



Seriously helpful: Serious Crime Act 2015 provides protection from civil liability

Does declining or delaying compliance with customer instructions while you comply with money laundering notification obligations expose you to liability to the customer?

Section 37 of the Serious Crime Act 2015 (the “**Act**”), which came into force on 1 June 2015, is likely to be welcomed by those operating in the regulated sector. This is because it enshrines in statute the principle established in case law, and discussed in our previous briefing “**Gambling, Money Laundering and Reasonable Suspicion**”¹ that a person reporting suspicions of money laundering and declining or delaying compliance with customer instructions shall be protected from civil liability towards that customer.

The reporting regime

The Proceeds of Crime Act 2002 (“**POCA**”) obliges institutions operating in the regulated sector to submit suspicious activity reports (“**SARs**”) to the National Crime Agency (“**NCA**”) when they have reasonable grounds to know or suspect that a person is engaged in money laundering.

Such institutions can also seek the NCA’s consent to conduct a transaction or carry out an activity, on behalf of a customer, about which they have suspicions. The activity or transaction must not proceed while the institution awaits consent. Institutions have always been concerned that declining or delaying compliance with customer instructions could expose them to the risk of civil claims being brought by customers who have suffered financial loss as a result.

Customers bringing such claims can require the institution in question to prove the reasonableness of the suspicion that gave rise to the SAR. However, the case law established that, provided such suspicion is proved, the institution cannot be held liable for loss suffered by customers as a result of failing to carry out their instructions. The threshold for proving reasonable suspicion under the common law was a relatively low one.

Statutory protection from civil liability

Section 37 of the Act inserted a new subsection, 4A, into section 338 of POCA as follows:

“(4A) Where an authorised disclosure is made in good faith, no civil liability arises in respect of the disclosure on the part of the person by or on whose behalf it is made.”

The amendment is a clear recognition of the importance of reporting money laundering suspicion and of a consideration that reporting genuinely held suspicions of money laundering, which the law requires, should not place institutions at risk of civil liability. Lord Bates stated, when presenting the amendment, that:

“While the Government recognise the concerns of customers, we believe that where an institution has suspicions regarding the transaction and reports those to law enforcement authorities in good faith, as the law requires it to do, that institution should not be liable for civil claims for damages”

The new subsection is likely to be very well received by the regulated sector. The new subsection will provide greater clarity and strengthen the existing common law position on civil liability arising from refusal to carry out customer instructions. Indeed, Lord Bates commented:

“We believe that placing this civil immunity on a statutory footing will provide for greater legal certainty.”

Practical considerations

Of course, institutions must remain cautious when submitting SARs. Whilst the new subsection does reinforce and codify protection from civil liability, it does specifically cover only situations where the disclosure is made in “good faith”. As noted by Lord Bates:

“those in the regulated sector responsible for submitting such reports will continue to be liable for any negligent or malicious conduct.”

¹ http://www.burgess-salmon.com/practices/disputes_and_litigation/publications/gambling_money_launders_and_reasonable_suspicion_banks_right_to_freeze_customer_accounts.aspx#

Therefore, it is important that institutions in the regulated sector:

- Have clear anti-money laundering policies that make clear how suspicion should be documented and ensure all SARs are submitted in good faith.
- Have standardised protocols and communications in place for dealing with customers whose instructions are declined or delayed.
- Confer with internal and, if necessary, external legal counsel on both reporting and how to respond to and deal with the customer.
- Avoid tipping off the customer of any suspicions, putative or actual.

If you have any questions on the above or anti-money laundering and fraud and white collar crime more generally, please contact David Hall or Thomas Webb.

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