⁴ General Assembly resolution 55/25 of 15 November 2000. Hereinafter the Palermo Convention.

²⁵ UN Convention against Transnational Organised Crime, article 12. A serious crime is defined in article 2 of the Convention.

²⁶ General Assembly resolution 58/4 of 31 October 2003, article 15.

²⁷ *Ibid.*, article 16.

²⁸ General Assembly resolution 58/4 of 31 October 2003, UN Convention Against Corruption, article 17.

²⁹ *Ibid.*, article 18.

³⁰ General Assembly resolution 58/4 of 31 October 2003, UN Convention Against Corruption, article 19.

³¹ *Ibid.*, article 20.

³² General Assembly resolution 58/4 of 31 October 2003, UN Convention Against Corruption, article 23.

As a result of the terrorist attacks in September 2001, the UN Security Council passed a series of Resolutions that extended the scope of its confiscation mechanisms to include terrorism. Gallant took the view that “the 2001 attacks in the United States gave the affiliation between terrorism and proceeds of crime global prominence. In the immediate aftermath of the destruction, the UN Security Council authorised an attack on proceeds linked to terrorism”.³³ For example, UN Security Council Resolution 1373 provides that countries must prevent and suppress the financing of terrorist acts,³⁴ criminalise terrorist financing,³⁵ freeze the funds and other financial assets of people who commit or attempt to commit terrorist acts³⁶ and prevent its citizens from making funds available to people who commit or attempt to commit terrorist acts.³⁷ The asset freezing provisions of Resolution 1373 must be read in conjunction with Article 8 of the International Convention for the Suppression of Terrorist Financing.³⁸ This provides that each country is required to forfeit the funds used or due to be used for an offence created by Article 2 of the International Convention for the Suppression of Terrorist Financing.³⁹ However, the extension of the confiscation measures to include terrorism must be questioned because the UN is utilising a ‘money laundering’ or ‘profit’ confiscation model towards a criminal offence that does not generate a profit. The financial process adopted by terrorists to accumulate funds can be contrasted with that adopted by money launderers. For instance, terrorist financing has been referred to as ‘reverse money laundering’, which is a practice whereby ‘clean’ or ‘legitimate’ money is acquired and *then* funnelled to support terrorism.⁴⁰ Conversely, money laundering involves the conversion of ‘dirty’ or ‘illegal’ money into clean money via its laundering through three recognised phases.⁴¹ Therefore, the extension of the money laundering confiscation model to include terrorism must be queried because terrorism is *not* a profit based crime.⁴²

³³ See Gallant above, n 1 at 1.

³⁴ Adopted by the Security Council at its 4385th meeting, on 28 September 2001, S/RES 1373 2001, para 1(a).

³⁵ *Ibid.*, at para 1(b).

³⁶ S/RES 1373 2001, para 1(c).

³⁷ *Ibid.*, at para 1(d).

³⁸ Png, C. ‘International legal sources II – the UN Security Resolutions’, in Blair, W. and Brent, R. (eds.), *Banks and financial crime – the international law of tainted money*, (Oxford University Press: Oxford, 2008) at p. 81.

³⁹ Such offences are committed if a person by “any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or (b) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act”.

⁴⁰ For a more detailed discussion of this process see Cassella, S. ‘Reverse money laundering’ (2003) *Journal of Money Laundering Control*, 7(1), 92-94.

⁴¹ The money laundering process contains three recognised stages: placement, layering and integration. For a more detailed discussion see Ryder, N. *Money laundering an endless cycle? A comparative analysis of the anti-*

In addition to the UN confiscation measures, the European Union (EU) has introduced a wide range of confiscation related instruments, partly influenced by the threat it faces from organised criminals.⁴³ The first measure was the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.⁴⁴ This required Member States to implement legislation that permits the confiscation of “instrumentalities and proceeds or property the value of which corresponds to such proceeds”.⁴⁵ The scope of the 1990 Convention was broader than the Vienna Convention because it applied to the proceeds of *any* offence and not just the proceeds of drug trafficking offences.⁴⁶ The scope of the 1990 Convention was extended in 2005 to include terrorist financing.⁴⁷ These Conventions are supported by several Council Framework Decisions. For example, Council Framework Decision 2005/212/JHA has attempted to standardise EU confiscation laws and provides that ‘ordinary confiscation’⁴⁸ and extended confiscation⁴⁹ must be available to all criminal offences that result in a custodial sentence exceeding one year.⁵⁰ Importantly, this Framework Decision required Member States to implement mechanisms that allow for the confiscation of instrumentalities and proceeds of criminal offences that attract a custodial sentence of more than one year.⁵¹ Furthermore, Member States are permitted to implement a civil confiscation regime as a separate proceeding.⁵² In 2007, Council Framework Decision 845/JHA stressed that Member States are required to create an ‘Asset Recovery Office’ to

money laundering policies in the United States of America, the United Kingdom, Australia and Canada (Routledge: London, 2012) at 1.

⁴² For example, the orchestrators of the terrorist attacks in September 2001, the London bombings in 2005, the Madrid train bombings and East Africa embassy bombings, do not seek to make a profit.

⁴³ European Commission *Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union*, Brussels, 12.3.2012, COM(2012) 85 final, 2012/0036 (COD) at 2.

⁴⁴ Strasbourg, 8.XI.1990.

⁴⁵ Article 2. For a more detailed commentary on the importance of the 1990 Convention see Nikolov, N. ‘General characteristics of civil forfeiture’ (2011) *Journal of Money Laundering Control*, 14(1), 16-31, at 19.

⁴⁶ See Stessens above, n 23 at 23.

⁴⁷ See Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism (2005), article 2.2.

⁴⁸ Ordinary confiscation has been defined by the European Commission as the confiscation of assets that are linked to a particular crime following conviction for that crime. See European Commission *Commission staff working paper Accompanying document to the Proposal for a Directive of the European Parliament and the Council on the freezing and confiscation of proceeds of crime in the European Union Impact Assessment* (European Commission: Brussels, 2012) at p. 9.

⁴⁹ Extended confiscation exceeds the direct proceeds of crime. European Commission above, n 43 at 4.

⁵⁰ It is also important to refer to for example Council Framework Decision 2001/500/JHA, which provides that Member States “shall take the necessary steps to ensure that all requests from other Member States which relate to asset identification, tracing, freezing or seizing and confiscation are processed with the same priority as is given to such measures in domestic proceedings”.

⁵¹ Art.2, §1.

⁵² Article 3, §4.

improve the tracing of assets from criminal activities across the EU.⁵³ Despite the introduction of these measures doubts remain over the effectiveness of the EU's approach towards the confiscation of the proceeds of crime. For instance, the amount of money confiscated in the EU is relatively low when compared to the estimated profits of criminal enterprises.⁵⁴ Therefore, in 2012, the European Commission published a draft Directive on the 'freezing and confiscation of the proceeds of crime in the European Union'.⁵⁵ The aim of the draft Directive is to "make it easier for Member States' authorities to confiscate and recover the profits that criminals make from cross-border serious and organised crime".⁵⁶ The origins of the draft Directive can be traced to the 'Stockholm Programme',⁵⁷ which recommended that Member States and the European Commission must prioritise the confiscation of the proceeds of crime.⁵⁸ Specifically, it provided that "the confiscation of assets of criminals should be made more efficient and cooperation between Asset Recovery Offices made stronger".⁵⁹ In June 2010, the Justice and Home Affairs Council also supported the need for a more co-ordinated approach across the EU towards the confiscation of the proceeds of crime.⁶⁰ The European Commission responded by proposing to publish draft legislation that would improve the EU's confiscation legislative framework.⁶¹ This was approved by the European Parliament who proposed to publish draft legislation to extend the scope of the civil confiscation regime to include property transferred to third parties.⁶²

⁵³ See Nikolov above, n 45 at 19.

⁵⁴ According to the European Commission authorities in France have confiscated €185m, €50m in the Netherlands and €281m in Germany. See European Commission above, n 43 at 3.

⁵⁵ *Ibid.*

⁵⁶ See European Commission above, n 43 at 2.

⁵⁷ For a more detailed discussion on the aims and objectives of the Stockholm Programme see European Commission *Delivering an area of freedom, security and justice for Europe's citizens Action Plan Implementing the Stockholm Programme* (Brussels, 20.4.2010) COM(2010) 171 final, available from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0171:FIN:EN:PDF>, accessed 29 June 2012.

⁵⁸ 'An open and secure Europe serving and protecting the citizens', Council document 17024/09, adopted by the European Council on 10/11 December 2009, available from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:en:PDF>, accessed 29 May 2012.

⁵⁹ *Ibid.*, at 4.4.5.

⁶⁰ The Council of the European Union, Press Release, Council Document 7769/1/10, available from http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/114900.pdf, accessed 29 May 2012, at p. 33.

⁶¹ European Commission *Communication from the Commission of the European Parliament and the Council – the EU internal security strategy in action: five steps towards a more secure Europe*, Brussels, 22.11.2010, COM(2010) 673 final, at 6, available from http://ec.europa.eu/commission_2010-2014/malmstrom/archive/internal_security_strategy_in_action_en.pdf, accessed 29 May 2012.

⁶² European Parliament *European Parliament Report on organised crime in the European Union*, (2010/2309(INI), available from <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2011-0333+0+DOC+PDF+V0//EN>, accessed May 29 2012.

The importance of confiscating the proceeds of crime has also been recognised by the FATF, an organisation that was established following the UN's undertaking to tackle money laundering in 1988.⁶³ The initial objective of the FATF was to develop and promote a global set of anti-money laundering (AML) standards, which could be adopted and applied consistently by nation states. The first set of 'Recommendations' were published in 1990, and their scope was extended to include counter-terrorist financing (CTF) following the terrorist attacks in September 2001.⁶⁴ In 2012, the FATF merged its AML and CTF Recommendations,⁶⁵ which now provide that countries should implement a set of measures that allow competent authorities to freeze, seize and confiscate:

1. property laundered,
2. proceeds from, or instrumentalities used in or intended for use in money laundering or predicate offences,
3. property that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organisations, or
4. property of corresponding value.⁶⁶

Recommendation 4 also provides that countries ought to introduce a civil or non-conviction confiscation regime, provided this is consistent with its domestic legislation. This, must be read in conjunction with Recommendations 30 and 38, with the former encouraging countries to create 'competent authorities' to detect, locate and instigate confiscation proceedings, and the latter providing that nations should create mechanisms for managing and distributing confiscated assets. However, it is important to note that the FATF is not a law making body, and therefore, its 'Recommendations' are not legally binding. Nonetheless, they have a global appeal and have been endorsed by over 170 countries. Furthermore, UN Security Council Resolution 1617 strongly urges "all Member States to implement the comprehensive,

⁶³ Johnson, J. 'Is the global financial system AML/CTF prepared?' (2008) *Journal of Financial Crime*, 15(1), 7-21, at 8.

⁶⁴ These are commonly referred to as the '9 Special Recommendations'. For a more detailed discussion see Thony, J. and Png, S. 'FATF special recommendations and UN resolutions on the financing of terrorism: a review of the status of implementation and legal challenges faced by countries' (2007) *Journal of Financial Crime* 14(2), 150-169.

⁶⁵ Financial Action Task Force 'FATF steps up the fight against money laundering and terrorist financing', 16 February 2012, available from http://www.fatf-gafi.org/document/17/0.3746.en_32250379_32236920_49656209_1_1_1_1.00.html, accessed 14 March 2012.

⁶⁶ Recommendation 4 as cited in Financial Action Task Force *The International Standards on Combating Money Laundering and the Financing of Terrorism – The FATF Recommendations* (Financial Action Task Force: Paris, 2012) at 12.

international standards embodied in the FATF Forty Recommendations on Money Laundering”.⁶⁷

Therefore, as a result of reviewing the international legal instruments of the UN, EU and ‘Recommendations’ of the FATF it is possible to identify a ‘confiscation typology’. The first part of the typology is a criminal confiscation regime. This mechanism can be described as the central tenant of the international policy towards confiscating the proceeds of crime. For example, a drug money laundering criminal confiscation regime was introduced by the Vienna Convention, broadened by the Palermo and Corruption Conventions and then further extended to terrorism by UN Security Council Resolution 1373. Additionally, similar provisions requiring the introduction of a criminal confiscation regime were contained in the 1990 and 2005 EU Conventions and also contained in the Recommendations of the FATF. The second part of the ‘confiscation typology’ is the use of a civil confiscation regime. This is the most controversial part of the confiscation typology because it does *not* require a criminal conviction. Therefore, it is imperative that a “careful balance to be struck between the civil rights of the individual and the need to ensure that the State has the tools to protect society by tackling crime effectively”.⁶⁸ The inclusion of a civil confiscation regime is found in the FATF Recommendations which provide that:

“Countries should consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction (non-conviction based confiscation), or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law”.⁶⁹

Further support for its inclusion is found in Council Framework Decision 2001/500/JHA which provides that Member States are permitted to implement a civil confiscation regime as a separate proceeding.⁷⁰ The third part of the confiscation typology is the creation of a competent authority or ‘assets recovery body’ to administer and manage the confiscation regime. The creation and use of an asset recovery body is referred to in the 1990 Council of

⁶⁷ United Nations Security Council Resolution 1617 (2005) S/RES/1617 (2005), adopted by the Security Council at its 5244th meeting on 29th July 2005. Also see Resolution 60/288 of the UN General Assembly (20 September 2006) which provides “to encourage states to implement the comprehensive international standards embodied in the Forty Recommendations on Money Laundering and the Nine Special Recommendations on Terrorist Financing of the Financial Action Task Force”.

⁶⁸ See Broadbridge above, n 18 at 24.

⁶⁹ Recommendation 4 as cited in Financial Action Task Force above, n 66 at 12.

⁷⁰ Article 3, §4.

Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.⁷¹ It is an obligation under Council Framework Decision 845/JHA which provides that Member States are required to create an ‘Asset Recovery Office’ to improve the tracing of assets from criminal activities across the EU.⁷² Additionally, the FATF Recommendations provide that “countries should ensure that competent authorities have responsibility for expeditiously identifying, tracing and initiating actions to freeze and seize property that is, or may become, subject to confiscation, or is suspected of being proceeds of crime”.⁷³ The final part of the typology is the creation of a ‘confiscation fund’ which ensures that the confiscated assets are securely held, not mismanaged and appropriately distributed. The FATF Recommendations provide that “countries should establish mechanisms that will enable their competent authorities to effectively manage and, when necessary, dispose of, property that is frozen or seized, or has been confiscated”.⁷⁴ Therefore, the next part of the article seeks to determine if the confiscation typology has been implemented in the US and UK.

The United States of America

The US provides an interesting case study due to its influence in the development of international financial crime policies and the threat it poses to its economy and national security. For example, the Department of Treasury has been instrumental in the implementation of several international legislative and policy measures. This includes the Vienna Convention, the creation of the FATF and the instigation of the ‘Financial War on Terror’ in 2001. The threat posed by the proceeds of crime in the US is well documented, but nonetheless, it merits a brief discussion. For example, the danger presented by the illegal drugs trade and the subsequent laundering of its proceeds influenced the instigation of the ‘War on Drugs’ by President Richard Nixon in the 1970s. The precise amount of money laundered through the US is impossible to determine,⁷⁵ yet the US General Accounting Office estimated in 1995 that \$300bn is laundered through its financial system every year.⁷⁶ It

⁷¹ See for example articles 14 and 27.

⁷² See Nikolov above, n 45 at 19

⁷³ Recommendation 4 as cited in Financial Action Task Force above, n 66 at 24.

⁷⁴ *Ibid.*, recommendation 30.

⁷⁵ For an excellent discussion of the various methods used to calculate the amount of money laundered see Unger, B. *The scale and impacts of money laundering* (Edward Elgar: Cheltenham, 2007) at pp. 29-56.

⁷⁶ General Accounting Office *Money laundering – needed improvement for reporting suspicious transactions are needed* (General Accounting Office: Washington, 1995) at p. 2.

revised this estimation in 2002, and suggested that the figure was nearer \$500bn.⁷⁷ The International Monetary Fund estimated that over half of the money laundered globally is conveyed through the US banking sector.⁷⁸ In recognition of the problems associated with drug money laundering the US government introduced a series of legislative measures that permitted the forfeiture of the proceeds of drug related criminal activity. Due to its success, the forfeiture provisions were extended to include a plethora of criminal activities including human trafficking, racketeering and corruption. This is a strategy that has been duplicated by the international community, a point illustrated by the breadth of the international confiscation measures outlined above. An example of the threat posed to its national security is terrorist financing, which until the attacks in September 2001, was not regarded as an immediate threat. The 9/11 Commission Report estimated that the terrorist attacks cost approximately \$500,000 and was partly funnelled into the US by a wire transfer and raised by criminal activities including credit card fraud and identity theft.⁷⁹ The terrorist attacks resulted in instigation of the ‘financial war on terror’ by President George Bush and the implementation of Presidential Executive Order 13,224 and the USA Patriot Act 2001. Both of these measures extended the remit of US forfeiture measures to include terrorism. Additionally, the US has suffered from a number of high profile ‘financial scandals’, a consequence of which has been a significant increase in the use of its forfeiture provisions. Well documented examples include Ivan Boesky,⁸⁰ Barry Minkow,⁸¹ Enron,⁸² WorldCom,⁸³

⁷⁷ General Accounting Office *Money laundering: extent of money laundering through credit cards is unknown* (General Accounting Office: Washington DC, 2002) at p. 1.

⁷⁸ Takats, E, *A theory of ‘crying wolf’: the economics of money laundering enforcement- IMF Working Paper* (International Monetary Fund: Washington DC, 2007) at p. 7.

⁷⁹ The National Commission on the Terrorist Attacks upon the United States *The 9/11 Commission Report* (Norton & Company Inc: 2004) at p. 169.

⁸⁰ Ivan Boesky cumulated a personal fortune of over \$200m by illegally obtaining information from market insiders and was convicted of insider dealing. As a result of plea bargain he spent two years in prison and was fined \$100m by the Securities and Exchange Commission. For a discussion of this see Hatch, J. ‘Logical inconsistencies in the SEC’s enforcement of insider trading: guidelines for a definition’ (1987) Washington and Lee Law Review, Summer, 935-954.

⁸¹ Barry Minkow managed what appeared to be a successful carpet cleaning company called ‘ZZZZ Best’. However, the company was a facade ponzi scheme which collapsed in 1987 and as a result investors and lenders lost over \$100m. Minkow was convicted in December 1988 after being found guilty by a jury on all 57 charges, sentenced to 25 years in prison and ordered to pay \$25m restitution. For a general discussion of this case see McLucas, W. and Goldstein, J. ‘Securities Litigation 1991: Strategies and Current Developments, Recent SEC Enforcement Developments’ (1991) Practising Law Institute, Litigation and Administrative Practice Course Handbook Series, Litigation, 163-229.

⁸² For an excellent discussion of the collapse of Enron see O’Connor, M. ‘The Enron Board: the perils of groupthink’ (2003) University of Cincinnati Law Review, 71, 1223-1320.

⁸³ For a more detailed commentary on the WorldCom scandal and its wider implications on the US telecommunications sector see Sidak, G. ‘The failure of good intentions: the WorldCom fraud and the collapse of American telecommunications after deregulation’ (2003) Yale Journal on Regulation 207-261.

Adelphia Communications,⁸⁴ Tyco International,⁸⁵ Bernard Madoff⁸⁶ and Alan Stanford.⁸⁷ Additionally, there has been a substantial increase in the levels of mortgage fraud, which costs the US economy \$10bn per year.⁸⁸ Therefore, the forfeiture of the proceeds of crime has become an important part of the US counter-fraud strategy, especially during the ‘Credit Crunch’.

Criminal Forfeiture

The principal mechanism used in the US to tackle the monetary ingredient of illegal activity is forfeiture.⁸⁹ The use of criminal forfeiture is reliant on the conviction of the defendant and is imposed at the same time as a custodial sentence.⁹⁰ Therefore, criminal forfeiture is an integral part of a criminal case which is imposed by a court on the defendant, once convicted.⁹¹ This is also referred to as *in personam*, which means that it is against the individual and it involves the prosecution indicting the property used in or obtained with the proceeds of the illegal activity. If the defendant is found guilty, criminal forfeiture proceedings are conducted in court before a judge and they could result in a decision of forfeiting property either ‘used’ or ‘obtained’ in the crime. Furthermore, the defendant could be required to pay a financial penalty, recompense the victims of the crime and be compelled

⁸⁴ Adelphia Communications was established in 1952, it became a public company in 1986 and grew at an unprecedented rate during the 1990s until it filed for bankruptcy in 2002. As a result of disclosing losses of over \$2bn, the Department of Justice and Securities and Exchange Commission began civil and criminal proceedings against John Rigas the companies CEO and his son Timothy Rigas for fraud. John was sentenced to 15 years in prison and Timothy Rigas was sentenced to 20 years. See Paranjpe, U., Wolensky, M., McNamara, M., Kenneth M., Roberts, K. and Pines, A. ‘Recent developments in the law affecting corporate counsel’ (2006) Tort Trial & Insurance Practice Law Journal, Winter, 41, 317-343, at 335-343.

⁸⁵ Tyco International was rocked by a financial scandal in 2002 when Dennis Kozlowski and Mark Swartz were accused of stealing over \$150m from the company. After their conviction in 2005 following a mistrial both men were sentenced to custodial terms between eight and 25 years in prison. See Hui Kim, S. ‘The banality of fraud: re-situating the inside counsel as gate keeper’ (2005) Fordham Law Review, 74, 983-1077, at 989-991.

⁸⁶ Bernard Madoff pleaded guilty to charges fraud, money laundering, theft and making false statements to the Securities and Exchange Committee and was sentenced to 150 years in prison by Judge Chin in 2009. For an explanation of why Judge Chin imposed such a long custodial sentence see Weiser, B. ‘Judge Explains 150-Year Sentence for Madoff’, 28 June 2011, New York Times, available from http://www.nytimes.com/2011/06/29/nyregion/judge-denny-chin-recounts-his-thoughts-in-bernard-madoff-sentencing.html?_r=1&pagewanted=all, accessed 11 July 2012.

⁸⁷ Alan Stanford was convicted in March 2012 of fraud and breaches of securities legislation after an investigation by the Federal Bureau of Investigation and Securities and Exchange Commission. See Blackden, R. ‘Allen Stanford sentenced to 110 years in prison for \$7bn Ponzi scheme’, 14 June 2012, Daily Telegraph, available from <http://www.telegraph.co.uk/finance/financial-crime/9332532/Allen-Stanford-sentenced-to-110-years-in-prison-for-7bn-Ponzi-scheme.html>, accessed 11 July 2012.

⁸⁸ Federal Bureau of Investigation 2010 Mortgage Fraud Report Year in Review (Federal Bureau of Investigation: Washington DC, 2011) at p. 5.

⁸⁹ See Gallant above, n 1 at 98.

⁹⁰ 18 USC 982.

⁹¹ The US criminal forfeiture statute is found at 18 USC § 982.

to disgorge the proceeds of the crime or the property utilised in the commission of the criminal offence.⁹² Therefore, they are part of the sentencing practice⁹³ and have been described as “a powerful law enforcement tool that is rapidly becoming a fixture in federal criminal practice”.⁹⁴ US law provides for the forfeiture of the proceeds of over 200 federal and state crimes including for example fraud, theft, arson, robbery, gambling and drug trafficking offences.⁹⁵ The courts have extensive powers to forfeit the drug proceeds and any personal or real property utilised in the commission of a drug offence.⁹⁶ The most potent forfeiture provisions apply to money laundering, which allows the forfeiture of *all* the property involved in the commission of the offence.⁹⁷ One of the most controversial US forfeiture laws is the Racketeering Influenced and Corrupt Organisations Act 1970.⁹⁸ The Act had two objectives:

1. to restrict the growth of criminal enterprises by preventing the reintegration of their proceeds of crime into the US economy,⁹⁹ and to
2. target the ‘kingpins of crime’.

RICO criminalised a wide range of racketeering activities including bribery, counterfeiting, mail fraud, wire fraud, money laundering, obstruction of justice, murder for hire, drug trafficking, prostitution, sexual exploitation of children and trafficking in counterfeit goods.¹⁰⁰ Contravention of these criminal activities could result in a fine and/or

⁹² Cassella, S. ‘The case for civil recovery: why in rem proceedings are an essential tool for recovering the proceeds of crime’, (2008) *Journal of Money Laundering Control*, 11(1), 8-14, at 9.

⁹³ Cassella, S. ‘Overview of asset forfeiture law in the United States’, (2004) *South African Journal of Criminal Justice*, 17(3), 347-367, at 355.

⁹⁴ Cassella, S. ‘Criminal forfeiture procedure: an analysis of developments in the law regarding the inclusion of a forfeiture judgment in the sentence imposed in a criminal case’, (2004) *American Journal of Criminal Law*, 32, 55-103, at 102-103.

⁹⁵ Cassella, S. ‘An overview of asset of forfeiture in the United States’, in S Young (ed.) *Civil forfeiture of criminal property – legal measures for targeting the proceeds of crime*, (Edward Elgar: Cheltenham, 2009) at p. 33.

⁹⁶ Under 21 U.S.C ss 853(a) and 881(a) (Criminal and civil forfeiture respectively).

⁹⁷ See Cassella above, n 95 at 35.

⁹⁸ Hereinafter RICO.

⁹⁹ One of the most important terms that need to be defined is an enterprise is defined as “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity” by The Racketeer Influenced and Corrupt Organizations or Title 18 of the United States Code, Section 1961(4). Likewise, a criminal enterprise is “any group of six or more people, where one of the six occupies a position of organizer, a supervisory position, or any other position of management with respect to the other five, and which generates substantial income or resources” as defined by The Continuing Criminal Enterprise statute, or Title 21 of the United States Code, Section 848(c)(2).

¹⁰⁰ Title 18 of the United States Code, Section 1961 (1).

imprisonment for up to twenty years and compulsory asset forfeiture.¹⁰¹ Furthermore, the Act allows federal agencies to apply for a pre-indictment restraining order and the forfeiture of any property transferred to third parties.¹⁰² In particular, a court is permitted to grant an order that forfeits the defendant's interest in or property in or deriving from a RICO enterprise.¹⁰³ The Department of Justice is permitted to bring forfeiture proceedings against illegal goods or property that was either used or obtained whilst breaking federal narcotics laws.¹⁰⁴ However, these provisions were unproductive because they were restricted to people who were convicted of involvement in a "continuing criminal enterprise".¹⁰⁵ Therefore, the forfeiture laws were extended to include the criminal proceeds derived from the sale of narcotics.¹⁰⁶ More amendments were introduced by the Comprehensive Drug Abuse and Prevention Act¹⁰⁷ and the Organised Crime Control Act, which revived the civil or *in rem* forfeiture as part of the 'war on drugs'.¹⁰⁸

Following the terrorist attacks in September 2001, the USA Patriot Act extended the ability of law enforcement agencies to seize and forfeit the assets of terrorists.¹⁰⁹ Interestingly, Gallant noted that "in organising its response to the destruction of 2001, the Bush administration immediately implemented a proceeds-orientated strategy whose target was the financial component of terrorist activity".¹¹⁰ The USA Patriot Act permits the forfeiture of all assets, whether overseas or national, involved in arranging acts of terrorism, assets retained or obtained for the purposes of conducting acts of terrorism.¹¹¹ Criminal forfeiture is permitted in terrorist cases for all of the proceeds of all specified activities including support and the financing of terrorism,¹¹² terrorist activities¹¹³ and for collecting or providing funds for terrorist purposes.¹¹⁴ Cassella stated that "the [forfeiture for terrorism] statute is designed

¹⁰¹ 18 U.S.C. § 1963(a).

¹⁰² 18 U.S.C. § 1963(d)(1)(B) and § 1963(c).

¹⁰³ 18 U.S.C. § 1963(a).

¹⁰⁴ 21 USC § 881(a).

¹⁰⁵ Comprehensive Drug Abuse Prevention and Control Act Title II, Part D, § 408(2)(A). See Nelson, S. (1994) 'The supreme court takes a weapon from the drug war arsenal: new defences to civil drug forfeiture', Saint Mary's Law Journal, 26, 157-201, at 159.

¹⁰⁶ 21 U.S.C. §§ 801-969 (1982) 881(a).

¹⁰⁷ 18 U.S.C. § 1963.

¹⁰⁸ Pub. L. No. 91-513, 1970 U.S.C.C.A.N (84 Stat.) 1437 (codified as amended at 21 U.S.C. § 801-971).

¹⁰⁹ Cassella, S. 'Forfeiture of terrorist assets under the USA Patriot Act of 2001', (2002) Law and Policy in International Business, 34, 7-15, at 7.

¹¹⁰ See Gallant above, n 1 at 76.

¹¹¹ *Ibid.*, at 105.

¹¹² Title 18 USC 2339A, 2339B and 2339C.

¹¹³ Title 18 USC 981(a)(1)(g).

¹¹⁴ Title 18 USC 981(a)(1)(h).

to incapacitate the terrorist completely by leaving him with no assets whatsoever to perpetrate further acts of violence against governments, their citizens or their property”.¹¹⁵ Somewhat controversially, the US “can impose indefinite forfeiture” under Presidential Executive Order 13,224.¹¹⁶ The appropriateness of using a proceeds-orientated strategy towards terrorist financing must be questioned for several reasons. For example, terrorists, unlike money launderers do not seek to hide the proceeds of crime, they seek to convert clean money into dirty money when it is used for supporting or promoting terrorism. This could apply for example to misapplied charitable donations. Another reason why this approach is flawed relates to concept of ‘cheap terrorism’, a term that has been used to describe the small amounts of financing needed to carry out terrorist attacks.¹¹⁷

Civil Forfeiture

Civil forfeiture is a non-conviction based regime that is used when the government regards the matter as civil rather than criminal. Gallant noted that civil forfeiture is a “peculiar crime control device ... its structure is irregular, a civil *in rem*, proceeding [is] against property rather than *in personam* criminal prosecution”.¹¹⁸ The Comprehensive Crime Control Act 1984 extended the use of *in rem* proceedings to include the forfeiture of ‘real property’ purchased with the illegal proceeds of crime.¹¹⁹ This action is taken *in rem* against the property and not the defendant. This means that the government acts as a civil plaintiff and anybody who challenges the proceedings is referred to as the claimant.¹²⁰ The Supreme Court in *United States v Various Items of Personal Property* stated that “it [*in rem*] is the property which is proceeded against and, by resort to a legal fiction, held guilty and condemned through it were conscious instead of inanimate and insentient”.¹²¹ Stessens noted that “the concept of civil forfeiture logically follows from relation-back doctrine; given the fact that the state is, by legal fiction, deemed to be the owner of the property from the

¹¹⁵ See Cassella above, n 95 at 36.

¹¹⁶ See Donohue above, n 3 at 170.

¹¹⁷ For a general discussion see Sproat, P. ‘Counter-terrorist finance in the UK: a quantitative and qualitative commentary based on open-source materials’ (2010) *Journal of Money Laundering Control*, 13(4), 315-335.

¹¹⁸ See Gallant above, n 1 at 89-90.

¹¹⁹ Saltzburg, D. ‘Real property forfeitures as a weapon in the government’s war on drugs: a failure to protect innocent ownerships’, (1992) *Boston University Law Review*, 72, 217-242, at 218. The civil forfeiture statute is found at USC 18 USC § 981.

¹²⁰ Cassella above, n 109 at 9.

¹²¹ 82 US 577, 581 as cited in Stessens above, n 23 at 39.

moment the offence was committed”.¹²² Civil forfeiture permits the government to control property that has been obtained with the proceeds of illegal activities.¹²³ Maxeiner stated that “theoretically, the owner is not punished because the forfeiture is directed against the property”.¹²⁴ Therefore, it is dependent on the myth that the property is capable of illegal behaviour.¹²⁵ Civil forfeiture proceedings have become popular with law enforcement agencies because prosecutors are *not* required to obtain a criminal conviction and they are able to initiate proceedings against property and not the defendant.¹²⁶ Controversially, civil forfeiture proceedings require a lower burden of proof than criminal proceedings, normally on a balance of probabilities. This has resulted in this forfeiture mechanisms being referred to as an “easy way to deprive criminals of the fruits of their acts”.¹²⁷ The appropriateness of civil forfeiture must be questioned due to the lack of constitutional safeguards provided and it has led to suggestions that law enforcement agencies have attempted to fill government coffers.¹²⁸ This is a view supported by Nelen who stated that the civil forfeiture procedures “erode important constitutional safeguards”,¹²⁹ such as the Double Jeopardy clause when it is used in conjunction with a criminal prosecution.¹³⁰ The problems associated with civil forfeiture relate to burdensome procedural requirements, and that the forfeiture is “limited to property traceable to the offence”, which in many instances is impossible to determine.¹³¹ Other criticisms include the potential unfair treatment of ‘innocent owners’ whose property could be forfeited because of the illegal activity of another party which they could not have anticipated.¹³² However, this argument could be dispelled due to the ‘uniform innocent owner defence’.¹³³ This requires the person asserting to be the *bona fide* purchaser that they “did not know and was reasonably without cause to believe that the property was subject to

¹²² *Ibid.*, at p. 41.

¹²³ See Saltzburg, above n 119 at 217.

¹²⁴ Maxeiner, J. ‘Bane of American forfeiture law: a banished at last?’ (1977) *Cornell Law Review*, 62(4), 768-802, at 768.

¹²⁵ See Gallant above, n 1 at 83.

¹²⁶ Chi, K. ‘Follow the money: getting to the root of the problem with civil asset forfeiture in California’, (2002) *California Law Review*, 90, 1635-1673, at 1639-1640.

¹²⁷ Moores, E. ‘Reforming the civil asset forfeiture reform act’, (2009) *Arizona Law Review*, 51, 777-803, at 779.

¹²⁸ Johnson, B. ‘Restoring civility – the Civil Asset Forfeiture Reform Act 2000: baby steps towards a more civilised civil forfeiture system’, (2002) *Indiana Law Review*, 35, 1045-1085, at 1069.

¹²⁹ See Nelson above, n 105 at 200.

¹³⁰ However, this argument has been dismissed by the Supreme Court in *United States v Ursery* (1996) 518 US 267.

¹³¹ See Cassella above, n 93 at 362-363.

¹³² See Johnson above, n 128 at 1054.

¹³³ 18 USC 983(d).

forfeiture”. Therefore, the person contesting the forfeiture proceedings must prove their ownership interest and their innocence.¹³⁴

Further amendments to the forfeiture laws were introduced by the Civil Asset Forfeiture Act 2000, which applies to all civil forfeiture proceedings started on or after 23 August 2000. This has been described as the most significant amendment to the US forfeiture laws since 1789.¹³⁵ The Act made a number of important changes to the civil forfeiture laws.¹³⁶ Firstly, it introduced a series of technical requirements that federal agencies must comply with. Secondly, the Act established measures for improving the legal representation for impoverished defendants.¹³⁷ Thirdly, it made several significant changes to the burden of proof, which demanded the US government meet “a preponderance of the evidence standard”.¹³⁸ Prior to the introduction of the Act, “all property was deemed forfeit once the government showed probable cause that the property was used to facilitate a narcotics crime or was derived from a narcotics crime”.¹³⁹ Fourthly, the ‘innocent owner’ requirement has been retained.¹⁴⁰ This mechanism can be used by the claimant to prove that they are the ‘bona fide’ purchaser of the property and that they “did not know and was reasonably without cause to believe that the property was subject to forfeiture”.¹⁴¹ Fifthly, the Act “contains provisions that allow a claimant to petition the presiding court for a determination of whether the forfeiture violates the Excessive Fines Clause of the Eighth Amendment”.¹⁴² The Civil Asset Forfeiture Act modernised the US forfeiture laws, yet its appropriateness has been

¹³⁴ For a more detailed discussion of this defence see the excellent article Cassella, S. ‘The uniform innocent owner defence to civil asset forfeiture: the Civil Asset Forfeiture Reform Act of 2000 creates a uniform innocent owner defence to most forfeiture cases filed by the Federal Government’ (2000-2001) *Kentucky Law Journal*, 89, 653-709.

¹³⁵ Also see Act of July 31, 1789, ch. 5, 1 Stat. 29, 39 as cited in Cassella, S. ‘The civil asset forfeiture reform act of 2000: expanded government forfeiture authority and strict deadlines imposed on all parties’, (2001) *Journal of Legislation*, 27, 97-151, at 97. Fesak noted that “our founders were well acquainted with this tradition; the fifth enactment of the First Congress established this nation's first statutory forfeiture, providing “[A]ll goods, wares, and merchandise . . . landed or discharged [in violation of the customs laws], shall become forfeited, and may be seized by any officer of the customs; and where the value thereof shall amount to four hundred dollars, the vessel, tackle, apparel and furniture, shall be subject to forfeiture and seizure”. See Fesak, M. ‘Who cares about counterfeiters? How the fight against counterfeiting has become an in rem process’ (2009) *Saint John’s Law Review*, 83, 735-794, at 737.

¹³⁶ See Johnson above, n 128 at 1070-1072.

¹³⁷ Chi noted that the forfeiture laws prior to the 2000 Act failed to “provide legal representation for defendants, as guaranteed by the Sixth Amendment”. See Chi above, n 126 at 1641.

¹³⁸ See Johnson above, n 128 at 1075.

¹³⁹ *Ibid.*, at 1058.

¹⁴⁰ 18 U.S.C. § 983(d).

¹⁴¹ 18 U.S.C. § 983(d)(3)(A)(ii).

¹⁴² See Johnson above, n 128 at 1072.

questioned.¹⁴³ For example, the dubious motivation or ‘perverse incentives’ of law enforcement agencies towards appropriating property for their own gain remains questionable, and the measures have been referred to as ‘legalised theft’.¹⁴⁴ US law enforcement agencies are allowed to maintain and utilise the proceeds acquired via forfeiture by the Comprehensive Crime Control Act 1984. This point is illustrated by several instances of law enforcement agencies who have forfeited property from people who have not been charged with any criminal offences.¹⁴⁵ Stessens was highly critical of these measures and noted that “it is fundamentally wrong to investigate and prosecute criminal activities with a view to the financial profits arising from them that will accrue to government”.¹⁴⁶ He added that other problems relate to the “influence of this personal pecuniary interest in the functioning of criminal justice, that is, its influence on the way police officers, prosecutors and judges carry out their tasks”.¹⁴⁷ The Comprehensive Crime Control Act has not resulted in a decrease in the amount of money forfeited and the safeguards it has introduced “has not proven to be an obstacle to federal law enforcement agencies. In fact, most people familiar with the program agree that the number of forfeitures is set to rise”.¹⁴⁸ The final type of forfeiture provision used in the US is Administrative forfeiture. This is an *in rem* action that is brought by the seizing agency without any judicial overview.¹⁴⁹ This can be contrasted with both criminal and civil forfeiture, which are “judicial matters, requiring the commencement of a formal action in a federal court”.¹⁵⁰ Administrative forfeiture is the most popular procedure and it relates to unchallenged cases which are pursued by federal law enforcement agencies as a ‘non judicial’ matter. This results in the court ordering the transfer of title of assets to the government.¹⁵¹ Therefore, the scope of administrative forfeiture is limited to four categories of assets:

1. where the value does not exceed \$500,000 per item;
2. where its importation is illegal;

¹⁴³ See Cassella above, n 106 at 150-151.

¹⁴⁴ See Moores above, n 127 at 779

¹⁴⁵ See for example the story of Luther and Meredith Ricks as cited *ibid*, at 782.

¹⁴⁶ See Stessens above, n 23 at 57.

¹⁴⁷ *Ibid*.

¹⁴⁸ See Moores above, n 127 at 783-784.

¹⁴⁹ The authority for a seizing agency to start an administrative forfeiture action is found in the Tariff Act of 1930, 19 U.S.C. § 1607.

¹⁵⁰ See Cassella above, n 95 at 36.

¹⁵¹ See Cassella above, n 93 at 353.

3. where it is a means of transporting used in moving or storing controlled substances, and
4. where it is currency or a monetary instrument of any value.¹⁵²

The creation of a competent authority to manage a confiscation regime

The US forfeiture regime is managed by several government departments and federal agencies, a position that can be contrasted with that adopted in the UK. For example, the Department of Treasury via its Treasury Executive Office for Asset Forfeiture administers the Treasury Forfeiture Fund.¹⁵³ Furthermore, the Department of Justice manages the Asset Forfeiture Program. The fundamental purpose of the Asset Forfeiture Program is to the “seizure and forfeiture of assets that represent the proceeds of, or were used to facilitate federal crimes”.¹⁵⁴ Furthermore, there are an additional number of federal agencies that are also involved in the Asset Forfeiture Program. This includes for example, the United States Postal Inspection Service, the Food and Drug Administration, the United States Department of Agriculture, Office of the Inspector General, the Department of State, Bureau of Diplomatic Security and the Defence Criminal Investigative Service.

The confiscated funds or assets should be transferred to the state via a confiscation fund

The Comprehensive Crime and Control Act 1984 allow the proceeds of forfeiture actions to be placed in a ‘special forfeiture fund’ that is jointly held at the Department of Justice and the Department of Treasury.¹⁵⁵ The fund is referred to as the ‘Department of Justice Assets Forfeiture Fund’ and its purpose is to “receive the proceeds of forfeiture and to pay the costs associated with such forfeitures, including the costs of managing and disposing of property, satisfying valid liens, mortgages, and other innocent owner claims, and costs associated with accomplishing the legal forfeiture of the property”.¹⁵⁶ The 1984 Act also introduced an equitable sharing programme that allowed law enforcement agencies to share a large

¹⁵² 18 USC 983(a)(1) and (2) and 19 USC 1602.

¹⁵³ For more information see Department of Treasury ‘About’ (n/d), available from <http://www.treasury.gov/about/organizational-structure/offices/Pages/The-Executive-Office-for-Asset-Forfeiture.aspx>, accessed 18 July 2012.

¹⁵⁴ Department of Justice ‘Participants and roles’ (n/d), available from <http://www.justice.gov/jmd/afp/05participants/index.htm>, accessed 2 August 2012.

¹⁵⁵ See Johnson above, n 128 at 1049-1050.

¹⁵⁶ Department of Justice ‘The fund’, (n/d), available from http://www.justice.gov/jmd/afp/02fundreport/02_2.html, accessed 12 July 2012.

proportion of the seized or forfeited assets.¹⁵⁷ The fund is assisted by the National Asset Forfeiture Strategic Plan which has five objectives:

1. provide a strategic framework to enhance the capability, reach, and effectiveness of the Programme;
2. provide direction to the asset forfeiture community to ensure that the Programme's mission is carried out effectively and efficiently;
3. to enable Programme participants to manage and expand this important and vital law enforcement tool;
4. ensure maximum participation by all Programme participants and determine appropriate areas of growth; and
5. advocate for the resources needed to support and grow the Programme.¹⁵⁸

The National Assets Seizure and Forfeiture Funds have proved to be successful and by the 1990s, \$500m was annually deposited and nearly \$1.4bn of property was held.¹⁵⁹ The money is distributed to law enforcement agencies and anti-crime initiatives by the Asset Forfeiture Programme which “plays a critical and key role in disrupting and dismantling illegal enterprises, depriving criminals of the proceeds of illegal activity, deterring crime, and restoring property to victims”.¹⁶⁰ According to the Department of Justice, the Asset Forfeiture Programme:

“Encompasses the seizure and forfeiture of assets that represent the proceeds of, or were used to facilitate federal crimes. The primary mission of the Program is to employ asset forfeiture powers in a manner that enhances public safety and security. This is accomplished by removing the proceeds of crime and other assets relied upon by criminals and their associates to perpetuate their criminal activity against our society. Asset forfeiture has the power to disrupt or dismantle criminal organizations that would continue to function if we only convicted and incarcerated specific individuals”.¹⁶¹

¹⁵⁷ Stessens above, n 23 at 77.

¹⁵⁸ Department of Justice *National Asset Forfeiture Strategic Plan 2008-2012* (Department of Justice: Washington DC, 2008) at p. 7.

¹⁵⁹ Stahl, M. ‘Asset forfeiture, burdens of proof and the war on drugs’, (2009) *Journal of Criminal Law and Criminology*, 83, 274-337, at 274-275. Cassella noted that the figure was \$600m per year. See Cassella above, n 95 at 23.

¹⁶⁰ See Department of Justice above, n 158 at 5.

¹⁶¹ Department of Justice ‘Asset forfeiture programme’ (n/d), available from <http://www.justice.gov/jmd/afp/>, accessed 12 July 2012.

Within the Department of Justice, the Asset Forfeiture Programme is used by the several departments including the Asset Forfeiture and Money Laundering Section, the Bureau of Alcohol, Tobacco, Firearms and Explosives, the Drug Enforcement Administration, the Federal Bureau of Investigation, the United States Marshals Service and the United States Attorneys' Offices.¹⁶² The Asset Forfeiture Programme is also used by the United States Postal Inspection Service, the Food and Drug Administration, the Department of Agriculture and Office of the Inspector General, the Bureau of Diplomatic Security and the Defence Criminal Investigative Service.¹⁶³ Between 2006 and 2008, over \$2bn of forfeited money and assets was distributed via the Asset Forfeiture Programme.¹⁶⁴ In 2010, \$1.6bn was deposited into the fund,¹⁶⁵ while \$1.64bn was submitted in 2011.¹⁶⁶ Since the creation of the fund in 1984, the Department of Justice has forfeited approximately \$20bn of the proceeds of crime.¹⁶⁷

The ability of US law enforcement agencies to forfeit the proceeds of crime is a central tenant of its criminal justice system.¹⁶⁸ The scope of the criminal forfeiture system was initially limited to drug money laundering; this has since been extended to over 200 federal and state criminal offences. The criminal forfeiture system is supported by an aggressive and controversial civil forfeiture system, which due to the lower burden of proof is a popular option for recovery agencies, who in some instances have abused these powers in the pursuit of economic self-sufficiency.¹⁶⁹ The US forfeiture regime is managed by several federal agencies, a position that can be contrasted with that adopted in the UK. The Department of Justice manages the Asset Forfeiture Program. In order to prevent what has been referred to as a legalised theft, a forfeiture fund was created in 1984 to store, manage and distribute the proceeds of crime to law recovery agencies. The US has adopted the confiscation typology as outlined at the start of the article, but as the next section of the article will demonstrate, there are a number of differences when compared to the UK.

¹⁶² See Department of Justice above, n 154.

¹⁶³ *Ibid.*

¹⁶⁴ See Department of Justice above, n 158 at 3.

¹⁶⁵ Department of Justice '2010 Asset Forfeiture fund reports', September 2010, available from www.justice.gov/jmd/afp/02fundreport/2010affr/report1.htm, accessed 14th October 2011. The Department of Justice is required to publish annual reports by virtue of 28 U.S.C. section 524(c)(6).

¹⁶⁶ Department of Justice 'Total Net Deposits to the Fund by State of Deposit' (n/d), available from <http://www.justice.gov/jmd/afp/02fundreport/2011affr/report1.htm>, accessed 12 July 2012.

¹⁶⁷ For the exact annual figures forfeited in the US see Department of Justice 'Historic reports' (n/d), available from <http://www.justice.gov/jmd/afp/02fundreport/HistoricReports.htm>, accessed 18 July 2012.

¹⁶⁸ See Cassella above, n 95 at 24.

¹⁶⁹ *Ibid.*, at 40.

The United Kingdom

The UK has a long and established history of forfeiting and confiscating the proceeds of crime. It was one of the first countries in the EU to introduce a confiscation regime and it will provide a valuable contribution to the article. Historically, it is important to note that the Crown exercised the power to forfeit the estate of a person convicted of treason until the enactment of the Forfeiture Act 1870.¹⁷⁰ However, the ability to forfeit property was reintroduced by the Obscene Publications Act 1959,¹⁷¹ the Misuse of Drugs Act 1971,¹⁷² the Powers of Criminal Courts Act 1973,¹⁷³ the Customs and Excise Management Act 1979,¹⁷⁴ the Drug Trafficking Act 1994¹⁷⁵ and the Immigration and Asylum Act 1999.¹⁷⁶ The UK has adopted a robust stance towards tackling the proceeds of crime because of the threat it poses to the ‘City of London’. Historically, London’s importance at the centre of the global banking sector can be traced back to the twelfth century. Blair stated that “the process of internationalisation received an important boost in London’s ‘big bang’ in the mid 1980s ... which led to enormous inward investment”.¹⁷⁷ In 2008, the British Bankers Association reported that “the UK’s financial industry has grown faster than any other business sector over the past ten years”.¹⁷⁸ According to HM Treasury the UK is regarded as the “world-leading financial services industry”,¹⁷⁹ a view supported by several studies including Long Finance,¹⁸⁰ Ernst & Young¹⁸¹ and the World Economic Forum.¹⁸² However, it is important

¹⁷⁰ Alexander, R. ‘Confiscation orders: do the UK’s provisions for confiscation orders breach the European Convention on Human Rights?’ (1998) *Journal of Financial Crime*, 5(4), 374-381, at 375.

¹⁷¹ Obscene Publications Act 1959, s. 3(3). As cited in Leong, A. ‘Asset recovery under the Proceeds of Crime Act 2002: the UK experience’, in S Young (ed.), *Civil forfeiture of criminal property – legal measures for targeting the proceeds of crime*, (Edward Elgar: Cheltenham, 2009) at p. 188.

¹⁷² Misuse of Drugs Act 1971, s. 27.

¹⁷³ Powers of Criminal Courts Act 1973, s. 22(6)(a). This Act was repealed on the 25 August 2000 by the Powers of Criminal Courts (Sentencing) Act 2000.

¹⁷⁴ Customs and Excise Management Act 1979, ss. 48-50, 88-90, 124, 139-141 and Schedule 3.

¹⁷⁵ Drug Trafficking Act 1994, s. 43.

¹⁷⁶ Immigration and Asylum Act 1999, ss. 48-49.

¹⁷⁷ Blair, W. (1998), ‘The reform of financial regulation in the UK’, *Journal of International Banking Law*, 13(2), 43-49, at 43. The phrase ‘big bang’ was famously referred to by Professor Gower during the enactment of the Financial Services Act 1986. See Gower, L. ‘Big Bang and City regulation’ (1988) *Modern Law Review*, 51(1), 1-22.

¹⁷⁸ Its Chief Executive stated that “financial services are the powerhouse of the UK economy: a massive contributor to the Exchequer through tax, an employer of more than a million people directly and one of the UK’s last acknowledged world-leading industries”. See British Bankers Association (2008), ‘Financial services sector tops UK growth tables’ Press Release 18 January 2008, available at <http://www.bba.org.uk/bba/jsp/polopoly.jsp?d=1569&a=12022> (accessed June 9 2009).

¹⁷⁹ HM Treasury ‘World-class financial centre’ (n/d), available from http://www.hm-treasury.gov.uk/fin_worldclass_index.htm, accessed 13 July 2012.

¹⁸⁰ Long Finance *The Global Financial Centres Index 11* (Long Finance: London, 2012) at p. 4.

to note that as a result of the deregulation of banking legislation in the 1970s and 1980s London could be regarded as an attractive financial centre for white collar criminals. For example, the ‘City of London’ faces a significant threat from money laundering, a view frequently declared by the US Department of State,¹⁸³ The former head of the Serious Fraud Office, Rosalind Wright QC stated that:

“London had become the money-laundering capital of the world. It is an unenviable reputation to have. London’s huge financial markets are not surprisingly a magnet for the launderer; \$1,000bn a day is exchanged in the foreign currency markets and the sheer volume of transactions makes it impossible to check every single one. We are also to an extent the victim of our own magnificent reputation: dollars ending up in a bank account in the UK are less likely to be thought to be tainted than if they were put through less reputable offshore banking centres”.¹⁸⁴

In addition to the threat posed by money laundering, the UK continues to face a threat from fraud, which according to the 2012 Annual Fraud Indicator costs the economy £73bn per year.¹⁸⁵ The UK also represents an important case study due to the proposal to create the National Crime Agency (NCA), which will manage the confiscation regime under the Proceeds of Crime Act 2002. Since the recommendations of the Hodgson Committee in 1984 and the publication of the Performance and Innovation Unit report, the UK’s policy towards tackling the proceeds of crime has undergone a series of reactive reforms. The hapless Assets Recovery Agency (ARA) was given the unenviable task of administering the confiscation regime;¹⁸⁶ only to be replaced by SOCA, because it did not achieve the ill advised political aspirations of several Labour Home Secretary’s. SOCA, will also be replaced by the NCA, thus leaving the UKs management of its confiscation regime in yet another state of uncertainty.

¹⁸¹ Ernst & Young *Waking up to the new economy Ernst & Young's 2010 European attractiveness survey* (Ernst & Young: London, 2010) at p. 21.

¹⁸² World Economic Forum *The Financial Development Report 2011* (World Economic Forum: London, 2011) at p. xiii.

¹⁸³ Department of State, *Bureau for International Narcotics and Law Enforcement Affairs International Narcotics Control Strategy Report Volume II Money Laundering and Financial Crimes*, Washington DC: Department of State Department, 2010) at p. 223.

¹⁸⁴ Wright, R. ‘Keynote address to the 17th International Cambridge Symposium on Economic Crime’ (2000) *Journal of Financial Crime*, 7(4), 304-307, at 305. Estimates on the extent of money laundering in the UK vary between £23bn and £57bn. See Financial Services Authority, ‘What is financial crime?’, (n’d), available from www.fsa.gov.uk/pages/About/What/financial_crime/money_laundering/faqs/index.shtml, accessed 16 June 2012 see Harvey, J. ‘An Evaluation of Money Laundering Policies’, *Journal of Money Laundering Control*, 2005 8(4) 339-345, at 340.

¹⁸⁵ National Fraud Authority *Annual Fraud Indicator 2012* (National Fraud Authority: London, 2012) at p. 3.

¹⁸⁶ For a detailed review of the Proceeds of Crime Act 2002 see the excellent article by Ulph, J. ‘Confiscation orders, human rights, and penal measures’ (2010) *Law Quarterly Review*, 126(Apr), 251-278.

The need for an effective confiscation regime was highlighted by the infamous decision of the House of Lords in *R v Cuthbertson*.¹⁸⁷ In this case, the defendants were convicted of conspiracy to manufacture and distribute drugs, yet the House of Lords determined that the forfeiture powers under the Misuse of Drugs Act 1971 were limited to “physical items used to commit the offence”.¹⁸⁸ Therefore, the House of Lords determined that the forfeiture powers under the 1971 Act could not be used because the defendants had been convicted of a conspiracy offence and not an offence under the Act.¹⁸⁹ The courts frustration was illustrated by Lord Diplock who stated “My Lords, it is with considerable *regret* [authors emphasis] that I find myself compelled to allow these consolidated appeals”.¹⁹⁰ Similarly, Lord Edmund-Davies who said “I too am forced to the most *reluctant* [authors emphasis] conclusion that all three appeals must be allowed and the forfeiture orders discharged in each case”.¹⁹¹ The decision in *Cuthbertson* resulted in the creation of the Hodgson Committee, which was asked to review “the limited forfeiture powers in recovering the proceeds of crime”.¹⁹² The Hodgson Committee recommended that:

“Criminal courts should have the power to order the confiscation of proceeds of an offence of which the defendant has been convicted or asked to be taken into consideration. There should be a prescribed minimum amount below which no confiscation order could be made, but once that limit is established there should be no maximum limit ... Only crown courts should have the power to make confiscation orders, but magistrates should be able to commit defendants to the crown court with a view to a confiscation order being made, Committal for this sole purpose should be possible even though the offence is only triable summarily. Crown courts should be required to consider whether a confiscation order should be made and Magistrates’ Courts to consider whether to commit for consideration of the making of a confiscation order”.¹⁹³

Therefore, the Drug Trafficking Offences Act 1986 imposed “a mandatory obligation on the court to confiscate the proceeds of drug trafficking offences”.¹⁹⁴ The confiscation regime under the Drug Trafficking Offences Act 1986 contained:

¹⁸⁷ [1981] AC 470.

¹⁸⁸ See Leong above, n 171 at 188.

¹⁸⁹ Misuse of Drugs Act 1971, s. 27.

¹⁹⁰ [1981] AC 470, at 479G.

¹⁹¹ *Ibid.*, at 485F.

¹⁹² See Leong above, n 171 at 189.

¹⁹³ As cited in Broadbridge above, n 18 at 24.

¹⁹⁴ Drug Trafficking Offences Act 1986, s. 1.

“a set of statutory assumptions that assets in possession, and those transferred to the defendant over the previous six years, were profits from his criminal activity. These were then included in the calculation of the defendant’s benefit. The burden of proof thus shifted to the defendant to show to the civil standard that the assumptions were inaccurate, or that ‘the amount which might be realised’ was less than the benefit”.¹⁹⁵

The initial scope of the UK’s confiscation provisions was similar to those in the US, in that they only applied to drug trafficking offences. The range of criminal offences was extended to all ‘non-drug’ indictable offences and specific summary offences by the Criminal Justice Act 1988.¹⁹⁶ Further amendments were introduced by the Drug Trafficking Act 1994¹⁹⁷ and the Proceeds of Crime Act 1995.¹⁹⁸ However, these were still ineffective and it led to the Labour government commissioning a review of the UKs confiscation regime by the Performance and Innovation Unit. The report recommended that an ‘Asset Confiscation Agency’ should be created and that both the money laundering and confiscation regime should be consolidated under one piece of legislation.¹⁹⁹ These recommendations were enacted via the Proceeds of Crime Act 2002.

Criminal Confiscation

A criminal confiscation order is imposed by a court against a convicted defendant to pay the amount of the benefit from crime.²⁰⁰ In order to grant a confiscation order, the court must consider two questions.²⁰¹ Firstly, whether the defendant has a criminal lifestyle?²⁰² Secondly, has the defendant profited from their illegal behaviour?²⁰³ A defendant is regarded to have had a ‘criminal lifestyle’ if one of the following three conditions is met, and there has to be a minimum benefit of £5,000 for the final two to be met:

¹⁹⁵ Criminal Justice Joint Inspection *Joint thematic review of asset recovery: restraint and confiscation casework* (Criminal Justice Joint Inspection: London, 2010) at p. 2.

¹⁹⁶ Criminal Justice Act 1988, ss. 71-89.

¹⁹⁷ Drug Trafficking Act 1994, ss. 1-41.

¹⁹⁸ Proceeds of Crime Act 1995, ss. 1-2.

¹⁹⁹ Cabinet Office *Recovering the Proceeds of Crime – A Performance and Innovation Unit Report* (Cabinet Office: London, 2000) at pp. 118-120.

²⁰⁰ Crown Prosecution Service (n/d) ‘Confiscation and Ancillary Orders pre-POCA: Proceeds of Crime Guidance’, available from http://www.cps.gov.uk/legal/a_to_c/confiscation_and_ancillary_orders/#whatis, accessed 24th October 2011.

²⁰¹ Proceeds of Crime Act 2002, s. 6.

²⁰² Proceeds of Crime Act 2002, s. 10 and 75. For examples of what amounts to criminal lifestyle under the Proceeds of Crime Act 2002 see Thomas, D. ‘Confiscation orders – update: Part 1’ (2011) *Archbold Review*, 4, 6-9; Thomas, D. ‘Confiscation orders – update: Part 2’ (2011) *Archbold Review*, 5, 6-9;

²⁰³ Proceeds of Crime Act 2002, s. 307.

1. it is a 'lifestyle offence' as specified in Schedule 2 of the Proceeds of Crime Act;²⁰⁴
2. it is part of a 'course of criminal conduct',²⁰⁵ and
3. it is an offence committed over a period of at least 6 months and the defendant has benefited from it.²⁰⁶

A person is regarded as having a criminal lifestyle if he is convicted of an offence under Schedule 2 of the Proceeds of Crime Act 2002.²⁰⁷ This includes for example, drug trafficking,²⁰⁸ money laundering,²⁰⁹ directing terrorism,²¹⁰ people trafficking,²¹¹ arms trafficking,²¹² counterfeiting²¹³ and intellectual property offences.²¹⁴ The second condition 'course of criminal conduct' is a part of a criminal activity in two cases. The first case is where the defendant has benefited from the conduct and "(a) in the proceedings in which he was convicted he was convicted or three or more other offences, each of the three or more of them constituting conduct which he has benefited".²¹⁵ The second instance is "(b) in the period of six years ending with the day when those proceedings were started he was convicted on at least two separate occasions of an offence constituting conduct from which he has benefited".²¹⁶ Once the court feels that this criterion has been met, it will determine a 'recoverable amount' and grant a confiscation order that compels the defendant to pay.²¹⁷ SOCA is not allowed to commence proceedings on their own initiative but are only permitted

²⁰⁴ This includes for example drug trafficking, money laundering, people trafficking, counterfeiting, blackmail and arms trafficking. See for example Alldridge, P. 'The limits of confiscation' (2011) Criminal Law Review, 11, 827-843, at 829.

²⁰⁵ Proceeds of Crime Act 2002, s. 75(2)(b).

²⁰⁶ Proceeds of Crime Act 2002, s. 75. For a discussion of what amounts to a criminal lifestyle see *R v Whittington (Mark)* [2010] 1 Cr. App. R. (S.) 83 (CA (Crim Div)) as cited in Thomas, D. 'Case Comment R. v Whittington: confiscation order - criminal lifestyle – assumptions' (2010) Criminal Law Review, 1 65-69.

²⁰⁷ For an illustration of the approach adopted by the courts to this issue see *Assets Recovery Agency v. The Personal Representative of Stephen Warnock, Deceased, Saraena Warnock, Stephen Warnock (Junior), and Clare Patterson* (2005) NIQB 16.

²⁰⁸ See certain offences under the Misuse of Drugs Act 1971.

²⁰⁹ This would include Proceeds of Crime Act 2002, s. 327 and 328.

²¹⁰ See Terrorism Act 2000, s. 56.

²¹¹ This would include for example breaches of the National, Immigration and Asylum Act 2002, s. 145.

²¹² See generally the offences created by the Customs and Excise Management Act 1979.

²¹³ Forgery and Counterfeiting Act 1981, ss. 14-17.

²¹⁴ See Copyright, Designs and Patents Act 1988.

²¹⁵ Proceeds of Crime Act 2002, s. 75(3)(a).

²¹⁶ Proceeds of Crime Act 2002, s. 75(3)(b). For a detailed discussion of these provisions see Gentle, S. 'Legislative comment Proceeds of Crime Act 2002' (2003/2004) Compliance Officer Bulletin 12(Dec/Jan), 1-29.

²¹⁷ Proceeds of Crime Act 2002, s. 7. A recoverable amount is either the "full amount of what the court has found to be his 'benefit' from his 'criminal conduct' or (b) the value of all of the defendant's remaining assets, called the 'available amount', if that can be proved to be less". See in Rees, E. and Fisher, R. *Blackstone's guide to the Proceeds of Crime Act 2002* (Oxford University Press: Oxford, 2002) at 23. For a discussion of the interpretation of an 'available amount' see *R. v Walker (Jack)* [2011] EWCA Crim 103; [2012] 1 W.L.R. 173 (CA (Crim Div)).

to do so when cases are referred to them where there is insufficient evidence to proceed with a criminal trial, or where the Crown Prosecution Service has decided against pursuing the case due to the public interest criteria,²¹⁸ where confiscation proceedings are unsuccessful due to procedural mistakes and where the defendant has died or even is abroad. However, there were six categories of cases which were initiated by its predecessor the ARA. This included deceased defendants, acquitted defendants, failed confiscation hearings, defendants are not within the jurisdiction, property whose owner is uncertain and where the defendants un-prosecutable due insufficient evidence.²¹⁹ These provisions of the Proceeds of Crime Act 2002 can be contrasted with those in the US because they are “not made *in rem* in relation to traced proceeds of crime”.²²⁰

The scope of the UK’s regime was extended to include the forfeiture of terrorist cash at its borders.²²¹ The Terrorism Act 2000 permits forfeiture provided a person is convicted of a terrorist financing offence. This includes fund raising,²²² use and possession,²²³ funding arrangements²²⁴ or money laundering.²²⁵ The court will grant a forfeiture order of “money or other property in the possession or under the control of a convicted person and which, at the time he intended should be used, or had reasonable cause to suspect might be used for the purposes of terrorism or he knew or had reasonable cause to suspect would or might have been used for the purposes of terrorism”.²²⁶ These forfeiture provisions were extended to the seizure of terrorist cash anywhere in the UK.²²⁷ These powers have been used, but the amount of money forfeited is small when compared to other types of criminal activity, only £1.452m was forfeited between 2001 and 2006.²²⁸ The Home Office reported that between

²¹⁸ For a more detailed discussion of this term see The Crown Prosecution Service *The code for crown prosecutors* (The Crown Prosecution Service: London, 2010) at pp. 10-15.

²¹⁹ Kennedy, A. ‘Civil recovery proceedings under the Proceeds of Crime Act 2002: the experience so far’ (2006) *Journal of Money Laundering Control*, 9(3), 245-264, at 245-253.

²²⁰ See Alldridge above, n 204 at 828.

²²¹ For a definition of terrorist cash see Anti-terrorism, Crime and Security Act 2001, Schedule 1, para 1(a) and (b).

²²² Terrorism Act 2000, s. 15.

²²³ Terrorism Act 2000, s. 16.

²²⁴ Terrorism Act 2000, s. 17.

²²⁵ Terrorism Act 2000, s. 18.

²²⁶ Terrorism Act 2000, schedule 4.

²²⁷ Anti-terrorism, Crime and Security Act 2001, schedule 1.

²²⁸ HM Government *Countering international terrorism: the United Kingdom’s strategy* (HM Government: London, 2006).

2008 and 2009 £838,539.65 was forfeited.²²⁹ It is important to note that there are some problems with the collection of any accurate data for the amount of terrorist cash forfeited.²³⁰

Civil Confiscation

The second method, civil recovery, allows SOCA to commence civil proceedings in the High Court if a criminal prosecution is unachievable.²³¹ In order for SOCA to initiate civil recovery or tax proceedings a number of criteria must be present:

1. recoverable property has been identified and has an estimated value of at least £10,000;²³²
2. recoverable property has been acquired in the last 12 years (20 years for tax);
3. recoverable property includes property other than cash, cheques and the like (although cash can be recovered in addition to other property);
4. there is evidence proven to civil standards of criminal conduct, and
5. for tax cases there must be reasonable suspicion that untaxed income has resulted from criminality.

SOCA can seek a civil confiscation order against any person holding the proceeds of crime.²³³ Here, the agency is permitted to recover “property obtained through unlawful conduct” which includes “money real or personal, heritable or moveable property”.²³⁴ The High Court determines on a balance of probabilities and “provides for retrospective application to property unlawfully obtained before the Act came into force”.²³⁵ SOCA must demonstrate on a balance of probabilities that there is some evidence of criminal activity. The civil burden of proof has proven to be extremely controversial and has been the subject to several legal challenges as demonstrated by the Supreme Court in *Gale and another v Serious Organised Crime Agency*.²³⁶ The respondent has the reverse burden of proof and

²²⁹ Home Office *Report on the operation in 2009 of the Terrorism Act 2000 and of part 1 of the Terrorism Act 2006 by Lord Carlisle of Berriew Q.C.* (Home Office: London, 2010) p. 21. At the time of writing this article no statistical data is provided in the 2010 review which was published in February 2011. See Home Office *Report on the operation in 2010 of the Terrorism Act 2000 and of part 1 of the Terrorism Act 2006 by Lord Carlisle of Berriew Q.C.* (Home Office: London, 2011).

²³⁰ *Ibid.*, at 21.

²³¹ Proceeds of Crime Act 2002, s. 240(2).

²³² Proceeds of Crime Act 2002, s. 287 and the Proceeds of Crime Act 2002 (Financial Threshold for Civil Recovery) Order 2003, S.I. 2003/175.

²³³ Proceeds of Crime Act (2002), s. 240 (1)(a) and 243(1).

²³⁴ Proceeds of Crime Act 2002, s. 304(1).

²³⁵ See Rees and Fisher above, n 217.

²³⁶ [2011] UKSC 49.

must illustrate the lawful origin of the assets.²³⁷ Where civil confiscation dealings have been instigated, it is possible for SOCA to apply for an Interim Receiving Order.²³⁸ An interim receiving order results in the appointment of a receiver whose role is to safeguard the property.²³⁹

The third recovery method is taxation and it enables SOCA to tax any income, benefit or turnover where the respondent is unable to legitimise the source.²⁴⁰ These controversial measures were famously endorsed by the US Supreme Court in *Holland v. US*,²⁴¹ and are used as a means of targeting people with a “with a high standard of living but no visible lawful means of financing it”.²⁴² The Proceeds of Crime Act 2002 allows the Director of SOCA to perform the tax collection duties of HM Revenue and Customs,²⁴³ which permits the agency to “disrupt organised criminal enterprises through the recovery of criminal assets”.²⁴⁴ The general revenue functions that can be transferred to SOCA include income tax,²⁴⁵ capital gains tax,²⁴⁶ corporation tax,²⁴⁷ national insurance contributions,²⁴⁸ statutory sick pay,²⁴⁹ statutory maternity pay,²⁵⁰ statutory paternity pay,²⁵¹ statutory adoption²⁵² pay and student loans.²⁵³ Under the Proceeds of Crime Act, SOCA must be satisfied that it has reasonable grounds to suspect that “income profits or gains arising or accruing to a person (including a company) in respect of a chargeable period are chargeable to tax and arise or accrue as a result of that person’s, or another’s, criminal conduct”.²⁵⁴ The taxation powers

²³⁷ See Leong above, n 171 at 209.

²³⁸ Proceeds of Crime Act 2002, s. 246.

²³⁹ For a brief discussion of the role of the appointed receiver see Johnstone, P. and Brown, G. ‘International controls of corruption: recent responses from the USA and the UK’ (2004) *Journal of Financial Crime*, 11(3), 217-248, at 235-236.

²⁴⁰ These powers originated in the US and have been used “as a weapon against organised crime through the outstanding work of the Internal Revenue Service’s Criminal Investigation Division”. See Lusty, D. ‘Taxing the untouchables who profit from organised crime’, (2003) *Journal of Financial Crime*, 10(3), 209-228, at 212.

²⁴¹ 348 U.S. 121 (1954).

²⁴² Mumford, A. and Alldridge, P. ‘Taxation as an adjunct to the criminal justice system: the new Assets Recovery Agency regime’, (2002) *British Tax Review*, 6, 458-469, at 460. For an excellent discussion of the controversy surrounding the use of such powers in the US see Duke, S. ‘Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid’, (1966) *Yale Law Journal*, 76, 1-76.

²⁴³ Proceeds of Crime Act 2002, s. 317.

²⁴⁴ Cory, R. ‘Taxing the proceeds of crime’ (2007) *British Tax Review*, 4, 356-362, at 356.

²⁴⁵ Proceeds of Crime Act 2002, s. 323(1)(a).

²⁴⁶ Proceeds of Crime Act 2002, s. 323(1)(b).

²⁴⁷ Proceeds of Crime Act 2002, s. 323(1)(c).

²⁴⁸ Proceeds of Crime Act 2002, s. 323(1)(d).

²⁴⁹ Proceeds of Crime Act 2002, s. 323(1)(e).

²⁵⁰ Proceeds of Crime Act 2002, s. 323(1)(f).

²⁵¹ Proceeds of Crime Act 2002, s. 323(1)(g).

²⁵² Proceeds of Crime Act 2002, s. 323(1)(h).

²⁵³ Proceeds of Crime Act 2002, s. 323(1)(i).

²⁵⁴ Proceeds of Crime Act 2002, s. 317(1)(a) and (b).

are in theory a very important tool in the fight against ending the ‘champagne lifestyle’ of organised criminals. However, evidence suggests that in practice these powers are ineffective. For example, it has been argued that the amount of money recovered by this mechanism is relatively insignificant when compared to the approximated profits produced by criminal enterprises.²⁵⁵ According to the National Audit Office, only 5.3% of cases referred related to tax, “of which resulted in total receipts by the Assets Recovery Agency of £0.5m”.²⁵⁶ An explanation for the small amount of money is that it took the Assets Recovery Agency on average 607 days to recover money via this method.²⁵⁷

The creation of a competent authority to manage a confiscation regime

The effectiveness of the confiscation provisions of the Proceeds of Crime Act have has been affected by the failings of the ARA and SOCA. The appropriateness of their in 2005 must be questioned because evidence suggests that the ARA performed extremely well and satisfied a majority of its ‘key performance indicators’.²⁵⁸ The success of the ARA was highlighted by the then Home Office Minister, Caroline Flint MP who stated that:

“After just one year criminals are feeling the pain of having their assets frozen, seized and confiscated on a greater scale than ever before: £55m suspect cash seized; £37.6m criminals’ cash confiscated; and £18.9m the subject of freezing and interim orders in the courts”.²⁵⁹

However, its performance suffered because of the unrealistic political aspirations. For example, the Home Office stated that the ARAs target for 2006/2007 was to confiscate £125m, £250m by 2009/2010 and “the longer term vision to detect up to £1bn”.²⁶⁰ These targets were unachievable and as Young stated, it was “misleading to measure the impact or performance by a simple calculus of cost based on the total amount of dedicated resources and benefit based on total amount forfeited”.²⁶¹ The performance of the ARA was limited by

²⁵⁵ See Cory above, n 244 at 358.

²⁵⁶ National Audit Office *Assets Recovery Agency – Report by the Comptroller and Auditor General* (National Audit Office: London, 2007) at 11.

²⁵⁷ *Ibid.*, at 17.

²⁵⁸ Leong, A. ‘The Assets Recovery Agency: future or no future?’ (2007) *Company Lawyer*, 28(12), 379-380, at 379.

²⁵⁹ As cited in Crown Prosecution Service Inspectorate *Payback time – a joint review of assets recovery since the Proceeds of Crime Act 2002* (HM Crown Prosecution Service Inspectorate: London, 2004) at p. 34.

²⁶⁰ Home Office *Rebalancing the criminal justice system in favour of the law-abiding majority Cutting crime, reducing reoffending and protecting the public* Home Office: London, 2006) at p. 36.

²⁶¹ See Young above, n 15 at 5.

the poorly drafted legislation, the Act's the relationship between the confiscation provisions and the European Convention of Human Rights.

In 2005, the role of managing the UK's confiscation mechanisms was transferred to SOCA by the Serious Organised and Crime and Police Act 2005. SOCA was mistakenly referred to as the 'British FBI', and its performance was measured against tackling the "400 major crime bosses in the UK, the so-called untouchables".²⁶² SOCA was granted additional powers under the Serious Crime Act 2007,²⁶³ to bring "organised criminals to justice".²⁶⁴ The measures included Serious Crime Prevention Orders which allow courts to impose restrictive conditions on those proved to be involved in serious crime.²⁶⁵ Furthermore, SOCA is allowed to scrutinise the monetary dealings and interactions of "serious acquisitive criminal" over a period of up to 20 years where the defendant has been sentenced to life imprisonment via a financial reporting order.²⁶⁶ When a court grants a financial reporting order, the criminal is required to report within a specified periodic time details of their financial transactions.²⁶⁷ Sproat took the view that financial reporting orders "would be obtained in cases of criminals convicted of a qualifying offence who law enforcement believes post a long-term threat".²⁶⁸ Qualifying offences are contained in Schedule 2 of the Proceeds of Crime Act 2002 and include for example tax evasion, money laundering, counterfeiting and drugs trafficking.²⁶⁹ The first financial reporting order was granted in against Abdullah Baybasin,²⁷⁰ who was described as "one of the country's most feared criminals and who ruled his £10bn heroin empire with violence and intimidation", after he was imprisoned for 22

²⁶² Fisher, J. 'A review of the new investigation powers under the Proceeds of Crime Act 2002' (2002) *Journal of International Banking Law*, 18(1), 15-23, at 15.

²⁶³ Serious Crime Act 2007, ss. 75-86.

²⁶⁴ Sproat, P. 'To what extent is the UK's anti-money laundering and asset recovery regime used against organised crime', (2009) *Journal of Money Laundering Control*, 12(2), 134-150, at 134.

²⁶⁵ *Ibid.*, at 136. See generally Serious Crime Act 2007, ss. 1-41 and Schedules 1 and 2.

²⁶⁶ Sproat above, n 264 at 138.

²⁶⁷ Anon. 'Offenders assisting investigators and prosecutors' (2006) *Sentencing News* 1(Mar), 7-11, at 11.

²⁶⁸ It is likely that such qualifying offences are created by the Fraud Act 2006 and the life style offences listed in Schedule 2 of the Proceeds of Crime Act (2002). For a discussion of the practical application of a financial reporting order see *R. v Wright (Brian)* [2008] EWCA Crim 3207; [2009] 2 Cr. App. R. (S.) 45 (CA (Crim Div)) as cited in Thomas, D. 'Sentencing: financial reporting order - defendant subject to confiscation order' (2009) *Criminal Law Review*, 5, 373-376.

²⁶⁹ See the Fraud Act (2006) and the Proceeds of Crime Act (2002), Schedule 2. The list of qualifying offences in the Proceeds of Crime Act 2002 has attracted criticism from some commentators for the offences that are not included. See for example Anon above, n 267 at 11.

²⁷⁰ *R v Abdullah Baybasin* 19 June 2006 at Woolwich Crown Court as cited in Kennedy, A. 'Winning the information wars: collecting, sharing and analysing information in asset recovery investigations' (2007) *Journal of Financial Crime*, 14(4), 372-404, at 382. A full transcript of the case can be accessed from The Law Society 'R v Abdullah Baybasin' (June 19 2006), available from <http://www.lawsociety.org.uk/documents/downloads/dynamic/ReginavAbdullahBaybasinCase.pdf>, accessed 6 June 2012.

years.²⁷¹ The Serious Crime Act 2007 widened the civil recovery and tax powers of SOCA to other prosecuting authorities. The powers go further than the customary criminal conviction and are often used when the assets in question are in the UK, but the defendant is out of the country or has fled. Unlike the ARA, SOCA has not achieved the optimistic targets set by the Home Office. For example, in July 2010 SOCA reported that it has confiscated £17.2m against a target of £39m.²⁷² The administration of the confiscation regime is due to undergo its third overhaul in less than a decade. In its ‘Coalition Agreement’, the government outlined its plans to merge the SFO, the Office of Fair Trading and the FSA into a single financial crime agency, the Economic Crime Agency (ECA). The Coalition government stated that “we take white collar crime as seriously as other crime and we are determined to simplify the confusing and overlapping responsibilities in this area in order to improve detection and enforcement”.²⁷³ The government acknowledged that the current regulatory structure is unworkable due to conflicting priorities, overlapping roles and ineffective outcomes.²⁷⁴ However, the formation of the ECA has been obstructed by differences of opinion within the Coalition government over its remit and the unparalleled positive reaction of both the SFO and FSA.²⁷⁵ The most significant factor that has prevented its creation is the uncertainty over its ownership. It is to the bemusement of the author, that neither the HM Treasury, which manages the FSA and administers the UKs anti-money laundering and counter-terrorist financing policies, was considered for this role. The ECA was to be managed by the Home Office, who hoped to end UK’s “piecemeal” toward tackling financial crime.²⁷⁶ However, the Home Office mistakenly expected that the “the initial elements” of the agency would be in place by the end middle of 2011.²⁷⁷ In a soap opera like twist, the Home Office decided against creating the ECA, and turned its attention to establishing the broader NCA. The objective of which was to tackle organised crime, fraud, cyber crime, maintain border protection and protect children and young people. The NCA is to be divided

²⁷¹ Townsend, M. ‘The gang shootings that put police with machine guns on London's streets’, 25 October 2009, available from <http://www.guardian.co.uk/uk/2009/oct/25/gang-shootings-armed-police-london>, accessed June 6 2012.

²⁷² BBC News, ‘Criminals fight asset seize bids’, 28 July 2010, available from <http://www.bbc.co.uk/news/uk-10790864>, accessed 26th October 2011.

²⁷³ HM Treasury ‘George Osborne, Chancellor of the Exchequer. Speech at The Lord Mayor’s Dinner for Bankers & Merchants of the City of London, at Mansion House 16 June 2010’, available from www.hm-treasury.gov.uk/press_12_10.htm, accessed 26 June 2010.

²⁷⁴ See generally Ryder, N. ‘The fight against illicit finance – a critical review of the Labour government’s policy’, (2011) *Journal of Banking Regulation*, 12(3) 252-275.

²⁷⁵ See for example Palmer, A. and Ryder, N. ‘The Economic Crime Agency’ (2011) *Financial Regulation International*, April, 1-3.

²⁷⁶ Home Office, Press Release, ‘Home Office to take lead on economic crime’, 17 January 2011, available from <http://www.homeoffice.gov.uk/media-centre/news/economic-crime>, accessed 23rd October 2011.

²⁷⁷ *Ibid.*

into four Command areas: Organised Crime Command, Border Policing Command, Economic Crime Command, and the Child Exploitation and Online Protection Centre.²⁷⁸ The Home Office envisage the role of the Economic Crime Command to “ensure a coherent approach to the use of resources focussed on economic crime across the full range of agencies deploying them”.²⁷⁹ Furthermore, it is hoped that it will “maintain an overview” of a wide range of economic crime agencies including the City of London Police and SFO.²⁸⁰ SOCA will cease to exist when these reforms are implemented, and the management of the UKs confiscation regime will transfer to the NCA.

The confiscated funds or assets should be transferred to the state via a confiscation fund

The position adopted in the UK towards the creation of a confiscation fund is very similar to that in the UK. The Proceeds of Crime Act 2002 provides that “any sums received by the Secretary of State in the consequences [via civil and/or criminal confiscation orders] of this Act are to be paid into the Consolidated Fund”.²⁸¹ In order to encourage recovery agencies to pursue and recover the proceeds of crime, the Home Office created the “Recovered Assets Incentivisation Fund”.²⁸² The scheme was created in 2003 and approximately £15.5 was allocated over a three year period by the government.²⁸³ Under this scheme, 50 percent of the recovered assets were distributed between the recovery agencies and where appropriate to promote local crime fighting initiatives.²⁸⁴ The redistributed proceeds of crime have been allocated to enforcement agencies such as the police, other front line agencies and used to cover confiscation proceedings.²⁸⁵ Furthermore, such income has been utilised by the Ministry of Justice to “defray the costs of regional collection and enforcement centres, related local and central management costs and the court costs relating to the making and enforcement of confiscation orders”.²⁸⁶ Additionally, “the assets comprising this fund are

²⁷⁸ The Home Office *The National Crime Agency – a plan for the creation of a national crime-fighting capability* (London: Home Office, 2011).

²⁷⁹ *Ibid.*, at 20.

²⁸⁰ Home Office above, n 278 at 20.

²⁸¹ Proceeds of Crime Act 2002, s. 460(2).

²⁸² National Audit Office above, n 256 at 8.

²⁸³ HM Crown Prosecution Service Inspectorate above, n 259 at 4-5.

²⁸⁴ National Audit Office above, n 256 at 14.

²⁸⁵ Alan Campbell MP, 21 Jan 2009 : Column 1494W, available from <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090121/text/90121w0015.htm>

²⁸⁶ Jonathan Djanogly MP, the Parliamentary Under Secretary of State, HC Deb, 12 March 2012, c107W.

then distributed in accordance with applicable policy”.²⁸⁷ The objective of this scheme is to distribute the proceeds of crime to crime affected communities and to illustrate that “crime does not pay”.²⁸⁸

Conclusion

The confiscation or forfeiture of the proceeds of crime is an integral part of the international community’s battle against, drug money laundering, terrorism, corruption and the commission of other serious offences. The international legislative measures seek to deprive organised criminals of their illegal proceeds of crime via either a criminal or civil confiscation order. The measures have been embraced in the two case studies subject to review in this article. What becomes clear after reviewing the relevant legislation in the US and UK and is that the forfeiture and confiscation of the proceeds of crime is a central part of their countries criminal justice system. The scope of these powers was gradually extended by successive international legislative measures introduced by the UN and the EU. The most contentious issue has been the introduction of and at times the recovery agencies over reliance on the civil recovery mechanism. This has resulted in claims that these powers amount to legalised theft because the accused has not been convicted of a criminal offence to merit the confiscation or forfeiture order. Nonetheless, the use of a civil mechanism to tackle organised crime, terrorists and drug cartels is justified due to the threat these criminal offences pose. In many circumstances, to obtain a successful criminal prosecution in these matters is extremely difficult, if not impossible due to the labyrinth of financial instruments and transactions that will be used to hide the proceeds of their illegal activities. jurisdictions.

United States of America

The US introduced its first forfeiture laws in 1789 and they are an integral weapon in its battle against organised crime, drug cartels, white collar criminals and terrorists. These measures have become extremely popular with law enforcement agencies because it is a means to generate revenue and, in effect, permits these agencies to become self sufficient.

²⁸⁷ Carr, I. and Goldby, M. ‘Recovering the proceeds of corruption: UNCAC and anti-money laundering standards’ (2011) *Journal of Business Law*, 2, 170-193, at 183.

²⁸⁸ Sproat, P. ‘The new policing of assets and the new assets of policing: a tentative financial cost-benefit analysis of the UK’s anti-money laundering and asset recovery regime’ (2007) *Journal of Money Laundering Control* 10(3), 277-299, at 278.

Evidently, US law enforcement agencies prefer to use the civil forfeiture procedures as opposed to the criminal forfeiture mechanisms. This is due to the lower burden of proof required and the need not to secure a criminal conviction. The civil forfeiture route does not provide the same level of constitutional safeguards as the criminal forfeiture procedures. Therefore, an appropriate balance must be achieved between protecting the constitutional rights of the accused whilst allowing law enforcement agencies to tackle the illegal proceeds of crime. The scope of the US forfeiture mechanisms has been broadened to include terrorism following the terrorist attacks of September 2001. However, the model adopted towards tackling the proceeds of crime for organised criminals, drug cartels and other criminal offences is inappropriate for terrorism. This is due to the fact that terrorists do not seek to profit from their illegal activity. An example of this approach is 'reverse money laundering' which involves terrorists receiving clean money from misapplied charitable donations for example that then becomes illegal money when it is used for the purposes of a terrorist attack. US forfeiture laws have been used to tackle the illegal activities of 'corporate fraudsters' such as Bernard Madoff during the 'Credit Crunch', which has resulted in some victims receiving compensation. Criminal forfeiture is an integral part of the US criminal justice system. US recovery agencies have been able to forfeit the proceeds of crime since 1789. The scope of its criminal forfeiture provisions was extended to tackle criminal enterprises, drug money laundering and terrorism. As a result of the 'Credit Crunch', recovery agencies have used forfeiture against white collar criminals. It is clear that the US has implemented the international legislative confiscation measures of the UN and the first part of the confiscation model. The US has also embraced the use of civil forfeiture, and this is an extremely popular mechanism with recovery agencies. However, it has led to accusations from some commentators that law enforcement agencies are aggressively pursuing civil forfeiture proceedings at the expense criminal proceedings. This is to be expected due to the impact of the austerity measures on law enforcement agencies in the US. The US, unlike the UK does not have a designated law enforcement agency that administers or manages its forfeiture scheme. The Department of Justice and the Department of Treasury jointly share this role, and law enforcement personnel are allowed to initiate proceedings for the forfeiture of the proceeds of crime. Since the creation of the confiscation fund in 1984 over \$20bn of the proceeds of crime has been redistributed to crime affected areas and to law enforcement agencies. The confiscation fund has proven to be an extremely contentious issue in the US, with two schools of thought. The first of which alleges that the confiscation fund allows recovery agencies to fill their coffers as part of an incentivised scheme. The second

view is that the confiscation fund provides essential financial resources for law enforcement agencies in their pursuit of organised criminals, drug cartels and white collar criminals. What becomes clear is that the US has created and successfully managed a confiscation fund that fulfils the criteria of the confiscation typology.

The United Kingdom

The scope of the UK's confiscation mechanisms was initially limited to the proceeds of drug trafficking related offences under the Drug Trafficking Offences Act 1986, which was introduced as a result of the decision of the House of Lords in *R v Cuthbertson*. The Conservative government extended these provisions on a piece-meal basis, but it wasn't until the introduction of the Proceeds of Crime Act in 2002 that the UK broadened the scope of its confiscation mechanisms. The Proceeds of Crime Act created the ARA, the UK's first dedicated confiscation agency and extended the scope of its criminal confiscation and civil confiscation measures. The creation of the ARA represented a significant departure from the UK's 'ad hoc' confiscation policy which resulted in a 'successful era' of confiscation measures. However, as a result of the ill advised political aspirations of successive 'headline' grabbing Home Secretary's, the ARA was bound to fail. Its position became untenable following the poorly drafted confiscation provisions of the Proceeds of Crime Act, the high level of internal disruption and was also hampered by the number of challenges under the European Convention of Human Rights. Therefore, the ARA was hastily removed and the asset recovery scheme was handed over the SOCA, or the 'British FBI' as mistakenly christened by certain sections of the media. SOCA also suffered the same fate as the ARA, despite being granted an extensive arsenal of powers by the Serious Crime Act 2007. SOCA's reign lasted four years, before it was dethroned by the announcement of yet 'another' new agency to policy to tackle organised crime, the NCA. One can only wonder how much time or 'stays of execution' the NCA will be granted in an era of austerity cuts. It makes little or no sense to continually 'rebrand' or 'repackage' the UK's confiscation agency; after all, it is a law enforcement agency not a washing powder. It is likely that the NCA will come under increasing pressure from the Coalition government to confiscate more money on a decreasing budget. This can be contrasted with the approach adopted in the US, where law enforcement agencies have seen a significant increase in funding from federal government. Now is not the time to reduce the budget of the UK's confiscation agency during a financial crisis that has contributed to a significant increase in illicit financial activities. The UK via

the Proceeds of Crime Act 2002 has successfully ratified the Vienna, Palermo and Corruption Conventions and the relevant provisions of UN Security Council Resolutions 1267 and 1373. It can be concluded that since the publication of Hodgson Committee in 1984, the UK's approach towards the confiscation of the proceeds of crime has improved considerably via the extensive array of instruments available under the Proceeds of Crime Act 2002, the Terrorism Act 2000, the Anti-terrorism, Crime and Security Act 2001, the Serious Organised Crime and Police Act 2005 and the Serious Crime Act 2007. However, it is important to note that a criminal confiscation order is not compulsory at the point of conviction and perhaps this needs to be reconsidered by the Coalition government given its effectiveness in the US. Statistical data suggests that the amount of money, assets and property confiscated has dramatically increased since the controversial recommendations of the Performance and Innovation Unit Report in 2000. For example, in 2009/2010 SOCA deprived criminal's access to resources and assets in excess of £317m.²⁸⁹ This includes property, areas of land, vehicles, bank accounts, cash and investments.²⁹⁰ However, it is essential to point that the outstanding value of confiscation orders was £1.259bn for 2011.²⁹¹ The amount of money confiscated via the Terrorism Act for terrorism related offences is relatively small in comparison to that confiscated under the Proceeds of Crime Act 2002. This is really note that surprising given the differences between terrorism and proceeds of crime related offences as outlined above. Therefore, this part of the UK confiscation model supports the confiscation model outlined at the start of this article. The civil confiscation regime has provided SOCA, law enforcement and prosecution agencies with an innovative approach towards tackling the proceeds of crime. The recommendation to introduce a civil or non-conviction confiscation regime was heavily criticised by civil liberty groups. However, the Performance and Innovation Unit and the Joint Committee on Human Rights both concluded that such a scheme would not contravene human rights legislation. Nonetheless, the introduction of a civil confiscation regime under the Proceeds of Crime Act 2002 resulted in several challenges under human rights legislation. This area of jurisprudence has provided a clear line of judicial precedent that continues to permit the use of civil confiscation orders. The UK does have a competent authority, SOCA, to administer the confiscation provisions of the Proceeds of Crime Act 2002. This part of the confiscation typology can be contrasted with that in the

²⁸⁹ Serious Organised Crime Agency 'Asset Recovery' (n/d), available from <http://www.soca.gov.uk/about-soca/how-we-work/asset-recovery>, accessed 18 July 2012.

²⁹⁰ *Ibid.*

²⁹¹ National Audit Office Ministry of Justice Financial Management Report 2011 (National Audit Office: London, 2011) at p. 31.

US, where there is not a single recovery agency, but a multitude of agencies under the Department of Justice and Department of Treasury. However, the effectiveness of the UK's asset recovery agency has been adversely affected by ill advised aspirations of successive Labour and Coalition governments. Indeed, the FATF described these goals as "overly optimistic" and it has led this author to conclude that it is impossible within the limited time frame since the enactment of the Proceeds of Crime Act 2002 for the UK's asset recovery body to become self sufficient let alone make a profit. The Coalition government has sadly made error as that of its Labour predecessor, in attempting to rebrand an apparently failing SOCA with the NCA. The legislative proposals to create the NCA, which is a key part of the Coalition governments wider organised crime policy,²⁹² were published Crime and Courts Bill 2012,²⁹³ although it is not expected to receive Royal Assent until 2012. The Bill transfers SOCA's role under the Proceeds of Crime Act 2002 to the NCA.²⁹⁴ The UK created a consolidation fund under the Proceeds of Crime Act 2002 and it is managed by the Home Office. Under the consolidation fund, recovering agencies which traditionally include the police and SOCA are 'encouraged' to pursue the proceeds of illegal activity as they will receive 50% of any confiscated assets. The incentivisation scheme could result in recovery agencies adopting an overly aggressive approach towards the confiscation of the proceeds of crime. The consolidation fund does provide recovering agencies with an essential source of funding in an austerity era where law enforcement agencies have seen their annual budgets slashed.

²⁹² Home Office *Local to Global: Reducing the Risk from Organised Crime* (Home Office: London, 2011).

²⁹³ A full copy of the Bill can be accessed from http://www.publications.parliament.uk/pa/bills/lbill/2012-2013/0004/lbill_2012-20130004_en_2.htm#pt1-pb1-l1g3, accessed 18 July.

²⁹⁴ Crime and Courts Bill 2012, clause 3(1)(b).