

SERIOUS CRIME ACT 2015

EXPLANATORY NOTES

TERRITORIAL EXTENT

Part 1: Proceeds of Crime

Commentary on Sections

Chapter 1: England and Wales

Confiscation: assets held by defendant and other

Section 1: Determination of extent of defendant's interest in property

16. This section, together with sections 2 to 4, amends the provisions in Part 2 of POCA in respect of third party interests in assets that may be realised to discharge a confiscation order. Under Part 2 of POCA a confiscation order is made against the defendant for a particular amount, and not against any particular assets held by the defendant, although the court may take into account property held by the defendant when determining the amount of the confiscation order. It is open to the defendant to pay off the order out of whatever assets he or she has available. As such, Part 2 of POCA makes no express provision for the court to deal with any third party interests in any of the property which the court takes account of when determining the amount of a confiscation order.
17. Part 2 of POCA does however make provision for third parties to make representations where they have been affected by the exercise of powers under that Part -- in particular, when they have been affected by a restraint order made under section 41 of POCA, or an order for the further detention of property under section 47M of POCA (the latter section is not yet in force).
18. Third parties also have the right to make representations under Part 2 of POCA when an enforcement receiver is appointed by the Crown Court under section 50 of the Act to enforce an unpaid confiscation order. The court must give anyone with an interest in the realisable property of the defendant a reasonable opportunity to make representations before the receiver may exercise their powers under section 51(2) of POCA to manage, deal or realise that property, or under section 51(6) to order the third party to make a payment to the receiver in respect of the defendant's beneficial interest in the property.
19. In general, it is most appropriate for third party interests to be dealt with substantively at the enforcement stage of a confiscation order given that the existence of such interests only crystallises against specific property at that stage. However, in some cases waiting until enforcement to determine the extent of a third party's interest in the defendant's property can complicate, lengthen and otherwise frustrate the confiscation process. Sections 1 to 4 seek to give effect to the commitment in the Serious and Organised Crime Strategy to strengthen POCA by "ensuring that criminal assets cannot be hidden with spouses, associates or other third parties".
20. This section inserts a new section 10A into POCA to confer on the Crown Court, when making a confiscation order, a power to make a determination as to the extent of the defendant's interest in particular property (new section 10A(1) and (5)). Given that a

consequence of making such a determination will be to determine the extent, if any, of any third party interest in the property, new section 10A(2) affords third parties who have, or may have, an interest in the property the right to make representations to the court about the extent of their interest. The right to make representations also extends to the defendant. Subject to two exceptions, any determination as to the extent of the defendant's interest in particular property is binding on any court or other person involved in the enforcement of the confiscation order (new section 10A(3)). The exceptions are where it is open to a court which has appointed an enforcement receiver to hear representations (see section 4) or in proceedings before the Court of Appeal or Supreme Court (new section 10A(4)).

21. It is envisaged that the Crown Court would only make such determinations in relatively straightforward cases, that is where the court considers that it can, without too much difficulty, determine the defendant's interest in particular property. In deciding whether to make a determination in any particular case, it is expected that judges will exercise this power to determine the defendant's interest in property only in those cases where their experience (including in respect of matters as regards to property law), the nature of the property, and the likely number and/or complexity of any third party interests allows them to do so.

Section 2: Provision of information

22. *Subsection (1)* amends section 16 of POCA, which requires the prosecutor to give the court "a statement of information" detailing the defendant's benefit from criminal conduct. New section 16(6A) requires such statements of information to include any information available to the prosecutor that would be relevant to the court's consideration of whether to make a determination under new section 10A and, if so, the terms of such a determination. Such information may include evidence of the defendant's and any third parties' interest in relevant property. New section 16(6B) empowers the court to require the prosecutor to provide further specified information relevant to the making of a determination. In order to fulfil such a requirement, it may be necessary for the prosecutor to obtain further information. Under section 17 of POCA, the court may require the defendant to respond to every allegation in the statement of information and to indicate to what extent each allegation is accepted. Where an allegation is disputed, the defendant must provide full details of any matters relied on.
23. *Subsection (2)* amends section 18 of POCA, which empowers the court to order the defendant to provide any information it needs to enable it to carry out its confiscation functions. *Subsection (2)(a)* amends section 18(2) to make it clear that the court's confiscation functions include functions under the new section 10A. *Subsection (2)(b)* amends section 18(6) so as to provide that where the prosecution accepts any allegation contained in the information provided by the defendant, the court may treat the acceptance as conclusive for the purpose of deciding whether to make a determination under new section 10A and, if it decides to make such a determination, the form of that determination.
24. *Subsection (3)* inserts new section 18A into POCA. New section 18A empowers the court to order any third party who may have an interest in the defendant's property to provide any information it needs to enable it to carry out its functions in connection with the making of a determination under the new section 10A of POCA. A similar power to order the defendant to provide information to the court is contained in section 18 of POCA. The court might use this power where, for example, the defendant alleges that a third party owns a part share in particular property and the court considers that it requires more information from the relevant third party to verify that claim.
25. Where the interested person fails to comply with the court's order without reasonable excuse, new section 18A(4) allows the court to draw any inference that it believes appropriate. However, new section 18A(5) provides that new section 18A(4) does not detract from any other power the court has to deal with the interested person, in

particular the power to punish the interested person for contempt of court for failure to comply with the order.

26. New section 18A(9) provides that no information provided by an interested person in response to a court order is admissible in any criminal proceedings. This protects the interested person against self incrimination. However, it does not prevent an interested person being prosecuted for an offence using evidence which may come to light as a result of any information provided to the court under new section 18A.

Section 3: Appeals

27. *Subsection (1)* inserts new subsections (4) to (8) into section 31 of POCA (which confers a right of appeal on prosecutors against any confiscation order made by the Crown Court). New subsections (4) to (8) enable the prosecutor, the defendant or a third party to appeal to the Court of Appeal against a determination made under new section 10A. The defendant or a third party may only appeal a determination if it appears to the court that the person is, or may be, a person holding an interest in the property affected by the determination. In the case of the defendant or a third party, the right of appeal then only arises in one of two circumstances, namely where a person with an interest in relevant property was not given a reasonable opportunity to make representations to the Crown Court before it made its determination (new section 31(6)), or where the Court of Appeal considers that the determination made under new section 10A would result in a serious risk of injustice to the appellant (new section 31(7)). This does not impact on the defendant's existing right to appeal a confiscation order to the Court of Appeal.
28. The rights of appeal conferred by new section 31(4) are negated where the conditions in new section 31(8) apply. Those conditions are where a receiver has been appointed under section 50 of POCA or where an application has been made by the prosecution for the appointment of a receiver but that application has not been determined, or where the Court of Appeal believes that such an application is to be made. No right of appeal is provided for in such circumstances given that the court appointing a receiver will be able to reconsider interests in relevant property where there would be a serious risk of injustice if the Crown Court's determination under new section 10A were to be adhered to (see section 4). Moreover, in cases where the receiver is bound by a Crown Court's determination as to the extent of a defendant's interest in particular property, any person affected by an enforcement order in relation to the property, that is an order to sell it to help satisfy the defendant's confiscation order, would be able to appeal to the Court of Appeal (under section 65 of POCA). When considering any such appeal, the Court of Appeal would not be bound by the Crown Court's determination (see new section 10A(4)(b)).
29. *Subsection (2)* inserts new subsection (2A) into section 32 of POCA, which provides that in determining an appeal under new section 31(4) the Court of Appeal may either confirm the original determination made by the Crown Court under new section 10A or make any other order it considers appropriate (including an order quashing the original determination). This affords the Court of Appeal the power to make a different determination from that made by the Crown Court as to the extent of the defendant's interest in relevant property.
30. *Subsection (3)* amends section 33 of POCA, which provides for further appeals to the Supreme Court. *Subsection (3)(a)* enables any party to proceedings in the Court of Appeal on an appeal under new section 31(4) to appeal the outcome to the Supreme Court. *Subsection (3)(b)* inserts new subsection (3A) into section 33 which confers on the Supreme Court broad powers to confirm, quash or vary the decision made by the Court of Appeal.

Section 4: Enforcement receivers

31. This section amends section 51 of POCA, which sets out the powers a court can confer on an enforcement receiver. Such powers include the power to realise property, but

this is accompanied by a requirement to afford persons with an interest in the property a reasonable opportunity to make representations to the court. New section 51(8B) extends this right on third parties to make representations to the court in certain circumstances where a determination has been made under new section 10A. Given that interested third parties will generally have been afforded an opportunity to make representations to the court prior to it making a determination under new section 10A, the amendments to section 51 of POCA do not, as a rule, allow further representations to be made at the enforcement stage. However, new section 51(8B) enables an affected person to make representations to the court which appointed the receiver where he or she was not given a reasonable opportunity to make representations to the Crown Court before it made its determination, or where the court considers that the determination made under new section 10A would result in a serious risk of injustice to the person. This provision affords an opportunity for an interested third party to make representations in circumstances where their interest in the property only came to light after the Crown Court had made its original determination under new section 10A. Subject to the court's consideration of any such representations and to the outcome of any appeal (as provided for in section 3), a determination made by the court under new section 10A is binding on a receiver.

Confiscation: other amendments

Section 5: Time for payment

32. *Subsection (1)* substitutes a new section 11 of POCA, which makes provision for the court to determine how long the defendant has to pay the amount due under a confiscation order. Section 11 currently provides that the amount is to be paid immediately, unless the defendant can demonstrate to the court that he or she needs more time to pay. If the court is satisfied that time to pay is required, it may allow up to six months to pay, and up to a further six months on a later occasion if there are exceptional reasons justifying the extension. In no case, however, will more than 12 months be granted from the day on which the confiscation order is made. The prosecution has the right to make representations to the court before any order extending the time available to pay a compensation order is made. The substituted section 11 seeks to give effect to the commitment in the Serious and Organised Crime Strategy to strengthen POCA by “significantly reducing the time that the courts can give offenders to pay confiscation orders”.
33. New section 11(1) expressly provides that the full amount payable under a confiscation order must be paid once the order is made (unless the court provides otherwise); the existing section 11(1) simply refers to “the amount”, albeit that the effect is that the full amount must be paid on the day the confiscation order is made.
34. New section 11(2) provides that the court may only extend the time to make full payment of the confiscation order if the court is satisfied that the defendant is unable to pay the full amount on the date the order is made. The existing section 11(2) gives the court a wider discretion to make an order providing more time to pay a confiscation order “if the defendant shows that he needs time to pay the amount ordered to be paid”. The new section 11(2) also provides that the court may require different amounts of time for payment (the “specified period”) of different parts of the amount ordered to be paid. For example, if the full amount is £1 million, the court might order £500,000 to be paid immediately (if the defendant has that amount available in cash), £200,000 within 28 days (if the defendant has shares worth that amount) and £300,000 within three months (if the defendant has property worth that amount).
35. New section 11(3) defines the specified period for the purpose of subsection (2). Whereas the existing section 11(3) sets the maximum length of the specified period at six months, the new section 11(3) reduces this to three months.

*These notes refer to the Serious Crime Act 2015 (c.9)
which received Royal Assent on 3rd March 2015*

36. New section 11(4) enables the court, on application by the defendant, to extend, by order, the specified period (“the extended period”). At present, the court may make such an order if it “believes there are exceptional circumstances”. The new test is that the defendant is unable to pay the amount required within the specified period “despite having made all reasonable efforts”. Where the court is satisfied that this test is met, it has the discretion to specify different time periods for payment of the outstanding sums. So, for example, if the defendant had been ordered to pay £150,000 within 14 days and makes an application to the court for extending that time period, the court may order that £50,000 be paid immediately, provide a further seven days for another £50,000 to be paid over and a further 14 days for the remaining £50,000 to be paid over. Any application by the defendant must be made before the expiry of the specified period.
37. New section 11(5) defines the extended period for the purpose of subsection (4) and, by extension, the maximum duration of the specified period and the extended period when aggregated together. Whereas the existing section 11(5) sets this maximum aggregated period at 12 months, the new section 11(5) reduces this to six months. As now, it would be possible for the court to grant an extended period for payment after the expiry of the specified period, but may not do so more than six months (currently 12 months) after the confiscation order was made (new section 11(6)).
38. New section 11(7) provides that any specified period or extended period must be as short as it can be. There is currently no equivalent provision in the existing section 11.
39. New section 11(8) replicates the existing ability of the prosecution to make representations before any order under new section 11(2) or (4) is made.
40. *Subsection (2)* substitutes a new subsection (3) in section 12 of POCA. Section 12 provides that the defendant must pay interest on a confiscation order that is not paid in full by the time allowed. The rate of interest is that specified in section 17 of the Judgments Act 1838, namely 8%. Any interest due forms part of the amount payable under a confiscation order. At present, interest is not payable during any period where the defendant has made an application to the court under section 11(4) of POCA to further extend the time allowed for payment and that application has not been determined by the court (provided that 12 months has not elapsed since the making of the order). Under the substituted section 12(3), this maximum period of grace where interest is not payable pending a court’s determination of an application under section 11(4) is reduced from 12 months to six months, in line with new section 11(5). In addition, new section 12(3) makes it clear that whilst interest is not payable on the amount in relation to which the defendant has an outstanding application for an extended period, interest would still be payable on any amounts due in respect of an expired specified period, that are not part of the outstanding application for an extended period.
41. *Subsection (3)* makes a consequential amendment to section 87 of POCA which defines when confiscation orders are satisfied and when they are subject to appeal. Subsection (3) inserts a new subsection (1A) into section 87 for the purpose of defining the term “amount payable”. This term is used in a number of places in Part 2 of POCA. As section 11 of POCA is currently drafted, the scheme as set out in Part 2 assumes that the amount ordered to be paid would be paid in full at some point, rather than in instalments. Against this background, the term “amount payable” should be read as a reference to the full amount. The definition in new section 87(1A) makes it clear that this term should be read as the amount that remains payable.

Section 6: Confiscation and victim surcharge orders

42. This section amends section 13 of POCA, which makes provision in relation to the effect of a confiscation order on the court’s other sentencing powers to make financial orders against the defendant. In particular, it requires a court that has made a confiscation order against a defendant to take account of that order before it imposes a fine or makes a specified financial order against the defendant. The specified financial orders are set out

in section 13(3) and expressly exclude a compensation order made under section 130 of the Powers of Criminal Courts (Sentencing) Act 2000 (that is, an order requiring the offender to pay compensation to the victim of the crime) and an unlawful profits order under section 4 of the Prevention of Social Housing Fraud Act 2013 (that is, an order requiring the offender to pay the landlord an amount representing the profit made by the offender as a result of the conduct that constituted the offence of unlawful sub-letting under section 1 or 2 of that Act).

43. Section 13(5) and (6) of POCA provide that where a defendant has either or both of a compensation order and an unlawful profit order made against him or her, in addition to a confiscation order, and the court believes the defendant will not have sufficient means to satisfy all the orders in full, the court must direct that the compensation and/or amount payable under the unlawful profit order (or both) be paid out of any sums recovered under the confiscation order, with the amount paid being the amount the court believes will not be recoverable because of the insufficiency of the defendant's means. The intention of these provisions is to ensure that, should the defendant have insufficient means to satisfy all the orders against him or her in full, any amounts owed to the victims of crime will take priority over the amounts owed to the government.
44. Section 161A of the Criminal Justice Act 2003 places an obligation on the court sentencing a defendant to order that defendant to pay a surcharge ("the victim surcharge"). The monies raised by this surcharge are used to fund victim services through the Victim and Witness General Fund. Section 161A(3) provides that where a court dealing with an offender considers it to be appropriate to make a compensation order or an unlawful profit order (or both), but is of the view that the defendant has insufficient means to pay both the victim surcharge and the amounts due under such orders, the court must reduce the surcharge accordingly (if necessary to nil). As with section 13(5) and (6) of POCA, the intention is that any amounts owed to the victims of crime will take priority over the amounts owed to the government – even if the money owed to the government is used to support victim services.
45. Whilst section 13(5) and (6) of POCA ensures that compensation orders and unlawful profit orders take priority over a confiscation order when the court believes the defendant will not have sufficient means to satisfy all the orders in full, the confiscation order still currently takes priority over any amounts ordered to be paid as a victim surcharge. The amendments made to section 13 of POCA provide that the victim surcharge is to be treated in the same way as compensation orders and unlawful profit orders, and is therefore to take priority over a confiscation order when the court believes the defendant will not have sufficient means to satisfy all the orders in full. *Subsections (2) to (4)* achieve this by introducing into section 13 the concept of a "priority order" and defining this term so as to include either a compensation order or the victim surcharge or an unlawful profits order.

Section 7: Orders for securing compliance with confiscation order

46. This section inserts new sections 13A and 13B into POCA. Section 41(7) of POCA confers on the Crown Court, when making a restraint order, the power to make such order as it believes appropriate for the purposes of ensuring that a restraint order is effective. Such a power has been used to, amongst other things, impose an overseas travel ban on the person subject to a restraint order. New section 13A confers a similar power on the Crown Court to make a "compliance order" when making a confiscation order. The Court is at liberty to impose any restrictions, prohibitions or requirements as part of a compliance order provided they are considered appropriate for the purpose of securing that the confiscation order is effective, but it must consider whether to impose a ban on the defendant's travel outside the UK (new section 13A(4)). If the court thinks that imposing a travel ban would help in ensuring that the confiscation order is effective then it might, for example, impose a requirement on the defendant to surrender his or her passport. Whilst the duty on the court to consider the imposition of a travel ban only applies to the defendant, it is open to the court to impose a prohibition or

restriction on a third party when this is considered appropriate to make the confiscation order effective. Any person affected by a compliance order, that is the defendant or a third party, together with the prosecutor may apply to the court to vary or discharge a compliance order (new section 13A(5)).

47. New section 13B provides for a right of appeal to the Court of Appeal and subsequently to the Supreme Court, by the prosecutor against a decision by the Crown Court not to make a compliance order, or by the prosecutor or person affected by a compliance order against the decision to make, vary or discharge a compliance order (including the terms of such an order as made or varied). These rights of appeal mirror those in sections 43 and 44 of POCA in respect of restraint orders.

Section 8: Variation or discharge

48. This section makes further provision for the discharge of confiscation orders. POCA provides for the writing off of confiscation orders in two circumstances. First, section 24 makes provision for an application to the Crown Court by a designated officer in a magistrates' court to have a confiscation order written off if the outstanding amount is under £1,000 and the outstanding amount is a consequence of exchange rate fluctuations or any other reason specified in an order made by the Secretary of State (this order-making power has not been exercised). Second, section 25 provides for an application to the Crown Court to have a confiscation order written off if the outstanding amount is less than £50.
49. *Subsection (2)* inserts new section 25A into POCA to enable the writing off of confiscation orders in a third set of circumstances, namely where the subject of the order has died. When the subject of an order has died, it is still possible to apply to the court to appoint an enforcement receiver under section 50 of POCA to enforce the order against the estate of the defendant. However, there may be cases where the estate has insufficient funds or where the cost of appointing a receiver exceeds the value of the assets that could potentially be recovered. New section 25A(2) enables the court to write off the confiscation order in such cases.
50. *Subsection (3)* provides for new section 25A of POCA to operate not only in relation to confiscation orders made under POCA but those made under the precursor confiscation regimes in the Drug Trafficking Act 1994 and the Criminal Justice Act 1998.
51. Section 23 of POCA enables the defendant or a receiver appointed under section 50 to apply to the Crown Court to vary the terms of a confiscation order where it can be shown that there are insufficient assets to satisfy the order. In the majority of cases no receiver is appointed, accordingly if the defendant dies there is no one who is eligible to apply to vary a confiscation order. *Subsection (1)* amends section 23 so as to add the prosecutor to the list of parties with the power to apply to the court to vary orders.

Section 9: Absconding defendants

52. This section amends sections 27 and 28 of POCA, which make provision for the making of confiscation orders where the defendant has absconded. Section 28 of POCA applies where a defendant absconds after proceedings for an offence or offences are started against that defendant, but before such proceedings are concluded. Section 27 applies where defendant absconds after he or she —
- is convicted of an offence or offences in proceedings before the Crown Court,
 - is committed by a magistrates' court to the Crown Court for sentence in respect of an offence or offences under the provisions of the Powers of Criminal Court (Sentencing) Act 2000 ("the 2000 Act"), or
 - is committed to the Crown Court in respect of an offence or offences under section 70 of POCA (which provides for an offender to be committed to the Crown

Court for confiscation proceedings following a conviction of an offence in the magistrates' court).

53. These provisions do not, however, expressly cover the situation where a defendant absconds shortly before the conclusion of their trial. In such circumstances it may be possible to complete the trial notwithstanding the absence of the defendant, provided that the defendant's counsel's instructions were sufficient to see the trial through to its conclusion. If the defendant was convicted in his or her absence in such a case, the legislation is unclear as to whether it would be possible to make a confiscation order against that defendant under section 27 or 28. Section 27(2)(a) currently makes it clear that section 27 applies where the defendant absconds after being convicted of an offence, but in this scenario the defendant would have absconded prior to conviction. There has also been uncertainty as to whether section 28 would apply as section 28(2)(a) specifies that one of the necessary conditions for that section to apply is that "proceedings for an offence or offences are started against a defendant but are not concluded". However, in May 2014 the Court of Appeal held, in the case of *R v. Charles Okedare* [2014] EWCA Crim 1173¹, "that an individual who has absconded and subsequently is convicted of a criminal offence in his absence can subsequently be made subject to a confiscation order under POCA at a hearing which he has not attended due to continuation of his absconding. The appropriate provision being section 6 as applied by section 28 of the Act." This section makes the position explicit on the face of POCA.
54. *Subsection (1)* substitutes a new subsection (2) of section 27 of POCA so as to provide expressly that a confiscation order may be made against a person who absconds before the conclusion of his or her trial and is subsequently convicted in his or her absence. The new section 27(2) preserves the other circumstances in which a confiscation order may currently be made against a person who absconds post conviction.
55. *Subsection (2)* substitutes a new subsection (6) of section 27 for the existing subsections (6) and (7). New subsection (6) adapts the operation of sections 19 to 21 in relation to a recaptured absconder. Those sections provide for the reconsideration of a decision by a court not to make a confiscation order or, where an order has been made, for the amount payable under the order to be increased. The principle underlying these sections is that the earlier decision of the court should only be open to reconsideration where new evidence comes to light (see sections 19(1)(a), 20(4)(a) and 21(1)(b)). The effect of new subsection (6)(a), (b) and (c) is to make sections 19, 20 and 21 respectively apply, in the case of a recaptured absconder, without the requirement for new evidence.
56. *Subsection (3)* amends section 28 of POCA which deals with absconders who abscond prior to conviction. Section 28(2)(c) provides that the prosecutor must wait for a period of two years from the date that the court believes that the defendant has absconded before they can apply for a confiscation order against that defendant. The original intention of this provision was to provide a reasonable opportunity for the defendant to be found or reappear before a confiscation order could be made against him or her. The amendment reduces the period of time in section 28(2)(c) from two years to three months.
57. *Subsection (4)* substitutes a new subsection (6) of section 28 of POCA so as to further modify the application of section 21 of that Act where a recaptured absconder is dealt with under section 28. The modification of section 21 is along similar lines to that made by subsection (2)(c) of the section.

Section 10: Default sentences

58. This section gives effect to the commitment in the Serious and Organised Crime Strategy to strengthen POCA by "substantially strengthening the prison sentences for

¹ <https://www.crimeline.info/case/r-v-okedare-charles>

*These notes refer to the Serious Crime Act 2015 (c.9)
which received Royal Assent on 3rd March 2015*

failing to pay confiscation orders so as to prevent offenders choosing to serve prison sentences rather than pay confiscation orders”.

59. *Subsection (1)* amends section 35 of POCA, which enables the Crown Court to set a default sentence for the defendant to serve if he or she fails to pay the amount due under the confiscation order. Section 35 of POCA achieves this outcome by treating an unpaid confiscation order as if it were an unpaid fine thereby attracting the fine enforcement provisions in the 2000 Act and Part 3 of the Magistrates’ Courts Act 1980. The 2000 Act makes provision for the court to fix a term of imprisonment (or detention where the defendant is under 18) for an individual if any sum for which he or she is liable to pay as a fine is not duly paid (a “default sentence”). The maximum default term applicable to a particular confiscation order is determined by a sliding scale based on the amount of the outstanding sum payable, varying from seven days’ imprisonment for an amount not exceeding £200 to ten years’ imprisonment for an amount exceeding £1 million (as set out in section 139(4) of the 2000 Act). Unlike a fine, serving a default sentence for failure to pay a confiscation order does not relieve the defendant of the obligation to pay the full amount due under the order, plus any interest that has accrued on that amount.

DEFAULT SENTENCES: SLIDING SCALE
UNDER SECTION 139(4) OF THE 2000 ACT

An amount not exceeding £200	7 days
An amount exceeding £200 but not exceeding £500	14 days
An amount exceeding £500 but not exceeding £1,000	28 days
An amount exceeding £1,000 but not exceeding £2,500	45 days
An amount exceeding £2,500 but not exceeding £5,000	3 months
An amount exceeding £5,000 but not exceeding £10,000	6 months
An amount exceeding £10,000 but not exceeding £20,000	12 months
An amount exceeding £20,000 but not exceeding £50,000	18 months
An amount exceeding £50,000 but not exceeding £100,000	2 years
An amount exceeding £100,000 but not exceeding £250,000	3 years
An amount exceeding £250,000 but not exceeding £1 million	5 years
An amount exceeding £1 million	10 years

60. Subsection (1) amends section 35 of POCA so as to disapply section 139(4) of the 2000 Act insofar as it relates to confiscation orders and to insert a new subsection (2A) containing a bespoke sliding scale of default sentences applicable to such orders. In providing for a new sliding scale of default sentences, new section 35(2A) makes two substantive changes to the sliding scale provided for in section 139(4) of the 2000 Act.
61. The first change is to simplify the sliding scale, replacing the existing 12 tiers as provided for in section 139(4) of the 2000 Act with four tiers.
62. The second change is to increase the maximum period of imprisonment for defaulting on a confiscation order for an amount exceeding £500,000 but not more than £1 million from five to seven years and for an amount exceeding £1 million from ten to 14 years.
63. New section 35(2C) confers power on the Secretary of State, by order, to amend the table in new section 35(2A) so as to provide for both minimum and maximum terms of imprisonment, to vary any minimum sentences so introduced, to vary the maximum sentences and to modify the tiers, for example by introducing additional tiers. As a result of the amendments made to section 459 of POCA by *subsection (2)* this order-making power is subject to the affirmative procedure.

64. *Subsection (3)* inserts new subsections (2B) and (2C) into section 258 of the Criminal Justice Act 2003, which governs the release of persons serving a default sentence under POCA. By virtue of section 258(2) of the Criminal Justice Act 2003 persons serving a default sentence are automatically eligible for release at the half way point of the default sentence. New subsection (2B) of section 258 of the Criminal Justice Act 2003 disapplies subsection (2) of that section where the default sentence relates to the non-payment of a confiscation order of more than £10 million. In such cases, therefore, the person would be required to serve the full default sentence until such time as the confiscation order is discharged on full payment. New subsection (2C) of section 258 of the Criminal Justice Act 2003 confers a power to vary the £10 million figure by order. As a result of the amendments made to section 330 of the Criminal Justice Act 2003 by *subsection (4)*, this order-making power is subject to the affirmative procedure.
65. As a result of the changes made by this section, the maximum custodial period that may be served by an offender who defaults on payment of a confiscation order over £10 million will increase from five years (that is, half of the current maximum 10 year sentence) to 14 years.

Section 11: Conditions for exercise of restraint order powers

66. This section amends sections 40 and 41 of POCA, which set out the circumstances under which a restraint order may be made by the Crown Court. A restraint order has the effect of freezing property that may be liable to confiscation following the trial and the making of a confiscation order; breach of a restraint order constitutes a contempt of court. The section gives effect to the commitment in the Serious and Organised Crime Strategy to strengthen POCA by “enabling assets to be frozen more quickly and earlier in investigations”.
67. Section 40 of POCA sets out a number of alternative conditions for making a restraint order. The intention is that a restraint order should be available at any time after a criminal investigation has started to minimise the risk of the accused being able to dissipate his or her assets beyond the reach of law enforcement agencies. Section 40(2) of POCA sets out the test in the first condition in the following terms –
- (a) a criminal investigation has been started in England and Wales with regard to an offence, and
 - (b) there is reasonable cause to believe that the alleged offender has benefited from his criminal conduct.

The phrase “reasonable cause to believe” in this context is taken to mean that the court thinks that, on the available evidence, it is more likely than not that the defendant has benefited from criminal conduct. This contrasts with the test for the arrest of a person, namely that there is “reasonable grounds for suspecting” that the person is guilty of an offence that had been or is being committed (see section 24 of the Police and Criminal Evidence Act 1984). The term “suspicion” denotes a degree of satisfaction, not amounting to belief, but at least extending beyond speculation. A test based on suspicion can therefore be more easily satisfied than one based on belief. *Subsection (1)* accordingly amends section 40(2) of POCA so that it provides that a Crown Court may make a restraint order where -

- (a) a criminal investigation has been started in England and Wales with regard to an offence, and
- (b) there *are reasonable grounds to suspect* that the alleged offender has benefited from his criminal conduct.

An advantage of aligning the test for making an arrest and that for the making of a restraint order is that it would be open to the relevant law enforcement agency to apply to the Crown Court for the making of a restraint order and for this to be served in parallel with affecting the arrest of the defendant.

68. *Subsection (2)* inserts new subsections (7A) to (7C) in section 41 of POCA which enable the court to monitor progress with the investigation and, if a decision to charge is not made within a reasonable time, the court may then discharge the restraint order. This safeguard ensures that a defendant does not have his or her assets frozen indefinitely where it becomes evident to the court that insufficient progress is being made with the criminal investigation. What constitutes a “reasonable time” is a matter for the court to determine on the facts of the case. Under section 41, as amended, the court must impose a reporting requirement at the time of making the restraint order (new subsections (7A) and (7B)(a)) unless the court decides not to do so and gives reasons for that decision (new subsection (7C)(a)). The court may decide not to impose a reporting requirement where, for example, the law enforcement agency has informed the court that the suspect is to be arrested and charged within a short period. If a reporting requirement is imposed, the court may, on its own motion, discharge the restraint order (new subsection (7B)(b)). If a reporting requirement has not been imposed, the court may, on its own motion, subsequently impose one (new subsection (7C)(b)) and in such a case the court may, again on its own motion, discharge the restraint order (new subsection (7B)(b)).

Section 12: Continuation of restraint order after quashed conviction

69. This section inserts new subsections (6A) and (6B) into section 42 of POCA to provide for the continuation of a restraint order following the quashing of a conviction but before the start of proceedings for a retrial, so that the defendant is not afforded the opportunity to dissipate any assets that are subject to the restraint order during this interregnum.
70. Section 40 of POCA sets out the conditions that must be satisfied for the Crown Court to make a restraint order. The second condition for making a restraint order (section 40(3) of POCA) is that –
- (a) proceedings for an offence have been started in England and Wales and not concluded, and
 - (b) there is reasonable cause to believe that the defendant has benefited from his criminal conduct.

The court is required to discharge any restraint order made in pursuance of this condition at the conclusion of the proceedings (section 42(6) of POCA). Where a person is convicted of an offence and the conviction is subsequently quashed on appeal, the proceedings are deemed to have concluded at the point at which the conviction is quashed (section 85(4) of POCA). These provisions when taken together require any restraint order to be discharged once the conviction has been quashed, irrespective of whether the prosecution intends to re-try the defendant for the offence(s) in question. The prosecution will not be able to apply for a fresh restraint order until the proceedings for the retrial have been commenced.

71. New section 42(6A) of POCA switches off the duty to discharge a restraint order and instead provides for an existing restraint order to continue in force where a conviction has been quashed and either the Court of Appeal has ordered a retrial or the prosecution has applied to the court for the case to be retried. New section 42(6B) provides for the subsequent discharge of such a restraint order if any of three scenarios apply:
- The Court of Appeal refuses to make an order for a retrial following an application by the prosecution;
 - The Court of Appeal has made an order for a retrial but there is an undue delay in starting proceedings (under section 8(1) of the Criminal Appeals Act 1968 the proceedings must usually be started within two months, although the Court of Appeal may extend this period); or
 - The proceedings for the retrial of the defendant have concluded either as a result of those proceedings being discontinued or as a result of the conviction or acquittal

of the defendant following the retrial. Where the retrial results in a conviction, the restraint order can be replaced by a confiscation order.

Section 13: Conditions for exercise of search and seizure powers

72. Sections 47A to 47S of POCA (as inserted by section 55 of the Policing and Crime Act 2009) provide for search and seizure powers in England and Wales to prevent the dissipation of realisable property that may be used to satisfy a confiscation order. The property may be seized in anticipation of a confiscation order being made. The seizure power is subject to judicial oversight. If a confiscation order is made, the property may be sold in order to satisfy the order. These sections are not yet in force. Section 47A sets out who may exercise the powers. These are an officer of Revenue and Customs, a constable and an accredited financial investigator. There are a number of pre-conditions for the exercise of these powers. In relation to the power to seize property (in section 47C), these pre-conditions are set out in section 47B and cover the situation where an individual is arrested or proceedings are begun against him or her for an indictable offence and there is reasonable cause to believe that he or she has benefited from the offence. In line with the change to the test for the grant of a restraint order made by section 11, *subsection (1)* of section 13 replaces the “reasonable cause to believe” test with a “reasonable grounds to suspect” test.
73. The seizure powers (in section 47C) and the search powers (in sections 47D to 47F) may only be exercised with the ‘appropriate approval’ described in section 47G unless, in the circumstances, it is not practicable to obtain such approval in advance. Sections 47G to 47I make provision in relation to this appropriate approval. Appropriate approval is the prior approval of a justice of the peace or, if that is not practicable, that of a senior officer, as defined in new section 47G(3). NCA officers designated with the powers of a constable, in accordance with the provisions in Schedule 5 to the Crime and Courts Act 2013, may exercise the powers in sections 47A to 47S of POCA.
74. *Subsection (2)* amends section 47G(3) to provide for the Director General of the NCA, or any other NCA officer authorised by the Director General, to confer the appropriate approval where the search or seizure powers are exercised by a designated NCA officer and it is not practicable to get prior approval from a justice of the peace.

Section 14: Seized money etc

75. This section primarily amends section 67 of POCA, which provides magistrates’ courts with a power to order any realisable property in the form of money in a bank or building society account to be paid to the designated officer of the court in satisfaction of a confiscation order. The section gives effect to the commitment in the Serious and Organised Crime Strategy to strengthen POCA by providing for the “rapid confiscation of cash held in bank accounts”.
76. *Subsections (1) and (2)* inserts new subsections (5) to (5B) into section 67 of POCA in substitution for the existing subsections (4) and (5). New section 67(5) has the effect of narrowing the conditions that must be satisfied before money may be seized from a bank or building society account under section 67. There are currently four such conditions:
- a) a restraint order has effect in relation to money to which section 67 of POCA applies;
 - b) a confiscation order is made against the person by whom the money is held;
 - c) an enforcement receiver has not been appointed under section 50 of POCA in relation to the money;
 - d) any period allowed under section 11 for payment of the amount ordered to be paid under the confiscation order has ended (see section 5 above).

*These notes refer to the Serious Crime Act 2015 (c.9)
which received Royal Assent on 3rd March 2015*

The new section 67(5) replicates the second and third of these conditions only. The first and fourth conditions are considered unnecessary. New section 67(5A) introduces a requirement whereby the authority making an application to a magistrates' court for a seizure order under section 67 of POCA must serve notice of the application on the bank or building society that holds the funds to which the application relates.

77. New section 67(5B) takes account of the provisions in new section 10A of POCA, as inserted by section 1 of the Act, which enable a court to make a determination as to the extent of the defendant's interest in property. New section 67(5B) will enable a magistrates' court to order the payment of funds, held in a bank or building society account of a third party (or parties) and subject to a determination by the court under new section 10A, towards the satisfaction of a confiscation order. This will enable funds held in a bank or building society account to be confiscated more rapidly where the account is not held in the name of the defendant, for example a company account. Any third parties affected would have the opportunity to make representations before such a determination is made.
78. *Subsection (4)* makes a similar amendment to section 67A of POCA to that made to section 67 by subsection (1). Section 67A provides that personal property (for example, a car or jewellery) that has been seized by an appropriate officer (for example, a constable or NCA officer) under a relevant seizure power (namely the seizure powers in POCA or PACE), or which has been produced to such an officer in compliance with a production order under section 345 of POCA, may be sold, on the authority of an order made by a magistrates' court, to meet a confiscation order in certain circumstances. Those circumstances currently mirror conditions (b) to (d) set out in paragraph 77. New section 67A(3) omits the last of these conditions. Section 67A is not yet in force.
79. *Subsection (3)* inserts new subsections (7A) and (7B) into section 67 which confer a power on the Secretary of State to amend, by order, section 67 so as to apply the money seizure power to money held by other financial institutions or other realisable cash or cash-like instruments or products, for example share accounts, pension accounts or "bitcoins". As section 67 currently only applies to money, any extension of the power in this section to cover a financial instrument or product may need to modify the section to provide for the instrument or product to be realised into cash; new subsection (7B) enables an order to be made to this end. As a result of the amendment made to section 459 of POCA by *subsection (5)*, this order-making power is subject to the affirmative procedure.