# Cracking corruption

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## Clamping down on high-end money laundering should be top of the enforcement agenda, says Claire Shaw

- **Better co-ordination & information sharing will feed into a more informed enforcement picture in the future.**


The dearth of UK prosecutions for money laundering offences has been widely discussed in recent times, both in government circles and in the media. However, the sheer scale of the perceived problem has only more recently come to light—highlighted by Transparency International, as well as several international consulting firms. PwC's *Anti Money Laundering: Global Economic Crime Survey 2016* quotes an estimated 2% to 5%, or US$1–2 trillion annually as being global money laundering transactions, but the UN estimates that only 1% of those cashflows are seized by the authorities worldwide. So it seems the UK is not alone in having a low recovery rate.

First, however, a note of optimism. It has to be said that the law enforcement response to the lower (in value per transaction) 'cash end' of money laundering has been relatively good. The National Crime Agency (NCA) reports that, for October 2014 to September 2015, £46,375,449 has been recovered from /denied to criminals by the authorities. It was the lower, cash end of money laundering which was the target for much of the original legislation in this area at around the turn of the millennium, but that was pre 9/11 and the landscape has changed enormously since then. The picture now is one of money laundering being driven by sophisticated gangs of organised criminals and terrorist funders, using rapidly changing technology to

transfer huge sums of money around the world. As a result, and this has been recognised by UK authorities, the focus needs to be on high-end money laundering, which poses different challenges to investigation and prosecution.

> "Although at first blush the figures on high-end money laundering prosecution seem disappointing, there is much to be hopeful about"

It is fair to say that one of the difficulties in bringing cases to trial, namely that of lack of a co-ordinated approach and strategy, has been addressed in recent years. The NCA is leading a joined up approach which seeks to involve not only government, law enforcement and professionals, but also engage with private business and the public more widely.

The *High End Money Laundering Strategy and Action Plan* was published in 2014. The involvement of the private sector is an interesting one, and is perhaps a recognition that at least some of the intelligence gathering, early monitoring/investigation and indeed cost needs to be 'outsourced' from a cash-poor public sector. That will probably be an unwelcome signal to those businesses in the regulated sector, for whom the cost of anti-money laundering (AML) compliance is already considerable.

While the proposal in the Conservative Manifesto to merge the Serious Fraud Office into the NCA may work well in this particular area of investigation—given that much of our money laundering investigations are police and intelligence driven in any event and so sit well within the NCA, the real problem with that proposal remains one of potential conflicts of interest.

The fight against international money laundering often involves powerful individuals who often happen also to be donors to political parties (this is an issue on the SFO's investigation into Unaoil, where some of the suspects are the members of the Ahsani family, who have also been significant donors to Conservative party funds). The NCA, whether combined with the SFO or not, is accountable to the home secretary—a politically appointed government minister. The SFO is part of the independent Government Legal Service, and is answerable to Parliament via the attorney general, whose first obligation is to the court. It follows that the potential for conflict is much greater for an organisation which is answerable to a minister, and so the NCA must ensure not only that it pursues lines of enquiry vigorously and is seen to be doing so, but that it has the independence and will to stand up to political pressure should that agenda and that of the investigation ever diverge.

## Supervisor challenges

Another area of difficulty in bringing high-end cases has undoubtedly been the role of supervisors and, again, there has been movement here. A recent treasury consultation has resulted in recommendations in March of this year for improvements in the role and responsibilities of supervisors in the regulated sector. The response to the first round of consultation highlighted a lack of accountability on the part of supervisors; lack of consistency in approach between supervisors in the same sector; insufficient powers to require information and/or carry out spot checks and too little/too much/inconsistent/out of date guidance from supervisors which has created uncertainty for business.

Another response was that the Financial Conduct Authority (FCA) has focused too heavily on the largest firms, with less scrutiny of smaller ones. The proposal to address these and other concerns is to introduce a new Office for Professional Body AML Supervision, to be hosted by the FCA. That proposal is subject to further consultation over the summer of 2017, with the expectation that it will be fully operational by the start of 2018. While any move towards consistency has to be welcomed, it has to be effective and there needs to be a balancing guard against creating yet another layer of bureaucracy.

## Technology hitches

The tools available to law enforcement, including that which assists in the rapid interrogation of intelligence, are often out of date and clunky. While there is an understandable drive for more suspicious activity reports (SARs) to be submitted, there has to be a means of interrogating that data effectively at the earliest opportunity, and to see patterns in financial transactions. There is also, of course, the question of the quality of the content of the SARs.

The uncertainty created by mixed messages from supervisors must surely be creating a climate whereby SARs are submitted out of an abundance of caution, without necessarily the understanding of the need for quality intelligence. While a joint public/private sector approach to funding the development of technology in this field might assist greatly, one must bear in mind that at stake are live, sensitive and complex criminal investigations, the security of which must be protected at all costs.

Technology, and the rapid pace of change, is also of course a problem for those businesses in the regulated sector which are required to have machinery in place in order to comply with their obligations. One hopes that a co-ordinated and comprehensive approach from supervisors will assist in the development of best practice advice and benchmarks which will assist regulated businesses to meet their compliance obligations by learning from their collective experience and problem resolution.

## Political difficulties

There are other practical and often political difficulties in this complex area of law enforcement and criminal justice action. Any prosecution for money laundering necessarily involves the establishment of a crime. The criminality in question may involve corruption, extortion and other crimes committed by public officials and others in very challenging high risk jurisdictions where there may not be mutual legal assistance treaties or information sharing agreements. While progress is being made, criminals simply move their activity to another country as soon as a co-operation agreement is reached in the first. There can hardly be a more poignant example of the need for international co-operation than the drive against money laundering (which goes hand in hand with that against international corruption), nor a more clear example that, whether for good or ill, we live in a globalised world, where traditional definitions of jurisdiction and boundaries may be obstacles to case prosecution.

There is also a point to be made about criminal proceeds in high-value cases being dealt with by other means than via prosecutions. That means that there may be a considerable area of data which is simply not finding its way into the statistics. The Proceeds of Crime Act 2002, for example, allows for the recovery of funds to be dealt with by civil actions. The recent rise of deferred prosecution agreements, as a hallmark of SFO case resolution (which may or may not involve allegations of money laundering), means that there are no prosecutions of the companies which may have received criminal proceeds.

Then there is the perennial issue of prosecutorial discretion. While this may be a bar to cases ending up as money laundering prosecutions, there is good reason for that, and any attempt to make changes here is likely to be met (rightly, in the author's view) with great resistance. In deciding to charge, and in particular deciding which offences to pursue, UK prosecutors must consider the public interest as well as the weight of the evidence. In doing so they inevitably pursue the clearest path to conviction: why charge a complex money laundering offence, which relies on predicate criminality and a potentially costly and time consuming forensic tracing exercise, when you can charge the underlying criminality and recover the proceeds of that crime by means of post-conviction confiscation proceedings? That is very tempting to any prosecutor, particularly bearing in mind the considerable powers afforded in confiscation proceedings, such as time to be served in default of payment on top of any sentence for the original offence.

Another route by which cases, often involving financial services organisations and professionals, are dealt with is of course the regulatory route, which is often unlikely to lead to a prosecution and so will not form part of the collected data in that regard. In circumstances in which knowledge or suspicion of involvement/complicity in money laundering on the part of intermediary businesses may be extremely difficult to establish, then a regulatory route will often be the most appropriate, especially given that penalties can be severe.

## Reasons to be cheerful...

Although at first blush the figures on high-end money laundering prosecution seem disappointing, there is much to be hopeful about. The political will is certainly there to push the agenda forward and implement the progress that has been made in terms of formulating a joined up strategy. This is particularly the case if London's status as a financial centre is to be maintained, secured and enhanced post-Brexit. There is a real recognition that the role of supervisors has at times fallen short. This is being addressed and the indications are that the new Office for Professional Body AML Supervision will be widely

welcomed within the regulated sector. It may also be the case that data on the money laundering cases has not adequately picked up the non-prosecutorial ways in which the issue is being effectively addressed. The hope there is that better co-ordination and information sharing will feed into a more informed enforcement picture in the future.

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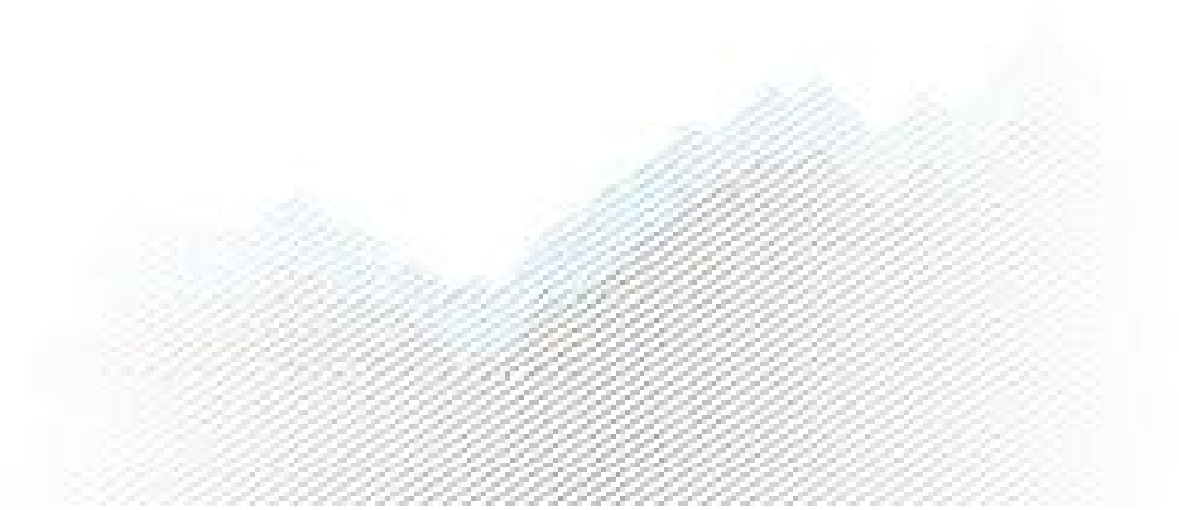

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