

FSC Newsletter

Criminal Justice Ordinance, 1995

This newsletter provides a brief explanation of the provisions of the Criminal Justice Ordinance 1995 which came into force on 1st January, 1996. It is not intended to provide authoritative guidance as to how the legislation may be interpreted by the Courts; further, it does not constitute formal guidance within the meaning of Section 9 (3) of the Ordinance: such guidance will be issued in due course. Any person or body requiring specific advice as to the application of the legislation to particular circumstances is advised to seek legal advice from a lawyer. Although every effort has been made to ensure that this explanatory note accurately reflects the legal position, no responsibility can be accepted for any errors it may contain.

Structure Of The Ordinance

The Ordinance is divided into three main parts as follows:-

Part II - creates a number of new criminal offences in relation to the laundering of the proceeds of criminal conduct and an offence of "tipping-off";

Part III - deals with the measures that must be taken by various businesses in the financial sector to prevent the use of the financial system for the purposes of money laundering; and

Part IV - gives the Supreme Court power to make confiscation orders in relation to the proceeds of criminal conduct and its value and to make restraint orders preventing any dealing in realisable property pending the conclusion of the proceedings. These powers are similar, but not identical to those provided by the Drug Trafficking Offences Ordinance in relation to drug trafficking offences.

Part II - The New Offences

Assisting another to retain the benefit of criminal conduct - By Section 2(1) it is an offence for a person to enter into or be otherwise concerned in an arrangement whereby the retention or control by or on behalf of another or that other's proceeds of criminal conduct is facilitated (this includes concealment, removing the property from Gibraltar, transferring it to nominees or otherwise) when he knows or suspects that the other person is or has been engaged in criminal conduct or has benefited from criminal conduct. It is also an offence for a person, in such circumstances, to enter into or be concerned in any arrangement whereby the other person's proceeds of criminal conduct are used to secure that funds are put at his disposal or are used to acquire property by way of investment.

Defences - If the suspicion or belief is disclosed to a Police or Customs Officer, the person concerned does not commit an offence under this Section if -

- (a) he makes the disclosure before he does the act concerned and does it with the consent of the Police or Customs Officer; or
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- (b) the disclosure is made after he does the act concerned, but is made on his initiative and as soon as it is reasonable for him to make it.

N.B. Disclosure does not constitute a breach of any restriction upon the disclosure of the information which may be imposed by statute or otherwise. Thus a banker, by way of example, would not be liable to the customer for breach of confidentiality by disclosing his suspicions to a Police or Customs Officer.

It is also a defence for a person to prove:-

- (a) that he did not know or suspect that the arrangement related to any person's proceeds of criminal conduct; or
- (b) that he did not know or suspect that by the arrangement the retention or control of property on behalf of the other had been facilitated or that the property was used to secure that funds were placed at his disposal or to acquire property by way of investment; or
- (c) he intended to disclose his suspicions to a Police or Customs Officer, but had a reasonable excuse for failing to do so.

Acquisition, possession or use of property representing proceeds of criminal conduct - This offence is created by Section 3(1) of the Ordinance and provides that a person is guilty of an offence if he acquires, uses or has possession of any property knowing that the property is, or in whole or in part directly or indirectly represents, another person's proceeds of criminal conduct.

Defences - It is a defence to show that the person charged acquired or used the property or had it in his possession for adequate consideration. BUT note Section 3(4) which provides that the provision for any person of goods or services which are of assistance to him in criminal conduct shall not be treated as consideration.

Where a person discloses a suspicion or belief to a Police or Customs Officer and does any act in relation to the property in contravention of Section 3(1), he is not guilty of the offence if-

- (a) the disclosure is made before he does the act and he does it with the consent of a Police or Customs Officer, or
- (b) the disclosure is made after he does the act, but on his initiative and as soon as it is reasonable for him to make it.

Again, any disclosure made to a Police or Customs Officer shall not be treated as a breach of any restriction on the disclosure of that information imposed by statute or otherwise.

It is also a defence to prove that:-

- (a) he intended to disclose the suspicion, belief or matter in question to a Police or Customs Officer, but
- (b) there was a reasonable excuse for his failure to make that disclosure.

Persons in employment - Where the person making the disclosure is in employment, it is sufficient for him to make the disclosure to the appropriate person prescribed by procedures established by his employer for the making of such disclosures. This applies to disclosures under both Sections 2 and 3 of the Ordinance.

Concealing or transferring the proceeds of criminal conduct - Sections 2 and 3 are concerned with laundering the proceeds of the criminal conduct of others; they do not make it an offence to launder one's own proceeds of criminal conduct. Section 4(1) deals with this situation providing that 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 represent, his proceeds of criminal conduct; or
 - (b) converts or transfers that property or removes it from Gibraltar
- for the purpose of avoiding prosecution for an offence to which the Ordinance applies or the making or enforcement in his case of a confiscation order. Section 4(2) creates a similar offence in relation to the proceeds of someone else's proceeds of criminal conduct.

Penalties - Offences contrary to Sections 2, 3 and 4 of the Ordinance are punishable with a maximum penalty of fourteen years imprisonment and an unlimited fine.

Tipping-off - Section 5 creates a number of offences in relation to "tipping off" concerning the unlawful disclosure of information to third parties. Section 5(1) provides that a person is guilty of an offence if -

- (a) he knows or suspects that a Police or Customs Officer is acting or is proposing to act in connection with an investigation which is being, or is about to be, conducted in relation to money laundering; and
- (b) he discloses to any other person information or any other matter likely to prejudice the investigation.

Sub-sections 2 and 3 create similar offences in relation to cases where disclosures have been made to Police or Customs Officers under Sections 2 and 3 of the Ordinance. Sub-section 4 provides an exemption for professional legal advisers provided that the information they disclose is not disclosed with a view to furthering a criminal purpose. These offences are punishable with a maximum penalty of five years imprisonment and an unlimited fine.

Meaning of "money laundering" - For the purpose of Section 5 "money laundering" means doing any act which constitutes an offence under Sections 2,3, or 4 or would constitute such an offence if done in Gibraltar.

Meaning of "criminal conduct" - For the purposes of Part II of the Ordinance, "criminal conduct" means conduct which:-

- (a) if it occurs in Gibraltar constitutes an indictable offence other than a drug trafficking offence; or
- (b) if it does not occur in Gibraltar would constitute such an indictable offence if it had occurred in Gibraltar.

Drug trafficking offences are excluded from the definition because similar offences in relation to drugs money laundering and "tipping-off" in relation to drug trafficking investigations are already to be found in Sections 54, 55, 56 and 58 of the Drug Trafficking Offences Ordinance, 1995.

Who do these provisions affect? The scope of these offences, and the similar provisions in the Drug Trafficking Offences Ordinance is very wide. It affects not only banks and other financial institutions, but many other businesses which are all vulnerable to be used by the money launderer including estate agents, car and boat dealers, lawyers, accountants, bureaux de change, safety deposit box companies, jewellers, gold and bullion dealers, casinos and the like. *Any person accepting money or other property from an individual knowing or suspecting that it represented the direct or indirect proceeds of drug trafficking or other criminal conduct as defined above would be vulnerable to prosecution.*

Part III - Measures To Prevent The Use Of The Financial System For Purposes Of Money Laundering.

Part II gives those disclosing suspicious transactions to law enforcement authorities certain protection from criminal liability for money laundering and civil liability at the suit of the customer for breach of confidentiality. Part III goes much further and imposes obligations on financial institutions to obtain evidence of the identity of their customers, keep proper records, set up procedures for the reporting of suspicious transactions and undertake staff training in relation to the appropriate practices and procedures. The scope of Part III is however more limited to the extent that it is confined to certain financial institutions and does not extend to estate agents, car dealers, jewellers, etc.

Who is affected by Part III? The scope of Part III is restricted to persons who, in the course of relevant financial business carried on in or from Gibraltar, form a business relationship or carry out a one-off transaction with or for another.

Meaning of "relevant financial business" - This is defined by Section 8 (1) and includes the following:-

- (a) a deposit-taking business carried on by a person who is an authorised institution under the Banking Ordinance 1992;
- (b) acceptance of deposits by a building society, including the raising of money from members of the society by the issue of shares;
- (c) business of the Gibraltar Savings Bank;
- (d) any home regulated activity carried on by a European credit institution;
- (e) investment business within the meaning of the Financial Services Ordinance;
- (f) any of the activities listed in points 1 to 12 or 14 of the Annex to the Second Banking Co-ordination Directive other than an activity falling within paragraphs (a) to (e) above.
- (g) insurance business carried on by a person who has received authorisation under Article 6 or 27 of the First Life Directive.

Meaning of "business relationship" and "one-off transaction" - Relevant financial business only comes within the ambit of Part III if it forms part of a "business relationship" or a "one-off transaction".

Business relationship - This term is defined by Section 7 (2) as being any arrangement between two or more persons where -

- (a) its purpose is to facilitate the carrying out of transactions between the persons concerned on a frequent, habitual or regular basis; and
- (b) the total amount of any payment or payments to be made by any person to any other in the course of the arrangement is not known or capable of being ascertained at the time the arrangement is made.

Section 7 (1) provides that references to an arrangement between two or more persons is a reference to an arrangement in which at least one party is acting in the course of a business. "Business relationship" is thus defined in very wide terms and only excludes private arrangements entered into by individuals other than in the course of business.

One-off transaction - Even if the relevant financial business does not amount to a "business relationship" under Section 7, it will still be caught by Part III if it constitutes a "one-off transaction". This term is defined in Section 6(1) as being any transaction other than one carried out in the course of an established business relationship formed by a person acting in the course of relevant financial business.

What obligations does Part III impose? Section 9(1) provides that no person shall in the course of relevant financial business carried on by him in or from Gibraltar, form a business relationship or carry out a one-off transaction unless he introduces the following procedures in relation to that business -

- (a) notwithstanding Section 14 of the Companies (Taxation and Concessions) Ordinance:-
 - (i) identification procedures in accordance with Sections 11 and 13;
 - (ii) record-keeping procedures in accordance with Section 16;
 - (iii) except where the person concerned does not employ or act in association with any other person, internal reporting procedures in accordance with Section 18;
 - (iv) such other internal control and communication procedures as are appropriate to forestall and prevent money laundering;
- (b) takes appropriate measures to make employees handling financial business aware of -
 - (i) the procedures he has adopted under paragraph (a) maintained by him which relate to the relevant financial business in question, and
 - (ii) the enactments relating to money laundering; and
- (c) provides his employees with training in the recognition and handling of transactions carried out by or on behalf of any person who is, or appears to be engaged in money laundering.

Meaning of money laundering - Money laundering for these purposes means doing any act which constitutes an offence under Sections 2, 3 or 4 or Sections 54, 55 or 56 of the Drug Trafficking Offences Ordinance 1995 or, if the act was done outside Gibraltar, would constitute such an offence if done in Gibraltar (See Section 6(3)). The definition of criminal conduct for these purposes is slightly different than in Part II and means conduct which -

- "(a) if it occurs in Gibraltar constitutes an indictable offence other than a drug trafficking offence; or
- (b) if it does not occur in Gibraltar -
 - (i) would constitute such an offence if it had occurred in Gibraltar; and
 - (ii) contravenes the law of the country in which it occurs." (See Section 6(4)).

For the purpose of clarifying the precise nature of the above requirements, the Ordinance (see Section 11) divides the transactions into four cases as follows:-

Case 1 is any case where the parties form or resolve to form a business relationship between them.

Case 2 is any case where, in respect of any one-off transaction, any person handling the transaction knows or suspects that the applicant for business is engaged in money laundering, or that the transaction is carried out on behalf of another person engaged in money laundering.

Case 3 is any case where, in respect of any one-off transaction, payment is to be made by or to the applicant for business of the amount of ECU 15,000 or more (say £10,000).

Case 4 is any case, where in respect of two or more one-off transactions, -

- (a) it appears at the outset to a person handling any of the transactions -
 - (i) that the transactions are linked, and
 - (ii) that the total amount in respect of all the transactions, which is payable by or to the applicant for business is ECU 15,000 or more, or

- (b) at any later stage, it comes to the attention of such a person that the provisions of paragraph (a) are satisfied.

Identification procedures - By Section 11(1), identification procedures must, in Cases 1 to 4, require as soon as reasonably practicable after contact is first made between a person and an applicant for business concerning any business relationship or one-off transaction, -

- (a) production by the applicant for business of satisfactory evidence of his identity;
or
- (b) the taking of such measures as will produce satisfactory evidence of identity and the procedures must require that, where such evidence is not obtained, the business relationship or one-off transaction in question shall not proceed any further. By Section 15(1), evidence of identity is satisfactory if -
- (a) it is reasonably capable of establishing that the applicant is the person he says he is; and
- (b) the person who obtained the evidence is satisfied, in accordance with the procedures maintained under Part III in relation to the relevant financial business concerned that it does establish that fact.

By Section 15(2) in determining the time span in which satisfactory evidence of identity has to be obtained, all the circumstances shall be taken into account and in particular the following:-

- (a) the nature of the business relationship or one-off transaction concerned;
- (b) the geographical location of the parties;
- (c) whether it is practical to obtain the evidence before commitments are entered into or before money passes;
- (d) in relation to Cases 3 and 4, the earliest stage at which there are reasonable grounds for believing that the total amount payable is ECU 15,000 or more.

Section 12 provides special rules in relation to payments by post and electronic means, Section 13 deals with transactions on behalf of another and Section 14 provides a number of limited exemptions from the identification requirements.

Record-keeping procedures - By Section 16, record-keeping procedures must require the keeping, for the prescribed period, of the following records:-

- (a) in any case where evidence of identity has been obtained, a record which indicates the nature of the evidence, and which -
- (i) comprises a copy of the evidence;
- (ii) provides such information as would enable a copy of it to be obtained; or
- (iii) where it is not reasonably practicable to comply with (i) or (ii), provides sufficient information to enable the details of a person's identity contained in the relevant evidence to be re-obtained; and
- (b) a record containing details relating to all transactions carried out by that person in the course of relevant financial business.

The prescribed period is a period of at least five years commencing with -

- (a) in relation to records described at (a) above, the date on which the relevant business was completed within the meaning of Section 16(4); and
- (b) in relation to the records described at (b) above, the date on which all activities taking place in the course of the transaction in question were completed.

Section 17(2) deals with the situation, relating to relevant financial business, where a person is acting as the servant or agent of another person. In these circumstances, the general rule is that the obligation is on the principal to ensure that the record keeping procedures are complied with.

Internal reporting procedures - By Section 18 these must include provision for the following:-

- (a) identifying an appropriate person to whom a report is to be made of any information or other matter which comes to the attention of a person handling relevant financial business and which, in the opinion of the person handling that business, gives rise to a knowledge or suspicion that another person is engaged in money laundering;
- (b) requiring that any such report be considered in the light of all other relevant information by the appropriate person, or by another designated person, for the purpose of determining whether or not the information or other matter contained in the report does give rise to such a knowledge or suspicion;
- (c) for any person charged with considering a report in accordance with paragraph (b) to have reasonable access to other information which may be of assistance to him and which is available to the person responsible for maintaining the internal reporting procedures concerned; and
- (d) for securing that the information or other matter contained in a report disclosed to a Police or Customs Officer, where the person who has considered the report under the procedures maintained in accordance with the preceding provisions of the Section knows or suspects that another person is engaged in money laundering.

Thus what is required is for a person to be appointed within the organisation to whom employees handling relevant financial business may report transactions which give rise to a knowledge or suspicion that another person is engaged in money laundering. This person must be given reasonable access to all information which may be of assistance to him and, if having considered it, he knows or suspects that another person is engaged in money laundering, he must report it to a Police or Customs Officer. In this way he acts as a kind of filter, reporting only those transactions where there is knowledge or suspicion of money laundering.

Supervisory authorities - Section 20 requires supervisory authorities that obtain information which, in their opinion indicates that any person has or may have been engaged in money laundering to disclose that information to a Police or Customs Officer as soon as reasonably practicable. The following are supervisory authorities:-

- (a) the Financial & Development Secretary in respect of Building Societies;
- (b) the Financial Services Commissioner;
- (c) the Authority appointed under Section 2 (1) of the Financial Services Ordinance 1989;
- (d) the Commissioner of Banking and the Banking Supervisor;
- (e) the Commissioner of Insurance and the Insurance Supervisor.

Offences and penalties - Any person who fails to comply with the requirements of Section 9 of the Ordinance is guilty of an offence and is liable to a maximum penalty of two years imprisonment or a fine or to both.

Supervisory/regulatory guidance - Section 9(3) provides that in determining whether a person has complied with the requirements of Part III the Court may take account of -

- (a) any relevant supervisory or regulatory guidance which applies to that person;
- (b) in a case where no such guidance applies, to any other relevant guidance issued by a body that regulates, or is representative of, any trade, profession, business or employment carried on by that person.

Although not of itself conclusive, a person who fully complies with any such guidance is more likely to be treated less harshly by the Court than one who does not. At the present time no such guidance has been issued, but it is anticipated that formal money laundering guidance notes will be issued in due course.

Part IV - Confiscation Of The Proceeds Of Criminal Conduct.

Since 1988, the Supreme Court has had jurisdiction to make confiscation orders depriving defendants convicted of drug trafficking offences of assets equivalent in value to the amount by which they have benefited from their crime. The Court also has jurisdiction, prior to conviction, to make restraining orders to prevent defendants disposing of assets which may be liable to confiscation in the event of their being convicted. Part IV extends this confiscation regime to cover all indictable offences. There are a few differences in the two confiscation regimes: in particular a confiscation order under Part IV may not be made for an amount less than £10,000 whereas there is no such limit in drug trafficking cases. Also, in drug trafficking cases, the judge is entitled to make certain assumptions adverse to the defendant, whereas no such assumptions may be made in cases to which Part IV applies.

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