

SERIOUS CRIME ACT 2015

EXPLANATORY NOTES

TERRITORIAL EXTENT

Part 1: Proceeds of Crime

Commentary on Sections

Chapter 4: Investigations and co-operation etc

Section 37: Exemption from civil liability for money-laundering disclosures

107. Part 7 of POCA obliges an individual to report to the NCA where there are reasonable grounds to know or suspect that a person is engaged in money laundering. Although this requirement to submit “Suspicious Activity Reports” (“SARs”) applies to any individual, SARs are mostly made by businesses in the “regulated sector” such as banks, other financial institutions and accountants.
108. The submission of a SAR removes the risk of prosecution for an offence in relation to money laundering. A reporter can also remove the risk to them of committing a money-laundering offence by seeking the consent of the NCA, under section 335 of POCA, to conduct a transaction or activity about which they have suspicions. The NCA has seven days to respond.
109. Whilst the reporter awaits the NCA’s decision on consent, the activity or transaction must not proceed. Furthermore, the reporter cannot disclose to the customer the fact that a SAR has been submitted, or any other information that may prejudice the NCA’s investigation into the reported activity or transaction, as doing so would constitute a “tipping off” offence under section 333A of POCA. This can place the reporter in a difficult position in not informing the customer of the reasons for suspension of their requested activity or transaction, and could result in the collapse of a financial or commercial deal.
110. Failing to carry out a customer’s instructions whilst waiting for authorisation can therefore expose financial institutions and others to the risk of civil litigation. The courts (see *Shah and others v HSBC Private Bank (UK) Ltd* [2010] EWCA Civ 3) have, however, held that whilst customers can require such institutions to prove that the suspicion that gave rise to the SAR was reasonable, provided the suspicion is so proved, the institution cannot be held liable for loss suffered by the customer as a consequence of the institution’s failure to carry out promptly the customer’s instructions.
111. This section amends section 338 of POCA to make express statutory provision in relation to the UK’s obligation under the third EU Anti-Money Laundering Directive (Directive [2005/60/EC](#)) to ensure that persons who make disclosures to relevant authorities in good faith must be protected from civil liability for doing so.

Section 38: Confiscation investigations

112. This section broadens the definition of a “confiscation investigation” for the purposes of Part 8 of POCA to include investigations after a confiscation order has been made into the extent and whereabouts of property that might be realised to satisfy the order. The section gives effect to the commitment in the Serious and Organised Crime Strategy to strengthen POCA by “extending the investigative powers in POCA so that they are available to trace assets once the confiscation order is made (at the moment those powers fall away once the order is made)”.

113. Part 8 of POCA makes provision in relation to investigations under that Act. Section 341 of POCA sets out five different types of investigations in relation to which Part 8 powers might be available. One such type of investigation is a confiscation investigation, which is defined in section 341(1) of POCA as an investigation into:

- whether a person has benefitted from his criminal conduct, or
- the extent or whereabouts of his benefit from his criminal conduct.

A confiscation investigation enables an appropriate officer, as defined in section 378(1) of POCA (for example, an NCA officer or a constable), to apply to the court for various orders to help achieve the goals of the investigation. These include a production order, an order to grant entry, a search and seizure warrant, a disclosure order, a customer information order and an account monitoring order.

114. In case of *R (Horne & Ors)* [2012] EWHC 1350 (Admin), the court explored the extent of such powers. It confirmed that in principle the powers could still be exercised after a confiscation order has been made – there is nothing in POCA restricting an investigation into the whereabouts of a person's benefit in the period up to the making of the confiscation order. The court also confirmed however, that the investigative powers available after a confiscation order has been made may be deployed only for the purposes of identifying the amount and whereabouts of benefit and not for the purpose of assisting in the satisfaction of a confiscation order once benefit has been identified and calculated.

115. The absence of investigatory powers for the purpose of assisting in the satisfaction of a confiscation order adversely impacts on law enforcement agencies’ ability to enforce a confiscation order. Where the defendant has assets that are beyond the reach of the enforcement powers at the time the order is made, for example where they are in another jurisdiction, law enforcement agencies are currently unable to use any of the investigative powers in Part 8 after the confiscation order is made to determine whether any of the assets may subsequently have come within a UK jurisdiction.

116. *Subsection (1)* broadens the definition of “confiscation investigation” in section 341 of POCA so that the investigative powers under Part 8 are exercisable after a confiscation order has been made for the purposes of identifying the extent and whereabouts of realisable property available to help satisfy the order.

117. *Subsection (2) and (3)* makes consequential amendments to sections 353 (which applies to England, Wales and Northern Ireland) and 388 (which applies to Scotland) of POCA. These sections sets out conditions for issuing a search and seizure warrant, including warrants issued as part of a confiscation investigation, in the absence of a production order. On occasions a production order will not be a suitable tool and so an application for a search and seizure warrant is made instead. This may occur, for example, where the person controlling the required material may be uncontactable or the investigation would be seriously prejudiced if access to the material was not obtained immediately. An individual served with a production order is generally given seven days to provide the requested material.

Section 39: External orders and investigations: meaning of “obtaining property”

118. This section amends section 447 of POCA which is the interpretation section for Part 11 of that Act; Part 11 of POCA makes provision for co-operation between jurisdictions in relation to freezing and confiscating the proceeds of crime.
119. Part 11 of POCA enables, among other things, requests and orders made by courts in other jurisdictions to be given effect in the United Kingdom. One such type of order is an “external order”, defined in section 447(2) as –
- “an order which -
- (a) is made by an overseas court where property is found or believed to have been obtained as a result of or in connection with criminal conduct, and
 - (b) is for the recovery of specified property or a specified sum of money.
120. In limiting the scope of an external order to the recovery of specified property or a specified sum of money, Part 11 as enacted reflected the scope of the then international agreements under which orders could be sent from a foreign court were similarly limited. For example, Article 5(1)(a) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988¹ requires State parties to “adopt such measures as may be necessary to enable confiscation of... proceeds derived from [specified] offences... or property the value of which corresponds to that of such proceeds”.
121. Domestic law, by contrast, recognises that the proceeds of crime can include not just specified money or property, but also a pecuniary advantage, such as not paying tax that is lawfully due. For example, in the context of confiscation orders made under Part 2 of POCA, section 76(5) of POCA provides that, for the purpose of determining a person’s criminal benefit, a person who obtains a pecuniary advantage as a result of or in connection with criminal conduct, is to be taken as obtaining a sum of money equal to the value of the pecuniary advantage.
122. In recent years, the international law relating to the confiscation of the proceeds of crime has adopted a broader approach to what such proceeds might be. For example, the 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism² defines “proceeds” as any economic advantage, derived from or obtained, directly or indirectly, from criminal offences.
123. New subsection (6A) of section 447 of POCA provides that the value of any pecuniary advantage obtained as a result of criminal conduct is to be treated as if it were a sum of money to the same value. The effect is to enable external orders to be used for the recovery of a pecuniary advantage obtained by criminal conduct in the same way as such orders can currently be used to recover property or sums of money. Part 11 also provides for “external investigations”, defined in section 447(3) as –
- “an investigation by an overseas authority into –
- (a) whether property has been obtained as a result of or in connection with criminal conduct,
 - (aa) the extent or whereabouts of property obtained as a result of or in connection with criminal conduct, or
 - (b) whether a money laundering offence has been committed.
- New section 447(6A) will also bite on external investigations, accordingly such an investigation could be for the purpose of ascertaining whether any pecuniary advantage has been obtained from criminal conduct and, if so, the extent of such advantage.

¹ https://www.unodc.org/pdf/convention_1988_en.pdf

² <http://conventions.coe.int/Treaty/EN/Treaties/Html/198.htm>

Section 40: Confiscation orders by magistrates' courts

124. Section 97(1) of SOCPA confers on the Secretary of State power by order (subject to the affirmative procedure) to make provision to allow magistrates' courts to make confiscation orders under Part 2 of POCA. A similar power is conferred on the Northern Ireland Department of Justice in respect of Part 4 of POCA. Section 97(2) of SOCPA provides that the power for magistrates' courts to make a confiscation order is subject to a restriction that the amount does not exceed £10,000. Confiscation orders above this amount could only be made in a Crown Court, as now. The intention behind this restriction is that magistrates' courts should be empowered to make confiscation orders only in less serious cases. No order under section 97(1) of SOCPA has yet been made.
125. *Subsections (2) to (4)* amend section 97 of SOCPA so as to confer power on the Secretary of State and the Department of Justice in Northern Ireland to vary, by order, the £10,000 limit. As a result of the amendment made to section 172 of SOCPA by *subsection (5)*, any such order is subject to the affirmative procedure.