FINANCIAL CRIME NEWSLETTER

REFORMING THE SAR REGIME

Written by Louise Sweet QC

The SAR regime is ultimately about crime detection. One effective way for a government to be tough on crime is to ensnare criminal profits and ensure that crime does not pay, but serious and sophisticated criminals have serious and sophisticated methods of laundering their profits. The regulated sector has been turned into the eyes and ears of the State for crime detection, but this regime has brought less than satisfactory results. The NCA receives about 2,000 reports every day of suspicious transactions. Many, if not most, of these are of low quality, fail to reveal useful intelligence and have not led to full investigations, let alone prosecutions.

Those who turn a blind eye to criminal cash passing through their institutions must of course be stopped. There is, however, a balance to be struck which also protects the regulated sector and its client base from onerous obligations which do little to contribute to the fight against crime. If consent to a transaction takes many months to resolve, the effect of this can be ruinous for individuals and companies. Banks are not permitted to tell the client of a SAR, and the cash is effectively frozen, with deals lost and resources wasted. Worse still, the corporate or individual is exposed to the risk of criminal sanctions for failing to act.

The Law Commission's consultation, now closed, wrestled with this balance and proposed a number of changes to help combat the problems faced by the current SAR regime. Three particularly interesting developments contained in the consultation are worth a closer look: new criminal corporate offences; reform of the "suspicion" threshold; and Geographic Targeting Orders.

New criminal corporate offences

The consultation proposes two new corporate criminal offences designed to encourage institutional anti-money laundering culture:

1. A corporate offence of failing to take reasonable measures to ensure staff and associates report suspicions of criminal property; and
2. A corporate offence would be committed where an employee or associate failed to report a suspicion of money laundering.

The Law Society is not keen on either of these, observing that the Money Laundering Regulations 2017 already create substantive criminal offences for firms that fail to implement adequate AML structures. They query how it will help the NCA fight crime to create further corporate offences covering the same ground?

The second proposal involves imposing liability on a corporate body on what would effectively be a strict liability basis where staff fail to report money laundering. This is unlikely to decrease the over-reporting culture, and could engender a tick box corporate approach to

training and supervision of AML obligations. Business resources would then be wasted in engaging in compliance that fails to assist in the fight against crime for fear of corporate criminal sanction.

The current regime is based on the judgment of employees whose suspicions are based on their proximity to transactions and ownership of their own legal obligations. This is an effective and accountable liability regime. The imposition of corporate liability could serve to undermine proper assessment of the transaction.

Practically, these proposed corporate offences would make little difference in the context of the existing SAR regime in the short term. A wider change in institutional culture may have more long-term implications for successful money laundering detection.

Reforming the suspicion threshold

The consultation seeks to define suspicion in line with Part 7 of POCA. Interestingly, whilst this proposal is intended to give those with reporting obligations clearer guidance, it has also been opposed by the Law Society and other consultees, who point out that a statutory definition is not needed as the courts have already clearly defined suspicion within the meaning of the Act (see *R v Da Silva [2007] 4 All ER 900 and GH [2015] 1 WLR 2126).*

A second proposal involves raising of the reporting threshold from the standard of suspicion in *Da Silva* to a test based on whether there are "reasonable grounds to suspect" money laundering. This proposal aims to reduce the number of low quality reports by encouraging a qualitative assessment of the quality of the evidence before a report is made.

A similar but different amendment is proposed for Authorised Disclosure under sub-sections 2(a) of sections 327 to 329 POCA, whereby regulated corporations will be guilty of an offence of failure to report if the person "knows or has reasonable grounds to suspect" that the property is criminal property (as opposed to the current threshold of "knows or suspects" it to be).

Raising the threshold may well reduce the number of low quality reports. However, since consideration would need to be given, for the first time, as to whether there are substantive, reasonable grounds underpinning a suspicion, raising the threshold would also give rise to the need for training and alterations to corporate compliance regimes. This may well lead to a huge cultural change in the approach to suspicious transactions. Guidance will certainly be welcome by all if second-guessing those assessments with the benefit of hindsight is to be avoided.

Geographic Targeting Orders and other jurisdictions

Geographic Targeting Orders ("GTOs"), as currently used by the US Treasury Department, are an example of thematic reporting whereby reporting obligations would arise where certain specified conditions are met. An order can be made by the Treasury Secretary requiring any financial institutions that exist within a geographic area to report transactions greater than a specified value. In 2016, there was an order made that individuals behind companies purchasing property for over $3m in Manhattan and $1m in Miami-Dade County must be reported.

The potential utility of such orders in the UK is obvious given, for example, the level of investment from high-risk jurisdictions into London properties. The advantages of this regime are: it would be clear and easy to prove criminal offences; there would be legal certainty for the regulated sector; and law enforcement would be able to determine the type of reports they wish to receive.

Britain has historically opted for a suspicion-based approach, and so the proposed introduction of a thematic scheme is a new development. There are compelling reasons to maintain the status quo, as it allows professionals in close proximity to the transactions to utilise their expertise and experience to spot and report transactions which may not meet criteria

set in a thematic or administrative reporting regime, but do indicate criminality. However, the combination of a suspicion-based approach with specific schemes allowing the imposition of narrow reporting criteria such as GTOs would be an innovation that should serve to strengthen significantly the effectiveness of the UK's SRA regime.

Conclusion

The results of the consultation will be watched closely by all in the regulated sector. The proposed reforms proposed could have a real and lasting impact on the UK SAR landscape, bringing cultural change and serving to simplify obligations under POCA and significantly reduce the number of defensive reports. The reforms also pose risks and challenges to the regulated sector in the form of new corporate offences, the advent of GTOs and the need for good training and guidance for those at the coal face of transactions. If the NCA wants to get ahead of sophisticated methods of money laundering they need to provide clear guidance and support for the regulated sector, who continue to be asked for help in the fight against serious crime.

ROYAL HEADACHE: PROSECUTING CORPORATE ENTITIES FOR OVERSEAS MONEY-LAUNDERING

Written by Jamas Hodivala

The ongoing battle to combat money-laundering in the UK is well-documented. This applies to both individual and corporate suspects. Whilst the Financial Conduct Authority enforces compliance offences[1], there is an increasing call for modernising legislation to facilitate the prosecution in the UK of corporate offenders for money-laundering offences. Apart from the identification principle being a "Victorian concept"[2], one issue with the prosecution of corporates for money-laundering is a growing international divergence of opinion in what amounts to criminal conduct which gives rise to the laundering of its proceeds. The legalisation of cannabis in some foreign jurisdictions is one obvious example. Another is the recent decision in *McDonnell v US 136 S. Ct. 2355 (2016)* in which the US Supreme Court held that receiving payment to use political influence to arrange meetings was not illegal under federal anti-corruption laws[3] (such conduct would almost certainly amount to an offence contrary to s.2 of the *Bribery Act 2010*). Funds derived from such activity do not represent the proceeds of criminal conduct in those foreign jurisdictions. However, the *Proceeds of Crime Act 2002 (Money Laundering: Exceptions to Overseas Conduct Defence) Order 2006* provides that "criminal conduct" includes conduct which would constitute an offence punishable with imprisonment for a maximum term in excess of 12 months in any part of the UK if it occurred there. This creates an awkward tension between reliance on the exercise of prosecutorial discretion to reflect

[1] e.g. *The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017*.
[2] Lisa Osofsky's evidence before the Justice Committee, 18 December 2018.
[3] For an interesting analysis of this case see 130, Harv. L.R. 467.

common-sense and the application of UK money-laundering laws to extraterritorial conduct.

The UK is increasingly considering the extraterritorial application of its domestic laws in this area. Section 49 and Schedule 2 of the *Sanctions and Anti-Money Laundering Act 2018*, when in force, enable the Minister to create extraterritorial obligations on overseas corporations enacted under UK law as well as those "doing business in the UK". The *Crime (Overseas Production Orders) Act 2019* likewise provides UK authorities with a direct mechanism by which to secure evidence outside mutual legal assistance treaties.

In *R v Rogers (Bradley) [2015] 1 WLR 1017*, the Court of Appeal concluded that ss.327-329 of the *Proceeds of Crime Act 2002* had extraterritorial effect[4]. The appellant lived and worked in Spain and had received the proceeds of fraud committed in the UK (facilitated by British nationals working in foreign call centres) into his Spanish bank account. He then allowed the subsequent withdrawal of the proceeds. He was convicted of "converting" the proceeds of crime contrary to s.327 of the Act by "permitting receipt of money into his personal bank account in Spain". He played no part in transferring the proceeds from the UK to his Spanish bank account. He appealed against his conviction and argued that there was no jurisdiction to try him as s.327 did not operate extraterritorially.

In relying on the provisions of s.327(1)(e) and (2A) of the Act and *R v Smith (Duncan Wallace) (No 4) [2004] QB 1418*, the Court of Appeal concluded that there was jurisdiction to try the appellant in the UK:

(1) Parliament intended that ss.327-329 should have extraterritorial effect ("**the first limb**"); alternatively

(2) That a substantial part of the conduct alleged had occurred in the UK, namely the fraud on British citizens. Applying *R v Smith (Duncan Wallace) (No 4)*, the Crown Court therefore had jurisdiction to try the appellant. At [55] the Court of Appeal continued that the UK courts would not claim jurisdiction if this was a fraud on Spanish citizens committed in Spain ("**the second limb**").

Part of the Court of Appeal's analysis in "the first limb", was the fact that s.340(11)(d) of the Act defined "money-laundering" by reference to conduct that would amount to an offence if committed in the UK. Regrettably, the Court did not refer to the fact that this phrase is explicitly used in other provisions (e.g. s.330 of the Act), but not in ss.327-329. The Court then relied on the underlying conduct which occurred in the UK in dismissing the appellant's argument. This may explain the Court's comment at [55] under "the second limb" that there would be no UK jurisdiction if the offence was committed overseas in relation to foreign victims.

When addressing "the first limb" argument, the Court of Appeal failed to analyse the distinction between personal and subject-matter jurisdiction. This is the legal principle that subject-matter jurisdiction (i.e. what conduct may be regulated) must not be conflated with personal jurisdiction (i.e. whose conduct may be regulated): *Mackinnon v Donaldson Lufkin & Jenrette Securities Corpn [1986] Ch 482.*

The answer may be that the Court of Appeal was probably considering an appeal by a UK citizen who happened to live and work in Spain (although this is not made clear in the judgment). Personal jurisdiction was therefore assumed to be established and the Court approached the issue solely as one of subject-matter jurisdiction, which was established on the facts of the case.

The same reasoning presumably applies to corporate offenders: if personal jurisdiction is established because, for example, the corporate was incorporated under UK law, then it could be tried in the UK if there was also subject-matter jurisdiction. As the Court of Appeal recognised, it is unlikely that UK courts would try an offence of money-laundering committed abroad on foreign victims. This is presumably because personal and subject-matter jurisdiction would not be established. If correctly decided, the Court's conclusion that ss.327-

[4] This decision was followed by the High Court in *Sulaiman v France [2017] Lloyd's Rep. F.C. 111*

329 operate extraterritorially is therefore probably a nuanced reflection of the facts of the case. It is doubtful that Parliament intended to confer truly extraterritorial jurisdiction in ss.327-329, in the sense of enabling offences committed abroad by foreigners to be tried in the UK.

However, where personal and subject-matter jurisdiction are established, the fact that the acts relied upon to prove the offence contrary to ss.327-329 occurred outside the UK territory, or that a defendant is located outside the UK, ought not be a jurisdictional bar to prosecution. The offences could be prosecuted in the UK provided there is some personal and subject-matter connection to the UK.

For example, personal jurisdiction could be established over corporates by way of UK incorporation, or potentially over foreign companies that "do business in the UK" (e.g. by a branch): see the factors relevant to the test for "doing business in the UK" used to confer personal jurisdiction in civil proceedings contained in *Adams v Cape Industries [1990] Ch 433* at 526-537.

Subject-matter jurisdiction could be established by a relevant act having taken place within the UK jurisdiction. Alternatively, subject-matter jurisdiction could be established where there is a "sufficient connection" between a company and the UK jurisdiction: *R (KBR, Inc.) v SFO [2019] 2 WLR 267.*

Even if these jurisdictional issues can be resolved to a prosecutor's satisfaction, the identification principle continues to provide them with a royal (Victorian) headache.

This article has been adapted from an article that was first written by Jamas and published by LexisPSL.

WHERE NEXT FOR DEFERRED PROSECUTION AGREEMENTS?

Written by Vedrana Pehar

We continue to observe an emerging global trend of jurisdictions introducing DPA's. Lisa Osofsky officially assumed the role of Director of the SFO on 28th August 2018 with a clear emphasis on collaboration across the international law-enforcement community. During her first week in the job, she delivered remarks at the Cambridge International Symposium on Economic Crime, where she highlighted the importance of global settlements stating that "cases are becoming increasingly multijurisdictional and complex, so cooperation to achieve settlements like Rolls-Royce are ever more important. Strengthening and deepening the relationships that make this happen is going to be a major focus". She has committed to "working with the newcomers to DPAs" including France, Argentina, Canada, and Australia, to strengthen the SFO's international relationships in anticipation of future global resolutions.

Countries around the globe have increasingly looked to the U.S. model, and derivative models like the UK's DPA regime, in expanding their own resolution toolboxes. This article will provide updates from the United Kingdom, which was the second jurisdiction to adopt DPAs as a means for resolving corporate enforcement actions, and then survey developments around the globe in countries that have adopted, or are considering adopting, similar regimes.

United Kingdom

The UK adapted an enforcement mechanism that has long been central to the work of U.S. authorities such as the DOJ and the Securities and Exchange Commission. Since their introduction in 2014, the SFO has secured four DPAs. The DPA regime allows prosecutors to enforce corporate sanctions while avoiding the pitfalls of a lengthy criminal trial and the detrimental effect of prosecution on the company. The process can be seen in action in the £497m DPA with Rolls-Royce, approved in January 2017.

Unlike in the U.S., under the UK's DPA regime, a High Court judge must be satisfied that the agreement is just and the terms are fair, reasonable, and proportionate. Also, unlike in the U.S., DPAs in the UK do not apply to individuals. The Code of Practice emphasises the responsibility of companies to provide evidence to allow the prosecution of individuals to continue concurrently to the DPA.

In November 2018, the SFO announced the end of the UK's first DPA, confirming that Standard Bank PLC (now known as ICBC Standard Bank PLC) had fully complied with its terms. The SFO entered into a DPA with Standard Bank in November 2015 to resolve allegations of an approximately $6 million payment made by a former subsidiary of Standard Bank to a local entity controlled by Tanzanian government officials. Standard Bank uncovered evidence of potential wrongdoing and self-reported to the SFO in April 2013. The agreement, which was approved by the Crown Court in November 2015, followed the bank's indictment under s.7 of the Bribery Act 2010 alleging failure to prevent bribery. Under the DPA, the charge was suspended for three years provided the bank complied with all its terms. Standard Bank was given seven days to pay financial orders of US$25.2m to the UK Treasury, compensation of $6m plus $1m interest to the government of Tanzania and £330,000 costs to the SFO.

It was also required to subject its existing anti-bribery and corruption controls, policies and procedures to an independent review by PwC, implement any resulting recommendations, and report regularly to the SFO. Lisa Osofsky welcomed the DPA's completion stating "DPAs are a way of holding companies to account without punishing innocent employees, and are an important tool in changing corporate culture for the better".

That is not to say that the use of DPAs has not been without problems. On 23rd January 2019, the SFO offered no evidence in relation to the case against Carl Rogberg, a director of Tesco. This followed the acquittal of other Tesco directors following a finding of no case to answer by Mr Justice Royce during their trial at the Southwark Crown Court. Since that brought to an end the criminal proceedings against individual defendants, the reporting restrictions that had previously been in place in relation to the DPA between the SFO and Tesco Stores were lifted.

Under the DPA between the SFO and Tesco, the company had agreed to pay a £129m fine and £3m in investigation costs. It also agreed to undertake and implement an ongoing compliance programme during the three-year term of the DPA. The statement of facts agreed between the SFO and the company (although obviously not the individuals concerned) identified the now-acquitted directors as having committed offences of fraud and false accounting.

Prior to the lifting of the reporting restriction, the acquitted directors had applied to the Court to have the statement of facts varied to remove the allegations against them. On 22nd January 2019, Sir Brian Leveson PC gave a judgment that where the Court had

approved a DPA between the SFO and a company, the Court had no jurisdiction to alter or modify the terms of the agreement in order to reflect the acquittal in parallel criminal proceedings of individuals whose alleged wrongdoing was detailed in the agreement. Once the DPA had been approved, the court's role was limited to enforcing the terms of the agreement.

This trial was the first example of a trial of individuals following a DPA approved by the SFO. Companies that agree to DPAs following an investigation will have to consider whether they can accept that there was criminal wrongdoing within their organisation. Following the high-profile failure of this prosecution, there exists uncertainty as to whether convictions against individuals will necessarily follow SFO-approved DPAs, which could weaken the SFO's hand in seeking to encourage companies to enter into future DPAs.

Recent enforcements trends outside the UK

A changing landscape in France

Following criticism of its incomplete anti-bribery and corruption legal framework, France, too, has tried to align its legislation with international standards. This culminated in the Sapin II Law on transparency, anti-corruption, and economic modernisation, enacted in December 2016. It introduced the *convention judicaire d'intérêt public* (CJIP), a settlement system like the DPA in the UK. The CJIP just like the DPA in the UK is open to companies, not private individuals. It may be proposed in cases of corruption, influence peddling, or money laundering or tax fraud, as well as their related offences.

In June 2018, Société Générale announced that it had entered into a CJIP with a French law enforcement agency to resolve anti-corruption charges. Société Générale resolved long-standing investigations by the DOJ and the U.S. Commodity Futures Trading Commission (CFTC) into certain of Société Générale's interbank offered rate submissions, and the DOJ and the French Parquet National Financier (PNF) into violations of the FCPA and French anti-corruption laws in connection with historic conduct involving Libyan counterparties. The settlements are highly unusual in that they combine unrelated investigations into a single deferred prosecution agreement, and because it is the first time the DOJ and the PNF have cooperated in reaching coordinated resolutions in a corruption case. As part of the settlements, Société Générale agreed to pay penalties totaling approximately $1.3 billion, to enter into a three-year DPA with the DOJ and a similar CJIP with the PNF, to a guilty plea in the U.S. by one of its subsidiaries and to undertake various remedial enhancements. No corporate monitor was imposed by the U.S. authorities, and the bank's anti-corruption program will be monitored for two years by the French agency created by Sapin II legislation, the Agence Française Anticorruption.

This DPA opens a new chapter in international corruption prosecutions. For several years, the American authorities had issued unilateral sanctions against French companies, but this negotiated settlement demonstrates that French authorities are now a legitimate prosecutorial authority in the eyes of the US DOJ.

Singapore

On 19th March 2018, Singapore passed legislation to allow prosecutors to make use of DPAs in investigations of corporations. The move was prompted by Singapore's increased collaboration with other jurisdictions in anti-corruption and money laundering investigations. Most recently, in December 2017, Keppel Offshore & Marine Limited, a Singapore Exchange-listed company and Singapore's largest oil rig builder, resolved an anti-corruption investigation by law enforcement authorities in the U.S., Brazil and Singapore and agreed to pay a total of $422 million in fines. According to the DOJ's press release, this case represented "the first coordinated U.S. Foreign Corrupt Practices Act (FCPA) resolution with Singapore." Under the new law, only offences included in a narrowly defined list are DPA eligible, including corruption, money laundering and receipt of

stolen property. The framework only applies to corporations, not individuals. The Singaporean DPA framework is similar to the U.K.'s in that DPAs must be approved by the Court and will be a matter of public record. However, unlike the UK DPA regime, the Singapore courts will not be required to approve the commencement of negotiations in respect of a DPA. The Singapore courts will only be involved in the final stage of the process.

Canada's "Remediation Agreement Regime"

On 19th September 2018, amendments to the *Criminal Code* came into force establishing for the first time a DPA regime for corporate wrongdoing in Canada. The new regime labelled "remediation agreements" under the legislation will finally make DPAs available to Canadian authorities. The legislation was introduced in conjunction with an announcement regarding changes to the already-existing Integrity Regime, which provides for potential debarment from contracting of government suppliers that have been charged or admitted guilt of the offences identified in Canada's Ineligibility and Suspension Policy. These two measures are intended to work together to create "incentives for corporations to self-report". Like in the UK, the remediation agreement will only be available to organisations and not individuals. Further, the new law states that a remediation agreement requires judicial approval, and that approval must be granted if the court finds that the agreement is in the public interest, and the terms of the agreement are fair, reasonable and proportionate.

Switzerland

In March 2018, the Swiss Office of the Attorney General ("OAG") presented a proposal to develop a framework for DPAs in Switzerland. After a public consultation period, the proposal was presented to the Swiss parliament, where it is currently pending review. The OAG's proposal largely mimics the U.S. model. It provides that after the completion of an investigation, if the conditions for an indictment are fulfilled, the prosecutor can enter into an agreement to defer prosecution, provided that the company fully cooperated throughout the investigation and has cooperated in the identification of the relevant individual(s) responsible for the offence. The proposed agreement template provides that if a company violates the agreement during the probation period and does not take timely remedial measures, the prosecutor will indict the company in the competent Court. However, if the company fulfills the agreement during the probation period, the prosecutor will terminate the proceedings.

We are some way from the first global DPA, but the SFO has pointed to such agreements as a sign that "choreographed resolutions are possible." Global jurisdictions are clearly implementing and considering DPAs, helping prosecutors to formalise the growing interagency enforcement environment. Jurisdictions undergoing consultations on DPAs are looking toward the UK as a model rather than the U.S. The attractiveness of the European approach is in its judicial safeguards and focus on the companies rather than individuals.

In other financial crime news …

- Government claims to be cracking down on money laundering have been somewhat undermined by a Freedom of Information request made to the Home Office by Evershed Sutherland, which revealed that there have been no prosecutions under the Money Laundering Regulations 2017 between June 2017 (when the new regulations came into force) and October 2018.
- The SFO have announced that they have terminated the long-running investigations into GlaxoSmithKline and into a number of individuals at subsidiaries of Rolls Royce (although Rolls Royce itself did enter into a DPA after accepting a fine of £498m).
- The DOJ has updated its FCPA Corporate Enforcement Policy to require companies "*to implement appropriate guidance and controls*" over the use by employees of any software, particularly messenger apps, "that generates but do not appropriately retain business records or communications".