

Legal Sector Affinity Group
Addendum to the Anti-Money Laundering Guidance for the Legal Sector 2021
Part 2a
Specific Guidance for Barristers & Advocates

Suggested Amendments July 2024

This document is an addendum with amendments to the 2021 edition of the Legal Sector Affinity Group, Part 2a Specific Guidance for Barristers and Advocates. It is provided as an update prepared by the Bar Council of England and Wales. The update reflects changes to the guidance in light of the Court of Appeal’s decision in R (on the application of World Uyghur Congress) v National Crime Agency [2024] EWCA Civ 715.

Approval of these amendments will be sought by HM Treasury (HMT). Until approval by HMT, this addendum is supplementary to the main Part 2a guidance and does not supersede it. It is not for your supervisor to provide specific legal advice and/or confirmation on the application of the money laundering regulations (MLRs) or other regulation or legislation. You must satisfy yourself on your legal/regulatory obligations under the MLRs and that you have complied with them. While care has been taken to ensure that this addendum is accurate, up to date and useful, members of the LSAG will not accept any legal liability in relation to it.

Executive Summary

§7, p.5

Remove:

“There is authority from the Court of Appeal of England and Wales that the “ordinary conduct of litigation” does not fall within the concept of becoming concerned in a money laundering arrangement under s.328 of POCA, which will mean that most of the things that you do as a barrister or advocate will not trigger anti-money laundering or counter-terrorist financing obligations. However, you should be alert to circumstances that may take litigation out of the “ordinary” and note that the “ordinary conduct of litigation” exception does not apply to activities performed outside a litigation or arbitration context.”

Add in its place:

You should familiarise yourself with the money laundering and failure to report offences under POCA and the terrorist financing, terrorist money laundering and failure to report offences under the TA.

§9, p.6

End the first sentence with:

“; including in relation to the source of funds for your fees.”

§16, p.7

Change the title above §16 to:

The “Ordinary Conduct of Litigation” Exemption

§16 Add at the end of the paragraph:

“That means that the majority of the work conducted by barristers and advocates will not trigger anti-money laundering or counter-terrorist financing obligations. Although the Court was considering s.328 alone, its reasoning in relation to the lawyer-client relationship is of application to each of the money laundering offences within POCA.”

§17 Delete current paragraph and add instead:

The “*ordinary conduct of litigation*” exception does not apply to activities performed outside a litigation or arbitration context. Practitioners should be alert to circumstances that may take litigation out of the “*ordinary*”, for example ‘sham’ litigation. Practitioners should also note that the Court in *Bowman v Fels* was not asked to and did not express a view as to whether the “*ordinary conduct of litigation*” exemption applies to the receipt of legal fees. Caution should therefore be had as to the source of funds received for the payment of fees.”

DETAILED GUIDANCE

OVERVIEW: THE LEGAL FRAMEWORK

§7, p.18

Add, before the last sentence:

“Following the decision to exit from the EU, provisions for the removal of EU law from the UK’s anti-money laundering regulations were made by the *Money Laundering and Transfer of Funds (Information) (Amendment) (EU Exit) Regulations 2019* (SI 2019/253) (which came into force at 11pm on 31 December 2020). Future regulations will be made pursuant to the powers provided for under Part 2 of the *Sanctions and Anti-Money Laundering Act (2018)*.”

Annex 2 - AML FAQs

FAQ 6

Remove current answer and replace with:

Provided that the fee that you have agreed represents “adequate consideration” (within the meaning of s.329(2)&(3)) of POCA you will not have committed the s.329(1) offence of acquiring, using or possessing criminal property’.

However, in *Rex (on the application of World Uyghur Congress) v the National Crime Agency* [2024] EWCA Civ 715, it was held that the ‘adequate consideration’ exemption has no application to the ss.327 and 328 POCA offences.

The Court also held that where a person acquires property that represents someone’s benefit from criminal conduct and that person knows or suspects that it constitutes or represents such a benefit, that property remains criminal property even where the ‘adequate consideration’ exemption applies. Only persons who receive such funds without notice of their criminal nature receive them as clean funds.

Whilst the decision in *World Uyghur Congress* does not impact upon the decision in *Bowman v Fels*, the Court in *Bowman v Fels* was not considering a lawyer’s obligations under POCA in relation to the receipt of legal fees. Whether the decision in *Bowman v Fels* applies to legal fees has not been considered by the Courts.

Accordingly, if you receive payment for fees knowing or suspecting that the funds received are criminal property you may be in possession of criminal property even if you give adequate consideration for those monies. Receiving such fees, without the required consent, could expose you to potential criminal liability for money laundering offences, such as being a party to a ‘transfer’ within the meaning of s 327 or an ‘arrangement’ within s 328 of the Act. A subsequent conversion or transfer of those monies could also expose you to criminal liability under s 327 of the Act.

You should therefore give careful consideration as to whether you should make a POCA s.338 “authorised disclosure”(aka a “Defence Against Money Laundering” disclosure, or “DAML”) to the National Crime Agency.

FAQ 7

Remove the first two sentences and replace with:

“Whilst, the method of payment is, strictly speaking, irrelevant, you should consider whether the method chosen gives rise to any AML/CTF concerns. The key issue in relation to payment of fees is whether you know or suspect that they are or represent the proceeds of criminal conduct. For further consideration of this issue see the answer to FAQ 6 above.”

Third sentence:

Remove the word “However” at the start of the sentence.

FAQ 8

Remove the first word “No” and replace with:

“Provided the information received does not cause you to know or suspect that your fees are being paid for the by proceeds of crime, no.”

After the last sentence, add:

“Where the information provided to you leads you to know or suspect that your fees are being paid by property that is or represents the proceeds of criminal conduct you may be at risk of committing a money laundering offence if you do not make a POCA s.338 “authorised disclosure”(aka a “Defence Against Money Laundering” disclosure, or “DAML”) to the National Crime Agency. For further consideration of this issue see the answer to FAQ 6 above.”

FAQ 14

Add an additional paragraph:

“Given your concerns in relation to the underlying transaction you may want to consider whether you have any concerns in relation to the source of the funds for your fees. For further consideration of this issue see the answer to FAQ 6 above.”

FAQ27

Add an additional paragraph:

“Given your concerns in relation to the underlying transaction you may want to consider whether you have any concerns in relation to the source of the funds for your fees. For further consideration of this issue see the answer to FAQ 6 above.”

FAQ 32

Add an additional paragraph:

“Given your concerns in relation to the property you may want to consider whether you have any concerns in relation to the source of the funds for your fees. For further consideration of this issue see the answer to FAQ 6 above.”

Annex 4, Typologies

Typology 1 – Public Access

Q1 & Q2

Remove current answer and replace with:

Provided that the fee that you have agreed represents “adequate consideration” (within the meaning of s.329(2)&(3)) of POCA you will not have committed the s.329(1) offence of acquiring, using or possessing criminal property’.

However, in *Rex (on the application of World Uyghur Congress) v the National Crime Agency* [2024] EWCA Civ 715, it was held that the ‘adequate consideration’ exemption has no application to the ss.327 and 328 POCA offences.

The Court also held that where a person acquires property that represents someone’s benefit from criminal conduct and that person knows or suspects that it constitutes or represents such a benefit, that property remains criminal property even where the ‘adequate consideration’ exemption applies. Only persons who receive such funds without notice of their criminal nature receive them as clean funds.

Whilst the decision in *World Uyghur Congress* does not impact upon the decision in *Bowman v Fels*, the Court in *Bowman v Fels* was not considering a lawyer’s obligations under POCA in relation to the receipt of legal fees. Whether the decision in *Bowman v Fels* applies to legal fees has not been considered by the Courts.

Accordingly, if you receive payment for fees knowing or suspecting that the funds received are criminal property you may be in possession of criminal property even where you give adequate consideration for those monies. Receiving such fees, without the required consent, could expose you to potential criminal liability for money laundering offences, such as being a party to a ‘transfer’ within the meaning of s.327 or an ‘arrangement’ within s.328 of the Act. A subsequent conversion or transfer of those monies could also expose you to criminal liability under s.327 of the Act.

You should therefore give careful consideration as to whether you should make a POCA s.338 “authorised disclosure”(aka a “Defence Against Money Laundering” disclosure, or “DAML”) to the National Crime Agency.

Whilst, the method of payment is, strictly speaking, irrelevant, you should consider whether the method chosen gives rise to any AML/CTF concerns. The key issue in relation to payment of fees is whether you know or suspect that they are or represent the proceeds of criminal conduct.

Q3 & Q4

First paragraph. Before the first sentence, add:

“As you suspected that the money from which your fees were paid were the proceeds of crime you may be in possession of criminal property.”

First paragraph. Remove the second sentence, “You are obliged to return the money.”

Third paragraph. Replace the last sentence with “In such circumstances, you must make a “DAML”, i.e. a POCA s.338 “authorised disclosure”, to the NCA and seek to obtain consent to return the funds to X.”

Typology 4 – A Commercial Case

Q1

Add, at the end of the section “*Acting Upon Your Instructions*”:

“Given your concerns in relation to the underlying transaction you may want to consider whether you have any concerns in relation to the source of the funds for your fees. For further consideration of this issue see the answer to Q1 & Q2 of Typology 1 – Public Access above.”

Q4

Add, at the end of the section “Acting Upon Your Instructions”:

“Given your concerns in relation to the underlying transaction you may want to consider whether you have any concerns in relation to the source of the funds for your fees. For further consideration of this issue see the answer to Q1 & Q2 of Typology 1 – Public Access above.”

In the section “Acting Upon Your Instructions”, Replace the first sentence with:

“Before acting upon your instructions to prepare the settlement agreement and minute of the decision of the arbitrator you, must make a POCA s.338 “*authorised disclosure*” to the NCA and seek consent to act, (referred to by the NCA as a “Defence Against Money Laundering” disclosure or a “DAML”).

Typology 5 – Crime

Q1

Replace the current answer with:

“Provided the admissions made by your client do not cause you to know or suspect that your fees are being paid for the by proceeds of crime, no. However, if the information provided to you leads you to know or suspect that your fees are being paid by property that is or represents the proceeds of criminal conduct you may be at risk of committing a money laundering offence if you do not make a POCA s.338 “authorised disclosure”(aka a “Defence Against Money Laundering” disclosure, or “DAML”) to the National Crime Agency. For further consideration of this issue see the answer to Q1 & Q2 of Typology 1 – Public Access above.”

Typology 9 – Family

Q1

After the last paragraph under the heading “Part Two: Further Instructions in Relation to the Cash that was in the Attic”, Add:

“You should consider whether the information provided by your client causes you to know or suspect that your fees are being paid for the by proceeds of crime. If you do know or suspect that your fees are being paid by property that is or represents the proceeds of criminal conduct you may be at risk of committing a money laundering offence if you do not make a POCA s.338 “authorised disclosure”(aka a “Defence Against Money Laundering” disclosure, or “DAML”) to the National Crime Agency. For further consideration of this issue see the answer to Q1 & Q2 of Typology 1 – Public Access above.”

In the third paragraph delete the word ‘and’ so that paragraph 3 reads:

“You consider that you may be committing a money laundering offence by either assisting the wife in retaining her property or by possessing the funds paid to you.”

Q 6

Remove current answer (not including the section headed “Other matters”) and replace with:

Provided that the fee that you have agreed represents “adequate consideration” (within the meaning of s.329(2)&(3)) of POCA you will not have committed the s.329(1) offence of acquiring, using or possessing criminal property’.

However, in *Rex (on the application of World Uyghur Congress) v the National Crime Agency* [2024] EWCA Civ 715, it was held that the ‘adequate consideration’ exemption has no application to the ss.327 and 328 POCA offences.

The Court also held that where a person acquires property that represents someone’s benefit from criminal conduct and that person knows or suspects that it constitutes or represents such a benefit, that property remains criminal property even where the ‘adequate consideration’ exemption applies. Only persons who receive such funds without notice of their criminal nature receive them as clean funds.

Whilst the decision in *World Uyghur Congress* does not impact upon the decision in *Bowman v Fels*, the Court in *Bowman v Fels* was not considering a lawyer’s obligations under POCA in relation to the receipt of legal fees. Whether the decision in *Bowman v Fels* applies to legal fees has not been considered by the Courts.

Accordingly, if you receive payment for fees knowing or suspecting that the funds received are criminal property you may be in possession of criminal property even if you give adequate consideration for those monies. Receiving such fees, without the required consent, could expose you to potential criminal liability for money laundering offences, such as being a party to a ‘transfer’ within the meaning of s 327 or an ‘arrangement’ within s 328 of the Act. A

subsequent conversion or transfer of those monies could also expose you to criminal liability under s 327 of the Act.

You should therefore give careful consideration as to whether you should make a POCA s.338 “authorised disclosure”(aka a “Defence Against Money Laundering” disclosure, or “DAML”) to the National Crime Agency.”

Typology 12 – Trusts, Advice Upon a Will

Q1

After the last paragraph, Add:

“You should consider whether the information provided to you by X about Y’s estate causes you to know or suspect that your fees are being paid for the by proceeds of crime. If you do know or suspect that your fees are being paid by property that is or represents the proceeds of criminal conduct you may be at risk of committing a money laundering offence if you do not make a POCA s.338 “authorised disclosure”(aka a “Defence Against Money Laundering” disclosure, or “DAML”) to the National Crime Agency. For further consideration of this issue see the answer to Q7 of this Typology, below.”

Q6

After the last paragraph, Add:

“You should consider whether the information provided to you by X about Y’s estate causes you to know or suspect that your fees are being paid for the by proceeds of crime. If you do know or suspect that your fees are being paid by property that is or represents the proceeds of criminal conduct you may be at risk of committing a money laundering offence if you do not make a POCA s.338 “authorised disclosure”(aka a “Defence Against Money Laundering” disclosure, or “DAML”) to the National Crime Agency. For further consideration of this issue see the answer to Q7 of this Typology, below.”

Q7

Remove current answer and replace with:

Provided that the fee that you have agreed represents “adequate consideration” (within the meaning of s.329(2)&(3)) of POCA you will not have committed the s.329(1) offence of acquiring, using or possessing criminal property’.

However, in *Rex (on the application of World Uyghur Congress) v the National Crime Agency* [2024] EWCA Civ 715, it was held that the ‘adequate consideration’ exemption has no application to the ss.327 and 328 POCA offences.

The Court also held that where a person acquires property that represents someone’s benefit from criminal conduct and that person knows or suspects that it constitutes or represents

such a benefit, that property remains criminal property even where the ‘adequate consideration’ exemption applies. Only persons who receive such funds without notice of their criminal nature receive them as clean funds.

Whilst the decision in *World Uyghur Congress* does not impact upon the decision in *Bowman v Fels*, the Court in *Bowman v Fels* was not considering a lawyer’s obligations under POCA in relation to the receipt of legal fees. Whether the decision in *Bowman v Fels* applies to legal fees has not been considered by the Courts.

Accordingly, if you receive payment for fees knowing or suspecting that the funds received are criminal property you may be in possession of criminal property even if you give adequate consideration for those monies. Receiving such fees, without the required consent, could expose you to potential criminal liability for money laundering offences, such as being a party to a ‘transfer’ within the meaning of s 327 or an ‘arrangement’ within s 328 of the Act. A subsequent conversion or transfer of those monies could also expose you to criminal liability under s 327 of the Act.

You should therefore give careful consideration as to whether you should make a POCA s.338 “authorised disclosure”(aka a “Defence Against Money Laundering” disclosure, or “DAML”) to the National Crime Agency.”

Typology 13 – Company

Q3

Insert, before the last paragraph:

Your client may require advice in relation to any potential criminal liability under ss.327, 328 and 329 of POCA. Following the decision in *Rex (on the application of World Uyghur Congress) v the National Crime Agency* [2024] EWCA Civ 715, even if they have provided ‘adequate consideration’ for X Ltd if the property that they acquire represents the benefit of criminal conduct and the client knows or suspects that to be the case, then that property remains criminal property once in their possession.

Your client may therefore need advice in relation to whether they should make a POCA s.338 “authorised disclosure”(aka a “Defence Against Money Laundering” disclosure, or “DAML”) to the National Crime Agency.”

End.