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International Guide to Money Laundering Law and Practice

CHAPTER 28 - Jersey

Reporting money laundering and financing terrorism activity and transactions

28.168
As noted in the Handbooks, a relevant person, or one of its employees, must make a suspicious activity report where they have knowledge or suspicion, or where there are reasonable grounds for having knowledge or suspicion, that:

(a) another person is engaged in money laundering or the financing of terrorism; or

(b) property constitutes or represents the proceeds of criminal conduct; or

(c) property is or may be terrorist property.

28.169
What may constitute reasonable grounds for knowledge or suspicion is an objective test, determined from facts or circumstances from which an honest and reasonable person working in a relevant person would have inferred knowledge or formed a suspicion. As the Handbooks note, something which appears unusual is not necessarily suspicious and will likely form the basis for examination which in turn may require judgment to be exercised as to whether something is suspicious.

28.170
The three situations in which a suspicious activity report must be made involve:

(a) where the relevant person (or one of its employees) believes that the business may have, itself, committed a money laundering or financing of terrorism offence, for example by becoming concerned in an arrangement facilitating money laundering or terrorist financing;

(b) where legislation contains an offence of failure to make a suspicious activity report to JFCU that another person is connected with either money laundering or financing terrorism; and

(c) as a result of obligations under the ML(J)O 2008 for a relevant person to have procedures in place to disclose that another person is engaged in money laundering or financing terrorism.

28.171
The regulatory requirements set out in the Handbooks are clear. They provide as follows:

'A relevant person must provide that:

- Where an applicant for business or customer fails to supply adequate customer due diligence information, or adequate documentation verifying identity (including the identity of any beneficial owners and controllers), consideration is given to making a suspicious activity report.

- Internal reporting procedures encompass the reporting of attempted transactions and business that has been turned away.

- Staff make internal suspicious activity reports containing all relevant information to the MLRO (or a deputy MLRO) as soon as it is reasonably practicable after the information comes to their attention – in writing.

- Suspicious activity reports include as full a statement as possible of the information giving rise to knowledge, suspicion or reasonable grounds for knowledge or suspicion of money laundering or financing terrorism activity and full details of the applicant for business or customer.

- Reports are not filtered out by supervisory staff or managers such that they do not reach the MLRO (or deputy MLRO).

- Reports are acknowledged by the MLRO (or a deputy MLRO).

A relevant person must establish and maintain arrangements for disciplining any member of staff who fails, without reasonable excuse, to make an internal suspicious activity report where he or she has knowledge, suspicion or reasonable grounds for knowledge or suspicion of money laundering or financing terrorism.'

28.172
The MLRO is tasked with evaluating the reports, determining whether to make any external report to the JFCU and if one be made, assisting in managing the customer relationship thereafter to avoid any tipping off issues. Once a report has been filed with the JFCU, the relevant person may find itself subject to an informal freeze.

Legal professional privilege

28.173
The Handbook for the Legal Sector provides detailed guidance and examines the tension between a lawyer's duty of confidentiality to his/her client and the disclosure obligations imposed by the PC(J)L 1999 and T(J)L 2002 and the circumstances in which the direct disclosure obligations otherwise imposed by the primary legislation do and do not apply.
Screening, awareness and training of employees

28.174
Although no less important that the other sections in the Handbooks, other sections within the Handbooks deal with internal administrative matters, namely:

(a) screening, awareness and training of employees (section 9);

(b) record keeping (section 10); and

(c) existing customers.

28.175
As noted in the Handbooks, one of the most important controls over the prevention and detection of money laundering and the financing of terrorism is having appropriately screened employees who are alert to the risks and well trained in the recognition of certain transactions and activity which may indicate money laundering or financing of terrorism activity.

28.176
It is a requirement that a relevant person has a:

'… clear and well articulated policy for ensuring that staff whose duties relate to the provision of financial services are:

(a) competent and have probity;

(b) aware of their obligations under the Proceeds of Crime Law, Terrorism Law, Directions Law, United Nations Sanctions Measures and the Money Laundering Order (and by extension, also the Handbook); and

(c) trained in the identification of unusual or higher risk activities or transactions, which may indicate money laundering or financing terrorism activity, and in the business' customer due diligence, reporting and record keeping procedures.'

28.177
Further, all employees need to have a basic understanding of money laundering and financing of terrorism and an awareness of internal reporting procedures (including the identity of the MLRO).

Record keeping

28.178
Record keeping is essential both for the purposes of any investigation or prosecution and also to facilitate effective supervision by the JFSC of compliance by a relevant person with the legislation and the Handbooks

28.179
In terms of record keeping, a relevant person must:

(a) Make and retain orderly records of customer due diligence information for at least five years from the end of the relationship with the customer (or the completion of the transaction, for one-off transactions). This must include information and evidence of identity and any customer files and business correspondence relating to the relationship. The Handbooks go on to prescribe specific details that must be recorded.

(b) Record and store customer due diligence information in a way that facilitates periodic updating of the information.

(c) Make and retain records of:

(i) compliance monitoring, systems controls and procedures;

(ii) suspicious activity reports;

(iii) all transactions carried out with or for a customer including reviews of complex transactions, unusually large transactions; and unusual patterns of transactions, which have no apparent economic or visible lawful purpose; and

(iv) training records.

The informal freeze

28.180
Whilst the offences under the PC(J)L 1999 and other statutes, along with the mechanism for raising suspicions with the JFCU may be familiar to those in the UK and other jurisdictions, a crucial distinction between the Jersey legislation and that in other jurisdictions, is the absence of any time limits on the JFCU for responding to disclosures or indeed taking proceedings or any other steps. If a disclosure has been made to the JFCU, the relevant person making the report would clearly have the requisite knowledge or suspicion to found an offence under art 32 were it to continue without the consent of the JFCU. However, were the JFCU to refuse to consent, the relevant person could find itself in a difficulty.

28.181
For example, in the case of a bank which has made a disclosure on its customer, were that customer to request payments out of his account, the bank could not action the request in the absence of consent from the JFCU, nor could it simply ignore the customer's request, lest it be subject to proceedings for breach of mandate. However, the tipping off provisions might also prevent the bank from telling its customer about the difficulties it faces and the fact that it has made a disclosure.

28.182
Having initially followed the guidance in *Amalgamated Metal Trading*, which involved the bank allowing, if not encouraging the customer, to bring proceedings against it, the Royal Court has now definitively determined the issue in the decision of *Gichuru v Walbrook Trustees (Jersey) Limited* and others. If an institution has concerns, it should explore those concerns with its customer. If it is unable to allay its concerns it should then make a disclosure. If the JFCU refuses to provide the necessary consent, the institution is unlikely to act on the customer's instructions and the customer then has the choice of either judicially reviewing the decision of the police (on the usual judicial review grounds) or of bringing a private action against the institution for breach of mandate as noted more recently by the Royal Court in the case of *In the Matter of the Antares Trust and Other Trusts*. In such proceedings, the burden will be on the customer to establish,

on a balance of probabilities, the legitimacy of the funds or assets. It is always possible that the court may, on the basis of the information before it, determine that the assets are legitimate, only for it to be discovered subsequently, that they are definitely not. If the institution wishes to rely upon the earlier judgment to protect itself from subsequent criminal proceedings, it will need to show that it took 'such steps as are reasonable in all the circumstances to resist proceedings'.

28.183
A recent example of a customer bringing a claim for breach of mandate is the English case of *Shah and another v HSBC Private Bank (UK) Ltd ('Shah')*. The bank in that case delayed in executing payment instructions because it suspected the funds were criminal property. The bank filed a suspicious activity report and awaited the consent of SOCA (the English equivalent of the JFCU) before making the payments requested. The bank declined to provide its customer with any information concerning its failure to make the payments. The customer brought a claim against the bank for breach of mandate claiming damages for the bank's failure to process the payment instructions and provide the customer with information as to the facts which had caused the bank not to process the payment instructions. The English High Court ruled that there must be an implied term in the contract that permitted the bank to refuse to execute payment instructions in the absence of appropriate consent where it suspected a transaction constituted money laundering. The court also ruled that the bank was under no duty to provide its customer with information and that there had to be an implied term that allowed a bank to refuse to provide the information where to otherwise do so might result in 'tipping off' for example.

28.184
Under art 32 of the PC(J)L 1999 dealing with the funds in question with the consent of the JFCU is a defence. Where consent is not given by the JFCU whether to a bank or a trustee for example who has filed a suspicious activity report ('SAR') funds or assets are generally treated as informally frozen for fear of prosecution otherwise for money laundering. That informal freeze is not however inviolable.

28.185
In *Re Bird* a trustee filed a SAR after the protector of the trusts in question was charged (but not yet convicted) with illegal gambling, racketeering and tax evasion. The trustee refused to make payments out of the trusts without the consent of the JFCU or to communicate with the protector. After the trustee made the SAR, the protector purported to appoint a successor protector who in turn appointed additional trustees who sought to change the law of the trusts from Jersey to Lichtenstein to circumvent the restrictions imposed by the trustee who was refusing to make payments from the trusts without the consent of the JFCU. The trustee applied for directions as to the validity of the appointments and said that the appointments amounted to a fraud on a power as the protector, the trustee said, had tried to extract assets from Jersey which were otherwise subject to the PC(J)L 1999 restrictions. The Jersey Court found that the protector's intention in appointing a successor was to ensure the smooth running of the trusts in the event he was remanded in custody and held that the appointment had been made in good faith in the best interests of the beneficiaries. The appointments to circumvent the restrictions imposed by Jersey law and to make payments which the law prohibited were found not to be improper as they were made in good faith in the interests of the beneficiaries. The intention was found to be consistent with the purpose for which the powers of appointment had been conferred. The intention to remove control of the trust from the trustee in Jersey was also found not be unlawful either because the appointments were not seeking to achieve something that was prohibited by Jersey law. In Re Bird the trustee had refused to make payments without the consent of the JFCU but the court said it was not prevented under art 32 from making payments without such consent. Unless and until the trust assets were proved to be the proceeds of crime, the Jersey Court held that it was not unlawful to make a payment. The intention to remove control from the Jersey trustee was to circumvent a restriction which the trustee itself had imposed rather than Jersey law. The change in identity of the protector and trustees did not result in assets being moved. If the appointments had been made following the conviction of the protector on the other hand, then the court is unlikely to have recognised the appointments which would have been seen in those circumstances as intending to commit a crime.

28.186
In the more recent case of *In the Matter of the Antares and Other Trusts*, newly appointed co-trustees sought a declaration (1) that they

had been validly appointed as trustees of four trusts whilst the existing trustee refused to recognise their appointment and (2) a declaration that they were validly empowered to issue certain instructions to agents of the existing trustee in connection with the assets of the trust and terminate contractual arrangements with those agents if necessary. There were criminal proceedings ongoing in Italy concerning alleged environmental offences and the actions of the settlor of the trusts and others. Consequently, the assets of the trust had been frozen and once the existing trustee had become aware of the criminal proceedings it was concerned that the assets of the trusts may represent proceeds of criminal conduct and so it filed a SAR with the JFCU. The JFCU issued a no consent letter in relation to the trusts and confirmed that it did not consent to any request to move the assets out of the control of the existing trustee. Consequently, the existing trustee considered that it was prevented from transferring any trust documentation to the newly appointed co-trustees or doing anything that would facilitate the movement or control of assets from the existing trustee in case such action would amount to a breach of the PCJ(J)L 1999, in particular art 30.

28.187
As already referred to above, so far as concerned the movement or transfer or control of trust assets, the Court noted the decision in *Gichuru* and held that if the existing trustees were not prepared to act on transfer instructions without consent from the JFCU, then the newly appointed trustees would either have to seek judicial review of the JFCU's refusal to consent or bring an action against the existing trustee for an order that it transfer the assets into the names of all co-trustees in accordance with its obligations under the trusts law. The court declined to determine whether the giving of instructions to terminate certain agreements related to the holding of the assets would amount an offence under art 30 noting that only in exceptional circumstances would a civil court make such a declaration. The Court did however hold that the mere provision of trust documents to the new co-trustees did not appear to amount to a breach of art 30 of the PC(J)L 1999 and said that the JFCU had exceeded its powers in refusing to consent to the provision of such documents and also refusing the endorsement of a memorandum to the trust deed setting out the names of the newly appointed co-trustees. The Royal Court further held that the participation by the trustees or others in litigation to determine the rights and liabilities of others in relation to the proceeds of crime did not constitute an offence under art 30 or any other money laundering provision of the PC(J)L 1999.

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