PROCEED WITH CAUTION:

THE CASE FOR A NARROWLY TAILORED CORPORATE CONFISCATION SCHEME IN THE UK

Vanessa Reid

formerly at Bright Line Law, Barrister

January 2020

PREFACE

Jonathan Fisher QC

Lead Counsel, Bright Line Law

The existing confiscation regime is not fit for purpose.

As the Law Commission moves forward with the publication before Spring 2020 of its eagerly anticipated consultation paper on the confiscation regime set out in Part 2 of the Proceeds of Crime Act 2002, the time is ripe to initiate a call for radical reform in the way in which the confiscation laws are applied to limited companies. At the present time, the UK does not have a confiscation regime for companies which is fit for purpose.

Historically, although corporate criminal liability has been recognised since the turn of the twentieth century, where company directors and chief executive officers have tended to act criminally in their professional capacities, prosecutors have been minded to initiate charges against the individuals and not the companies through which they have acted. However, as companies expanded their activities and directors and chief executive officers were compelled to delegate their functions, a prosecutor's ability to hold a company criminally liable became more challenging. The traditional doctrine of corporate identification is founded on the notion that the actions of an individual can be attributed to a company only where the person acting criminally could be said to represent the company's controlling mind and will.

Today, corporate criminal liability can arise in a different way. Pursuant to contemporary models of corporate criminal liability based on notions of positive corporate culture and good standards of corporate governance, the law has begun to hold companies criminally liable where an employee has acted criminally and the company fails to show that it had adequate measures in place to prevent the criminal act from taking place. The employee does not need to represent the company's controlling mind and will for criminal liability to arise. The paradigm cases concern corporate liability for failing to prevent the payment or receipt of a bribe and failing to prevent the facilitation of tax evasion. Inevitably, this model of corporate criminal liability will lead to an increase in the number of corporate prosecutions.

The recent decision of the Court of Appeal in *Crown Prosecution Service v Aquila Advisory Limited* [2019] EWCA Civ 588 is bound to increase the number or corporate prosecutions as well. In this case, the proceeds of tax evasion offences were held by a company whose directors had been prosecuted and sentenced to lengthy periods of imprisonment for cheating HM Revenue & Customs. Following conviction, the prosecution sought to argue that the directors' actions could be attributed to the company, and in this way the Court could make a confiscation order against the directors which included the monies held by the company. On a strict application of corporate liability principles, which has been the subject of extensive consideration by the Supreme Court in *Petrodel Resources Limited v Prest* [2013] UKSC 34, the Court of Appeal (Criminal Division) held that the corporate veil could not be removed. Accordingly, the prosecutor's attempt to confiscate the profit derived from the tax evasion failed. Lord Justice Patten noted that the only route available to the prosecutor

would have been to add the company to the indictment, and if convicted, to see a confiscation order directly against the company.

There are two key reasons why the present confiscation regime is not fit for purpose.

First, for the purposes of calculating the amount to be confiscated, it is absurd and highly artificial for the law to require the benefit of corporate criminal activity to be calculated as the gross figure and not the net figure after taking into account the company's expenses which have been legitimately incurred. The effect of ignoring legitimately incurred expenses is to cause a confiscation order to include monies which do not represent the benefit flowing from criminal activity which the company has committed. This is neither the time nor the place to develop a critique of the social and economic value of limited companies; suffice it to make the point that the application of a punitive confiscation regime to the corporate entity is inimical to its future success, and therefore, its wider contribution to society. The point is elementary.

Secondly, there is an equally elementary point. The principal enforcement mechanism under a confiscation order is a sentence of imprisonment for default. It borders on the facile to observe that a company cannot be sent to a period of imprisonment, and therefore, quite simply, in the case of a company which goes into liquidation, the confiscation order remains unpaid. There is no provision in the legislation which imposes personal responsibility on a director to ensure that a confiscation order is paid. There ought to be.

I am pleased to say that The White Collar Crime Centre, which is Bright Line Law's vehicle for promoting research into corporate wrongdoing and producing policy and strategic briefings, has published an excellent paper which addresses these issues. Entitled "Proceed with Caution: The case for a Narrowly Tailored Corporate Confiscation Scheme in the UK", the paper has been written by Vanessa Reid, now an English pupil barrister and former US attorney based at Carmelite Chambers in London. Vanessa prepared this paper when she was employed as a researcher for The White Collar Crime Centre.

The paper makes out the case for radical reform, including additional enforcement tools which would enable the courts to put pressure on directors to take the payment of corporate confiscation orders seriously. Conversely, when it comes to calculating the amount of the confiscation order, the law needs to be narrowed, so that instead of making confiscation orders in artificially inflated amounts, only net benefit from criminal activity would be considered.

Finally, as the focal point of the paper's recommendations, The White Collar Crime Centre calls for the introduction of a corporate probation order to be made in all cases where there is a corporate confiscation order. If the confiscation order is not satisfied by the time payment is due, the conditions of corporate probation would come into effect. These conditions could include the preparation of financial reports showing a company's ability (or otherwise) to pay the confiscation order, and in the case of default, provision for the appointment of a trustee to run the company or, in extreme cases, to liquidate the company and end its existence.

Corporate probation, like corporate monitoring, is consistent with the encouragement of positive corporate culture and good standards of corporate governance, and it would sit happily with other developments in the contemporary approach to corporate liability in criminal law.

Jonathan Fisher QC

Lead Counsel, Bright Line Law

The White Collar Crime Centre

January 2020

FOREWORD

Vanessa Reid, Barrister

Formerly of Bright Line Law

Many aspects of the UK's criminal confiscation regime have been widely critiqued, but scant attention has been paid to the issue of criminal confiscation and company defendants. While the number of company prosecutions only continues to grow, our empirical investigations reveal that few confiscation orders are issued directly against company defendants. As a result, it is unsurprising that the theoretical basis for doing so has been under-explored. This paper will argue that there are compelling theoretical and practical justifications for confiscating the proceeds of crime from companies, but that existing confiscation policies must be better tailored to company defendants before such a policy will be fit for purpose.

Specifically, this project investigates whether and how criminal confiscation under Part 2 of the *Proceeds of Crime Act 2002* (POCA) should be applied to company defendants after prosecution. It is submitted that, at least as the UK confiscation regime currently stands, confiscation is not a fit for companies, and companies are not a fit for confiscation. However, a more refined approach to confiscation—one that is appropriately tailored to the realities of company defendants—could prove effective in both promoting corporate social responsibility and ensuring that corporate crimes do not lead to unfair benefits or marketplace distortions. Such an approach would also have the advantage of treating company defendants and individual defendants consistently.

The application of the current confiscation regime to company defendants leads to myriad inconsistencies and serves neither the purposes of the legislation nor the public interest. Confiscating gross sales rather than net profits from company defendants who engage in legitimate business gratuitously punishes innocent shareholders whilst running the risk of driving productive and socially valuable enterprises out of business. POCA's harsh "hidden asset" presumptions—which allow courts to presume that a defendant has retained the gross proceeds of a crime—are all the more absurd in the context of clearly inferable business expenses. POCA's primary enforcement mechanism—a default prison sentence—is simply inapplicable to company defendants. Overall, many of the commonly recognised problems with POCA's most severe features are only magnified when they are applied to company defendants.

The question then becomes, is there a way to make confiscation a better fit for company defendants, or should company defendants simply be exempted from the confiscation regime? This paper will argue that several measures could be taken to make confiscation a better fit for company defendants, and that refining the application of the confiscation regime to company defendants is preferable to exempting companies from confiscation altogether. A more nuanced and tailored approach to the confiscation of company assets would serve the purposes of the legislation and level the playing field for businesses without unduly punishing shareholders or distorting the marketplace.

For example, using net proceeds to calculate confiscation orders against company defendants would help ensure that confiscation proceedings target only the genuine proceeds of crime rather than extracting legitimate earnings. Given the inevitable costs of running any kind of a business,

looking to gross receipts to calculate a confiscation order will often wildly over-collect from company defendants. It ought therefore to be possible for a court to look at a business and attempt to assess which proceeds are legitimate and which are genuinely tainted by criminal conduct. It is equally plausible to allow company defendants to deduct business expenses, as failure to do so will inevitably lead to double-counting and the confiscation of legitimately earned assets. While such a practice has often been denigrated by UK courts—many judges have expressed concern about the difficulty or distastefulness of digging through the accounting books of criminal enterprises—similar schemes have been put into practice in countries like Australia without any of the oft-prognosticated dire consequences.

Additional enforcement tools would allow courts to put pressure on individual directors in order to ensure that confiscation orders are paid rather than simply forcing companies into liquidation. We suggest that courts be given the express power to make a company's directors personally liable for failure to pay a confiscation through the creation of a new offence of failure to ensure that a confiscation order is paid. The UK should also consider adopting the practice of corporate probation—already common in the US—in the event of unpaid confiscation orders in order to provide an equivalent to the mandatory default prison sentence that is already issued against individual defendants alongside confiscation orders. At present, courts might consider making use of the new "compliance order" power to fashion appropriate enforcement mechanisms for companies and their directors, but, ultimately, a more well-defined legislative fix is needed.

In the end, a corporate confiscation regime that serves the discernible aims of the legislation and properly incentivizes companies to improve the quality and competitiveness of their conduct would serve the public interest. A confiscation regime for companies that is predictable, fair, and leaves the market more of a level playing field should be considered by courts and legislators as a potentially valuable tool for improving corporate accountability and combating crime.

Section I of this paper discusses the confiscation regime as it currently exists in the UK, from the early days of modern confiscation through the current state of the Proceeds of Crime Act 2002. Section II makes the case for applying confiscation to company defendants, first by exploring the empirical data demonstrating that confiscation is under-utilized against company defendants and then by discussing the theoretical justifications for company confiscation and what type of corporate confiscation regime is best supported by these justifications. Having argued that there is solid theoretical backing for a corporate confiscation regime, Section III then discusses the major practical and theoretical obstacles to applying the confiscation laws to company defendants. Finally, Section IV discusses several proposed solutions to the difficulties with confiscation and company defendants discussed in section III. Ultimately, it will emerge that there are weighty positive reasons for applying the confiscation regime to company defendants and whatever on-the-ground difficulties may arise will prove to be practically surmountable at the end of the day with a sufficiently narrowly tailored approach to companies and confiscation.

I. THE CONFISCATION REGIME

The UK currently has a robust statutory confiscation scheme in the form of the *Proceeds of Crime Act 2002* (POCA). Whilst the UK's confiscation regime is often criticised as being simultaneously overly draconian and insufficiently effective at removing the proceeds of crime, it has become a familiar part of the crime-fighting landscape for prosecutors, courts, and defendants. This section will provide a brief history of confiscation in the UK and a discussion of how POCA currently functions.

A. The early history of confiscation in the UK

The power of the state to seize the property of a criminal was long governed solely by the law of forfeiture.[1] From the medieval era until the passage of the *Forfeiture Act 1870*, all property of a convicted felon was automatically forfeited to the crown; there was therefore no need for a power to "confiscate" criminal proceeds in the modern sense, or to distinguish between criminal proceeds and property which was used in the commission of the crime.[2] A variety of general and specific forfeiture powers were subsequently enacted, but such powers were generally limited to seizing property which was used or intended for use in the commission of a crime.[3]

In 1981, the House of Lords issued a decision that highlighted the limitations of these narrow forfeiture provisions.[4] In *R. v Cuthbertson*, the House of Lords found with "considerable regret" that the then-existing legislation did not allow for the forfeiture of proceeds from a major drug trafficking operation.[5] After a year-long undercover investigation led to 120 arrests and raids on 87 addresses, the authorities were able to trace over £750,000 in LSD sales to the defendants.[6] A forfeiture order for the relevant assets was issued under section 27 the *Misuse of Drugs Act 1971*, which provided for the forfeiture of the property of a person "convicted of an offence under this Act."[7] The House of Lords found that, lamentably, the forfeiture powers invoked were not applicable because the defendants had pleaded guilty to conspiracy under the common law or the

---

[1] Criminal Justice Joint Inspection of the HMCPSI, HMICA, MICA (March 2010), *Joint Thematic Review of Asset Recovery: Restraint and Confiscation Casework* at [1.7]; *see also* Sally Broadbridge, Home Affairs Section, *Research Paper 01/79: Proceeds of Crime Bill, Bill 31 of 2001-2002* (29 October 2001) at 10.

[2] Broadbridge at 10-11.

[3] *Id.*

[4] *R. v Cuthbertson* [1981] AC 470.

[5] *Id.* at 479; *see also* Neil Prior, "Operation Julie: Forty years since mid Wales LSD bust" *BBC News* (10 April 2016), *available at* https://www.bbc.co.uk/news/uk-wales-35963741.

[6] *See* Neil Prior, "Operation Julie: Forty years since mid Wales LSD bust" *BBC News* (10 April 2016), *available at* https://www.bbc.co.uk/news/uk-wales-35963741; *see also Proceeds of Crime Bill: Explanatory Notes*, as introduced in the House of Commons on 18th October 2001[Bill 31] at para. 3.

[7] *Cuthbertson* at 471-472.

Criminal Law Act 1977 and had not been convicted of any offence under the 1971 Act itself.[8] The forfeiture orders were therefore discharged.[9]

The *Cuthbertson* decision galvanised Parliament to establish a committee led by Sir Derek Hodgson (the 'Hodgson Committee') to investigate the law of confiscation and make recommendations for reform. The Hodgson Committee's 1984 *Report on the Profits of Crime and Their Recovery* ('Hodgson Report') recommended that UK courts be granted broad powers to confiscate the proceeds of crime as opposed to merely seizing property associated with the commission of an offence.[10] The Hodgson Report emphasised that the objective of any new confiscation legislation should be to "restore the *status quo* before the offence."[11] Notably, the Hodgson Committee stated that accomplishing this goal "would require confiscation of only the net profits of offending."[12]

In response to the Hodgson Report, Parliament passed the *Drug Trafficking Offences Act 1986* (DTOA 1986), which included confiscation provisions for drug trafficking offences and drug-related money laundering offences.[13] This was followed shortly thereafter by the *Criminal Justice Act 1988* (CJA 1988), which granted the Crown Court the power to issue confiscation orders for non-drug indictable offences and some specified summary offences. The *Criminal Justice Act 1993* (CJA 1993) increased the number of money laundering offences covered by the confiscation provisions and strengthened the general crime confiscation powers. The *Drug Trafficking Act 1994* (DTA 1994) consolidated the drug-related confiscation provisions, whilst the *Proceeds of Crime Act 1995* strengthened the courts' general confiscation powers and aligned the treatment of drug and non-drug offences with respect to confiscation of criminal proceeds. While the 1993 and 1995 amendments to the CJA did give the confiscation regime more bite, by the end of the 1990s there was nonetheless an emerging consensus that the regime was not functioning effectively. Parliament therefore commissioned a new report on recovering the proceeds of crime.

The 2000 Cabinet Report *Recovering the Proceeds of Crime* concluded that, despite the extensive expansion of criminal confiscation powers since the mid-1980s, there were "significant deficiencies in the way these powers ha[d] been used."[14] The report recommended "a simpler and more robust legal regime, including extended civil forfeiture powers[.]"[15] The report also recommended that Inland Revenue and law enforcement agencies more aggressively pursue the taxation of unlawful

---

[8] *Id.* at 479-484.

[9] *Id.* at 485.

[10] Hodgson Committee, *The Profits of Crime and Their Recovery* (Howard League for Penal Reform, 1984) (hereinafter 'Hodgson Report') at 70 and 151.

[11] Hodgson Report at 74.

[12] *Id.* at 151.

[13] The DTOA 1986 also contained the first iteration of the notoriously harsh "criminal lifestyle" assumptions, of which more later. *See* Nicholas Ryder, *To confiscate or not to confiscate? A comparative analysis of the confiscation of the proceeds of crime legislation in the United States and the United Kingdom*, Journal of Business Law 767, 787 and n. 195 (2013).

[14] Performance and Innovation Unit (PIU), *Recovering the Proceeds of Crime* (London: Cabinet Office, 2000) at para. 4.1.

[15] *Id.* at para 1.8.

gains and unexplained wealth, noting that "[m]any criminal businesses generate substantial revenues that are untaxed."[16] The report reiterated that the confiscation regime "is intended to be reparative, not retributive, i.e. it only seeks to recover from offenders the benefit of their unlawful activities[.]"[17] Nonetheless, the report highlighted the potential of confiscation to deter crime and disrupt criminal businesses and markets, not merely to deprive criminals of ill-gotten gains.[18]

The 2000 Cabinet Report ultimately led to the passage of the *Proceeds of Crime Act 2002* (POCA), which set forth a comprehensive legislative scheme for both civil and criminal confiscation. POCA has been amended and augmented numerous times since its enactment, most recently by the *Criminal Finances Act 2017* (CFA 2017), and remains the primary confiscation statute in the UK today.

B. The Proceeds of Crime Act 2002

1. Statutory Purposes

Confiscation under POCA is not intended to be a form of compensation, damages, or punishment. Rather, it is intended to deprive offenders of the proceeds of criminal conduct, and, to a lesser extent, to deter the commission of further offences and reduce the amount of assets available to fund further criminal activity.[19]

The seminal statement of POCA's overriding purpose comes from the 2008 House of Lords case *R v May*:

> The legislation is intended to deprive defendants of the benefit they have gained from relevant criminal conduct, whether or not they have retained such benefit, within the limits of their available means. It does not provide for confiscation in the sense understood by schoolchildren and others, but nor does it operate by way of fine. The benefit gained is the total value of the property or advantage obtained, not the defendant's net profit after deduction of expenses or any amounts payable to co-conspirators.[20]

In the 2012 case *R v Waya*, the UK Supreme Court reiterated that "POCA is concerned with the confiscation of the proceeds of crime. Its legislative purpose . . . is to ensure that criminals (and

---

[16] *Id.* at paras. 10.1-10.2.

[17] *Id.* at para. 4.11.

[18] *See* Jonathan Fisher QC and Justin Bong Kwan, *Confiscation: deprivatory and not punitive – back to the way we were*, Crim L.R. 192-201, 196 (2018) (citing PIU, *Recovering the Proceeds of Crime* paras 3.5-3.8, 3.9-3.19).

[19] *See R v May* [2008] UKHL 28 n. 48(1); *R v Waya* [2012] UKSC 51 [2]; *see also* Crown Prosecution Service, *Legal Guidance, Proceeds of Crime* (revised 12 March 2018) at 2 ("Confiscation is an essential tool in the prosecutors toolkit to deprive offenders of the proceeds of their criminal conduct; to deter the commission of further offences; and to reduce the profits available to fund further criminal enterprises."), https://www.cps.gov.uk/legal-guidance/proceeds-crime (visited 26 July 2018).

[20] [2008] UKHL 28 n. 48(1).

especially professional criminals engaged in serious organized crime) do not profit from their crimes, and it sends a strong deterrent message to that effect."[21]

Thus, although confiscation is closely bound up with criminal conduct, it is not designed to be a criminal penalty. It is primarily intended to remove the proceeds of crime rather than to punish culpable conduct. Nonetheless, as will be discussed below, many observers have noted that in practice confiscation tend to be more punitive than the case law and enforcement guidance might suggest—it has at this point become commonplace to refer to POCA as a "draconian" regime.[22]

2. The Nuts and Bolts

POCA provides courts and enforcement agencies with a wide (and ever-increasing) range of tools for investigating and confiscating the proceeds of crime. As the focus of this project is to assess the use of criminal confiscation orders against company defendants, this section will focus primarily on POCA part 2 criminal confiscation orders and POCA's various enforcement mechanisms.

a. Issuing confiscation orders

POCA section 6 dictates that the Crown Court[23] *must* assess whether to issue a confiscation order if a defendant is convicted in the Crown Court, or committed to the Crown Court by the Magistrates' Court for sentencing or confiscation, and either the prosecutor requests that the court carry out such an assessment or the court itself believes it is appropriate to do so.[24] Under section 6,

---

[21] [2012] UKSC 51 [2].

[22] *See* Jonathan Fisher QC and Justin Bong Kwan, *Confiscation: Deprivatory and Not Punitive: Back to the Way We Were* [2018] Crim. L.R. 2018, 3, 192-201; Meyric Lewis and Rachel Jones, *Planning, confiscation orders and "criminal lifestyle": a square peg for a round hole?*, [2014] J.P.L. 9, 972, 973 ("Although in theory a confiscation order is not an additional punishment, the POCA regime has sometimes been called 'draconian'"); Stephen Gentle, Cherie Spinks and Tim Harris, *Legislative Comment: Proceeds of Crime Act 2002: update*, Compliance Officer Bulletin, Issue 139 at 3 (September 2016) ("Among defence practitioners and certain Court of Appeal judges the regime is commonly described as draconian and one which can lead to unfair and disproportionate outcomes"); Polly Dyer and Michael Hopmeier, *Confiscation: an update: Part 1 – benefit, realisable amount and proportionality*, Arch. Rev. 2017, 5, 7 ("POCA remains as draconian as ever"); *R v Bajwa* [2011] EWCA Crim 1093 [48] (referring to POCA as a "draconian regime").

[23] As of now, only the Crown Court has the power to issue confiscation orders. *See* POCA s. 6. Magistrates' Courts previously had the power to make confiscation orders under the CJA 1988, but lost this power when POCA was enacted in 2002. Section 97 of the *Serious Organised Crime and Police Act 2005* (SOCPA) granted the Secretary of State power to make provision for Magistrates' Courts to impose confiscation fines of up to £10,000, but as of yet no affirmative instrument has been made to give force to this provision. *See Magistrates Association Position Statement: Confiscation Orders* (15 April 2015), *available at* https://www.magistrates-association.org.uk/ma-position-statements (visited 15 June 2018). The Home Office briefing notes on the Serious Crime Bill (now the *Serious Crime Act 2015*) state that "[w]ork is in hand to commence this [SOCPA section 97] power" but do not provide a timescale for when this is likely to occur. Home Office, *Circular 020/2015: amendment of the Proceeds of Crime Act 2002 by the Serious Crime Act 2015* (27 May 2015) at 15, *available at* https://www.gov.uk/government/publications/circular-0202015-amendments-to-the-proceeds-of-crime-act-2002 (visited 15 June 2018).

[24] POCA s. 6(1)-(3).

the court must first determine whether the defendant has benefited from his criminal conduct.[25] If the defendant has so benefited, the court must then calculate both the amount of benefit received and the amount available to the defendant.[26] Finally, the court must use those calculations to determine the relevant "recoverable amount" and issue a confiscation order accordingly.[27]

A defendant is deemed to have benefited from a crime if he has obtained property or a pecuniary advantage "as a result of or in connection with the conduct."[28] If the court determines that a defendant has benefited from his crime—to any extent whatsoever—the next question to address is whether the defendant has a "criminal lifestyle", in which case a number of harsh presumptions will come into play.[29]

b. Criminal lifestyle provisions

A defendant will be deemed to have a "criminal lifestyle" if he has been convicted of any offence listed in POCA Schedule 2, which include money laundering, counterfeiting, directing terrorism, trafficking drugs, people, or weapons, and other serious offences.[30] Any conviction under Schedule 2 will suffice to establish a criminal lifestyle, no matter how small the benefit to the defendant.

A defendant may also be deemed to have a criminal lifestyle by virtue of having been convicted of multiple offences in a certain period of time if the combined benefit reaches a certain threshold, even where such offences are not serious. As such, a defendant will be deemed to have a criminal lifestyle if he has been convicted of at least two offences of any type in the previous six years and the total combined benefit obtained from these offences is at least £5,000.[31] A criminal lifestyle can also be established where a defendant has either in the same proceedings been convicted of three or more offences from which he has received a combined benefit of £5,000 or has committed any type of offence carried out over a period of at least six months from which he has obtained a benefit of at least £5,000.[32] Given that the consequences of being found to have a criminal lifestyle are potentially severe, "if there is any ambiguity in the language of [the statute] then that must be resolved in favour of those who would otherwise be subject to the draconian regime that would be imposed on them if they were to be held to have a 'criminal lifestyle.'"[33]

---

[25] POCA s. 6(4).

[26] POCA s. 7-8.

[27] POCA s. 6(5).

[28] POCA s. 76(4).

[29] POCA s. 6(4)-(5).

[30] POCA s. 75, POCA schedule 2.

[31] POCA s. 75.

[32] POCA s. 75(2)(c), 75(3)(a)-(b).

[33] *R. v Bajwa* [2011] EWCA Crim 1093 [48].

If a defendant is found to have a criminal lifestyle, the court must calculate the benefit received from the defendant's "general" criminal conduct by applying a number of broad assumptions set forth in POCA section 10.[34] Under section 10, the court must assume that any property transferred to the defendant at any time during the six years prior to the start of proceedings was obtained from his general criminal conduct, any expenditure incurred by the defendant during this period was paid with property obtained from his general criminal conduct, and any property held by the defendant at any time after his conviction date was obtained as a result of his general criminal conduct.[35] The burden then shifts to the defendant to establish on a balance of probabilities that any such assets are *not* the proceeds of crime, for example by showing that the money has come from legitimate earnings.[36] In order to do so, the defendant must present "clear and cogent evidence" that the assets did not derive from criminal conduct.[37]

POCA's criminal lifestyle provisions were intended to reflect legislators' concerns about serious or organised crime.[38] In practice, however, the extraordinarily broad parameters of POCA's criminal lifestyle definition sweep in many defendants convicted of low-level offences, a concern that was acknowledged at the time of POCA's passage. During Parliamentary debate of the bill, Mr. Nick Hawkins expressed concern that the criminal lifestyle provisions as written "[ran] the risk of catching a huge number of other people [who are not major criminals] in the net as a result of the law of unintended consequences."[39] Mr. Dominic Grieve argued that the bill's broad definition of a criminal lifestyle "would lead to a slippery slope that will lead to sloppy thinking about what we are trying to do, and who we are trying to do it to."[40]

POCA does provide a small safety valve for the harsh consequences of the criminal lifestyle provision. Under section 10, a defendant may attempt to make a showing that application of the criminal lifestyle assumptions would lead to a "serious risk of injustice."[41] Lord Chief Justice Woolf explained in *R v Benjafield*, that "any real as opposed to a fanciful risk of injustice can be

---

[34] POCA s. 8, 10.

[35] POCA s. 10.

[36] POCA s. 10(6); *see also R v. Hodge* [2014] EWCA Crim 377 [3] (once criminal lifestyle assumptions are applied, the burden shifts to defendant to prove on a balance of probabilities that his assets were not obtained as a result of general criminal conduct).

[37] *R. v Clarke* [2008] EWCA Crim 2650 [11].

[38] *See* Indira Carr and Miriam Goldby, *Recovering the Proceeds of corruption: UNCAC and anti-money laundering standards*, Journal of Business Law (2011) ("The criminal lifestyle provisions of POCA . . . are there to target organised crime"); Meyric Lewis and Rachel Jones, *Planning, confiscation orders and "criminal lifestyle": a square peg for a round hole?*, Journal of Planning & Environment (2014) 2-3 ("Schedule 2 of the POCA as enacted . . . illustrates the classic crimes that confiscation orders are meant to tackle: it includes such offences as drugs, arms and people trafficking, and directing terrorism.").

[39] House of Commons, Standing Committee B, Thursday 15 November 2001 (Afternoon), Proceeds of Crime Bill, Clause 6: Making of order, https://publications.parliament.uk/pa/cm200102/cmstand/b/st011115/pm/11115s01.htm (visited 14 June 2018), Speech of Mr. Nick Hawkins (3:30 pm).

[40] *Id.*, Speech of Mr. Dominic Grieve (3:45 pm).

[41] POCA s. 10(6).

appropriately described as serious" in this context.[42] The court therefore has a responsibility to ensure that no clear injustice will be worked by a confiscation order, bearing in mind that this question is not always determined by the scale of the offending conduct.[43] Among other considerations, "[t]he court should be alert to make allowance for situations which make it impractical for a defendant to satisfy the burden of proof which the legislation places upon him."[44]

c. Calculating benefit

If a defendant is found not to have a criminal lifestyle, the court must calculate the benefit received from the particular criminal offence of which the defendant has been convicted.[45] As noted above, a defendant is deemed to have benefited from a crime if he has obtained property or a pecuniary advantage "as a result of or in connection with the conduct."[46] If a person has received a pecuniary advantage in connection with criminal conduct, he is considered to have obtained "a sum of money equal to the value of the pecuniary advantage."[47] The amount of benefit to the defendant is the value of the property thus obtained.[48]

UK courts construing both POCA and earlier confiscation statutes have consistently interpreted this language to mean that the relevant benefit is the gross amount obtained in connection with the criminal conduct, not the net profits.[49] The House of Lords confirmed in *R v May* that, for POCA purposes, "[t]he benefit gained is the total value of the property or advantage obtained, not the defendant's net profit after deduction of expenses."[50] UK courts have generally followed this admonition, even where the gross amount received is far in excess of the defendant's profit from the enterprise.[51] As discussed below, there has been some recent case law addressing the

---

[42] [2000] EWCA Crim 86 [41(4)].

[43] *Id.* at [91].

[44] *Id.*

[45] POCA s. 8.

[46] POCA s. 76(4).

[47] POCA s. 76(5).

[48] POCA s. 76(7).

[49] *See R v Harvey* [2015] UKSC 73 [22]; *R. v Waya* [2012] UKSC 51 [26]; *R v. May* [2008] UKHL 28 n. 48(1); *R v Banks* [1996] EWCA Crim 1799 (construing the Drug Trafficking Act 1994); *R v Smith* [1989] 1 WLR 765 (construing the Drug Trafficking Offences Act 1986); *see also Shabir v R* [2008] EWCA Crim 1809 [12] ("Since powers of confiscation were first introduced, the consistent decision of the courts has been that the statutory language does not allow the expression 'benefit' to be limited to the net profit or gain, or the retained profit or gain, of the defendant.").

[50] *R v May* [2008] UKHL 28 n. 48(1).

[51] *See R. v Waya* [2012] UKSC 51 [26] (a valid confiscation order may require "the defendant to pay the whole of a sum which he has obtained jointly with others", "several defendants each to pay a sum which has been obtained, successfully, by each of them, as where one defendant pays another for criminal property", or "a defendant to pay the whole of a sum which he has obtained by crime without enabling him to set off expenses of the crime."); *Shabir v R* [2008] EWCA Crim 1809 [13] ("[N]ot infrequently, and perhaps even ordinarily, the amount of money confiscated will exceed the profit made by the criminal from his offence.").

question of whether human rights law and long-standing criminal justice principles might place some limitations this practice.

d. Available amount

After the court has calculated the amount of the benefit, it must assess the amount of assets actually available to the defendant for paying the confiscation order.[52] This "available amount" is defined as the total value of all free property held by the defendant at the time the confiscation order is made, plus the total value of all tainted gifts made to others by the defendant, minus the amount payable in pursuance of other obligations which have greater priority, such as a pre-existing fine or compensation order.[53] Because a confiscation order is not meant to impose an additional financial penalty, "however great the payments a defendant may have received or the property he may have obtained, he cannot be ordered to pay a sum which it is beyond his means to pay."[54]

At this stage of the proceedings, the burden is on the defendant to show by the balance of probabilities that the amount available to him is less than the benefit obtained.[55] He must do so by presenting "clear and cogent evidence" to that effect.[56] If the defendant is not able to do so, there is no burden placed on the prosecution to make a *prima facie* case for the existence of undisclosed assets—the burden remains on the defendant to demonstrate the value of his realisable assets or lack thereof.[57] Nonetheless, "there is no principle that a court is bound to reject a defendant's case that his current realisable assets are less than the full amount of the benefit, merely because it concludes that the defendant has not revealed their true extent or value, or has not participated in any revelation at all."[58] While the burden remains on the defendant to rebut the presumption that he has retained the total amount of the benefit, the court should look to "the facts as a whole" to make the available amount determination "in a just and proportionate way."[59]

The *Serious Crime Act 2015* (SCA 2015) introduced provision 10A to POCA, granting the Crown Court the power to make a determination as to the extent of a defendant's interest in a particular property or asset.[60] This provision effectively grants third parties the right to make

---

[52] POCA s. 5(a).

[53] POCA s. 9.

[54] *R v May* [2008] UKHL 28 [41].

[55] *R v Sawyer* [2014] EWCA 2227 [6]-[9]; *see also R v. Mahmood* [2013] EWCA Crim 325 [31] ("The burden of showing the available amount is less than the benefit figures rests on the defendant and he discharges the burden on him on a balance of probabilities.")

[56] *R v Smith* [2011] EWCA Crim 2029 [11].

[57] *R v Summers* [2008] EWCA Crim 872 [11]; *see also R v Gricevicius* [2018] EWCA Crim 106

[58] *R v McIntosh* [2012] 1 Cr App R (S) 60 [15].

[59] *Id.*

[60] POCA s. 10A, as amended by Serious Crime Act 2015 s. 1.

representations to the court as to the extent of their asserted interest in a given property.[61] Because confiscation orders are issued against defendants, not specific properties, third parties had previously been allowed to make representations only at the enforcement stage when a particular piece of property was to be seized to fulfil a confiscation order.[62] This expanded power allows the court to make more fine-grained distinctions regarding both who "obtained" what benefit as well as which assets are genuinely "available" to the defendant.

e. Making the order

Once the benefit and available amount have been determined, the court calculates the "recoverable amount" and issues the confiscation order.[63] POCA defines the recoverable amount as either the amount of the benefit resulting from the criminal conduct or the available amount, whichever is less.[64] Originally, POCA did not provide the Crown Court with any flexibility regarding the amount of the confiscation order. Once the recoverable amount had been calculated, the court was required to issue a confiscation order in that amount and had no discretion to do otherwise.

In the seminal 2012 case *R v Waya*, the UK Supreme Court held that confiscation orders otherwise properly calculated under POCA's provisions could be "disproportionate" to the legitimate aims of the legislation and thereby run afoul of the European Convention on Human Rights (ECHR).[65] In such instances, the court must substitute a proportionate order for the order that would have otherwise issued under POCA's requirements.[66] *Waya* did not set forth a general test for determining whether a confiscation order is disproportionate, and, as discussed below in section III, UK courts are still hashing out the question of what limitations this holding places on confiscation orders.

In order to codify the holding of *R v Waya*, the SCA 2015 amended POCA to provide courts with the discretion to alter the amount of a confiscation order where it would otherwise be disproportionate.[67] POCA now states that the requirement that a court make a confiscation order in

---

[61] POCA s. 10A(2); *see also Sanam v NCA* [2015] EWCA Civ 1234 [49] ("Under Part 2 third party interests in property held by the defendant may be determined at the stage of making the confiscation order when, pursuant to section 10A of POCA, the court is determining the extent of the defendant's interest in property held by him or her and such a third party interest may exist.").

[62] *See R v Hayes* [2016] Unreported (Central Crim Ct), WLR 01085958 (only an "interested party" under section 10A may make representations at the confiscation stage—otherwise, the third party must wait until the enforcement stage to present evidence regarding any interest in a property being seized).

[63] POCA s. 6(5)(b).

[64] POCA s. 7.

[65] *R v Waya* [2012] UKSC 5.

[66] *Id.* at [82].

[67] SCA 2015, Schedule 4, para. 19. The explanatory notes at paragraph 352 of the Serious Crimes Act 2015 state that this provision is intended to give statutory effect to *Waya*.

the recoverable amount "applies only if, or to the extent that, it would not be disproportionate to require the defendant to pay the recoverable amount."[68]

The court's confiscation powers do not terminate at the time the confiscation order is made, or even at the time it is fully paid. Section 22 of POCA allows a court to vary an existing confiscation order upwards to require further payment from the defendant where the amount available to him has increased since the original order was made and the court "believes it is just" to do so.[69] Courts may also make additional confiscation orders after a first confiscation order has been fully satisfied if the first confiscation order was based on an available amount that was less that the full benefit.[70]

In the 2013 case *R v Padda*, the Court of Appeal confirmed that a second confiscation order could be made taking into account the defendant's legitimate earnings in the time since a first order had been fully satisfied.[71] The *Padda* defendant was convicted of drug offences and had a confiscation order of £9,520 issued against him.[72] The court assessed that the defendant's total benefit from his offending was £156,226, but his available assets at the time of the confiscation proceedings were considerably lower.[73] The defendant fully paid his confiscation order and served five years in prison, after which he began working legitimately and started his own business.[74] Four years after the defendant was released from prison, the judge made a second confiscation order at the request of the prosecution for £74,652, based on the defendant's newly available assets at the time of the re-opened confiscation proceedings, and issued an additional 12-month default sentence in case of failure to pay the new confiscation order.[75]

The *Padda* defendant challenged the legitimacy of this second order, arguing that the principle of proportionality set forth in *Waya* had not been duly considered, as the judge had taken insufficient account of the passage of time since the original confiscation order and ignored the fact that the defendant had acquired the assets legitimately.[76] The Court of Appeal found that, while the justice system should seek to encourage rehabilitation of offenders, the judge had considered all

---

[68] POCA s.6(5) (effective 1 June 1 2015); *see* sections 6, 92 and 156 of POCA as amended by paragraphs 19, 35 and 46 of the SCA 2015.

[69] POCA s. 22. The SCA similarly expanded the POCA Part 8 investigatory powers to last beyond the making of the confiscation order to allow investigation into the amount or whereabouts of realisable property that may be available for satisfying a confiscation order after it has been made. POCA s.341(1)(c) (effective 1 March 2016) (Added by Serious Crime Act 2015 s. 38).

[70] *R v Padda* [2013] EWCA Crim 2330 [2].

[71] *Id.*; *see also In re Peacock* [2012] UKSC 5 [1]-[2] (affirming the same principle with respect to the Drug Trafficking Act 1994).

[72] *R. v Padda* [2013] EWCA Crim 2330 [2].

[73] *Id.*

[74] *Id.* at [9].

[75] *Id.* at [4].

[76] *Id.* at [24].

relevant principles in reaching his decision and had not acted unreasonably.[77] The Court of Appeal found that the second confiscation order was neither wrong in principle nor manifestly excessive.[78]

3. Enforcement

POCA provides for a variety of investigatory powers and enforcement mechanisms. Of most relevance to the present discussion are restraint orders, receivership, default sentences, and compliance orders.

a. Restraint orders

Restraint orders are an enforcement tool used by courts and prosecutors in POCA Part 2 cases, generally before a confiscation order has been issued.[79] A restraint order freezes a person's property and money while a criminal investigation or prosecution is ongoing in order to prevent the dissipation of assets that might later be subject to a confiscation order.

POCA section 40 authorises the Crown Court to issue a restraint order if a criminal investigation is underway and there are "reasonable grounds to suspect" that the alleged offender has benefited from his criminal conduct.[80] A restraint order should not issue unless there is "a real as opposed to a fanciful risk" that assets will be dissipated that might later be subject to confiscation.[81] The SCA 2015 lowered the standard for restraint orders from "reasonable cause to believe" to "reasonable grounds to suspect" that a crime has been committed and that the suspect has benefited from that crime.[82]

A prosecutor may apply to the court for a restraint order against either the suspect under investigation or a third party, if there is reason to believe that third party may be holding assets that originally derived from the crime being investigated.[83] This applies to the recipients of "tainted gifts"—including assets sold at a significant undervalue at the date of transfer—but not bona fide purchasers for value.[84] A restraint order may also apply to a person who holds assets or a bank account jointly with the suspect or a company if the court believes that the assets of the company in reality be treated as those of the defendant.[85]

---

[77] *Id.* at [46]-[47].

[78] *Id.* at [27], [49].

[79] POCA s. 40(1)-(3).

[80] POCA s. 40(1)-(3).

[81] *R v B* [2008] EWCA Crim 1374 [9], [13].

[82] SCA s. 11, amending POCA s. 40.

[83] *See* POCA s. 41.

[84] POCA s. 69(3), 77-78.

[85] *See G (restraint order) v In the Matter of the Criminal Justice Act 1988* [2001] EWHC Admin 606 (setting forth principles for the issuance of restraint orders issued against the suspect's spouse or company); *see also Boyle Transport v R.* [2016] EWCA Crim 19*; R. v McDowell* [2015] EWCA Crim 173; *R v. Sale* [2013] EWCA Crim 1306; *see also* Civil Procedure Rules, Practice Direction RSC 115(5.1)-(5.2).

Once a restraint order has been issued, the subject is prohibited from dealing with any of the specified realisable property.[86] The restraint order may apply to property anywhere in the world that may later be subject to confiscation following a trial and conviction.[87] Restraint orders should allow access to funds for reasonable living expenses and legal advice regarding the order itself, and for the purpose of enabling the subject to continue carrying on a legitimate trade or business.[88] Frozen assets must not, however, be made available for the payment of legal expenses related to the underlying criminal offence under investigation.[89] The right to draw on restrained funds for living expenses generally comes to an end when a confiscation order is made and all avenues of appeal have been exhausted.[90]

A restraint order will remain in place until the "conclusion of the proceedings" or until a subsequent order from the court varying or discharging it.[91] Proceedings are not concluded until the defendant is acquitted or, if the defendant is convicted and a confiscation order is made, once the confiscation order is satisfied or discharged.[92] The court is not only authorised but required to discharge a restraint order if criminal proceedings are not initiated within a reasonable amount of time after the investigation has begun.[93] This duty applies regardless of whether an application to discharge the order has been made.[94]

b. Receivership

Once the Crown Court has made a restraint order, it may appoint a receiver in respect of any realisable property to which the order applies under POCA section 49.[95] It may also do so under section 50 once a confiscation order has been made, has not been satisfied, and is not subject to appeal.[96] A receiver may exercise a wide range of powers, including the power to take possession of and manage the property, sell the property, carry on legal proceedings, incur capital expenditures, and exercise the powers of attorney with respect to the property.[97] "Managing" the property

---

[86] POCA s. 41(1).

[87] POCA s. 41(1)-(2).

[88] POCA s. 41(3); *see also G (restraint order) v In the Matter of the Criminal Justice Act 1988* [2001] EWHC Amin 606 (setting forth principles and exceptions for restraint orders issued under the Criminal Justice Act 1988 against third parties and companies owned or operated by the defendant); *Revenue and Customs Prosecution Office v Briggs-Price* [2007] EWCA Civ 568.

[89] POCA s. 41(4).

[90] *See* CPS Legal Guidance, Proceeds of Crime Act 2002, n. 19, *supra*, at 38-39.

[91] POCA s. 42(7)(b).

[92] POCA s. 85(3)-(5).

[93] POCA s. 41(7B)(b).

[94] *Id.*

[95] POCA s. 48, 50.

[96] POCA s. 50.

[97] POCA s. 49, 51.

encompasses the power to run the business—or arrange for another person to run the business—"the assets of which are part of the property" subject to the order.[98]

A receiver is entitled to receive his remuneration and costs from the assets under his control.[99] This is the case even where a defendant is ultimately acquitted or the third party whose assets have been placed under receivership has not been accused of any wrongdoing.[100] This policy has significant ramifications for innocent third parties. As discussed above, restraint orders (and therefore receivership orders) may be imposed against any person reasonably suspected of holding criminal property. When a third party's property is taken into receivership, the principle that a receiver's remuneration and costs are to be paid out of the restrained property remains applicable.[101]

c. Default sentences

A court is obligated to impose a default sentence whenever making a confiscation order.[102] A default sentence is a term of imprisonment imposed on a defendant upon non-payment of a confiscation order.[103] It is served after the sentence, if any, for the underlying crime.[104] A default sentence is not served in lieu of payment—the amount due under the order remains payable in full even after the sentence has been served.[105] The purpose of a default sentence is to secure payment of the confiscation order, not to impose additional retributive punishment.[106]

In *R v Castillo (German)* [2011] EWCA Crim 3173 [13], the Court of Appeal expounded a set of principles to be considered in administering a default sentence.[107] In setting such a sentence, court should not use a rigid arithmetical approach to the sentencing bands, but instead consider all the circumstances of the case, keeping in mind that the primary purpose of a default sentence is to

---

[98] POCA s. 49(10)(b), 51(10).

[99] POCA s. 49(2)(d).

[100] *See Hughes (on the application of Hughes) v Customs and Excise Commissioners* [2002] EWCA Civ 734 (restraint and receivership orders providing compensation to receivers even in case of acquitted defendant not a breach of defendant's property rights under Article 1 of the First Protocol of the European Convention on Human Rights); *Capewell v Customs and Excise Commissioners* [2007] UKHL 2 (recent changes to civil procedural rules did not alter the fundamental principle that receivers are entitled to remuneration and expenses from restrained assets even where defendant is ultimately acquitted and no confiscation order is made); *see also Barnes (as former Court Appointed Receiver) v Eastenders Group* [2014] UKSC 26.

[101] *Eastenders Group* at [58].

[102] POCA s. 35; Powers of Criminal Courts (Sentencing) Act 2000, s. 139(2).

[103] POCA s. 35, 38-39; Powers of Criminal Courts (Sentencing) Act 2000 s. 139-40.

[104] POCA s. 38(1)-(2).

[105] POCA s. 38(5).

[106] *R v Castillo (German)* [2011] EWCA Crim 3173 [13] ("The purpose of the default term is not punishment for the achievement of retributive justice. It is rather to secure satisfaction of the confiscation order and so deprive the criminal of the fruits of his crime."); *R v Johnson* [2016] EWCA Crim 10 [31(iii)] ("The purpose of the term is enforcement not further punishment.").

[107] *R v Castillo (German)* [2011] EWCA Crim 3173 [13].

secure payment of the confiscation order.[108] The court should not be influenced by the overall length of the sentence passed for the crime plus the default term.[109]

The *Castillo* court made clear that the principle of proportionality must be considered in the context of default sentences.[110] In *Castillo*, the sentencing judge issued a confiscation order for £3 million with a default sentence of 10 years, then the maximum possible default sentence.[111] The Court of Appeal quashed the 10-year sentence on the grounds that it was not proportionate, as confiscation orders for £100 million or more were subject to the same maximum term, and substituted a default term of nine years' imprisonment.[112] The Court of Appeal has consistently found that confiscation orders for sums relatively close to the floor of the top sentencing bracket should not trigger the maximum default sentence.[113]

In keeping with the principles set forth in *Castillo*, courts may also consider all the circumstances of the case and depart downward from the maximum sentences. As the Court of Appeal recently reaffirmed in the 2016 case *R v Johnson*, while the court is obligated to impose some term of default imprisonment when making a confiscation order, "[t]here is no minimum term which must be imposed."[114] If the court is satisfied that changed circumstances justify doing so, it may substantially reduce a default term previously imposed.[115]

POCA allows for pro-rata release in cases where the defendant has paid part of the amount owed.[116] Under this scheme, a defendant will have his default sentence reduced in proportion to the percentage of the total sum owed he has paid. For example, if a court has issued a confiscation order of £400,000 with a default sentence of four years, a defendant who has paid £200,000 reduces his sentence to two years. This was not altered by the Serious Crimes Act 2015, which made other changes to the manner in which default sentences are calculated and served.

A recurring issue in this area is how to calculate the pro-rata reduction in light of the interest that accrues when a confiscation order has been paid only in part. As noted above, once a defendant has failed to pay a confiscation order in the time allotted, interest starts to be added to the amount owed at the rate of 8 percent per annum, often rendering it difficult or impossible for a defendant to dig himself out of debt once the time limit has run.

---

[108] *Id.* at [12].

[109] *Id.*

[110] *Id.* at [13]-[14].

[111] *Id.* at [2].

[112] *Id.* at [15].

[113] *Id.*; *see also R v. Piggot* [2009] EWCA Crim 2292.

[114] *R v Johnson* [2016] EWCA Crim 10 [31(iii)].

[115] *Id.*

[116] POCA s. 35(2); Sentencing Act s. 140(3); *Magistrates' Court Act 1980* s. 79(2).

In the 2016 case of *R (on the application of Emu) v Westminster Magistrates Court*, a confiscation order of £2 million with a default sentence of 10 years' imprisonment was issued against the defendant.[117] By the time the matter came before the magistrate for default sentencing, Mr. Emu had paid some £394,000, but £408,497 in interest had accrued.[118] The amount outstanding was therefore well over the original £2 million. The magistrate decided that the default sentence should be calculated on the basis of the amount outstanding, regardless of what payments had been made.[119]

The High Court disagreed, finding that the calculation of a pro-rata sentence reduction should be based on a comparison between the total sum owed at the date of the decision to impose the default sentence, including interest, measured against the amount of payment made by the individual—what Mr. Justice Collins described as the "middle course."[120] This results in some reduction of sentence for payments made, but not as much as if the court were to entirely ignore the accrual of interest and measure the payments against the original amount imposed (most favourable to the defendant) or base its calculation solely on the total amount outstanding, regardless of what payments had been made (least favourable).[121]

In a recent decision, the Supreme Court determined that magistrates should in fact take the *most* favourable approach to pro rata sentencing by basing the reduction of the default sentence on the ratio of the amount paid to the amount originally owed, not the amount outstanding at the time of sentencing.[122] In *R (Gibson) v Secretary of State for Justice*, a confiscation order of £5.4 million was issued against the defendant, with a default prison term of six years.[123] The defendant failed to pay the amount in full within the 12 months allotted, and the amount owed began to accrue interest. By the time he appeared before the magistrate for committal of sentence, the defendant had paid £90,370, but owed a total of £8.1 million due to the amount of interest accumulated.

Based on his payments, the defendant was owed a reduction in his sentence. The magistrate based the calculation of the reduction on the ratio of the payments paid to the total amount outstanding, as endorsed by the High Court in *Emu*. The Supreme Court, however, determined that the sentence reduction should instead be based on the amount of payments made as balanced against the original amount owed.

d. Compliance orders

The Serious Crime Act 2015 created a broad new enforcement power by adding POCA section 13A, which provides courts with the authority to make a "compliance order" upon the

---

[117] *R (on the application of Emu) v Westminster Magistrates Court* [2016] EWHC 2561 (Admin) [3].

[118] *Id.* at [6].

[119] *Id.* at [15].

[120] *Id.* at [13].

[121] *Id.*

[122] *R (Gibson) v Secretary of State for Justice* [2018] UKSC 2.

[123] *Id.*

making of a confiscation order.[124] This provision provides the court with the discretion to make "such an order as it believes is appropriate for the purpose of ensuring that the confiscation order is effective."[125]

Under section 13A, once a confiscation order has been made the court must consider whether any restriction or prohibition on the defendant's travel outside the United Kingdom should be imposed whilst the confiscation order remains unpaid.[126] The statutory language does not provide any additional guidance regarding what types of orders might be made under this section or what the limits on the court's powers may be in this context.

The Court of Appeal recently addressed the proper approach to compliance orders in *R. v Pritchard (John)*.[127] The defendant in that case was convicted for his role in an international drug importation conspiracy.[128] The Crown Court judge imposed a confiscation order in the amount of £92,920 and a compliance order in the form of an indefinite travel restriction, which prohibited the defendant from leaving the United Kingdom and required him to surrender his passport and travel documents.[129] He was also prohibited from obtaining new travel documents.[130]

The defendant challenged the compliance order as unnecessary and disproportionate. The Court of Appeal rejected the defendant's argument that the court making a compliance order must consider it *necessary* to ensuring that the confiscation order is fulfilled.[131] Lord Justice Davis, writing for the majority, reasoned that "[o]n the contrary, the making of an order is geared to such an order as the court 'believes is appropriate' for ensuring that the confiscation order is effective."[132] Nonetheless, to be appropriate, such an order must be "justified" by a proper reason, and the determination of whether a compliance order is justified requires considerations of proportionality.[133]

The scope of the court's powers to make compliance orders other than travel bans remains largely untested in litigation. It seems likely that future decisions will reiterate that the proportionality analysis must be applied to compliance orders and clarify that the powers of section 13A are not meant to overlap or usurp the other section 2 powers, such as receivership or restraint, which are subject to more complex and specific requirements and safeguards.

---

[124] SCA s. 7, adding POCA s. 13A.

[125] POCA s. 13A(2).

[126] POCA s. 13A(4).

[127] [2017] EWCA Crim 1267.

[128] *Id.* at [5].

[129] *Id.* at [18].

[130] *Id.*

[131] *Id.* at [20].

[132] *Id.*

[133] *Id.* at [25]-[26].

4. Piercing the corporate veil

Company assets may sometimes be confiscated in cases with individual defendants. Courts are permitted to "pierce the corporate veil" in POCA proceedings by treating the assets of a company as the assets of an individual under appropriate circumstances.[134] As recent case law makes clear, this narrow exception to well-settled company law principles may only be applied in limited circumstances.

It is a fundamental tenet of company law that a company has "a legal status and existence which is separate from that of its shareholders and directors."[135] Acts done in the name of and on behalf of a company will be treated as the acts of the company, not the individuals carrying them out.[136] The liabilities of a company are not the liabilities of its shareholders or directors and, conversely, the assets of a company are not the assets of its shareholders or directors.[137] This is the case regardless of whether a single person wholly owns or controls 100 percent of the shares.[138] The separate legal status of a company may not be disregarded merely because the court deems it to be "just" in a given case, as this would lead to inconsistent and unpredictable results.[139]

In the leading case of *Prest v. Petrodel Resources Ltd & Ors* [2013] UKSC 34, Lord Sumption's majority opinion identified two principles that justify the lifting or piercing of the corporate veil: the concealment principle and the evasion principle.[140] The concealment principle holds that where a company is deemed nothing more than an "alter ego" for the company's owner or owners, the court may identify the individuals as the real actors and treat them accordingly.[141] The evasion principle

---

[134] Lord Justice Davis has recently lamented that the "ugly metaphorical language [of 'piercing the corporate veil'] has become established by use." *Boyle Transport (Northern Ireland) Ltd v R.* [2016] EWCA Crim 19 [2]. The authors of this report concur in the assessment.

[135] *Boyle Transport v R.* [2016] EWCA Crim 19 [45] (citing *Salomon v A. Salomon & Co. Ltd.* [1897] AC 222).

[136] *Jennings v CPS* [2008] UKHL 30 [16].

[137] *Id.*

[138] *Id.*

[139] *Prest v. Petrodel Resources Ltd & Ors* [2013] UKSC [21] (quoting *Adams v Cape Industries plc* [1990] Ch 433 at 536) ("the court is not free to disregard the principle of *Salomon v A Salomon & Co Ltd* [1897] AC 22 merely because it considers that justice so requires."); *R v. Sale* [2013] EWCA Crim 1306 [23] (quoting *R v Seager & Blatch* [2009] EWCA Crim 1303 [76]) ("a court can[not] 'pierce' the carapace of the corporate entity and look behind it . . . simply because it considers it might be just to do so."); *Boyle Transport v R.* [2016] EWCA Crim 19 [88] ("the test is not simply one of 'justice' [which] would be unprincipled and would give rise to great uncertainty and inconsistency in decision making.").

[140] *Prest v. Petrodel Resources Ltd & Ors* [2013] UKSC 34 [28]. The majority of justices in *Prest* agreed with the principles laid down by Lord Sumption, but several concurrences suggested that this should not be considered an exclusive test, as there might also be additional circumstances under which the corporate veil might justifiably be pierced. *See* Neuberger, L (concurring) [57]-[83]; Hale, L (concurring) [84]-[95]; Mance, L (concurring) [97]-[102]; Clarke, L (concurring) [103]; Walker, L (concurring) [104]-[106].

[141] *Prest v. Petrodel Resources Ltd & Ors* [2013] UKSC 34 [27]-[28]; *see also R. v McDowell* [2015] EWCA Crim 173 [55] (the company must be deemed to be nothing more than an "alter ego" for the company's owner or owners); *G (restraint order)*

provides that the court may disregard company formalities where an individual is subject to a legal obligation or liability and a company is deliberately "interposed" to evade or frustrate the enforcement of that obligation or liability.[142] Under the evasion principle, the court may pierce the corporate veil only for the limited purpose of "depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality."[143]

Lord Sumption and several of the concurring justices in *Prest* asserted that, in cases falling under the concealment principle, the corporate veil is not actually being lifted at all.[144] Rather, the court is simply accurately identifying the real actors involved and acting accordingly.[145] Regardless of whether a court applying the concealment principle is to be considered as piercing the corporate veil or merely "looking behind it" to discover what the corporate façade is hiding, these are circumstances that have been identified as appropriate for treating the supposed benefits accruing to a corporation as benefits accruing to an individual, which is most relevant for present purposes.

In the 2013 case of *R v Sale*, the Court of Appeal first applied the principles of *Prest* to POCA confiscation proceedings.[146] The Court of Appeal found in *Sale* that the Crown Court judge had been right to lift the corporate veil in confiscation proceedings when assessing benefit accruing to the individual defendant.[147] The defendant was a company's sole controller, and had engaged in fraud, corruption, and false representation to secure high-value contracts for the company.[148] The court found that the activities of the defendant and those of the company were "so interlinked as to be indivisible" and that to the extent that the company had been involved, its actions had served only to hide the defendant's wrongdoing.[149] The court found that the circumstances of the case fell within the concealment principle articulated in *Prest*, and it was therefore appropriate to lift the corporate veil and treat the benefit to the company as a result of the crime as though it were a benefit to the individual defendant.[150]

The *Sale* decision enumerated three situations—originally set forth by the Court of Appeal in *R v Seager & Blatch*—where the benefit obtained by a company should be treated as a benefit obtained by an individual defendant for purposes of calculating a confiscation order: (1) where an offender attempts to use the corporate façade to conceal his crime or his benefit from crime; (2)

---

v In the Matter of the Criminal Justice Act 1988 [2001] EWHC Admin 606 [11] (the company must have "no genuine separate existence from the defendant" and must be used by the defendant as a device for crime).

142 *Id.* at [28], [35].

143 *Id.* at [35].

144 *Id.* at [28], concurrences cited in n. 140, *supra*; *see also R v McDowell* [2015] EWCA Crim 173 [51(ii)].

145 *Id.*

146 [2013] EWCA Crim 1306 [39]-[40].

147 *Id.* at [40].

148 *Id.* at [5]-[6].

149 *Id.* at [40]-[41].

150 *Id.* at [40].

where an offender does criminal acts in the name of the company; and (3) where the transaction or business structures are used as a "cloak" to conceal their true nature from third parties or the court.[151] In this case, the Court of Appeal found that the defendant had carried out criminal acts in the name of the company, justifying the judge's subsequent piercing of the corporate veil in assessing the appropriate amount of a confiscation order.

These principles were subsequently applied again to confiscation proceedings in 2015 in *R v McDowell*.[152] The defendant in that case was a convicted arms dealer, as well as the sole director, shareholder and controller of a company he used "openly" to make criminal transactions.[153] The court found that there was in fact no need to lift the corporate veil as the defendant was clearly the "alter ego" of the company.[154] It was therefore appropriate to examine the receipts and profits of the company in confiscation proceedings for the purpose of determining the benefit obtained by the defendant personally.[155]

In the 2016 case *Boyle Transport v R*, Lord Sumption, again delivering the leading opinion, definitively confirmed that the *Prest* standard for piercing the corporate veil applies with equal force to POCA confiscation proceedings.[156] The judgment emphasised that the Crown Court must adhere to the principles of company law during confiscation proceedings, and should bear in mind that the confiscation process is not aimed at punishment but at recovery of ill-gotten benefit.[157] The nature and extent of the criminality involved should also be considered.[158] Lord Sumption noted that the fact that a defendant is the sole owner or controller of a company involved in criminal conduct does not necessarily mean the defendant is acting as the alter ego of the company—in deciding whether to pierce the corporate veil in criminal proceedings the Crown Court must take into account all the facts and circumstances of a particular case.[159]

Lord Sumption's admonitions that the formalities of company law should not be lightly set aside in confiscation proceedings were heeded in *R v Powell*, in which the Court of Appeal found that two company directors convicted of consenting in the company's failure to comply with environmental regulations should not be treated as having personally obtained the pecuniary advantage accrued by the company from its failure to clean up the site.[160] The court found that the company was not a "front" being used to conceal the role of the directors or evade responsibility for

---

[151] *Id.* at [23] (quoting *R v Seager & Blatch* [2009] EWCA Crim 1303 [76]).

[152] [2015] EWCA Crim 173.

[153] *R. v McDowell* [2015] EWCA Crim 173 [5], [51(ii)].

[154] *Id.*

[155] *Id.*

[156] *Boyle Transport v* R [2016] EWCA Crim 19 [91].

[157] *Id.* at [90], [93].

[158] *Id.* at [95].

[159] *Id.* at [97].

[160] [2016] EWCA Crim 1043 [28], [34]-[35].

criminal actions, but rather a legitimate company that had broken the law by failing to comply with environmental regulations.[161] It was therefore not a case of either concealment or evasion, and was not an appropriate case in which to pierce the corporate veil.[162]

II. THE CASE FOR APPLYING CONFISCATION TO COMPANIES

Having surveyed the functioning of the current confiscation regime in Section I, this next section of the paper will discuss the current underutilisation of confiscation against company defendants, assess the potential theoretical justifications for confiscation, and argue that there are compelling theoretical and practical grounds for more consistently applying the confiscation regime to company defendants directly.

A. Confiscation is underutilised against company defendants

On its face, POCA is equally applicable to both individual and company defendants, as the statutory language refers to "a defendant . . . convicted of an offence."[163] Nonetheless, our empirical investigations indicate that confiscation orders are rarely issued directly against company defendants, particularly in proportion to the overall number of corporate prosecutions.

Some recent responses to Freedom of Information Act (FOIA) requests from the Ministry of Justice (MOJ) provide a snapshot of the current state of affairs regarding companies and confiscation. Between 30 June 2015 and 30 June 2016, 13 confiscation orders were issued by the Crown Court against company defendants, of which 10 were paid in full.[164] Between 30 June 2016 and 30 June 2017, four confiscation orders were issued by the Crown Court against company defendants, of which all four were paid in full.[165] Of the 13 cases in which confiscation orders were issued against company defendants in the 2015/2016 time period, the underlying offences consisted of five intellectual property crimes (primarily counterfeiting and trademark infringement), four trading standards offences (primarily failures to abide by consumer protection regulations), one agreement to bribe an agent, one failure by a company to prevent bribery, one breach of an enforcement notice, and one offence of committing damage to the breeding site or resting place of a wild animal.[166] Of the four cases in which such orders were issued in the 2016/2017 time period,

---

[161] *Id.* at [25], [31].

[162] *Id.* at [27]-[29], [32].

[163] POCA s. 6(2).

[164] Response to Freedom of Information Act (FOIA) Request – FOI 180108003 (30 January 2018). This number includes both cases in which the company defendant was convicted on indictment in the Crown Court and cases in which the company defendant was committed to the Crown Court by the Magistrates' Court for sentencing or confiscation. As discussed above, only the Crown Court may issue confiscation orders under POCA. *See* n. 23, *supra*. These statistics therefore capture all confiscation orders issued directly against company defendants during these time periods.

[165] *Id.*

[166] Response to Freedom of Information Act (FOIA) Request – FOI 180208014 (1 March 2018).

three of the underlying offences were for breach of or failure to comply with an enforcement notice and one was for trademark infringement.[167]

As discussed in section I, courts have the power to "pierce the corporate veil" in the confiscation context and treat a company as the alter ego of an individual defendant. It is clear from the case law that courts do frequently confiscate the assets of corporations under the alter ego theory. Because these alter ego cases involve the prosecution of individual defendants, no separate statistics are gathered regarding the number of cases in which confiscation orders are effectively issued against companies in the guise of individuals.

Publicly available MOJ statistics show some clear trends with respect to criminal prosecution of companies. The number of prosecutions of non-person defendants (e.g., companies, public bodies, and other organisations) in the Crown Court has more than doubled since the mid-2000s, rising from 102 in 2007 to 224 in 2016 and 234 in 2017.[168] The number of non-person defendants sentenced in the Crown Court (including both those convicted at the Magistrates' Court and those convicted at trial at the Crown Court) has risen from 171 in 2007 to 339 in 2016 and 312 and 2017.[169] The average fine imposed on non-person defendants in the Crown Court has also shot up precipitously during the same time period, from £50,713 in 2007 to £246,245 in 2017.[170]

The total number of non-person defendants proceeded against in the Magistrates' Court has held steady during the past decade, with 11,011 non-person defendants proceeded against in 2007 and 11,782 non-person defendants proceeded against in 2017.[171] However, the number of non-person defendants committed by the Magistrates' Court for trial at the Crown Court has steadily increased over that time period, from 86 in 2007 to a high of 272 in 2016 and back down to 205 in 2017.[172]

---

[167] *Id.*

[168] Ministry of Justice, *Criminal Justice System statistics quarterly: December 2017* (Published 17 May 2018) (hereinafter 'MOJ Statistics (2017)'), Crown Court data tool, *available at* https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2017 (visited 15 June 2018). These numbers are the bookends of a steadily increasing number of Crown Court prosecutions of company defendants, as the Ministry of Justice reported the following number of non-person defendants tried in the Crown Court for each of the following years: 102 in 2007, 103 in 2008, 126 in 2009, 125 in 2010, 126 in 2011, 129 in 2012, 162 in 2013, 129 in 2014, 202 in 2015, 224 in 2016, and 234 in 2017.

[169] *Id.* The number of non-person defendants sentenced in the Crown Court was the following for each of the following years: 171 in 2007, 178 in 2008, 193 in 2009, 181 in 2010, 182 in 2011, 178 in 2012, 217 in 2013, 197 in 2014, 301 in 2015, 339 in 2016, and 312 in 2017.

[170] *Id.* The amount of the average fine has also followed a clear year-by-year trend of increasing, as the following average fines were imposed on non-person defendants in each of the following years: £50,713 in 2007, £75,904 in 2008, £81,309 in 2009, £103,490 in 2010, £75,706 in 2011, £85,586 in 2012, £70,461 in 2013, £53,793 in 2014, £123,163 in 2015, £218,730 in 2016, and £246,245 in 2017.

[171] MOJ Statistics (2017), Magistrates' Court data tool.

[172] MOJ Statistics (2017), Magistrates' Court data tool. The Magistrates' Courts have committed the following numbers of non-person defendants for trial in the Crown Court in each of the following years: 86 in 2007, 59 in 2009, 62 in 2009,

So, what conclusions may we draw from these numbers? First, the number of company prosecutions in the Crown Court is on the upswing, and shows no signs of slowing down. This increase in prosecutions has undoubtedly been spurred at least in part by the creation of several new types of corporate criminal liability in the decade since the global financial crisis first spurred calls for increased corporate social responsibility. The *Corporate Manslaughter and Corporate Homicide Act 2007* came into effect on 6 April 2008, providing that a company can be convicted of a gross breach of duty by "senior management" leads to a death. The *Bribery Act 2010* created a corporate offence of failure to prevent payment of a bribe and the *Criminal Finances Act 2017* create a corporate offence for failure to prevent tax evasion. Public demand for corporate accountability remains high, and Solicitor General Robert Buckland MP has recently proposed yet another new law creating a corporate offence for "failing to prevent economic crime."[173] The nearly five-fold increase in the amount of the average fine issued against non-person defendants by the Crown Court in this same time period keeping with trend of ever-increasing criminal responsibility for companies.

Second, the number of confiscation orders issued directly against company defendants is dramatically lower than the number of company prosecutions. This is particularly note-worthy given that POCA section 6 dictates that the Crown Court must make a confiscation assessment in all cases of acquisitive crime if the prosecutors so requests, and that most offences committed by companies are motivated by profit, either directly or indirectly. While the statistics available provide only a snapshot of the number of confiscation orders issued against companies, just four confiscation orders were issued against companies between June 2016 and June 2017. This is in contrast to the 339 non-person defendants sentenced by the Crown Court in 2016 and 312 in 2017. As noted above, this does not mean that prosecutors are not pursuing corporate assets through confiscation proceedings—case law makes clear that corporate assets are often confiscated under an alter ego theory following prosecutions of individuals. However, it is clear that confiscation is being underutilised as a tool in direct corporate prosecutions, while such prosecutions are only increasing in number.

B. Theoretical justifications for company confiscation

In the previous section, we have established that very few confiscation orders are sought against company defendants in comparison with the number of company prosecution. The question then arises, is this a bad thing? Put another way, should confiscation be applied to company defendants more frequently?

In this section, we argue that there are compelling theoretical justifications for increasing the use of confiscation in the context of company prosecutions. The same reasons that support

---

59 in 2010, 57 in 2011, 62 in 2012, 149 in 2013, 225 in 2014, 253 in 2015, 272 in 2016, and 205 in 2017. MOJ Statistics (2017), Magistrates' Court data tool.

[173] Joe Watts, "Minister says time has come for corporate offence of 'failing to prevent economic crime'", *Independent* (18 March 2018), *available at* https://www.independent.co.uk/news/uk/politics/failing-to-prevent-economic-crime-robert-buckland-solicitor-general-consultation-a8262396.html (visited 16 June 2018).

confiscating the proceeds of crime from individual defendants apply to company defendants, and it would be arbitrary (or worse) not to apply the same policies to corporations and natural persons. Applying the confiscation regime to companies does pose a number practical and theoretical challenges, as will be discussed in section III. However, we argue that these challenges are surmountable and make a number of proposals in section IV for fashioning a confiscation regime that can effectively and justifiably be applied to companies.

1. Theoretical frameworks for confiscation

In order to show that confiscation of company assets is justified, let us consider the two leading theoretical frameworks for the confiscation of the proceeds of crime: deprivation and deterrence. We will argue that, while both provide good reasons to extend confiscation to company defendants, the deprivatory approach provides the better account of why we should confiscate the proceeds of corporate crime. We will consider the implications of each framework for how corporate confiscation should be carried out on the ground.

a. Deprivation

The deprivatory approach to confiscation holds that the proceeds of crime should be confiscated from anyone possessing such proceeds. There are at least three separate justifications for confiscation which fall under the deprivation umbrella: (1) depriving bad actors of the instrumentalities of future crimes; (2) restoration; and (3) consumer protection.

(1) Instrumentalities of crime

One justification for confiscating the proceeds of crime is "to deprive criminals of their instrumentalities to engage in further criminal activity."[174] Removing ill-gotten assets disrupts the economic and political power of bad actors, providing them with fewer resources for committing additional crimes in the future. This may be conceptualised as a form of crime prevention through incapacitation, which is one of the traditional rationales for non-punitive criminal sanctions.[175]

Confiscation has often been cast as a means of weakening the economic power of organised criminal operations, in particular.[176] In their 2018 article, *Confiscation: deprivatory and not punitive – back to the way we were*, Jonathan Fisher and Justin Kwan explain that confiscation has long been seen as a means of combating the potentially far-ranging influence of organised crime:

---

[174] Jonathan Fisher QC and Justin Bong Kwan, *Confiscation: deprivatory and not punitive – back to the way we were*, Crim L.R. 192-201, 194-95 (2018).

[175] Mitchell N. Berman, "The Justification of Punishment", in Marmor, Andrei (ed), *The Routledge Companion to Philosophy of Law* (Taylor & Francis Group, New York 2012) at 145; Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford University Press 2011) at 29 (noting that incapacitation helps prevent crime but is not, in itself, "punishment").

[176] Jonathan Fisher QC and Justin Bong Kwan, *Confiscation: deprivatory and not punitive – back to the way we were*, Crim L.R. 192-201, 194-95 (2018).

> Recognising confiscation as a means to weaken the economic power of criminal organisations, the European Court of Human Rights in *Arcuri v Italy* noted that '[t]he enormous profits made by these organisations from their unlawful activities give them a level of power which places in jeopardy the rule of law within the state.'[177]

There are compelling parallels to be drawn between organised crime and companies. Both consist of groups of persons banding together to achieve a shared purpose, and both are capable of amassing great wealth and power as a result. By the same token, both are capable of committing crimes at a larger scale and potentially causing much further-reaching harm than an individual criminal. Thus, the instrumentalities-of-crime rationale is a particularly compelling justification for confiscating the proceeds of crime from companies. It follows, however, that this justification applies most strongly where there is reason to believe that the company would be likely to use such proceeds to commit additional crimes in the future. This will be the truest of companies whose underlying business is illegal and least applicable to companies who conduct legitimate businesses that have been tainted by some form of illegality, e.g. payment of a bribe or over-charging.

(2) Restoration

Another deprivatory rationale for confiscation is simple fairness. Under this approach, it is fundamentally unfair for anyone to benefit from criminal conduct. To ameliorate this unfairness, any proceeds of crime should therefore be confiscated in order to restore the status quo. When confiscation powers were first examined in depth by the Hodgson Committee in the 1980s, the committee's report concluded that the fundamental objective of a confiscation regime "should be to restore the *status quo* before the offence."[178]

This "restorative" justification for confiscation is applicable regardless of whether the person or entity possessing the criminal proceeds was involved in the criminal conduct, or even aware of it. The purpose of confiscation in this instance is not to punish a culpable actor or prevent the means of committing a future crime, but simply to restore the equilibrium that existed before any crime was committed. It is therefore a compelling justification for confiscating the proceeds of crime from a company even where innocent shareholders will ultimately be on the hook for the loss. While shareholders without decision-making power cannot be deterred and should not be punished, nor should they unfairly benefit from criminal conduct (even criminal conduct of which they were not aware).

The restorative approach to confiscation may be aptly analogised to the private law remedy of disgorgement of profits to avoid unjust enrichment. It is therefore notable that in at least two of the major deferred prosecution agreements (DPA) entered into with large companies by the Serious Fraud Office (SFO) since such agreements were first introduced in 2014, the financial penalty agreed to explicitly included the disgorgement of profits.

---

[177] *Id.* (quoting *Arcuri v Italy* (52024/99) 5 July 2001 ECtHR 517 at 527).

[178] Hodgson Report at 74.

On November 2015, the SFO entered into a DPA with Standard Bank after the bank was indicted for alleged failure to prevent bribery contrary to section 7 of the Bribery Act 2010.[179] Standard Bank agreed to pay a financial order of US$25.2 million to HM Treasury and a further US$7 million to the Government of Tanzania. The $25.2 million total financial penalty consisted of a US$16.8 million fine and US$8.4 million disgorgement of profits. Similarly, on 17 January 2017, following a four-year investigation, the SFO and Rolls-Royce entered into a DPA, accounting for three decades of alleged criminal conduct in seven jurisdictions.[180] Rolls Royce agreed to pay a total of £497,252,645 including £258,170,000 in disgorgement of profits and a financial penalty of £239,082,645.

The use of disgorgement of profits in these DPAs proves that the remedy of removing the unfairly obtained profits of crime from companies is already being used in the context of large-scale corporate investigations. This demonstrates that such an approach is feasible even in highly complex cases. There is no defensible reason why such an approach should not be made available to courts and prosecutors in all types of corporate prosecutions, including cases in which a company proceeds to trial and convicted.

(3) Consumer protection

A third deprivatory rationale for confiscation is applicable *only* to companies: consumer protection. Under this theory of confiscation, the proceeds of crime should be confiscated on the ground that allowing a company to retain the proceeds of crime creates a distortion in the marketplace that harms competition and potentially harms consumers.

Allowing a company to retain the proceeds of crime will reward bad behaviour rather than rewarding the firm that provides the best product or works the most efficiently. This will allow sub-par firms to succeed in the marketplace, and possibly gain a marketplace advantage through no virtue of their own. It will allow a firm to succeed on the basis of something that is unrelated to whether or not it "deserves" to succeed in the marketplace. This can lead to an inferior firm gaining unwarranted market share or access to consumers that it has not "earned" through legitimate competition. The proceeds of crime should therefore be confiscated from a company in order to prevent it from gaining this unfair advantage.

This would perhaps justify confiscating more than just net proceeds. If a company receives an ill-gotten investment or income stream and then grows its business or gains a footing in the marketplace, even if it returns the entire amount of the original illicit investment, a market distortion has still been created and not been corrected. Therefore, this framework might warrant a different calculation of "benefit" altogether—a "but for" approach. Under this approach, the benefit to be confiscated might be any benefit to a company that it would not have received "but for" the

---

[179] Serious Fraud Office, *Case Information: Standard Bank PLC* (last modified 1 June 2016), *available at* https://www.sfo.gov.uk/cases/standard-bank-plc (visited 16 June 2018).

[180] Serious Fraud Office, *Case Information: Rolls-Royce PLC* (last modified 17 January 2017), *available at* https://www.sfo.gov.uk/cases/rolls-royce-plc (visited 16 June 2018).

criminal conduct. This would therefore include any improvements or advancements made as a result of that illicit income. It would not, however, include all gross sales of the company, as it should still be possible in many cases to identify legitimate areas of business that would have been carried on irrespective of the criminal conduct. As discussed below, the Court of Appeal recommended such an approach in the 2013 case *R v Sale*, suggesting that the best way to calculate benefit in a case in which lucrative contracts were unfairly obtained through bribery would be for the prosecution to put forth evidence of the "true benefit" to the company in the form of "the pecuniary advantage gained by obtaining market share, excluding competitors and saving on the costs of preparing proper tenders."[181]

b. Deterrence

Deterrence is one of the fundamental purposes of criminal law, and another potential rationale for confiscation.[182] "Specific deterrence" occurs when a specific offender who is punished is put off from committing further crimes.[183] "General deterrence", in contrast, involves the punishment of an offender to deter other actors from committing crimes.[184] Punishment for the purpose of general deterrence can be seen as a message to the community of potential bad actors that crime will not be tolerated, whereas specific deterrence is intended to impose sufficient hardship on an individual that they will be dissuaded from risking such a penalty again in the future. When assessing whether a given policy is justified by the aim of deterrence, it is therefore important to consider both specific and general deterrence.

As is aptly noted by Fisher and Kwan, "it is unclear whether the current regime under POCA produces any meaningful amount of deterrence, and there is a lack of evidence on this issue" in addition to the "broader question as to whether confiscation as a response to crime can deter criminals or potential offenders at all."[185] This is only more so when it comes to confiscation and corporate offenders. This is so because confiscating assets from companies will often ultimately redound to the detriment of the shareholders, who are generally not in a position to prevent the company from committing crimes. Those who are in a position to prevent a company from committing crimes—directors and other high-ranking employees—will not pay the price when company assets are confiscated.

Confiscation may not even be properly considered "deterrence" in the strict sense. Deterrence is usually achieved by imposing an additional affirmative incentive not to commit a bad act (for example, a fine), whereas confiscation simply removes a pre-existing incentive to commit a crime

---

[181] [2013] EWCA Crim 1306 [57].

[182] Tadros, *The Ends of Harm* at 29.

[183] *Id.*

[184] *Id.*

[185] Fisher and Kwan at 196-97.

(namely, the profit). Confiscation is better justified by the looser sense of deterrence, which is anything that makes actors less incentivized to commit a crime.

Within the arsenal of tools for combating corporate crime, financial penalties in the forms of fines are likely to be a more targeted approach to deterrence than confiscation. The most coherent approach to criminal penalties for companies is likely to resemble that taken by the SFO in the DPAs mentioned above—confiscation should be focused on removing unfair advantage (through the disgorgement of profits) while fines can be used more effectively for both specific and general deterrence. Confiscation serves the end of deterrence in the general sense that it helps establish that crime does not pay, but fines are a better and more focused tool for attempting to deter companies from misconduct.

2. An Additional Consideration: Fairness to individuals

Another argument for applying confiscation rules to company defendants is simply that "the law should not discriminate against individual persons in favor of corporate persons."[186] As argued by legal scholar William Robert Thomas, "[i]mplicit, and sometimes explicit, to this rationale is a view that corporate personhood exists to serve the interest of individual within society; failing to hold corporations legally responsible, in a similar manner to the ways that we hold individual persons legally responsible, is unfair to individuals."[187] U.S. courts—early adopters of corporate criminal liability[188]—have consistently stated that "the treatment of corporate persons should resemble, as nearly as possible, the treatment of individual persons. With respect to corporate liability, that meant exposing corporations whenever possible to the same tort and criminal responsibilities that individuals faced."[189] For example, as early as the nineteenth century, U.S. courts refused to except corporations from exemplary damages on the basis that "whatever rule of damages would apply in a suit against a natural person, ought to apply in a suit against a corporation [as] any discrimination in that regard would shock the public's sense of impartial justice."[190]

As a matter of fairness to individuals, company defendants should not be exempted from a criminal penalty to which natural persons are habitually subjected. Individuals convicted of acquisitive crimes are subject to both prison sentences and confiscation orders; it follows that companies convicted of acquisitive crimes should similarly be subject to both a deterrent or retributive punishment (such as a fine or corporate probation) and the confiscation of the proceeds of such a crime.

---

[186] William Robert Thomas, *How and Why Corporations Became (and Remain) Persons Under the Criminal Law*, Florida State University Law Review (forthcoming) at 49, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2834645 (visited 16 June 2018).

[187] *Id.*

[188] The U.S. Supreme Court first recognised corporate criminal liability in *New York Central & Hudson River Railroad v. United States*, 212 U.S. 481 (1909).

[189] *Id.* at 51.

[190] *Id.* at 52 (quoting *Jefferson R.R. Co. v. Rogers*, 28 Ind. 1, 7 (1867)).

III. CONFISCATION AND COMPANY DEFENDANTS: CHALLENGES

Having established that there are compelling theoretical justifications for confiscating the proceeds of crime from company defendants, we will now turn to some of the challenges that arise in the context of corporate confiscation. There are two primary difficulties to be addressed. The first is in fashioning a confiscation order that is fair, reasonable, and serves the aims of the legislation. The second is in enforcing such an order.

A. Calculating a fair and reasonable confiscation order

There are a number of challenges to making a just and reasonable confiscation order against a company defendant. As discussed above in section II, such an order would ideally serve the aims of depriving potential criminals of the instrumentalities of crime, restoring the status quo to what it was before the crime occurred, protecting consumers by preventing firms from benefiting unfairly in the marketplace without driving otherwise productive firms out of business, and, to a lesser extent, deterring crimes by sending a message to both the individual company defendant and the community of companies that they will not stand to benefit from criminal misconduct. Such an order should therefore seek to remove the genuine proceeds of crime from a company without removing the proceeds of legitimate business activities.

1. Proportionality

In order to assess what a reasonable confiscation order might look like in the context of a company defendant, it will be instructive to look to recent case law regarding the limits placed on confiscation orders by the European Convention on Human Rights (the Convention). The UK Supreme Court and the European Court of Human Rights (ECtHR) have confirmed that confiscation orders must be "proportionate" in order to comply with the Convention. The resulting case law has generated some principles that are instructive in terms of assessing POCA as it is currently applied and what a better system might look like when it comes to company defendants.

a. The ECHR right to peaceful enjoyment of possessions

Provision (1) of Article 1 of the first protocol to the Convention (A1P1) provides that no one shall be deprived of the peaceful enjoyment of his possessions "except in the public interest and subject to the conditions provided for by law and by the general principles of international law."[191] Provision (2) provides that the preceding shall not "impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."[192]

The European Court of Human Rights (ECtHR) has instructed that, taken together, these provisions dictate that where an individual's property is taken by the state "there must . . . exist a

---

[191] Article 1 to Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (A1P1 ECHR).

[192] *Id.*

reasonable relationship of proportionality between the means employed and the aim sought to be realised."[193] This "proportionality" requirement will be violated where "the property-owner concerned has had to bear an 'individual and excessive burden', such that 'the fair balance which should be struck between the protection of the right of property and the requirements of the general interest' is upset."[194] A court considering a proportionality challenge "must consider whether the proceedings as a whole afforded the applicant a reasonable opportunity for putting his case to the competent authorities with a view to enabling them to establish a fair balance between the conflicting interests at stake."[195]

b. R. v Waya

As noted in section I, in the 2012 case *R v Waya*, the UK Supreme Court made clear that POCA must be given effect in a manner that is compatible with A1P1.[196] The court found unanimously that provisions of POCA were "capable of operating in a manner that violates" A1P1 and that a judge therefore "can and must substitute a confiscation order that is proportionate for the confiscation order that would be produced by applying strictly the relevant provisions of POCA, where this is disproportionate."[197]

The specific facts at issue in *Waya* involved the purchase of a property made with a combination of legitimately and illegitimately obtained funds. The defendant made fraudulent statements about his income and employment in order to obtain a loan of £465,000 and combined this loan with £310,000 of his own money to purchase a property for £775,000.[198] He was subsequently convicted of having made false statements, and confiscation proceedings were initiated. By the time the confiscation proceedings began, the market value of the property had increased to £1,850,000.[199] The trial judge issued a confiscation order for £1,540,000, an amount arrived at by deducting the amount of the original "untainted" contribution from the market value of the property at the time of the confiscation proceedings.[200] The Court of Appeal reduced the amount of the order to £1,100,00, or 60% of the current market value of the property, as the tainted loan made up 60% of the original purchase price. The UK Supreme Court took up the case and found that the amount of the benefit to the defendant as a result of his dishonesty was best understood as 60% of the appreciation in the net value of the flat, subject to the mortgage and other

---

[193] *Paulet v The United Kingdom* [2014] ECHR 477 [64]; *see also R v Waya* [2012] UKSC 51 [12] ("It is clear law . . . that there must be a reasonable relationship of proportionality between the means employed by the State in, inter alia, the deprivation of property as a form of penalty, and the legitimate aim which is sought to be realised by the deprivation").

[194] *Id.* at [65] (internal citations omitted).

[195] *Id.*

[196] [2012] UKSC 51.

[197] *Id.* at [82] (Lord Phillips and Lord Reed, concurring).

[198] *Id.* at [36].

[199] *Id.* at [37].

[200] *Id.*

adjustments.[201] The Supreme Court therefore calculated that a confiscation order in the sum of £392,400 should be substituted for the previously issued order.[202]

Lord Walker and Sir Anthony Hughes, writing for the *Waya* majority, set forth guidance for courts undertaking a proportionality analysis of confiscation orders in the future, noting that "[t]he clear rule as set out in the Strasbourg jurisprudence requires examination of the relationship between the aim of the legislation and the means employed to achieve it[:] the first governs the second, but the second must be proportionate to the first."[203] The majority instructed that in order to comply with the requirements of the Convention, a domestic court "must recognise and respect the essential purpose, or 'grain' of the statute."[204] Lord Walker and Sir Hughes provided the following discussion of POCA's purpose:

> The purpose of the legislation is plainly, and has repeatedly been held to be, to impose upon convicted defendants a severe regime for removing from them their proceeds of crime. It is not to be doubted that this severe regime goes further than the schoolboy concept of confiscation, as Lord Bingham explained in *R v May* [2008] 1 AC 1028. Nor it is to be doubted that the severity of the regime will have a deterrent effect on at least some would-be criminals. It does not, however, follow that its deterrent qualities represent the essence (or the "grain") of the legislation. They are, no doubt, an incident of it, but they are not its essence. Its essence, and its frequently declared purpose, is to remove from criminals the pecuniary proceeds of their crime.[205]

Courts issuing confiscation orders must therefore keep this this aim in mind, as a confiscation order "must . . . bear a proportionate relationship to this purpose."[206]

The majority opinion emphasised that this did not undercut the potentially severe consequences of the regime.[207] For example, the majority noted, a legitimate and proportionate order might require "the defendant to pay the whole of a sum which he has obtained jointly with others", "several defendants each to pay a sum which has been obtained, successfully, by each of them, as where one defendant pays another for criminal property", or "a defendant to pay the whole of a sum which he has obtained by crime without enabling him to set off expenses of the crime."[208] The majority acknowledged that these propositions "involve[d] the possibility of removing from the defendant by way of confiscation order a sum larger than may in fact represent his net proceeds of crime" but were nonetheless "consistent with the statute's objective and represent[ed] proportionate

---

[201] *Id.* at [78].

[202] *Id.* at [81].

[203] *Id.* at [20].

[204] *Id.*

[205] *Id.* at [21].

[206] *Id.* at [22].

[207] Id. at [26].

[208] *Id.*

means of achieving it."[209] In rejecting the per se disproportionality of these scenarios, the majority echoed familiar concerns about the deduction of expenses, asserting that "[t]o embark upon an accounting exercise in which the defendant is entitled to set off the cost of committing his crime would be to treat his criminal enterprise as if it were a legitimate business and confiscation a form of business taxation."[210] The court dismissed the prospect of such an accounting as both "offensive" and "frequently impossible of accurate determination."[211]

Since *Waya* was decided, a number of challenges have been brought to the proportionality of confiscation orders, and some guiding principles have emerged from the ensuing case law. Nonetheless, the limits of a "proportionate" confiscation order are still being hammered out by courts and litigants.

c. Paulet v the United Kingdom

In the 2014 case *Paulet v The United Kingdom*, the ECtHR weighed in on the application of A1P1 to the UK's confiscation scheme.[212] The ECtHR emphasised that the "fair balance" mandated by A1P1 requires that a domestic court considering a proportionality challenge to a confiscation order consider both the public interest and an individual's right to peaceful enjoyment of his possessions.[213] It is not sufficient for a court merely to find that a confiscation order is in the public interest—the Convention requires that the court weigh this public interest against the individual's right in order to determine whether the "requisite balance" was maintained.[214]

In *Paulet*, the defendant was an Ivoirian national living and working in the United Kingdom who obtained employment using a counterfeit French passport.[215] Over the course of four years, he earned a total gross salary of £73,293.17 of which he retained £21,649.60 in savings.[216] It was undisputed that the defendant paid all the tax and national insurance due on his earnings and that his employment income had been genuinely earned. When the defendant applied for a driving licence, the falsity of his passport was discovered, and criminal proceedings were initiated against him.[217] He pleaded guilty at trial, after which the judge imposed a custodial sentence of seventeen months and recommended the defendant for deportation.[218]

---

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] [2014] ECHR 477.

[213] *Id.* at [67]-[68].

[214] *Id.*

[215] *Id.* at [6]-[7].

[216] *Id.* at [8].

[217] *Id.* at [9].

[218] *Id.* at [10].

In addition, the trial judge imposed a confiscation order under section 6 of POCA in the amount of all of the defendant's accumulated savings.[219] After deducting tax and national insurance payments, the court calculated that the defendant had received a "benefit" of £50,000 and that the £21,949.60 retained in savings was the amount available. A confiscation order was issued in the full amount of the defendant's remaining savings with a default sentence of 12 months in case of failure to pay. Thus, as the ECtHR noted, "the confiscation order had the effect of depriving the applicant of all of the savings he had accumulated during the four years of employment."[220]

The defendant appealed against the confiscation order on the ground that it was an "abuse of process" and "oppressive" for the Crown to seek and the court to impose a confiscation order that amounted to his entire savings over nearly four years of genuine work."[221] The defence submitted that there would be an abuse of process where, on a correct application of the law to the facts, the resulting "benefit" figure yielded a disproportionate or oppressive result.[222] It was submitted that "to seek the imposition of a confiscation order on the basis of a benefit figure which far exceeded the value of the defendant's crimes could properly be described as disproportionate—either in the traditional sense used in criminal sentencing ('not fitting the punishment to the crime') or in the language of the Convention—and was therefore an abusive exercise of jurisdiction."[223] The defence further submitted that a confiscation order could be described as "oppressive" where it "did not pursue any of the legitimate aims of the confiscation regime and/or did not further the Parliamentary intent of stripping defendants of the proceeds of crime."[224]

The Court of Appeal held that the decision to seek a confiscation order against the defendant did not constitute an abuse of process, and dismissed the appeal.[225] The court found that the "the appropriate link between the appellant's earnings and his criminal offences, in the context of the wider public interest, was plainly established" as the appellant was "deliberately circumventing the

---

[219] *Id.* at [11].

[220] *Id.*

[221] *Id.* at [15]. Prior to the 2012 *Waya* decision, a number of successful challenges to confiscation orders had been framed as "abuse of process" claims. *See R v Morgan* and *R v Bygrave* [2008] EWCA Crime 1323 (potentially an abuse of process for the Crown to seek a confiscation order where the benefit to a defendant was limited to a loss occasioned by a single victim and where the defendant stood ready to repay the victim in full); *R v Shabir* [2008] EWCA Crim 1809 (it was likely "oppressive" for the Crown to seek a confiscation order of over £400,000 against a defendant whose actual defalcations were accepted to amount to only £464). The *Waya* decision confirmed that these cases were rightly decided, but instructed that a "better analysis" of such a situation was to consider whether a seemingly unfair confiscation order was "wholly disproportionate" and therefore a breach of A1P1. [18]. The *Waya* majority emphasised that "the safeguard of the defendant's Convention right under A1P1 not to be the object of a disproportionate order does not, and must not, depend on prosecutorial discretion, nor on the very limited jurisdiction of the High Court to review the exercise of such discretion by way of judicial review." [19].

[222] *Paulet* at [15].

[223] *Id.*

[224] *Id.* at [16].

[225] *Id.* at [17].

prohibition against him seeking remunerative employment in this country in any capacity."[226] The Court of Appeal refused to certify a point of law of general public importance which ought to be considered by the Supreme Court. The defendant therefore appealed the order to the ECtHR.

The ECtHR held that the scope of the review carried about by the Court of Appeal had been too narrow to satisfy the balancing requirements of A1P1.[227] The ECtHR found that it was clear that the Court of Appeal had conducted the requisite inquiry into whether or not the confiscation order was in the public interest.[228] However, "having decided that it was, they did not go further by exercising their power of review so as to determine 'whether the requisite balance was maintained in a manner consonant with the applicant's right to 'the peaceful enjoyment of his possessions', within the meaning of the first sentence of Article 1.'"[229] By failing to weigh the public interest against the individual interest at stake, the domestic court failed to satisfy the "fair balance" requirement inherent in A1P1.[230]

The ECtHR reached its conclusion on these procedural grounds, and did not weigh in on the substantive question of how such a balancing might have turned out.[231] As such, the *Paulet* decision makes clear that it is not sufficient for courts to find that a confiscation order is in the public interest without then going on to balance that interest against the individual right at stake. It does not, however, provide much in the way of guidance regarding how a court ought to conduct that balancing or, where there is a defined public interest in confiscation, what might nonetheless constitute a disproportionate burden on a defendant.

d. R v Harvey

In the 2015 case *R v Harvey*, the UK Supreme Court considered an A1P1 challenge to the proportionality of a confiscation order that included value-added tax (VAT) already paid or accounted for to HMRC in the total amount "obtained" by the defendant.[232] The majority found that courts should deduct VAT that has been paid or accounted for when making a confiscation order, but confirmed that as a general matter other types of taxes and business expenses were not to be deducted. Several emphatic dissents provided instructive discussions of the limits of disproportionality and the live issues yet to be determined regarding the impact of A1P1 on POCA.

---

[226] *Id.* at [19].

[227] *Id.* at [67]-[69].

[228] *Id.* at [67].

[229] *Id.*

[230] *Id.* at [68].

[231] *Id.* at [69] ("The foregoing considerations are sufficient to enable the Court to conclude that in the circumstances of the applicant's case there has been a violation of Article 1 of Protocol No. 1 to the Convention. The Court does not consider it necessary to reach any further conclusions in respect of the proportionality of the confiscation order imposed on the applicant.").

[232] [2013] EWCA Crim 1104 [1].

The case involved a machinery rental company that was 98.9% owned by the defendant, with the remainder owned by the defendant's wife, and treated as the defendant's alter ego for confiscation purposes.[233] Following an arson attack against the defendant's competitor, the police raided the company and found that a "significant proportion" (around 38 percent) of the items of machinery had been stolen.[234] The parties agreed that some of the machinery had been legitimately purchased, and the Crown accepted that "the Company would have been viable if it had limited itself to legitimate activities."[235] The judge assessed the benefit to the defendant by first totalling the company's aggregate turnover for the relevant period, inclusive of VAT, and then assessing the benefit as 38 percent of that amount.[236] The only issue on appeal to the Supreme Court was whether the court was right to include VAT in the benefit amount.[237]

Lord Neuberger and Lord Reed writing for the majority found that courts should disregard VAT that has been paid or accounted for when calculating the sum that has been "obtained" by a defendant for POCA purposes.[238] The court found that while such a practice was "appropriate under the terms of POCA as traditionally interpreted" it was nonetheless disproportionate under A1P1.[239] The majority found that the failure to discount the payment of VAT was problematic from a "double recovery" perspective, noting that "[a]ny provision which entitles the Executive to double recovery from an individual, although not absolutely forbidden by A1P1, is clearly at risk of being found to be disproportionate."[240]

The majority noted that the *Waya* decision had made clear that "where the proceeds of crime are returned to the loser, it would be disproportionate to treat such proceeds as part of the 'benefit obtained' by a defendant as it would amount to a 'financial penalty' or 'an additional punitive sanction', which should not be imposed through the medium of POCA."[241] The payment of VAT, the majority recognised, was not precisely equivalent to the scenario described in *Waya* of a thief returning stolen goods to their rightful owner, as the state will not be the original "loser" in most cases.[242] Nonetheless, as Lord Mance argued in his concurrence, the two scenarios are comparable in terms of the principle that "a defendant who has made good his liability to restore [or pay VAT]

---

[233] *Id.* at [2], [49].

[234] *Id.*

[235] *Id.* at [5].

[236] *Id.* at [5].

[237] Id.

[238] *Id.* at [36].

[239] *Id.*

[240] *Id.* at [32].

[241] *Id.* at [33].

[242] *Id.*

should not be in a worse position when it comes to the making of a confiscation order than a defendant who has not done so."[243]

The majority nonetheless confirmed that "no deduction can be made to take into account the amount of income tax or corporate tax which is paid in respect of the [criminal] activity; nor can other expenditure necessarily incurred in connection with, or as a result of, the acquisition of an asset through criminal activity be deducted from the value of what has been acquired in order to assess the value of what has been 'obtained' for the purposes of POCA."[244] The majority distinguished VAT as unique from other taxes in that "a VAT liability arises on each taxable supply, and therefore can be directly and precisely related to the obtaining of the property in question under POCA."[245] This is in contrast to income tax and corporation tax, which are computed on the basis of a taxpayer's net income, "and therefore cannot be allocated to a particular transaction or the obtaining of a particular property."[246] The majority expressly left open the question of how courts should treat VAT for which the defendant is liable but has not accounted to HMRC.[247]

The majority opinion was criticized on a number of fronts by dissenting judgements from Lord Hughes and Lord Toulson. Lord Hughes argued that two fundamental aspects of POCA cut against the majority's decision: (1) the measure of the benefit to the defendant is "what is obtained, not what is retained" and (2) "[t]he measure of the benefit is not reduced by the costs or outgoings associated with obtaining it."[248] He noted that:

> No doubt a different scheme could have been prescribed, and one such might have involved calculation of retained benefit. In some countries schemes for the confiscation of criminal proceeds do follow this approach, notably those which rely upon tracing and recovering specific property. The UK system does not. It depends upon ascertaining the value of what was obtained, and then recovering not specific property but, rather, that sum. Having obtained such a sum through crime, the defendant is expected to surrender it from any assets which he holds, whether they were legitimately or criminally acquired. That, as Lord Bingham observed in *May* at para 46, involves no injustice or lack of proportionality.[249]

Lord Hughes rejected the contention that VAT was distinguishable from other taxes in this context, as, he argued, the mechanisms by which VAT is calculated and collected do not render the seller a de facto agent of the state.[250] When a merchant is paid a price by his customers that is VAT

---

[243] *Id.* at [40] (Lord Mance, concurring).

[244] *Id.* at [22].

[245] *Id.* at [26].

[246] *Id.*

[247] *Id.* at [39].

[248] *Id.* at [54].

[249] *Id.* at [56].

[250] *Id.* at [63].

inclusive, Lord Hughes asserted, he "obtains" the VAT element as well as the rest of the price paid and it "bec[o]me[s] his to do with as he wishe[s]."[251] Therefore, "[o]nce the position as to taxes generally is accepted, there is no sufficient basis for singling out VAT as requiring different treatment; indeed it would be inconsistent to do so."[252]

Lord Hughes emphatically rejected the suggestion that *Waya* had established a "general principle" that "disproportionality of a confiscation order is demonstrated if it entails something described as 'double recovery'", asserting that "this is not what *Waya* says and there is no such general principle."[253] Lord Hughes concluded that

> there is nothing disproportionate about a proceeds of crime regime which confiscates the gross proceeds of offending without giving credit for taxes, direct or indirect, paid to the state. That is so, even though this plainly involves the state both receiving the taxes earlier paid and recovering by way of the confiscation order. This follows from the general rule that confiscation is entitled to fasten on gross receipts rather than on profits.[254]

What Lord Hughes's position ultimately highlights is the fact that a gross receipts approach inevitably leads to some form of double recovery from the defendant, particularly in circumstances in which it is clear that some expenses or taxes necessarily must have been paid out. It is inconsistent for the courts to both express concerns about doubly recovery and insist on a strict gross receipts approach to calculating confiscation orders.

In a separate dissent,[255] Lord Toulson highlighted the "long and unbroken line of authority" holding that gross rather than net receipts are the relevant calculation in the confiscation context, and argued that there was insufficient justification to deviate from that principle for the purpose of deducting VAT.[256] He emphasised the potential difficulties in conducting the "full accountancy process" required to determine whether a defendant has truly paid or accounted for the VAT owed, particularly in the case of a demonstrably dishonest defendant.[257] He noted that "[t]his is just the sort of accountancy exercise against which the courts have taken a firm stand from the outset," citing the long line of cases going back to *R v Smith* [1989] 1 WLR 765 (construing the Drug Trafficking Offences Act 1986) and *R v Banks* [1996] EWCA Crim 1799 (construing the Drug Trafficking Act

---

[251] *Id.* at [66].

[252] *Id.* at [76].

[253] *Id.* at [71] (Lord Hughes).

[254] *Id.* at [76] (Lord Hughes).

[255] *Id.* at [81]-[127] (Lord Toulson, dissenting).

[256] *Id.* at [97].

[257] *Id.* at [123]. Lord Toulson noted that the *Harvey* defendant had forged invoices in the name of other machinery suppliers, meaning that "the court would be entitled to required evidence from a credible source that the purported transactions, generating the supposed input tax against which the appellant claimed to have offset output tax, were genuine." *Id.* at [23].

1994) in which UK courts have found that the need to avoid carrying out an accounting of criminal activities justifies the use of gross rather than net receipts in the confiscation context.[258]

Lord Neuberger and Lord Reed responded to Lord Toulson's point about the potential complexity of the accounting process by noting that "the potential inconvenience involved in applying POCA in a manner which is consistent with A1P1 is not a good reason for failing to do so."[259] Similarly, Lord Mance, in his concurrence, addressed Lord Toulson's argument by noting that "the process of making a confiscation order is . . . inherently complex. Criminal courts have under the Proceeds of Crime Act 2002 to make a whole series of often very difficult assessments, e.g. as to the nature and scale of offending, as to benefits received and as to means."[260] Regardless of the complexity of the undertaking, he concluded, "[t]he question whether it would be disproportionate to include in a confiscation order output VAT for which the defendant has accounted is, under A1P1, a question of substantive justice, which courts cannot and should not avoid addressing for reasons of convenience."[261]

Ultimately, the *Harvey* decision indicates that confiscation orders imposing "double recovery" may trigger proportionality concerns, but that there is no per se rule against confiscation orders that may amount to double recovery. The *Harvey* majority carved out a narrow exception for VAT but, as the dissenting judgements persuasively argue, this is not a principled distinction. Either we are concerned with double recovery as not serving the true purposes of the statute or we are not. The *Harvey* decision also makes clear that the potential difficulties in carrying out the "full accountancy process" are not a sufficient reason to avoid calculating a genuinely proportionate confiscation order. This undercuts one of the main arguments against taking a net proceeds approach to confiscation.

e. *R v Gricevicius*

In the 2018 case *R v Gricevicius*, the Court of Appeal took up the question of whether the proportionality requirement of A1P1 indicates that a court should consider deducting business expenses when making a confiscation order.[262] While the defence conceded that it was well settled under UK law that business expenses were not to be deducted in calculating benefit, the defendant submitted that it was disproportionate for the court to disregard business expenses and use only gross receipts when calculating the amount of hidden assets presumed to be available to pay a confiscation order.[263]

---

[258] *Id.* at [124], [97]-[100]; *see also* Lord Hughes (dissenting) at [57].

[259] *Id.* at [35].

[260] *Id.* at [44].

[261] *Id.* at [45].

[262] [2018] EWCA Crim 106.

[263] *Id.* at [15]-[17].

In *Gricevicius*, the defendant pleaded guilty to participation in a large-scale conspiracy to supply cocaine and was sentenced to 14 years' imprisonment.[264] A confiscation order was issued against the appellant for £2.34 million, representing the total value of the drugs he supplied to the crime syndicate over the course of 10 months.[265] The defendant neither gave nor called evidence during the confiscation proceedings, and the judge's determination of the recoverable amount was therefore based entirely on evidence of hidden assets.[266]

The defence did not dispute the judge's calculation of the benefit based on the gross value of the drugs supplied by the appellant.[267] Rather, the defence appealed the order on the grounds that "different considerations applied when determining a defendant's available amount."[268] The defence argued that "[w]hilst it was proportionate to have a strict interpretation of benefit to ensure that defendants do not profit from their crimes, it would not be proportionate to require them to pay what they do not have [as] this would condemn a defendant to serving a prison sentence in default and would be disproportionate."[269]

The defence argued that in a case such as this where the available amount was calculated entirely on the basis of presumed hidden assets, the judge should estimate the actual profits received from the drug transactions and approach the confiscation calculation accordingly.[270] In this case, the recoverable amount should have been fixed at an amount less than the benefit, as the judge "did not take account of the appellant's drug business expenses, such as the purchase price of the drugs."[271] The defence invited the court to take a "common sense" approach by recognising that a defendant in this situation would never retain the full gross sale price of the drugs supplied, as he inevitably "will have to pay his own source of supply for the drugs which he supplies to others."[272]

The Court of Appeal rejected these arguments, finding that "the judge was fully entitled in the circumstances to find that the available amount equated to the benefit figure."[273] The Court of Appeal emphasized that the burden of proof is on the defendant to demonstrate that his available

---

[264] *Id.* at [2].

[265] *Id.* at [5].

[266] *Id.* at [9]. The evidence of hidden assets considered by the judge included the fact that the appellant had previously owned real property in Lithuania and had given no evidence as to what had become of this property. There was also evidence that the appellant led a "cash-rich lifestyle"—including undocumented share purchases and trades, cash transfers to his wife's bank accounts, and the purchase of a car for cash—without any recorded withdrawals from known bank accounts or any known legitimate income. The judge rejected a defence assertion that the appellant's apparent bank overdrafts indicated that he did not have hidden assets. *Id.* at [9].

[267] *Id.* at [17].

[268] *Id.*

[269] *Id.* at [17].

[270] *Id.* at [10].

[271] *Id.* at [10].

[272] *Id.* at [32].

[273] *Id.* at [30].

assets are less than the full amount of the benefit.[274] If a defendant fails to do so, the court found, it is not disproportionate for a judge to issue a confiscation order in the full amount of the benefit.[275] While a court should look to "the facts as a whole" in assessing available amount—and a defendant's failure to provide evidence does not necessitate an "automatic order in the amount of the benefit figure"—the court is not required, of its own volition, to make any assumptions about business expenses or any other type of set-off.[276]

Lord Justice Treacy, writing for the unanimous panel, wrote that the defence's argument that the court should look to net profits at the stage of calculating the available amount was "surprising" given that the focus of the legislation was on depriving criminals of what they have gained rather than what they have retained.[277] He reiterated the repeated concern of UK courts that, even if it were appropriate to look to net profits at this stage, "carrying out some form of accounting exercise into enterprises of this sort . . . almost by definition would prove impossible to undertake."[278] He also noted *Waya*'s clear conclusion that a "legitimate and proportion confiscation order may require a defendant to pay the whole of the sum which he has obtained by crime without enabling him to set off expenses of the crime" and that "[t]he possibility of removing from a defendant by way of confiscation order a sum larger than may represent his net proceeds of crime is consistent with the statute's objective and represents a proportionate means of achieving it."[279]

The upshot of *Gricevicius* is that it will not be considered disproportionate for the court to issue a confiscation order in the whole amount of the gross receipts from a crime even where common sense dictates that it is impossible that the defendant ever retained the gross sale amount, or anything close to it. The burden to demonstrate that available assets are less than the total amount of the gross receipts remains with the defendant regardless of whether the defendant's failure to present evidence leads to an outcome in which he is required to pay significantly more than he ever received as a result of his crime.

f. Implications for company defendants

What principles may be taken from these cases when it comes to confiscation and company defendants? *Waya* has confirmed that a confiscation order that does not serve the purposes of the legislation is impermissible under the Convention. *Paulet* indicates that it is not sufficient for there to be some public interest in the confiscation order at issue—that public interest must nonetheless be weighed fairly against the defendant's property rights. We would add to this analysis two additional public interest considerations when it comes to company defendants. First, the public has an interest in ensuring that companies that engage in legitimate activities are not driven out of business even

---

[274] *Id.* at [30].

[275] *Id.* at [30].

[276] *Id.* at [29].

[277] *Id.* at [31].

[278] *Id.* at [31].

[279] *Id.* at [34].

where some criminal activity has occurred. Second, the public has an interest in ensuring that firms do not gain an unfair advantage in the marketplace as a result of criminal conduct.

Harvey demonstrates that, in spite of the UK's long history of using gross receipts to calculate benefit in the confiscation context, double recovery is still a concern for UK courts. *Harvey* carves out a narrow exception to the rule against deducting taxes or other business expenses that is applicable only to VAT that has been paid or accounted for. However, we argue that the distinction between VAT and other types of taxes and expenses is not a principled one, particularly in the context of businesses. As *Harvey* indicates, UK courts can and should undertake the exercise of calculating which taxes paid and expenses undertaken can reasonably be deducted from the calculation of benefit in order to fashion a confiscation order that more sensibly serves the aims of the legislation.

Finally, *Gricevicius* indicates that UK courts remain resistant to seeing the holding of *Waya* and A1P1 as a check on the gross receipts approach to confiscation. Even where common sense dictates that reasonable business expenses must have been incurred, and it is clear that the harsh hidden asset assumptions will lead to draconian results, UK courts remain reluctant to engage in an accounting of criminal conduct without further guidance from Parliament. It will therefore ultimately be necessary for the legislature to step in and set forth a more tailored scheme for calculating confiscation orders in the context of company defendants, ideally one which considers net proceeds as a starting point for calculating a confiscation order.

2. The UK gross receipts approach in alter ego cases

As discussed above, UK courts have consistently construed POCA and its predecessors as requiring a gross receipts approach to confiscation. This paper argues that this approach leads to a particularly unfair outcome when applied to companies, as companies tend to have more complex cost and revenue streams than individual defendants. As discussed in section II, there are very few instances of UK courts issuing confiscation orders against company defendants directly. However, there are a number of cases in which courts have addressed confiscation from companies in the context of alter ego cases. This has been particularly so since the 2013 decision in *R v Sale*, in which the Court of Appeal set forth three circumstances in which it was appropriate to pierce the corporate veil and treat a company as the alter ego of an individual defendant in the confiscation context.[280] This framework was reaffirmed in the 2016 Court of Appeal case *Boyle Transport v R*.[281]

This section will examine some of these alter ego cases in order to assess the approach UK courts have taken to confiscation and companies thus far. In general, the Court of Appeal has upheld the use of the gross receipts approach to confiscation of company assets in alter ego cases even where it was clear that most of the relevant proceeds went towards business expenses or where

[280] *R v Sale* [2013] EWCA Crim 1306.

[281] *Boyle Transport v* R [2016] EWCA Crim 19.

there was been an exchange of legitimate goods or services for value in spite of some form of associated illegality.

In the 2010 case, *Del Basso & Goodwin v R* the Court of Appeal addressed a confiscation order which had been issued against two individuals running a business offering long-term parking near an airport.[282] The prosecution sought a confiscation order in the amount of the gross sales generated by the business. It was not disputed that the business was legitimate other than having failed to obtain planning permission for the land to be put to that use.[283] The defendants contended that the court should recognise that the parking business was operated entirely for the benefit of a Football Club, and that the defendants received little or no personal profit.[284] Moreover, almost all of the income derived was expended on the costs of the scheme including VAT, insurances, business rates, and rent.[285]

The Court of Appeal found that POCA did not permit the court to look to a defendant's net profit as "[w]hat happens to the benefit after it has been obtained . . . forms no part of the statutory test."[286] Therefore, the confiscation order was appropriately calculated on the basis of gross receipts of the business, not on the profits arising.[287]

In the 2013 case *R v Beazley* a husband and wife were convicted of the unauthorized use of a trade mark in connection with the sale of branded car wheel trims.[288] The sale of these car rims constituted the entirety of the defendants' business. The Crown sought a confiscation order of £130,000 based in part of evidence of gross sales of £105,000.[289] The defendants asserted that they had made only £25,000 in profit, and that any order for more than this amount would be "oppressive."[290] The judge stayed the confiscation proceedings on the basis that it was "unlikely that Parliament had had in mind a situation such as this case."[291] The judge drew attention to the fact that these were strict liability offences, not requiring a showing of bad faith or dishonesty, and that the defendants were carrying on a "proper business" in the sense that they were keeping records, paying taxes, and acting legitimately in all ways other than misusing the trade mark.[292] On that basis, the

---

[282] *Del Basso & Goodwin v R* [2010] EWCA Crim 1119.

[283] *Id.* at [12]-[13].

[284] *Id.* at [12].

[285] *Id.*

[286] *Id.* at [39].

[287] *Id.*

[288] *R v Beazley* [2013] EWCA Crim 567.

[289] *Id.* at [7].

[290] *Id.* at [8].

[291] *Id.* at [11].

[292] *Id.*

judge felt that it would "do violence to the statutory language" to treat the defendants as having a criminal lifestyle.[293]

The Court of Appeal found the "by no stretch of the imagination" did any of these reasons justify staying the confiscation proceedings.[294] The Court of Appeal emphasised that the criminal lifestyle provisions are not limited to the types of serious offences that attract long prison sentences, such as drug trafficking or violent robbery, and that trade mark infringement does real damage to the holders of the mark.[295] The Court of Appeal found that it was entirely appropriate to apply the criminal lifestyle provisions "to those whose business is founded on the commission of offences" as was the case in this instance.[296]

In the 2013 case *R v Sale*, the Court of Appeal addressed an alter ego scenario in which the defendant pleaded guilty of corruption after providing gifts and hospitality to a Network Rail employee in order to help secure work for his company, of which he was the sole proprietor.[297] The Court of Appeal found that the judge had been right to pierce the veil to assess benefit in terms of the amount of benefit to the company.[298] However, the Court of Appeal found that it had been disproportionate of the judge to make a confiscation order for £1.9 million, which represented the total sum paid to the company by Network Rail as a result of the high-value contracts obtained by the employee who had received the gifts.

The Court of Appeal found that, while it was proper under POCA to assess the benefit in the amount of the entire amount of the contracts paid to the company, this was nonetheless disproportionate under *Waya* and A1P1 of the Convention. The Court of Appeal noted that "it would have seemed to us proportionate to limit the confiscation order to the profit made[.]"[299] The Court of Appeal suggested that the "true benefit" would ideally include "the pecuniary advantage gained by obtaining market share, excluding competitors, and saving on the costs of preparing proper tenders", but did not have any information with which to make this calculation.[300] The amount of the order was therefore reduced to the amount of profits obtained, but the Court of Appeal noted that it hoped that in the future prosecutors would be "alert" to this aspect of similar confiscation cases so that the "real benefit or pecuniary advantage to the wrongdoer can be identified."[301]

---

[293] *Id.*

[294] *Id.* at [13].

[295] *Id.*

[296] *Id.*

[297] *R v Sale* [2013] EWCA Crim 1306.

[298] *Id.* at [42]-[43].

[299] *Id.* at [56].

[300] *Id.* at [57]-[58].

[301] *Id.* at [60].

The 2014 case *R v King* did not involve an alter ego company, but the related scenario of an individual defendant who falsely held himself out as a private seller rather than a commercial trader.[302] Over a 9-month period the defendant sold 58 cars in the guise of a private individual whilst in reality those sales formed part of his commercial business activities. The defendant represented that the sales were private in order to avoid having to provide buyers with a warranty. The sales were otherwise legitimate, and all but one of the 58 car purchasers were satisfied that they had received value for money.

The Crown agreed not to treat this as a criminal lifestyle case and therefore relied on a benefit figure calculated based on the total turnover on the sale of the 58 cars.[303] The defendant argued that in light of *Waya* this was disproportionate and that it was arbitrary to make him pay, in addition to the profits of the enterprise, what amounted to a fine or penalty by adding the original purchase price of the cars, along with the value of the work he undertook on them, given that the objective of confiscation proceedings was to remove an offender's financial benefit as opposed to deterring others.[304] The defendant submitted that because the purchasers of the cars received full value for money, this was analogous to case in which stolen goods had been fully restored to their owners.[305] The Court of Appeal had previously found that in these "full restoration" cases the value of the returned goods should not be included in the confiscation calculation.[306]

The Court of Appeal dismissed the defendant's arguments that the benefit in this case should be based on profit. The properly calculated benefit was the gross amount of turnover from the car sales as "this business was founded on illegality."[307] The court found that if a business transaction was inherently unlawful because of the manner in which it was conducted, that finding militated in favour of making an order directed at the gross takings of the business.[308] The Court of Appeal reasoned that the relevant authorities revealed "a clear distinction to be drawn between cases in which the goods or services are provided by way of a lawful contract (or when payment is properly paid for legitimate services) but the transaction is tainted by associated illegality" (e.g. bribery or overcharging) and "cases in which the entire undertaking is unlawful (e.g. a business which is conducted illegally[]).[309] Lord Justice Fulford noted that this distinction was "not necessarily determinative" because the facts of such cases will vary widely, but was a "relevant factor to be

---

[302] *R v King* [2014] EWCA Crim 621.

[303] *Id.* at [7].

[304] *Id.* at [10]-[11].

[305] *Id.* at [11].

[306] Id. at [22]-[23] (citing *R v Morgan and R v Bygrave* [2008] EWCA Crim 1323).

[307] *Id.* at [33].

[308] *Id.*

[309] *Id.* at [32].

taken into account when deciding whether to make an order that reflects the gross takings of the business."[310]

On balance, these cases illustrate the self-evidently harsh results that can flow from applying the gross receipts approach to confiscation to companies, particularly where the enterprise involves a significant amount of legitimate business activity in spite of some associated illegality. However, they also indicate that UK courts have already started to consider whether a more tailored approach confiscation of company assets might be warranted. The approach outlined by the Court of Appeal in *R v Sale*—in which the court suggested that the best measure of the "true benefit" to the defendant included "the pecuniary advantage gained by obtaining market share, excluding competitors, and saving on the costs of preparing proper tenders"—provides an instructive model for the type of approach that courts and legislators should consider when attempting to calculate a reasonable confiscation order for a company defendant. The court's reasoning in both *R v King* and *R v Beazley* provides further indication that the Court of Appeal has at least considered that gross receipts may not be the best measure of the "benefit" to a company in cases in which the nature of the business is not inherently illegal.

3. Net profits v. gross receipts: a comparative perspective

As discussed above, the UK has consistently upheld the use of gross receipts rather than net proceeds for calculating benefit in the confiscation context. However, this paper argues that a net proceeds approach would be better suited to company defendants, particularly those whose fundamental business is legal but have been in some way tainted by illegality. It is therefore worth looking to the approach taken by other jurisdictions to consider whether a net proceeds approach might be used in this context.

Australia, in particular, uses net proceeds in the confiscation context and allows defendants to deduct reasonable business expenses, even in the context of entirely illegitimate enterprises such drug trafficking operations. Australian courts have acknowledged that while it can be challenging to delve into the accounting books of a criminal operation, this is not a sufficient reason to avoid the undertaking. Australian courts and legislators have concluded that concerns about double recovery and overly punitive confiscation orders are sufficiently important to justify taking a more nuanced and realistic approach to calculating the "benefit" that may realistically be ascribed to a defendant.

The US system of confiscation, on the other hand, is increasingly coming to resemble the notoriously draconian UK regime. Whilst the US Supreme Court had previously erred on the side of lenity in this context, Congress has since made clear that courts are to use gross receipts in calculating a confiscation order, regardless of the amount of proceeds actually gained by a defendant. There is little indication that this has helped deter additional crime or helped further the goals of the U.S. confiscation regime.

---

[310] *Id.*

This paper argues that, even if at this juncture the UK is not prepared to alter its approach to calculating benefit as a general matter, a net proceeds approach is far better suited to company defendants and will better serve the goals of the confiscation regime when applied to company defendants. The Australian example demonstrates that such an approach is both possible and desirable, and should be strongly considered as a model for UK courts and legislators in this area.

a. Australia's net proceeds approach

Australian courts' approach to calculating the benefit a defendant receives from a crime—and which property is confiscable as "derived" from criminal conduct—indicates a willingness to undertake the complex analyses required to make such determinations. Australian courts have shown particular concern for the principle of avoiding double punishment in curtailing the government's attempts to confiscate property going beyond what a defendant actually received as a result of the crime.

The Commonwealth Australian Proceeds of Crime Act 2002 (CAPOCA) uses a person's net gain as a starting point for calculating benefit for the purposes of issuing a confiscation order.[311] Specifically, sections 123 and 124 of the Act direct the court to look to evidence that "the value of the person's property during or after the illegal activity exceeded the value of the person's property before the illegal activity."[312] The court is to treat the value of the benefit to the person as a result of illegal activity to be "not less than the amount of the greatest excess."[313] The amount of the benefit is further reduced if the court is satisfied that the excess amount is due to causes unrelated to unlawful activity.[314]

Section 126 of the Act specifies that "expenses or outgoings the person incurred in relation to the illegal activity" are not to be subtracted when calculating the value of the benefit. This has been a point of contention for courts, enforcement agencies and defendants, as the Act does not define "expenses" or "outgoings." Enforcement agencies have often pressured courts to interpret this section expansively and prohibit defendants from deducting any expenditures, legitimate or otherwise, that are in any way related to the criminal conduct. However, Australian case law has clarified that this provision refers to the type of expenses incurred directly in the undertaking of the crime, not general business expenses or costs more tangentially related to the criminal activity.

In *Commissioner of Australian Federal Police v Fysh*, the Supreme Court of New South Wales addressed the proper calculation of "benefit" in an insider trading case.[315] The Commissioner argued that the confiscation order issued against a respondent convicted of insider trading should be issued in the whole amount received upon the sale of the shares, as this was the full amount of the benefit

---

311 Proceeds of Crime Act 2002 (Cth) s. 123 (Value of benefits derived—non-serious offences); s. 124 (Value of benefits derived—serious offences).

312 *Id.*

313 POCA (Ch) s. 123(1)(c), s. 124(1)(c).

314 POCA (Ch) s. 123(2), s. 124(2).

315 [2013] NSWSC 81.

received as a result of the criminal conduct.[316] The defendant asserted that the correct assessment of the benefit was the difference between the sum he received for the shares and the sum he paid for the shares in the first place.[317] There was no dispute regarding the fact that the defendant had purchased the shares with assets legitimately acquired before the commission of the offence.[318]

Justice McCallum, writing for the court, found that "[t]he value of the benefit derived from the sale of shares purchased unlawfully with inside information is the net amount received on the sale of shares after deducting the original purchase price."[319] Justice McCallum reasoned that the "ordinary usage" of the word "benefits" is "the good or gain received."[320] By way of example, the decision noted that, had the respondent "sold the shares for the price for which he bought them (or less)" it would be uncontroversial to conclude that he had derived no "benefit" from his offending.[321]

The *Fysh* decision held that the capital used to purchase the shares was not to be considered "expenses or outgoings" within the meaning of section 126 of the Proceeds of Crime Act. Justice McCallum noted that the ordinary meaning of "expenses or outgoings" included amounts spent in the course of the criminal undertaking—such as brokerage fees, transaction fees, banking fees for the transfer of funds, and accounting or bookkeeping fees, among others—but not the initial capital expended on the valid purchase of shares.[322] Justice McCallum reasoned that "[i]n the context of share trading, the capital invested to buy the shares would not ordinarily be described an expense or outgoing of the transaction."[323] He explained that, in the context of the Act as a whole, section 126 was best understood as intending to "foreclose the unseemly prospect of the court's assessment of the value of the relevant benefits being hijacked by accounting issues and expanded to become a complex, costly auditing exercise."[324] Justice McCallum did find that the respondent's payment of brokerage fees for the illicit transaction could not be deducted from the amount of the benefit, as this was precisely the type of expense or outgoing falling within the meaning of section 126.[325]

The *Fysh* decision drew an express distinction between the Australian confiscation system and the "deliberately draconian" approach taken by the UK.[326] The decision notes that under the UK confiscation scheme, "it will not infrequently happen that a defendant is obliged by a confiscation

---

316 *Id.* at [4].

317 *Id.*

318 *Id.*

319 *Id.* at [21].

320 *Id.* at [21].

321 *Id.* at [21].

322 *Id.* at [31].

323 *Id.* at [31].

324 *Id.* at [29].

325 *Id.* at [54].

326 *Id.* at [43], [46]-[47].

order to pay more than the profit he has made from his crime."[327] Justice McCallum reasoned that while the Australian Parliament did possess the power to pass legislation having "a draconian impact on common law rights" if it elected to do so, it was not proper for a court to approach a statutory interpretation issue with the presumption that the statute was intended to be draconian without some express indication that the legislature had so intended.[328] The court cited a similar insider trading decision from the Court of Appeal of Western Australia which expressed the view that measuring the benefit by the full purchase price of the shares in an insider trading case would result in "manifest injustices which could not have been intended."[329]

The Supreme Court of Tasmania reached a similar conclusion in 2015 in another insider trading case, *Director of Public Prosecutions (Cth) v Gay*.[330] Justice Escourt, writing for the court, approved a slightly different approach as set forth by the Western Australia Court of Appeal in *Mansfield v Director of Public Prosecutions* (2007) 33 WAR 227. Under this approach, the benefit was determined by calculating the difference between the price for which the respondent had sold his shares and the price the shares would have sold for had the inside information been generally available.[331] Justice Escourt noted that it was particularly inapt to use the entire purchase price as the "benefit" in a case—such as an insider trading case—in which "the sale of an item is not absolutely prohibited, but is only prohibited in specified circumstances."[332]

Some courts and commentators have suggested the drug proceeds cases should be treated differently, as obtaining drugs in the first place is inherently illegal.[333] However, recent case law suggests that Australian courts will look to net rather than gross proceeds even in this context in order to avoid violating the principle of double punishment.

In the 2015 case *Director of Public Prosecutions (NSW) v Colakoglu*, the Supreme Court of New South Wales addressed the appropriate calculation of "benefit" for purposes of a drug proceeds order where undercover police officers had purchased drugs from the respondents.[334] The Director of Public Prosecution sought confiscation orders in the total amount of the price of the drugs paid by the undercover officers to the respondents.[335] The Director submitted that it was "the clear intention of the legislation . . . that, when a person exchanges drugs for money, the amount of

---

[327] *Id.* at [46] (quoting *R v Pedersen* [1995] 2 NZLR 386 [18]).

[328] *Id.* at [47].

[329] *Id.* at [52] (quoting *Mansfield v Director of Public Prosecutions* (2007) 33 WAR 227 [52]).

[330] [2015] TASSC 15.

[331] *Id.* at [62].

[332] *Id.* at [74].

[333] For example, the *Fysh* court drew a distinction between insider trading cases and drug trafficking cases, reasoning that "[i]t would plainly be inimical to the objects of the Act to require the court to audit the accounts of drug offenders in order to determine the benefits of their drug transactions." [53].

[334] [2015] TASSC 15.

[335] *Id.* at [61]-[62].

money received by the person is the benefit."[336] The respondents argued that the proceeds should instead be calculated by considering the monetary sum actually gained, namely the profits from the transaction. The respondents submitted that to allow the prosecution to claim proceeds which exceeded—potentially by a large margin—the amount of actual profit which the offender received from his or her crime would breach the principle of double jeopardy.[337]

The primary judge rejected the Director's approach, accepting the respondents' submissions regarding the respective definitions of "benefits", "proceeds" and "expenses or outgoings."[338] The Supreme Court upheld the decision, finding that the primary judge had not erred in doing so. Justice Johnson, writing for the unanimous panel, found that the primary judge had acted in accordance with the process set forth in *R v Hall* [2013] 227 A Crim R 544, which required the confiscation assessment to be made "having regard to the information before the court" as to the value of the benefit to the respondent and the market value of the drugs while disregarding any expenses as outgoings incurred in connection with the commission of the offence.[339] Justice Johnson noted that, in this context, the term "expenses or outgoings" was directed at "a range of factors associated with a particular drug supply operation", such as payments made for delivery or transport, but did not extend to the Director's expansive definition of all money spent on the initial purchase of the drugs.[340]

In finding that the confiscation amount should reflect profit rather than sale price, the primary judge noted that it was "difficult to accept that the legislature intended that the community profit many times over from the commission of an offence as opposed to taking away any . . . legitimate proceeds of crime from an offender."[341] Justice Johnson reiterated this concern, noting that "[t]he construction advanced by the Director would allow, in the case of several co-offenders, a windfall result where multiples of the same sum would be accumulated, and held referable to each particular offender, although the sum in question bore no relationship to what could be regarded as the proceeds of crime or actual benefit derived by that offender from the particular crime or crimes."[342] He noted that where a respondent was deprived of significantly more than "the fruits of [his] crimes", the principle of avoiding double punishment gained particular traction.[343]

The approach taken by the Australian courts demonstrates that it is perfectly feasible for courts to consider the net proceeds of crime as a starting point for the confiscation calculation in

---

[336] *Id.* at [61].

[337] *Id.* at [66].

[338] *Id.* at [92].

[339] *Id.* at [88].

[340] *Id.* at [95].

[341] *Id.* at [39].

[342] *Id.* [95].

[343] *Id.* [100].

order to avoid overly harsh outcomes or double punishment. This has proven to be the case even in the case of entirely criminal enterprises such as drug smuggling operations.

b. US confiscation takes a turn for the draconian

The US, in contrast, has moved from a net profits to a gross receipts approach to confiscation in the past decade. In *United States v Santos*, a divided US Supreme Court addressed the question of whether the phrase "proceeds of some form of unlawful activity" in the federal money-laundering statute meant "profits" (net income) from the unlawful activity or "receipts" (gross payments) from the unlawful activity.[344] Justice Scalia's plurality opinion found that the term "proceeds" was ambiguous, and the rule of lenity therefore dictated that it be interpreted to mean net profits.[345] Justice Scalia, writing for the majority, suggested that Congress might consider "speak[ing] more clearly" on this matter in order to "keep[] courts from making criminal law in Congress's stead."[346]

Congress promptly took up Justice Scalia's invitation to clarify the statute's language, by passing the Fraud Enforcement and Regulatory Act of 2009 (FERA).[347] FERA states that in the context of money laundering, fraud "the term 'proceeds' means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity."[348] Subsequent appellate decisions confirm that this statute definitively supersedes the holding in *Santos* and that gross benefit should now be used to calculate the proceeds of illegal activity.[349] This marks a significant departure from the approach previously taken and augurs harsher outcomes for US defendants facing confiscation orders in the future. It is not clear that this shift in approach has better served US courts or the public in the effort to confiscate the proceeds of crime.

B. Enforcement

If confiscation orders are to be issued against company defendants, they must be enforced. The general difficulties in enforcing criminal sanctions against companies are widely recognized. Historically, the criminal justice system was designed for individuals, and many of its basic enforcement tools are not a natural fit for companies. Enforcing confiscation orders against company defendants poses a number of analogous difficulties.

1. General challenges in enforcing corporate criminal law

---

[344] 553 U.S. 507 (2008).

[345] *Id.* at 514.

[346] *Id.*

[347] Fraud Enforcement and Regulatory Act of 2009 (FERA), Pub. L. No. 111–21, § 2(f)(1), 123 Stat. 1617, 1618 (2009), *codified at* 18 USC §1956(c).

[348] 18 U.S.C. § 1956(c)(9).

[349] *See, e.g., United States v. Gibson* (5th Cir. 2017) 875 F.3d 179, 190 ("Congress effectively overruled *Santos* by amending the statute to define "proceeds" more broadly, and that law took effect on May 20, 2009.").

Commentators have long recognised the unique challenges of enforcing criminal law against companies.[350] Most fundamentally, companies cannot be imprisoned, as they have "no soul to damn, no body to kick."[351] Financial penalties may be imposed, but present their own difficulties.[352] Too small a fine will simply be absorbed by a company as the cost of doing business, while too large a fine is likely to be passed on to "innocent or impotent" shareholders or consumers.[353] As John Coffee has described the problem, "moderate fines do not deter, while severe penalties flow through the corporate shell and fall on the relatively blameless."[354] Even where fines impose sufficient costs at an organisational level to deter corporate managers from encouraging or tolerating misconduct, individual employees may still perceive the risk of personal liability as outweighed by the immediate corporate rewards for performance achieved through illegal conduct.[355]

2. The limitations of POCA's enforcement mechanisms for company defendants

Enforcing confiscation orders against companies poses comparable problems. As discussed above, default sentences are the primary mechanism for enforcing confiscation orders against individuals. POCA currently requires that every time a confiscation order is made a prison term also be imposed as part of the sentence to be served by the defendant in the instance that the order is not fulfilled. This "default sentence" is, in theory, intended to incentivize payment of the order rather than to impose additional punishment. In practice, as discussed above in section I, default sentences can have a deeply punitive impact, potentially leading to lengthy prison terms for individual defendants. This is particularly evident in cases where harsh hidden asset assumptions lead to the issuance of confiscation orders that an individual is simply not capable of fulfilling with genuinely available funds. These prison sentences disrupt the ability of individual defendants to re-enter society and earn the income that might allow them to pay the money owed. Default sentences

---

[350] *See* John C. Coffee, Jr., *Making the Punishment Fit the Corporation: The Problems Of Finding An Optimal Corporation Criminal Sanction*, 1 N. Ill. U. L. Rev. 3 (1980); Darryl K. Brown, *The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement*, 1 Ohio S. J. of Crim. L. 521, 541 ("A range of scholars have explored the difficult question of the appropriate mix for the wide range of available sanctions in corporate crime"); (2004); Michael Viano & Jenny R. Arnold*, Corporate Criminal Liability*, 43 Am. Crim. L. Rev. 311, 312 (2006) ("Corporate criminal liability developed as courts struggled to overcome the problem of assigning criminal blame to fictional entities in a legal system based on the moral accountability of individuals."); Jonathan Clough, "Improving the Effectiveness of Corporate Criminal Liability: Old Challenges in a Transnational World" in *New Directions for Law in Australia: Essays in Contemporary Law Reform* eds. Ron Levy *et al.*, pp. 163-172 (Australia, ANU Press: 2017).

[351] John C. Coffee, Jr., *"No Soul to Damn, No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 Mich. L. Rev. 386 (1981).

[352] Marjorie H. Levin, *Corporate Probation Conditions: Judicial Creativity or Abuse of Discretion?*, 52 Fordham Law Review 637, 637-38 (1984) ("There is . . . widespread criticism of the efficacy of fines to control corporate crime.").

[353] Christopher Kennedy, *Criminal Sentences for Corporations: Alternative Fining Mechanisms*, 73 Cal. L. Rev. 443, 443 (1985);

[354] Coffee, *No Soul to Damn* at 386-87.

[355] Richard S. Gruner, *Corporate Criminal Liability and Prevention*, Ch. 12: "Innovative Corporate Sentences" § 12-39[2][a] (New York: Law Journal Press 2004).

can therefore arguably have the effect of making the confiscation regime act as a form of double punishment for individuals.

A company, however, cannot serve a prison sentence upon defaulting on a confiscation order.[356] This not only removes one of the central tools for ensuring that confiscation orders are fulfilled in the case of company defendants, but also leads to unfair disparity between the treatment of company defendants and individual defendants.[357] As things currently stand, individuals subject to confiscation orders run the risk of lengthy prison sentences that they may be powerless to avoid, while company defendants face no equivalent threat. As will be discussed below, courts and legislators may therefore wish to consider adopting the parallel mechanism of corporate probation for companies in order to help remedy this disparity.

Another problem with applying current POCA enforcement mechanisms to company defendants is that most of the available mechanisms are not well-tailored for targeting the actual decision-makers in a company context. If a confiscation order issued against a company is not paid, courts do not currently have the ability to issue orders against managing directors or other senior employees directly unless those individuals are defendants in their own right. This is analogous to the problem of corporate fines that "flow through the corporate shell" to "innocent or impotent" shareholders without adversely affecting managers with the agency and authority to ensure that company resources are not improperly diverted from payment of court orders. As discussed further below, courts may want to consider making creative use of "compliance orders" to help ensure that senior management is held responsible for the payment of a confiscation order by a company.

Ultimately, the same types of problems arise in enforcing POCA against company defendants as bedevil the rest of corporate criminal law. The lack of a "body" to imprison or a single culpable decisionmaker to motivate or deter makes it difficult to ensure that sanctions are being effectively tailored to achieve compliance with statutory objectives. Enforcement tools designed for individuals are simply an awkward fit for companies in many cases. Therefore, rather than simply transplanting the same POCA enforcement tools currently used to enforce confiscation orders against individuals, UK courts and legislators should look to corporate crime enforcement innovations from other jurisdictions when crafting a POCA enforcement scheme that is genuinely tailored to company defendants.

3. Organisational Probation

One enforcement tool that UK courts might consider for ensuring the fulfilment of confiscation orders by company defendants is corporate probation, also known as organisational probation. Organisational probation is commonly used for various types of corporate oversight in

---

[356] A company may be "imprisoned" by suspending its right to engage in commerce or "executed" by having its charter revoked, but may not be physically imprisoned in the literal sense. Marjorie H. Levin, *Corporate Probation Conditions: Judicial Creativity or Abuse of Discretion?*, 52 Fordham Law Review 637, 637-38 (1984).

[357] *See* Thomas, n. 183, *supra*, *How and Why Corporations Became (and Remain) Persons* at 49 ("[T]he law should not discriminate against individual persons in favor of corporate persons.").

the US and has more recently been adopted by Canada in the occupational health and safety context.[358]

As an early adopter of corporate criminal liability,[359] the US was among the first jurisdictions to develop the concept of "organisational probation" as an alternative approach to sanctioning companies and other organizations.[360] Organisational probation provides courts with the broad power to monitor and impose requirements on a convicted organisation.[361] Any such requirements must be "reasonably related" to the statutory sentencing purposes.[362]

Organisational probation was first proposed in the U.S. in a set of 1971 recommendations made to Congress by the National Commission on Reform of Federal Criminal Laws (better known as the "Brown Commission").[363] At that time, probation at the U.S. federal level was governed by the Federal Probation Act of 1925 (FPA), which provided that probation was a form of suspended sentence rather than an affirmative sentence that could be imposed independently.[364] The Brown Commission recommended that probation be established as an independent and affirmative sentence applicable to both individuals and organizations.[365] The proposal lacked details for how organisational probation was to be implemented, and Congress did not immediately act on the Brown Commission's recommendations.[366]

At the same time, judges in the U.S. federal court system were independently beginning to impose the sentence of organisational probation on convicted companies.[367] In the 1972 case *United*

---

[358] Occupational Health and Safety Act (Alberta) (effective 31 March 2004) s. 18, Canadian Criminal Code s. 732.1(3.1); *see* Cristina Wendel, "A first for Alberta – Employer sentenced to corporate probation and community service for violating the Occupational Health and Safety Act", *Occupational Health & Safety Law* (4 February 2016), *available at* http://www.occupationalhealthandsafetylaw.com/a-first-for-alberta-employer-sentenced-to-corporate-probation-and-community-service-for-violating-the-occupational-health-and-safety-act.

[359] *New York Central & Hudson River Railroad v. United States*, 212 U.S. 481 (1909) (recognising corporate criminal liability for the deliberate actions of agents and employees through the doctrine of respondeat superior).

[360] William S. Lofquist, *Organizational Probation and the U.S. Sentencing Commission*, 525 Annals of the American Academy of Political and Social Science 157 (1993); Richard Gruner, *To Let the Punishment Fit the Organization: Sanctioning Corporate Offenders Through Corporate Probation*, 16 American Journal of Criminal Law 1 (1988); *see also U.S. v. Hagerman*, 545 F.3d 579 (7th Cir. 2008) (Posner, Richard J.) ("Corporate probation has been called 'a flexible vehicle for imposing a wide range of sanctions having the common feature of continued judicial control over aspects of corporate conduct.'").

[361] Christopher A. Wray*, Note: Corporate Probation Under the New Organizational Sentencing Guidelines*, 101 Yale Law Journal 2017, 2017-2018, n. 4 (1992) ("Such [organizational probation] conditions might include restitution, community service, a remedial order, adverse publicity, or forced internal reforms in corporate structure and decisionmaking.").

[362] 18 U.S.C. § 3563(b).

[363] Lofquist, *Organizational Probation and the U.S. Sentencing Commission* at 158.

[364] *Id.* at 160.

[365] *Id.* at 159.

[366] *Id.* at 159-160.

[367] *Id.* at 160 ("The simultaneous legislative and judicial application of probation to organizations was coincidental.").

States v Atlantic Richfield Co., the Seventh Circuit Court of Appeals expressly confirmed for the first time that corporations could be placed on probation.[368] The defendant company in *Atlantic Richfield Co.* had been convicted of illegal pollution discharge into navigable waters following a prior conviction for similar conduct at the same facility and placed on probation for a period of six months.[369] As a condition of probation, the court ordered that the company set up and complete a program within 45 days to "handle oil spillage into the soil and/or stream."[370] In the event this condition was not complied with, the court was to appoint a special probation officer with powers of a trustee under the supervision of the court.[371]

The Seventh Circuit found that, as a general matter, companies were subject to the suspended sentence provisions of the FPA and therefore could be placed on probation.[372] The court reasoned that the FPA was meant to promote the supervision and rehabilitation of offenders "in the hope that further illegal acts would not be committed" and that this purpose was equally applicable to corporations and individuals.[373] However, the Seventh Circuit found that in this instance the district court had over-stepped its authority.[374] The probation conditions imposed were "unreasonable" to the extent that "the probationer may not know when they are satisfied."[375] The court found that such probation conditions went beyond the bounds of what was authorised by the statute and remanded the case for imposition of a new sentence within the limits specified by the FPA.[376]

Judicial creativity briefly flourished as courts attempted to determine the permissible contours of organisational probation under the FPA. Commentators suggested that occupational disqualification of company directors should be imposed as a condition of corporate probation.[377] Sentencing judges concocted elaborate public service requirements for companies and their directors.[378] At least one judge proposed to "imprison" a convicted company by seizing the company's assets, closing and guarding its physical plants, and limiting the activities of its

---

368 *United States v Atlantic Richfield Co.*, 465 F.2d 58, 61 (7th Cir. 1972).

369 *Id.* at 59.

370 *Id.*

371 *Id.*

372 *Id.* at 61.

373 *Id.*

374 *Id.*

375 *Id.*

376 *Id.*

377 Martin F. McDermott*, Occupational Disqualification of Corporate Executives: An Innovative Condition of Probation*, 73 Journal of Criminal Law and Criminology 604 (1982).

378 *See* Mary Lou Howard, *Charitable Contributions as a Condition of Federal Probation for Corporate Defendants: a Controversial Sanction Under New Law*, 60 Notre Dame L. Rev. 530 (1985); Lynn M. Gattozzi, *Note: Charitable Contributions as a Condition of Probation for Convicted Corporations: Using Philanthropy to Combat Corporate Crime*, 37 Case Western Reserve Law Review 569 (1987).

employees.[379] The judge then suspended the sentence, requiring as a condition of probation that four executives of "comparable salary and stature" to those involved in the underlying crime be required to perform full-time community service for up to two years.[380]

This period of relatively unfettered innovation was short-lived, as subsequent case law reined in the burdens that could be imposed on companies as conditions of probation, particularly in light of the limitations of the then-operative legislation.[381] William Lofquist explains that, during this period, "[a] common law of organizational probation developed, characterized by use of probation only to provide corporations time to establish fine payment, restitution, and community service programs."[382] Nonetheless, by the 1980s, "probation was involved in approximately 20 perfect of all federal corporate criminal convictions."[383]

In 1984, following years of complaints about the inadequacy of the antiquated legislative framework for sentencing, Congress at long last acted on many of the recommendations of the Brown Commission by passing the Sentencing Reform Act of 1984 (SRA).[384] The SRA recognised probation as an independent, affirmative sentencing option, as opposed to an optional alternative to or suspension of another sentence, applicable to both individuals and organisations.[385] The Act also

---

[379] *U.S. v. Allegheny Bottling Co.*, 695 F. Supp. 856, 861 (E.D. Va. 1988), *aff'd in part & rev'd in part sub nom. U.S. v. Harford*, 870 F.2d 656 (4th Cir. 1989) (per curiam), *cert. denied*, 493 U.S. 817 (1989) ("corporate imprisonment can be accomplished by simply placing the corporation in the custody of the United States Marshal" who would "restrain the corporation by seizing the corporation's physical assets . . . or restricting its actions or liberty in a particular manner" including "clos[ing] the physical plant itself and guard[ing] it" and "allow[ing] employees to come and go and limit[ing] certain actions or sales[.]"); *see also* Jonathan P. Hicks, "Corporate Prison Term For Allegheny Bottling," *The New York Times* p. D00002 (1 September 1988), *available at* https://www.nytimes.com/1988/09/01/business/corporate-prison-term-for-allegheny-bottling.html.

[380] *U.S. v. Allegheny Bottling Co.*, 695 F. Supp. at 858-859. The entirety of the sentence imposed on the company defendant other than the $1 million fine was later overturned as a "nullity" by the Fourth Circuit in *U.S. v. Harford*, 870 F.2d 656, *3 (4th Cir. 1989) (per curiam) on the basis that it was beyond the power of the court to "imprison" a corporation or place special conditions on its executives.

[381] *See U.S. v. Missouri Valley Const. Co.*, 741 F.2d 1542, 1544 (8th Cir. 1984) (federal courts lacked authority to impose as a condition of a probation a requirement that a company contribute to a charitable organization that has not suffered actual damages or loss as a result of the company's offence); *U.S. v. John Scher Presents, Inc.*, 746 F.2d 959, 964 (3d Cir. 1984) (the district court exceeded the scope of its discretion where a corporate defendant was required as a condition of probation to pay money to charitable organizations not in any way aggrieved by the defendant's offence); *U.S. v. Harford*, 870 F.2d 656, *3 (4th Cir. 1989) (per curiam), *cert. denied*, 493 U.S. 817 (1989) (overturning district court judge's attempts to "imprison" defendant company on the grounds that "the Supreme Court [has] clearly held a corporation may not be sent to jail" and that the statutory scheme did not authorise any sanction beyond imposition of the maximum fine).

[382] Lofquist, *Organizational Probation and the U.S. Sentencing Commission* at 160-61.

[383] *Id.* at 160.

[384] Sentencing Reform Act of 1984, Pub. L. 98-473, 98 Stat. 1987; *see also* Christopher A. Wray, *Corporate Probation Under the New Organizational Sentencing Guidelines*, 101 Yale Law Journal 2017, 2023 (1992).

[385] Lofquist at 160; Wray at 2023.

established the U.S. Sentencing Commission (USSC), which was tasked with developing specific guidelines for how these and other changes to federal sentencing should be implemented.[386]

The SRA heralded a broader shift in federal sentencing philosophy.[387] Pre-SRA sentencing law stressed rehabilitation as sentencing's primary purpose, but the SRA endorsed six different sentencing goals: (1) reflecting the seriousness of the offence, promoting respect for law, and providing just punishment for the offence ("just punishment"); (2) providing adequate deterrence to criminal conduct (deterrence); (3) protecting the public from further crimes of the defendant (incapacitation); (4) providing the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner (rehabilitation), (5) "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" (determinacy) and (6) "the need to provide restitution to any victims of the offense" (restitution).[388] The SRA requires that a sentencing judge impose only such probation conditions as are "reasonably related" to these sentencing purposes and "involve only such deprivations of liberty or property as are reasonably necessary for [these] purposes."[389]

After several more years of research and debate, the USSC at last submitted a final set of organisational sentencing guidelines to Congress on 1 May 1991[390], which became effective the following year.[391] These guidelines increased the size of the fines that courts could impose against corporate offenders up to and including fines "sufficient to divest the organization of all its net assets" in the most extreme cases.[392] The guidelines also provided that restitution, remedial orders, community service, and orders of notice to victims may be imposed as either independent sanctions or as conditions of probation.[393]

The guidelines established a mandatory scheme of corporate probation where necessary to ensure the defendant company's compliance with some other sanction, including payment of a remedial order, completion of community service, or payment of a monetary penalty.[394] The guidelines require a court to impose probation if the defendant organization has not paid all

---

[386] *Id.*

[387] Wray at 2023.

[388] *Id.* at 2030 (citing 18 U.S.C. § 3553(a)(2)(A)-(D), (a)(6)-(7)).

[389] 18 U.S.C. § 3563(b).

[390] United States Sentencing Commission, "Sentencing Guidelines for Organizational Defendants," 26 Apr. 1991; *see also* John C. Coffee, Jr., Richard Gruner & Christopher Stone, *Draft Proposal on Standards for Organizational Probation, in Discussion Materials on Organizational Sanctions* (United States Sentencing Commission 1988) (subsequently adopted as Part D(2) of the Sentencing Guidelines).

[391] U.S. Sentencing Commission, Federal Sentencing Guidelines Manual §§ 8D (1992) (hereinafter U.S.S.G.).

[392] U.S.S.G. § 8C1.1. This provision is only to be invoked if the court determines that the organization "operated primarily for a criminal purpose or primarily by criminal means." *See also* Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. Penn. J. Bus. L. 797 (2013).

[393] U.S.S.G. § 8B1.1-1.4.

[394] U.S.S.G. § 8D1.1(a)(1)-(2).

monetary penalties "in full at the time of sentencing, and restrictions are necessary to safeguard the organization's ability to make payments."[395] Probation is also required in any case in which the court does not impose a fine on a convicted company.[396] Probation is likewise mandatory where the court finds that it is necessary to accomplish one or more of the purposes of sentencing set forth in the Act.[397] Any sentence of probation issued against an organisation must include the condition that the organization not commit another crime during the term of probation.[398]

Since the 1990s, corporate probation has become a significant element of the U.S. approach to corporate crime.[399] It remains a central component of the U.S. Sentencing Guideline[400] and is frequently imposed by courts sentencing convicted organizations.[401] The U.S. Department of Justice (DOJ) continues to expand the use of corporate probation and monitoring through deferred prosecution agreements (DPAs).[402] This practice has met with opposition from critics who feel that it provides too lenient an option for corporate malfeasants.[403] Others have argued that imposing probation on solvent companies wastes resources sanctioning activities that could be more effectively deterred through monetary fines.[404]

Some common conditions of organisational probation include the adoption of internal compliance programs, the imposition by the court of surprise audits, and periodic reports concerning an organization's financial condition in order to ensure its ability to pay any outstanding monetary penalties.[405] In extreme cases, the court may oust corporate management and appoint a

---

[395] U.S.S.G. § 8D1.1(a)(2).

[396] U.S.S.G. § 8D1.1(a)(7).

[397] U.S.S.G. § 8D1.1(a)(7).

[398] U.S.S.G. § 8D1.3(a).

[399] *See* Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 Iowa Law Review 698 (2002); Molly E. Joseph, *Organizational Sentencing*, 35 Am. Crim. L. Rev. 1017, 1022 n. 41 (1998) ("In 1995, 60% of sentenced organizations were placed on probation").

[400] U.S.S.G. § 8D: Organizational Probation (adopted amendments effective 1 November 2018).

[401] *See, e.g.,* Nick Carey, "U.S. judge sentences Volkswagen to three years' probation, oversight", *Reuters: Business News* (21 April 2017), *available at* https://www.reuters.com/article/us-volkswagen-emissions-idUSKBN17N1SD; *U.S. v. Robert Berg Enterprises, Inc.*, No. 1:14-CR-00059-JAW, 2015 WL 5895831 (D. Me., 8 Oct. 2015) (corporate probation properly imposed in order to enforce payment obligations); *U.S. v. Orthofix, Inc.*, 956 F.Supp.2d 316, 333 (D. Mass. 2013) (imposing probation to ensure an organization's compliance with a "forward-looking ethics plan" a proper tool for the realization of the sentencing objectives); *U.S. v. Guidant LLC*, 708 F.Supp.2d 903, 917 (D. Minn. 2010) (the public's interest would be served by placing defendant corporation on probation in spite of change in corporate form).

[402] U.S. Department of Justice, *Monitoring Potential Criminal Antitrust Violations and a Proposal for Efficient and Effective Corporate Probation Monitorships: Remarks Prepared for the Public Roundtable on Criminal Antitrust Compliance* (9 April 2018).

[403] Michael Rothfield, "Corporate Probation: Punishing or Punting?" *The Wall Street Journal* (31 August 2012), *available at* https://www.wsj.com/articles/SB10000872396390444772804577621780469137056.

[404] Shayne Kennedy, *Probation and the Failure to Optimally Deter*, 71 S. Cal. L. Rev. 1075 (1998).

[405] Joseph, Organizational Sentencing at 1022-23.

trustee to run the corporation.[406] While company employees and managers may be required to comply with the conditions of a corporate compliance plan, corporate probation cannot be used to impose probation terms on entities who were not defendants or formal agents of a defendant.[407]

4. Offences aimed at company directors and officers

Another tactic that has been used to try to effectively improve corporate culture and compliance is the creation of offences aimed at company directors. The UK, in particular, has adopted a number of such offences alongside the creation of new types of corporate offences. Of most relevant to the present discussion are two offences established by the *Companies Act 2006* for failure to file accounts and deliver annual statements.[408]

Section 451 of the Companies Act provides that if a company does not comply with its duty to file accounts and reports by the relevant deadline, "every person who immediately before the end of that period was a director of the company commits an offence."[409] It is a defence for the person charged with such an offence to show that he took all reasonable steps to ensure that the requirements would be complied with.[410] A person guilty of the offence is liable to a fine and, for continued contravention, a daily default fine until the failure is remedied.[411] Similarly, Section 853L of the Act makes similar provisions regarding the failure to deliver an annual confirmation statement.[412] An offence under section 853L is committed by the company, every director of the company, every secretary of the company, and every other officer of the company who is in default.[413] As will be discussed below, the UK might consider creating an analogous for company directors and officers in the event that a confiscation order issued against the company is not paid in the time required.

IV. CONFISCATION AND COMPANY DEFENDANTS: SOLUTIONS

We have established that there are sound practical and theoretical reasons for expanding the use of confiscation proceedings against company defendants. However, we have also laid out a number of challenges that arise in the context of both making and enforcing confiscation orders in the context of companies. This section of the paper will therefore propose some concrete policies

---

406 Neil P. Cohen, *The Law of Probation and Parole: June 2018 Update*, Ch. 7: Probation and Parole Conditions in General § 7.2—Corporate Probation (2d).

407 *U.S. v. Sun-Diamond Growers of California*, 138 F.3d 961, 977 (D.C. Cir. 1998), *aff'd* 526 U.S. 398 (1999) (sentencing judge has broad discretion to establish conditions of probation on corporate defendants and employees but could not impose probationary conditions on third party non-defendants where those third parties were not acting as agents of the defendant).

408 Companies Act 2006 s. 451, 853L.

409 Companies Act 2006 s. 451(1).

410 Companies Act 2006 s. 451(2).

411 Companies Act 2006 s. 451(4).

412 Companies Act 2006 s. 853L.

413 Companies Act 2006 s. 853L(1).

that might help address some of these challenges. While a comprehensive legislative solution will require further development and deliberation, this paper proposes that serious thought be given to the ideas below.

First, we believe that policymakers should take a hard look at the different types of criminal conduct committed by company defendants and consider distinguishing between conduct which is inherently criminal and conduct which is inherently legal but conducted in an illegal manner (e.g., a business that would be legal but for the lack of an appropriate licence). This idea draws inspiration from POCA's criminal lifestyle provisions and non-criminal lifestyle provisions, through which POCA already applies different presumptions to different categories of defendants.

We propose that company defendants who engage in a significant amount of legitimate business activity should be permitted to deduct legitimate business expenses when calculating the benefit they have received from criminal activity for the purpose of calculating a confiscation order. Companies that conduct legitimate businesses but have fallen afoul of the criminal law should be rehabilitated rather than run out of business, as they provide jobs, create profits for shareholders and investors, and add social value by providing goods and services to customers. Using net profits instead of gross receipts is a reasonable and feasible approach to ensuring that companies do not unfairly benefit as a result of criminal activity whilst preventing socially productive firms from being driven out of business. For the reasons discussed below, we suggest that, in spite of the long-standing reluctance of UK courts to consider using net profits to calculate confiscation orders, this is not as radical a proposal as it might first initially seem. Other jurisdictions have long used net profits in the confiscation context, and recent developments in both case law and practice indicate that the UK might be more ready to take this leap than is generally believed. Doing so would also further the goals of applying POCA to company defendants.

Second, the UK should consider adopting the tool of organisational probation—already well established in the US—in order to address the problem of default sentences in the confiscation context. As discussed above, default sentences must be issued in conjunction with confiscation orders issued against individual defendants. Among the well-recognised problems with sanctioning corporations is the fact that they cannot be imprisoned. As we have noted, there is a fairness concern about treating individual defendants and company defendants differently. Borrowing the tool of corporate probation and monitoring as a substitute for default sentences would be a good way to help remedy this lack of parity while also helping ensure that confiscation orders issued against companies are actually fulfilled.

Third, legislators should consider creating a new offence applicable to company directors of failure to ensure payment of a confiscation order. The offence would be analogous to existing Companies Act 2006 offences for failure to file annual accounts under section 451 and failure to deliver confirmation statements under section 853L.[414] Such an offence would provide some accountability for individual directors and officers in the instance that a confiscation order was not

[414] Companies Act 2006 s. 451, 853L.

paid. Currently, a confiscation order issued against a company defendant is not directed at individual directors or employees, and therefore such individuals cannot be held in contempt of court for failure to comply. A new offence for failure to ensure that a confiscation order was paid would set forth some basis for ensuring that the individuals responsible could be subject to a court's authority even if not named as defendants.

A. Deducting business expenses

We have proposed that confiscation orders issued against company defendants whose businesses are not founded on illegality be calculated on the basis of net profits rather than gross receipts. As discussed at length above, UK courts have been reluctant to deviate from the practice of using gross receipts to calculate benefit in confiscation cases. Judges often cite the practical difficulty of conducting an accounting of net profits, as well as a general moral uneasiness with the idea of allowing convicted defendants to deduct expenses related to criminal conduct. However, there is reason to suspect that such fears may be overstated.

For one, other jurisdictions allow defendants to deduct legitimate business expenses in confiscation proceedings. As discussed above, Australia, in particular, has longed used net profits when assessing benefit in the confiscation context, and does not appear to have suffered the dire consequences often warned of by UK courts. The US, on the other hand, previously assessed benefit using net profits—demonstrating that such a practice is feasible—but has recently taken a turn in the opposite direction by requiring the use of gross receipts instead. There is little indication that this has improved the efficacy or fairness of the US confiscation system.

In addition, some recent case law discussed above indicates that UK courts may be softening on this front. In several recent cases, UK courts have at least considered the deduction of certain types of expenses or the use of net profits in confiscation cases involving businesses. In the 2015 case *R v Harvey*, the UK Supreme Court upheld the principle that VAT that has been validly paid should be deducted from a company's total sales in calculating benefit for purposes of making a confiscation order.[415] Similarly, in the 2013 case *R v Sale*, the Court of Appeal ordered that a confiscation order be made in the amount of profits obtained, and suggested that in the future, rather than using gross receipts, courts should attempt to calculate the "true benefit" obtained as a result of the crime, which might include "the pecuniary advantage gained by obtaining market share, excluding competitors and saving on the costs of preparing proper tenders."[416] In a third case, *R v King*, the Court of Appeal upheld the use of gross receipts in a confiscation case, but emphasised that this was because the business in question was "founded on illegality."[417] The *King* decision expressly drew a distinction between cases in which legitimate payment is properly made for lawful goods or services but the transaction is in some way tainted by illegality and cases in which the entire

[415] [2015] UKSC 73 [36].

[416] [2013] EWCA Crim 1306 [43], [57].

[417] [2014] EWCA Crim 621 [33].

business is conducted unlawfully.[418] This is precisely the distinction we suggest should be made in this context.

Indeed, POCA itself contains some provisions requiring courts to conduct an accounting of the proceeds of crime, under certain circumstances. POCA Part 6, which deals with revenue functions, provides for UK courts to conduct an accounting and offset the payment of certain taxes when assessing the taxability of the suspected proceeds of crime.[419] Restraint orders issued under POCA section 40 must allow sufficient access to funds for the subject to continue carrying on a legitimate trade or business, which potentially requires some investigation into the accounts of an allegedly criminal business.[420]

Finally, as discussed above, the SFO's use of disgorgement of profits in DPAs against large corporate defendants indicates that such an accounting is feasible and has been treated as a reasonable way of resolving large and complex criminal charges against company defendants who have benefited as a result of their crimes. As a general matter, companies are particularly likely to keep records of expenses, reducing the practical objections to conducting a full accounting. Lord Toulson's dissent in *Harvey* raised the concern that many defendants are demonstrably dishonest and therefore may not be trusted not to falsify records or misrepresent evidence.[421] Nonetheless, as Lord Neuberger and Lord Reed wrote in the *Harvey* majority, "the potential inconvenience involved in applying POCA in a manner which is consistent with A1P1 is not a good reason for failing to do so."[422] The same is true of making a full and fair accountancy of the legitimate business expenses of company defendants. Courts are frequently called upon to assess the legitimacy of business records and accounting evidence in a variety of contexts—the fact that such a practice can be challenging is not sufficient reason not to undertake it.

All of this indicates that using net profits, or something similar to the "true benefit" proposed in *R v Sale*, to assess confiscation orders against company defendants that engage in a substantial amount of legitimate business is both achievable and desirable, and may be the way the winds are already blowing.

A similar principle might theoretically be applied to determining the "available amount" for companies. Rather than looking to the value of all free property held by the company at the time the confiscation order is made, courts might look to the maximum amount of money which could realistically be paid by a company without driving that company out of business. This would further the goals of the legislation without unnecessarily destroying productive firms. As discussed above, in the 2013 case *R v Padda*, the Court of Appeal confirmed that in cases where a defendant did not

---

[418] *Id.* at [32].

[419] POCA Part 6, s. 317-326 (Revenue Functions); *see also Paulet v The United Kingdom* [2014] ECHR 477 (tax and national insurance paid on earnings properly deducted from total amount of confiscation order issued under POCA Part 6).

[420] POCA s. 41(3).

[421] [2013] EWCA Crim 1104 [123] (Lord Toulson, dissenting).

[422] [2013] EWCA Crim 1104 [35] (Lord Neuberger and Lord Reed, writing for the majority).

have the funds available to pay back the entire amount of his benefit, but subsequently obtained additional funds through legitimate earnings, a second confiscation order could be made taking into account the defendant's legitimate earnings in the time since the initial confiscation order was satisfied.[423] Thus, if a company which was previously unable to pay the full amount of the benefit received without going out of business later became more solvent, the authorities could simply reopen proceedings and request that the court order a new and larger confiscation order.

This could have particularly interesting implications for companies in the event that a policy of calculating the "true benefit" to a company such as the Court of Appeal proposed in *R v Sale* were adopted. As noted above, the Court of Appeal suggested in *Sale* that the best measure of the benefit to a company as the result of criminal conduct might be "the pecuniary advantage gained by obtaining market share, excluding competitors and saving on the costs of preparing proper tenders." Arguably, were a company to go on to become wildly successful after surviving its brush with POCA, it might be plausible to find that new evidence had become available regarding the "true benefit" to a company as a result of its misconduct, and to increase the amount of the confiscation order accordingly pursuant to the principles set forth in *R v Padda*.

These proposals will require further investigation and discussion before any concrete new legislation is contemplated. However, we urge that policymakers strongly consider that new formal policies may need to be adopted in order to better tailor confiscation orders to company defendants.

One potential objection to these proposals is unfairness to individuals who engage in a legitimate business but have not taken advantage of the corporate form to establish a company. Consider the individual who sells legitimate goods in a market stall but fails to obtain the proper permit for doing so. What justification is there for permitting company defendants to deduct business expenses but not permitting an individual to do so?

There is a case to be made that companies create broader social value than individuals by creating jobs and providing value to shareholders. By virtue of their larger scale, they are more likely to contribute to the economy and increase the general prosperity. While it is well-settled that companies may be subject to criminal sanctions, a company itself cannot be morally culpable in the same way as an individual. Innocent bystanders—both employees and shareholders—suffer when a company is driven out of business, even by dint of its own misconduct. Therefore, we argue that there are some grounds for treating company and individual defendants differently on this score.

Nonetheless, we suggest that it is likely that such a policy *should* apply to individual unincorporated traders as well. Normative principles suggest that any legal person (corporate or individual) engaged in a valuable or legitimate business practice should be permitted to deduct legitimate business expenses from the amount to be paid under a confiscation order. However, the scope of this review has been cabined to the challenges of applying POCA to company defendants. We will thus leave such expansive proposals to another day.

---

[423] *R. v Padda* [2013] EWCA Crim 2330 [27], [49].

B. Corporate Probation

We have established that there is a disparity in the treatment of individual and company defendants when it comes to the imposition of a default sentence. We have also set forth the myriad difficulties with enforcing criminal sanctions against companies generally, and with enforcing POCA against company defendants, specifically. We suggest that the UK might consider adopting the tool of corporate probation to help remedy this disparity between company defendants and individual defendants and to help ensure that confiscation orders issued against companies are fulfilled. Corporate probation also has the advantage of promoting the rehabilitation of the corporate culture of socially valuable businesses.

We propose that when a confiscation order is issued against a company defendant, a default sentence of corporate probation be mandatorily imposed as well. The length of probation would be the same length as the default prison sentence for the offence, but could be extended in the case of ongoing failure to comply. In the event that the confiscation order is not paid by the time payment is due, the conditions of corporate probation would come into effect. Such conditions could include the preparation of financial reports showing a company's ability to pay the outstanding amount due, as well as surprise audits or internal compliance programs for both paying the confiscation order and, potentially, avoiding future misconduct. In the case of ongoing default, more severe conditions could be imposed, including the appointment of a trustee to run the company and ensure that payment is made or, in the most extreme cases, winding down the company entirely.

As in the US system, such probation conditions would need to be reasonably related to the purposes of sentencing. In the cases we envision, the purpose of sentencing would be limited to ensuring payment of the confiscation order—as with a standard default prison sentence—and, to a lesser extent, ensuring that the company does not continue to benefit from criminal conduct. Therefore, corporate probation conditions like community service for employees would be unlikely to be applicable. However, the UK might consider adopting the US rule of requiring that any imposition of corporation probation include a condition that the company not commit another crime during the term of probation.

C. New offence aimed at company officers and directors

It is well-established that it is difficult to successfully impose criminal sanctions against companies directly, given that companies are operated and managed by individual directors and employees. The same is true for imposing confiscation orders against companies. Without some effective means of ensuring that the individuals responsible actually comply with the confiscation order, efforts to apply POCA to company defendants may prove futile.

Therefore, we propose that the UK consider adopting a new offence of default in fulfilling a confiscation order in the time provided. The offence could be modelled on sections 451 and 853L of the Companies Act, which establish offences for failure to file accounts or deliver annual statements as required. Such an offence could be applicable to every director and officer of the company in default, be punishable by fine. In the event of a company's ongoing failure to pay a confiscation order, a daily default fine could be imposed until the failure was remedied.

V. CONCLUSION

In this paper, we first provided an overview of the past and present confiscation in the UK, including a detailed analysis of the *Proceeds of Crime Act 2002*. Next, we made the case for applying confiscation to company defendants at all. We investigated the empirical data indicating that confiscation is dramatically underutilised against company defendants as compared to the overall number of corporate prosecutions. We then provided an analysis of the various theoretical justifications for confiscating corporate assets and what type of corporate confiscation scheme such justifications might best support. We argued that a deprivatory approach to compensation is the best framework for company defendants, and assessed three separate deprivatory justifications for company confiscation: removing the instrumentalities of crime, restoring the status quo, and protecting consumers and the marketplace. We also pointed out the need to restore parity between individual defendants and company defendants in this context. We proposed that the most fair and rational approach to criminal penalties for companies is likely to involve a combination of fines for deterrence and confiscation of profits for deprivation.

We went on to explore the challenges that arise in applying the existing confiscation legislation to company defendants. This included an in-depth analysis of recent case law on the proportionality of confiscation orders under Article 1 of Protocol 1 of the European Convention on Human Rights and a discussion of the approach taken to confiscation in alter ego cases in the UK. We provided a comparative analysis of methods for calculating confiscation orders in Australia and the US, highlighting the fact that Australia has long used net receipts for calculating confiscation orders without descending into dysfunction. We suggested that recent case law indicates that UK courts may already be starting to consider a more tailored approach to calculating confiscation orders against businesses.

Next, we highlighted a variety of challenges that arise in enforcing confiscation orders against company defendants. We provided a brief discussion of the widely recognised challenges posed by enforcing criminal law against company defendants and the analogous difficulties presented by enforcing POCA in this context. Most crucially, we identified the fact that default sentences cannot currently be applied to company defendants, creating a discrepancy between the treatment of individual defendants—who encounter potentially lengthy prison terms in the event of a failure to pay confiscation orders—and company defendants, who currently face no such deterrent. We noted that POCA also currently lacks a clear mechanism for compelling company directors to ensure that a confiscation order issued against a company is fulfilled. We provided a discussion of corporate probation in the US as an example of one model that the UK might consider when addressing these challenges. We also noted the prevalence of offences aimed at ensuring that company directors and officers comply with legally mandated duties, including two specific examples from *the Companies Act 2006* that might be replicated in the confiscation context.

In the final section of this project, we provided a number of suggestions for possible solutions to the challenges arising in the corporate confiscation context. To start, we proposed that company defendants who engage in legitimate business activities should be permitted to deduct legitimate business expenses in the context of calculating a confiscation order. We suggested that policymakers

might consider a range of additional approaches to tailoring confiscation orders for company defendants—including one modelled on the Court of Appeal's suggestion in *R v Sale* that the benefit to a business in confiscation proceedings might best be measured by the pecuniary gain in market share and the excluding of competitors resulting from the relevant criminal conduct.

We made additional recommendations for how legislators might address the unique enforcement challenges presented by applying the confiscation regime to company defendants. We proposed that the UK consider adopting corporate probation in the place of default prison sentences for company defendants. We argued that such a practice would restore parity between individual and corporate defendants and help ensure that confiscation orders issued against companies are actually paid. Finally, we recommended the creation of a new offence aimed at company officers and directors imposing personal liability for failure to fulfil a confiscation order.

Ultimately, we argue that there is a place for applying confiscation to company defendants. Confiscating the proceeds of corporate crimes furthers the aims of the legislation by helping to ensure that bad actors—whether corporate or individual—do not benefit from their crimes, and helps protect consumers by preventing unethical firms from gaining an unfair advantage in the marketplace. However, a more tailored corporate confiscation regime, in which both the calculation and enforcement of confiscation orders is intentionally designed to apply to company defendants in a rational and effective manner, would best serve the public interest and the fight against corporate crime. We hope that these ideas will be given serious consideration by policymakers going forward in order that such a regime might be fully realised.