

19 August 2022

Ms Babalwa Mbengo
Committee Secretariat
Portfolio Committee on Police
PO Box 15
Cape Town
8000

Doc Ref: SADIYAAA/#316934_v1
Your ref: POCDATARA Amendment Bill
Direct ☎: +27 11 645 6740
E-✉: SadiyaaA@banking.org.za

Per Email: POCDATARAamendmentbill@parliament.gov.za

Dear Madam

THE BANKING ASSOCIATION SOUTH AFRICA'S SUBMISISON ON THE PROTECTION OF CONSTITUTIONAL DEMOCRACY AGAINST TERRORIST AND RELATED ACTIVITIES AMENDMENT BILL

The above matter refers.

The Banking Association South Africa (**BASA**) appreciates the opportunity to comment on the Protection of Constitutional Democracy Against Terrorism and Related Activities Amendment Bill (**POCDATRA Bill**).

Please find herewith our submission for your consideration. We trust that our input will assist in shaping the POCDATARA Bill and are available to discuss the contents hereof if required. Kindly note that BASA does not require a time slot to present to the Committee.

Kind Regards



Sadiyaa Amod
Manager - Legislation & Regulatory Oversight

NAME OF PERSON COMPILING SUBMISSION: SADIYAA AMOD

ORGANISATION: BANKING ASSOCIATION SOUTH AFRICA

SUBMISSION DESCRIPTION: POCDATARA BILL, 2022

Additions are noted in brackets [xxx], and deletions are struck through ~~xxx~~

NO	REFERENCE IN ACT/BILL/DOCUMENT	COMMENT (Why is it a problem?)	PROPOSED WORDING/CHANGE
1.	<p>1. Section 1 of the Act, 2004 is hereby amended— by the insertion in subsection (1) after the definition of "Director of Public Prosecutions" of the following definition:</p> <p>(e) 'electronic communications service provider' means electronic communications service provider as defined in section 1 of the Cybercrimes Act.</p>	<p>1) Clarify if section 1(e) is limited to 'independent' service providers that operate such service as an only (sole) service – an independent Mobile Network Operator, or also applicable where this is provided as a service offering by another type of business, e.g., in collaboration with a primary 'electronic communications service provider'?</p> <p>2) Clarify what is considered "who is deemed to be licensed". Does this extend to a telecommunications service provided which comprises of a Mobile Virtual Network Operator (MVNO), which is characterised as a mobile virtual network operator that does not operate under its own license and does not have the infrastructure to provide mobile services to its customers. Instead, it leases wireless capacity from</p>	

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		<p>pre-existing Mobile Network Operator (MNO).</p> <p>3) The clarity on this item will impact on comments below as this definition links to additional provisions of the Amendment Bill, to wit proposed section 3A that creates offences in relation to 'electronic communications service provider'.</p>	
2.	<p>Section 1(f) by the substitution in subsection (1) for the definition of “entity” of the following definition: " 'entity', with reference to sections 3, 4, and 14 (in so far as it relates to the aforementioned sections), 22[,] and 23 [and 25], means a natural person, or a group of two or more natural persons (whether 5 acting in the furtherance of a common purpose or conspiracy or not), or a syndicate, gang, agency, trust, partnership, fund or other unincorporated association or organisation, or any incorporated association or organisation or other legal person, and includes, where appropriate, a cell, unit, section, subgroup or branch thereof or any combination thereof, <u>and also any entity referred to in a Resolution of the United Nations Security Council and announced in a notice by the Minister of Finance under section 26A(1) of the Financial Intelligence Centre Act, or in a notice given under section</u></p>	<p>1) BASA suggests that it must be clear that an “entity” that has subsequently been removed from a Resolution of the United Nations Security Council and from a notice announced by the Minister of finance under section 26A(1) of the Financial Intelligence Centre Act 38 of 2001 (the FIC Act), or from a notice given under section 26A(3) by the Director referred to in section 1 of the Financial Intelligence Centre Act will not be considered an “entity”.</p> <p>2) Per paragraph 2.4 of the Memorandum on the Objects of POCDATARA Amendment Bill, all UNSC Resolutions, which include financial sanctions, must be published by the Minister of Finance in accordance with section 26A(1) of the FIC Act. BASA is in agreement with the above interpretation and requirements</p>	<p>1) BASA suggests that the following wording be considered:</p> <p>2) “entity”, with reference to sections 3, 4, and 14 (in so far as it relates to the aforementioned sections), 22, and 23 and 25, means a natural person, or a group of two or more natural persons (whether acting in the furtherance of a common purpose or conspiracy or not), or a syndicate, gang, agency, trust, partnership, fund or other unincorporated association or organisation, or any incorporated association or organisation or other legal person, and includes, where appropriate, a cell, unit, section, sub-group or branch thereof or any combination thereof, and also any entity referred to in a Resolution of the United Nations Security Council and announced in a notice by the Minister of Finance under section 26A(1)</p>

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	<p><u>26A(3) by the Director referred to in section 1 of the Financial Intelligence Centre Act;</u>"</p>	<p>of section 26A(1). Therefore, the Minister does not have a discretion to publish or not publish.</p> <p>3) Noting the above requirement, any UNSC Resolution, as amended (by the removal and/ or insertion of 'entity' (as defined) names, would also be required to be published in terms of section 26A(1).</p> <p>4) In light of the above, it is unclear as to the purpose of section 26A(3)(a) – (b), as any such notice contemplated in these sections may only be done pursuant to a notice as gazetted under section 26A(1). The intention hereof would never be for the purposes of amending an initial UNSC Resolution only – as subsequent UNSC Resolutions would be issued amending (adding or removing) sanctions and / or 'entities' in or from the UNSC Resolution.</p> <p>5) Furthermore, noting the concern expressed in the Memorandum, regarding the delay in publication of notifications of entities listed in the UNSC Resolution by the President in terms of POCDATARA, a similar concern is noted in relation to the publication by the Minister of Finance as contemplated in section 26A(1) of the</p>	<p>of the Financial Intelligence Centre Act, [and] or in a notice given under section 26A(3) by the Director referred to in section 1 of the Financial Intelligence Centre Act.</p> <p>3) Alternatively, BSA suggests that the deletion of the words:</p> <p>"in a notice given under section 26A(3) by the Director referred to in section 1 of the Financial Intelligence Centre Act."</p>

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		<p>FIC Act. Noting that 'entities'/ accountable institutions should not be prejudiced by the delay in publication in instances where sanctions and/ or entities have been amended.</p>	
3.	<p>Section 1(n) by the substitution in subsection (1) for the definition of "property" of the following definition: " 'property' means money or any other movable, immovable, corporeal or incorporeal thing, and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof, <u>or any digital representation of perceived value, such as a crypto-currency, that can be traded or transferred electronically within a community of users of the internet who consider it as a medium of exchange, unit of account, or store of value and use it for payment or investment purposes, but does not include a digital representation of a fiat currency or a security as defined in the Financial Markets Act, 2012 (Act No. 19 of 2012);</u>";</p>	<p>1) The definition of 'property' in the form prior to its proposed amendments, is already all-encompassing definition and would include any digital representation of perceived value, which would include i.e. crypto assets, fiat currency and securities.</p> <p>2) The term 'money' in its broadest sense would include any tangible or intangible thing that functions as a means of exchange or debt settlement, a measure of value, a unit of account or as a store of value, and accordingly would include -</p> <p>a) Cash or currency, being physical coins and notes, as contemplated in the SARB Act of 1989.</p> <p>b) A credit against an account held at a banks and which is convertible to cash or currency by the bank on demand.</p> <p>c) Electronic money or e-money, as contemplated in the SARB's position paper on electronic money, which is</p>	<p>1) Noting the commentary, we propose the following: –</p> <p>a) The definition of property remains unamended and hence propose the deletion of the words set out below</p> <p><i>'property' means money or any other movable, immovable, corporeal or incorporeal thing, and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof, or any digital representation of perceived value, such as a crypto-currency, that can be traded or transferred electronically within a community of users of the internet who consider it as a medium of exchange, unit of account, or store of value and use it for payment or investment purposes, but does not include a digital representation of a fiat currency or a security as defined in the Financial</i></p>

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		<p>defined as <i>"Monetary value represented by a claim on the issuer. This money is stored electronically and issued on receipt of funds, is generally accepted as a means of payment by persons other than the issuer and is redeemable for physical cash or a deposit into a bank account on demand."</i></p> <p>d) Virtual or digital currency (e.g., Ripple). In the SARB's position paper on Virtual Currencies, it is defined as <i>"a digital representation of value that can be digitally traded and functions as a medium of exchange, a unit of account and/or a store of value, but does not have legal tender status."</i></p> <p>3) If there is concern as to whether virtual or digital currency constitutes 'money', and hence the proposed inclusion of the following in the definition of property, which defines 'digital representation of perceived value', as being <i>'that can be traded or transferred electronically within a community of users of the internet who consider it as a medium of exchange, unit of account, or store of value and use it for payment or investment purposes, but does not include a digital representation of a fiat currency or a security as defined in the</i></p>	<p><i>Markets Act, 2012 (Act No. 19 of 2012);"</i></p> <p>b) As an alternative if not in support of the above, cross reference the definition of crypto-asset as proposed in Schedule 1 to the FIC Act (which is currently under review).</p> <p>4) In relation to the definition of crypto asset (mentioned above), noting that within the next 12 – 18 months a crypto asset is contemplated as being declared a financial product, consideration to be given to deleting the following wording from the said definition 'or a security as defined in the Financial Markets Act' to refer to a financial product under FAIS? (Excluding crypto assets now, anticipating its declaration as a financial asset.</p>

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		<p><i>Financial Markets Act, 2012 (Act No. 19 of 2012);"</i></p> <p>4) The above wording mirrors the proposed definition of 'crypto assets' contemplated in the prior and now more recent proposed amendments to schedule 1 to the FIC Act. In this regard, a definition of a crypto asset has been contemplated in a number of regulatory requirements / frameworks, namely –</p> <p>i. IFWG Consultation Paper:</p> <p>o "Crypto assets are digital representations or tokens that are accessed, verified, transacted, and traded electronically by a community of users. Crypto assets are issued electronically by decentralised entities and have no legal tender status, and consequently are not considered as electronic money either. It therefore does not have statutory compensation arrangements. Crypto assets have the ability to be used for payments (exchange of such value) and for investment purposes by crypto asset users. Crypto assets have the ability to function as a medium of exchange, and/or unit of account and/or store of value within a community of crypto asset users."</p>	

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		<ul style="list-style-type: none"> ii. IFWG Position Paper which was published for comment <ul style="list-style-type: none"> o 'A crypto asset is a digital representation of value that is not issued by a central bank, but is traded, transferred and stored electronically by natural and legal persons for the purpose of payment, investment and other forms of utility, and applies cryptography techniques in the underlying technology'. iv. Declaration of crypto assets as a financial product, under the Financial Advisory and Intermediary Services Act. <ul style="list-style-type: none"> o "crypto assets" means any digital representation of value that can be digitally traded, or transferred, and can be used for payment or investment purposes, but excluding digital representations of fiat currencies or securities that already fall within the definition of financial product. v. Prior version of the proposed amendments to the POCDATARA Bill. <ul style="list-style-type: none"> o 'virtual asset' means the digital representation of value that can be digitally traded, transferred or used for payment. 	

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		<ul style="list-style-type: none"> <li data-bbox="842 285 1373 846">o Noting that the revised definition as contained in the current proposed amendments to POCDATARA, consideration has been given to the updated guidance issued by FATF in October / November 2021, with the term 'virtual asset' being defined as 'a digital representation of value that can be digitally traded, or transferred, and can be used for payment or investment purposes. Virtual assets do not include digital representations of fiat currencies, securities and other financial assets that are already covered elsewhere in the FATF Recommendations.' <li data-bbox="842 870 1373 1252">vi. Amendments to regulation 28 of the Pension Funds Act, which defines crypto asset "'crypto-asset' means a digital representation of value that is not issued by a central bank, but is capable of being traded, transferred or stored electronically by natural and legal persons for the purpose of payment, investment and other forms of utility; applies cryptographic techniques and uses distributed ledger technology. <li data-bbox="842 1276 1373 1406">o While the definition of section 28 of the Pension fund Act aligns with the definition as contained in the IFWG's position paper 2020 that was issued for 	

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		<p>commentary and subsequently confirmed in the final IFWG position paper published in June 2021 it is important for South African Regulators to agree on a definition of 'crypto asset'</p> <p>5) We urge that Regulators should achieve consistency in the definitions across the board, since different definitions are being applied and there is a concern that differing definitions could bring about disparity in interpretation and treatment.</p>	
4.	<p>"Prohibition of publication with terrorism related content Section 3A(2): A person commits an offence if he or she, in respect of a publication with unlawful terrorism related content— (a) publishes, distributes or circulates such a publication; (b) gives, sells or lends such a publication; (c) offers such a publication for sale or loan; (d) provides a service to others that enables them to obtain, read, listen to, or look at such a publication, or to acquire it by means of a gift, sale or loan; (e) transmits the contents of such a publication electronically; or (f) has such a publication in his or her possession for any purpose contemplated in paragraphs (a) to (e).</p>	<p>1) Section 3A(2)(d) is very onerous, especially for electronic communications service providers – the offence lies in “enables them to obtain, read, listen to, or look at such a publication” whereas such a provider may only provide the access mechanism but has no control over what content is accessed through its service. If the provider for example, enables broad internet access, and the user then chose to search and access prohibited material, the provider will be on the wrong side of the law – this is too wide a provision, especially in view of sub-section (4).</p> <p>2) Given the nature of the services of accountable institution/s (see above),</p>	<p>1) It is proposed that the content of the proposed section 3A(2)(d) which states <i>'provides a service to others that enables them to obtain, read, listen to, or look at such a publication, or to acquire it by means of a gift, sale or loan,</i> be deleted.</p> <p>2) In the absence of its deletion, we propose the following amendment – <i>(d) provides a service to others that enables them to obtain, read, listen to, or look at such a publication, or to acquire it by means of a gift, sale or loan.</i></p> <p>3) In the event that section 3A(2)(d) is not deleted, it is recommended that a new provision be drafted or amendment be made to draft section 3A(5) to allow the</p>

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	<p>(4) For the purposes of subsections (2) and (3), references to the electronic publication with unlawful terrorism related content includes such publication on the internet and social media platforms.</p>	<p>this could be directly applicable to them and impact business operations as it would potentially require content screening. This could have massive impact; may require additional due diligence/screening; changes to processes, etc.</p>	<p>defence contemplated in section 3A(5)(a) to apply in relation to section 3A(2)(d) as well.</p>
5.	<p>Amendment of section 4 of Act 33 of 2004</p> <p>4. Section 4 of the principal Act is hereby amended—</p> <p>(d) by the substitution in subsection (1)(i) for subparagraph (iii) of the following subparagraph:</p> <p>"(iii) for the benefit of a specific entity identified [in a notice issued by the President under section 25] pursuant to a Resolution of the United Nations Security Council relating to the identification of entities— 21</p> <p>(aa) that commit, or attempt to commit, any terrorist and related activity or participate in or facilitates the commission of any terrorist and related activity; or</p> <p>(bb) against which Member States of the United Nations must take the actions specified in that Resolution in order to combat or prevent terrorist and related activities,</p> <p>and which are announced by the Minister of Finance, under section 26A(1) of the Financial Intelligence Centre Act, or in a notice given by</p>	<p>1) See comments under item 2 above.</p>	<p>1) See comments under item 2 above.</p>

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	the Director of the Financial Intelligence Centre under section 26A(3) of the Financial Intelligence Centre Act,";		
6.	<p>Amendment of section 4 of Act 33 of 2004</p> <p>4. Section 4 of the principal Act is hereby amended—</p> <p>(g) by the substitution in subsection (2)(a) for subparagraph (iii) of the following subparagraph:</p> <p>"(iii) for the benefit of a specific entity identified [in a notice issued by the President under section 25] pursuant to a Resolution of the United Nations Security Council relating to the identification of entities— 22</p> <p>(aa) that commit, or attempt to commit, any terrorist and related activity or participate in or facilitates the commission of any terrorist and related activity; or</p> <p>(bb) against which Member States of the United Nations must take the actions specified in that Resolution in order to combat or prevent terrorist and related activities,</p> <p>and which are announced by the Minister of Finance, under section 26A(1) of the Financial Intelligence Centre Act, or in a notice given by the Director of the Financial Intelligence Centre under section 26A(3) of the Financial Intelligence Centre Act; or"</p>	1) See comments under item 2 above	1) See comments under item 2 above

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7.	<p>Section 12 of the principal Act is hereby amended-</p> <p>(a) by the substitution for the heading of the following heading: “Duty to report presence of person suspected of intending to commit or having committed [an] offence and failure to so report.... ... Section 12(9): For the purposes of this Act, no duty of secrecy or confidentiality or any other restriction on the disclosure of information, whether imposed by legislation or arising from the common law or agreement, affects the duty of compliance with this section by an accountable institution, supervisory body or reporting institution as defined in section 1 of the Financial Intelligence Centre Act, or any other person.</p>	<p>1) Whilst there is no hierarchy in legislation, section 12(9) by creating the obligation to comply with this section, notwithstanding an obligation imposed by legislation creates a hierarchy without substantiation, therefore.</p> <p>2) In relation to reference to “reporting institutions”, note that once the amendments to Schedule 1 to the FIC Act are effective, the reference to “reporting institution” may/ will be no longer applicable.</p>	<p>1) It is proposed that section 12(9) be reworded as follows: “For the purposes of this Act, no duty of secrecy or confidentiality or any other restriction on the disclosure of information, may affect the duty of compliance with this section by an accountable institution, supervisory body or reporting institution as defined in section 1 of the Financial Intelligence Centre Act, or any other person.”</p>
8.	<p>Substitution of section 23 of Act 33 of 2004 18. The following section is hereby substituted for section 23 of the principal Act: 23. Freezing order Section 23(2)(b): a specific entity identified in a notice pursuant to a Resolution of the United Nations Security Council relating to the identification of entities— (i) that has committed, or attempted to commit, any terrorist and related activity, or</p>	<p>1) See comments under item 2 above.</p>	

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	<p>participates in or facilitates the commission of any terrorist and related activity; or (ii) against which Member States of the United Nations must take the actions specified in the Resolution in order to combat or prevent terrorist and related activities, and that are announced by the Minister of Finance, under section 26A(1) of the Financial Intelligence Centre Act, or in a notice given by 40 the Director of the Financial Intelligence Centre under section 26A(3) of the Financial Intelligence Centre Act</p>		