

Home Office Circular: Criminal Finances Act 2017

POWER TO EXTEND MORATORIUM PERIOD SECTIONS 336A-336C

Introduction

1. This circular is issued to ensure consistency in practice by law enforcement agencies (LEAs) in the operation of the provisions, and to provide an understanding of the responsibilities of the different agencies when an extension has been sought. This circular does not constitute legal advice. It is not a statement of law and is not intended to provide a comprehensive description or interpretation of the power.

Background

2. Readers of this circular should be familiar with the existing HO Circular 29/2008 - *Proceeds of Crime Act 2002: Obligations to Report Money Laundering – The Consent Regime*, which gives guidance on the existing moratorium period. They should also be familiar with HO Circular 022/2015 *Money laundering: the confidentiality and sensitivity of suspicious activity reports (SARs) and the identity of those who make them*.
3. Under the Proceeds of Crime Act (POCA), individual persons and businesses in the regulated sector are required not only to report before the event suspicious transactions or activity that they become aware of, but to desist from completing these transactions until a specific consent is received. This is the 'consent regime' in section 335 of POCA.
4. The offences contained in sections 327-329 of the Proceeds of Crime Act 2002 ("POCA") each requires a "prohibited act" (as defined in the relevant section of POCA) involving criminal property to be committed. Illustrative examples of a "prohibited act" include concealing; arranging for the transfer of; or acquiring or using criminal property.
5. There are defences to each of the offences where a person makes an "authorised disclosure" under section 338 of POCA and receives "appropriate consent" as part of the DAML (Defence Against Money Laundering) regime under section 335. The condition is that before the end of the notice period he does not receive notice from a constable or customs officer that consent to the doing of the act is refused. If a refusal is given, then a 31-day moratorium period commences. The notice period is the period of seven working days starting with the first working day after the person makes the disclosure. In practice DAML matters are dealt with by the UKFIU which is housed within the National Crime Agency.
6. Amendments to POCA in the Criminal Finances Act 2017 ("CFA") allow "senior officers" of authorised law enforcement agencies (or "Applicants" in this context) to seek an extension to the moratorium period for up to an additional 31 days at a time, up to a maximum of 186 days (see new sections 336A-336D of POCA).

7. The extension can be applied for in England and Wales, by senior officers (as defined in section 336D(7)). In the case of an application in Scotland to the sheriff, "senior officer" means a procurator fiscal.
 8. The court may, on an application under section 336A of POCA, grant an extension of a moratorium period if satisfied that –
 - a. an investigation is being carried out in relation to a relevant disclosure (but has not been completed);
 - b. the investigation is being conducted diligently and expeditiously;
 - c. further time is needed for conducting the investigation; and
 - d. it is reasonable in all circumstances for the moratorium period to be extended.
2. NOTE: The decision to maintain a refusal of appropriate consent throughout the initial moratorium period or any extension to it, remains with the NCA.

Role of the Applicant

9. The amendments to POCA sections 335 and 336 provide that the moratorium period may be extended by court order, provided that the application is made to the relevant court before the end of the initial moratorium period, or subsequent extensions.
10. Throughout the initial moratorium period and any extension, the investigating agency must liaise with the UKFIU to provide meaningful updates on the progress of the investigation to demonstrate ongoing activity and, where relevant, any delays to taking positive action within the period allowed.
11. Due to the constitutional position in Scotland, the procurator fiscal will be making representations in court and therefore fulfil the role of the Applicant in Scotland. However, other roles undertaken by the Applicant (including liaison with the UKFIU and other relevant parties) will be performed in Scotland by law enforcement agencies as is current practice. Any application for extension will be based on information gathered by law enforcement agencies who will be required to give evidence if necessary. It should also be noted that the Criminal Procedure Rules referenced below in respect to extensions of the moratorium period do not apply in Scotland as separate Criminal Procedure Rules are held (as detailed in SSI 2017/429).
12. As soon as the investigating agency takes a decision to make an extension application (and on or before day 25 of the relevant moratorium period), the Applicant (a "senior officer" as defined above) must immediately engage with the UKFIU to ensure the relevant dates for refusal and expiry are correct. The Applicant must send the UKFIU a copy of the application, including confirmation of the basis on which the Applicant believes the statutory grounds for an extension are met prior to the application being submitted to the court. This is to ensure that these matters are factored into UKFIU decision making and to allow the UKFIU to raise with the investigating agency any concerns it may have

about maintaining the refusal. It will also allow confirmation to be given by the UKFIU of the date which a notice of refusal was given and the date on which the moratorium period expires.

13. If there is more than one relevant disclosure which needs an extension, Applicants can submit one extension application, as long as it is clear that there is more than one disclosure involved; even when they are from different reporters.
14. If there are several relevant disclosures in one investigation, but their moratorium periods expire on different days; they may be submitted on one application, as long as the extension request meets the earliest expiry date. This may be practical if the disclosures are within a few days of each other, but separate extension applications should be considered if there is a significant difference in expiry dates.
15. Once the UKFIU has considered if there are grounds to maintain the refusal in order to permit the application to be submitted to the courts, the UKFIU will notify the Applicant by email. As part of its responsibility for the regime, it will also notify the reporter in writing that an application to extend is being considered by the investigating agency when the UKFIU has decided to maintain the refusal; irrespective of any notification or discussion by the Applicant and the reporter.
16. Part 47.64(2)(d) of the Criminal Procedure Rules (Crim. PR) sets out that the Applicant **must** serve notice on each Respondent (or an 'interested person') that the application has been lodged. It should be noted that Crim. PR 47.62 state materially: "Under section 336D(3) of the 2002 Act, 'interested person' means the person who made the disclosure and any other person who appears to the person making an application under rule 47.64 to have an interest in the property that is the subject of that disclosure". This will include the subject of the investigation and/or the main or associated subjects named in the disclosure.
17. A Respondent / interested persons must be given at least two business days' notice of the hearing (Crim. PR 47.63 (3)(a)). The application must be made before the existing moratorium period would otherwise end.
18. The Applicant is able to seek permission from the court to exclude a Respondent / interested person or their representative from any part of the hearing. Criteria for determining an application in the absence of a Respondent / interested person are set out at Crim. PR 47.63 (3)(b)(i-iv) as below:
 - (i) the Applicant cannot identify or contact the absentee,
 - (ii) it would prejudice the investigation if the absentee were present,
 - (iii) it would prejudice the investigation to adjourn or postpone the application so as to allow the absentee to attend, or
 - (iv) the absentee has waived the opportunity to attend.

19. The Applicant is responsible for assessing any potential risks to the reporter or any investigative activity from making the application and plan to mitigate those. This includes if the interested person/s has warning markers or previous criminal behaviour for weapons or violence; or has previously destroyed evidence prior to, or at arrest.
20. It is the responsibility of the Applicant to serve the application itself on each Respondent / interested persons to such an extent, if any, as the court directs. Crim. PR 47.65(c)(i-v) makes provision for an application to withhold information from a Respondent / interested person, under the following criteria:
- (i) evidence of an offence would be interfered with or harmed,
 - (ii) the gathering of information about the possible commission of an offence would be interfered with,
 - (iii) a person would be interfered with or physically injured,
 - (iv) the recovery of property under this Act would be hindered, or
 - (v) national security would be put at risk.
21. When submitting an application to extend the moratorium period, the Applicant is able to seek to withhold specified information from a Respondent / interested persons or their representative during those proceedings; which is contained in the application and that they intend to rely upon during the proceedings. The hearing will need to be held ex-parte, including where the interested person has been notified of the hearing in advance. Where an application to withhold material is made, the court must exclude the interested person to whom the application relates or their representative from the hearing where the application is considered.
22. However, regardless of whether the court approves an application to exclude an interested person or their representative from the hearing, or approves a redacted version of the application being sent to the interested person; it is still the responsibility of the Applicant to serve the notice of the application, as well as the application itself on each Respondent / interested person to such an extent, if any, as the court directs.
23. If the investigating agency receives or becomes aware of a representation from a Respondent / interested person, or an indication that they wish to make representations at the hearing of the application for the extension, the investigating agency will notify the UK FIU as soon as practicable and in any event before the hearing takes place.
24. Section 333D of POCA has been amended by the CFA so that the 'tipping-off' offence under section 333A of POCA is **dis-applied** when an application to extend is made. Where this application is made under section 336A, a person does not commit an offence under section 336D if –
- a. The disclosure is made to a customer or client of the person,
 - b. The customer or client appears to the person making the disclosure to have an interest in the relevant property, and
 - c. The disclosure contains only such information as is necessary for the purposes of notifying the customer or client that the application under

section 336A has been made.

25. It is the sole responsibility of the Applicant to manage all applications for extension of the moratorium period through the court process. Where the Court has considered an extension to the moratorium period, it is the responsibility of the investigating agency to document the detail of the court decision and to send these, together with a signed and court stamped copy of the order, and any other papers to the UKFIU on the same working day
26. Once the extension has been granted, in accordance with current Criminal Procedure Rules, the Applicant is responsible for contacting the reporter and the Respondent / interested person or representative with the outcome. The UKFIU has a separate duty to notify the reporter in writing that the refusal has been maintained for a further 31 days; irrespective of the Applicants duty to inform all Respondents / interested persons
27. S336C allows for automatic extension of the moratorium period where an application is made for an extension before the expiry date, but the application has not been heard; or where an appeal of a decision on an extension has been applied for but not heard. Where a delay in the court hearing has occurred, the Applicants should be clear that the extension's expiry date as requested in the application, is still the operative date.
28. The Applicant will be responsible for managing questions from both the reporter and the owner of the property. The Applicant will be responsible for maintaining contact with the reporter in relation to each and every application to extend the moratorium period. Additionally, the Applicant must regularly update the UKFIU with the progress of the investigation, the result of any application made and any factors which impact on the need to continue the moratorium period. This allows the UKFIU to discharge its role and functions (see below).
29. It remains the responsibility of the investigating agency to monitor on an ongoing basis any change in circumstances and the grounds on which the Court has granted any extension. Where there is a material change, particularly if the investigating agency consider that the grounds for withholding the DAML may no longer apply, the investigating agency must notify the UKFIU within one working day, together with their recommendation on whether to grant or maintain the DAML refusal. The UKFIU will, in accordance with the principles described in HO Circular 29/2008 also continue to review the need to maintain the DAML refusal, and notify the reporter if the DAML is no longer withheld.
30. Part 47 of Crim. PR (last amended April 2018) which applies to these Applications can be found at Annex A
31. The definition of a senior officer (England & Wales) varies across agencies and is set out in Statutory Instrument No 318 of 2018 which is extracted at Annex B.

Role of the UKFIU

32. HO Circular 29/2008 sets out that the UKFIU operates as the national centre for all authorised disclosures and also for the issue of decisions concerning the granting or refusal of DAML. While the Court can extend the period of the moratorium, decisions on whether to grant or refuse a DAML rest with the UKFIU, on recommendation from the relevant law enforcement agency. The FIU will consider any moratorium extension application and court decision on whether an extension is justified, as part of their ongoing reviews.
33. It should be noted that it will not automatically be the case that the UKFIU will maintain the refusal of a DAML on the basis that an investigating organisation has indicated that it intends to apply for an extension of the moratorium period, or on the basis that the Court has already extended the moratorium period and the UKFIU has not been previously notified.
34. UKFIU officers will actively monitor the decision on whether to grant a DAML throughout the initial moratorium period and any extensions to ensure that, in cases where DAML continues to be withheld, this is justified in line with the principles in HO 29/2008. To meet this obligation, the FIU will periodically request meaningful updates from the investigating agency. Updates may also be requested on other occasions, for example in response to a request from an affected party such as the asset owner. The investigating organisation will respond to a request for an update from the UKFIU within two working days or within the timeframe specified by the UKFIU, including the investigating agency's recommendation on the DAML decision.
35. If the UKFIU decide to grant a DAML at any time following the making of an order extending the moratorium period, they will notify the investigators and the reporter of that decision. There is no need to notify or return to the Court if any remaining part of the extension period is no longer required.

Role of the Court

36. Amendments to POCA through the CFA allow authorised LEAs to seek an extension to the moratorium period 31 days at a time, up to a maximum of 186 days.
37. The court may not grant an extension if the effect would be to extend the period by more than 186 days (in total) beginning with the day after the end of the initial 31 day period mentioned in section 335(6) or (as the case may be) section 336(8) of POCA 2002.
38. Any application for an extension to the moratorium period must first be made in the following courts:
 - a. England and Wales– the Crown Court
 - b. Scotland – the sheriff
39. The appropriate appeals courts for these provisions are as follows:
 - a. Scotland – the Sheriff Appeal Court
 - b. England and Wales – see section 28 of the Senior Courts Act 1981

(appeals from Crown court and inferior courts)

Jurisdictional issues

40. Section 443 under POCA allows for the making of regulations for the recognition of applications made in one jurisdiction to be applicable in whatever jurisdiction governed by the Act. However, these powers are not yet commenced in Northern Ireland, and the Order made under section 443 does not allow for the use of an England and Wales order to extend the moratorium period for use within Northern Ireland. Where law enforcement agencies wish to extend the moratorium period in Northern Ireland they should seek legal advice.

**The Criminal Procedure Rules October 2015 as amended April 2016,
October 2016, April 2017, August 2017, October 2017 & April 2018**

**SECTION 10: ORDERS FOR THE EXTENSION OF A MORATORIUM PERIOD
UNDER THE PROCEEDS OF CRIME ACT 2002**

When this Section applies

47.62.—(1) This Section applies where the Crown Court can extend a moratorium period under section 336A of the Proceeds of Crime Act 2002(a)¹.

(2) In this Section, 'respondent' means, as well as a person within the meaning of rule 47.2(c), an 'interested person' within the meaning of section 336D of the 2002 Act (b)².

[Note. Under section 336A of the Proceeds of Crime Act 2002, the Crown Court may extend a moratorium period under section 335 or section 336 of the Act(c)³ by up to 31 days beginning with the day after the day on which the period otherwise would end.

Under sections 335 and 336 of the 2002 Act, a moratorium period is the period of 31 days starting with the day on which consent to the doing of an act is refused by a constable, a customs officer or the Director General of the National Crime Agency. The act to which those sections refer is one that would be an offence under section 327, 328 or 329 of the 2002 Act (money laundering offences) but for the making of a disclosure within the meaning of section 338 to such an officer in relation to that act. On the expiry of the moratorium period the person who made the disclosure will be treated as having the relevant officer's consent to the doing of the act and so will commit no offence by doing it.

The Crown Court may extend a moratorium period more than once, but the total period of extension may not exceed 186 days beginning with the day after the day on which the first 31 day period ended.

¹(a) 2002 c. 29; section 336A is inserted by section 10 of the Criminal Finances Act 2017 (c. 22), with effect from a date to be appointed.

² (b) 2002 c. 29; section 336D is inserted by section 10 of the Criminal Finances Act 2017 (c. 22), with effect from a date to be appointed.

³ (c) 2002 c. 29; section 335 is amended by section 10 of the Criminal Finances Act 2017 (c. 22), with effect from a date to be appointed. Section 336 was amended by paragraphs 168 and 173 of Schedule 4 to the Serious Organised Crime and Police Act 2005 (c. 15) and paragraphs 108 and 133 of Schedule 8 to the Crime and Courts Act 2013 (c. 22). It is further amended by section 10 of the Criminal Finances Act 2017 (c. 22), with effect from a date to be appointed.

Under section 336D(3) of the 2002 Act, 'interested person' means the person who made the disclosure and any other person who appears to the person making an application under rule 47.61 to have an interest in the property that is the subject of that disclosure.]

Exercise of court's powers

47.63.—(1) The court may determine an application to which rule 47.64 (Application for extension of moratorium period) applies

- (a) at a hearing (which must be in private unless the court otherwise directs), or without a hearing; and
- (b) in the absence of—
 - (i) the applicant,
 - (ii) a respondent.

(2) The court must not determine such an application in the applicant's absence if the applicant asks for a hearing.

(3) The court must not determine such an application in the absence of a respondent unless—

- (a) the absentee has had at least 2 business days in which to make representations; or
- (b) the court is satisfied that—
 - (i) the applicant cannot identify or contact the absentee,
 - (ii) it would prejudice the investigation if the absentee were present,
 - (iii) it would prejudice the investigation to adjourn or postpone the application so as to allow the absentee to attend, or
 - (iv) the absentee has waived the opportunity to attend.

(4) The court officer must arrange for the court to hear such an application no sooner than 2 business days after notice of the application was served, unless—

- (a) the court directs that no hearing need be arranged; or
- (b) the court gives other directions for the hearing.

(5) If the court so directs, the parties to an application may attend a hearing by live link or telephone.

(6) The court must not extend a moratorium period unless the applicant states, in writing or orally, that to the best of the applicant's knowledge and belief—

- (a) the application discloses all the information that is material to what the court must decide; and

- (b) the content of the application is true.
- (7) Where the statement required by paragraph (6) is made orally—
- (a) the statement must be on oath or affirmation, unless the court otherwise directs; and
 - (b) the court must arrange for a record of the making of the statement.
- (8) The court may—
- (a) shorten or extend (even after it has expired) a time limit imposed by this rule;
 - (b) dispense with a requirement for service under this Section (even after service was required); and
 - (c) consider an application made orally instead of in writing.

Application for extension of moratorium period

47.64.—(1) This rule applies where an applicant wants the court to extend a moratorium period.

- (2) The applicant must—
- (a) apply in writing before the date on which the moratorium period otherwise would end;
 - (b) demonstrate that the applicant is entitled to apply as a senior officer within the meaning of section 336D of the Proceeds of Crime Act 2002;
 - (c) serve the application on the court officer;
 - (d) serve notice on each respondent that an application has been made; and
 - (e) serve the application on each respondent to such extent, if any, as the court directs.
- (3) The application must specify—
- (a) the disclosure in respect of which the application is made;
 - (b) the date on which the moratorium period began;
 - (c) the date and period of any previous extension of that period; and
 - (d) the date on which that period is due to end.
- (4) The application must—
- (a) describe the investigation being carried out in relation to that disclosure; and
 - (b) explain the grounds for believing that—
 - (i) the investigation is being conducted diligently and expeditiously,

- (ii) further time is needed for conducting the investigation, and
- (iii) it would be reasonable in all the circumstances for the moratorium period to be extended.

(5) A respondent who objects to the application must—

(a) serve notice of the objection on—

- (i) the court officer, and
- (ii) the applicant

not more than 2 business days after service of notice of the application; and

(b) in that notice explain the grounds of the objection.

(6) The applicant must serve any order made on each respondent.

[Note. The Practice Direction sets out forms of application and notice of objection for use in connection with this rule.]

Under section 336D of the Proceeds of Crime Act 2002, 'senior officer' means the Director General of the National Crime Agency or an authorised officer of that Agency, a police officer of at least the rank of inspector, an officer of HM Revenue and Customs or an immigration officer of equivalent rank, a senior member of the Financial Conduct Authority, the Director of the Serious Fraud Office or an authorised member of that Office, or an accredited financial investigator.

The time limit for making an application is prescribed by section 336A(3) of the Proceeds of Crime Act 2002. It may be neither extended nor shortened. Under section 336B(2) of the Act(a) ⁴the court must determine the application as soon as reasonably practicable. Under section 336C (b)⁵, where an application is made and not determined before the moratorium period otherwise would expire then that period is extended until (i) the application is determined, or (ii) the expiry of 31 days beginning with the day after the day on which that period expired, whichever occurs first.]

Application containing information withheld from a respondent

47.65.—(1) This rule applies where an application to extend a moratorium period includes an application to withhold information from a respondent.

(2) The applicant must—

(a) omit that information from any part of the application that is served on the respondent;

⁴ (a) 2002 c. 29; section 336B is inserted by section 10 of the Criminal Finances Act 2017 (c. 22), with effect from a date to be appointed.

⁵ (b) 2002 c. 29; section 336C is inserted by section 10 of the Criminal Finances Act 2017 (c. 22), with effect from a date to be appointed.

(b) mark the other part to show that, unless the court otherwise directs, it is only for the court; and

(c) in that other part, explain the grounds for believing that the disclosure of that information would have one or more of the following results—

- (i) evidence of an offence would be interfered with or harmed,
- (ii) the gathering of information about the possible commission of an offence would be interfered with,
- (iii) a person would be interfered with or physically injured,
- (iv) the recovery of property under this Act would be hindered, or
- (v) national security would be put at risk.

(3) At any hearing of an application to which this rule applies—

(a) the court must first determine the application to withhold information, in the respondent's absence and that of any legal representative of the respondent;

(b) if the court allows the application to withhold information, then in the following sequence—

- (i) the court must consider representations first by the applicant and then by the respondent, in the presence of both, and
- (ii) the court may consider further representations by the applicant in the respondent's absence and that of any legal representative of the respondent.

(4) If the court refuses an application to withhold information from the respondent, the applicant may withdraw the application to extend the moratorium period.

[Note. See section 336B of the Proceeds of Crime Act 2002]

**STATUTORY INSTRUMENT 2018 - No. 318 (EXTRACT)
PROCEEDS OF CRIME, ENGLAND AND WALES**

The Proceeds of Crime Act 2002 (References to Financial Investigators)
(Amendment) (England and Wales) Order 2018

Made - - - - 6th March 2018

Laid before Parliament 12th March 2018

Coming into force - - 17th April 2018

**Section 336D(7)(h) ⁶ (senior officer for the purposes of section 336A
(power of court to extend the moratorium period)) In relation to
England and Wales, an accredited financial investigator who is—**

- (a) an NCA officer at or above grade 2; or
- (b) a member of staff of—
 - (i) the Competition and Markets Authority and is at or above grade 7;
 - (ii) the NHS Counter Fraud Authority and is at or above grade 8C;
 - (iii) the Department for Business, Energy and Industrial Strategy and is at or above the grade of Deputy Chief Investigation Officer;
 - (iv) the Department for Environment, Food and Rural Affairs and is at or above the grade of Senior Executive Officer;
 - (v) the Department of Health and is at or above grade 6;
 - (vi) the Department for Work and Pensions and is at or above grade 7;
 - (vii) the Environment Agency and is at or above the grade of Area Environment Agency – EA grade 7;
 - (viii) the Financial Conduct Authority and—

⁶ Section 336D was inserted by section 10(4) of the 2017 Act.”.

- (aa) is at or above the grade of Manager; or
(bb) is authorised by a member of staff at or above the grade of Head of Department (whether generally or specifically) for this purpose;
- (ix) the Food Standards Agency and is at or above grade 7;
 - (x) the Gambling Commission and is at 10 or above the grade of Head of Enforcement;
 - (xi) the Gangmasters Labour and Abuse Authority and is at or above the grade of Enforcement Manager;
 - (xii) the Home Office and is at or above the grade of Senior Executive Officer;
 - (xiii) the Intellectual Property Office and is at or above the grade of SEO/C1;
 - (xiv) a local authority and holds an appropriate office;
 - (xv) the Marine Management Organisation and is at or above the grade of Senior Executive Officer;
 - (xvi) the Medicines and Healthcare Products Regulatory Agency and is at or above grade 7;
 - (xvii) the Ministry of Defence and is at or above the grade of B2;
 - (xviii) the Natural Resources Body for Wales (Corff Adnoddau Naturiol Cymru) and is at or above the grade of Senior Manager;
 - (xix) the Pensions Regulator and is at or above the grade of Regulatory Manager;
 - (xx) a police force in England and Wales (other than a constable) and is at or above a grade equivalent to the rank of Inspector;
 - (xxi) the Post Office and is at or above the grade of broadband 3;
 - (xxii) the Prudential Regulation Authority and is at or above the grade of Manager;
 - (xxiii) the Royal Mail and is at or above the grade of broadband 3;
 - (xxiv) the Rural Payments Agency and is at or above the grade of Senior Executive Officer;
 - (xxv) Transport for London and is at or above the grade of Senior Management Level;
 - (xxvi) Velindre National Health Service Trust and is at or above the grade of Operations Fraud Manager (pay band 8B); or

(xxvii) The Driver and Vehicle Standards Agency and is at or above grade 7.