



Non-Conviction Based Confiscation Typologies

A Practitioner Guide



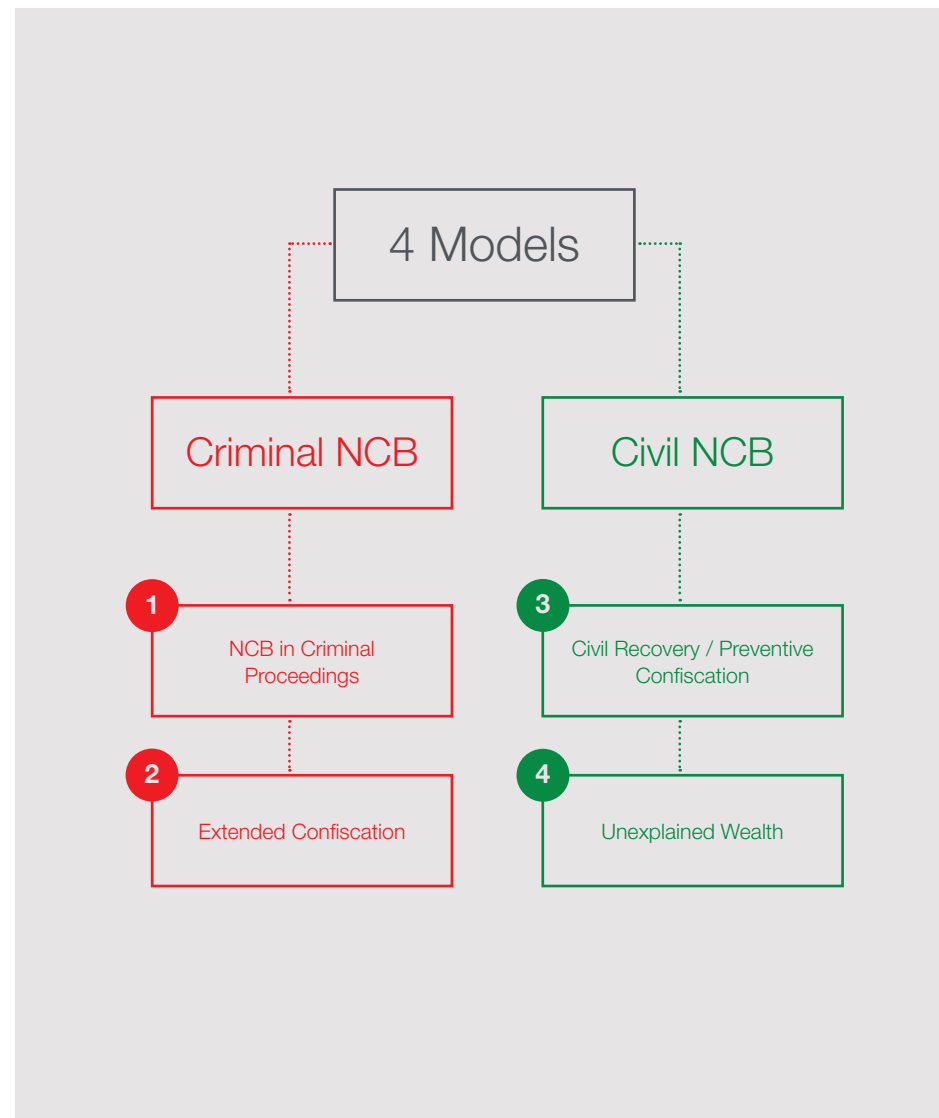
This guide explains four models or ‘typologies’ of non-conviction based (NCB) confiscation or forfeiture, resulting from the same case. The models are based on EU confiscation law. The legislation in some states includes more than one model, or is a cross between the criminal and civil NCB confiscation models. It may also be that although the proceedings are similar, the agencies mandated to act vary from the models described.

Model 1: Confiscation or forfeiture after the defendant has died. This model is linked to criminal proceedings. It applies where confiscation is not possible on the basis of a final conviction. Proceedings have been instituted against an offender but not concluded. The offender cannot be brought before the court or convicted due to his or her death. Other examples of model 1 are when the offender has absconded or the court deems him/her unfit for prosecution due to immunity, age or mental state.

Model 2: ‘Extended confiscation’. This model allows for the confiscation or forfeiture of assets not connected to the crime for which the offender is being prosecuted. The order to confiscate is effectively ‘extended’ beyond the assets related to the prosecution, to other assets the defendant ‘owns’.

Model 3: Civil Confiscation or forfeiture. This model is an in rem (action against the asset not the person) process to confiscate or forfeit assets obtained through unlawful conduct. The confiscation is civil by nature but with an indirect link to a crime or criminal activity.

Model 4: Unexplained Wealth. This model compares the actual property a person has acquired against income declared by that person in order to identify any disparity between the two. It is mostly applied both within civil proceedings but in certain jurisdictions can also be applied in criminal proceedings. Establishing a direct or indirect link to a predicate offence is not necessary.



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Model 1: Confiscation or forfeiture after the defendant has died

John Brown lives on the boundary of a medium size town and worked as an administrative assistant at a local accountancy firm.

He has been a recreational cocaine user for several years, always buying from the same supplier in a neighbouring town. Around 5 years ago he started to supply his own friends, work colleagues and associates with cocaine from the same supplier, using a cutting agent to increase his profit from deals. As his reputation grew, his clientele expanded, and 2 years ago he stopped working, focusing his attention entirely on his expanding drugs business.

Around the same time, he purchased a piece of land next to his house and has now built a detached house for his brother and family to live in. He drives a BMW X5, as does his wife.

Following a tip-off from a local street dealer, Brown was intercepted by the local police drugs unit, driving his BMW. He had just collected 0.5 kilo of cocaine from his supplier. The drug was in a bag on the passenger seat of the car. Brown was arrested and his house searched. No further drugs were found in the house. However, a small quantity of cutting agent was found, together with a small amount of drug equipment and €15.000 in cash, indicating that he is supplying the drug. There is enough evidence to prosecute John Brown for drug dealing.

The week before John Brown is due to appear in court, he is involved in a fight in prison, he sustains severe head injuries and dies before verdict was issued in court.

It was proved beyond all doubt that the crime was committed and the sum of money was the proceeds of crime.

The prosecutor (a court in a trial) terminated the criminal prosecution against the person. However, the prosecutor continued, in criminal proceedings, to forfeit the drugs and the sum of money as the proceeds of Brown's crime.

The prosecutor proved that the criminal acts happened, i.e. a particular crime was committed by particular persons. The criminal burden of proof was applied to do this (proving beyond reasonable doubt). The court then decided to forfeit the proceeds of Browns crime, in a criminal proceeding. The drugs were forfeited as an item dangerous to society and the money as direct proceeds of crime.

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Model 2: 'Extended confiscation'

John Brown lives on the boundary of a medium size town and worked as an administrative assistant at a local accountancy firm.

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Around the same time, he purchased a piece of land next to his house and has now built a detached house for his brother and family to live in. He drives a BMW X5, as does his wife.

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Brown is convicted at court for possession of the cocaine with intent to supply it to others. The prosecution informs the court that the value of the drug is €15.000.

Brown has been convicted of a serious crime for which he may gain a regular source of income (possession of a controlled drug with the intention to supply). The court therefore

assumed that other assets that the convicted person had owned or benefited from in the past years were the proceeds of crime.

Therefore, the confiscation order was 'extended' beyond the €15.000, which were the assets gained through the drug crime for which he was before the court, to assets assumed to be derived from other criminal similar criminal activity. The court gave Brown notice of its intention to confiscate his wife's car and his brother's house and land, and €250.000 in a savings account in Luxembourg.

The onus of proof as to the legality of these assets then shifted to Brown who could not show to the court that these assets were acquired through legal means.

In the case of Brown, the assets confiscated included both his house and the house of his brother including the land, both vehicles and €250.000 in the savings account.

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Model 3: Civil Confiscation or forfeiture

John Brown lives on the boundary of a medium size town and worked as an administrative assistant at a local accountancy firm.

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Around the same time, he purchased a piece of land next to his house and has now built a detached house for his brother and family to live in. He drives a BMW X5, as does his wife.

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Brown is **NOT** convicted at court for any offences. It is suspected that this was due to technical issues with the prosecution and possible intimidation of witnesses.

A proceeds of crime case can however be brought in relation to the land, the detached house and the two BMWs. An ex-parte application can be made to court

to temporarily freeze the assets pending the full hearing of the action.

A full test of the evidence is heard before the court, with a full right of reply by any person claiming an interest in the property. If the court concludes on the balance of probabilities, that the property represents directly or indirectly the proceeds of criminal conduct, the property may be frozen for a further period. A receiver may be appointed to manage or sell the property and place the proceeds of the sale in an interest bearing account. Anyone claiming an interest in the property can apply to the court to have the property returned during the freezing period but must prove on the balance of probabilities that the property is not the proceeds of criminal conduct. If no applications are made, the state may eventually apply to have the frozen funds forfeited to the state, and thereby extinguishing anyone's rights or claims in the property.

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Model 4: Unexplained Wealth

John Brown lives on the boundary of a medium size town and worked as an administrative assistant at a local accountancy firm.

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Brown is **NOT** convicted at court for any offences. It is suspected that this was due to technical issues with the prosecution and possible intimidation of witnesses.

However, the law enforcement agency mandated to look into Brown's wealth, which in this case is the financial police, started their own investigation to examine Brown's

income against the overall value and source of all property he owns.

The financial police have broad powers and among other things such as income, tax records and expenses, they requested bank data and all relevant banking documents, and made copies of accountancy records.

At the conclusion of the investigation, investigators identified that there was a difference between the value of the property owned and the feasible income of the owner.

The difference was higher than the limit set by national law. The financial police submitted a final report of their findings to, in the case of this jurisdiction, a prosecutor and identified all the evidence available to prove the facts.

In this case, the prosecutor is the relevant authority mandated to question individuals on disparity between wealth and income. The prosecutor examined the report prepared by the financial police and asked Brown to clarify the source of his property and to present evidence on the source.

Brown failed to provide a clear and sufficient explanation as to the source of his property, as requested by law. Evidence gathered by the police identified a difference between his income and the property. The prosecutor then filed a motion to the court.

The prosecutor asked the court, in a civil proceeding, to draw a conclusion that the difference between the feasible income and the actual property of Brown was gained from illegal activities, and as such, it should be seized.

The prosecutor presented all the evidence before the court in order to prove that the difference between the feasible income and the property was at least the limit set forth by national law. Once satisfied that this was the case, the court forfeited Brown's property in favour of the state.



CARIN NCB Typologies Guide

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