Introduction

Cross border influences on United Kingdom Law

1. Most businesses and professions operating in the United Kingdom must meet onerous obligations under United Kingdom money laundering laws.

2. The law in relation to money laundering is extensive and complex, not least because money laundering is an international activity that has prompted many initiatives from countries around the world. Unhappily, not all jurisdictions are moving in the same direction or speed with the result that a patchwork of international agreements and legal instruments has appeared.

3. The latest milestone is the *Third Money Laundering Directive* which was formally adopted on the 26th October 2005, and which came into force on the 15th December 2005. It must be implemented into domestic law by the 15th December 2007. The Directive is substantial and it repeals the first Directive (91/308/EEC, as amended by the second Directive [2001/97/EC]). The Law Society responded to what was then a proposal (October, 2004). The Directive takes an "all crimes" approach, which (in essence) is the approach we see enacted in the Proceeds of Crime Act 2002 ("POCA"). Since the 31st July 2006, HM Treasury has been consulting interested parties regarding the United Kingdom's proposals for giving statutory effect to the 3rd Directive:[1]

4. The history of the three money-laundering directives is briefly summarised, in tabulated form, at the back of this paper.

Anti-money laundering strategies

5. Two techniques (described below) have been deployed to assist in the detection of money laundering. Increasingly, the United Kingdom is enacting anti-money laundering measures that use both of the aforementioned techniques.

6. The first technique is the creation of an **administrative system** for reporting financial transactions in which specified persons must make disclosures in prescribed circumstances and in the prescribed manner. This system, sometimes described as a "prescriptive approach", has been in use in several jurisdictions. In the United States of America, the *Bank Secrecy Act 1970* (also known as the *Currency and Foreign Transactions Reporting Act*) requires specified persons to complete a *Currency Transaction Report* (CTR) in respect of transactions the value of which exceed a prescribed amount.[2]

7. The second technique is a **suspicion-based system** of reporting. It is this technique that has been favoured by lawmakers in the United Kingdom. It forms part of what is sometimes styled a "risk-based approach" towards tackling money laundering. On the one hand, it is a system that places a heavy burden on those who must repeatedly exercise judgment about a

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1 http://www.hm-treasury.gov.uk/media/B60/AC/moneylaundering310706.pdf: a 132 page document.

2 "1. IRS Form 4789 *Currency Transaction Report* (CTR): A CTR must be filed for each deposit, withdrawal, exchange of currency, or other payment or transfer, by, through or to a financial institution, which involves a transaction in currency of more than $10,000. Multiple currency transactions must be treated as a single transaction if the financial institution has knowledge that: (a) they are conducted by or on behalf of the same person; and, (b) they result in cash received or disbursed by the financial institution of more than $10,000. (31 CFR 103.22)
2. U.S. Customs Form 4790 *Report of International Transportation of Currency or Monetary Instruments* (CMIR): Each person (including a bank) who physically transports, mails or ships, or causes to be physically transported, mailed, shipped or received, currency, traveler's checks, and certain other monetary instruments in an aggregate amount exceeding $10,000 into or out of the United States must file a CMIR. (31 CFR 103.23)"

large number of transactions carried out over a very short period time. On the other hand, it does have the advantage of being more flexible than a prescriptive regime, and which allows those in industry and commerce to decide on a case-by-case basis the steps that need to be taken with respect to a particular transaction or activity. Neither the "prescriptive approach" nor the "risk-based approach" is pain-free for those who must comply with rules that make heavy demands on time and financial resources. However, it is not without interest that in Australia there has been resistance to proposals to introduce an anti-money-laundering regime that was thought to be too prescriptive and which might make too many demands on industry: it preferred a "risk-based approach".[3]

8. Anecdotally, it is said that some accountants have routinely reported on their clients to NCIS (now SOCA)[4] in the belief that doing so is safer than not doing so. If these statements are true, then such reporting is not only unnecessary, and not what the legislation requires, but it is unhelpful, and unjust. On the other hand it must be recognised that some businesses and individuals are not meeting money-laundering requirements.

9. In the United Kingdom money laundering rules are coercively enforced by the creation of offences in respect of which the *mens rea* is often as low as suspicion that the property directly or indirectly represents the proceeds of criminal conduct.

10. Note that the Serious Organised Crime and Police Act 2005 (SOCPA) makes a number of important amendments to Part 7 of POCA (money laundering). The amendments are designed to relax some of the rules enacted by POCA, but only to a very limited extent. Shortly stated, they
    a. Make provision to address a problem in relation to overseas conduct – i.e. conduct that is legal by the laws in the state where the conduct is carried out, but unlawful by the laws of the United Kingdom. This is the so-called "Spanish bullfighting" problem – a problem that has arisen due to the absence of a dual criminality requirement of "criminal conduct" in Part 7 of POCA [s.340(2)].
    b. Ease the burden on a "deposit-taking body" by not requiring it to make disclosures (after the initial disclosure has been made) and to obtain a "appropriate consent" in respect of transactions carried out in circumstances specified in the Act.

Words and phrases

"Money Laundering" and 'money laundering offences'

11. Section 340 (11) defines "money laundering" as:

> "(11) …. an act which-
> (a) constitutes an offence under section 327, 328 or 329,
> (b) constitutes an attempt, conspiracy or incitement to commit an offence specified in paragraph (a),
> (c) constitutes aiding, abetting, counselling or procuring the commission of an offence specified in paragraph (a), or
> (d) would constitute an offence specified in paragraph (a), (b) or (c) if done in the United Kingdom."

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[3] http://www.freehills.com/publications/publications_6030.asp - an article by Freehills, *Anti-Money Laundering Update*, 25th July 2006, in response to a revised draft of the Anti-Money Laundering and Counter-Terrorism Financing Bill (Australia).

[4] Created under the Serious Organised Crime Act 2005.

12. Note that the four offences of "*failure to disclose: regulated sector*" [s.330]; "*failure to disclose: nominated officers in the regulated sector*" [s.331]; "*failure to disclose: other nominated officers"* [s.332], and "*tipping off*" [s.333] are often styled 'money-laundering offences' but they do not constitute to "money laundering" for the purposes of Part 7: s.340(1).

"Criminal conduct"

13. "Criminal conduct", is defined by s.340(2) of POCA.

> "(2) Criminal conduct is conduct which-
>
> (a) constitutes an offence in any part of the United Kingdom, or
>
> (b) would constitute an offence in any part of the United Kingdom if it occurred there."

14. Note that "criminal conduct" performed outside the United Kingdom does not include a dual criminality ingredient, and therefore conduct performed abroad that would be unlawful *somewhere* in the United Kingdom (even if not throughout the United Kingdom) is sufficient.[5]

"Criminal property"

15. "Criminal property" is defined by section 340 (3):

> "(3) Property is criminal property if-
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> (a) it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and
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> (b) the alleged offender knows or suspects that it constitutes or represents such a benefit.
>
> (4) It is immaterial-
>
> (a) who carried out the conduct;
>
> (b) who benefited from it;
>
> (c) whether the conduct occurred before or after the passing of this Act."

16. Note that the alleged offender's level of knowledge (knows or suspects) is relevant to the question whether property is "criminal property" [s.340(3)(b)].

17. Note that s.340(3) [criminal property] and s.340(2) [criminal conduct] must be read together. Thus, a person in the United Kingdom who handles money, which he knows or suspects to be acquired from bullfighting in Spain, handles "criminal property" because bull fighting is unlawful by the laws of the United Kingdom.[6] Whether that person commits a money-laundering offence under sections 327-329 POCA now depends on whether he can avail himself of the defence added to each offence by s.102 SOCPA: and see the *Proceeds of Crime Act 2002 (Money Laundering: Exceptions to Overseas Conduct Defence) Order 2006* which came into force on the 15th May 2006. This defence is considered in greater detail later in this paper.

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[5] Note the effect of s.107 of SOCPA 2005 that modifies the reach of s.340(2) POCA, in connection with the three main money laundering offences in POCA, namely, s.327 (concealing, etc, criminal property); s.328 (concerned in an arrangement to launder); and s.329 (acquisition and use); and the three offences of "failing to disclose", namely, s.330 (regulated sector), s.331 (nominated officers in the regulated sector), and s.332 (other nominated officers).

[6] In Spain, bull-fighting is lawful in certain circumstances, but such performances are unlawful by the laws of the United Kingdom: see, for example, the Protection of Animals Act 1911 (as amended) and note the Animal Welfare Bill.

Offence: "Conceals, disguises; converts, transfers": s.327 [7]

The statutory provisions

18. Section 327(1) and (2) of POCA provides:

"(1) A person commits an offence if he-

(a) conceals criminal property;
(b) disguises criminal property;
(c) converts criminal property;
(d) transfers criminal property;
(e) removes criminal property from England and Wales or from Scotland or from Northern Ireland.

(2) But a person does not commit such an offence if-

(a) he makes an authorised disclosure under section 338 and (if the disclosure is made before he does the act mentioned in subsection (1)) he has the appropriate consent;
(b) he intended to make such a disclosure but had a reasonable excuse for not doing so;
(c) the act he does is done in carrying out a function he has relating to the enforcement of any provision of this Act or of any other enactment relating to criminal conduct or benefit from criminal conduct."

History of this offence

19. The s.327 offence has its roots in s.14 of the Criminal Justice (International Co-operation) Act 1990:[8] a provision that was partially re-enacted in s.49 of the DTA 1994,[9] (mirrored in s.93C of the CJA 1988).[10] The offence is framed in a way that ensures that the United Kingdom

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7 The amendments to these sections appear in Fortson, *Serious Organised Crime and Police Act 2005* (Current Law Statutes, Sweet & Maxwell,). For a useful colour coded set of amendments see: http://www.lawsociety.org.uk/documents/downloads/ML_POCAamends.pdf

8 **Section 14.CJICA 1990** — *Concealing or transferring proceeds of drug trafficking.*

(1) A person is guilty of an offence if he—
(a) conceals or disguises any property which is, or in whole or in part directly or indirectly represents, his proceeds of drug trafficking; or
(b) converts or transfers that property or removes it from the jurisdiction,
for the purpose of avoiding prosecution for a drug trafficking offence or the making or enforcement in his case of a confiscation order.

(2) A person is guilty of an offence if, knowing or having reasonable grounds to suspect that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of drug trafficking, he—
(a) conceals or disguises that property; or
(b) converts or transfers that property or removes it from the jurisdiction,
for the purpose of assisting any person to avoid prosecution for a drug trafficking offence or the making or enforcement of a confiscation order.

(3) A person is guilty of an offence if, knowing or having reasonable grounds to suspect that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of drug trafficking, he acquires that property for no, or for inadequate, consideration.

(4) In subsections (1)(a) and (2)(a) above the references to concealing or disguising any property include references to concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it.

(5) For the purposes of subsection (3) above consideration given for any property is inadequate if its value is significantly less than the value of that property, and there shall not be treated as consideration the provision for any person of services or goods which are of assistance to him in drug trafficking.

(6) …..[penalties]

9 **Section 49 DTA 1994** — (1) [*identical to s.14(1) Criminal Justice (International Co-operation) Act 1990*]
s.49(2) [*identical to s.14(2) Criminal Justice (International Co-operation) Act 1990*]
s.49(3) [*identical to s.14(4) Criminal Justice (International Co-operation) Act 1990*]

10 **93C, CJA 1988** — (1) [*identical to s.14(1) Criminal Justice (International Co-operation) Act 1990, save that the words "criminal conduct" appear*]
S.93(2) [*identical to s.14(2) Criminal Justice (International Co-operation) Act 1990, save that the words "criminal conduct" appear*]
S.93(3) [*identical to s.14(4) Criminal Justice (International Co-operation) Act 1990, save that the words "criminal conduct" appear*]
S.93(4) [penalties].

meets its international obligations under treaty: indeed the United Kingdom has exceeded its obligations.[11]

20. Section 14 of the 1990 Act, created three offences - all of them confined to the proceeds of drug trafficking:
    - The first offence under s.14 CJICA was directed at the trafficker himself: he was forbidden to conceal, disguise, convert, transfer, or to remove out of the jurisdiction, *his own* proceeds of drug trafficking "for the purpose of avoiding prosecution for a drug trafficking offence, or the making or enforcement *in his case* of a confiscation order" [s.14(1)].
    - The second offence was directed at those who assisted the trafficker (by concealing etc), knowing or having reasonable grounds to suspect that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of drug trafficking, and that he acted "for the purpose of assisting any person to avoid prosecution for a drug trafficking offence, or the making, or enforcement of a confiscation order" [s.14(2)].
    - The third offence, was that of acquiring property "for no, or inadequate consideration" knowing or having reasonable grounds to suspect that the property directly, or indirectly, represents the proceeds of another person drug trafficking [s.14 (3)].

21. The second and third offences (above) exceed the requirements of the 1988 United Nations Convention, by lowering the *mens rea* to suspicion, or "having reasonable grounds to suspect".

22. The first two offences in s.14 of the 1990 Act were re-enacted as s.49(1) and (2) of the DTA 1994 respectively. Section 93C of the CJA 1988 made corresponding provision in connection with criminal conduct other than drug trafficking. But the third offence under section 14(3) of the 1990 Act [acquired property for no, or inadequate consideration], was re-enacted with modifications as s.51 of the DTA 1994, and s.93B of the CJA1988.

Differences between s.327 and s.49 DTA/s.93C CJA 1988

23. Note the following differences between the s.327 offence and s.49 DTA/s.93C, CJA 1988:
    a. ***Mens rea***: For the purposes of s.327 the prosecution must prove that the alleged offender "knows or suspects" that the property constitutes a person's benefit from "criminal conduct". Section 327 is actually silent about *mens rea*, but the answer is found in s.340(3) which provides the definition of "criminal property" which includes two components: first, that the property constitutes benefit from "criminal conduct" [s.340(3)(a)], and secondly, that the alleged offender "knows or suspects"

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[11] Article 3 of the *United Nations Convention Against Illicit Traffic In Narcotic Drugs And Psychotropic Substances* (Cm 804) provides that parties to the convention are to establish, offences the following activities:

"(b) (i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph (a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;

(ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such an offence or offences."

….

"(c)(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such offence or offences."

that it constitutes such a benefit [s.340(3)(b)]. By contrast, the *mens rea* for an offence contrary to s.49(2)/s.93C is knowing or "having reasonable grounds to suspect" [see *Ali, Hussain*, [2005] EWCA Crim 87].

b. **Purpose: of avoiding prosecution, etc.** The requirement of "purpose" does not feature in s.327 whereas it does exist for the purposes of s.14(1) and (2) of CJICA1990, s.49(2) DTA and s.93C CJA 2988. This aspect of the earlier legislation tended to be overlooked: but not in *Causey* (18th October 1999; CA), or in *Powell*[12] (where it was held that the purpose did not have to be the dominant one, but there could be personal purposes as well), and see *Singh*.[13] Note that for the purposes of s.49(2) DTA/s.93C(2) CJA, it does not matter that the prosecution is one taking place outside the United Kingdom: *Mulvey* [2003] EWCA Crim 2195.[14]

c. Thirdly, s.327(2), 328(2), 329(2), 330(6), 331(6), 332(6), 333(2), use words such as "But a person does not commit such an offence…". Dr David Thomas QC, states in *Archbold 2005* that this is deliberate, "and intended to avoid argument as to burden and standard of proof" [Chapter 33-10]. An alternative view is that Parliament simply decided to place that issue into the hands of the courts: consider *Colle*[15], and see *Butt*[16].

d. **One offence**. Fourthly, s.327 POCA, unlike s.49 DTA and s.93C CJA 1988, does not create two offences in respect of (i) the person who launders the proceeds of his own offending and (ii) the person who launders the proceeds of another person's offending. There is now just one offence.

24. In *Montila*[17], the Court of Appeal held that for an offence to be committed under s.49(2) DTA, or s.93C(2) CJA 1988, it was not necessary to prove that the property was in fact the proceeds of drug trafficking or the proceeds of a crime (as the case may be). It was sufficient to prove that D had reasonable grounds to suspect that the property was the proceeds of drug trafficking/crime, even if it was not. The House of Lords reversed that decision.[18] The mischief Parliament was seeking to address was the concealment (etc) of *actual* proceeds. Their Lordships noted the absence of "reasonable suspicion" as a basis for criminal liability in the three main international instruments [see para28, Report]. Suspicion, howsoever it is described, is also not mentioned in any of the three EC money laundering Directives. Their Lordships remarked:

> "Common to all three international instruments was the proposal that those third parties whose actions were to be criminalised were people who knew that the property which they were dealing with was the proceeds of drug trafficking or criminal conduct. Reasonable suspicion is not mentioned in any of them. It was of course open to the Legislature to find its own solutions to the problem in the domestic system. There is no doubt that the effectiveness of the measures that were being introduced was assisted by enabling prosecutions to be brought where there was no evidence

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12 [2004] EWCA Crim 2244

13 [2003] EWCA Crim 3712.

14 "There is no reason to think that limiting the offence to the avoidance of a prosecution in this country was the intention of Parliament, nor would it make any kind of sense", per Lord Justice Kay.

15 (1992) 95 Cr.App.R.67

16 [1999] Crim.L.R. 414

17 [2004] 1 WLR 624

18 [2004] UKHL 50

> of actual knowledge but reasonable grounds to suspect could be established. But to broaden the scope of the third party offences still further so as to bring cases within their reach where the Crown could not prove that the property that was being dealt with was the proceeds of drug trafficking or criminal conduct would have been a significant departure from what had been asked for by the international instruments. One would have expected some indication of this to be given to Parliament, and there was none."

Ascertaining the moment property becomes "criminal property"

25. What must be concealed (etc) is "criminal property", but for the purposes of POCA, it is sometimes difficult to identify the moment property becomes "criminal property".

26. In L*, G, Q and M,*[19] (also known as *Loizou and others*) the Court held that on a natural meaning of s.327(1), property must be "criminal property" *at the time that the relevant acts were done.* To illustrate the point Clarke LJ said (emphasis supplied):

> "Suppose I receive pay as a judge in cash, that cash is not criminal property. Suppose I use that money to pay Hughes J for a car which I know he has stolen. In that event I, of course, commit the offence of receiving goods knowing them to be stolen. I do not, however, commit the offence of transferring criminal property because the property I am transferring, namely the money which I earned as a judge, is not criminal property. Of course, in the hands of Hughes J as the seller of the stolen car, the cash is criminal property because it constitutes "a person's benefit from criminal conduct" within section 340(3)(a) which he knows suspects constitutes such a benefit within section 340(3)(b). Does Hughes J commit an offence under section 327(1)? **The answer is plainly no, because he has not concealed, disguised, converted or transferred criminal property**. He has simply received what is now criminal property and retained it. Section 327(1) does not create an offence of receiving criminal property.
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> …
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> 34. Of course, if the cash were criminal property in the hands of the transferor, immediately before the transfer, the transferee would commit the offence of transferring criminal property, if he was party to a joint enterprise pursuant to which the property was transferred. Indeed, as we understand it, that is the way in which the case is put against some of the appellants on the basis of the inferences sought to be drawn in paragraph 22 of the case summary to which we have referred earlier."

27. Although Hughes J would have received "criminal property", namely the cash, he would not have done anything that amounted to concealing it, or disguising it, etc. Section 327(1) does not create an offence of *receiving* "criminal property" but s.329 *does* makes it an offence to acquire criminal property, or to have possession of it, and the defence of 'adequate consideration' in s.329(1)(c) can hardly be said to be satisfied if the cash was obtained in exchange for a stolen car!

28. Would Hughes J have committed an offence contrary to s.327 by transferring the car to Clarke LJ? Professor David Ormerod in his commentary to that case implies that the answer is "yes":[20]

> "Hughes J. certainly does not commit an offence in relation to the cash received since that did not, at the time of/immediately before transfer, constitute criminal property. But does not Hughes J. commit an offence under s.327 by his transfer of the criminal property (the stolen car which directly represents the benefit of his crime)? What is more, if Clarke L.J. knows that Hughes J. has stolen the car, by purchasing it from him, is Clarke L.J. not also committing a money laundering offence by assisting Hughes J. in the commission of a money laundering offence, namely the transfer of the stolen car? It is submitted that the court's example ought to be treated with caution."

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19 [2005] EWCA Crim 1579

20 [2005] Crim.L.R. 885

Intending to use lawfully-acquired property for a crime: does it become "criminal property"?

29. In its skeleton argument, the Crown stated that property legitimately acquired becomes 'criminal property' under s.340 if a person forms an intention to use it for a criminal purpose. The court did not decide that this was wrong, but it said (*obiter*) that such a result would not be justified by the statutory language, and that chapter 3 of Part 5 POCA (cash forfeiture), and civil recovery (Part 5, POCA) might be apt to deal with that situation.

30. It is respectfully submitted that the Crown's argument is flawed. "Criminal property" flows from "criminal conduct". Property does not become "criminal property" in a case where a crime is contemplated but not yet carried out (even partially). Thus, money lawfully acquired by D does not become "criminal property" the moment D intends to buy drugs in order to sell them.

    Scenario 1
    "X" wins £10,000 in a lawful lottery, but the following day he agrees with "Y" to finance a drug smuggling venture using his winnings. The money is obviously "property" for the purposes of POCA [s.340(9)(a)], but at the moment "X" agreed to smuggle drugs, the money had not been *obtained* by "X" as a "benefit from criminal conduct" [s.340(2) to s.340(5)] and therefore it does not constitute "criminal property" in the hands of "X".

    Scenario 2
    X joined a conspiracy to smuggle drugs and then sold his lawfully acquired boat for £90,000. X used the proceeds to buy drugs. By virtue of s.340(5), a person "benefits from conduct if he obtains property as a result of or in connection with the conduct". Conduct means "criminal conduct". A conspiracy to unlawfully import controlled drugs is "criminal conduct". The question that arises is whether X obtained the proceeds of sale "in connection with" the conspiracy.
    It is submitted that the property – i.e. the proceeds – was obtained by way of a lawful sale of the boat. Giving the section a purposive interpretation, there is no identifiable benefit that X obtained as a result of, or even in connection with, the conspiracy: *Rigby*,[21] and *In Re R. and re Criminal Justice Act 1988*,[22] see also *McKinnon*[23].

31. Note that s.327(1)(e) does not speak of removing property out of "the jurisdiction", but merely that property is removed "from" England and Wales, or Scotland, or Northern Ireland. The view expressed by the author of the annotations to Part 7 of POCA[24] suggests that it is enough for a person to move the property out of one of the UK constituent jurisdictions. It is submitted that this is correct. Parliament did not use the expression "from the United Kingdom" as it could have done had it wished to avoid such a construction.

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21 [2006] EWCA Crim 1653
22 [1991] COD 369
23 [2004] EWCA Crim 395
24 Current Law Statutes "The Proceeds of Crime Act 2002"

Offence: Concerned in an arrangement: s.328 [25]

Statutory provisions

32. Section 328 provides (in part):

> "(1) A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.
>
> (2) But a person does not commit such an offence if-
>
> (a) he makes an authorised disclosure under section 338 and (if the disclosure is made before he does the act mentioned in subsection (1)) he has the appropriate consent;
>
> (b) he intended to make such a disclosure but had a reasonable excuse for not doing so;
>
> (c) the act he does is done in carrying out a function he has relating to the enforcement of any provision of this Act or of any other enactment relating to criminal conduct or benefit from criminal conduct."

Discussion

33. The s.328 offence has its origins in s.24 of the DTOA 1986, and later s.50 DTA.[26] Corresponding provisions relating to other forms of criminal conduct appear in s.93A of the CJA 1988, and s.38 of the Criminal Law (Consolidation) (Scotland) Act 1995; and see *Colle*,[27] and *Butt*.[28]

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[25] The amendments to these sections appear in Fortson, *Serious Organised Crime and Police Act 2005* (Current Law Statutes, Sweet & Maxwell). For a useful colour coded set of amendments see: http://www.lawsociety.org.uk/documents/downloads/ML_POCAamends.pdf

[26] 50.—(1) Subject to subsection (3) below, a person is guilty of an offence if he enters into or is otherwise concerned in an arrangement whereby—

(a) the retention or control by or on behalf of another person (call him "A") of A's proceeds of drug trafficking is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise), or

(b) A's proceeds of drug trafficking—

(i) are used to secure that funds are placed at A's disposal, or

(ii) are used for A's benefit to acquire property by way of investment,

and he knows or suspects that A is a person who carries on or has carried on drug trafficking or has benefited from drug trafficking.

(2) In this section, references to any person's proceeds of drug trafficking include a reference to any property which in whole or in part directly or indirectly represented in his hands his proceeds of drug trafficking.

(3) Where a person discloses to a constable a suspicion or belief that any funds or investments are derived from or used in connection with drug trafficking, or discloses to a constable any matter on which such a suspicion or belief is based—

(a) the disclosure shall not be treated as a breach of any restriction upon the disclosure of information imposed by statute or otherwise; and

(b) if he does any act in contravention of subsection (1) above and the disclosure relates to the arrangement concerned, he does not commit an offence under this section if—

(i) the disclosure is made before he does the act concerned and the act is done with the consent of the constable; or

(ii) the disclosure is made after he does the act, but is made on his initiative and as soon as it is reasonable for him to make it.

(4) In proceedings against a person for an offence under this section, it is a defence to prove—

(a) that he did not know or suspect that the arrangement related to any person's proceeds of drug trafficking;

(b) that he did not know or suspect that by the arrangement the retention or control by or on behalf of A of any property was facilitated or, as the case may be, that by the arrangement any property was used as mentioned in subsection (1)(b) above; or

(c) that—

(i) he intended to disclose to a constable such a suspicion, belief or matter as is mentioned in subsection (3) above in relation to the arrangement, but

(ii) there is reasonable excuse for his failure to make any such disclosure in the manner mentioned in paragraph (b)(i) or (ii) of that subsection.

(5) In the case of a person who was in employment at the time in question, subsections (3) and (4) above shall have effect in relation to disclosures, and intended disclosures, to the appropriate person in accordance with the procedure established by his employer for the making of such disclosures as they have effect in relation to disclosures, and intended disclosures, to a constable.

[27] (1992) 95 Cr.App.R. 67

[28] [1999] Crim.L.R. 414

34. Significant differences exist between the s.328 offence and the earlier offences, and therefore pre-POCA cases need to be applied with care:

    (i) The phrase "becomes concerned in" replaces "is otherwise concerned in". There is probably little practical difference brought about by this change.

    (ii) The *mens rea* under s.50DTA/93A,CJA is fairly narrow, namely, that D knew or suspected that "A" carried on drug trafficking/crime and, with that *mens rea*, he became concerned in an arrangement which in fact facilitated e.g. the retention of criminal proceeds by "A".

    Under s.328 POCA there is a double *mens rea* requirement in section 328:
    (a) That the defendant knows or suspects that the arrangement will have one of the results specified in s.328(1), i.e. "acquisition, retention, use, or control" of criminal property, and
    (b) That the alleged offender "knows or suspects" that the property constitutes or represent somebody's benefit from criminal conduct: s.340(3)(b).

    (iii) Section 328 requires the prosecution to prove *mens rea*. The section does not replicate e.g. s.50(4)(a) and (b) DTA, which placed a burden on the defendant to prove lack of knowledge or suspicion.

35. The "another person" need not be the person who originally obtained property as a result of, or in connection with, conduct carried on by him.

36. The key words in s.328 POCA are "becomes concerned in", "arrangement", and "facilitates". *Bowman v Fels*.[29]

Must 'criminal property' exist?

37. As stated above, the s.328 offence has a double *mens rea* requirement, but in *Archbold News*[30] it is stated ("with great reluctance") that "it is arguable that the criminal 'arrangement' is to be defined solely by reference to the accused's state of mind" with the results (i) that the offence is complete once the arrangement has been entered into, and (ii) the arrangement may relate to unspecified future goods "or even property which has not yet come into existence". The point is indeed 'arguable' but it is not an argument that ought to succeed, and indeed, were it to fail, the problems posed in the article would disappear. It is submitted that s.328 punishes a person who enters into an arrangement that enables a third party to keep his/her ill-gotten proceeds. The section is not intended to relate to unspecified future goods: thus, logically, there is – as Parliament intended - a place for conspiracy to commit the s.328 offence (see s.349(11) of POCA 2002).

38. The s.50 DTA offence includes the words "the retention or control by or on behalf of another person (call him "A") of A's proceeds of drug trafficking is facilitated". It might be said that the wording of s.328 POCA deliberately changed the law by catching future dealing with criminal property. The better view is that Parliament merely wished to streamline a cumbersome, convoluted, offence.

39. In s.328, the *mens rea* is directed at the fact of facilitation. The definition of "criminal property" is relevant here, because s.340(3) defines such property as that which [emphasis supplied]

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29 [2005] EWCA 226, CA

30 July 19, 2005, issue 7, page 8; Tony Shaw Q.C., and Professor David Ormerod.

> "(a) …constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and
> (b) the alleged offender knows or suspects that it constitutes or represents such a benefit."

For the purposes of s.340 (and therefore for the purposes of s.328), the "alleged offender" is D. D's state of mind must relate to a person's benefit from criminal conduct (s.340(3)(a)) – that is to say, criminal property that exists.

40. It is further submitted that Parliament did not intend to introduce an offence (s.328) that would be out of place with the structure of the remaining money laundering offences (namely s.327 and s.329 (and see *Montila* (HL)).

Facilitating or retention

41. Exchanging currency is capable of constituting "facilitating or retention" in s.328: *McMaster*[31]; *Tarsemwal Lal Sabhawal.*[32]

42. See the case of *K v National Westminster Bank, HMRC, SOCA* [2006] EWCA Civ 1039 where the bank asserted that to comply with a payment request made its customer to pay money out of its account would mean that it would become concerned in an arrangement which it suspected would facilitate the use of criminal property by its customer. In order to avoid committing a criminal offence it had therefore to make an authorised disclosure and obtain the appropriate consent. The Court (Longmore LJ) said:

> "There can be no doubt that, if a banker knows or suspects that money in a customer's account is criminal property and, without making disclosure or without authorised consent (if disclosure is made), he processes a customer's cheque in such a way as to transfer that money into the account of another person, he facilitates the use or control of that criminal property and thus commits an offence under section 328 of the 2002 Act. It would be no defence to a charge under that section that the Bank was contractually obliged to obey its customer's instructions."

Bowman v Fels [2005] EWCA Civ 226

43. It is not surprising that the s.328 offence is a source of considerable concern to those who handle, or advise third parties in connection with money and other types of property. Even judges became alarmed that a decision/judgment made by them might be caught by s.328 POCA. But it is surprising that the same concern was not voiced before s.328 was enacted given the reach of s.50 DTA 1994 and s.93A CJA 1988.

44. The central question on the appeal was whether s.328 applies to the ordinary conduct of legal proceedings "or any aspect of such conduct - including, in particular, any step taken to pursue proceedings and the obtaining of a judgment" [para.52].

45. The Court answered the question as follows:

(1) It is improbable that Parliament, being the UK legislator, had the ordinary conduct of legal proceedings to judgment in mind under s 328 [para.63].

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[31] (1994) 1 Cr.App. R. 402
[32] [2001] 2 Cr.App.R(S) 81

(2) Section 328 is not intended to cover or affect the ordinary conduct of litigation by legal professionals. To describe a judgment or order as an "arrangement" is an unnatural use of language, whether one looks at the matter from the viewpoint of the litigant, the lawyers or the judge [para.65]. Therefore, a judgment or order is not an 'arrangement' within the section [para.65].

(3) Any steps taken to issue or to pursue legal proceedings with a view to obtaining a judgment or order, is outside the concept of "arrangement" [para.66].

(4) To enter into an arrangement involves a single act at a single point in time; so too…does to "become concerned" in an arrangement, even though the point at which someone may be said to have "become" concerned may be open to argument [para.67]: see also the decision of the Court of Appeal in *Ramzan*[33] on this point.

(5) Section 328 is not intended to cover or affect the ordinary conduct of litigation by legal professionals. That includes any step taken by them in litigation from the issue of proceedings and the securing of injunctive relief or a freezing order up to its final disposal by judgment. There is nothing in the language of s.328 to suggest that Parliament intended to override legal professional privilege [para.83].

46. The court left open whether s.328 means that a person who has done some previous act "such as giving advice, or playing a role in negotiations, can fall to be treated retroactively as having committed an offence by that act, if and when an arrangement is subsequently made".

47. For a discussion of the meaning of the word "suspects" see "*Failure to disclosure: s.330*" below.

Offence: Acquisition, or use and possession – s.329 [34]

48. Section 329 provides (as amended by SOCPA: amendments are in italics):

"(1) A person commits an offence if he-

(a) acquires criminal property;
(b) uses criminal property;
(c) has possession of criminal property.

(2) But a person does not commit such an offence if-

(a) he makes an authorised disclosure under section 338 and (if the disclosure is made before he does the act mentioned in subsection (1)) he has the appropriate consent;
(b) he intended to make such a disclosure but had a reasonable excuse for not doing so;
(c) he acquired or used or had possession of the property for adequate consideration;
(d) the act he does is done in carrying out a function he has relating to the enforcement of any provision of this Act or of any other enactment relating to criminal conduct or benefit from criminal conduct.

(2A) Nor does a person commit an offence under subsection (1) if-

(a) he knows, or believes on reasonable grounds, that the relevant criminal conduct occurred in a particular country or territory outside the United Kingdom, and
(b) the relevant criminal conduct-
(i) was not, at the time it occurred, unlawful under the criminal law then applying in that country or territory, and
(ii) is not of a description prescribed by an order made by the Secretary of State.

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33 [2006] EWCA Crim 1974

34 The amendments to these sections appear in Fortson, *Serious Organised Crime and Police Act 2005* (Current Law Statutes, Sweet & Maxwell). For a useful colour coded set of amendments see: http://www.lawsociety.org.uk/documents/downloads/ML_POCAamends.pdf

(2B) In subsection (2A) "the relevant criminal conduct" is the criminal conduct by reference to which the property concerned is criminal property.

(2C) A deposit-taking body that does an act mentioned in subsection (1) does not commit an offence under that subsection if-

(a) it does the act in operating an account maintained with it, and

(b) the value of the criminal property concerned is less than the threshold amount determined under section 339A for the act.

(3) For the purposes of this section-

(a) a person acquires property for inadequate consideration if the value of the consideration is significantly less than the value of the property;

(b) a person uses or has possession of property for inadequate consideration if the value of the consideration is significantly less than the value of the use or possession;

(c) the provision by a person of goods or services which he knows or suspects may help another to carry out criminal conduct is not consideration.

49. This offence has its origins in s.14(3) of the Criminal Justice (International Co-operation) Act 1990, and later enacted as s.51 of the Drug Trafficking Act 1994[35] and mirrored in s.93B of the CJA 1988.

50. The offence requires proof of *mens rea*, i.e. knowing or suspecting that the property is obtained from "criminal conduct": see s.340. The usual defence will be that "adequate consideration" was given - a question of fact for the jury. Note that s.51 DTA/s.93B, CJA 1988, required nothing less than "knowledge" of the illicit origin of the property. The pendulum has therefore swung back and forth in relation to *mens rea* because, under s.14(3) Criminal Justice (International Co-operation) Act 1990, the *mens rea* for that offence is "knowing or having reasonable grounds to suspect"!

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[35] 51.—(1) A person is guilty of an offence if, knowing that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of drug trafficking, he acquires or uses that property or has possession of it.

(2) It is a defence to a charge of committing an offence under this section that the person charged acquired or used the property or had possession of it for adequate consideration.

(3) For the purposes of subsection (2) above—

(a) a person acquires property for inadequate consideration if the value of the consideration is significantly less than the value of the property; and

(b) a person uses or has possession of property for inadequate consideration if the value of the consideration is significantly less than the value of his use or possession of the property.

(4) The provision for any person of services or goods which are of assistance to him in drug trafficking shall not be treated as consideration for the purposes of subsection (2) above.

(5) Where a person discloses to a constable a suspicion or belief that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of drug trafficking, or discloses to a constable any matter on which such a suspicion or belief is based—

(a) the disclosure shall not be treated as a breach of any restriction upon the disclosure of information imposed by statute or otherwise; and

(b) if he does any act in relation to the property in contravention of subsection (1) above, he does not commit an offence under this section if—

(i) the disclosure is made before he does the act concerned and the act is done with the consent of the constable; or

(ii) the disclosure is made after he does the act, but is made on his initiative and as soon as it is reasonable for him to make it.

(6) For the purposes of this section, having possession of any property shall be taken to be doing an act in relation to it.

(7) In proceedings against a person for an offence under this section, it is a defence to prove that—

(a) he intended to disclose to a constable such a suspicion, belief or matter as is mentioned in subsection (5) above, but

(b) there is reasonable excuse for his failure to make any such disclosure in the manner mentioned in paragraph (b)(i) or (ii) of that subsection.

(8) In the case of a person who was in employment at the time in question, subsections (5) and (7) above shall have effect in relation to disclosures, and intended disclosures, to the appropriate person in accordance with the procedure established by his employer for the making of such disclosures as they have effect in relation to disclosures, and intended disclosures, to a constable.

(9) No constable or other person shall be guilty of an offence under this section in respect of anything done by him in the course of acting in connection with the enforcement, or intended enforcement, of any provision of this Act or of any other enactment relating to drug trafficking or the proceeds of drug trafficking.

51. Note that s.14(3) of Criminal Justice (International Co-operation) Act 1990 was limited to the acquisition of property. Section 51 DTA/s.93B CJA 1988, extended the activities to "use" and "possession". This is consistent with the three EC money laundering Directives.

Offence: Failure to disclosure: s.330 [36]

Statutory provision

52. Section 330 as amended by SOCPA provides (in part):

(1) A person commits an offence if *the conditions in subsections (2)-(4) are satisfied.*

(2) The first condition is that he-

(a) knows or suspects, or

(b) has reasonable grounds for knowing or suspecting, that another person is engaged in money laundering.

(3) The second condition is that the information or other matter-

(a) on which his knowledge or suspicion is based, or

(b) which gives reasonable grounds for such knowledge or suspicion, came to him in the course of a business in the regulated sector.

(3A) The third condition is-

(a) that he can identify the other person mentioned in subsection (2) or the whereabouts of any of the laundered property, or

(b) that he believes, or it is reasonable to expect him to believe, that the information or other matter mentioned in subsection (3) will or may assist in identifying that other person or the whereabouts of any of the laundered property.

(4) The fourth condition is that he does not make the required disclosure to-

(a) a nominated officer, or

(b) a person authorised for the purposes of this Part by the Director General of the Serious Organised Crime Agency, as soon as is practicable after the information or other matter mentioned in subsection (3) comes to him.

(5) The required disclosure is a disclosure of-

(a) the identity of the other person mentioned in subsection (2), if he knows it,

(b) the whereabouts of the laundered property, so far as he knows it, and

(c) the information or other matter mentioned in subsection (3).

(5A) The laundered property is the property forming the subject-matter of the money laundering that he knows or suspects, or has reasonable grounds for knowing or suspecting, that other person to be engaged in.

(6) But he does not commit an offence under this section if-

(a) he has a reasonable excuse for not making the required disclosure,

(b) he is a professional legal adviser and-

(i) if he knows either of the things mentioned in subsection (5) (a) and (b), he knows the thing because of information or other matter that came to him in privileged circumstances, or

(ii) the information or other matter mentioned in subsection (3) came to him in privileged circumstances, or (c) subsection (7) applies to him.

(7) This subsection applies to a person if-

(a) he does not know or suspect that another person is engaged in money laundering, and

(b) he has not been provided by his employer with such training as is specified by the Secretary of State by order for the purposes of this section.

[36] The amendments to these sections appear in Fortson, *Serious Organised Crime and Police Act 2005* (Current Law Statutes, Sweet & Maxwell). For a useful colour coded set of amendments see: http://www.lawsociety.org.uk/documents/downloads/ML_POCAamends.pdf

Discussion

53. Section 330 applies to persons engaged in business in the "regulated sector" – a term defined by s.330(12) POCA, and Schedule 9 (as amended by the *Proceeds of Crime Act 2002 (Business in the Regulated Sector and Supervisory Authorities) Order 2003 (S.I. 2003 No. 3074*), and S.I. 2006 No. 2385 *The Proceeds of Crime Act 2002 (Business in the Regulated Sector) Order 2006*).

54. The first condition mentioned in section 330(2) requires proof that the defendant (i) knows, or (ii) suspects, or (iii) that he has reasonable grounds for knowing or suspecting (etc). For a discussion as to what is meant by "knowledge', 'belief' and 'suspicion': see Glanville Williams, "*Handling, Theft and the Purchaser who takes a Chance*" [and see *Hall*[37]; *Toor*[38]].

55. In the 5th edition of "*Misuse of Drugs: Offences, Confiscation and Money Laundering*,[39] the author suggested that for a defendant to have culpable "suspicion", his/her suspicion must have a rational basis, and that it is not enough that a person has an 'inkling' that something improper is occurring, or has occurred.

56. In *Da Silva*,[40] the Court of Appeal gave guidance as to the meaning of the word "suspicion" in the context of the CJA 1988. The Court remarked that using words such as "inkling" or "fleeting thought" is liable to mislead. The Court recommended that if such words are to be used then the following points ought to be kept in mind:

> "What then does the word "suspecting" mean in its particular context in the 1988 Act? It seems to us that the essential element in the word "suspect" and its affiliates, in this context, is that the defendant must think that there is a possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease would not suffice. But the statute does not require the suspicion to be "clear" or "firmly grounded and targeted on specific facts", or based upon "reasonable grounds". To require the prosecution to satisfy such criteria as to the strength of the suspicion would, in our view, be putting a gloss on the section.
>
> We consider therefore that, for the purpose of a conviction under section 93A(1) (a) of the 1988 Act, the prosecution must prove that the defendant's acts of facilitating another person's retention or control of the proceeds of criminal conduct were done by a defendant who thought that there was a possibility, which was more than fanciful, that the other person was or had been engaged in or had benefited from criminal conduct. We consider that, if a judge feels it appropriate to assist the jury with the word "suspecting", a direction along these lines will be adequate and accurate.
>
> 17. The only possible qualification to this conclusion, is whether, in an appropriate case, a jury should also be directed that the suspicion must be of a settled nature; a case might, for example, arise in which a defendant did entertain a suspicion in the above sense but, on further thought, honestly dismissed it from his or her mind as being unworthy or as contrary to such evidence as existed or as being outweighed by other considerations. In such a case a careful direction to the jury might be required. But, in our view, before such a direction was necessary there would have to be some reason to suppose that the defendant went through some such thought process as set above. The present case was not a case where any such direction could be thought to be necessary."

57. The Court also made it clear that in instances where the word "suspects" appear without words of qualification (such as "on reasonable grounds" or "reasonably suspects") there is no justification for importing them into the statutory provision in question:

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37 [1985] Crim.L.R. 377
38 (1987) 85 Cr.App.R. 116
39 Sweet & Maxwell, 2005. R. Fortson.
40 [2006] EWCA Crim 1654

> "We regard this as an impossible argument. This court could not, even if it wished to, imply a word such as 'reasonable' into this statutory provision. To do so would be to make a material change in the statutory provision for which there is no warrant. This is all the more the case when one sees that the draftsman is aware of the difference between 'suspecting' and 'having reasonable grounds to suspect' and on occasion uses the latter phrase in preference to the former word."

58. There is no reason to gloss the word "suspicion" other than to limit the reach of a criminal provision (policy). The word means the same in civil law as it does in criminal law: *K v National Westminster Bank, HMRC, SOCA* 2006] EWCA Civ 1039.

59. The Court, in *Da Silva* did not define the phrase "reasonable grounds to suspect"; but the House of Lords in *Saik* did do so. It now seems clear that the phrase has both a subjective and an objective requirement.

60. It will be seen that s.14 CJICA 1990 uses the phrase "reasonable grounds to suspect" as an alternative to knowledge, whereas the 1988 Convention only required domestic states to create money-laundering offences that would be punishable "when committed intentionally". In *Montila*, the House of Lords noted the absence of "reasonable suspicion" as a basis for criminal liability in the three main international instruments [para.28].

61. It is worth noting that the *First Money Laundering Directive* (10th June 1991; 91/308/EEC) makes it clear that, for the purposes of the Directive, the conduct which it defines as "money laundering", is conduct "committed intentionally" i.e. "knowing that…property is derived from criminal activity or from an act of participation in such activity". It also states that "*knowledge*, *intent* or *purpose* required as an element of the abovementioned activities may be inferred from objective factual circumstances" [emphasis supplied]. The so-called "*Second Money Laundering Directive*" (it actually amends the first one) also defines "money laundering" as conduct "committed intentionally".[41] The *Third Money Laundering Directive* (2005/60/EC) is similarly expressed in relation to the mental element of activities that it describes as "money laundering".

62. It might be said that "having reasonable grounds to suspect" is entirely objective, but it is unclear whether Parliament intended to create an objective requirement. It is submitted that it is more likely that Parliament thought that it was merely using a phrase that has appeared in other enactments and which has already been the subject of judicial comment – especially in relation to police powers.[42] It is therefore unsurprising that, in *Saik*, Lord Hope expressed the opinion that "having reason to suspect" (for the purposes of existing money laundering offences) has an objective as well as a subjective requirement. Lord Hope said:

> "The test as to whether a person has reasonable grounds to suspect is familiar in other contexts, such as where a power of arrest or of search is given by statute to a police officer. In those contexts the assumption is that the person has a suspicion, otherwise he would not be thinking of doing what the statute contemplates. The objective test is introduced in the

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41 Directive 2001/97/EC.

42 In "*The Serious Organised Crime and Police Act 2005*", Current Law Statutes, Annotated, Sweet & Maxwell, this author wrote – in the context of amendments made to s.24 PACE 1984 (arrest) – "Although it is possible to construe the words "reasonable grounds for suspecting", as meaning only that reasonable grounds must exist, even if the officer did not in fact suspect, this would be to overlook the fact that that a reasonable suspicion "is the source from which all a police constable's powers of arrest flow..." (per Bingham LJ., as he then was): *Chapman v. D.P.P* [1988] Crim.L.R. 843, and note the commentary to that case. The Court, in *Chapman*, did not draw a distinction between the two phrases: and see *Davis v. D.P.P* [1988] Crim.L.R. 249; *O'Hara v. Chief Constable of the Royal Ulster Constabulary* [1997] 1 Cr.App.R. 447, [1997] Crim.L.R. 432 and the commentary to that case."

> interests of fairness, to ensure that the suspicion has a reasonable basis for it. The subjective test - actual suspicion - is not enough. The objective test - that there were reasonable grounds for it - must be satisfied too. In *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286, where the issue related to the test in section 12(1) of the Prevention of Terrorism (Temporary Provisions) Act 1984 which gave power to a constable to arrest a person without warrant if he had reasonable grounds for suspecting that he was concerned in acts of terrorism, I said at p 298A-C:
>
> > "In part it is a subjective test, because he must have formed a genuine suspicion in his own mind that the person has been concerned in acts of terrorism. In part also it is an objective one, because there must also be reasonable grounds for the suspicion which he has formed. But the application of the objective test does not require the court to look beyond what was in the mind of the arresting officer. It is the grounds which were in his mind at the time which must be found to be reasonable grounds for the suspicion which he has formed."
>
> 53. The words used in section 93C(2) can, in my opinion, be analysed in the same way. By requiring proof of knowledge or of reasonable grounds to suspect that the property was criminal proceeds, the subsection directs attention in the case of each of these two alternatives to what was in the mind of the defendant when he engaged in the prohibited activity. Proof that he had reasonable grounds to suspect the origin of the property is treated in the same way as proof of knowledge. The subsection assumes that a person who is proved to have had reasonable grounds to suspect that the property had a criminal origin did in fact suspect that this was so when he proceeded to deal with it. A person who has reasonable grounds to suspect is on notice that he is at the same risk of being prosecuted under the subsection as someone who knows. It is not necessary to prove actual knowledge, which is a subjective requirement. The prosecutor can rely instead on suspicion. But if this alternative is adopted, proof of suspicion is not enough. It must be proved that there were reasonable grounds for the suspicion. In other words, the first requirement contains both a subjective part - that the person suspects - and an objective part - that there are reasonable grounds for the suspicion."

63. It is submitted that the reasoning of Lord Hope has much to commend it.

64. This paper does not dwell on section 330 POCA (tipping off) but in *K v National Westminster Bank, HMRC*, SOCA, the Court made some interesting and helpful observations on the question whether it was open to a party to legal proceedings to cross-examine as to the basis for the suspicion. The Court said:

> This section makes it clear that a banker who makes a disclosure which he knows or suspects is likely to prejudice any investigation commits a criminal offence. The only sure way in which such an offence can be avoided is if the banker avails himself of sub-section 2(c) and procures his professional legal adviser to make the relevant disclosure and then only to a person in connection with legal proceedings pursuant to sub-section 3(b). The Bank in the present case correctly followed this statutory route of disclosure and procured its solicitors to make the relevant disclosure to the court by the letter of 6th September 2005, when they were sued by the claimant for an injunction.
>
> It cannot be of any consequence whether the Bank's solicitor made the disclosure to the court by way of letter or by way of formal witness statement since the solicitor will not himself have any suspicion; he will only be reporting the suspicion of the bank's officers, whether that be the Nominated Officer of the bank or the manager of the account who may have been the first person to entertain the relevant suspicion. It would be a fruitless exercise to cross-examine the solicitor about the existence of the bank's suspicion. There is, moreover, no mechanism whereby any officer of the bank can be required to attend for cross-examination since there is no provision enabling the relevant person to give evidence of his suspicion.
>
> This is not surprising. It may well have been the intention of the statute to protect those having a suspicion and reporting that suspicion to the authorities from being identified, since it is notorious that those concerned in money laundering are no respecters of persons who report them to the authorities. This conclusion is bolstered by the further consideration that any cross-examination of a bank employee would, in fact, be almost as pointless as cross-examination of a bank's solicitor. Once the employee confirmed that he had a suspicion, any judge would be

highly likely to find that he did indeed have that suspicion. Any cross-examination would be bound to decline into an argument whether what the employee thought could amount in law to a suspicion, which is not a proper matter for cross-examination at all.

Ms Dohmann submitted that, if this was the position, it would be all too easy for banks to assert a suspicion which was in fact groundless. She instanced this very case, saying that the only reasons for the transaction to be suspect was that it concerned mobile telephones and that the payment by the Swiss purchaser came from an off shore account. That she said was just not enough to amount to a proper suspicion in law. The answer to this submission is two-fold:-

(1) The existence of suspicion is a subjective fact. There is no legal requirement that there should be reasonable grounds for the suspicion. The relevant bank employee either suspects or he does not. If he does suspect, he must (either himself or through the Bank's Nominated Officer) inform the authorities;

(2) The provisions of the statute permitting only the bank's professional legal adviser to make a disclosure on its behalf and then only for the purpose of court proceedings cannot be side-stepped.

The truth is that Parliament has struck a precise and workable balance of conflicting interests in the 2002 Act. It is, of course, true that to intervene between a banker and his customer in the performance of the contract of mandate is a serious interference with the free flow of trade. But Parliament has considered that a limited interference is to be tolerated in preference to allowing the undoubted evil of money-laundering to run rife in the commercial community. The fact that the interference lasts only for 7 working days in what we were told were the majority of cases and a further 31 days only, unless the relevant authority goes to the length of applying to the court for a Restraint Order when all cards will have to be on the table in any event, shows that the interference with freedom of trade is limited. Many people would think that a reasonable balance has been struck. That reasonable balance avoids the difficulties, raised by the previous statutory provisions (contained in sections 93A–93D of the Criminal Justice Act 1988 where no time limits were incorporated) and discussed in *Bank of Scotland v A Ltd* [2001] EWCA Civ 52, [2001] 1 WLR 751 and *Amalgamated Metal Trading Ltd v City of London Police Financial Investigation Unit* [2003] EWHC 703 (Comm), [2003] 1 WLR 2711.

Even so the terms of the Act have, not surprisingly, given rise to concern. Judge Norris QC in *New Bridge Holdings v Barclays Bank* in Birmingham 10th February 2006, paragraph 26, has suggested that one way forward might be:-

> "to provide for some procedure whereby the arbitrary and capricious exercise of power should be prevented by the court being told, in confidence by the relevant authority, whether or not an investigation is in progress and the general nature of that investigation, so that the court could form a view – a view as to the likely success of the applicant at trial in obtaining the relief he seeks or the Bank committing an offence if it makes the transfer without the relevant consent."

I fear that I do not think it would be satisfactory or acceptable for SOCA to communicate privately to the court without the court being able to communicate to the claimant. That would not be open justice. Insofar as Judge Norris was concerned about arbitrary or capricious exercise of power by SOCA (or any other relevant authority) that can be catered for by judicial review. I did not understand Mr Mitchell to assert that SOCA (or any other authority) were not amenable to judicial review on ordinary principles. That is not a matter with which this court is concerned on this application. The only matter with which this court is presently dealing is whether the Bank had a suspicion that the money in its customer's account was criminal property. But again for the Bank to communicate its suspicion to a judge in private would not be right either. Quite apart from the elementary principle of open justice, the court might be put in a position where its own view was that the Bank did not hold a suspicion (perhaps because it thought that any suspicion could not reasonably be held) but the SOCA took a contrary view. An expression of view by the court in the absence of SOCA could not bind them; it would also be a misuse of resources for them to have to instruct counsel in every case in order that they could be bound by the result. For all these reasons I do not think it right for the judge to be drawn into dealing with these matters in the absence of the claimant. It is quite unlike debates about privileged documents when the judge sometimes sees the documents and

makes up his own mind whether privilege is rightly claimed. In such cases the litigation is well developed and the issues can be debated, at any rate in outline, with all parties present.

Is a money-laundering charge an activity offence?

65. In *Ramzan*, the Court of Appeal said [emphasis supplied]:

> "59. Mr Sells contends that wherever there is a course of criminal conduct, a single count may be preferred, charging an activity offence. We are unable to accept so widely stated a proposition. If it were correct, it would mean that all the debate which has occupied the criminal law for years as to how to deal with repetitive offences from employee theft via benefit fraud to sexual assault has been unnecessary. So too would the recent enactment of the provisions of section 17 and following of the Domestic Violence, Crime and Victims Act 2004.
> 60. We do not consider that the substantive offences of money laundering contained in s.49(2) Drug Trafficking Act 1994 and s.93C(2) Criminal Justice Act 1988 are in *pari materia* to that in s.170 Customs and Excise Management Act 1979, nor that they should be regarded as activity offences. The statutory language is quite different. An offence is committed with each conversion, or removal etc of money. Different considerations may apply to different transactions, particularly if the jury is invited by the Crown to infer mens rea from the repetition, scale or circumstances of them. Sample charges may well be appropriate, depending on the evidence, but that is not the same thing as a compendious count of the kind proposed. Moreover, substitution at this stage is a matter of discretion, and this Court does not have the opportunity to re-create the evolution of the trial. We are not prepared to substitute convictions for offences in the form proposed.
> 61. We have not addressed, and say nothing about the nature of:
> i) offences against differently expressed provisions of the Acts, for example s.50 Drug Trafficking Act and s.93A Criminal Justice Act; and compare now s.328 Proceeds of Crime Act;
> ii) sample count(s), if demonstrably appropriate."

66. The decision of the Court on this point – which is limited (at the moment) to s.49(2) DTA, and s.93C(2) CJA 1988 – will require a prosecutor think carefully about the number of substantive counts that ought to be on an indictment in order to allow the sentencer to sentence appropriately in the event of conviction. This, of course, is said pending s.17 of the Domestic Violence Crime and Victims Act 2004 coming into force.

67. It is relevant to note what the Court of Appeal said in *Bowman v Fels*[43] about money laundering offences under POCA 2002 regarding whether they constitute activity offences [emphasis supplied]:

> "First, each of ss 327-9 speaks of doing an act in precise terms suggestive of a focus on a particular point in time. This is so in the case of ss 327 and 329, even though use or possession of criminal property may be continuing, with the result that a charge may be brought and may succeed by reference to any point during a period. In s 328 the nature of the act is either entering into an arrangement or the vaguer concept of "becom[ing] concerned in an arrangement". To enter into an arrangement involves a single act at a single point in time; so too, on the face of it, does to "become concerned" in an arrangement, even though the point at which someone may be said to have "become" concerned may be open to argument."

[43] [2005] EWCA Civ 226

Conspiracy to commit a money laundering offence [44]

Section 1 of the Criminal Law Act 1977

68. Section 1(1) of the Criminal Law Act 1977 provides:

> "Subject to the provisions of this Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either –
>
> (a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or
>
> (b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible,[45]
>
> he is guilty of conspiracy to commit the offence or offences in question."

69. However, s.1(1) is subject to section 1(2) which provides [emphasis supplied]:

> "(2) Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance **necessary for the commission of an offence**, a person shall nevertheless not be guilty of conspiracy to commit that offence by virtue of subsection (1) unless he and at least one other party to the agreement **intend or know that that fact or circumstance shall or will exist** at the time when the conduct constituting the offence is to take place."

Principles regarding s.1(1) and (2) CLA that are made clear in *Saik*.

70. The application of s.1 of the CLA 1977 has proved difficult in respect of money laundering offences (and generally). The leading case is the House of Lords decision in *Saik*.[46]

71. *Saik* clarifies a number of matters of general application regarding the application of s.1(1) and s.1(2) CLA 1977:

    a. Section 1(2) applies to all offences. Its application is not limited to cases of recklessness or to offences of strict liability.[47]

    b. Section 1(2) is to be construed to avoid the result described by Professor Elliott as the "scandalous paradox".[48] That is to say, the operation of s.1(2) is not excluded merely because liability for an offence may be incurred with knowledge of a fact or circumstance of the *actus reus*.[49] Two decisions of the Court of Appeal get

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[44] I am immensely grateful to Professor David Ormerod for reading a draft of this paper and whose comments (and wider works) in this area of the criminal law have helped me to avoid a number of pitfalls that have certainly befallen others. Any errors that remain are mine and not his.

[45] Added by s.5 of the Criminal Attempts Act 1981.

[46] [2006] UKHL 18; 2 WLR 993

[47] According to Professor J.C. Smith, the purpose of s.1(2) CLA 1977 was to ensure that strict liability and recklessness have no place in conspiracy, even if the agreement was to commit a crime which might be committed recklessly or a crime of strict liability [*Conspiracy under the Criminal Law Act 1977 [part 1]* [1997] Crim L.R. 598; and *part 2* [1977] Crim L.R. 638; and see Lord Hope, *Saik*, para.59]. Professor Glanville Williams took a different view [*The New Statutory Offence of Conspiracy* (1927) 127 NLJ 1164] but the weight of academic and judicial opinion – even before *Saik* - was that s.1(2) excludes recklessness (at the very least) and therefore the words "intend" or "know" in s.1(2) must be contextualised and construed to give effect to that objective.

[48] Professor Elliott "*Mens Rea in Statutory Conspiracy, (1) A Comment*" [1978] Crim LR 202, 205.

[49] See also Professor David Ormerod's article *Making Sense of Mens Rea in Statutory Conspiracies*, Current Legal Problems, and who describes the paradox thus: "On a literal reading, intention or knowledge as to all the circumstances of the actus reus is to be required only where the agreement is to commit a crime which may be committed with recklessness or strict liability as to a material circumstance. On this reading, intention or knowledge would not be required where the substantive offence does require knowledge. Section 1(2) would therefore have created a stricter mens rea test for conspiracy to commit crimes of strict liability than for conspiracy to commit crimes which in substantive form require proof of knowledge or intention as to circumstances".

close to suggesting a contrary proposition, but these decisions ought to be disregarded on this point: *Sakavickas*[50] and *Rizvi*[51].

c. Section 1(2) applies only to facts and circumstances, relating to the *actus reus* of an offence which are "necessary for the commission of an offence" [s.1(2)]: see below.

d. Accordingly, what D must "know" or "intend" for the purposes of s.1(2) of the 1977 Act, is a fact or circumstance relating to the *actus reus* of the substantive offence and not to its *mens rea*: see below.

e. The word "know" is not to be watered down to "belief" or even "wilful blindness".

72. Less clear, is whether "conditional intent" may be sufficient *mens rea* for a conspiracy. The matter is considered in greater detail later in this paper.

Distinction between property identified and property not identified

73. In *Ramzan*,[52] Hughes L.J. summarised the effect of *Saik* (HL) as follows [para.9]:[53]

> "Because of the operation of s.1(2), a conspiracy requires proof that the Defendant intended or knew that that fact or circumstance would or did exist. That means that if the money was already identified when the conspiracy was formed, the Defendant must be proved to have known of its relevant illicit origins, or, if no money was yet identified, he must be proved to have intended that the money should be of such illicit origin. Thus, as with other offences, the mens rea for conspiracy is greater than for the substantive offence."

74. In *Saik*, S pleaded guilty to an offence of conspiracy "to convert the proceeds of drug trafficking and/or criminal conduct contrary to s.1(1) CLA1977". The prosecution case was that S and others conspired to convert banknotes, for the purpose of assisting another to avoid prosecution for a criminal offence knowing or having reasonable grounds to suspect that such property represented another person's proceeds of criminal conduct." In essence, this was a conspiracy to commit an offence contrary to s.49(2) DTA/s.93C(2) CJA.

75. Their lordships said that the way the prosecution put its case:

> "…might be taken to suggest that for the purpose of the conspiracy charge 'having reasonable grounds to suspect' was an alternative to proving knowledge. This is not so. The effect of section 1(2) was that the prosecution had to prove intention or knowledge".[54]

76. In a case where s.1(2) CLA 1977 applies, it is doubtful whether the prosecution may put its case in the alternative (intention or knowledge). The distinction, according to *Saik*, is

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50 [2004] EWCA Crim 2686; [2005] 1 WLR 857; [2005] Crim LR 293

51 [2003] EWCA Crim 3575

52 [2006] EWCA Crim 1974

53 *Ramzan* also makes clear that *Saik* will not result in the flood-gate being opened in respect of convictions pre-*Saik*: "It is the very well established practice of this Court, in a case where the conviction was entirely proper under the law as it stood at the time of trial, to grant leave to appeal against conviction out of time only where substantial injustice would otherwise be done to the Defendant". The Court added: "Where a case is considered by the CCRC, it is for the Commission to decide whether or not to make a reference to this Court. If it does, the reference stands as if leave has been granted: s.9(2) Criminal Appeal Act 1995. It follows that one effect of making such a reference is to pre-empt the decision which might otherwise be made on the merits of the case as to whether substantial injustice is established, so that leave should be granted, or whether leave should be refused in accordance with the ordinary practice of this court".
In *Ahmed and Qureshi* [2004] EWCA Crim 2599, Q was convicted of a conspiracy to contravene s. 93C(2) CJA 1988, and A was convicted of a conspiracy to contravene s.49(2) DTA 1994 and/or s.93C(2) CJA 1988. There appeal was limited to the confiscation orders made against them.

54 Lord Nicholls, para.28.

between cases where property is identified at the time the agreement is made (*knowledge*), and cases where property is not identified at that time (*intention*).

77. Where the allegation is that D committed a money-laundering offence (i.e. any of the offences contrary to s.327-329 POCA, or one of their forerunners)[55] the criminal provenance of the property is a fact necessary for the commission of the offence.

78. Where the allegation is a *conspiracy* to commit a money laundering offence, it remains the case that the criminal provenance of the money is a fact necessary for the commission of the full substantive offence, but what s.1(2) CLA 1977 requires is that the defendant either intended or knew that that fact shall or will exist at the time the agreement to commit the offence is carried out. Thus Lord Nicholls said [para.23]:

> "23… This fact falls within section 1(2). So, applying section 1(2) to that fact, the prosecution must prove the conspirator intended or knew that fact would exist when the conspiracy was carried out."

79. Whether the defendant falls into the category of either having intended, or knew of the existence of that fact turns on whether the property was unidentified or identified when the agreement was made.

Property not identified: intention to be shown

80. "…Where the property has not been identified when the conspiracy agreement is reached, the prosecution must prove the conspirator intended that the property would be the proceeds of criminal conduct": per Lord Nicholls in *Saik*.

81. The reason why this holds true was explained by Lord Nicholls [para.24]:

> "24. … where the conspiracy related to unidentified property, there is no question of having to prove that the property was the proceeds of criminal conduct…that is not possible. It is not possible because the property which was the subject of the conspiracy had not been identified when the conspiracy was entered into. Despite this, the crime of conspiracy will be committed. It will be committed even if the property never materialises or never exists…."

82. If the defendant intended to launder criminal property then it does not matter (i) that the property turned out not to be criminal property, or (ii) that the property never existed. The defendant's fate is thus determined by what had been agreed. Thus, in *Suchedina, Hosier, and others*,[56] Lord Justice Hughes referred to paragraph 24, *Saik* (above), and said:

> "*Saik* itself now makes clear that where a conspiracy count looks to future transactions there can be no question of having to prove that the money is of illicit origin, for *ex hypothesi* it is as yet unidentified: see Lord Nicholls at paragraph 24."

83. But Lord Justice Hughes added:

> "19. …..It is not enough that he has agreed to launder money which he only suspects may be of illicit origin: *Saik*. Nor is it enough that he is prepared to take the risk that it may be of illicit origin. He must intend to launder money which is of illicit origin of one kind or the other, or both. But if he does intend to launder it whichever its illicit origin, he is still intending to launder money intended to be illicit, and he is entering an agreement to a course of conduct

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[55] It is submitted that all of these offences require proof of that fact. It has been said that in certain circumstances, an offence might be committed contrary to s.328 notwithstanding that the property dealt with did not in fact represent the proceeds of criminal conduct. It is difficult to see how this argument can be sustained in the light of *Montila*.

[56] [2006] EWCA Crim 2543

> which will, if carried out in accordance with his intention, necessarily amount to or involve the commission of one or other or both of the two substantive offences referred to.
>
> 20. If such an agreement is proved, the offence is constituted by the agreement."

84. It had been submitted on behalf of one of the appellants in *Suchedina and others* that where a defendant is charged with an either/or conspiracy, of the *El Kurd* type, he cannot be convicted unless it is proved that he knew from which of two possible illicit sources (drugs/crime) the money came. The Court rejected that submission on the grounds that it is sufficient that "the Defendant must be proved to have agreed, at some stage, to launder[57] money which he intends shall be of one or other illicit origin, or of both" [para.19, emphasis supplied]. In other words, the defendant must have applied his mind to the fact that the property might be from one illicit source, or another, or a combination of sources but, nonetheless, he agreed that the property would be dealt with on that footing. It is submitted that a more difficult question relates to the defendant who agrees that money shall be 'laundered' but *only if* it is *not* (e.g.) drug trafficking money. This problem is considered in greater detail under the heading "conditional intention".

Property identified: knowledge required

85. Where the property is *identified* at the time the agreement is made, what must be proved is *knowledge* of the illicit provenance of the property:

> "25. What, however, if the property to which the conspiracy relates was specifically identified when the conspirators made their agreement? In that event the prosecution must prove the conspirators 'knew' the property was the proceeds of crime." [Lord Nicholls]

86. The reason why *knowledge* is required is because the overall effect of s.1(2) CLA is to raise (or to maintain) the threshold of *mens rea* that must be proved for a substantive offence "to that required to establish the state of mind described in section 1(2)".[58] Thus, in *Saik* Lord Nicholls said [para.20]

> "…the more direct and satisfactory route is to regard section 1(2) as performing in relation to a conspiracy the function which words such as 'knowingly' perform in relation to the substantive offence".

87. Lord Nicholls' use of the word "function" is revealing, because it lends support to the view that s.1(2) is designed to ensure that persons are only convicted of a conspiracy to commit an offence if they know or are aware of the facts and circumstances that will make their proposed course of conduct criminal.

The practical effects of *Saik*

88. The distinction mentioned above is an attempt to bring s.1(2) CLA up to date with current practices in relation to the widespread use of conspiracy charges - including instances where substantive charges are available.

89. However, the distinction creates new problems. How is a jury to be directed in a case where three people are said to be party to a conspiracy, but who allegedly join the conspiracy at

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[57] A somewhat 'loaded' expression, but the sense of what is being said is clear.

[58] See the speech of Lord Hope in *Saik* [para.67], where he said "The solution which the Court of Appeal adopted in *Singh* is no doubt correct, because it is faithful to the wording of the state of mind that requires to be established for a conspiracy. But it is open to the objection that it shifts attention away from the wording of section 93C(2) to the words of section 1(2). It works in favour of the defendant in a way that was not anticipated by Parliament when it enacted section 93C(2). It raises the threshold from that required to establish the state of mind described in section 93C(2) to that required to establish the state of mind described in section 1(2).

different times? Suppose A and B entered into an agreement at a time when the property was not identified, but C joined the conspiracy only after the property had been identified. In C's case, is the jury to be directed having regard to the word 'know' in s.1(2) but, in the cases of A and B, the directions must have regard to the word "intend" in subsection (2)? Surely the answer is not to have two counts of conspiracy!

90. When is property identified? Identified by whom? Must the defendant who seeks to rely on s.1(2) of the 1977 Act know of the existence of the property (in order for it to be 'identified'), or is it enough that the property had been identified/ascertained by one or more members of the alleged conspiracy? What does "identified" in this context actually mean?

91. Must property be specifically identified in the sense that items have been physically identified and agreed upon? Suppose D1 and D2 know that a jeweller's shop stocks Rolex watches and D1 and D2 agree to snatch "a couple of them". Has the property been identified, or are we still in the realms of what the parties intended rather than knew?

92. Are there circumstances in which property must possess particular characteristics before it may be regarded as having been identified? For example, that the property is tainted with criminality, e.g. stolen, or that it represents the proceeds of crime [or, more specifically, drug trafficking if the conspiracy is alleged to be in connection with that activity].

93. What about mixed goods i.e. where any part of what is dealt with is tainted with criminality? Suppose D agrees to sell 100 paintings on behalf of T, in pursuance of an agreement to launder T's proceeds of crime. In fact, only 50 paintings are the proceeds of crime but the remainder are not. Must D know which paintings are tainted? Surely not. D has enough information about the consignment to know the fact or circumstance of the *actus reus* necessary for the commission of (e.g.) the s.327 POCA offence: the extent of his criminality is another matter.

94. In *Ramzan*[59] Lord Justice Hughes said that the court did not accept "that in this context there is a crucial difference between knowledge and intention, the former not being inherent in the statutory purpose once established, but the latter being necessarily demonstrated by that purpose". Lord Justice Hughes made this point again in *Suchedina and others* (2006). In the majority of cases the difference may be theoretical, but there might be circumstances in which the difference is material.

95. Suppose D1 signed up to an agreement to launder money at a time when the property had not been identified. In answer to a charge of conspiring to money-launder, D1 claims that he did not know that the cash he handled some weeks later (identified), was in fact the proceeds of crime. Is it open to the prosecution to chose whether to put its case on the basis of intention or knowledge if, subsequent to the agreement, the property becomes 'identified'? It is submitted that the answer is to concentrate on facts and circumstances of the *actus reus* that can be proved to have been known to the parties, or intended by them, at the moment the agreement was made to commit a crime. It is at that moment that liability in conspiracy arises. It cannot be otherwise, because agreement is the essence of conspiracy (see *Suchedina and others* (2006)).

[59] [2006] EWCA Crim 1974

96. The following scenarios illustrate the effect of *Saik*:

> Scenario 1
> D1 and D2 agree to rob a security guard (V) of any cash that they anticipate he will be carrying in two days time [property belonging to another being the fact or circumstance]. There is an agreement to pursue a course of conduct, which, if carried out in accordance with their intentions, will constitute robbery: s.1(1). They intend that the 'fact or circumstance' shall or will exist: s.1(2).
>
> Scenario 2
> D1 and D2 are charged with a conspiracy to possess a controlled drug. They agreed to receive a box from T on a particular date believing that the crate would contain tobacco. They foresaw the risk that the box might contain cannabis, which in the event, it did. For an offence to be committed contrary to s.5(2) of the Misuse of Drugs Act 1971, it is necessary for the prosecution to prove that the substance which D possessed was a controlled drug of some description. As the substance was not identified (ascertained) at the time the agreement was made, s.1(2) CLA 1977 requires that D "intended" that a controlled drug shall or will exist. Had the substance been identified (ascertained) at the time the agreement was made, then D must "know" that the substance in question was a controlled drug.
>
> Scenario 3
> D1 and D2 are shady jewellers. They inspect and agree to buy Rolex watches from T *believing* (correctly as it turned out) that the watches had been stolen. They agreed to pursue a course of conduct, which having been carried out in accordance with their intentions, necessarily amounted to the commission of an offence (handling stolen goods). But, section 1(2) applies to all offences (*Saik*, HL). The goods were identified at the time the agreement was made and therefore, on a charge of conspiracy to handle stolen goods, it is insufficient to show that D merely believed that the goods are stolen. They must be proved to have known that the watches were stolen. The wisest course is for the prosecution to charge the substantive offence of handling stolen goods and not conspiracy!

97. Consider the case of *El Ghazal*.[60] E, T and C were charged with a conspiracy to obtain cocaine. T asked E if he could arrange a meeting between T and C so that T and C could "make a deal about cocaine". E was present when T met C. T agreed that C would purchase cocaine for T. E accompanied T and C to the meeting with the vendor but left soon after as he said he knew the others were about to do "something funny" regarding payment. E complained that the judge misdirected the jury by implying that an agreement to do acts that were merely preparatory to the commission of a crime amounted to a conspiracy under s.1(1) CLA 1977. It was held that the appeal would be dismissed: if the jury was sure that T was asking to be introduced to C so that one of them could procure cocaine, and the appellant knew that was the purpose of the introduction, then he was entering into an agreement to obtain cocaine for one of them.

98. Assuming that the decision was correct at that time (the decision has been criticised)[61] what might the result be now? It is submitted that the result would be the same. As we have seen,

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60 [1986] Crim.L.R.52

61 At first sight, the decision appears incorrect because, on one interpretation of the facts, E did no more than to arrange a meeting between T and C to "make a deal" about procuring cocaine. Once the meeting took place *that* agreement had been performed. For this reason the decision, or at least the basis for attaching liability, has been criticised, notably by the late Professor Smith in the Criminal Law Review ([1986] Crim.L.R. 52). On the other hand, it was the prosecution's case that E knew from the start that either T or C would obtain the cocaine and therefore E had conspired with T to obtain the drug. If

for an offence to be committed contrary to s.5(2) of the Misuse of Drugs Act 1971, it is necessary for the prosecution to prove that the substance which D possessed was a controlled drug of some description. Section 1(2) of the CLA 1977 says that E and "at least one other party to the agreement" must "intend or know" that that fact "shall or will exist at the time when the conduct constituting the offence is to take place". At the moment E entered into the agreement with T, the drug had not been identified, and therefore it was sufficient that E *intended* that the drug would exist at the moment T and/or C came into possession of the substance.

Multiple transactions

99. In *Suchedina and others* (2006)[62] the Court of Appeal had this to say about single and multiple transactions:

> "As *Saik* makes clear, in the case of a single transaction relating to identified property, where there is no basis for inferring an agreement to continue to further as yet unidentified transactions, it is appropriate to speak of knowledge of origin as the *mens rea* of the conspiracy although that does not differ, as it seems to us, from intention that the identified money be of illicit origin. And in such a case it may well be that there is no basis for inferring any knowledge/intention of illicit origin unless it be proved that the money is in fact of such origin. In such a case the Judge will so direct the jury.
>
> In other cases it may be open to the jury to infer even from one or more overt acts an agreement to launder future as yet unidentified money. If that is the case, then as Lord Nicholls made clear at paragraph 24 of *Saik*, there can be no question of the actual origins of future unidentified money being proved. All this will depend on the facts of each individual case."

100. It is submitted that if an agreement relates to a series of transactions, then s.1(2) CLA 1977 is satisfied if D intends to launder criminal property notwithstanding that during the tenure of the agreement, property is identified.

101. But suppose the initial agreement was to carry out a single transaction in connection with *unidentified* property, and the agreement was carried out. Then - moments later - a further agreement was made between the same parties to deal with *identified* property. It is arguable that s.1(2) CLA requires proof that the defendant knew that the origin of the property was illicit. If that were the position, would evidence of D's intention and conduct in connection with the first transaction be admissible to prove knowledge (or to rebut a defence of lack of knowledge) with respect to the second agreement? If the answer is in the affirmative, is evidence of the first transaction 'bad character evidence' for the purposes of chapter 1 to Part 11 of the CJA 2003, or would it fall within the exception to the definition of "bad character" in s.98 of the 2003 Act?

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this submission is translated into the language of s.1(1) CLA 1977 then it might be said that E agreed with T to pursue a course of conduct (i.e. to arrange the meeting) intending that cocaine would be procured by T and/or C, and therefore, if that agreement was carried out (in accordance with their intentions) an offence (possession) would necessarily be committed. This raises the question whether parties to a conspiracy must jointly intend the consequence that is the subject of the agreement. In his commentary to *El Ghazal*, Professor Smith wrote "An alternative and, it is submitted, better, ground for the decision of the Court of Appeal in *Anderson* (1985) 80 Cr.App.R. 64, 76-77 is that it is an offence to aid and abet the commission by others of the statutory offence of conspiracy under the Criminal Law Act 1977 and the Accessories and Abettors Act 1861. Cf. Tapper, (ed.) *Crime, Proof and Punishment*, p.21 at pp.28-29 and the draft Criminal Code Bill, clause 52(7), Law Com. No. 143, (1985), and [1984] Crim.L.R. 551. There was overwhelming evidence in the present case that the appellant aided and abetted T and C to conspire to commit the offence under the Misuse of Drugs Act. Under the terms of the 1861 Act, the appellant could then be convicted as a principal offender. The result is the same; but it is important to get the theoretical basis of the liability right".

62 [2006] EWCA Crim 2543

Why was a distinction made in *Saik* (HL) between identified and unidentified property?

102. A useful starting point is a statement made by the Law Commission in its Report [Report No.76, para.7.2; emphasis supplied]:

> "…a person should be guilty of conspiracy if he agrees with another person that an offence shall be committed. Both must *intend* that any consequence specified in the definition of the offence will result and both must *know* of the existence of any state of affairs which it is necessary for them to know in order to be aware that the course of conduct agreed upon will amount to an offence."

103. However, s.1 of the Criminal Law Act 1977 does not expressly speak of *intention* as to *consequences*, or *knowledge* of *circumstances*. It is little wonder that it is very easy for lawyers to conflate the two concepts.

104. The offence of conspiracy is a "thought crime" where the agreement is the kernel of the offence. The language of s.1(2) speaks only of the future, e.g. that a fact or circumstance "shall", or "will exist", at the time when the conduct constituting the offence is to take place. [63] Section 1(2) does not speak of facts or circumstances that the defendant knows *exist*. It may be that Parliament did not contemplate that charges of conspiracy would be used in preference to substantive offences. Furthermore, the money laundering offences differ from most indictable offences in that the *mens rea* is often set as low as "suspect" or "having reasonable grounds to suspect". It is questionable whether Parliament drafted s.1 CLA 1977 with *mens rea* as low as suspicion in mind.

105. In any event, s.1 does not expressly cater for two types of cases where conspiracy to commit an offence is charged: (i) agreements to perform criminal acts that have yet to be performed, and (ii) agreements in respect of acts that have been performed.

106. At the moment an agreement is made to commit a crime, a party to that agreement might have limited knowledge of the facts and circumstances that must exist for the offence to be committed. This is what Lord Nicholls of Birkenhead had in mind when he said in *Saik*,[64]:

> "When the agreement is made the 'particular fact or circumstance necessary for the commission' of the substantive offence may not have happened. So the conspirator cannot be said to know of that fact or circumstance at that time. Nor, if the happening of the fact or circumstance is beyond his control, can it be said that the conspirator will know of that fact or circumstance.
>
> 20. Section 1(2) expressly caters for this situation. The conspirator must 'intend or know' that this fact or circumstance 'shall or will exist' when the conspiracy is carried into effect. Although not the happiest choice of language, 'intend' is descriptive of a state of mind which is looking to the future. This is to be contrasted with the language of substantive offences. Generally, references to 'knowingly' or the like in substantive offences are references to a past state of affairs. No doubt this language could be moulded appropriately where the offence charged is conspiracy.
>
> But the more direct and satisfactory route is to regard section 1(2) as performing in relation to a conspiracy the function which words such as 'knowingly' perform in relation to the substantive offence. That approach accords better with what must be taken to have been the parliamentary intention on how the phrase 'intend or know' in section 1(2) would operate in this type of case. Thus on a charge of conspiracy to handle stolen property where the property

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[63] It is arguable that the words "course of conduct", in s.1(1) CLA 1977, have been analysed without sufficient regard to the "intentions" of the party to an agreement. If X and Y intend to kill V by poisoning him, it is really to be said that if the substance is so weak that it could not kill anything, that a conspiracy to murder must fail because the "course of conduct" which X and Y intend to purse would not "necessarily" have killed V? The quality of the substance would be relevant when applying s.1(2) CLA 1977 were X and Y to be charged with a conspiracy to "administer a noxious substance"?

[64] [2006] UKHL 18

> has not been identified when the agreement is made, the prosecution must prove that the conspirator intended that the property which was the subject of the conspiracy would be stolen property."

107. Suppose D1 and D2 join an agreement to smuggle contraband into the United Kingdom: they *intend* to import controlled drugs. D1 may *know* that goods prohibited from importation shall or will exist at the moment of importation, or he might *intend* that such goods shall or will exist at that time even if he does not know (and could not know) that that will happen. On the other hand, if D1 merely *suspects* that a fact or circumstance necessary for the commission of an offence shall or will exist, he can scarcely be said to *know* that fact.

Is knowledge, or the gradations of knowledge, relevant if D *intends* to commit a crime?

108. If it is the purpose (intention) of a party to an agreement to bring about a forbidden result does it matter that he only believes or suspects that a fact critical to the success of the venture shall or will exist "at the time when the conduct constituting the offence is to take place"? The answer is surely 'no' because his intention survives even if the plan is doomed to fail.

109. In *Singh* (Court of Appeal; 18 December 2003),[65] S was convicted on a compendious count of conspiracy to launder the proceeds of crime/drug trafficking contrary to s.49(2) DTA and/or s.93C(2) CJA.[66] The prosecution case was that the conspirators were money-laundering large sums of sterling which had come either from drug trafficking or other criminal conduct, but it was not known which. S submitted that the formula in the indictment, "knowing or having reasonable grounds to suspect" was not sufficient for a statutory conspiracy to commit either of those offences.

110. The Court of Appeal dismissed the appeal stating that "*knowledge* of the precise provenance of the banknotes money was not at the heart of this conspiracy, but *intention* to launder illicitly obtained money was". The Court said:

> "…it follows that there is no point of substance in Mr. Krolick's complaint that something short of knowledge was alleged in the indictment when, given the thrust of the prosecution case, knowledge of the precise provenance of the banknotes money was not at the heart of this conspiracy, but intention to launder illicitly obtained money was".

111. The reasoning of the Court is powerful and difficult to fault. If D1 and D2 agree to commit the offence of handling stolen goods, *intending* to handle such goods, what difference does it make whether or not the goods had been identified in their hands at the time the agreement was made? The reasoning of Auld LJ in *Singh* therefore seems compelling when he said [para.34; emphasis supplied]:

> "If two or more people intend and agree to commit an act that they know to be unlawful, then knowledge or mistake as to a fact critical to the success of the conspiracy is immaterial to its proof; the intention is proxy for, or more correctly an alternative to, knowledge of such a fact.

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65 [2003] EWCA Crim 3712

66 "… conspired together and with persons unknown, knowing or having reasonable grounds to suspect that certain property, namely banknotes, was, or in whole or in part directly or indirectly represented, another person's proceeds of drugs trafficking *and/or* criminal conduct, to convert or transfer or remove from the jurisdiction that property for the purpose of assisting any person to avoid prosecution for a drug trafficking offence *and/or* for an offence to which Part IV of the Criminal Justice Act 1988 applies, *or* for the purpose of avoiding the making or enforcement of a confiscation order, in contravention of …the Drug Trafficking Act 1994 and/or …the Criminal Justice Act 1988." [The Court's emphasis]

> And, it follows, gradations of knowledge, such as 'reasonable grounds to suspect' it, are irrelevant."

112. Yet, on one interpretation of *Saik* (HL), if the goods were identified at the time the agreement was made, D1 and D2 must *know* that the goods were in fact stolen.

113. In *Saik*, Lord Hope referred to the words of Auld LJ above and said [para. 67; emphasis supplied]:

> "Proof of an intention to commit the substantive offence, it seems to me, is an essential part of proving the offence of any conspiracy. It must be proved that the activity that the parties to the conspiracy were intending to engage in would amount to or involve the commission of a crime. As a general rule all the elements that require to be established for the commission of that crime must be explained to the jury, because they cannot find the defendant guilty of conspiracy unless they are sure that the activity that he and the others were proposing to engage in was itself criminal. The solution which the Court of Appeal adopted in *Singh* is no doubt correct, because it is faithful to the wording of the state of mind that requires to be established for a conspiracy. But it is open to the objection that it shifts attention away from the wording of section 93C(2) to the words of section 1(2). It works in favour of the defendant in a way that was not anticipated by Parliament when it enacted section 93C(2). It raises the threshold from that required to establish the state of mind described in section 93C(2) to that required to establish the state of mind described in section 1(2)."

114. Thus, "the solution which the Court of Appeal adopted in *Singh*" is correct – or more precisely, it is at least correct in relation to cases of money-laundering where property has not been identified at the time the agreement is made.

115. But where property has been identified at that time the agreement is made, then (on one interpretation of *Saik*) the prosecution must prove that D *knew* of facts or circumstances that are necessary for the commission of an offence.[67]

116. There is, however, one way of distinguishing between two types of cases where problems concerning the application of s.1(2) CLA 1977 arise.[68] It is a distinction, which if valid, the opinions of their Lordships in *Saik* do not spell out.

    a. In the first situation, the parties agree to commit a crime. They intend that all the ingredients of the *actus reus* shall be carried out. Accordingly, there is a conspiracy to commit the offence in question. Given that they intend that all relevant facts and circumstances "shall or will exist", it follows that they do not need to know that those facts will exist, and therefore (it is submitted) gradations of knowledge (suspicion, belief, etc) are irrelevant.

    b. In the second situation, D1 and D2 *intend* to pursue a course of conduct that may, or may not, have illegal consequences. Their liability under the criminal law will turn on facts or circumstances that each of them intended or knew at the time the agreement was made. In this situation, s.1(2) CLA 1977 comes to the rescue of those who neither intended nor knew of facts or circumstances necessary for the commission of an offence. This will typically arise in cases of strict liability or

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[67] Note that in *Ali and others* [2005] EWCA Crim 87, the Court said that *Singh* "does not survive *Montila*" [para. 147] – a reference to the fact that the Court of Appeal's decision in *Montila* had, by then, been overturned in the House of Lords. However, in *Saik*, Lord Nicholls qualified this statement when he said that para.147 (above) should not be read as applying in a case where the conspiracy relates to "unidentified property". In this situation the offence will be committed "even if the property never materialises or never existed" [para.24]. Such a case turns on what the accused intended and therefore the reasoning of the Court of Appeal in *Singh*, at para.34 of the judgment (above), is valid.

[68] The author is very grateful to Professor David Ormerod for bringing this point to the author's attention. He is not responsible for the way it has been expressed or interpreted by the author.

recklessness, but it may also arise in cases where the *mens rea* for an offence includes a state of mind that falls short of knowledge of an essential fact or circumstance necessary to the commission of an offence. Money laundering cases provide useful illustrations of the problems that arise, and the principles that are to be applied.

Conspiracy and conditional intention

117. Conditional intention is a complex and contentious concept. There are reasonable arguments for and against treating conditional intent as sufficient *mens rea* for an offence. The case against doing so was eloquently stated (if too simplistically) by Scalia J in his dissenting opinion in *Holloway v US Supreme Court*[69]:

> "….it is not common usage – indeed, it is an unheard of usage – to speak of my having an 'intent' to do something, when my plans are contingent upon an event that is not virtually certain, and that I hope will not occur. When a friend is seriously ill, for example, I would not say that 'I intend to go to his funeral next week.' I would have to make it clear that the intent is a conditional one: 'I intend to go to his funeral next week if he dies.' The carjacker who intends to kill if he is met with resistance is in the same position: he has an 'intent to kill if resisted'; he does not have an 'intent to kill'. No amount of rationalization can change the reality of this normal (and as far as I know exclusive) English usage."

118. In *Saik*, the House of Lords considered whether "conditional intention" has any place in the application of s.1(2) CLA 1977. Their Lordships were divided on this point.

119. Lord Hope thought that the answer would depend on the facts of the case [para.79].

120. Baroness Hale thought that a conditional intention might be sufficient [para.99]:

> "Even the late Professor JC Smith seems to have regretted that the Law Commission, in their determination to exclude recklessness, might have "thrown out the baby, conditional intention, with the bathwater, recklessness" (see "*Mens Rea in Statutory Conspiracy: Some Answers*" [1978] Crim LR 210, at 212). My Lords, I do not think that they did. The dividing line between them may be narrow, but it is discernible. Once again, it is important to distinguish between what happens when the substantive offence is committed - when the men have intercourse with the woman whether or not she consents - and what happens when they agree to do so. When they agree, they have thought about the possibility that she may not consent. They have agreed that they will go ahead even if, at the time when they go ahead, they know that she is not consenting. If so, that will not be recklessness; that will be intent to rape. Hence they are guilty of conspiracy to rape."

121. Lord Brown of Eaton-under-Heywood found the arguments regarding conditional intention "beguiling" but rejected it:

> "Beguiling though for a time I confess to have found this argument, I have finally come to reject it. If someone launders property he suspects to be hot, he takes the risk that it is hot (and can be proved to be so) and in that event commits the substantive offence under section 93C(2). But he commits it by actually laundering the property and not merely by agreeing to do so. Assume that A and B one morning agree to launder a bundle of £50 notes which C is to bring in that afternoon, suspecting but not knowing the notes will be hot. They are arrested before the money arrives. Are they guilty of conspiracy to launder notwithstanding that, had they received and laundered the money, they might well have had a defence based on *Montila*? With, I confess, some reluctance, I would hold not."

[69] (1999) 126F. 3d.82

122. Lord Nicholls, on the other hand, thought that there was room for conditional intention [para.5]:

> "An intention to do a prohibited act is within the scope of section 1(1) even if the intention is expressed to be conditional on the happening, or non-happening, of some particular event. The question always is whether the agreed course of conduct, if carried out in accordance with the parties' intentions, would necessarily involve an offence. A conspiracy to rob a bank tomorrow if the coast is clear when the conspirators reach the bank is not, by reason of this qualification, any less a conspiracy to rob. In the nature of things, every agreement to do something in the future is hedged about with conditions, implicit if not explicit. In theory if not in practice, the condition could be so far-fetched that it would cast doubt on the genuiness of a conspirator's expressed intention to do an unlawful act. If I agree to commit an offence should I succeed in climbing Mount Everest without the use of oxygen, plainly I have no intention to commit the offence at all. Fanciful cases apart, the conditional nature of the agreement is insufficient to take the conspiracy outside section 1(1)."

123. Lord Nicholls added [para.33; emphasis added]:

> "Section 1(2) explicitly requires a conspirator to 'intend or know' that the relevant fact 'shall or will' exist. That is not the state of mind of a conspirator who agrees to launder money he only suspects may be criminal proceeds. He does not 'intend' the money will be the proceeds of crime, conditionally or otherwise. He simply suspects this may be so, and goes ahead regardless. A decision to deal with money suspected to be the proceeds of crime is not the same as a conscious decision to deal with the proceeds of crime."

"Even if" : "only if"

124. It is tempting to argue that within the body of rules relating to conspiracy there is a proper place for conditional intention and, that as between types of conditional intention, it is possible to distinguish cases that should attract criminal liability from those that should not. For example, a person who agrees to sell goods "*even if*" they are stolen has the intention to handle stolen goods. If two persons agree to have sexual intercourse with a woman *even if* she does not consent, they intend to rape.

125. The "even if" situation is easy to rationalise as a form of intention. But a condition that is framed as an "only if" condition, is more difficult. Does D intend to rob "*only if*" he succeeds in his ambition to walk on the moon? The condition is so far fetched that it might be said that D has no intention to rob at all [this was the thrust of Lord Nicholls' comment with regards to his 'Mount Everest' example, para. 5, *Saik*].

126. Of course, a person may say, "I will, with others, rob a bank, but *only if* the coast is clear". Does that mean that he lacks the intention to rob? He obviously cannot rely on s.1(2) CLA 1977 because the fact that the coast *will be* clear is not a fact or circumstance of the *actus reus* necessary for the commission of the offence. But he surely does intend to rob because, without disregarding the wording of s.1(1), the primary purpose of the agreement is to commit robbery – there is no other reason or purpose that underpins the agreement. His qualifying condition might end up thwarting his intention but it does not set it at nought.

127. A more difficult problem is that which arose in *O'Hadhmaill*,[70] where members of the IRA agreed to make bombs on the basis that "if the results of the peace process satisfy [the IRA] well and good; if not, it was their intention to resume their bombing campaign". The Court of Appeal held that this was a sufficient basis for a conspiracy to cause explosions. What was the agreed "course of conduct"? It was to cause explosions by making bombs for that

[70] [1996] Crim LR 509.

purpose. But was it a course of conduct that the defendant intended "shall be pursued"? The word "shall" is a word that describes emphatic intention or determination but, in this instance, the agreed course of conduct would only have been pursued on the happening of a particular event. Does that matter? The answer is probably not, because where action is planned and agreed, the fact that its performance might be delayed or frustrated does not alter *intended* results or consequences. Suppose a tyrant agrees with others that should he be deposed from power, they are to kill persons he has named as "enemies of the state". He might never be deposed but the tyrant has surely conspired to murder.

128. In *Harmer*,[71] H was convicted of a conspiracy to contravene s.49(2) DTA/s.93C,CJA 1988.[72] Over a nine month period £1.2m was transferred out of the jurisdiction from accounts to which the H was a signatory. The money had been transferred between different corporate bank accounts in order to mix it up and make it difficult to trace. In his charge to the jury, the trial gave directions as the law stood after the Court of Appeal decision in *Montila*. The trial judge directed the jury to decide, "…whether or not you are sure that he had reasonable grounds to suspect that it was the proceeds of crime of some person". He did not direct the jury that the prosecution had to prove that the relevant money *was* the proceeds of criminal conduct or the proceeds of drug trafficking: indeed, the prosecution could not prove this to be a fact.

129. By the date of the appeal in *Harmer*, the House of Lords had reversed the decision of the Court of Appeal in *Montila*. Nevertheless, the Crown contended that for a charge of conspiracy, it does not have to prove that the property in question was the proceeds of crime.

130. The Court reasoned that the submission was wrong because the Crown did not establish (for the purpose of s.1(1)(a) CLA 1977) that the *object* of the agreement was an offence: it was not an offence because *Montila* decides that the Crown must prove that the property is the proceeds of crime (not merely that D has reasonable grounds to suspect that it represents another person's proceeds of crime).

131. The correctness of this part of the Court's reasoning was questioned (but left open) by the Court of Appeal in *Ali and Hussain*[73] (and see the commentary to *Ali* by Professor Ormerod, who said that the court was right to cast doubt on what was said in *Harmer* about section 1(1)(a).)[74] Thus, Professor Ormerod said:

> "The position is further complicated because the court in *Harmer* based its decision principally on the ground that the conspiracy was not complete unless the criminal property existed in fact because otherwise the conspirators would not be agreeing to perform a course of conduct that would necessarily constitute a crime. After careful analysis (at [99]-[110]) this court [*Ali*], rightly it is submitted, casts doubt on that aspect of *Harmer*. If D1 and D2 agree to launder the criminal proceeds of X's criminality should he offer them the opportunity, they have committed the conspiracy even if the property never materialises or exists."

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71 [2005] EWCA Crim 1

72 "[the defendants]…conspired together and with others to convert or transfer property, namely currency, which they had reasonable grounds to suspect in whole or in part represented another person's proceeds of criminal conduct and, alternatively or, drug trafficking for the purpose of avoiding prosecution or the making or enforcement of a confiscation order in contravention of section 93C(2)(b) of the Criminal Justice Act 1988 and, alternatively or, section 49(2)(b) of the Drug Trafficking Act 1994."

73 [2005] EWCA Crim 87

74 [2005] Crim.L.R. 864

132. The only gloss that might be put on the above is that in *Harmer*, the Court used the words "*object* of the agreement".[75] It might be said that the Court was alluding to H's *purpose*, which on the facts in *Harmer*, might be limited to dealing with property whilst harbouring only a suspicion that the money was tainted with criminality. Much turns on what H had agreed or, to put the point another way, did H intend or know that at the time when the conduct in question was to take place, the money would be the proceeds of crime? And, to what extent does "intend" embrace forms of conditional intention?

133. A further submission made on behalf of the Crown in *Harmer* was that the facts were analogous to cases where the offence charged was factually impossible to commit. However, as the Court of Appeal pointed out, the substantive offence in H's case was not impossible to commit: "it was simply that the prosecution could not prove that it had been committed".

Facts or circumstances "necessary for the commission of an offence"

134. In *Montila*, the Court of Appeal held that, for the purposes of s.49(2) DTA/s.93C(2) CJA 1988,[76] it is not an element of the offence that the property dealt with was in fact the proceeds of drug trafficking/crime. The House of Lords reversed this decision on the 25th November 2004.[77]

135. Had the decision of the Court of Appeal been correct, the result would have been that s.1(2) CLA, 1977 could not be invoked to support an argument that D, on a charge of conspiracy to commit a s.49(2)/s.93C(2) offence, must *know* that he was dealing in the proceeds of crime. The illicit origin of the property would not have been a fact of the *actus reus* "necessary for the commission" of an offence under s.49(2) DTA or s.93C(2) CJA 1988 [s.1(2) CLA 1977].

136. Professor David Ormerod has pointed out that at the time the cases of *Sakavickas*, *Rizvi* and *Saik* were decided,[78] it was open to the Court of Appeal to have rejected the application of section 1(2) on that basis alone.[79] The same point might be made about the case of *Singh*[80] (discussed below). It is to be noted that although *Montila* is not referred to in the judgment of the Court, Lord Justice Auld referred to a submission made by the Crown that "section 1(2*) has no application to this indictment*, which does not require proof of a fact, but of an intent for which the subsection expressly provides as an alternative to knowledge in proof of conspiracy", namely, "unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place".

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75 "23. Mr Kane's central submission is that the statutory definition of conspiracy comprising section 1(1)(a) of the 1977 Act embraces an agreement whereby the conspirators intend and agree to commit "an offence or offences". *Montila* decides that converting or transferring property which a defendant has reasonable grounds to suspect represents another person's proceeds of crime is not an offence, unless the Crown also prove that the property is the proceeds of crime. The Crown, therefore, did not establish in the present case that the appellant was guilty of conspiracy under section 1(1)(a), since they did not establish that the object of the agreement was an offence. In our judgment, this is clearly a correct construction of the sub-section."

76 [2004] 1 WLR 624; 3rd November 2003.

77 *Montila* [2004] UKHL 18.

78 That is to say, before the decision of the Court of Appeal was overruled by the House of Lords in *Montila*.

79 (2006) Current Legal Problems: *Making Sense of Mens Rea in Statutory Conspiracies*.

80 [2003] EWCA Crim 3712

137. The submission of the Crown was correct if the reference to s.1(2) CLA 1977 was a reference to the law as stated by the Court of Appeal in *Montila*. But it seems more likely that the actual submission was that conspiracy is a 'thought-crime', which may be committed in one of two alternative ways: i.e. by *intending* or *knowing* that a fact or circumstance shall or will exist at the moment the offence is to take place. As S *intended* to money launder, S's lack of knowledge of the provenance of the money was therefore irrelevant. Attractive as that submission is, it does not go far enough to explain the purpose and effect of s.1(2) of the 1977 Act in cases where acts that had been agreed would be performed, have been performed: see *Saik* (HL).

Section 1(2) and D's knowledge of his *mens rea*

138. It is now settled that what D must intend or know for the purposes of s.1(2) is a fact or circumstance that the prosecution must prove as part of the *actus reus* of the offence. In a number of cases the Courts have fallen into error holding that s.1(2) is satisfied if D had knowledge of his own *mens rea*. In *Saik*, the House of Lords cited *Sakavickas*[81] as an example of this [para.68]:

> "In *R v Sakavickas* [2004] EWCA Crim 2686; [2005] 1 WLR 857, [2005] Crim LR 293, the appellants were convicted of a conspiracy to assist another to retain the benefit of criminal conduct. The substantive offence was in section 93A of the 1988 Act, which makes this an offence where the accused knew or suspected that the other person had engaged in or benefited from criminal conduct. The issue on appeal was whether a person was guilty of a conspiracy to commit that offence if he had a mere suspicion of the criminal character of the person with whom the arrangement was entered into. It was submitted for the appellants that section 1(2) of the 1977 Act applied and that, in order to be guilty of conspiracy, the alleged offender and at least one other person had to intend or know that the money to be laundered was or was to be the proceeds of another person's crime when the offence contrary to section 93A was taking place. Dismissing the appeal, the court held that section 1(2) did not apply to an offence contrary to section 93A of the 1988 Act. In its view, the fact or circumstance necessary for the commission of the offence was the suspicion of the defendant. Establishing suspicion also established knowledge of that suspicion. The defendant must inevitably have knowledge of his own state of mind: para 17."

139. In *Rizvi*,[82] the Court said that [paras.11 and 12; emphasis supplied]:

> "So far as actual knowledge is concerned, there is no question of a defendant being convicted of an offence without knowledge on his part.

140. The sentence "[so] far as actual knowledge is concerned, there is no question of a defendant being convicted of an offence without knowledge on his part", gets close to accepting that the 'scandalous paradox' is a reality. However, we know that s.1(2) is to be construed and applied in a manner that does not give rise to the existence of that paradox: *Saik* (HL).

141. The Court, in *Rizvi*, went on to deal with what it regarded to be the more difficult question:

> The more difficult question is what the effect of section 1(2) is on a person who has reasonable grounds for suspicion that the money is 'hot'.
> [para.12.] In this situation again it seems to us that there is no question of liability without knowledge of any particular fact or circumstance. In other words the liability is not absolute. It depends upon the defendant's knowledge of the facts or circumstances which ought to give rise to the suspicion. On this analysis, there is no lack of knowledge of "any particular fact or circumstance" for the purposes of section 1(2)."

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81 [2004] EWCA Crim 2686
82 [2003] EWCA Crim 3575

142. The Court treated the defendant's knowledge of his own *mens rea* as being sufficient for the purposes of s.1(2) [para.12, see above]. That interpretation was rejected by the House of Lords in *Saik*, as it was in *Harmer*,[83] and in *Ali and Others*[84] [decided 7 June 2005].

143. In *Harmer*, (for facts, see above) the Court, considered s.1(2) CLA 1977 and said:

> "This intention or knowledge is precisely what the prosecution in the present case accepted they could not prove….If the prosecution cannot prove that the money was the proceeds of crime, they cannot prove that the appellant knew that it was. So section 1(2) of the 1977 Act applies and is not satisfied. Mr Ross drew our attention in this context to paragraphs 27, 28 and 34 of the judgment of this court in *R. v. Singh* [2003] EWCA Crim 3712 (18 December 2003). This decision preceded *Montila* and, in so far as it might be seen to support Mr Ross' argument, does not in our view survive *Montila*."

144. In *Ali and others*, count 4 alleged a conspiracy to contravene section 49(2) of the Drug Trafficking Act 1994, contrary to section 1(1) of the Criminal Law Act 1977.[85] The Court of Appeal said that as "*Harmer* reflects the law as it stands after *Montila*, the jury should not have been directed to convict if a defendant only suspected that at least part of the money he was dealing with was another person's proceeds of drug trafficking" [para.148].

The reason for the error

145. The decisions of *Rizvi* and *Sakavickas* followed the reasoning of the Court of Appeal when considering cases of criminal damage in which the issue was whether – for a conspiracy – it is enough to show that defendant had been reckless whether the life of another had been endangered (aggravated arson)[86]: see *Mir and Beg* (unreported, 22.4.94) and *Browning and Dixon* (unreported, 6.11.98). The cases are often said to be authority for the proposition that the defendant must be proved to have known or intended that life was, or would be, endangered. However, proof of actual endangerment is not a fact that it is "necessary for the prosecution to prove" in respect of the substantive offence, and therefore cases such as *Mir and Beg* are said to be wrongly decided.

146. The case of *Mir and Beg* is best explained by having regard to the effect of *Caldwell*[87] on charges of conspiracy in such cases.[88] The case was unusual on its facts (petrol sprinkled inside a house, and the gas taps left open). The decision in *Mir and Beg* is correct if the Court held that it was necessary for the prosecution to prove the existence of circumstances

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83 [2005] EWCA Crim 1

84 [2005] EWCA Crim 87

85 "Liaquat Ali, Akhtar Hussain and Arshad Mahmood [acquitted] on a day between the 1st day of September 1997 and the 13th day of February 2001 conspired together with FAISAL MALIK, IMRAN SYED, ABDUL MITHA, JAMES CARR and ASIF MEMON and with other persons unknown to conceal, disguise or remove from the jurisdiction property namely, a quantity of bank notes, knowing or having reasonable grounds to suspect that, in whole or in part, directly or indirectly, they represented another person's proceeds of drug trafficking for the purpose of assisting another to avoid prosecution for a drug trafficking offence or the making of a confiscation order or avoiding the enforcement of a confiscation order in contravention of Part II of the Drug Trafficking Act 1994."

86 Section 1 of the Criminal Damage Act 1971: "(2) A person who without lawful excuse destroys or damages any property, whether belonging to himself or another - (a) intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed; and (b) intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered; shall be guilty of an offence. (3) An offence committed under this section by destroying or damaging property by fire shall be charged as arson."

87 [1982] A.C. 341

88 See the commentary by Professor David Ormerod on *Sakavickas* (CLR, April 2005); and see Smith and Hogan, *The Criminal Law*, 11th ed., pp.379-381 [esp.p.380, fn.189].

that would objectively cause a reasonable person to conclude that they posed a risk to life, and that the defendant in question knew of those circumstances.[89]

147. *Caldwell* has been superseded by the decision of the House of Lords in *G*.[90] It therefore seems likely that s.1(2) now has no application in such cases.[91] It is now clear that for the purposes of s.1(2) CLA 1977, the "fact or circumstance" that the defendant must "know" or "intend" relates to the *actus reus* of the substantive offence in question and not with its *mens rea*.

Section 1(2) CLA 1977, *Courtie*, and *Siracusa*

148. It is beyond the scope of this document to discuss in any detail the cases of *Siracusa*,[92] *R v Patel*, (Woolf LJ, as he then was, August 7th, 1991), *Taylor and Others*,[93] and *Ayala*.[94] What follows is intended to 'flag up' a topic for discussion.

149. In his commentary to *Taylor and others*, Professor Sir John Smith said:[95]

> "It is quite clear that an indictment alleging conspiracy to import Class A drugs is not satisfied by proof of an agreement to import Class B drugs but the decision that the converse does not apply, must be seriously questioned.
> The converse is that the parties agree to import a Class A drug and are indicted for conspiring to import a Class B drug. They are, of course, then guilty of conspiracy to import a Class A drug. They cannot at the same time be guilty of the distinct offence of conspiracy to import a Class B drug, merely because that offence carries a lesser penalty. So to hold is quite inconsistent with section 1(2) of the Criminal Law Act 1977 which the court actually cites. It fits the facts exactly.
> Where the substantive offence of importing a Class B drug is charged it must, of course, be proved that the drug imported or to be imported was a Class B drug; but liability may be incurred without knowledge of that fact, if D believed it to be a Class A drug (*Shivpuri* [1987] A.C. 1); but "a person shall nevertheless not be guilty of conspiracy to commit that offence ... unless he and at least one other ... intend or know that that fact or circumstance shall or will exist ... "

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89 The author of this paper was counsel in the case of *Mir and Beg*. The author still has the perfected grounds of appeal in that case, but very little else. The perfected grounds of appeal include this passage: "It was the Applicant's case that:
(i) the four co-defendants acted on a frolic of their own;
(ii) the Applicant did not know that gas was going to be employed (still less did he authorise its use);
(iii) the use of gas by the arsonist(s) was consistent with an intention to aid conflagration and, accordingly, the prosecution's contention that 'destruction' was desired, was speculative;
(iv) that there was no evidence that he knew or foresaw that the use of gas, employed in this way, would create an obvious danger to the life of another."

90 [2004] A.C. 1034.

91 *Making Sense of Mens Rea in Statutory Conspiracies*, Current Legal Problems (2006) "After the landmark overruling of *Caldwell* in *G*, under the present law, the fact or circumstance which must be proved to exist for the substantive offence under s 1(2) of the Criminal Damage Act 1971 is, it is submitted that the defendants themselves perceived the risk of the life endangerment from the damage to property that they intended or about which they were reckless. Thus the circumstances relating to the risk of life endangerment are now purely mens rea elements of the substantive crime. On a conspiracy to commit aggravated criminal damage, section 1(2) can no longer have any role to play. To require proof of the defendants' knowledge or intention as to the defendants' own mens rea of the substantive crime would be something that was never envisaged. Section 1(2) of the 1977 Act applies where the fact or circumstance of the substantive crime is one of actus reus. Section 1(2) should have no application in relation to matters of mens rea in the substantive offence."

92 90 Cr App R 340

93 [2001] EWCA Crim 1044

94 [2003] EWCA Crim 2047

95 [2002] Crim LR at 205

150. The above cases, and the above commentary, need to be considered with the case of *Courtie*[96] in mind (different maximum penalties creating different offences).[97]

151. In *Siracusa*, the Court of Appeal was asked to decide whether a conspiracy to import cannabis (then a Class B drug) was a conspiracy to import heroin (Class A)? O'Conner L.J. said:

> "We have come to the conclusion that if the prosecution charge a conspiracy to contravene section 170(2) of the Customs and Excise Management Act by the importation of heroin, then the prosecution must prove that the agreed course of conduct was the importation of heroin. This is because the essence of the crime of conspiracy is the agreement and in simple terms, you do not prove an agreement to import heroin by proving an agreement to import cannabis."

152. The decision in *Siracusa* has much to commend it - not least for its straightforward approach. That said, s.1(2) CLA 1977 did not feature in the analysis of the Court, but Professor Smith refers to the provision in his commentary to *Taylor and others*. Presumably, in *Siracusa*, the Court of Appeal was well aware of the impact of *Courtie* on s.170 CEMA/MDA offences because, in its judgment, the Court referred to *Shivpuri* in which *Courtie* was discussed. It seems likely that it is the application of the principle in *Courtie* that makes the Class of controlled drug a fact "necessary for the commission of an offence" for the purposes of s.1(2) CLA 1977.

153. As the Court in *Siracusa* pointed out, the *mens rea* for the substantive offence under s.170 CEMA is merely that the defendant knew that he was dealing in goods prohibited from importation:

> "The prosecution must prove that the defendant knew that the goods were prohibited goods. They do not have to prove that he knew what the goods in fact were. Thus it is no defence for a man charged with importing a Class A drug to say he believed he was bringing in a Class C drug or indeed any other prohibited goods: *Hussain* (1969) 53 Cr.App.R. 448; *Shivpuri* (1986) 83 Cr.App.R. 178; *Ellis* (1987) 84 Cr.App.R.235."

Compendious counts of conspiracy

154. In *El-Kurd*,[98] the Court of Appeal attempted to remove problems caused by the "dichotomy" Parliament had created after it enacted two sets of money laundering offences in respect of (i) drug trafficking [DTA 1994], and (ii) other types of criminal conduct [CJA 1998]. The Court suggested that a compendious count of conspiracy might avoid the necessity for any choice to be made by fact-finders between an agreement to launder money illicitly obtained from drug trafficking, or other criminal activity. Such a count was not appropriate in all cases [and see *Hussain*;[99] and *Suchedina*.[100] This particular problem has been resolved by the enactment of POCA in respect of cases to which that Act applies.

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96 [1984] A.C. 463

97 Lord Diplock in *Courtie* said: "My Lords, where it is provided by a statute that an accused person's liability to have inflicted upon him a maximum punishment which, if the prosecution are successful in establishing the existence in his case of a particular factual ingredient, is greater than the maximum punishment that could be inflicted on him if the existence of that particular factual ingredient were not established, it seems to me to be plain beyond argument that Parliament has thereby created two distinct offences, whether the statute by which they are created does so by using language which treats them as being different species of a single genus of offence, or by using language which treats them as separate offences unrelated to one another."

98 [2001] Crim.L.R. 234

99 [2002] 2 Cr.App.R.26

155. In *Suchedina and others*,[101] counsel for one of the appellants argued that (i) that an either/or conspiracy is not known to the law, at any rate when what is in question is past conduct, rather than a plan looking to the future; and in any event, (ii) that in order to be convicted a defendant charged with such a conspiracy must be proved to have known from which of the two possible illicit sources the money came; since Suchedina was acquitted by the jury of the single Act conspiracies the jury cannot have been satisfied that he suspected, let alone knew, from which illicit source the money came.

156. The Court of Appeal rejected both submissions. The second point has already been considered in this paper: see "*Distinction between property identified and property not identified*" (above).

157. The Court dealt with the first point in the following terms:

> "14. Where a count is framed as an either/or conspiracy such as count 3 in this case, the allegation is of an agreement to launder money which is of illicit origin and irrespective of which kind of illicit origin. That amounts to an allegation that the Defendant is agreeing to launder money of either or both origins, that is to say an allegation that he intends to launder illicit money irrespective of which of the two types of crime generated it. Such an agreement, if proved, is an offence. Section 1(1) of the Criminal Law Act 1977 expressly provides that a conspiracy is an agreement to a course of conduct which if carried out will necessarily lead to the commission of an offence or offences. The agreement, if carried out, will necessarily lead to the commission of the offence contrary to the Drug Trafficking Act and/or to the offence contrary to the Criminal Justice Act. Such a count is not bad for duplicity; it alleges one agreement.
>
> 15. Those propositions, as well as representing our own independent conclusions, are supported by a line of authority. The possibility of such an either/or count was raised, obiter, by this court in *El Kurd* 199901848/Z3 (26.7.2000); noted in [2001] Crim LR 234. It was expressly upheld in *Hussain & Bhatti* [2002] EWCA Crim 6; 2 Cr App R 26 at 363. In the case of this very defendant, this Court held in *Attorney General's reference No 4 of 2003* [2004] EWCA Crim 1944 that conviction upon this count triggered the confiscation provisions of the Drug Trafficking Act precisely because it was an allegation of agreement to commit offences under both Acts, that is to say to launder the money whichever its illicit provenance; indeed it must follow that it triggered the confiscation provisions of both Acts.
>
> 16. The correctness of that conclusion is not altered by the later decision of the House of Lords in *Montila* [2004] UKHL 50; [2005] 1 Cr App R 26 at 425. The House there held that where either of the substantive offences referred to in this count is charged, the Crown must prove not only that the Defendant had the necessary *mens rea*, but that the money was actually the product of drug trafficking or criminal conduct, as the case may be. But that does not mean that an agreement to launder money whichever its illicit origin ceases to be an agreement to launder money which is intended actually to be from drug trafficking and/or to launder money which is intended actually to be from criminal conduct. On the contrary, that is precisely the agreement which is charged by a count such as count 3. The cases of *El Kurd*, *Hussain & Bhatti* and *AG ref 4 of 2003* were all considered by their Lordships in *Montila*.

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[100] [2004] EWCA Crim 1944, [2005] 1 Cr.App.R.2

[101] [2006] EWCA Crim 2543

NEW DEFENCES TO PART 7: SOCPA 2005

Section 102, SOCPA

158. Section 102 of SOCPA 2005 is the subject of a brief note in the Government's Explanatory Notes, yet it is a provision of considerable importance.

159. Section 102 amends the three main money laundering offences in the Proceeds of Crime Act 2002 namely, s.327 (concealing, etc, criminal property); s.328 (concerned in an arrangement to launder); and s.329 (acquisition and use); and the three offences of "failing to disclose", namely, s.330 (regulated sector), s.331 (nominated officers in the regulated sector), and s.332 (other nominated officers).

160. In respect of each offence the amendments made by s.102 of the 2005 Act add a defence that did not previously exist in connection with conduct performed overseas that is legal there but unlawful by the laws of one of the three constituent jurisdictions in the United Kingdom. A colourful example, often cited, concerns the person who lawfully works as a matador in Spain and who deals with the proceeds of this profession somewhere in the United Kingdom (where bullfighting is illegal). The problem arises having regard to s.340(2) and (3) of POCA.

161. The Parliamentary Permanent Under-Secretary of State for the Home Department gave a brief explanation for making the amendment to POCA and the reasons for it [*Hansard*, January 13, 2005, col.193]:

> "The main purpose of [s.102] is to filter out the need for the regulated sector to report activities such as, for example, the profit from bullfighting in Spain—whether one is for or against it—or companies engaging in what is apparently lawful business abroad. Switzerland, for example, does not have such a detailed system for regulating financial markets as the UK under the Financial Services and Markets Act 2000. As the regulated sector in the UK has impressed on us, we do not want to create a situation in which business transactions cannot happen within the UK and therefore affect jobs in our economy…the duty to disclose money laundering arises only if the conduct will amount to an offence if committed here. We are not concerned with acts that are not unlawful in this country."

<u>The problem explained</u>

162. By s.340(2) "criminal conduct" is conduct which (a) constitutes an offence in any part of the United Kingdom, or (b) would constitute an offence in any part of the United Kingdom if it occurred there". There is no dual criminality test involved. Bullfighting is not lawful in the United Kingdom,[102] but it is lawful in Spain. It follows that such conduct comes within s.340(2)(b). POCA then states that property is "criminal property" if "(a) it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), *and* (b) the alleged offender knows or suspects that it constitutes or represents such a benefit" [s.340(3)].

163. By virtue of s.340(4) it is immaterial, (a) who carried out the conduct; or (b) who benefited from it; or (c) whether the conduct occurred before or after the passing of this Act. Accordingly, a person in the United Kingdom, who handles money here, and which he knows or suspects was acquired from bullfighting in Spain, is handling "criminal property".

164. When it comes to the three offences of "failing to disclose", the *mens rea* differs from the offences in ss.327-329, and it differs as between the offences created under s.330 to s.332, depending on whether the charge is brought under ss.330 or 331, or under s.332. In respect

[102] See the Protection of Animals Act 1911 and see the Animal Welfare Bill.

of the offences under s.330 and s.331, the *mens rea* includes an objective component, namely, that he "(a) knows or suspects, or (b) has reasonable grounds for knowing or suspecting, that another person is engaged in money laundering". In respect of the offence under s.332 it must be proved that the accused "knows or suspects that another person is engaged in money laundering". This means that in relation to the Spanish bullfighting example, a person stands to be judged objectively if charged with an offence under ss.330 or 331.

165. It will be seen that all six offences stem from someone's "criminal conduct" as defined by s.340(2), POCA. The effect of s.102 is that *for the purposes of those six offences only*, a person is to be acquitted if the relevant conduct was unlawful in the United Kingdom, but lawful in the place outside the United Kingdom where the conduct occurred, AND the defendant knows or believes on reasonable grounds that the conduct did occur there. It is important to note that Parliament did *not* achieve this result by amending the definition of "criminal conduct" by including in s.340(2) a dual criminality test. This means that if "D" acts with respect to property, which is "criminal property" (e.g. money derived from bull fighting in Spain), but "D" mistakenly believed that the bullfighting took place somewhere in the United Kingdom, the defence will not be available to him. The definition of "criminal conduct" remains unaltered.

166. Section 102 "will be a welcome amendment to the current position, although those conducting business abroad will still need to investigate the applicable laws in sufficient depth to satisfy themselves to a reasonable degree of certainty that any conduct with which they are involved is not illegal" [*Law Now*, "Money Laundering", July 5, 2005].

<u>Important limit placed on the "overseas conduct" defence.</u>

167. On the 15th May 2006, the *Proceeds of Crime Act 2002 (Money Laundering: Exceptions to Overseas Conduct Defence) Order 2006* came into force and provides:

> "2. —(1) Relevant criminal conduct of a description falling within paragraph (2) is prescribed for the purposes of sections 327(2A)(b)(ii), 328(3)(b)(ii) and 329(2A)(b)(ii) of the Proceeds of Crime Act 2002 (exceptions to defence where overseas conduct is legal under local law).
>
> (2) Such relevant criminal conduct is conduct which would constitute an offence punishable by imprisonment for a maximum term in excess of 12 months in any part of the United Kingdom if it occurred there other than—
>
> (a) an offence under the Gaming Act 1968;[103]
>
> (b) an offence under the Lotteries and Amusements Act 1976,[104] or
>
> (c) an offence under section 23 or 25 of the Financial Services and Markets Act 2000."

168. The effect of this order is to disapply the defence in any case where the maximum term of imprisonment that can be imposed for an offence <u>exceeds</u> 12 months. Article 2(2) does not apply where the maximum term of imprisonment is 12 months. Note that offences set out in Article 2(2)(a) to (c) are also outside the limit placed on the defence. The government's Explanatory Memorandum states that

> "Proceeds from conduct which is lawful under local law would continue to fall within the money laundering offences if it constituted a serious offence here. The Order lists a few of exceptions to this rule".

169. One wonders what impact changes to the laws of the USA will have in relation to internet on-line gambling.

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[103] This Act is prospectively repealed by Schedule 17 to the Gambling Act 2005 (c.19) but the repeal is not yet in force.

[104] This Act is prospectively repealed by Schedule 17 to the Gambling Act 2005 (c.19) but the repeal is not yet in force.

Section 103 SOCPA: Deposit taking bodies

170. A "deposit- taking body" is defined by new s.340(14) to be "a business which engages in the activities of accepting deposits", or "of the National Savings Bank"].

171. The *Explanatory Notes* summarise the effect of the amendments made by this section to POCA as follows:

> "225. Section 103 amends the three principal money laundering offences in sections 327-329 of the Proceeds of Crime Act 2002 (POCA), and inserts a new section 339A on threshold amounts. Under section 327(1)(d) of POCA, a bank or other deposit-taking body would need to make a disclosure to obtain consent before proceeding with any transaction which was suspected of involving criminal property. These amendments would, in certain circumstances, allow deposit-taking bodies to continue to operate accounts without the need to seek consent in each case. They do not apply to the duty to make a disclosure in respect of the initial opening of an account or, as the case may be, the time when the deposit taking body first suspects that the property is criminal property (see section 338(2A) of POCA, as inserted by section 106 (5)). A bank or other deposit-taking body would not commit an offence in operating an account of a person suspected of money laundering when the amount of money concerned in the transaction is below £250 or such higher threshold amount as may be specified by a constable or an officer of Revenue and Customs, or by a person authorised by the Director General of NCIS (or, in future, authorised by the Director General of SOCA). Where a deposit-taking body requests a threshold amount higher than the £250 default threshold, one may be specified. The £250 default threshold can be varied by order of the Secretary of State. Where a threshold amount (above the £250 default level) has been specified for an account, the specified amount may be varied by any of the officers who could have specified it. Different thresholds may be specified in relation to the operation of the same account (for example, a threshold could be specified for deposits that is higher than the threshold specified for withdrawals)."

The 'money laundering offences' and the 'failing to disclose' offences

172. The 2002 Act also creates three offences of "failing to disclose" the fact or a suspicion that another person is engaged in money laundering. These are offences contrary to s.330 ("regulated sector"), s.331 ("nominated officers in the regulated sector"), and s.332 ("other nominated officers"). Note that the duty is to disclose a suspicion of "*money laundering*", and not - as is so often stated - a suspicion of any crime.

173. For a definition of "regulator sector" and businesses carrying out "relevant business" see schd.9 to POCA and the Money Laundering Regulations 2003. The expression "criminal property" is defined by s.340(3). Note that POCA defines "money laundering" to be an act that contravenes ss.327-329 [s.340(1)(11)(a)]. Note the *mens rea* required to be proved in respect of these three main money laundering offences (see the General Note to s.102, and see s.340(3)).

174. A business (such as a deposit taking body) might be at risk of committing both a 'money laundering offence' and a 'failing to disclose' offence. Thus, if it is conducting business with a customer and there is reason to suspect that the latter is engaged in money laundering, an offence might be committed under s.330 or s.331. If the body completes a transaction involving criminal property, then it may be committing an offence under 327-329.

175. There are two defences common to all three main money laundering offences (under ss.327-329):
    (i) That an authorised disclosure is made under section 338, or Authorised disclosures (see s.338) should be followed with "appropriate consent" before the relevant action or transaction is completed [s.335]. Note that this defence is quite distinct from the wider obligation to report/disclose under ss.330-332 of POCA, and note the Money Laundering Regulations 2003.
    (ii) The person concerned intended to make an authorised disclosure but he/she had a reasonable excuse for not making it.

176. The duty to report is particularly onerous in respect of persons falling within the "regulated sector" [see Schd.9, POCA; and note the definition of "relevant financial business" for the purposes of the 2003 Money Laundering Directive]. The purpose of amendments made to ss.330-332 by s,104(3), (4) and (6) of the 2005 Act is to ease that burden.

Improved position for 'deposit-taking bodies'

177. The amendments introduced by s.103 of the 2005 Act are designed to ease the burden on a "deposit-taking body" by allowing it to maintain an account without having to obtain "appropriate consent" on every occasion that it is asked or required to carry out a transaction. The obligation to report usually arises because a "deposit-taking body" is within the "regulated sector", but s.103(2)-(4) amends the three main money laundering offences so that such a body will not commit an offence contrary to those provisions if, in operating an account maintained with it, it carries out a transaction for a value less than the "threshold amount" specified in new s.399A.

178. Note that the Home Secretary may vary the amount from time to time: s.339A. Accordingly, a deposit-taking body will not be required to make a disclosure, or to receive "appropriate consent", before making a transaction involving "criminal property" if the amount is less than £250. Note that this does not mean that a "deposit-taking body" need not make a report at all. Such a body will be required to disclose a suspicion when it first entertains it - this might be when the account was first opened, or during the running of the account [see new s.338(2A), POCA, inserted by s.106(5) of the 2005 Act].

179. It is open to a "deposit-taking body" to make a disclosure and to seek the consent of a constable, Revenue or Customs officer, to specify a threshold amount higher than £250: see new s.339A(3) POCA. Different threshold amounts may be specified for different transactions [s.339(5)].

180. The amount of £250 is not very high but there is some flexibility within the legislation to allow transactions of a higher amount to be completed without peril. However, when the Bill was first introduced in November 2004, the proposed amount was £100 (allegedly based on the advice from NCIS [*Hansard*, January 13, 2005, col.199]), but representations were made in Standing Committee D that the amount was too low [*ibid.*, col.197-200]

181. The changes will not affect solicitors because they are not "deposit taking bodies": see the Law Society Notes for Guidance (Addendum), July 1, 2005.

Section 104, SOCPA 2005: Disclosures

182. Section 104 SOCPA amends ss.330, 331, and 332, so that disclosures under those provisions will only be required if the person making the disclosure
    (1) knows the identity of the person in respect of whom it is known, or suspected, (or where there are reasonable grounds to know what suspect) that he is engaged in money laundering: or
    (2) knows the whereabouts of any of the laundered property, or
    (3) has information or material that might assist in identifying that person, or tracing laundered property. Note the definition of "laundered property" which now appears in ss.330-332 [s.330(5A); s.331(5A); s.332(5A), POCA, inserted by s.104, SOCA 2005].

183. The authors of "*Law Note, Money Laundering*", [Bulletin, July 2005 CMS Cameron McKenna LLP] suggest - correctly - that this change is likely to be of most significance to banks and accountants which have previously been making frequent NCIS reports in circumstances when the identity of the launderer is not known (as would be the case with most credit/debit card fraud). Further useful commentary is provided by Herbert Smith & Co. in an e-bulletin ["*The Serious Organised Crime and Police Act 2005: Some common sense in the money laundering regime at last?*", April, 28, 2005]:

> "This [s.104] will be of significant assistance to auditors who, for example, will no longer need to report that their clients have suffered from shoplifting by persons unknown. Similarly, banks who have suffered fraud by persons unknown and have no useful information to report, will not now need to do so. Conversely, if any of the information set out at (a) to (c) is known, it must be included in the report; there can be no 'editing' to exclude such information. There may be a degree of uncertainty in some cases as to whether a person "can" identify the launderer. Suppose, for example, an auditor is aware that his client has been defrauded and that the client knows who the perpetrator was. The police could ask his client who the criminal is – does that mean the auditor can identify the criminal? It is to be hoped that SOCA will not impose any additional obligations on those in the regulated sector, but in practice there may be some risk if employees close their eyes to information which is readily available."

184. Nothing in the amendments introduced by s.104 of the 2005 Act, to this Part of POCA, is intended to water down the obligations on business and professions to 'know their client'.

Section 105 SOCPA: form and manner of disclosures

185. Section 105 SOCPA introduces important amendments to the form and manner of disclosures made under Part 7 of the Proceeds of Crime Act 2002.

186. By s.105(2) an employee is no longer bound to follow the employers' procedures when making a disclosure to a "nominated officer" [for definitions of a "of nominated officer" see ss.330(9), 332(1), 335(9), 336(11), Proceeds of Crime Act 2002]: see now ss.330(9)(b), 337(5)(b), and s.338(5)(b) of the Proceeds of Crime Act 2002. For example, a member of staff might seek the advice of the Money Laundering Reporting Officer as to whether a transaction is indicative of improper conduct or not. The member of staff might not fill in a form to the MLRO, but nonetheless the MLRO will have to decide whether the matter should be taken further or not. Internal reports are therefore not to be ignored merely because the information is not recorded in accordance with procedures laid down by the firm/business.

187. Section 105 also amends s.339 of the Proceeds of Crime Act 2002. The Secretary of State continues to be able to prescribe the manner in which disclosures under ss. 330, 331, 332,

or 338 must be made, but new s.339(1A) creates an offence if a disclosure is made otherwise than in the form prescribed under subs.1. The offence is summary only punishable with a fine not exceeding level 5 on the standard scale. Some might say that this is a case of bureaucracy going too far.

Section 106

188. The purpose of section 106 SOCPA was explained by Caroline Flint in Standing Committee D [*Hansard*, 13th January, 2005, column 200] as follows:

> "[s.106] is a tidying-up clause that addresses an anomaly identified by the legal and accountancy professions. Under the Proceeds of Crime Act 2002, a professional legal adviser advising a client is not obliged to disclose to NCIS information that they obtain from the client in privileged circumstances. The definition of privileged circumstances does not cover the case in which a professional adviser passes to his nominated officer information that he has received in privileged circumstances. Passing the information would constitute disclosure and trigger the nominated officer's duty to tell NCIS. That would put a professional adviser in a dilemma of whether not to disclose to NCIS and risk a breach of the reporting requirements, or to disclose and risk a breach of professional privilege or other confidence intended to be protected. Clause 98 amends the Act so that the nominated officer is not obliged to disclose to NCIS when the professional legal adviser seeks advise for him on whether the facts known to him give rise to the need for a disclosure."

Section 107

189. Sections 364 and 415 of the Proceeds of Crime Act 2002 are amended to broaden the definition of a "money laundering offence" for the purpose of the 2002 Act to include offences of money laundering under an earlier enactments, notably ss.93A, 93 B, 93 C, of the Criminal Justice Act 1988, as well as ss.49, 50, and 51, of the Drug trafficking Act 1994, and ss.37, and 38, of the Criminal Law (Consolidation) (Scotland) Act 1995, and Articles 45-47 of the Proceeds of Crime (Northern Ireland) order 1996.

Section 108

190. The effect of section 108 is summarised in the *Explanatory Notes* as follows [para. 234]:
"Section 108(4) amends section 447(3) of the Proceeds of Crime Act 2002 to extend the meaning of an external investigation to include the extent and whereabouts of criminal property. Section 445 of the Act gives power to enable assistance to be given in the UK for the purposes of external investigations."

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A TABULATED HISTORY OF THE THREE MONEY LAUNDERING DIRECTIVES

First Directive	**Second Directive**	**Third Directive**
Credit institutions. {see Art.1, Directive 77/780/EEC(4), as amended by Directive 89/646/EEC (5)} [now repealed]	***Credit institutions***. {Directive 2000/12/EC; Art.1; Art.2a}[105]	***Credit institutions;*** [Art.2]
Financial institutions. {an undertaking other than a credit institution whose principal activity is to carry out one or more of the operations then included in #2 to 12 and #14 of the list annexed to Directive 89/646/EEC, or an insurance company duly authorized in accordance with Directive 79/267/EEC (6), as last amended by Directive 90/619/EEC (7), in so far as it carries out activities covered by that Directive} [now repealed]	***Financial institutions (including money service businesses);*** {Directive 2000/12/EC; #2-12 and #14 of the list in Appendix I}[106]	***Financial institutions;*** {now includes various insurance intermediaries}. [Art.2]
	Auditors, external accountants and tax advisors; [Art.2.3]	***Auditors, external accountants and tax advisors;***
	Real estate agents; [Art.2.4]	***Real estate agents;***
		Trust and company service providers;
	Notaries and other independent legal professionals (when participating in certain financial or property transactions); [Art.2.5]	***Legal professionals;*** Notaries and other independent legal professionals, when they participate, whether by acting on behalf of and for their client in any financial or real estate transaction, or by assisting in the planning or execution of transactions for their client concerning the: (i) buying and selling of real property or business entities; (ii) managing of client money, securities or other assets; (iii) opening or management of bank, savings or securities accounts; (iv) organisation of contributions necessary for the creation, operation or management of companies; (v) creation, operation or management of trusts, companies or similar structures.

[105] Credit institution shall mean an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account.

[106] 2. Lending.
3. Financial leasing
4. Money transmission services
5. Issuing and administering means of payment (e.g. credit cards, travellers' cheques and bankers' drafts)
6. Guarantees and commitments
7. Trading for own account or for account of customers in:
   (a) money market instruments (cheques, bills, certificates of deposit, etc.)
   (b) foreign exchange;
   (c) financial futures and options;
   (d) exchange and interest-rate instruments;
   (e) transferable securities
8. Participation in securities issues and the provision of services related to such issues
9. Advice to undertakings on capital structure, industrial strategy and related questions and advice as well as services relating to mergers and the purchase of undertakings
10. Money broking
11. Portfolio management and advice
12. Safekeeping and administration of securities
13. Credit reference services
14. Safe custody services

First Directive	**Second Directive**	**Third Directive**
	Dealers in high value goods, such as precious stones metals, or works of art, auctioneers, whenever payment is made in cash, and in an amount of Euro 15,000 or more. [Art.2.6]	High value goods dealers who trade in cash over 15,000 Euro or more. {now applies to all dealers who trade in high value goods}
	Casinos. [Art.2.7]	***Casinos.***
		Note: Member States may decide that legal and natural persons who engage in a financial activity on an occasional or very limited basis and where there is little risk of money laundering or terrorist financing occurring do not fall within the scope of Article 3(1) or (2): ***Article 2.2: and see page 7 of this document.***
Credit and financial institutions shall • require identification of their customers. • Obtain supporting evidence of ID when entering into business relations, or opening an a/c or saving a/c or safe custody facilities; • Obtain supporting evidence of ID in respect of any transaction worth *ecu,*[107] 15,000 or more (whether as a single sum or linked payments). • Obtain ID wherever there is suspicion of money laundering [Art.3.6] • Keep evidence for use in an investigation into money laundering, for at least 5 years after relationship with the client has ended. • To examine with special attention any transaction which they regard as particularly likely, by its nature, to be related to money laundering. <u>Credit and financial institutions shall</u> • Cooperate fully with the authorities responsible for combating money laundering [Art.6]; • Voluntarily disclosing to authorities	*Credit and financial institutions and persons shall:* • require identification of their customers. [Revised Art.3.1] • Obtain supporting evidence of ID when entering into business relations, or opening an a/c or saving a/c or safe custody facilities; • Obtain supporting evidence of ID in respect of any transaction worth *ecu,*[108] 15,000 or more (whether as a single sum or linked payments). • Casino customers to be ID'd if they buy or sell gambling chips worth euro 1000 or more (unless the casino is registered and ID their customers immediately on entry). • Obtain ID wherever there is suspicion of money laundering [Art.3.6] • Keep evidence for use in an investigation into money laundering, for at least 5 years after relationship with the client has ended.	<u>Credit and financial institutions</u> • Shall be prohibited from keeping anonymous accounts or anonymous passbooks. • Shall require that the owners and beneficiaries of existing anonymous accounts or anonymous passbooks be made the subject of customer due diligence measures as soon as possible and in any event before such accounts or passbooks are used in any way. [Art.6] <u>Institutions and persons</u> Shall apply ***customer due diligence*** measures in the following cases when: (a) Establishing a business relationship; (b) carrying out occasional transactions amounting to EUR 15,000 or more, whether the transaction is carried out in a single operation or in several operations which appear to be linked; (c) There is a suspicion of money laundering or terrorist financing, regardless of any derogation, exemption or threshold; (d) There are doubts about the veracity or adequacy of previously obtained customer identification data. [Art.8 sets out what *Customer Due Diligence*

[107] The history of the ECU is summarised by the *Sauder School of Business (The University of British Columbia)* as follows: "The European currency unit, ECU for short, was an artificial "basket" currency that was used by the member states of the European Union (EU) as their internal accounting unit. The ECU was conceived on 13th March 1979 by the European Economic Community (EEC), the predecessor of the European Union, as a unit of account for the currency area called the European Monetary System (EMS). The ECU was also the precursor of the new single European currency, the euro, which was introduced on January 1, 1999. The acronym ECU is considered a word and in French is the name of ancient French coin. The ISO-4217 symbol for the ECU was "XEU".

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[109] Member States shall not be obliged to apply the obligations laid down in paragraph 1 to notaries, independent legal professionals, auditors, external accountants and tax advisors with regard to information they receive from or obtain on one of their clients, in the course of ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings.'

First Directive	**Second Directive**	**Third Directive**
facts that might be an indication of money laundering [Art.6]; • Furnishing (if requested) the authorities with necessary information in accordance with legislation [Art.6]. • Refrain from carrying out transactions which they know or suspect to relate to money laundering [Art.7] • Not to tip off customers the fact that information has been supplied [Art.8].	• To examine with special attention any transaction which they regard as particularly likely, by its nature, to be related to money laundering. *Credit and financial institutions and persons shall also:* • Cooperate fully with the authorities responsible for combating money laundering [revised Art.6]; • MS to ensure that persons inform the authorities of facts that might be an indication of money laundering [revised Art.6]; • MS may designate self-regulatory body of the Legal professions to be informed of facts relevant to money laundering; that body to cooperate with the authorities [revised Art.6] • Furnishing (if requested) the authorities will all necessary information in accordance with legislation [revised Art.6]. But note impact of ***legal professional privilege***.[109] • Refrain from carrying out transactions which they know or suspect to relate to money laundering [revised Art.7] • Not to tip off customers the fact that information has been supplied [Art.8].	*Measures* consist of] Member States shall require that the verification of the identity of the customer and the beneficial owner takes place before the establishment of a business relationship or the carrying-out of the transaction. [Art.9] *Casino Customers* [Art.10] 1. Casino customers to be identified and ID verified if they buy/exchange gambling chips worth EUR 2 000 or more. 2. Casinos (State supervised) deemed to have satisfied customer due diligence if they register, identify, verify the ID of customers immediately on or before entry, regardless of the amount of gambling chips purchased. *Note simplified customer due diligence provisions:* Article 11. *Note enhanced customer due diligence requirements:* Art. 13 *Performance by Third Parties:* but obligations and responsibilities rest with the institution or the person covered by the Directive. Article2 14-19. *Reporting obligations:* Articles 20-27 Institutions and persons covered by this Directive to pay special attention to any activity which they regard as particularly likely, by its nature, to be related to money laundering or terrorist financing and in particular complex or unusually large transactions and all unusual patterns of transactions which have no apparent economic or visible lawful purpose. [Article 20] *Other requirements* • FIU to be a central unit: Art.21 • Institutions and persons to cooperate fully with the FIU; [Art.22(1)] • Institutions and persons to promptly informing the FIU, on their own initiative, of matters which he/she/it "knows, suspects or has reasonable grounds to suspect that money laundering or terrorist financing is being or has been committed or attempted"; [Art.22(1)] • To promptly furnishing the FIU, at its request, with all necessary information, in accordance with the procedures established by the applicable legislation. [Art.22(1)] • Savings with regard to Legal Professional Privilege and related rules in relation to Art.22(1) in the case of "notaries, independent legal professionals, auditors, external accountants and tax advisors, with regard to information they receive from or obtain on one of their clients, in the course

First Directive	**Second Directive**	**Third Directive**
		of ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings". • Refrain from carrying out transactions which they know or suspect to relate to money laundering [Art.24] • Not to tip off customers the fact that information has been supplied [Articles 28-29]. *Record keeping and statistical data:* Articles 30-33. *Enforcement measures:* Articles 34-39 *Implementing measures:* Articles 40-41
Derogation re ID with regards to insurance policies if periodic payments do not exceed *ecu* 1000 pa, or a single premium for a policy does not exceed ecu 2500.	Derogation re ID with regards to insurance policies if periodic payments do not exceed euro 1000 pa, or a single premium for a policy does not exceed euro 2500 {save where monies debited from a named account held by a credit institution subject to the Directive.} Exception where customer is a credit or financial institution covered by the Directive, including institutions in a third county which imposes relevant requirements laid down by the Directive.	
Firms protected from breach of rules of confidentiality [Art.9]	Firms and persons protected from breach of rules of confidentiality [revised Art.9]	Firms and persons protected from breach of rules of confidentiality [Art.26] Member States to protect those who report suspicions of money laundering from being exposed to threats or hostile action. [Art.27]
Member States to disclose facts that could constitute evidence of money laundering if it inspects a credit/financial institution. [Art.10]	Member States to disclose facts that could constitute evidence of money laundering if it inspects a credit/financial institution. [Art.10] Supervisory bodies relating to stock, foreign exchange, and financial derivatives, to disclose facts that could constitute evidence of money laundering. [revised Art.10]	Member States to disclose facts that could constitute evidence of money laundering if it inspects a credit/financial institution. [Art.25(1)] Supervisory bodies relating to stock, foreign exchange, and financial derivatives, to disclose facts that could constitute evidence of money laundering. [Art.25(2)]
Measures more strict than those in the Directive, may be imposed by Member States [Art. 15]		
	Save in respect of credit and financial institutions, where "a natural person falling within any of Article 2a(3) to	

First Directive	**Second Directive**	**Third Directive**
	(7) undertakes his professional activities as an employee of a legal person, the obligations in this Article shall apply to that legal person rather than to the natural person" [revised Art.11]	
Money laundering is [when committed intentionally]: • Conversion, transfer of property for the purpose of concealing or disguising the illicit origins of property, or assisting a person to evade legal consequences of his action. • Concealment or disguise nature, source, location, disposition, movement of property derived from crime. • Acquisition, possession, use of property derived from crime.		
		Purpose of the Third Directive [para. 9]: "Directive 91/308/EEC, … contained relatively little detail on the relevant procedures. In view of the crucial importance of this aspect of the prevention of money laundering and terrorist financing, it is appropriate…to introduce more specific and detailed provisions relating to the identification of the customer and of any beneficial owner and the verification of their identity. [A] precise definition of 'beneficial owner' is essential. Where the individual beneficiaries of a legal entity or arrangement such as a foundation or trust are yet to be determined, and it is therefore impossible to identify an individual as the beneficial owner, it would suffice to identify the class of persons intended to be the beneficiaries of the foundation or trust. This requirement should not include the identification of the individuals within that class of persons."
		"criminal activity" means any kind of criminal involvement in the commission of a serious crime" [Art.3(4)]
		"serious crime" (a) acts defined in Art.1 to 4 of F.D.2002/475/JHA; (b) any offences defined in Art.3(1)(a) of the 1988 UNC against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; (c) activities of criminal organisations defined in Art.1 of Council Joint Action 98/733/JHA [21.12.98] making it a criminal offence to participate in a criminal organisation in the Member States of the EU; (d) fraud, at least serious, defined in Art.1(1) and Art.2 of the Convention on the Protection of the European Communities' Financial Interests ; (e) corruption; (f) offences punishable by deprivation of

First Directive	**Second Directive**	**Third Directive**
		liberty or a detention order for a maximum of at least 1 year or, as regards those States which have a minimum threshold for offences in their legal system, all offences punishable by deprivation of liberty or a detention order for a minimum of more than six months;
		'beneficial owner' means the natural person(s) who ultimately owns or controls the customer and/or the natural person on whose behalf a transaction or activity is being conducted. The beneficial owner shall at least include: (a) in the case of corporate entities: (i) the natural person(s) who ultimately owns or controls a legal entity through direct or indirect ownership or control over a sufficient percentage of the shares or voting rights in that legal entity, including through bearer share holdings, other than a company listed on a regulated market that is subject to disclosure requirements consistent with Community legislation or subject to equivalent international standards; a percentage of 25 % plus one share shall be deemed sufficient to meet this criterion; (ii) the natural person(s) who otherwise exercises control over the management of a legal entity: (b) in the case of legal entities, such as foundations, and legal arrangements, such as trusts, which administer and distribute funds: (i) where the future beneficiaries have already been determined, the natural person(s) who is the beneficiary of 25 % or more of the property of a legal arrangement or entity; (ii) where the individuals that benefit from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates; (iii) the natural person(s) who exercises control over 25 % or more of the property of a legal arrangement or entity.

The Treasury's Consultation Paper: Implementing the Third Money Laundering Directive: A consultation Document (page 17) states:

2.18 Article 2.2 of the Third Directive does, however, give Member States a discretion to remove legal or natural persons who engage in financial activity on an occasional and limited basis from the definition of a financial institution, where there is little risk of money laundering or terrorist financing.

2.19 To take advantage of this derogation, firms must meet the technical criteria for financial activity on an occasional and limited basis that is set by the European Commission. The full list of technical criteria agreed by the Commission and Parliament[3] is below.

> This following set of criteria is cumulative, i.e the firm must meet all of the conditions.
>
> (a) the financial activity is limited in absolute terms;
>
> (b) the financial activity is limited on a transaction basis;
>
> (c) the financial activity is not the main activity;
>
> (d) the financial activity is ancillary and directly related to the main activity;
>
> (e) with the exception of the activity referred to in point (3)(e) of Article 2(1) of Directive 2005/60/EC, the main activity is not an activity mentioned in Article 2(1) of that Directive;
>
> (f) the financial activity is provided to the customers of the main activity only and not generally offered to the public.
>
> For the purposes of point (b) of the first subparagraph, Member States shall apply a maximum threshold per customer and single transaction, whether the transaction is carried out in a single operation or in several operations which appear to be linked. That threshold shall not exceed 1000 Euro.
>
> For the purposes of point (c) of the first subparagraph, Member States shall require that the turnover of the financial activity does not exceed 5% of the total turnover of the legal or natural person concerned.

[3] The European Commission and the European Parliament have agreed these implementing measures. This text has not, however, been formally adopted and the drafting of the text (but not the substance) may change.

It is not entirely clear what is meant by "limited in absolute terms" – on first reading this seems to be something of an oxymoron. The Government says that "Article 2.2 of the Third Directive therefore offers the opportunity for the UK to reduce the scope of the regulated sector by removing persons that perform financial activity on an occasional and limited basis, where that activity is low risk of money laundering and terrorist financing and which meets the criteria set by the Commission." [para.2.20]