IN-DEPTH

Anti-Money Laundering

UNITED KINGDOM

Anti-Money Laundering

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Contributing Editor

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In Depth: Anti-Money Laundering provides an insightful overview of anti-money laundering (AML) law and practice in key jurisdictions worldwide. With a focus on recent developments and their practical implications, it analyses key issues including relevant offences, government policy, enforcement trends, international cooperation and much more.

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Summary

INTRODUCTION
YEAR IN REVIEW
LEGAL FRAMEWORK
ASSOCIATED OFFENCES
ANTI-MONEY LAUNDERING REGULATION
ANTI-MONEY LAUNDERING IN PRACTICE
ENFORCEMENT
INTERNATIONAL ORGANISATIONS AND AGREEMENTS
OTHER LAWS AFFECTING THE RESPONSE TO MONEY LAUNDERING
OUTLOOK AND CONCLUSIONS
ENDNOTES

Introduction

Recent headlines in the UK's mainstream media, from anxiety about 'Russian money'-[2] to local politicians' problems with their bank accounts,[3] have increasingly brought anti-money laundering (AML) into the limelight. But the nature and scope of AML and related laws remain obscure for most, until, that is, their accounts are inexplicably blocked by a well-meaning compliance officer or algorithm.

Even then, most will not see any of the full panoply of options available to UK law enforcement agencies (LEAs), which now include account freezing and unexplained wealth orders, as well as the more traditional criminal justice routes. Fewer still will be aware of the UK's (often less harmonious than ideal) relationships with the EU, the Crown Dependencies (Jersey, Guernsey and the Isle of Man) and the British Overseas Territories.

Nonetheless, it is these often-obscure provisions that govern the relationship between the UK and 'dirty money', which is perhaps best described by contrasting theory and reality. In theory, the UK's laws on money laundering, and increasingly too its requirements for corporate transparency, are easily among the toughest in the world, creating a hostile environment in which launderers (and the rest of us) face manifold stumbling blocks in the way of every dubious (or unusual) transaction.

The reality, unhappily, is that the UK remains a desirable destination for criminally derived assets, particularly from corruption. For now, at least, the value of its property and financial markets, and apparent legitimacy afforded by its reputation (deserved or not) for transparency, seem still to outweigh the practical impacts of the AML regime on criminal property and the launderers that handle it.

Year in review

i The war on 'dirty money'

The war in Ukraine has accelerated public scrutiny of the problem of 'dirty money' in the UK, a term increasingly used to refer to the assets of hostile governments, kleptocrats, oligarchs and tax evaders, as well as proceeds of crime.

That agenda has combined with two others:

1. an increased appetite to require greater transparency from UK corporate entities and to hold them to account for criminal acts committed by their personnel; and
2. a growing suspicion, fuelled by government as well as anti-corruption charities, about the activities of professional service providers (enablers).

ii The Farage affair

Cutting across those agendas to an extent, UK ministers have prompted the Financial Conduct Authority (FCA) to review its guidance on banks' treatment of politically exposed

persons (PEPs), including the blocking and closure of their accounts, and refusals to accept them as customers.[4] The review was prompted by the case of Nigel Farage, former Member of the European Parliament for (and head of) the UK Independence Party (and later head of its successor, the Brexit Party), whose Coutts account was closed for unclear reasons. In his comments on the affair, Farage said banks had cited his (former) PEP status as a barrier to their dealing with him. In that context, he called AML laws 'a sledgehammer that misses the nut'.[5]

Coutts itself said the closure was on commercial grounds, before material emerged that suggested it was prompted by broader considerations, including the mismatch between its public profile and his public comments on issues such as climate change and immigration, seen by many as political. Separate to the PEP review, this aspect of the Farage affair has prompted a new set of rules that require banks to give their customers accurate reasons for closing their accounts (unless, presumably, this would tip off the customer about an AML concern).[6]

iii AML supervision

At the time of writing, HM Treasury has just finished consulting on potential changes to the regime for supervising AML-regulated entities, which currently involves various state and non-state supervisors. Options include an increased role for the Office for Professional Body AML Supervisors (OPBAS), a recently created supervisor of supervisors, housed within (part of) the FCA, which has been critical of the approach of those bodies charged with supervising accountants and lawyers.[7]

iv The Economic Crime Act

The Economic Crime and Corporate Transparency (ECCT) Act[8] has also just been passed, which will (among other things):

1. provide protections for firms that share data in connection with suspicious transactions;
2. provide defences for regulated firms in connection with 'mixed' balances (only part of which represent the proceeds of criminal conduct);
3. simplify the recovery of cryptoassets in confiscation and civil recovery proceedings;
4. expand the role of Companies House in policing self-reported information on UK corporate entities;
5. increase the scope for fines to be imposed on regulated law firms, including for AML breaches;
6. provide that corporate entities will be criminally liable, in cases of economic crime (including money laundering), for the acts of their senior managers; and
7. create a separate offence for larger corporates of failure to prevent fraud (following a precedent of similar laws relating to bribery and the facilitation of tax evasion), where an associated person commits a fraud offence and the corporate cannot show that it had reasonable procedures in place to prevent the conduct.

Amendments that would have extended the 'failure to prevent' offence, to include corporate failures to prevent money laundering, were rejected by the government on the grounds that the existing laws were sufficient.

v Money laundering in supply chains

The English courts, meanwhile, have recently looked at money laundering in the context of supply chains, specifically clothing said to represent the proceeds of conduct equivalent to modern slavery offences in China. Controversially, the judgment of the High Court appeared to side with LEAs' view that, even where products (and the proceeds of their sale) represent criminal property in the hands of the initial seller, any subsequent buyers in the supply chain cannot be (or, at any rate, cannot realistically be proven) guilty of money laundering. An appeal is pending, the result of which will be of interest to UK corporates whose supply chains may be suspect, as well as to money laundering lawyers.[9]

vi Money from unregistered money service businesses

Another judgment, in the context of non-conviction-based civil recovery, confirmed the forfeiture of otherwise clean funds that had been acquired via the services of a money service business (MSB) that had not (in breach of AML laws) registered as such. The harsh result is only partly mitigated by the ability of the acquirer to resist recovery if they can show that they were not on notice of the MSB's offence (in other words, that they thought the MSB was registered).[10]

Legal framework

i The legislation and its context

The context of AML regulation in the UK includes:

1. its historic membership (until Brexit) of the European Union, and therefore its transposition of the EU's Money Laundering Directives (MLDs), up to and including the fifth (MLD5);
2. the regulation of the financial sector by the FCA under the Financial Services and Markets Act 2000 (FSMA);[11]
3. the obligations of the regulated sector for the purposes of the Terrorism Act 2000 (TACT);[12]
4. the provisions on confiscation and civil recovery, as well as money laundering, under the Proceeds of Crime Act 2002 (POCA);[13] and
5. the corporate transparency provisions, including the requirement to collect and provide information about any person with significant control (PSC), in Part 21A of the Companies Act 2006.[14]

The obligations of AML-regulated firms are set out in the cumbersomely named Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLRs).[15]

Following Brexit, the power to amend the MLRs (except insofar as provided under the FSMA) is contained, along with the power to make regulations that create financial and trade sanctions, in the Sanctions and Anti-Money Laundering Act 2018 (SAMLA).[16]

Recent legislation has enhanced the responsibilities of corporate entities in connection with economic crime. The Economic Crime (Transparency and Enforcement) Act 2022 introduced a Register of Overseas Entities (ROE) that own land in the UK, requiring these entities to collect and provide information about their beneficial owners.[17]

ii The principal money laundering offences

The key provisions of POCA for AML purposes are those that create the principal money laundering offences and the obligations of the regulated sector, as well as those that define the relevant terms.

As with many key terms in POCA, the phrase 'money laundering' gives a misleading impression. The prohibited acts in Sections 327 to 329 are much broader than that phrase would imply, and include:

1. concealing, disguising, converting or transferring criminal property, or removing it from the jurisdiction (Section 327);[18]
2. entering into, or becoming concerned in, arrangements that facilitate the acquisition, retention, use or control of criminal property (Section 328);[19] and
3. acquiring, using or possessing criminal property (Section 329).[20]

iii Exceptions

Each of those offences is subject to a defence (more accurately an exception) of consent, also called a Defence Against Money Laundering (DAML). In practice, this is obtained by including a request in a suspicious activity report (SAR), via an online portal, to the UK's Financial Intelligence Unit, which is part of the National Crime Agency (NCA).[21] (The same portal is used for SARs submitted under TACT.)

Amendments in the ECCT Act will allow regulated sector firms to deal with mixed property (such as bank accounts) that contains proceeds of criminal conduct, provided the balance remaining after the transfer of funds contains at least the value of those (tainted) proceeds.

The offence in Section 329 is also subject to an exception where property is acquired for 'adequate consideration', although this does not apply where the acquirer knows or suspects that they may thereby help someone to commit criminal conduct.

iv Overseas conduct

Exceptions to offences in which the conduct that gave rise to the property occurred outside the UK (overseas conduct), and was lawful under that jurisdiction, have been disapplied for

any conduct whose maximum penalty in the UK would exceed 12 months' imprisonment.[22] This can mean, for example, that handling investments in a Canadian cannabis business (albeit lawful where it took place) could amount to prohibited acts under POCA.

v Reporting obligations and 'tipping off'

POCA also obliges individuals[23] and nominated officers (MLROs) in the regulated sector[24] (and MLROs outside it)[25] to submit SARs where they have reasonable grounds to suspect that someone is money laundering, and it prohibits them from tipping off customers and others that this has been done.[26]

'Regulated sector' is defined in Schedule 9 of POCA[27] (with provisions of TACT and the MLRs having equivalent effect). Despite Brexit, it remains broadly the same as in the MLDs.

From 2 June 2021, guidance from the Crown Prosecution Service has the effect that a person can be prosecuted for a failure to report even where no money laundering offence took place (or can be shown to have taken place).[28]

vi Penalties

The principal money laundering offences are punishable with up to 14 years' imprisonment, failures to submit SARs are punishable with up to five years' imprisonment, and 'tipping off' is punishable with up to two years' imprisonment.[29]

The Sentencing Council has published guidance on sentencing for money laundering offences.[30]

vii The consent regime

Consent (DAML) is deemed to have been obtained if the NCA does not refuse it within an initial notice period of seven clear working days (not including weekends or bank holidays) or after the expiry of a further moratorium of 31 calendar days (which can be extended by the courts).[31]

viii Immunity from civil claims

Section 338(4A) of POCA provides immunity from civil claims where a SAR has been made in good faith.[32]

ix Criminal property

For these purposes:

1. property is criminal property if it constitutes or represents (even if only in part) a person's benefit from criminal conduct;
2. a person benefits from conduct if they obtain any interest in property 'as a result of or in connection with' it;
3. conduct is criminal conduct if it breaches any UK law (an 'all crimes' approach) (or, in the case of overseas conduct, if it would have done so had it occurred in the UK);

4. property includes intangible and incorporeal property; and
5. a pecuniary advantage is also treated as property.[33]

x Proving predicate conduct

Case law (*R v. Anwoir*)[34] has confirmed that, to succeed, a prosecutor need not specify, let alone prove, any specific predicate offence. Instead, they may invite the jury to conclude that the way the property is handled (for instance, where cash is handed over in a bag at a street corner) gives rise to an 'irresistible inference' that its provenance is criminal in nature.

xi Knowledge or suspicion

The mental element of the principal offences is, in effect, contained in the definition of 'criminal property'. It requires that the person committing the prohibited act (the 'alleged offender') either knows or suspects that the property concerned constitutes or represents the proceeds of criminal conduct. For the arrangements offence under Section 328, the person becoming concerned in the arrangement must also know or suspect that it would facilitate another person's acquisition of criminal property.

The subjective requirement of knowledge or suspicion contrasts with the objective requirement for reasonable grounds to suspect in the reporting obligations of the regulated sector.

'Suspicion' has been defined in case law (*R v. Da Silva*)[35] to mean 'a possibility, which is more than fanciful, that the relevant facts exist . . . a vague feeling of unease would not suffice'.

To be guilty of conspiracy to commit a principal money laundering offence, the conspirator must have actual knowledge, rather than mere suspicion (as established in R v. Saik).[36]

xii Prejudicing an investigation

Although the tipping off offence applies only within the regulated sector, a similar offence (punishable with up to five years' imprisonment) applies more widely, where a disclosure is made that is likely to prejudice an investigation (and the person knows or suspects that this is so).[37]

xiii Global jurisdiction?

A controversial decision of the Court of Appeal, *R v. Rogers*,[38] can be read to provide global jurisdiction for the principal money laundering offences in POCA, contrary to the general rule that the UK's jurisdiction for criminal offences is limited to acts within its territory (or where a substantial measure of the conduct took place there, as established in *R v. Wallace Duncan Smith*).[39]

The idea that acts outside the UK may breach POCA is particularly problematic when combined with the fact that 'criminal conduct' for these purposes can include overseas

conduct that was lawful where it occurred (but would have breached UK law had it occurred here). For instance, an investor in a Canadian cannabis firm would (following *R v. Rogers*-) breach POCA by handling, in Canada, the proceeds of lawful (under Canadian law) investment. The effect is to push a feature of POCA that already seemed unacceptably imperial in nature firmly into the realms of the absurd.

The conviction being appealed in *R v. Rogers* was for handling, in Spain, the proceeds of a fraud that had taken place in the UK. Dicta from the judgment certainly conclude that jurisdiction for the principal offences extends beyond the UK, based in part on references to overseas conduct in the context of the reporting obligations of the regulated sector. While some subsequent cases (notably in an extradition context) have accepted those dicta as authority for the global jurisdiction of these offences, the better view is that it was instead the substantial measure of the fraud and laundering that took place, taken together, in the UK that made the launderer's conviction safe.

The practical implications for AML-regulated firms are limited, given that their reporting obligations exclude scenarios in which a predicate offence overseas was lawful where it occurred.

xiv Individuals and firms

The prohibitions and obligations in POCA are drafted with individual liability in mind. Corporate liability for most criminal offences, including these, arises in English law only where liability is established on the part of a 'directing mind' (or, when the relevant provisions of the ECCT Act take effect, a senior manager) of the company. By contrast, the obligations in the MLRs are principally imposed on firms.

Associated offences

i Terrorist financing

TACT[40] prohibits, under the heading of 'terrorist financing', dealings with property that represents the proceeds of terrorism offences or is intended for terrorist purposes, including any property that belongs to a proscribed organisation, and requires firms in the regulated sector[41] to submit SARs where they have reasonable grounds to suspect these offences.

The MLRs refer to terrorist financing offences under TACT as well as money laundering offences under POCA.

ii Financial sanctions

Regulations made under SAMLA, notably those relating to Russia,[42] prohibit:

1. dealing with funds or economic resources that belong to a designated person (DP) or an entity owned or controlled by a DP (this is broadly defined, but in contrast to definitions for the PSC register and in the MLRs, includes a threshold for ownership of over 50 per cent of shares or voting rights);

2. providing funds or economic resources to a DP or for their benefit; or
3. enabling, facilitating or circumventing these prohibitions.

The prohibitions apply outside the UK to 'UK persons', a term that includes UK citizens and UK-incorporated companies.[43]

In each case, criminal liability relies on a low objective standard of reasonable grounds to suspect, but civil penalties can be imposed on a strict-liability basis.[44]

The enforcement authority for these purposes is the Office for Financial Sanctions Implementation (OFSI), which publishes guidance[45] and a consolidated list of DPs.[46]

Sanctions regulations also place obligations to report to OFSI any suspicions of DPs or breaches. These apply to 'relevant firms', a category broadly akin to the regulated sector for TACT, POCA and the MLRs but also including a broader category of lawyers (not just those dealing with transactions). Exceptions apply where the grounds rely on information subject to legal professional privilege (LPP).

Although the MLRs do not refer to financial sanctions, in practice the FCA and other supervisors are increasingly concerned with ensuring that the firms they supervise have policies, controls and procedures in place to prevent breaches and to ensure that reports are made where required.

As with POCA, SAMLA provides immunity from civil claims for actions taken in good faith to comply with sanctions.[47]

Anti-money laundering regulation

i 'Relevant persons' and their supervisors

The list of business types that are covered by the MLRs as 'relevant persons' is long and the landscape of supervisors assigned to them is frustratingly complex.[48]

The most important firms covered, certainly in terms of volumes of property, transactions and SARs, are those supervised by the FCA, including credit and financial institutions. The MLRs list (as do TACT and POCA) several categories of firm, many of which (despite Brexit) are described by reference to EU laws. Most, but not all, are also regulated by the FCA for other purposes under the FSMA.

The most recent additions to the FCA's list of AML-supervised firms are cryptoasset businesses, more specifically cryptoasset exchange providers and custodian wallet providers. Despite being given a period of grace within which to register, many have not, and FCA guidance appears to signal disquiet about these new entries into the ranks of their supervised population.[49]

Regulated professional firms (including accountants, auditors, barristers, insolvency practitioners, legal executives, notaries and solicitors) make up a substantial portion of the list, albeit with a much smaller volume of SARs, reflecting (at least in part) the nature of their roles.[50] They are supervised, controversially for some, by their respective regulatory bodies, whose supervisory functions are, in turn, overseen by OPBAS.

Casinos are supervised by the Gambling Commission, which also imposes requirements equivalent to those that the MLRs impose on other gambling operators, via their licences.

This leaves HM Revenue & Customs (HMRC) with the uncomfortable variety of remaining firm types, in its dubious capacity as 'AML supervisor of last resort'. The types include tax advisers, and trust and corporate service providers, insofar as they are not regulated by professional bodies, as well as estate agents, high-value dealers and MSBs. The most recent additions to the list include letting agents and art market participants (when dealing with transactions above certain thresholds).

ii Risk assessments

Although the text of the MLRs is forbiddingly long, its structure can be helpful in guiding an AML-regulated firm through its onerous requirements.[51] The starting point, logically given the risk-based approach to AML, is the requirement to produce a firm-wide written assessment of the risks (by the nature of its business and customers) that it could be involved in money laundering or terrorist financing (and, in a recent addition, proliferation financing). That risk assessment should consider the guidance of the firm's AML supervisor, as well as the UK's higher-level risk assessments and, ultimately, the recommendations of the Financial Action Task Force (FATF). If done properly, the firm-wide risk assessment should then inform the required policies, controls and procedures to address the risks that have been identified.

iii Customer due diligence

The MLRs require firms to collect know-your-customer (KYC) information from customers and, based on the specific risks of each customer or transaction, to conduct an appropriate degree of customer due diligence (CDD) and ongoing monitoring.[52]

In this context, the MLRs provide definitions (consistent with the EU's MLDs and the UK's PSC register)[53] for the purposes of identifying beneficial owners, including a threshold of over 25 per cent of shares for the owners of corporate entities.[54]

In some circumstances, including where the customer is a PEP or based in a high-risk third country, the MLRs require that a higher level of enhanced due diligence (EDD) is carried out.

iv Reliance and record-keeping

In theory, the MLRs permit a degree of reliance on CDD by regulated third parties.[55] However, these depend on agreements with those third parties that are onerous in nature and ultimately cannot discharge the legal responsibilities of the relying party. Some supervisors discourage or prevent the use of these reliance procedures.

The requirements of the MLRs to retain, for specified periods, records of CDD, sit alongside (if not always very comfortably) the requirements of the UK's retained version of the EU's General Data Protection Regulation (UK GDPR)[56] and the Data Protection Act 2018 (DPA).[57]

v Beneficial ownership information

The MLRs oblige corporates to provide information about their beneficial owners to regulated firms, which, in turn, enables those firms to comply with their CDD and EDD obligations.[58] Separate obligations support HMRC's maintenance of beneficial ownership registers in connection with certain trusts.

vi Registration

The MLRs require AML-regulated firms to register with their supervisors and prohibit the carrying on of their business if they have not done so.[59] Any refusal by supervisors to register a firm or a decision to suspend their registration can be the subject of an appeal.

vii Enforcement

Breaches of the MLRs can be pursued civilly by supervisors,[60] but they are also an offence[61] for which individual officers may also be liable if the conduct involved their 'consent, connivance or neglect'.[62]

Anti-money laundering in practice

i 'Tough on crime'

POCA was devised in the early years of Prime Minister Tony Blair's new Labour government and reflects its determination to be conspicuously 'tough on crime'. A number of decisions were made in that context, the object and effect of which was to capture as much activity and property as possible, at the expense of capturing some activity and property that in other jurisdictions would either by dealt with by administrative rather than criminal processes, or that would be considered entirely blameless.

In the context of the principal money laundering offences, this means that:

1. the scope of prohibited acts includes not only deliberate placement, layering and integration of the proceeds of crime, but also mere acquisition or possession;
2. the scope of predicate conduct includes overseas conduct that is lawful where it occurs (other than conduct trivial enough to be punishable in the UK with 12 months' imprisonment or less);
3. mixed property (containing funds or other property from both legitimate and illegitimate sources) is treated as criminal property for these purposes;
4. 'benefit' is broadly defined to include property obtained in connection with criminal conduct;
5. criminal conduct includes anything that breaches UK law (the 'all crimes' approach);
6. 'property' is also broadly defined, and includes pecuniary advantages;
7.

the mental element of the principal offences is low, including suspicion as well as knowledge; and

8. these offences are treated seriously, with maximum sentences of 14 years' imprisonment.

The 'tough' approach is also reflected in:

1. the breadth of the reporting obligations placed on the regulated sector (which also entail personal criminal liability and maximum sentences of five years' imprisonment);
2. the immunity from civil claims granted to those acting in good faith to comply with POCA; and
3. the fact that breaches of the MLRs also attract criminal liability and can (in theory) result in individual officers of regulated firms being imprisoned.

ii Too many SARs?

It is not surprising that the result of these decisions is a glut of SARs, nor that the volume of intelligence thereby produced for law enforcement is unmatched by investment in analytical capability and funding for LEAs that could make use of it to pursue money laundering activity and other forms of crime, either through the criminal justice system or the increasingly user-friendly civil recovery system.

While this is by no means a problem unique to the UK, the extent of the problem reflects those initial decisions, and the political dimension makes it hard to see how the problem can be fixed. Which minister will knowingly suggest making the law less tough on crime? The Law Commission, asked to look at the SARs regime, was deliberately limited in its scope, recognising that the broad parameters of POCA are unchangeable.[63]

iii Impacts of the regime

For regulated firms, the main impact of the AML regime is cost, with banks and others spending billions on an increasingly sophisticated AML industry, increasingly supported by technological solutions. To add insult to injury, larger firms now pay a contribution to the costs of the AML regime (the economic crime levy), on the dubious premise that they are the beneficiaries of it (or, worse, of the activity it is designed to tackle).[64]

For firms' customers, the impacts can be much more serious and invariably seem arbitrary and unfair. Refusals to open accounts, and decisions to close them, became the subject of popular debate following the intervention of Nigel Farage, who ascribed those decisions in his case (although, as it transpired, this was largely incorrect) to his (former) PEP status (see Section II.ii). The result is that the FCA has been asked to look (again) at how PEP status impacts customers (and potential customers), which is arguably a clear example of politicians' focus on aspects of the system that impact them directly.

iv Worst case scenarios

The bigger problem for banks' customers (and, less commonly, others caught in the AML-compliance dilemmas of firms outside the financial sector) is the consent regime, which works on a flawed assumption that the disruption to legitimate users and transactions by 'false positives' can be met by an option to obtain consent within a notice period of (normally) seven clear working days. For individuals or businesses whose main or only account is frozen, this can be a devastating delay.

The problem is worsened when (as often happens) the bank (or other regulated firm) does not, for whatever reason, request consent either promptly or at all, or where the NCA refuses consent and triggers a further 31-day moratorium. Throughout this process, an understandably broad approach to the risks of tipping off means that the typical regulated firm tells its customer absolutely nothing about the nature of the problem and how it can be resolved.

v Perverse results?

Arguably, the lowest impact of the regime, more than 20 years into its operation, is on the sophisticated money launderer, who knows by now how to 'game the system', presents KYC and CDD packages that will 'pass muster' with regulated firms, knows the risks of SARs, notice periods and moratoriums, and factors in the rare occasions where property is frozen as an acceptable cost of doing business. Although there are of course some successes, it is an uncomfortable truth that the UK's AML regime is conspicuously better at disrupting legitimate customers than illegitimate ones.

Enforcement

i Prosecutions for money laundering

Prosecutions of individuals for the principal money laundering offences in POCA are by far the most common use of the criminal justice system in the fight against money laundering. Even then, they remain relatively rare, thanks to an under-resourcing of LEAs generally, and a prioritising of offences involving sex, violence or illegal drugs ahead of less emotive cases of economic crime. Where a case of economic crime is prosecuted and involves (alleged) dealings with the crime's proceeds as well as the crime itself, prosecutors are discouraged from overloading the indictment with laundering charges that add little or nothing to the overall level of criminality alleged.[65]

ii Civil recovery under POCA

Much more commonly, LEAs are making active use of powers in the civil recovery provisions in Part 5 of POCA, including those that permit detention of cash[66] and certain other (listed) assets[67] (soon to include cryptoassets), and freezing of bank and e-money accounts,[68] for up to two years, where they are reasonably suspected of representing the proceeds of (or intended for use in) unlawful conduct, and their forfeiture, if the courts are satisfied (to the civil standard) that this is so.

While no criminal conviction is required for (and no conviction results from) civil recovery, these powers are increasingly seen as an effective (and lower cost) alternative to the criminal justice process. This is particularly true where the conduct concerned occurred overseas, so could not be prosecuted in the UK in any event. In those cases, the court must be satisfied that the conduct would have breached both UK and local law.[69]

iii Prosecutions and the regulated sector

Prosecutions for money laundering by corporate entities, for failing to submit SARs or for breaching the MLRs, are essentially non-existent in the UK. This partly reflects the same priorities that discourage POCA prosecutions generally (as above), but mainly results from the parallel structure of supervision and enforcement that applies to the AML-regulated sector. The FCA and others will generally find it far more expedient to investigate and, where appropriate, take disciplinary action against regulated firms and their personnel, including the imposition of fines and public statements about their conduct, rather than engage the criminal law.

A key exception (at the time of writing, still the only prosecution for breaching the MLRs) is the FCA's successful criminal case against NatWest,[70] arising from its failures in ongoing monitoring in connection with one of its customers, a jewellery firm that bought and sold gold in return for increasingly large volumes of cash, which was eventually subject to criminal investigation. The admitted facts provide a salutary case study of the opportunity for AML systems to fail in practice, particularly where they are automated.[71]

iv Regulatory enforcement

Enforcement activity under the MLRs varies with the supervisors involved. The FCA, HMRC and the Gambling Commission are popularly understood (at least by the firms they supervise, if not by the public) to be relatively tough, while the independent supervisors of professionals such as accountants, auditors, barristers and solicitors continue to struggle, in the face of increasing scrutiny and criticism by OPBAS, to sustain credibility.

International organisations and agreements

i A clean bill of health?

The UK's most recent Mutual Evaluation Report (and a later update)[72] provided it with a strongly positive story to tell about its compliance with FATF recommendations, although anti-corruption charities and campaigning organisations continue to criticise its approach to dirty money.[73]

ii Divergence from the EU

Before Brexit, the UK's AML laws were undeniably driven to a large extent by the MLDs, and observers with an interest in these laws (both pro- and anti-Brexit, and both within and

outside the UK) have watched closely for signs of how that may change now that the UK has the freedom to diverge from EU standards.

Thus far, divergence has been limited. An MLD that required corporate liability for money laundering offences was the subject of a pre-Brexit opt-out, with a dubious claim from the UK government that its existing laws would have made it compliant in any event. An EU court ruling that prevents states from making their beneficial ownership registers public has given the UK an opportunity, confirming that its own register will remain public, to show that divergence can work in the interests of AML efforts. Debates about the equivalence of UK financial services regulation, including AML rules, have not so far suggested any desire by the UK to make these services less AML-regulated.

iii International cooperation

Cooperative relationships between the UK and other jurisdictions in criminal investigations (which, thanks to the nature of money laundering, are inherently more likely to have an AML element) are commonplace. But the relationship with the EU remains the most important of these by some distance, and the provisions of the new Trade and Cooperation Agreement fall some way short of the previous arrangements. The sharing of databases is a key issue, informed, in turn, by the UK's insistence on not being bound by EU data protection laws or their means of enforcement. Going some way to patch up the problem, a working arrangements agreement has been agreed between the NCA and Europol.[74]

AML enforcement seems likely to be a key area of divergence between the EU and UK in future, with EU-wide AML enforcement increasingly in prospect, and the UK decidedly outside the tent (with, for now, little or no prospect of influencing or working with the developing new systems).

iv Tax havens

Just as important in an AML context are the relationships between the UK and its many related jurisdictions, technically separate but sharing degrees of governance and financial relationships. These comprise the British Overseas Territories, which include the British Virgin Islands and Cayman Islands, and the Crown Dependencies. Efforts to bring these jurisdictions in line with the UK's transparency laws have been controversial, given their high dependency on attracting wealth via services connected with corporate entities and trusts.

Other laws affecting the response to money laundering

i AML in context

The UK's response to money laundering is affected by various other laws, including:

1. the principles by which criminal liability is attributed to corporate entities by the acts of individuals – currently their 'directing minds', although soon to be extended (by

the ECCT Act, in cases of economic crime, including money laundering) to other senior managers;

2. the broader regulatory structures of firms subject to the MLRs, including financial institutions and gambling operators, as well as those professionals whose regulators are also their AML supervisors;
3. the corporate transparency requirements and mechanisms, including the PSC register and the ROE, and the role of Companies House; and
4. the data protection provisions of the UK GDPR and DPA.

ii Privileged circumstances

The reporting obligations of lawyers and other professionals under POCA are subject to exceptions where information is provided in privileged circumstances, a similar but subtly different concept to LPP. A key example is where an accountant receives information from a client (or their solicitor) in connection with a legal issue, which would not ordinarily attract LPP but may engage the exceptions.

iii Parts of POCA

The various parts of POCA contribute to AML efforts in different ways. Parts 2 to 4 concern the making of orders against convicted defendants and the restraint of property belonging to (or gifted by) suspects pending these orders (Part 2 covers England and Wales,[75-] Part 3, Scotland[76] and Part 4, Northern Ireland[77]), while Part 5 concerns civil recovery of property obtained through or whose intended use is in unlawful conduct.[78] Part 7[79] includes not only the principal money laundering offences but also the all-important consent regime, by which SARs sent to the NCA can prompt the freezing of assets that may then become the subject of orders under Parts 2 to 5.

Part 8[80] sets out various investigative powers, including to obtain unexplained wealth orders. Rarely used in practice, these can require the holders of high-value property to explain their interest in it, either where the property is suspected of representing the proceeds of unlawful conduct or where the holder is a PEP or suspected of involvement in serious crime, and their known sources of legitimate income are insufficient to explain their interest.

iv Magnitsky sanctions

Although the sanctions on Russia are the best known of the regimes created by SAMLA, from the perspective of the UK's efforts to tackle the proceeds of overseas corruption the most important is the Global Anti-Corruption Sanctions Regulations 2021 (GASRs).[81-] These allow ministers to designate persons they reasonably suspect of involvement in overseas corruption offences (bribery, or the misappropriation of public assets by a public official), including by laundering their proceeds. This means that suspected offenders' or launderers' assets can be frozen, insofar as they are within the UK (or the control of UK persons), without the need for a criminal case or the use of POCA civil recovery powers.

Along with the Global Human Rights Sanctions Regulations 2020,[82] the GASRs represent the UK's contribution to the legacy of Sergey Magnitsky, the Russian auditor who died in prison having investigated allegations of corruption.

Outlook and conclusions

For the time being, the attention of UK policymakers is understandably more focused on corruption, kleptocracy and the targets of financial sanctions, rather than on more traditional and prosaic AML concerns. It is unclear whether or how the Farage affair will ultimately help fix the AML regime, with its mix of 'anti-woke' rhetoric and insights into how banks treat (former) PEPs and others who present a higher risk in terms of banking the proceeds of corruption.

Brexit, for now, does not seem to have upended the UK's AML regime, which remains wedded to the provisions of the MLDs (though with no commitment to dynamic alignment). A political desire to distance the UK from EU rights and enforcement mechanisms has meanwhile hobbled its cooperation arrangements with other EU bodies, such as Europol and Eurojust. Differing perspectives on data protection have already created divergence in unexpected directions, with the UK's commitment to public registers of beneficial ownership now in stark contrast to the EU's more nuanced approach.

The biggest single change on the horizon of the UK's AML regime, at the time of writing, is to its supervisory framework. Years of government impatience with the fractured landscape of supervisors, particularly the professional bodies, seems set to collide with a drumbeat of political rhetoric about enablers of launderers, tax avoiders, kleptocrats and oligarchs. The result seems likely to be a single national supervisor, undoubtedly the FCA, of all AML-regulated firms. From the perspective of the professions' independence, as well as the need for appropriate expertise from supervisors in the businesses they supervise, it is an unfortunate result, which may in due course be seen as counterproductive.

As with so much in AML, in the UK and elsewhere, the problem of supervision is largely one of resources. The FCA (which is funded by the wealthy financial sector) has the resources, and (thanks to that) the expertise, to supervise banks and others and (arguably) to adopt the government's agenda of imposing their standards on the regulated professions. The professional bodies have lesser resources, and so fall behind in their attempts to impose AML standards on professionals and professional firms, many of which are themselves under-resourced and struggling to keep up with evolving requirements.

The context, meanwhile, is a framework for tackling dirty money that is terminally lopsided. On one side, a well-resourced financial sector is incentivised by tough laws to submit intelligence in very large volumes into the system; on the other, law enforcement is inadequately resourced to sift and make use of that intelligence in practice. For a jurisdiction in which financial services and property values have always had particular importance, the UK seems depressingly reluctant to take on board the wearily familiar message, that to tackle dirty money effectively, a great deal of clean money is required.

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