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How the FinCen Papers provide an opportunity to improve the Suspicious Activity Report (SARs) regime

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Corporate Crime analysis: The 'FinCen Papers' look set to become the next Panama Papers, where confidential information has been leaked, lifting the lid on the sheer scale of financial crime and money laundering. Gary Pons, barrister at 5SAH Chambers specialising in complex financial cases and recovery of the proceeds of crime, considers the publication of the FinCen Papers, containing over 2100 Suspicious Activity Reports (SARs) from the US Treasury Department's Financial Crimes Enforcement Network (FinCen), the problems with the SARs regime it reveals and suggests that it might be an opportunity to improve the SARs regime.

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What are the FinCen Papers?

Buzzfeed, the American Internet Media website, obtained over 2100 SARs from FinCen. The SARs emanate from banks and financial institutions which were sent to FinCen to provide the details of transactions that were suspected to involve money laundering.

Buzzfeed has had these SARs for over a year. It collaborated with the International Consortium of Investigative Journalists (ICIJ), the people behind the Panama Papers, to ensure that they were thoroughly analysed and disseminated.

What are SARs?

SARs are the mechanism by which law enforcement are alerted by those bodies in the regulated sector (often banks and financial institutions) that certain client or customer activity is suspicious and might indicate money laundering or terrorist financing. The obvious benefit of SARs are that they provides law enforcement with valuable information on potential criminality, that it otherwise would not have.

In the US, the Financial Recordkeeping and Reporting of Currency and Foreign Transactions Act of 1970 (31 USC 5311 et seq.) (the Bank Secrecy Act) provides that financial institutions are required to assist the US government agencies in detecting and preventing money laundering. It requires a financial institution to file a SAR in relation to activity which it suspects might be criminal with FinCen.

Similar provisions exist in the UK in sections 330 to 339 of the Proceeds of Crime Act 2002 (POCA 2002). It is a defence to an allegation of money laundering if a financial institution applies by way of authorised disclosure for consent to do the relevant act and that consent has either been granted or if it has been refused, that the moratorium period has expired. Thus, if a bank or financial institution is asked to process a transaction which is suspected involves the proceeds of crime, it commits a criminal offence unless it discloses the details to law enforcement and receives consent to process the transaction. Furthermore, a financial institution is required to make a disclosure if it has reasonable grounds for suspecting that a person is engaged in money laundering. This disclosure is wider and not merely transactional in nature.

What is the purpose of SARs?

SARs are theoretically the perfect example of collaboration between the private and public spheres. This is the kind of collaboration that continues to be at the very heart of the Government's Economic Crime Plan. In requiring financial institutions to be proactive in combating money laundering it allows quality information to be provided to law enforcement. SARs are obviously an important tool in the fight against organised crime and money laundering. Their

overall utility depends on the quality of the information provided and the capability of law enforcement to react to them.

What do the FinCen Papers tell us?

The FinCen Papers do not represent the entire picture, because they are a selection of the information contained by one country's agency. Nevertheless, the amount of money involved is staggering. The SARs that BuzzFeed obtained relate to more than US\$2 trn in transactions. The principle financial institutions involved are Deutsche Bank, Bank of New York Mellon, JP Morgan Chase and Standard Chartered.

The global nature of money laundering is underlined. These SARs contain information on more than 10,000 people and organisations. They involve over 170 countries and territories. They provide an alarming picture of the prevalence of money laundering in the UK. In relation to the place of residence of the individuals who are the subject of the SAR, the UK is in third place with 45 SARRS. Only the US with just over 250 and Russia with more than 120 have more. When it comes to organisations, the UK come into its own. There are just over 300 SARs which feature organisations in Hong Kong, and over 400 featuring organisations with addresses in the British Virgin Islands. The UK has 622. This provides stark confirmation of the UK's reputation as the premier safe haven for ill-gotten gains.

The headlines will obviously focus on the amount of money involved and the details of particular prominent individuals. Criticism is already being levelled at the banks for the way in which they have permitted these transactions to have taken place.

Fergus Shield and Dean Starkman of the ICIJ in their article about the FinCen Papers state that the papers reveal:

'how banks continue to move dirty money for drug cartels, corrupt regimes, arms traffickers and other international criminals—and how a broken US-led enforcement system perpetuates business as usual'.

The reality is that a degree of caution is needed before widespread criticism is levelled at the banks and financial institutions. The degree to which they have turned a blind eye can only be assessed by examining the full details of each SAR and the particular nature of the relationship between the financial institution and their client. That information may be available to BuzzFeed and ICIJ, but it is not currently in the public domain.

On a more basic level the banking institutions have complied with the requirements placed on them by the Bank Secrecy Act. They have provided information to the authorities although it is apparent that in many cases it has not been provided at the time of the transaction but later, at the time that suspicion was purportedly acquired. In some cases, suspicion has been acquired due to the publishing of information within the Panama Papers. The real questions go to the heart of the SAR regime and how effective it can be if the law enforcement authorities do not have sufficient resources to properly investigate.

The problem with the SARs Regime

In the BuzzFeed article, it is stated that in the US: 'last year, banks and other financial institutions filed more than 2 million SARs'.

It is self-evident that to investigate such a large number of SARs requires significant resources. Nevertheless, if any government is serious in its policy to clamp down on money laundering, it must invest significant resources into the agencies that investigate SARs.

SARs in the US continue to increase every year. Common sense dictates that this requires a similar increase in government investment in FinCEN.

The position is no different in the UK as is evident from the 2019 Law Commission report: 'Anti-money laundering: the SARs regime.' Over 450,000 SARs were received and processed by the National Crime Agency's UK Financial Intelligence Unit (UKFIU) between April 2017 and March 2018. The volume of authorised disclosures made to the NCA continues to rise. In February 2019, the NCA received approximately 4,000 compared with 2,000 in February 2018. The SARs regime places a huge strain on the UKFIU.

The Law Commission in its report highlighted some of the problems with the current regime at pages 29-31 of its report:

- there are too many reports that are of poor quality, because they are made primarily to provide a defence to any potential allegation of money laundering against the financial institution

- the current provisions are complex and there is no definitive guidance on them
- reporting and assessing SARs is a resource-intensive process both for UKFIU and the financial institution

The Law Commission Report made 18 recommendations including that further analysis on the quality of SARs is conducted at regular intervals.

While the FinCen Papers understandably provide a renewed focus on the nature and scale of global money laundering, it should not be forgotten that the structure to successfully combat money laundering exists. It is the lack of resources that prevents law enforcement from dealing with the global issue that money laundering represents.

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