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Will the levy break, or break you first?

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The UK Budget on 11 March 2020 included a levy – figure(s) yet to be determined – on regulated firms to help fund the fight against financial crime. **John Binns** of BCL Solicitors questions the rationale.

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Chancellor of the Exchequer Rishi Sunak's budget already seems a world away, and doubtless many of his announced measures will now take some time to come to fruition, or possibly be abandoned altogether. Doubtless many in the UK regulated sector will wish the latter fate on the Anti-Money Laundering (AML) Levy, the idea of charging a fee to firms that operate in the regulated sector to help fund the fight against financial crime. As



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one of the few measures aimed at raising revenue for an already cash-strapped area of state activity, albeit one with small and medium-sized enterprises in its sights, it seems prudent to consider its planned consultation to be just around the corner. When it appears, there are major questions about the principle and the detail to be answered.

The first fundamental question, of course, is why businesses in the regulated sector rather than the state should have to fund the fight against financial crime. The idea of the sector is that these businesses are gatekeepers to a financial and economic system that is open to abuse by money launderers and terrorist financiers, and so are asked to adopt measures to detect and disrupt their activities, such as conducting due diligence on customers and making Suspicious Activity Reports (SARs) to the National Crime Agency (NCA). The core members of the sector remain banks and other financial institutions, which submit the vast majority of SARs. Alongside them are the designated non-financial businesses and professions (DNFBPs, although curiously neither the phrase nor its abbreviation have ever really caught on), which include accountants, lawyers, when dealing with commercial or property transactions, estate agents, tax advisers, and now art market participants, crypto-asset businesses, and letting agents, when dealing with amounts above a certain threshold.

The system, then, is already one in which private businesses are obliged to conduct unpaid work – for many, a significant overhead – to help deal with the problem of financial crime. By any reasonable analysis, that is a problem whose impact is felt by society as a whole and for which the state must ultimately take responsibility, although doubtless it is fair for the private sector to be asked to play a part. It is also a problem for which no one could reasonably accuse the regulated sector of being to blame (although the NCA has been known to accuse DNFBPs, particularly lawyers, of reporting too infrequently).

What then, would be the argument for making the sector responsible for further costs? One potential analogy might be with the UK Financial Conduct Authority, which regulates banks and other financial institutions and is funded by them rather than by the state. Some of the DNFBPs are subject to supervision by independent professional regulators, which are similarly funded on a membership basis. In both cases, monitoring compliance with AML requirements, and taking enforcement action where they are said to have been breached, is certainly part of the functions that those bodies undertake and that the regulated businesses are obliged to fund. But the principle there is that the bodies exist to protect the reputations of their members and the public's confidence in them, which, in appropriate cases, can include enforcement action against the few that give the rest a bad name. It would be hard to justify on that basis, say, a levy on art dealers that would help fund the general activities of the NCA (or even the Metropolitan Police's perpetually cash-strapped Arts and Antiquities Unit).

These fundamental questions also feed into the detail of how the levy would operate. Though it could be characterised as a tax on a subset of businesses operating in the UK, it is unlikely to make sense to have HM Revenue & Customs collect it, either as a new standalone tax or via any of the existing taxes on business (even the most obvious, corporation tax, would not be appropriate as many of the businesses are not corporations). The obvious alternative, given that all such businesses have to be registered, is to impose a fee for that registration and to require it to be renewed, again for a fee, on, for example, an annual basis. That, however, begs an immediate question about the impact of non-payment, and whether it would turn an otherwise lawful business into a criminal one for not having a valid registration.

The next question, and the one on which any consultation would surely spend most time, is how to quantify the levy or, in other words, how to spread it amongst the businesses concerned. A flat fee per business would surely be unfair, placing the same burden on a fledgling crypto-asset firm as say, Barclays to help tackle financial crime. A fee calculated by reference to a firm's turnover, or its profits, might be fairer, but would raise a further question for those businesses that conduct some work in the regulated sector and some outside it. These could include, for instance, letting agents, most of whose work may be below the threshold, or law firms who primarily do advisory work, with perhaps the occasional conveyancing instruction. And while it would clearly risk perverse incentives to set a fee according to the number of SARs submitted (or, worse, some notional idea of the mismatch between number submitted and number expected), to ignore the major difference in firms' risk profiles – between, say, a high-street conveyancer that eschewed any 'risky business', and a boutique London firm that actively courted politically exposed persons and oligarchs – would surely also risk injustice.

It may transpire in due course that these problems have all been anticipated, and Mr Sunak's announcement may turn out to be underpinned by a fully thought-out set of options on which we will all have the opportunity to comment. But if not, this particular proposal may have already earned its place in the tray of papers on his desk, doubtless already large and growing, that merit the label 'too difficult'.

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