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Insights

THE CPS CRACKS DOWN ON MONEY LAUNDERING; BUT TO WHAT EFFECT?

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On 2 June 2021, the Crown Prosecution Service (the "CPS") updated its Money Laundering Offences guidance on prosecuting 'failure to disclose' offences under section 330 of the Proceeds of Crime Act 2002. Such a failure exists when a person:

- receives information in the course of business in a regulated sector as a result of which he or she knows or suspects or has reasonable grounds for knowing or suspecting that another person is engaged in money laundering;
- can identify either that person or the whereabouts of any of the laundered property, or believes, or it is reasonable for them to believe, that the information will or may assist in identifying that person or the whereabouts of any of the laundered property; and
- fails to disclose that information to a nominated officer or to the NCA.

The revised Guidance is available at https://www.cps.gov.uk/legal-guidance/money-laundering-offences. Under that updated guidance, the CPS will consider bringing a prosecution of an offence of failure to disclose even if there is insufficient evidence to establish that money laundering was planned or undertaken.

THE OBLIGATIONS UNDER POCA AND THE UPDATED GUIDANCE

The definition of "regulated sector" is broad and will capture businesses within the financial services sector and law firms acting on financial transactions. However, an offence under section 330 cannot be committed by a corporate body; only individuals will be prosecuted. The maximum sentence which can be imposed following a conviction under section 330 is five years' imprisonment.

Prior to the update to the guidance, the CPS would not bring a prosecution under section 330 where there was insufficient evidence to establish that money laundering was planned or undertaken. However, in the updated guidance the CPS has indicated its willingness to bring a prosecution where "individuals in the regulated sector receive information giving rise to a suspicion, or provides reasonable grounds for suspecting, that another is engaged in money laundering, an offence is committed by failing to make a report under section 330, regardless of whether it subsequently transpires that the money laundering cannot be proven, or that it did not occur".

This is a potentially significant development given that one of the critical barriers in proving the offence under the previous guidance lay in the very real difficulty of proving that money laundering had actually taken place. Simply establishing a proper subjective or objective basis for such suspicion, however strong the grounds may be, and despite an array of 'red flags' being apparent, was not enough to justify a prosecution. That barrier has now been removed and we await the effects of that removal.

KEY TAKEAWAYS

This change could signal a very real willingness by the CPS to commence prosecutions for the failure to disclose offence. London is often called the "money laundering capital of the world". The updated guidance may be an attempt by the CPS to curb that reputation and be proactive in doing so. This, in turn, translates to an increased pressure on the professionals within the financial and legal sectors to consider making disclosures even in circumstances where money laundering may not be substantiated. Given the consequences of the offence, careful consideration should be given to one's obligations to disclose suspicions of money laundering.

While only time will tell whether prosecutions are instigated for this offence, what is certain is that no-one will want to risk being caught in the cross hairs of any such prosecution, meaning that we can expect an increase in the level of disclosures.

Whether those additional disclosures will actually serve any purpose apart from providing a degree of insulation against criminal prosecution to the individual making the disclosure is a moot point. As recently as January 2021, Graeme Biggar, the Director General of the National Economic Crime Centre, when giving evidence to the House of Commons Treasury Committee, told the Committee that of the 750,000 SARs estimated to be received this year (his comments were, of course, made before the revised CPS Guidance was issued), he estimated that anywhere between 10% to 33% of those reports would be of no particular value to the NCA.

While we do not question the sincerity of the CPS's desire to curb money laundering, only effective action will determine whether they are successful.

(The authors are grateful to Katerina Hemalova, Trainee Solicitor, for her contribution to this article.)

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MEET THE TEAM

Mukul Chawla KC

Co-Author, London

mukul.chawla@bclplaw.com
+44 (0) 20 3400 1000

Joseph Ninan

Co-Author, London

joseph.ninan@bclplaw.com
+44 (0) 20 3400 4971