

# Money Laundering Law

A Regulatory bulletin from DLA Piper





## Proposed Merger of the Assets Recovery Agency and the Serious Organised Crime Agency

In a written statement by the Parliamentary Undersecretary for Police and Security at the Home Office on 11 January 2007, it was announced that the Government would be bringing forward its proposals to merge the Assets Recovery Agency ("**ARA**") with the Serious Organised Crime Agency ("**SOCA**"). The intention is that these merger provisions should come into force from April 2008, subject to the passing of necessary legislation.

As a result of the ARA ceasing to exist from next year, its novel powers of civil recovery, established by the Proceeds of Crime Act 2002 ("**POCA 2002**"), will have to be extended to the other criminal prosecutors: in England and Wales, the Crown Prosecution Service, the Revenue and Customs Prosecutions Office, and the Serious Fraud Office; in Northern Ireland, the Public Prosecution Service.

One criticism levelled at POCA 2002, and the structures it set up, is what is termed the 'hierarchy'; currently, civil

recovery can only be tried once criminal confiscation has failed and only after that can criminal assets be taxed. Jane Earl, Director of the ARA, sees the proposed merger as addressing this criticism, enabling the new body to use 'more of the powers more of the time in more ways'.

Others have, however, already expressed concerns over the merged agency and the feared narrowing of its focus. While SOCA currently concentrates on so-called 'Level 3 crime' - organised gangs operating

both nationally and internationally, the ARA has always had within its sights the street-level criminals, including sellers of counterfeit goods and benefit cheats. The concern is that these more 'minor' crimes will, in the future, be ignored. The merger plan purports to have addressed this point and has, as an objective, the blending of SOCA's more intelligence-led approach with that of asset recovery. The intention is that the hunt for criminal profits will become its central modus operandi.

## MiFID: Consequential Money Laundering Rule Changes

Two new Orders come into force on 1 November 2007: *The Terrorism Act 2000 (Business in the Regulated Sector) Order 2007* and the *Proceeds of Crime Act 2002 (Business in the Regulated Sector) Order 2007*. The text of both is now available on the Office of Public Sector Information ("**OPSI**") website.

As part of the implementation of Directive 2004/39/EC, the Markets in Financial Instruments Directive ("**MiFID**"), certain consequential amendments must be made to existing legislation; thus, the above Orders will amend the Terrorism Act 2000 and the Proceeds of Crime Act 2002, respectively, by

adding to the list of regulated activities the new activity of operating a multilateral trading facility. The effect of this is that a business will in the future be in the regulated sector to the extent that it conducts such an activity. This is relevant to the offence of failure to disclose information concerning money

laundering in sections 21A and 21B of the Terrorism Act 2000 and section 330 of the Proceeds of Crime Act 2002, one component of which offence requires information to come to a person in the course of a business in the regulated sector.

# Draft Money Laundering Regulations 2007 - Consultation Closes

In July 2006 HM Treasury launched a consultation document: *Implementing the Third Money Laundering Directive*, on the resultant changes required of our domestic legislation.

The aim of this first consultation was to open debate on the options for implementation where the UK has been given flexibility. Following the results of this first phase, the

Government published in January 2007 draft *Money Laundering Regulations 2007* for further consultation. These will repeal and replace the 2003 Regulations and will

come into force in December. The second period of consultation closed on 2 April 2007.

## Fruits of Cheating the Revenue can amount to Money Laundering

In *Regina v K<sup>1</sup>* the Court of Appeal held that unpaid tax which was the product of cheating the Revenue was a pecuniary advantage and could amount to 'criminal property' within the meaning of section 340 of POCA 2002, even where the trade whose profits were liable to income tax or whose turnover was subject to VAT was legitimate.

It was alleged that IK had assisted his father, SK, in running KME, a money exchange business which arranged transfers of money from the UK to Pakistan and that they had dishonestly concealed £5.9m worth of cash transactions. Both were charged with money laundering. In a further count, MR, a co-defendant, was charged with cheating the Revenue, the prosecution claiming that he had systematically cheated the Revenue of income tax and VAT by under-declaring the takings of his legitimate grocery business and had transferred to KME for transmission to Pakistan sums of money which had not been declared. SK and MR were further charged with money laundering in relation to the

sums transferred (£200,000) which represented, at least in part, the amount by which HMRC had been cheated.

Considering that he was bound by *R v Gabriel<sup>2</sup>*, the judge at first instance upheld the defence team's view that the proceeds of legitimate trading did not constitute criminal property. However, on appeal, this was reversed, it being held that a person who cheated the Revenue obtained a pecuniary advantage as a result of criminal conduct within the meaning of section 340(2) of POCA 2002 (the "Act"). Accordingly, MR was to be judged to have obtained a sum equal to the value of the amount of which HMRC was cheated, and that sum was a

benefit by reason of section 340(5) of the Act. The issue hinged on whether the undeclared sums 'constitute[s] a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly).<sup>3</sup>

The Court of Appeal held that it could not have been the intention of the Act that its money laundering provisions should not extend to the fruits of cheating the Revenue and that the court was not bound by *R v Gabriel*. That case could be distinguished because in the present case, as was not disputed, the prosecution had made out a prima facie case of cheating.

<sup>1</sup> *Regina v K* [2007] EWCA Crim 491.

<sup>2</sup> *R v Gabriel* [2006] EWCA Crim 229; [2006] Crim LR 854.

<sup>3</sup> Section 340(3)(a) POCA 2002.

# Treasury Publishes Anti-Money Laundering and Counter-Terrorist Finance Strategy

28 February 2007 saw the publication of the HM Treasury's paper *The Financial Challenge to Crime and Terrorism*, the focus of which is three-fold: it outlines the threats posed, describes the anti-money laundering and counter-terrorist finance measures currently in place and then identifies its plans for the next five years.

Going forward, HM Treasury's key priorities for the furtherance of 'detecting, deterring and disrupting crime and terrorism' are as follows:

- to build knowledge about criminal and terrorist activity, in particular, through the work of SOCA and the Home Office;
- to establish a dedicated Treasury Asset Freezing Unit which will be proactive in recovering criminal assets;
- to reinforce the new risk-based approach to identifying potential money laundering activities, by focusing on vulnerable sectors. The Government will, for instance, introduce new measures for the money service business sector which includes the replacement of the existing registration system with a licence-based regime. It will also bring forward enhanced safeguards for the charities' sector, underpinned by additional funding for the Charity Commission;
- to reduce the administrative burden on business. A consultation will be launched to consider changes to the consent and tipping-off rules and new measures will be introduced to simplify identification and due diligence checks which will be compliant with the revised Money Laundering Regulations;
- to encourage information sharing both within the public sector and between the public and private sectors;
- to engage international partners, especially through the UK's forthcoming (from July 2007) Presidency of the Financial Action Task Force.

## Law Society Approves Money Laundering Statements in Letters of Engagement

The Law Society's Money Laundering Task Force has recently updated its advice to law firms with new approved wording for use in client care letters or terms of engagement.

In order to suit a broad range of firms, three versions have been drafted allowing for the wording to be adapted, if necessary, with information about a firm's limit on the acceptance of cash and its policy on sending funds to third

parties. Solicitors are also given flexibility to add a warning that clients may be charged additional costs for depositing funds directly into their bank account without following the proper procedures.

The new wording can be found on the Law Society's website under *Anti-money laundering - draft paragraphs for client care letters or terms of engagement*.

# Government Publishes Final Report on Fraud Review

*Fighting Fraud Together*, the Government's report resulting from the fraud review it instigated in October 2005, has now been published.

The review set itself three main objectives:

- 1 to consider the scale of the problem of fraud;
- 2 to identify the appropriate role for the Government in dealing with that problem; and
- 3 to allocate resources to maximise value-for-money throughout the system.

Having assessed these three areas, the report has made various recommendations for consultation, including:

- the establishment of a uniform measurement of fraud so that the national extent of fraud can be assessed based on a robust measurement methodology;
- the creation, within central government, of a national Fraud

Strategic Authority tasked with devising and implementing a national strategy;

- the establishment of a national Fraud Reporting Centre for England and Wales with the capacity to link to domestic and international partners;
- the acceptance of plea bargaining as an alternative to a full criminal trial;
- the foundation of a Financial Court jurisdiction within the High Court to link the Crown Court with a division of the High Court and to hear serious fraud cases and associated proceedings; and
- the publication by the Sentencing Guidelines Council of specific guidelines for fraud offences, including increasing the maximum sentence for the most serious or repeated offences to 14 years.

The package of reforms and recommendations proposed by the Fraud Review has already been welcomed in principle by the Government. It has, however, been criticised by the Fraud Advisory Panel (a charity originally established by the Institute of Chartered Accountants in England and Wales) in its published response: 'Missing an Opportunity'. It is their view that the Review both lacks urgency and fails to make the necessary pledges regarding new resources.

The detailed work identified by the Review will now be taken forward by the Attorney General's Programme Board and recommendations requiring legislation will be developed into formal proposals, with a progress report being published by the end of 2007.

## British Bankers' Association Publishes Suggested Compliant Text on Wire Transfers

To implement the Financial Action Task Force ("**FATF**") on Money Laundering's Special Recommendation VII, the EU adopted Regulation 1781/2006, which came into force on 1 January 2007, and which requires both that Payment Service Providers include certain information in electronic funds transfers and that the information is verified.

The core requirement is that the payer's name, address and account number must be included in the

transfer, but there are a number of exemptions, concessions and variations permitted.

Full details on compliance and the suggested text to be used are available on the BBA website; [www.bba.org.uk](http://www.bba.org.uk)

# EU and International News



## European Anti-Fraud Office Uncovers International Crime Ring Involving EU Funds

Working closely with the European Anti-Fraud Office, the competent Prosecutor's Offices of Bulgaria, Germany and Switzerland and their respective national authorities, have recently carried out an extensive six-month operation which uncovered an international crime ring involving EU pre-accession funds. The estimated financial impact of the subsidy fraud is 7.5 million euros, which is the biggest misappropriation of EU funds so far uncovered.

Following the investigation, it is alleged that a linked network of more than 50 companies in Bulgaria, Germany and Switzerland had been involved in a fraudulent carousel operation which had accessed subsidies from the EU-

funded SAPARD programme (Special Accession Programme for Agriculture and Rural Development). Over the course of two years, the companies in question had acquired used machinery for the food, beverages and tobacco

industries but had falsified the documentation so that the machinery appeared to be new and highly priced. SAPARD aid was then irregularly claimed in Bulgaria based on the inflated prices.

## Financial Action Task Force Holds Plenary Meeting at the Council of Europe

For three days in February, the FATF and the Council of Europe's MONEYVAL committee held a joint Plenary Meeting at the Council of Europe. India was welcomed as an observer - the first step towards full membership in the FATF - adding to the existing observers from China and the Republic of Korea, in a move to strengthen the worldwide battle against money laundering and terrorist financing.

The Plenary adopted the FATF report assessing Turkey's anti-money laundering and counter-terrorist financing system for compliance with global standards and also the MONEYVAL report regarding Georgia's system. MONEYVAL Compliance Enhancing Procedures were lifted in respect of Armenia, but remain in place for Azerbaijan.

The FATF issued two reports at the meeting: *Laundering the Proceeds of VAT Carousel Fraud* and *Money Laundering and Terrorist Financing Schemes in South America*. Both reports will be available on the FATF website in the coming weeks. It was also announced that additional research studies on various areas including real estate, terrorist financing

and drug trafficking are currently underway. The FATF also reported that it is involved in a joint project with industry associations and bodies in the banking and securities sectors with the objective of adopting best practice guidelines on the implementation of a risk-based approach to combating money laundering and terrorist financing.

# Wolfsberg Group Issues Guidance on Anti-Corruption Measures

Recognising that corruption is often associated with organised crime, money laundering and even the financing of terrorism, the Wolfsberg Group<sup>4</sup> issued a statement against corruption on 13 March.

In essence, the statement outlines ways in which banks (incorporating institutions which are involved in private and retail banking as well as project finance) can protect themselves against the misuse of their operations for corrupt practices and suggests measures to prevent corruption internally.

The paper identifies three areas of risk:

## 1 Services Risk

A variety of the services offered by financial institutions might be used to effect the payment and receipt of bribes. The paper uses a system of "red flags" highlighting transactions which require special attention but which should be capable of being identified in the course of existing anti-money laundering monitoring.

## 2 Customer Risk

Certain customers and certain industries identified during due diligence or enhanced due diligence may potentially represent a greater degree of risk. In particular, Politically Exposed Persons ("PEPs") are identified as representing a higher risk because they are either in a position to exert undue influence on decisions regarding the conduct of business by private sector parties, or have access to state accounts/funds. In addition, intermediaries/agents are

highlighted as presenting a higher level of risk. These can be difficult to identify but have often been used to pay bribes on behalf of a company. Similarly, correspondence customers could fall into this high-risk category, a bank typically having no direct relationship with the customers of the correspondent bank.

## 3 Country Risk

The Wolfsberg Group has, separately, identified countries which have significant levels of corruption.

Guidance on how to address the various risks, on the filing of 'suspicious activity reports', on possible mitigating measures etc. can be gleaned from the full report see: [www.wolfsberg-principles.com/statement\\_against\\_corruption.html](http://www.wolfsberg-principles.com/statement_against_corruption.html)

<sup>4</sup> The Wolfsberg Group consists of the following leading international banks: ABN AMRO, Banco Santander, Bank of Tokyo-Mitsubishi-UFJ, Barclays, Citigroup, Crédit Suisse, Deutsche Bank, Goldman Sachs, HSBC, JP Morgan Chase, Société Générale and UBS.



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