

AMENDMENTS TO POCA AND CRYPTO RELATED CIVIL RECOVERY POWERS: ALL ROADS LEAD TO RECOVERY?

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Between 2022 to 2023, civil forfeiture and recovery powers under Part 5 of the Proceeds of Crime Act 2002 contributed £160.1 million to the public purse. With criminal confiscation powers bringing in £179 million, the amount recouped using civil rather than criminal asset recovery powers equates to just under half of the total asset recovery receipts during that period.

Whilst there are a number of reasons why this ratio has changed compared to previous years, there is no denying that law enforcement agencies are increasingly resorting to POCA's civil asset recovery powers to recover money or assets determined constitute property obtained through unlawful conduct or intended for use in unlawful conduct, without the need for a criminal conviction to do so.

Civil Recovery and Crypto

Inevitably civil powers are also increasingly being used in the recovery of cryptoassets deriving from criminal offences such as fraud and money laundering, following the decision in *AA v. Persons Unknown* (2020) 4 WLR 35 and *DPP v. Briedis* (2021) EWHC 3155 (Admin) that crypto is property and therefore capable of falling within the ambit of POCA's recovery powers. This is particularly in circumstances where the offending has taken place overseas and therefore cannot be, or at least cannot be easily, prosecuted in UK courts.

In July this year, for example, the High Court granted a Civil Recovery Order (CRO) over crypto held in wallets accessible to a hacker (who in this case had been convicted and either a confiscation order had not been ordered or the public interest was better served in seeking a CRO). The CRO was made following a search at the hacker's address, which led to the seizure of a book containing recovery seeds, enabling the police to reconstruct the wallets holding approximately £750,000 worth of crypto. Thereafter, the CPS applied for a Property Freezing Order (PFO) to preserve the assets, and after the hacker consented to the CRO, the crypto was forfeit.



This was thought to have been the first such civil recovery of a wallet, hence why the case is pride of place in the CPS's News Centre, one of only two which relate to the use of CROs in the context of crypto-related crime. The first was a £1 million CRO obtained in January 2023 in the context of a £21 million crypto fraud and laundering scheme, as a consequence of the main perpetrator having died before he could be prosecuted.

Whilst there are further examples of CROs being used in the crypto context, it is notable that the two 'flagship' cases paraded by the CPS related to UK based individuals who had been arrested and/or convicted. This perhaps belied some deficiencies in the regime, including the fact that in order to seize crypto assets an arrest was required, which was difficult in cases where the wallet-holder's identity was unknown or the individual was based overseas.

Amendments to POCA

The Economic Crime and Corporate Transparency Act 2023 (ECCTA) was enacted on 26 October 2023 to remedy some of those deficiencies. Part 4 and its associated schedules of the Act are intended to upgrade both the criminal and civil asset recovery tools under POCA, to enable law enforcement to seize, freeze, and recover crypto assets more easily. This includes the creation of civil freezing and forfeiture powers specifically for crypto assets.

Seizure of 'crypto-related items' and cryptoassets now do not require an arrest, with an enforcement officer only being required to have 'reasonable grounds for suspicion' that the item is a crypto-related item or that the cryptoasset is recoverable property or intended by any person for use in unlawful conduct. Detention of the seized items or assets can be authorised by the magistrates' court for an initial six months, up to potentially three years (the latter in circumstances where overseas evidence needs to be obtained).

The expansion of the civil regime includes crypto-wallet freezing orders, issued directly against crypto exchanges and custodian wallet providers. These orders permit the magistrates' court to freeze the wallet, for a second time after the first detention, for up to three years. Exclusions to such an order are also permitted, including allowances for reasonable living and legal expenses and the carrying on of trade and business. At any point, the court can also order detained or frozen crypto assets to be converted into cash, to maximise value given the volatility of the crypto market.

Crypto forfeiture orders under s303Z41 POCA can be applied against detained or frozen assets. Once forfeited, an enforcement officer must realise the property or make arrangements for its realisation. If it cannot be realised, the crypto asset may be destroyed by law enforcement.

Additional routes for victims

Victims and other owners of crypto assets that are detained or frozen (as well as monies frozen pursuant to an account freezing order) now formally have the ability to apply directly to the magistrates' court for some or all of the crypto assets (or converted crypto assets) to be released to them. This provides another opportunity for victims to obtain partial or full redress, which is potentially a less expensive and drawn-out route compared to civil proceedings or criminal prosecution.

This is all great for law enforcement and victims. Gold star to the government. However, the danger of non-conviction-based forfeiture, as demonstrated by the statistic at the beginning of this article, is how frequently civil powers are used as not just as an alternative, but in lieu of a proper criminal investigation and prosecution. It is clear that civil recovery is the only option in some cases, but in many cases, criminal investigations and prosecutions can and should be pursued. Law enforcement often see civil recovery as an easier option to maximise chances of recovery, due to the lower burden of proof and the typically broad interpretation of 'recoverable property'. Yet the perpetrator is often still at large, no longer even needing to have been arrested, charged, or convicted for their ill-gotten gains to be forfeit.

A boon for the public purse and/or victims, but it does not necessarily act as effective punishment or deterrent for the individual(s) who committed the offence in the first place. The government should therefore monitor the use of the existing and expanded civil recovery regime to ensure that it is being used to cater for the exception, rather than the norm.



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That may not be high on the agenda, however, given how proud the government is about its non-conviction-based recovery regime. So proud, that it co-led a two-year project that resulted in the Financial Action Task Force (FATF) announcing a day after the ECCTA was passed that it would be adopting a new set of strengthened standards for seizure and confiscation, which will for the first time include requirements for non-conviction-based confiscation. Over 200 countries are signed up to the new standards, which may of course facilitate mutual legal assistance requests for civil recovery of property abroad under POCA, including in the context of crypto investigations and prosecutions. Perhaps as a result of these developments, we will see many more successors to the two 'flagship' crypto civil recovery cases on the CPS website. Maybe, in due course, civil recovery receipts will dwarf those made pursuant to criminal confiscation powers. Whether that's something law enforcement should be aiming for is, however, another question entirely.

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