

Requesting a defence from the NCA under POCA and TACT



UKFIU

UK Financial Intelligence Unit

This is a United Kingdom Financial Intelligence Unit (UKFIU) product. It is aimed at all reporters of Suspicious Activity Reports (SARs) and is produced in line with the National Crime Agency's (NCA) commitment to share perspectives on the SARs regime.

March 2023 v6.0



NCA

National Crime Agency

Requesting a defence from the NCA under POCA and TACT

This document is intended to inform you of the approach when reporters, through submitting a Suspicious Activity Report (SAR), seek a defence (or 'consent') from the National Crime Agency (NCA):

- To a **principal money laundering offence** (sections 327-329 Proceeds of Crime Act 2002 ['POCA']) under sections 335 and 336 of POCA;

and/or

- A **terrorist financing offence** (sections 15-18 Terrorism Act 2000 ['TACT']) under section 21ZA of TACT.

Please ensure you are familiar with:

- Part 7 of POCA
- Part 3 of TACT
- if you are a business in the regulated sector, any guidance issued by your anti-money laundering supervisor, professional body or trade association.¹

If you are unsure, always seek your own independent legal advice and/or consult your supervisor or trade body.

If there is a threat of harm or crime in action please ring the police on 999.

The UKFIU can be contacted by email: UKFIUSARS@nca.gov.uk

A note on the term 'consent'

The term 'consent' is frequently misinterpreted. Often it is seen as seeking permission or seen that where requests are granted that this is a statement that the funds are clean or that there is no criminality involved. This is not the case.

Additionally, reporters sometimes seek 'consent' where they have been unable to complete customer due diligence. **The process is not a substitute for taking a risk-based approach or for fulfilling your regulatory and legal responsibilities, including those under the Money Laundering Regulations 2017.** Such misinterpretation and conduct risks undermining efforts to prevent money laundering and counter terrorist financing.

As such the granted letters from the NCA no longer use the term 'consent' and instead use the terms 'defence to a money laundering offence' or 'defence to a terrorist financing offence'. For absolute clarity we retain the use of the term 'consent' in refusal letters.

¹ If you are unsure if your firm is in the regulated sector consult your regulator, professional body or trade association, or seek independent legal advice.

What is a Suspicious Activity Report?

The Suspicious Activity Report (SAR) regime is administered by the United Kingdom Financial Intelligence Unit (UKFIU) which is part of the NCA. A SAR is submitted where someone, mainly in the regulated sector (where it is an offence not to submit), has knowledge, suspicion or belief, or if in the regulated sector reasonable grounds to know or suspect, that another person is laundering money or financing terrorism.

The UKFIU works with UK law enforcement, government agencies, supervisors and 150 other international FIUs to prevent and disrupt money laundering and to counter the financing of terrorism. SARs are submitted to the UKFIU under the Proceeds of Crime Act 2002 (POCA) and the Terrorism Act 2000 (TACT). They are processed, analysed and disseminated to UK law enforcement and other government bodies, and via the international network of FIUs.

What are the defences under POCA and TACT?

One of the core functions of the UKFIU is the receipt and processing of requests for a defence for money laundering or terrorist financing (otherwise known as 'consent', 'appropriate consent' or 'prior consent'). We received over 83,000 requests in 2021-2022.

The principal money laundering offences are set out in the Proceeds of Crime Act 2002 at sections 327-329. The Terrorism Act 2000 establishes several terrorist financing offences, set out in sections 15-18 of the Act.

Where a person suspects or knows that **property is criminal**, or suspects or believes that something is or may be **terrorist property**, and where they intend to carry out an activity which they anticipate could result in them committing a principal money laundering or terrorist financing offence, a person may request a criminal defence from the NCA in relation to that intended activity.

Where they have submitted an authorised disclosure and have the 'appropriate consent' (sections 335 and 336) of the NCA under POCA they do not commit one of the principal money laundering offences (sections 327-329 POCA). Where they have submitted a disclosure and have the 'prior consent' (section 21ZA TACT) of the NCA they do not commit one of the terrorist financing offences (sections 15-18 TACT).

The terrorist financing offences have extra-territorial jurisdiction and money laundering offences can have extra-territorial jurisdiction. This means that a person may be prosecuted in the UK for conduct that took place outside of the UK, which would have been unlawful had it taken place in the UK in some circumstances.

Reporters are responsible for determining whether the activities and arrangements that their organisation may become involved in risk being contrary to any/all of the principal money laundering or terrorist financing offences and, if so, making an application to the NCA.

A granted response and the defence does not:

- imply NCA approval of the proposed act(s), persons, corporate entities or circumstances contained within the disclosure;
- oblige or mandate a reporter to undertake the proposed act; provide derogation from, or replace, a reporter's professional duties of conduct or regulatory requirements, such as those under the Money Laundering Regulations 2017 concerning customer due diligence, etc.
- provide a reporter with a criminal defence against other criminal offences pertaining to the proposed act; or,
- override the private law rights of any person who may be entitled to the property specified in the disclosure.

How do I request a defence from the NCA?

Only officers within the NCA's UKFIU are designated by the NCA Director General to receive and respond to requests for a defence.

In order to request a defence a reporter should submit a SAR to the UKFIU including all relevant information to allow the UKFIU to analyse the request and, as necessary, seek advice from the relevant agency.

The most frequently used, and most efficient, method to submit a SAR is via **SAR Online** (<https://www.ukciu.gov.uk/saronline.aspx>). **Please make sure you tick the 'consent requested' box** to allow the consent team to process the SAR and that you **submit the SAR under POCA or TACT, depending on the nature of your knowledge, belief or suspicion.**

Requests must be for a specified activity (or specified series of activities) and also should not be open-ended (such as seeking a defence relating to "handling all business dealings" relating to the subject or account).

Requests for a Reasonable Excuse defence under Section 21ZB of the Terrorism Act must state so clearly and be marked as 'Consent Required' when inputting.

What information does the UKFIU need?

Please include the information set out below, as failure to do so may result in the closure of your cases.

In the **Reason For Suspicion** field (limited to 8,000 characters, approximately 1,300 words) set out the **facts concisely and focus** on **who** is involved, **what** and **where** the criminal/terrorist property is and its value (estimated as necessary), **when** and **how** circumstances arose and are planned to happen, and ultimately **why** you are suspicious or have knowledge.

Details on the transaction or arrangement:

- A description of the **suspected criminal** or **terrorist property** concerned e.g. what amount of money or property is involved?
- **How will the transaction take place** e.g. in-person or online?
- What is (are) the **reason(s)** for or **context** to the transaction?
- The **details of the entities** involved (or likely to be involved) – further details below.
- **When is the transaction likely to take place** or arrangement be entered into?
- Has the application for consent been prompted by **law enforcement enquires**? If so, which agency made those enquiries?
- If the subject has been **reported previously**, what are the relevant SAR numbers and outcomes?
- Whether the activity the reporter is seeking consent for is, for example, aid of a **humanitarian** nature?
- Details of any **due diligence** reporters have completed.
- Any other **compliance obligations** and how these have been resolved, for example financial sanctions obligations.

The NCA would also expect to take into account the international position concerning the entities involved in the proposed transaction. The UK must meet its obligations with regards to international/UN sanctions regimes.

Details on entities involved:

In the relevant fields include as much detail as possible on the entities involved (individuals, addresses, companies, accounts):

- Subject's **full name, date of birth** and **addresses** (including postcode).
- Subject details (e.g. National Insurance numbers, vehicle registration, driving licence, passport number, phone numbers, email addresses, etc).
- Subject's **occupation/employer**.
- details of any **associated subjects** (including, where appropriate, full details of **professionals involved in the activities**).
- Company details including **full legal name**, designation (Ltd, LLP, GmbH, SARL), **registration number and tax reference/VAT numbers, country of incorporation** and **details on beneficial ownership** where held).
- If relevant to your business, the subject's financial details (**account numbers**) and details of associates.
- Whether the transaction/arrangement involves a recognised – including proscribed – **terrorist organisation** or otherwise a **sanctioned individual or organisation**.²

² Payments involving a designated person under financial sanctions will also require Office of Financial Sanctions Implementation (OFSI) approval through a separate licensing process.

The NCA would also expect you to take into account the international position concerning the entities involved in the proposed transaction. The UK must meet its obligations with regards to international/UN sanctions regimes.

It is appreciated that you may not always have the full details concerning all of the entities involved, especially where you are reporting on subjects which are not your usual clients/customers/suppliers.

While we appreciate it is more time-consuming, it is important that details are completed within the appropriate SAR Online fields and not solely placed within the 'Reason For Suspicion' field.

What happens after my request is submitted?

Once a SAR is submitted it enters what is known as the 'notice period', which is seven working days starting from **the day after the SAR is submitted**. The end of the working day is **1700** hours. For example, if a SAR is submitted (at any time up to midnight) on Monday 2 May, the day 1 of the notice period will be Tuesday 3 May, and the notice period will end at 1700 on Wednesday 11 May, which is day 7. The notice period excludes weekends and bank holidays.³

The UKFIU will then assess the information and consult with partners as necessary to inform a decision. We may seek further information from you in writing (normally via email). Additionally, if you wish to contact the UKFIU to raise a matter relating to your request please email DAML@nca.gov.uk or TFT@nca.gov.uk for POCA or TACT respectively.

How does the UKFIU make decisions?

During the notice period the UKFIU will assess the information, consult with partners as necessary, and make a decision to determine the appropriate response.

For POCA requests the UKFIU makes decisions in line with the guidance in **Home Office Circular 29/2008**, considering proportionality and necessity. There is not an equivalent Circular for TACT requests; the UKFIU makes decisions considering proportionality and necessity.

The main objective for the UKFIU is to identify whether there is likely to be a law enforcement response to the suspected or known activities outlined. In applying tests of proportionality and necessity, refusal decisions in POCA cases will take place in the majority of cases where there is likely to be a criminal investigation leading to restraint within the 31 day ('moratorium') period that follows refusal. In POCA cases where there is no likelihood of restraint or other action within a moratorium period then, in most cases, it would not be proportionate for the NCA to refuse.

Additionally we may not reply to a request, or we may close the case due to a lack of information.

³ Section 335(5) &(7), and section 336(7) & (9) POCA: *The notice period is the period of seven working days starting with the first working day after the person/the nominated officer makes the disclosure. A working day is a day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 (c80) in the part of the United Kingdom in which the person is when he makes the disclosure.*

My case has been closed due to lack of information - why?

In requests which do not include enough information the UKFIU adopts different approaches depending on the level of deficiency. For requests which have significant information missing we may write to you informing that the case is closed without further consultation. In other cases we will write to you requesting information – if we haven't heard from you **in writing within two working days**, we may close your case.

Where your case, is closed you will need to resubmit any request for it to be considered again. Please be aware that the UKFIU may refer poor quality SARs to the relevant anti-money laundering supervisor for their attention and appropriate action.

I have received a granted letter - what should I do next?

In cases where you receive a granted letter you are afforded a defence. However, this does not mean that your other regulatory and legal obligations are discharged. It also does not mean that the property is not criminal property or terrorist property, or that we agree with the action you are proposing to take. You should consider your next steps carefully and should not take the NCA's granted letter as 'permission to proceed'. You have a defence to specific offences in POCA and TACT but not to other criminal offences (including those in the Money Laundering Regulations 2017, Bribery Act 2010, Fraud Act 2006, etc).

The UKFIU has no mandate to advise reporters on the approach or actions they should take to mitigate particular risks or to advise that property is, or is not, the proceeds of crime or terrorist property.

I have received a refusal letter - what does this mean?

Where you receive a refusal in POCA cases this means that you do not have the defence until either a granted letter is sent to you or the end of the 31 day moratorium period. The moratorium period begins on the day of refusal and ends after 31 calendar days. During this period law enforcement may get in touch regarding any investigation, such as to serve production orders, property freezing orders and restraint orders in relation to the matter.

Continuing to transact following receipt of a refusal risks committing a prima facie money laundering or terrorist financing offence.

Where you receive a refusal letter in TACT cases, there is no moratorium period, and you do not have a defence unless and until the request is granted by the NCA. Decisions under TACT are kept under review following refusal.

I have not received any response after the seven day working notice period - what does this mean?

Where an 'authorised disclosure' is made under section 338 POCA, a defence is afforded to a reporter in cases where no reply is provided by the NCA at the end of the seven day notice period under section 335(3) POCA or, in the case where the disclosure is from a nominated officer in the regulated sector, under section 336(3) POCA.

Where a disclosure is made under TACT, a person is treated as having a defence if no notice of refusal is received by them before the end of the notice period, under section 21ZA(2) TACT.

I have been informed that I appear not to have fulfilled my regulatory responsibilities, and so a reply is not being given - why?

POCA sets out that the NCA must exercise its functions under the Act in the way in which it considers is best calculated to contribute to the reduction of crime. Where a reporter displays conduct, such as failing to undertake basic regulatory obligations, and this conduct could be condoned or encouraged by receiving a 'granted' response from the NCA, we will consider sending this letter and will close the case. The matter may also be referred to your anti-money laundering supervisor.

May I inform a client/customer that I have made a report?

You must not say anything to your client/customer which risks prejudicing an investigation. Doing so could constitute an offence under section 333A POCA or section 21D TACT ("tipping off") for those in the regulated sector and/or section 342 POCA or section 39 TACT ("prejudicing an investigation").

If a reporter considers that it has an obligation to disclose its copy of a SAR in private litigation proceedings then they should inform the NCA (via UKFIUSARS@nca.gov.uk) in order that any risks to prejudicing to an investigation (POCA section 333A and section 342; or TACT section 21D and section 39) may be assessed and managed.⁴

⁴ [Home Office Circular 22/2015](#): Money Laundering: the confidentiality and sensitivity of suspicious activity reports (SARs) and the identity of those who make them (published 18 June 2015).

Will you keep my SAR confidential?

All SARs are treated confidentially, though there are times when a SAR may be required to be disclosed in legal proceedings. The NCA applies the same process for recording and disseminating of SARs and information derived from them as it does for all sensitive intelligence. All those with access to SARs, who are accredited by the NCA Proceeds of Crime Centre, are trained in the handling of the material to ensure the source of the information is protected.⁵ Those with access must have regard to [Home Office Circular 22/2015](#) and where there is a likelihood of disclosure in legal proceedings the reporter will be contacted by the UKFIU.⁶

If reporters have concerns about the inappropriate use of SARs by others, or breaches of SAR confidentiality, you should contact the SAR Confidentiality Breach Line on 0207 238 1860 (available 24/7). Please note this number is for reporting breaches of confidentiality only.

I am an international non-governmental organisation (INGO) - how does this legislation affect me?

Humanitarian, development and peacebuilding work overseas does not normally engage terrorism offences. However, it often takes place in the context of conflict, instability and fluid governance arrangements, including in regions where terrorist groups are active. Such work may involve contact with proscribed groups and their members, ordinary and incidental financial transactions within the local economy, and travelling or maintaining a presence in volatile environments to safely deliver aid to those most in need.

Situations may arise where international non-governmental organisation's (INGOs) determine that entering into a transaction or arrangement, which they consider necessary to ensure the timely delivery of humanitarian assistance or to support other activities that support basic human needs, may be an offence under Sections 15-18 of TACT. Concerns over committing a criminal offence may lead the INGO to suspend the planned activity rather than proceeding with it.

In such circumstances, use of 21ZA provides a potential avenue for the INGO to proceed with the activity without committing an offence under Sections 15-18 of TACT, by submitting a section 21ZA application before carrying out those activities.

Where a reporter becomes involved in a transaction or arrangement that they consider may be an offence under sections 15-18 of TACT, they can make a disclosure under 21ZB; further information on 21ZB is included on page 11.

⁵ As Financial Investigators, Financial Intelligence Officers or SAR Researchers.

⁶ [Home Office Circular 22/2015](#): Money Laundering: the confidentiality and sensitivity of suspicious activity reports (SARs) and the identity of those who make them (published 18 June 2015).

As set out above, reporters should remember that each section 21ZA application and decision is specific to an individual situation and transaction. Reporters will need to set out details on the specified activity (or specified series of activities) and the transaction or transactions and entities involved. The NCA will assess the risk of funds being used to fund terrorism and decide on balance whether to grant the request for a defence, ensuring its decision is proportionate and in the public interest.

Alongside obligations under TACT, the NCA would also expect INGOs to take into account the international position concerning the entities involved in the proposed transaction. Some of these regimes have specific licensing or exemptions for specific INGOs. For example, in December 2022, the UN Security Council passed Resolution 2664 which provides an exemption for humanitarian activities conducted by specific actors including the UN, non-governmental organisations and other humanitarian assistance providers. This is applicable to all existing financial sanctions in the UN sanction regimes, including the 1267/1989/2253 ISIL (Da'esh) and Al-Qaida sanctions regimes.

Under POCA what is the role of a 'constable' or a 'customs officer' versus the NCA in making decisions?

If you are in the regulated sector (under the Money Laundering Regulations 2017) and therefore have a nominated officer, the nominated officer can only request a defence from an authorised officer (UKFIU officers) in the NCA. If you are outside the regulated sector then a report may be made to a constable (which includes officers of the NCA UKFIU) or officer of Revenue & Customs, and they may provide a decision. However, that constable or Revenue & Customs officer has a statutory duty to notify the NCA UKFIU of that disclosure as soon as practicable after receipt.

Under TACT what is the role of a 'constable' versus the NCA in making decisions?

There are a number of relevant sections under TACT which you will need to consider when deciding whether and how to report, in particular sections 21, 21ZA, 21ZB and 21A.

Section 21 of TACT provides that: a person does not commit an offence (under sections 15-18) if they are acting with the express consent of a constable; and a person does not commit an offence (under sections 15-18) by involvement in a transaction or arrangement relating to money or other property if as soon as reasonable practicable on their own initiative after becoming concerned in the transaction they disclose to a constable and the constable does not forbid their continued involvement in the transaction or arrangement. Reference to a constable includes officers of the NCA UKFIU.

Section 21ZA enables a person to seek consent for specific, future transactions or arrangements where the reporter considers there is a risk of an offence under sections 15-18 of TACT 2000. In the event an NCA officer has given consent it would mean that no offence would arise.

Section 21ZB is intended to provide a person with a reasonable excuse defence in the event that a transaction/arrangement was entered into which might have been contrary to sections 15-18 of TACT 2000. For a disclosure under 21ZB to be effective, the reporter must have a reasonable excuse for failing to make a disclosure prior to entering into the arrangement/transaction; and the disclosure must have been made on the reporter's own initiative as soon as reasonably practicable. If the transaction or arrangement is ongoing the reporter should discontinue with it until after they have received a decision from the NCA.

An officer of the NCA who is authorised for the purposes of section 21ZA by the Director General of that Agency (i.e. an "authorised officer") is the decision maker for the purpose of consent applications under 21ZA. An officer of the NCA who is authorised for the purpose of section 21ZB is authorised to receive disclosures under section 21ZB.

Section 21A is the obligation on those in the regulated sector who know or suspect, or have reasonable grounds for knowing or suspecting, that another person has committed or attempted to commit a section 15-18 offence, to disclose to a nominated officer or constable. Reference to a constable includes officers of the NCA UKFIU.

Where a constable outside the NCA UKFIU receives a report under any of the subsections in Part 3 Terrorism Act, they have a statutory duty to pass it to the NCA UKFIU as soon as practicable.

Other compliance obligations

For avoidance of doubt, **this guidance does not include compliance responsibilities relating to financial sanctions**. A separate process will need to be undertaken through OFSI for transactions that may breach financial sanctions. When considering other compliance obligations reporters may wish to refer to existing guidance which has been published. This includes, but is not limited to:

- List of terrorist groups or organisations - Proscribed terrorist groups or organisations - GOV.UK (www.gov.uk)
- The UK sanctions list - GOV.UK (www.gov.uk)
- The CT information note - For information note: operating within counter-terrorism legislation, counter-terrorism sanctions and export control - GOV.UK (www.gov.uk)
- OFSI sanctions guidance - Financial sanctions: guidance - GOV.UK (www.gov.uk)
- OFSI's consolidated designations list - Who is subject to financial sanctions in the UK? - GOV.UK (www.gov.uk)
- Guidance on trade sanctions, arms embargoes, and other trade restrictions - Trade sanctions, arms embargoes, and other trade restrictions - GOV.UK (www.gov.uk)