Serious Economic Crime
A boardroom guide to prevention and compliance

With contributions from leading advisers and featuring introductions from:
When enacted almost a decade ago, the UK Proceeds of Crime Act 2002 (POCA) was hailed as a powerful new tool that would help prosecutors target criminal assets and thereby “cut the profits that are made from crime and increase the risk to those who indulge in criminal activities”.  

By any measure, POCA is a wide-ranging piece of legislation, running to 462 sections and 12 schedules. The money laundering offences created by the Act are broadly drafted and have significant extra-territorial effect. Further, the confiscation and civil recovery mechanisms in Parts 2 and 5 of POCA, together with the investigatory provisions in Part 8, are significant weapons for enforcement authorities. There is no doubt that POCA has been used effectively on many occasions since coming into force but the full strength of the legislation in the battle against bribery and other related forms of corruption has been recognised only in the last few years.

This chapter provides an overview of the ways in which POCA has been used in the past, and may be used in the future, by the Serious Fraud Office (SFO) against commercial organisations and individuals accused or convicted of serious economic crimes.

Jurisdiction and penalties
POCA gives UK enforcement authorities, including the SFO, broad extra-territorial jurisdiction over commercial organisations and individuals suspected of having engaged in money laundering, even when those authorities would not have jurisdiction to prosecute the underlying conduct giving rise to criminal proceeds. This is significant in the context of serious economic crimes, which often have an international dimension.

Take the case of a US-based company that bribed a foreign government official in a country in sub-Saharan Africa in connection with a tender for a major infrastructure project. Let us assume that the US company has no subsidiaries or operations in the UK, that no part of the corrupt scheme took place within UK territory, and that no British citizens were implicated in the bribery. As a result of the bribes having been made, however, the US company was awarded the tender and generated significant revenues from the project. The revenues were paid into a bank account held by the company in the UK and from that account they were transferred to one held by the company in the US.
It is unlikely the company would have committed an offence under the UK Bribery Act 2010. The mere fact that the project revenues were transferred into and out of a UK bank account would be sufficient, however, to bring the US company within the jurisdiction of the UK enforcement authorities. The company could thus be prosecuted for one or more substantive money laundering offences, so long as it could be established that a ‘directing mind’ of the company was himself guilty of money laundering (see the ‘identification principle’ dealt with elsewhere in this book). An enforcement authority would not need to demonstrate that the money was the benefit of a particular or specific act of criminal conduct; it would simply need to produce circumstantial evidence sufficient to justify an inference that the money had a criminal origin.

The penalties under POCA for money laundering are severe – often more severe than the penalties for the underlying conduct giving rise to the criminal property. A person found guilty of a substantive money laundering offence would be liable, on conviction in the crown court, to imprisonment for a term not exceeding 14 years, or to a fine, or both.

In contrast, a person found guilty of a bribery offence contrary to the Bribery Act 2010 would be liable to a maximum ten-year prison sentence, or to a fine, or both.

The prosecution of economic crime by the Serious Fraud Office

The Director of the SFO has broad prosecutorial discretion and POCA has clearly been a useful addition to the SFO’s arsenal in the fight against several types of economic crime, including bribery and other forms of corruption.

The SFO is eager to encourage businesses and professional advisers to self-report cases of corruption, and the prospect of dealing with corruption using civil recovery orders, rather than through criminal prosecution, has often been cited by the SFO Director as an incentive to self-reporting. It is therefore important that commercial organisations understand how the SFO has used civil recovery orders in the past, as previous actions are likely to offer a helpful guide to future conduct.

The confiscation and recovery of criminal property

POCA includes provisions that enable enforcement authorities to confiscate or recover criminal property in both criminal and civil proceedings.

Confiscation orders

Part 2 of POCA empowers the court to make an order against defendants requiring them to pay an amount equal to the benefit from crime, unless there are insufficient assets, where they:

- have been convicted of an offence in proceedings before the crown court; or
- have been committed to the crown court for sentencing in respect of an offence tried in a lower court.

A prosecutor may ask a court to make a confiscation order, or a court may decide of its own volition that a confiscation order would be an appropriate sanction.

The approach that the UK courts are required to take with respect to confiscation orders is set out in Section 6 of POCA:

(1) A court first must decide whether a defendant has a criminal lifestyle, which will be deemed to be the case if the offence: (a) is one of the so-called ‘lifestyle offences’ specified in Schedule 2 of POCA, such as drug trafficking, money laundering or counterfeiting; (b) constitutes conduct forming part of a course of criminal activity; or (c) is an offence committed over a period of at least six months that has benefited the defendant.

(2) If a court concludes that a defendant has a criminal lifestyle, it then must decide whether the defendant has benefited from his or her
general criminal conduct. If so, the court needs to determine the recoverable amount and make a confiscation order requiring the defendant to pay that amount.

(3) If a court concludes that a defendant does not have a criminal lifestyle, it must decide whether the defendant has nonetheless benefited from his or her criminal conduct. If it concludes that there has been a benefit, it must determine the recoverable amount and make a confiscation order requiring the defendant to pay that amount.

Civil recovery orders

In addition to the confiscation procedure that applies in the context of criminal proceedings, Part 5 of POCA allows enforcement authorities to recover, in civil proceedings before the High Court, property that is, or represents, property obtained through 'unlawful conduct'. This is defined as conduct:

- that is unlawful under UK criminal law; or
- that occurs in a country outside the UK and is unlawful under that country’s criminal law and would be unlawful in the UK if it were to occur there.

The use of civil recovery orders by the Serious Fraud Office

Since 2008, the SFO has obtained several civil recovery orders in cases involving bribery and corruption.

Balfour Beatty

A subsidiary of Balfour Beatty, the international engineering company, was involved in a joint venture with an Egyptian company for the construction of a major cultural centre in Alexandria. Balfour Beatty discovered several payment irregularities that were inaccurately recorded in the subsidiary’s accounts. Balfour Beatty self-reported to the SFO. The SFO found that the Balfour Beatty subsidiary had breached the Companies Act requirement to maintain accurate business records.

An investigation also concluded, however, that there was no financial benefit to any individual employee and that Balfour Beatty’s management was working to review and improve the company’s anti-corruption procedures. The SFO obtained a civil recovery order worth £2.25 million and a contribution toward the costs of the proceedings.

AMEC

AMEC, an international engineering and project management company, found evidence of irregular payments in connection with a project in which it was a shareholder. The company self-reported to the SFO in March 2008. The SFO found that AMEC had breached the Companies Act requirement to maintain accurate business records but acknowledged its prompt referral of the case upon the conclusion of its internal investigation and its co-operation with the SFO’s investigation. On October 26, 2009, the SFO obtained a civil recovery order against AMEC worth almost £5 million plus costs.

DePuy International

DePuy International, a UK-based manufacturer of orthopaedic products, is a subsidiary of Johnson & Johnson, the US-based pharmaceuticals and healthcare products company. Between 1998 and 2006, DePuy International made payments to intermediaries for the purpose of making corrupt payments to healthcare professionals in Greece.

Following an internal investigation by Johnson & Johnson, the unlawful conduct was reported to the US authorities. The US Department of Justice referred the matter to the SFO in October 2007 and subsequently entered into a deferred prosecution agreement with Johnson & Johnson. The SFO obtained a civil recovery order against DePuy International on April 8, 2011 requiring the company to pay more than £4.8 million plus costs.

MW Kellogg

MW Kellogg is a UK-based subsidiary of a US company, Kellogg Brown and Root, an engineering and construction firm with experience in the energy
and petrochemicals sectors. The parent company was one of four corporate entities that formed a joint venture to bid for contracts on a liquefied natural gas project in Nigeria. The joint venture won four contracts, three of which had been obtained following the payment of bribes or promises to pay bribes. The parent company admitted to structuring the joint venture through MW Kellogg to avoid compliance with the US Foreign Corrupt Practices Act. It reached a civil settlement with the US authorities in February 2009.

MW Kellogg self-reported to the SFO and fully co-operated with an investigation into its conduct. The SFO obtained a civil recovery order against MW Kellogg on February 16, 2011, requiring payments of more than £7 million. MW Kellogg also undertook to review and strengthen its audit and anti-corruption procedures.

Macmillan Publishers
An agent for Macmillan Publishers, a UK-based company, attempted to make a corrupt payment with a view to influencing the award of a World Bank tender to supply educational materials in Southern Sudan. The company did not win the contract and the World Bank reported the agent’s conduct. The City of London Police executed search warrants in December 2009 and Macmillan Publishers reported the matter to the SFO in March 2010. The SFO and the World Bank conducted parallel investigations, which concluded that the company may have won tenders in Rwanda, Uganda and Zambia as a result of corrupt relationships. The company co-operated with those investigations and reacted appropriately in reviewing and improving its internal anti-corruption policies and procedures.

The SFO obtained a civil recovery order requiring that Macmillan Publishers pay more than £11 million, which the SFO determined to be the amount of revenue earned by the company because of potentially unlawful conduct.

In each of these cases, the SFO concluded that a civil recovery order was an appropriate and proportionate alternative to a criminal prosecution. When deciding whether to opt for a criminal sanction or a civil penalty, the SFO will typically consider:

- the availability of evidence to support a criminal prosecution, bearing in mind the enhanced burden of proof in criminal cases (‘beyond a reasonable doubt’) compared with the burden of proof in civil cases (‘a balance of probabilities’);
- the extent of any co-operation with the SFO’s investigations, including the provision of evidence that could lead to the investigation and prosecution of other entities or individuals;
- a commitment to remedial action to improve internal compliance procedures, including board-level support for strengthening audit and control processes; and
- whenever the conduct is also punishable under the criminal law of another jurisdiction, the need to ensure that the offender is not prosecuted twice for the same conduct.

This approach has attracted judicial criticism. For example, in his sentencing remarks in *R v Innospec Ltd* (2010), which concerned corrupt conduct in Iraq and Indonesia, Lord Justice Thomas said:

“Those who commit such serious crimes as corruption of senior foreign government officials must not be viewed or treated in any different way to other criminals. It will therefore rarely be appropriate for criminal conduct by a company to be dealt with by means of a civil recovery order … It would be inconsistent with basic principles of justice for the criminality of corporations to be glossed over by a civil as opposed to a criminal sanction.”

Lord Justice Thomas did recognise, however, that “there may … be a place for a civil order, for example, as a means of compensation in addition to a fine”.

The Director of the SFO has since reiterated
his view that “there may be cases when we [the SFO] are unable to prosecute and we consider that a civil recovery order is appropriate”. Indeed, as the Director has pointed out, the UK Attorney General has issued guidance that expressly permits the use of civil recovery orders whenever: (a) it is not feasible to secure a conviction; (b) a conviction is obtained but a confiscation order is not made; or (c) a relevant authority is of the view that the public interest will be better served by using those powers rather than by seeking a criminal disposal.

It is therefore unlikely that the SFO will make significant adjustments to its policy regarding the use of civil recovery orders in the immediate future.

Money laundering offences
In addition to the confiscation and recovery mechanisms described above, POCA recast the English money laundering offences. The explanatory notes to POCA define money laundering as “the process by which the proceeds of crime are converted into assets which appear to have a legitimate origin, so that they can be retained permanently or recycled into further criminal enterprises”.

Money laundering was first criminalised in the UK under the Drug Trafficking Offences Act 1986, which dealt specifically with the proceeds of these offences. Further money laundering offences were subsequently enacted but each set applied to a different category of predicate offences. In practice, this meant that law enforcement authorities needed to identify a specific underlying offence before they could prosecute for money laundering. This anomaly was addressed in POCA, which created a single set of money laundering offences applicable in all circumstances, without regard to the nature of any predicate offences.

POCA created three substantive money laundering offences. It is a defence to each of these if a person makes an authorised disclosure and gains the appropriate consent. A disclosure is an ‘authorised disclosure’ if:

- a constable, customs officer or a nominated officer is informed that property is criminal property;
- it is made in the form of a suspicious activity report (SAR); and
- either it is made before the alleged offender commits the prohibited act, or, if it is made after, there is a good reason for the failure to make the disclosure before the act and the disclosure is made as soon as it is practicable.

Suspected activity reports
SARs are submitted to the Serious Organised Crime Agency (SOCA), typically electronically via a secure website. When a person is seeking consent to proceed with a transaction involving potentially criminal property, the SAR must identify as clearly as possible:

- the suspected criminal property, including its value (if known);
- the reason for the person’s suspicion that the property is criminal property;
- the prohibited act that the person intends to undertake involving the suspected criminal property; and
- the other parties involved in dealing with the suspected criminal property, including their dates of birth and addresses.

Persons in the regulated sector should collect the fourth category of information to ensure compliance with their customer due diligence requirements under the Money Laundering Regulations 2007. The procedures that have been adopted by many banks and investment firms recently have been found to have serious weaknesses in that regard.

Upon receipt, SARs are logged in a database that is maintained by the United Kingdom Financial Intelligence Unit. The UKFIU evaluates all SARs for strategic and tactical intelligence and the SARs database can be accessed by approximately 80 law enforcement agencies, including police forces, the SFO, HM Revenue &
SARs containing requests for consent are prioritised by SOCA. A constable, customs officer or nominated person may give consent to the proposed or historic transaction. Alternatively, a person will be deemed to have consent to proceed if:

- he or she does not receive notice from a constable or customs officer that consent is refused within seven working days from the date of the request; or
- he or she receives notice from a constable or customs officer that consent is refused within the period of seven working days, but a moratorium period of 31 days has elapsed since he or she received that notice.

The strategy for filing suspicious activity reports

In practice, corporates and individuals often have difficulty in deciding whether they have the requisite knowledge or suspicion to justify making a disclosure. The Joint Money Laundering Steering Group has published helpful guidance on that issue. The guidance emphasises that ‘knowledge’ does not necessarily mean actual knowledge; it also may be inferred from the circumstances surrounding a transaction or proposed transaction. ‘Suspicion’ is a lower standard than ‘knowledge’ but a suspicion still needs to be “more than merely fanciful” to justify disclosure.

Corporates should consider the timing of any SAR filing that they wish to make. For example, if a UK-based corporate concludes, following an internal investigation, that it benefited from bribes paid by its employees overseas, it is highly likely that a SAR would need to be filed. The corporate may also wish to self-report the overseas corruption to the SFO. When deciding on the timing of each of these filings, it should be borne in mind that concurrent filing is preferred by the enforcement authorities, and if the SFO finds out about an incident of overseas corruption from a SAR, the corporate could lose its opportunity to earn credit for self-reporting.

Corporates must take care to ensure that information on SARs is closely controlled, since POCA contains a separate ‘tipping off’ offence (Section 333). A person may commit that offence if:

- he or she knows or suspects that a SAR has been filed or that a disclosure has been made to a nominated officer; and
- he or she makes a disclosure that is likely to prejudice any investigation that might be conducted as a result of the filing of that SAR or the making of that disclosure.

The maximum penalty for the tipping-off offence is significant: imprisonment for a term not exceeding five years, or a fine, or both (Section 334). Corporates and individuals should therefore be mindful of the risk that prejudicial information may be disclosed inadvertently.

Future developments

In recent years the SFO has demonstrated a renewed determination to tackle overseas corruption and prosecute corporate wrongdoers. Those efforts may be expected to become more robust now that the UK’s antiquated bribery laws have been replaced by the Bribery Act 2010.

As the risk of investigations and prosecutions of overseas corruption increases, POCA is likely to become more important to the SFO’s work. It is therefore crucial that individuals and corporates working in industries and markets that present significant corruption risks familiarise themselves with the Act’s key provisions and its far-reaching implications.
Chapter 15. The Proceeds of Crime Act 2002 and the prosecution of economic crime

(1) John Denham, Minister for Police, Courts and Drugs, introducing the second reading of the Proceeds of Crime Bill in the House of Commons, October 30, 2001.

(2) An SFO guide, ‘The Serious Fraud Office’s approach to dealing with overseas corruption’, states: “We have encouraged business and professional advisers to self-report cases of overseas corruption to us … The benefit to the corporate will be the prospect (in appropriate cases) of a civil rather than a criminal outcome as well as the opportunity to manage, with us, the issues and any publicity proactively.”


(4) Attorney General’s Office – ‘Guidance to prosecuting bodies on their asset recovery powers under the Proceeds of Crime Act 2002’.

(5) In short, a person will commit a criminal offence if he or she conceals, disguises, converts or transfers criminal property, or removes criminal property from the UK (Section 327); enters into or becomes concerned in an arrangement which he or she knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person (Section 328); or acquires, uses or has possession of criminal property (Section 329). Under Section 340 of POCA, property is ‘criminal property’ if it constitutes a person’s benefit from criminal conduct or represents such a benefit (in whole or part, and whether directly or indirectly) and the alleged offender knows or suspects that it constitutes or represents such a benefit. The term ‘criminal conduct’ is broadly defined in Section 340 to include conduct that constitutes an offence in the UK or would constitute an offence in the UK if it occurred there.

(6) Further defences are provided (a) when a person intended to make an authorised disclosure but had a reasonable excuse for not doing so and (b) when a person’s act was committed in carrying out a function relating to the enforcement of POCA or any other legislation relating to criminal conduct or the benefit from criminal conduct. In respect of the offence of acquiring, using or having possession of criminal property, no offence will have been committed if a person can establish that he or she acquired, used or had possession of criminal property for adequate consideration (Section 329). Consideration will be inadequate if its value is significantly less than the value of the property or the value of the use or possession of the property. The provision of goods or services that may help another to conduct criminal conduct is not regarded as adequate consideration.

(7) According to its website: “The Joint Money Laundering Steering Group is made up of the leading UK Trade Associations in the Financial Services Industry. Its aim is to promulgate good practice in countering money laundering and to give practical assistance in interpreting the UK Money Laundering Regulations. This is primarily achieved by the publication of industry guidance.”
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Published by White Page Ltd in association with the Serious Fraud Office, Serious Economic Crime’s primary purpose is to give board-level readers in the UK and international businesses informed commentary on the impact of UK anti-fraud and anti-corruption legislation. As the scope of this legislation continues to expand and interact more with the legislation in other jurisdictions, so the landscape for best-practice compliance and fraud prevention has become increasingly complex. The wealth of expert insights from lawyers, accountants and specialist anti-fraud consultants in this publication’s 36 chapters is therefore an invaluable resource.

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