

The Making of a Super-SAR: A Case Study

February 2018

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The UK Government has continued to develop the UK's existing anti-money laundering ("AML") framework, both in response to EU driven initiatives, but also as part of its own national strategy. The Criminal Finances Act 2017¹ ("CFA") has significantly bolstered the UK regime and reformed the suspicious activity report ("SAR") regime to allow for the voluntary sharing of information in connection with suspicions of money laundering in the regulated sector², which may then lead to the filing of a joint SAR (or 'Super-SAR') with the National Crime Agency ("NCA") and potentially provide more useful intelligence to the NCA. This alert discusses the introduction of Super-SARs via a case study.

Background

The volume of SARs filed in the UK has been increasing year-on-year. The NCA's 2017 SARs Annual Report states that the NCA received 419,451 SARs between October 2015 and September 2016. There are concerns that the volume of SARs has become unmanageable and that a large number of "defensive" SARs are being filed, which have little utility for the NCA, but are a product of the current framework under the Proceeds of Crime Act 2002 ("POCA"). The UK Government is considering further amendments to the current POCA regime³, but in the meantime, the new Super-SAR regime is a mechanism for consolidated reports to be made to the NCA. This will allow the NCA to examine several stages of a money laundering scheme without extensive cross-referencing. The Super-SAR regime is expected to facilitate the sharing of information within the Joint Money Laundering and Intelligence Taskforce ("JMLIT"), a partnership that has been set up between certain firms in the financial sector and UK law enforcement. JMLIT has been seen as a success.

The New Regime

The existing 'failure to disclose' offences under POCA remain in place under the new regime.⁴ These offences impose obligations on firms in the regulated sector ("**Regulated Firms**"), their employees and their nominated officers (i.e. those nominated to receive internal reports such as the Money Laundering Reporting Officer "**MLRO**") to make an internal or external disclosure in certain circumstances. The rationale for these offences,

¹ For more detail on other aspects of the Criminal Finances Act 2017, see the White & Case Alert "Facilitating tax evasion: how to avoid being unwittingly caught by the Criminal Finances Act 2017" <https://www.whitecase.com/publications/alert/facilitating-tax-evasion-how-avoid-being-unwittingly-caught-criminal-finances-act>

² As defined by Schedule 9 of POCA, per section 339ZG(9) POCA.

³ United Kingdom Anti-Corruption Strategy 2017-2022.

⁴ Sections 330 and 331 of POCA.

and related legislative AML requirements for Regulated Firms, is that those in the regulated sector are gatekeepers to the financial system and are therefore required to protect it.

The CFA amends POCA⁵ to set out procedures for: (i) submitting a disclosure request to a Regulated Firm (“**Disclosure Request**”); (ii) responding to a Disclosure Request; and (iii) submitting a report to the NCA jointly with another Regulated Firm i.e. a Super-SAR.⁶ The new regime is complicated and the drafting within the amended sections of POCA is not clear.

Submitting a Disclosure Request

A Disclosure Request can only be made by either an NCA authorised officer, or by a regulated firm⁷ (a “**Requesting Firm**”).⁸ The recipient of the Disclosure Request must also be a firm that is carrying on a business in the regulated sector as a relevant undertaking (the “**Recipient**”).⁹

All Disclosure Requests must contain the following:¹⁰

1. A statement that the request is made in connection with a suspicion that a person is engaged in money laundering and identify the person suspected (if known);
2. A description of the information that is sought from the Recipient; and
3. Identify the person or persons to whom it is requested that the information is disclosed.

Additionally, where the Disclosure Request is made by a Requesting Firm, rather than the NCA, it must also:¹¹

4. Set out the grounds for the suspicion that a person is engaged in money laundering; and
5. Provide such other information as the person making the Disclosure Request thinks appropriate for the purposes of enabling the Recipient to determine whether the information requested ought to be disclosed.

Where a Disclosure Request is made by a Requesting Firm, they must also make a notification to the NCA (the “**Required Notification**”),¹² which discharges the Requesting Firm’s disclosure obligations under section 330 and the nominated officer’s obligations under 331 POCA.¹³

This Required Notification to the NCA must:¹⁴ (a) state that a Disclosure Request has been made; (b) specify the firm to whom the Disclosure Request was made; (c) identify any persons (if known) suspected of being engaged in money laundering, in connection with the Disclosure Request; (d) provide all such other information as would be required for making a disclosure to the NCA in filing a traditional SAR¹⁵, in particular, the information which forms the basis for such knowledge or suspicion, and the whereabouts of the laundered property (if known).¹⁶

⁵ Section 11 of the CFA inserts new sections 339ZB to 339ZG into POCA.

⁶ This alert focuses on money laundering, but the CFA has also made corresponding amendments to the counter-financing of terrorism framework under the Terrorism Act 2000. See sections 21CA to 21CF of the Terrorism Act 2000.

⁷ Or “persons” where a joint request is made.

⁸ Sections 339ZB(2)(c) and 339ZB(3) POCA.

⁹ Section 339ZB(2)(a) POCA.

¹⁰ Section 339ZC(1) POCA.

¹¹ Section 339ZC(2) POCA.

¹² Section 339ZC(3)(b) POCA.

¹³ Section 339ZD(2) POCA – though note the limitations within section 339ZE POCA.

¹⁴ Section 339ZC(5) POCA.

¹⁵ Under section 330 POCA.

¹⁶ Sections 339ZC(5) and 330 POCA.

Case Study

Hades Investments LLC is a customer of Cronos Bank. Hades Investments LLC makes three transfers in U.S. Dollars to Mr Zeus, a customer of Saturn Bank. The transfers are in the amounts of USD 10 million, USD 7 million and USD 3 million and occur within a working week.

The transfers are brought to the attention of the Money Laundering Reporting Officer (“MLRO”) of Saturn Bank because Mr Zeus is the brother of a high-ranking official in an oil-rich Nigerian state and is subject to enhanced customer due diligence because he is a family member of a politically exposed person (“PEP”). Although Mr Zeus is a successful business person, the transfers appear to be irregular in the context of the normal activity on his account.

The MLRO of Saturn Bank makes a Disclosure Request to Cronos Bank asking for information about Hades Investments LLC. The MLRO notes that it is suspected that Mr Zeus may be engaged in money laundering and outlines the reasons why - Mr Zeus is the brother of a high-ranking official in an oil-rich Nigerian state and has received three transfers of U.S. Dollars in round amounts and totalling USD 20 million within a week from Hades Investments LLC and that this account activity is irregular for Mr Zeus. The MLRO asks for additional information regarding Hades Investments LLC, including who the ultimate beneficial owner is, where the entity is incorporated, the duration of its relationship with Cronos Bank and its source of wealth and source of funds.

The MLRO of Saturn Bank makes the Required Notification to the NCA in relation to the disclosure request made to Cronos Bank and includes such information as she would have put in an ordinary SAR. The MLRO notes that there are reasonable grounds to suspect money laundering in the same terms as the Disclosure Request. The MLRO also seeks consent from the NCA to continue to operate Mr Zeus’ bank account.

Responding to a Disclosure Request

Having received a Disclosure Request, the question for the Recipient is whether or not to disclose information, as the regime is voluntary rather than mandatory. The Recipient may disclose information, if the following conditions are met:¹⁷

1. Condition 1 is that:
 - (a) the Recipient is a Regulated Firm;
 - (b) the information on which the disclosure is based came to the Recipient in carrying on that regulated business; and
 - (c) the person (or persons) to whom the information is to be disclosed is also a Regulated Firm.
2. Condition 2 is that:
 - (a) an NCA authorised officer has requested the Recipient to make the disclosure; or
 - (b) the person to whom the information is to be disclosed (or at least one of them) has requested the Recipient to do so.
3. Condition 3 is that, before the Recipient makes the disclosure, the Required Notification, as described above, has been made to the NCA.
4. Condition 4 is that the Recipient must be satisfied that the disclosure will or may assist in determining any matter in connection with a suspicion that a person is engaged in money laundering.

POCA now states that a voluntary disclosure made in good faith by a Regulated Firm does not breach an obligation of confidence owed by the person making the disclosure, or any other restriction on the disclosure of information, however imposed.¹⁸ However, a relevant disclosure may not include information obtained from a UK law enforcement agency, unless that agency consents to the disclosure.¹⁹

¹⁷ Section 399ZB(2) to (5) POCA.

¹⁸ Section 339ZF(1) POCA.

¹⁹ Section 339ZF(2) POCA.

Case Study

The MLRO of Cronos Bank receives the Disclosure Request from Saturn Bank and then reviews the customer due diligence documents and account activity of Hades Investments LLC.

The ultimate beneficial owner of Hades Investments LLC is a Nigerian citizen who is not designated as a PEP. Hades Investments LLC is incorporated in Delaware and invests in the oil industry in Nigeria and has the benefit of several oil prospecting licences which it operates as joint ventures with other entities. It also provides marketing and project management services in the oil extractive industry. It is a relatively new customer for Cronos Bank.

The MLRO of Cronos Bank considers matters and decides that she has suspicions that Hades Investments LLC has engaged in money laundering given the information on file and the Disclosure Request from Saturn Bank. The MLRO of Saturn Bank gives confirmation to the Cronos Bank MLRO that Saturn Bank has made the Required Notification to the NCA.

The MLRO of Cronos Bank then discloses the requested information to Saturn Bank. Cronos Bank seeks consent from the NCA to continue to operate the Hades Investment LLC account and also to close it.

Making a Super-SAR

Following the disclosure of information by the Recipient in response to a Disclosure Request, the Recipient and the Requesting Firm may decide to produce a joint disclosure report (i.e. a Super-SAR). A joint disclosure report is²⁰:

1. A report to an NCA authorised officer;
2. Made jointly by the Recipient and the Requesting Firm (as defined above and potentially with others to which the Recipient has disclosed information);
3. Prepared after the making of a disclosure by the Recipient to the Requesting Firm, as described above;
4. Sent before the end of the 'applicable period', which means before the expiry of: (1) a period specified by the NCA if it made the request; or (2) 84 days from the day on which the Required Notification to the NCA was made;²¹ and
5. A report which satisfies the following content requirements:²²
 - (a) explaining the extent to which there are continuing grounds to suspect that a person has been engaged in money laundering;
 - (b) identifying that person;
 - (c) setting out the grounds for the suspicion; and
 - (d) providing any other relevant information.

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A joint disclosure report is made by Saturn Bank and Cronos Bank and signed by the MLRO of each firm.

²⁰ Section 399ZD(4) POCA.

²¹ Section 339ZD(6) POCA.

²² Section 339ZD(5) POCA.

Implications

As discussed above, the new information sharing scheme was introduced with the aim of improving the provision of SAR intelligence by providing consolidated information to the NCA. It remains to be seen how effective this will be in practice:

- The new provisions, absent regulatory guidance, are voluntary and there is no legal obligation for Regulated Firms to make Disclosure Requests or submit Super-SARs. From a practical perspective, the POCA SARs regime is already onerous for Regulated Firms. The new legislative provisions add to the list of points for Regulated Firms to consider in this context.
- The new provisions are complex and not user-friendly.
- There are concerns that the sharing of information under the new regime may have data protection implications.
- In practice, the initial use of the Super-SARs regime may be driven by JMLIT, absent regulatory guidance applicable to non-members of JMLIT. It will be interesting to see if future NCA SARs Annual Reports summarise how many Super-SARs have actually been filed.

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