CORPORATE CRIME | COUNSEL'S BLOG

A BIRDS-EYE VIEW OF RECENT DEVELOPMENTS IN NON-CONVICTION MONEY LAUNDERING AND ASSET RECOVERY

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The background

1. The current estimates of the cost of financial crime and money laundering in the UK are said to be £160bn and £100bn respectively[1]. To put that into perspective, planned spending on UK health and social care in 2019/2020 is £140bn.

2. The 2018 Financial Action Task Force report awarded high marks to the UK's AML regime[2]. There is no shortage of bodies or powers available (leading to the risk of fractured approaches). The three statutory supervisors: HMRC, Gambling Commission and FCA (within which is the Office for Professional Body AML Supervision ("OPBAS"), regulating the supervisors of 22 accountancy and legal professionals) apply a vast array of AML legislation and regulations.

3. In addition, the co-ordination of all financial crime is the responsibility of the relatively new National Economic Crime Centre ("NECC")[3] who are also responsible for the Joint Money Laundering Intelligence Taskforce (a joint public and private organisation with law enforcement, FCA, and some 40 financial institutions).

4. The National Crime Agency receive some 460,000 SARs a year (the data from which the UK Financial Intelligence Unit analyses and shares with investigatory agencies). That is an enormous volume, perhaps too big. To put it into perspective, the UK can receive half of all reports in the EU each year.

5. At the sharp end, there are roughly 8,000 investigations and 2,000 prosecutions a year (1,400 convictions) where money laundering is the sole or primary offence.

6. This is all very impressive, but bearing in mind the high degree of concern and cost, should there be more? In particular, should there be prosecutions at the high end and where the so-called enablers and facilitators provide respectability to suspicious transactions?

[1] https://www.nationalcrimeagency.gov.uk/who-we-are/publications/242-national-economic-crime-centre-working-together-to-protect-the-public-prosperity-and-the-uk-s-reputation/file
[2] http://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-united-kingdom-2018.html
[3] Created to co-ordinate the relevant law enforcement and regulatory agencies (NCA, SFO, FCA, COLP, HMRC, CPS, Home Office) in the fight against economic crime

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7. Lest there be any doubt about the importance of prosecution, section 2A of the Proceeds of Crime Act 2002 ("POCA") imposes a statutory requirement that the Attorney General's guidance on POCA "*must indicate that the reduction of crime is, in general, best secured by means of criminal investigations and criminal proceedings"*, no doubt to stop law enforcement simply seizing assets without prosecutions. Prosecution is viewed as the best way to create a hostile environment.

8. Although there are calls for more powers (for example, in the first report on AML supervision and sanctions, the Treasury Committee[4] repeated the call for changes to corporate liability) are we using the current powers sufficiently?

9. The *mens rea* required to establish the key POCA offences (i.e. knows or suspects) is amongst the lowest of hurdles in financial crime.

10. The Criminal Finances Act 2017 ("CFA") introduced corporate liability, which is easier to prove, but we still await the first prosecution of the corporate offence of failure to prevent tax evasion[5]. A Freedom of Information request in February 2020 revealed some nine companies under investigation with a further possible 21 investigations across 10 business sectors. Will there be a prosecution or will these cases be resolved by way of DPA or HMRC civil settlement?

11. FCA anti-money laundering powers: the Regulations[6] incorporating the 4th EU Directive on Money Laundering effectively create a 'failure to prevent' criminal offence on regulated firms. Notwithstanding repeated hints that serious cases would be criminally prosecuted, none have.

12. We are well aware that our law enforcement and regulatory agencies do not have the resources to investigate and prosecute all financial crime *reported* let alone all financial crime *committed* and, of necessity, must carefully husband resources. How, therefore, do they calibrate the best use of resources?

How do prosecutors decide?

13. The Attorney General's updated POCA Guidance (issued following the introduction of the CFA in 2017)[7] repeats that crime reduction is best secured by criminal investigation and prosecution. It also states that asset recovery should be considered in all cases. Further, it provides a list of circumstances when a "*non-conviction"* option might be used, such as

[4] March 2019.

[5] The offence follows principles similar to those of the Bribery Act. A non-human legal person (wherever formed or incorporated) is guilty if a person acting on its behalf facilitates tax evasion here or abroad subject to it showing it had reasonable prevention procedures (or that it was not reasonable to expect such procedures). If tax was due abroad there must be some connection to the UK: either the body was incorporated in the UK, carried on part of a business in the UK or the conduct forming part of the offence took place in UK. Guidance has been issued similar to that on the Bribery Act.

[6] The Money Laundering, Terrorist Financing And Transfer Of Funds (Information On The Payer) Regulations 2017 2017 No. 692

[7] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/678293/2018_01_s2A_Guidance.pdf

seizures. Importantly, it contains another list where "*a conviction is feasible but use of non-conviction powers might better serve the overall public interest"* (one of which is where a better deployment of resources may be to use an Unexplained Wealth Order[8]).

14. In the early noughties, great consideration was given to when it was appropriate to prosecute rather than to deal with an issue by administrative or regulatory methods. In his review of the burden of regulation[9] on business, Sir Philip Hampton concluded that regulatory sanctions did not reflect the severity of offending or benefit gained. He recommended a review of sanctions.

15. That review was performed by Professor Richard Macrory, whose conclusions were that greater powers should be given to regulators, leaving criminal prosecutions for *serious* breaches[10]. Macrory set out principles for any sanction and made recommendations which included sensible points as to when one approach was preferred to another. He recommended that: i) regulators should publish an enforcement policy, ii) justify their choice of enforcement actions year on year to stakeholders, iii) enforce in a transparent manner, iv) be transparent in the way in which they apply, v) determine administrative penalties, and vi) avoid perverse incentives that might influence the choice of sanctioning response.

16. The purpose was to ensure that regulators behaved responsibly and did not take a shortcut of fining where they ought not to. The same principles can be applied to investigators taking a non-conviction option.

Are prosecutors more willing to use non-conviction options?

17. Deferred Prosecution Agreements ("DPAs"): notwithstanding criticisms and the need for tweaking, the seven DPAs are a success, particularly the record-breaking Airbus agreement. We will watch with interest whether any corporate that admits liability is prosecuted to conviction and whether breaches are enforced.

18. Unexplained Wealth Orders ("UWOs") have grabbed headlines thanks to Mrs Hajieva's[11] extravagant spending of £16m at Harrods. Clearly, they are a good option where prosecutions may be difficult if, for example, there are difficulties about obtaining evidence from other jurisdictions or the asset is the proceeds of crime but the respondent is not necessarily the criminal. However, as was discussed in the *Baker*[12] case, the purpose of these orders is limited to obtaining information.

19. Of more note, when the NCA obtained UWOs concerning the houses of people involved in UK-based crime, they were combined with Account Freezing Orders ("AFOs") which have been more extensively used than UWOs. In December 2019, the NCA agreed a settlement

[8] This Guidance applies to CPS, HMRC, SFO, FCA and NCA with regards to POCA.
[9] http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/bud05hampton_150305_640.pdf

[10] https://webarchive.nationalarchives.gov.uk/20121205164501/http://www.bis.gov.uk/files/file44593.pdf which led to the introduction of the Regulatory Enforcement and Sanctions Act 2008
[11] [2020] EWCA Civ 108
[12] [2020] EWHC 822 (Admin)

of frozen funds whereby £190m was to be returned to Pakistan[13]. Accordingly, there was no prosecution, no conviction and not even litigation of the claims of criminality in the High Court. A settlement was entirely consistent with the revised s2A Guidance but runs the risk of being seen as the use of a pragmatic approach which allows wealthy people to buy their way out of prosecution but potentially to retain some of their wealth.

20. HMRC: as discussed above, we await the HMRC's approach to their failure to prevent crimes. It should be remembered that although the *Panama Papers* were specifically referred to in Explanatory Notes to the CFA in addressing offences to be captured, prosecutions look unlikely from that leak. It was HMRC's expectation that there would be civil settlements with over £190m to be raised[1]. There was no reference to prosecution.

21. FCA: in many ways, the more interesting dilemma is that facing the FCA and the Regulations. In its Business Plan, the FCA made clear that it would use its "*full range of supervision and regulatory enforcement tools… regulatory and criminal investigations"* to combat money laundering and financial crime more generally.

22. The FCA has considerable involvement in AML. It regulates AML for financial institutions and e-commerce. It has powers pursuant to POCA. It conducts thematic reviews. It has imposed fines on bodies for breaches involving money laundering[14] and issues guidance in its Financial Crime Guide[15] and for the Joint Money Laundering Steering Group's Guidance[16].

23. The Regulations effectively create a *failure to prevent* money laundering offence by making it a criminal offence for a relevant person (which includes an officer or manager of a corporate body) to breach a "*relevant requirement*" (carrying up to 2 years' imprisonment)[17] subject to a defence, *"if that person took all reasonable steps and exercised all due diligence to avoid committing the offence".* Such language is used in many regulatory contexts[18].

24. Although the Regulations do not affect all corporates, they do affect some 100,000 businesses who are effectively "gatekeepers" to the financial system. They are very extensive indeed.

25. *"Relevant requirements"* include taking appropriate steps to *"identify and assess the risks"* of money laundering and terrorist financing to which a business is subject (and keep records)[19] and *"establish and maintain policies"*, controls and procedures to mitigate and manage effectively the risks of money laundering and terrorist financing identified in any

[13] https://www.nationalcrimeagency.gov.uk/news/nca-agrees-190m-settlement-after-frozen-funds-investigation-3
[14] For example, in 2010, the FCA visited SBUK as part of a thematic review and had serious concerns. A Remediation Plan was implemented but not tested. In 2014, a follow-up visit identified serious deficiencies particularly CDD, EDD, SARs. In 2016, the Bank was fined £3,250,600 and a restriction was imposed. The MLRO, personally overworked, insufficiently resourced, with many other duties, tried to implement changes and failed to escalate concerns, and was fined £17,900 and prohibited from certain functions. The CEO was fined £76,400 and a number of steps he ought to have taken were identified.
[15] https://www.handbook.fca.org.uk/handbook/FCG.pdf
[16] https://jmlsg.org.uk/guidance/current-guidance/
[17] Reg 86.
[18] See Law Commission's analysis: http://www.lawcom.gov.uk/app/uploads/2015/06/cp195_Criminal_Liability_consultation.pdf
[19] Reg 18.

risk assessment[20]. There are the usual offences of prejudicing investigations and consenting or conniving offences against officers of a body corporate.

26. Although it is likely that, as with health and safety offences, an investigation will follow a report, it is not necessary. If the FCA performed one of its thematic reviews and found a body wanting, it could prosecute.

27. For some years, Mark Steward of the FCA has stated egregious breaches should be prosecuted – or else why have the power? As yet, none have been. He has said that investigations are opened on a twin civil and criminal basis. He appears keen that there be a criminal case under the Regulations (albeit some cases might equally be prosecutable under the POCA offences).

28. The test, as with the other agencies, will be whether one is brought.

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This briefing note was produced by Sean Larkin QC. This note should not be taken as constituting formal legal advice. To obtain expert legal advice on any particular situation arising from the issues discussed in this note, please contact our clerking team at barristers@qebhw.co.uk. For more information on the expertise of our specialist barristers in criminal and regulatory law please see our website at https://www.qebholliswhiteman.co.uk/.

[20] Reg 19.