

# Legal Update

## UK money laundering and the future of SARs - the Law Commission's Report and Recommendations

On 18 June 2019, the England and Wales Law Commission published a report<sup>1</sup> regarding the UK's anti-money laundering ("AML") framework (the "Report"). The Report follows a two-year consultation project aimed at improving the prevention, detection, and prosecution of money laundering and terrorism financing in the UK, and forms part of a much broader picture of reform of the AML framework. This includes, in particular, the announcement in January 2019 of a new UK Cabinet taskforce – the Economic Crime Strategic Board – to set priorities and direct resources pursuant to the UK Government's Serious and Organised Crime Strategy, and publication of a House of Commons Treasury Committee's report on Economic Crime (March 2019), and the government's response (May 2019).

The Report makes 19 recommendations, principally concerning the suspicious activity report ("SAR") regime under Part 7 of the Proceeds of Crime Act 2002. This alert highlights some key features of the Report's findings and recommendations, and outlines the impact they may have on existing practices and the general direction of travel for the UK's legislative framework on financial crime.

The recommendations focus on improving shortcomings in the current regime. The findings in the Report included the following two central themes:

- **fragmented supervision of the anti-money laundering regime**, resulting in "...a lack of uniformity across approved guidance" and misunderstandings amongst reporters. This arises out of the fact that there are 22 separate bodies responsible for AML supervision in the UK. The observation is consistent with a number of other recent reports regarding the UK's AML framework, including a report issued by the Office for Professional Body AML Supervision ("OPBAS") (March 2019) which noted inconsistent approaches across the various supervisory bodies to supervision, information sharing, and enforcement, and the FCA's thematic review of money laundering risks in Capital Markets (June 2019), which noted a "...lack of specific industry guidance.." around when to file a SAR; and
- **low quality "defensive" SARs with "...limited, or even no, useful intelligence"**; due in part to confusion over reporters' obligations, and concerns for potential criminal liability for failing to report a suspicion. The Law Commission found that 15% of SARs sampled as part of its review did not meet the "suspicion" threshold. Extrapolated, this suggests that 4,121 unnecessary SARs were filed between October 2015 and March 2017.

<sup>1</sup> <https://www.lawcom.gov.uk/project/anti-money-laundering/>

## Key Recommendations

1. **Prescribed SAR form** – the Law Commission believes that a standardised form will give reporters more confidence in articulating suspicions and ensure that it is easier for law enforcement to gain valuable financial intelligence from SARs. It is further recommended that the form would allow for a single SAR to be reported in respect of multiple transactions on the same account or for the same customer, rather than requiring separate SARs for each separate suspicious transaction.
2. **Guidance** - guidance from the Secretary of State for the Home Office regarding: (a) what constitutes a “suspicion” and thus triggers the obligation to file a SAR; (b) the procedure for obtaining “appropriate consent” from the UK National Crime Agency (“**NCA**”) to proceed with a suspicious transaction; and (c) the scope of the “reasonable excuse” exemption. The Law Commission’s consultation observed a widespread call for clear and consistent guidance from one single authoritative source, which would assist reporters properly to understand and comply with their obligations.
3. **Advisory Board** - an advisory board to oversee the SAR regime and allow it to be more responsive to new and emerging threats. It is envisaged that the advisory board will: (a) help produce the above statutory guidance, monitor the effectiveness of the SAR regime, and make further recommendations to the Secretary of State as appropriate; (b) analyse the quality of SARs; and (c) review whether the “suspicion” threshold for filing a SAR should have an objective element added to it.
4. **Ring-fencing** – allow financial and credit institutions to ring-fence funds suspected to be the proceeds of crime, segregating them from “clean” funds, and to conduct transactions exclusively utilising the clean funds. This seeks to redress the potentially disproportionate position under the current regime where suspicion regarding individual transactions can result in (for example) the freezing of all the bank accounts of the individual or entity, indefinitely.

The Report recommends that certain aspects of the existing regime should remain as they are. It is particularly noteworthy that the Law Commission considered, but has not recommended any changes to, the consent regime as a whole (subject to continued review by the proposed advisory board) and the SAR regime’s applicability to all crimes (rather than to only so-called “serious” crimes). Thus, as the regime currently stands, an authorised disclosure to the NCA is still required for suspicions of technical, even trivial, potential criminality, which may involve little or no intelligence value.

The Law Commission also considered four wider areas of potential reform: (a) corporate criminal liability; (b) the extraterritorial jurisdiction of the UK’s AML regime; (c) a legal conduct overseas exemption (commonly known as the “Spanish bullfighter” issue, relating to an activity illegal in the UK but not illegal in the jurisdiction in which it occurs - an issue the Law Commissions highlights as “pressing”, especially, for example, given the recent growth of the cannabis industry); and (d) voluntary information sharing between regulated entities. However, the Law Commission made no recommendations in relation to these areas, which has led a number of commentators to the view that this was a lost opportunity.

### All fixed now?

The Financial Action Task Force (“**FATF**”), in December 2018, said the UK “SAR regime requires a significant overhaul to improve the quality of financial intelligence available to the competent authority”. This sentiment was echoed in the House of Commons Treasury Committee’s Report on Economic Crime: “[t]he SARs reform programme is...an exceptionally important piece of work for the AML regime... Confidence in the SARs system, at present, appears to be weak outside the core financial services”. Time will tell whether the Law Commission’s recommendations provide the impetus for the overhaul needed.

The recommendations do propose some streamlining of the SAR regime (most notably, through the creation of a standardised SAR form). But on the thornier issues such as - “defensive” reporting, and guidance for reporters who understandably err on the side of caution in the face of potential criminal liability, it appears that these will fall to the Secretary of State and the proposed advisory board.

If you have any questions about the issues raised in this legal update, please get in touch with your usual Mayer Brown contact or:

#### **Sam Eastwood**

Partner, London  
E: [seastwood@mayerbrown.com](mailto:seastwood@mayerbrown.com)  
T: +44 20 3130 3087

#### **Jason Hungerford**

Partner, London  
E: [jhungerford@mayerbrown.com](mailto:jhungerford@mayerbrown.com)  
T: +44 20 3130 3084

#### **Stephen Moi**

Senior Associate, London  
E: [smoi@mayerbrown.com](mailto:smoi@mayerbrown.com)  
T: +44 20 3130 3730

#### **Peter Chapman**

Associate, London  
E: [pchapman@mayerbrown.com](mailto:pchapman@mayerbrown.com)  
T: +44 20 3130 3596

#### **Mayer Brown's Team & Capabilities**

Mayer Brown has lawyers in offices in all the world's major financial centres, and throughout the Americas, Europe, and Asia, who offer clients an all-encompassing solution to ensure compliance with an increasingly global legal and regulatory framework as regards all matters pertaining to financial regulation, financial crime, and management of financial crime risks. Our team includes former government prosecutors and compliance lawyers with experience in every facet of regulation and enforcement.

With regard to money laundering in particular, our team has extensive experience in counselling a wide array of financial institutions, including banks, brokerage firms, insurance firms, money transmitters, and Fintech firms on their anti-money laundering compliance obligations. Relying on our knowledge of the financial services industry and experience before supervisors around the globe,

we seek to assist clients in developing appropriately tailored compliance programs that satisfy their legal obligations. In the event that a compliance issue arises, we assist clients to isolate the problem, remediate it, and to contend with potential supervisory fall-out. If ongoing enforcement occurs, we are experienced in negotiating the terms of deferred prosecution agreements and assisting institutions to manage monitorship programmes. This has involved:

- preparation or review of financial crime related training programmes and materials
- responding to specific inquiries regarding typologies that may indicate money laundering or related financial crime risk
- enhancement or review of internal policies and procedures relating to the management of financial crime risk
- advising on regulatory and law enforcement reviews of all aspects of compliance programmes, including reviews of various transaction monitoring, screening, and payment alert systems
- analysing applicable data privacy laws across various jurisdictions for regulatory or law enforcement requests and investigations, intra-group information sharing, and other financial crime risk management purposes.

Our global team offers comprehensive guidance and counselling, including the following services:

#### Corporate Compliance Programs

We advise clients on the development and implementation of internal compliance programs to reduce the risks of a violation of applicable laws, regulations, and guidance. We conduct compliance assessments to identify strengths and weaknesses in existing compliance programs. Additionally, we help companies formulate compliance policies, address specific implementation issues in the context of particular corporate cultures and multinational operations, and prepare training and other educational materials, among other key practices, to ensure compliance.

## Prospective Transactions

*We help clients assess prospective transactions with respect to compliance, and we advise on structuring transactions to satisfy the requirements of the applicable laws and regulations. We help clients engage in effective due diligence with respect to the engagement of foreign agents, consultants, representatives and joint-venture partners, and we counsel on appropriate contractual provisions to address financial crime compliance and risk. In addition to advising on particular international transactions, we also counsel clients on acquisitions of companies engaged in international businesses.*

## Investigations

*We have extensive experience in handling internal and external corporate investigations, including those addressing possible violations of the books-and-records, internal controls and financial crime related laws generally. We have worked with inside counsel, internal auditors and external auditors to assemble and review documents, interview directors and current and former employees, and advise management, boards of directors, and audit committees on the results of investigations. We are familiar with the complexities of multinational investigations, including sensitivity to issues raised by local data protection, financial privacy, and employment laws, as well as blocking and sovereignty statutes, and coordinating the work of foreign counsel when needed.*

---

Mayer Brown is a distinctively global law firm, uniquely positioned to advise the world's leading companies and financial institutions on their most complex deals and disputes. With extensive reach across four continents, we are the only integrated law firm in the world with approximately 200 lawyers in each of the world's three largest financial centers—New York, London and Hong Kong—the backbone of the global economy. We have deep experience in high-stakes litigation and complex transactions across industry sectors, including our signature strength, the global financial services industry. Our diverse teams of lawyers are recognized by our clients as strategic partners with deep commercial instincts and a commitment to creatively anticipating their needs and delivering excellence in everything we do. Our “one-firm” culture—seamless and integrated across all practices and regions—ensures that our clients receive the best of our knowledge and experience.

Please visit [mayerbrown.com](http://mayerbrown.com) for comprehensive contact information for all Mayer Brown offices.

This Mayer Brown publication provides information and comments on legal issues and developments of interest to our clients and friends. The foregoing is not a comprehensive treatment of the subject matter covered and is not intended to provide legal advice. Readers should seek legal advice before taking any action with respect to the matters discussed herein.

Mayer Brown is a global services provider comprising associated legal practices that are separate entities, including Mayer Brown LLP (Illinois, USA), Mayer Brown International LLP (England), Mayer Brown (a Hong Kong partnership) and Tauil & Chequer Advogados (a Brazilian law partnership) (collectively the “Mayer Brown Practices”) and non-legal service providers, which provide consultancy services (the “Mayer Brown Consultancies”). The Mayer Brown Practices and Mayer Brown Consultancies are established in various jurisdictions and may be a legal person or a partnership. Details of the individual Mayer Brown Practices and Mayer Brown Consultancies can be found in the Legal Notices section of our website. “Mayer Brown” and the Mayer Brown logo are the trademarks of Mayer Brown.

© 2019 Mayer Brown. All rights reserved.

Attorney Advertising. Prior results do not guarantee a similar outcome.