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EDITORIAL

Looking ahead to 2017, the new European Account Preservation Order regime (**EAPO**), which comes into force on 18 January, requires international banks to make sure they have adequate systems in place to meet onerous new administrative obligations to freeze all accounts, on short notice, held in the name of a customer across 26 Member States (see **Europe**).

Also for 2017, both UK and non-UK banks (and particularly those with a branch in the UK) need to take steps now to get ready for a proposed UK corporate criminal offence of failing to prevent the facilitation of UK or non-UK tax evasion by an "associated person", likely to be in force Autumn 2017. The definition of an "associated person" is extremely wide, and covers third parties who provide a service for or on behalf of the company (eg a foreign tax adviser, offshore accounting firm, broker). The UK Government has made it clear that it regards financial services, legal and accounting to be the most likely sectors affected by this proposed offence. The only defence to the strict liability offence is to have "reasonable" prevention procedures in place, so UK and non-UK financial institutions should start planning now how they are going to undertake risk assessments in order to have the necessary prevention procedures in place (see **UK**).

We cover many other developments in this edition, including the "Luxleaks" case on auto-laundering (which has implications for financial institutions' suspicious transaction reporting), Belgian AML laws regarding Politically Exposed Persons (**PEPs**), recent German rulings regarding state immunity issues in sovereign (Greece) bond investor claims and a Dutch ruling which appears to impose an obligation on financial institutions to check that referral agents, who are selling a financial institution's investment products to retail consumers, are properly licenced. We are pleased to include an article from Irish law firm McCann Fitzgerald on a recent decision concerning the meaning of "consumer" under Irish law.

It leaves me only to extend a warm seasonal greeting - fijne feestdagen en een gelukkig nieuwjaar.

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Belgium

ANTI-MONEY LAUNDERING: RISK OF FAILING TO APPLY OWN POLICIES

A recent money laundering dispute has shed light on how the Management Committee of the National Bank of Belgium (**NBB**) interprets certain provisions of Belgian anti-money laundering (**AML**) laws concerning business relations with Politically Exposed Persons (**PEPs**). In a recent out-of-court settlement[1], the NBB, as prudential supervisor, assessed the behaviour of a Belgian bank in this context. The ruling is a reminder that a financial institution must take a proactive approach to anti-money laundering both by installing internal procedures and ensuring compliance with them.

Mr A, a non-Belgian resident, had several accounts with Belgian Bank X. From the start of the relationship, in 2004, Mr A had been a politically exposed person (**PEP**). However, this fact had only been detected and uploaded onto the bank's system in October 2013 and only triggered an increase in the client's risk profile in 2014.

Over the years, Mr A had deposited large sums of cash into his bank accounts. He had also received two international money transfers (from a company incorporated in the Seychelles, which used an account held with a bank in Mauritius, and through Western Union Retail Services).

Regulatory background – AML rules

The settlement discusses the application of the requirements under the Belgian money laundering prevention law of 11 January 1993 (as amended by the law of 18 October 2010, the **Money Laundering Prevention Law**)[2]:

- Financial institutions must implement appropriate procedures to detect PEPs and apply appropriate enhanced customer due diligence measures with respect to persons who are or who have been entrusted with prominent public functions.
- Financial institutions must conduct enhanced ongoing monitoring of the business relations with PEPs and the transactions executed by them.
- Financial institutions must install a first line and a second line monitoring process in order to detect atypical transactions and generate suspicious transaction reports and investigation by the central money laundering reporting officer (**MLRO**).

The first line monitoring process engages employees of the credit institution who have direct contact with clients. Such employees must actively monitor transactions and file a report of atypical transactions with the MLRO.

The second line monitoring process involves an obligation to install automated supervision systems which trigger automatic alerts to the MLRO when atypical transactions take place. Atypical transactions are transactions which are particularly sensitive to money laundering or terrorism financing by reason of: (i) their nature; (ii) the capacity of the persons involved; (iii) the unusual nature of the transactions in light of the activities, profession or risk profile of the client; or (iv) the origin of the money.

- Financial institutions must promptly inform the national Financial Intelligence Unit in Belgium (**CFI-CTIF**) when they know, suspect or have reasonable grounds to suspect that a contemplated transaction is related to money laundering or the financing of terrorism.

Procedures not adequate or suitable

The NBB found that, after the entry into force of the Money Laundering Prevention Law, the bank had not introduced adequate and suitable procedures to determine whether an existing or new client or its beneficial owner was a PEP. The bank had failed to

establish a system to identify PEPs in its existing client database. The bank had simply regarded the detection of PEPs as a part of its vigilance duties, without any additional measures to be taken.

The bank had also not complied with obligations under the Money Laundering Prevention Law to monitor, on an ongoing basis, the PEP status of a client. The NBB observed that no status check had been performed on Mr A since 2007.

Internal monitoring failed

Internal email communication in December 2011 showed that the bank became aware that Mr A was a PEP and carried a higher AML risk. At the time, an employee had requested documents to determine the origin of the funds but had not taken any further action. The NBB found that this first line monitoring process had not performed well. Despite requesting documents, the employee had not acted on several indications which, according to the NBB, should have raised questions about the legitimacy of the transactions involved and thus caused the employee to act. These indications could, according to the NBB, be found in: (i) the quantity and amount of the cash transfers; (ii) the "high risk" status of the country of origin of the transfers to a PEP; (iii) the lack of clear business motivation for the transfers; and (iv) the lack of evidence of the legitimate origins of the transfers in the documents received from Mr A (which should have raised suspicions of corruption).

The second line monitoring process had also not performed well, as the transactions had triggered several alerts in the automated monitoring systems, which had not been investigated by the MLRO when triggered, but only afterwards in the framework of another investigation. This was so, even though the central AML-Unit had been informed of the higher risk posed by Mr A.

Risk-based procedures also failed

The NBB found that by not investigating these alerts immediately, the bank had not acted in accordance with its own internal "prioritising" procedures, which ranked alerts on the basis of certain risk criteria, such as the risk profile of the country of domicile of the client or the incoming transfers.

Notification to authorities far too late

The CFI-CTIF was only notified three years after the deposits of large sums and the international money transfers into the account of Mr A and almost two years after the internal email communication referred to above. The NBB concluded that the CFI-CTIF should have been informed immediately upon the bank having reasonable grounds to suspect that the transactions were related to money laundering or the financing of terrorism.

Conclusion

This settlement indicates that having adequate AML procedures is required, though only half the battle. Financial institutions must also ensure that employees comply with those procedures, and that the procedures are reviewed if the legal/regulatory regime changes. There were clear failings in this case at a number of levels.

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[1] The settlement was published (in Dutch only) on www.nbb.be/doc/cp/nl/2016/20160830_minnelijke_schikking.pdf

[2] More details on the views of the regulator with regard to banks' AML obligations can be found in the AML rulebook dated 23 February 2010 (available in French and Dutch on http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=2010022304); and the AML circular dated 6 April 2010 (available in French and Dutch on https://www.nbb.be/en/articles/circulaire-cbfa201009-devoirs-de-vigilance-legard-de-la-clientele-la-prevention-de)

France

BANK'S FAULTS REDUCES COMPENSATION FROM ROGUE TRADER

A bank with inadequate regulatory systems and controls has been compensated only for a fraction of the losses it incurred from the improper trading activities of a former employee. In what appears to be a significant change of approach to compensation claims where a victim is partially at fault, the French Supreme Court (*Cour de cassation*) ruled that the bank's own fault had to be taken into account in order to determine its right to compensation. This resulted in the former employee being ordered to pay only EUR 1 million to his former bank, even though the bank had suffered a EUR 4.9 billion loss.[1]

A new decision has been handed down in the saga between Jérôme Kerviel and his former employer, the *Societe Generale*.

Mr Kerviel had taken unhedged positions for several billions of euros in high-risk markets, beyond the authorised limit. He had concealed these positions using false emails and fictitious operations. The bank suffered a loss of EUR 4.9 billion when, on discovering the fraud, it had to unlock these positions quickly to comply with banking regulations.

Mr Kerviel was prosecuted for breach of trust, fraudulent introduction of data in an automated processing system, forgery and use of its proceeds (*abus de confiance, introduction frauduleuse de données dans un système de traitement automatisé, faux et usage de faux*).

On 5 October 2010[2], the Paris Court of first instance (*Tribunal de Grande Instance*) found Mr Kerviel guilty of these aforementioned offences and sentenced him to five years imprisonment, including two years of a suspended sentence (*deux ans avec sursis*). It also prohibited him from exercising any activity related to financial markets. In addition, the Court ordered Mr Kerviel to compensate the bank for the entire loss it had suffered, namely EUR 4.9 billion. The Paris Court of Appeal upheld this decision both on its criminal and civil aspects.[3]

On appeal, the *Cour de cassation*, in its decision of 19 March 2014[4], while confirming Mr Kerviel's conviction, quashed the civil aspects of the Court of Appeal's judgment.

Victim's fault

It is a long-held view of the French Civil Courts that a victim has a limited right to compensation if he/she has contributed to his/her damage.

However, when it came to deciding on compensation, the French Criminal Courts made a distinction: they followed the same rules as civil courts in case of offences against persons[5] but refused to do so in instances of intentional offences against goods.[6]

In the latter case, the victim's fault was not taken into account in the assessment of compensation.[7] The rationale behind this decision was to prevent an offender from benefitting from his/her offence. The offender should be required to compensate the victim for the entire loss suffered: deciding otherwise would allow the offender to somehow benefit from his own wrongdoing.[8]

In the Kerviel case, the Court of Appeal had noted that the bank was partially at fault but, in accordance with the well-established Criminal Court's case law for intentional offences against goods, the Court of Appeal did not take these faults into account when assessing the level of compensation that Mr Kerviel should have to pay. However, the *Cour de cassation* held that the bank's faults should be taken into account in determining the amount of compensation due.

Following this decision, the Versailles Court of Appeal had to decide the amount owed by Mr Kerviel to *Societe Generale*. It largely based its decision on two previous reports that had noted the shortcomings in *Societe Generale's* systems and controls – an internal report and a report of the Banking Commission, which was the competent regulatory authority at the time (it had sentenced *Societe Generale* to a EUR 4 million fine). In its decision, the Versailles Court of Appeal explained that "the multiple faults committed by the bank have had a major and determining role in the causal process at the origin of the very important loss suffered by it" and highlighted the deficiencies of the bank's control systems.[9] As a result, it ordered Mr Kerviel to pay EUR 1 million to the bank.

The impact of this decision

This ruling is significant because the French Supreme Court appears to have changed its position regarding compensation of the victim of an intentional offence against goods. In the *Cour de cassation* press release about the Kerviel case[10] the Court states that "whatever the nature of the offence committed, criminal courts have to take into account the victim's fault in the assessment of the amount of the compensation due to him/her by the accused when this fault has contributed to the damage". The Criminal Division of the *Cour de cassation* has confirmed this change in two subsequent decisions.[11]

Thus, if a bank employee acts fraudulently and the bank suffers a loss, the bank may only have a limited right to compensation if the bank itself was partially at fault. As a result, the compensation can be significantly affected: in this case, the bank had lost EUR 4.9 billion but yet was awarded only EUR 1 million in compensation. In reality, Mr Kerviel was probably unable to pay either of these two amounts but the rule set out in this case could apply in other situations where ability to pay is not an issue and may significantly influence the compensation actually paid to a bank.

In addition, the ruling highlights how, even though the bank is the "victim" of an offence, its failings are highlighted in court, thus presenting a reputational risk.

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[1] In such a criminal case, French Courts have to rule both on the criminal aspect (conviction of the accused) and the civil aspect (compensation of the victim) of the case. Yet, importantly, the French Supreme Court only rules on the law (not on the facts). Thus, it can overturn a Court of Appeal decision (completely or partially) and refer the case back to another Court of Appeal to decide on the facts.

[2] Paris Court of first instance, 5 October 2010, n°0802492011.

[3] Paris Court of Appeal, 24 October 2012, n°11/00404

[4] *Cour de cassation*, Criminal Division, 19 March 2014, n°12-87.416.

[5] For example, *Cour de cassation, Chambre mixte*, 28 January 1972, n°70-90.072: *"when several faults have contributed to the occurrence of a damage resulting from an offence, their authors' liability is incurred to an extent that the trial judges freely determine"*.

[6] "Offences against goods" are offences affecting property rights such as theft or fraud, whereas "offences against persons" are offences affecting other persons' integrity, such as murder or rape.

[7] *Cour de cassation*, Criminal Division, 27 March 1973, n°72-91.435.

[8] For example, a burglar could keep a part of his theft because the victim had been negligent by letting his/her door open.

[9] Versailles Court of Appeal, 23 September 2016, n°14/01570.

[10] *Press release*: *"The so-called Société Générale case"* (19 March 2014).

[11] *Cour de cassation*, Criminal Division, 25 June 2014, n°13-84.450; *Cour de cassation*, Criminal Division, 23 September 2014, n°13-83.357.
Still, it must be noted that, in the second decision, the Court found that the bank was not at fault because it had no possibility to discover the fraud.

Germany

GERMAN COURTS DISMISS GREEK GOVERNMENT BONDHOLDERS' CLAIMS AGAINST GREECE ON STATE IMMUNITY OR JURISDICTION GROUNDS

BGH, judgment dated 8 March 2016, file no. VI ZR 516/14; Oldenburg Higher Regional Court, judgment dated 18 April 2016, file no. 13 U 43/15; Cologne Higher Regional Court, judgment dated 12 May 2016, file no. 8 U 44/15; Schleswig Higher Regional Court, judgment dated 7 July 2016, file no. 5 U 84/15

German courts have dismissed damages claims by holders of Greek government bonds against Greece following the debt restructuring in 2012. The Federal Court of Justice (*Bundesgerichtshof*, **BGH**) held that such actions in tort were inadmissible due to state immunity. The bond exchange was based on sovereign acts – a statute and a Ministerial Council decision. The courts in Oldenburg and Cologne found that state immunity does not apply to contractual claims under the bonds, but still dismissed the actions for lack of jurisdiction. The court in Schleswig disagreed, finding that state immunity applies to all types of claims. The BGH will have to decide again as all three courts allowed an appeal on points of law.

Greek government bonds lost more than half their value

The claimants in all cases, German private investors, had bought Greek government bonds from their banks. The banks had bought the bonds from other banks participating in the giro system of the Bank of Greece. The Greek Bondholder Act in February 2012 (the **Act**)[1] allowed the conditions of Greek government bonds to be amended by majority vote and Ministerial council decision. In March 2012, the majority of bondholders agreed to trade in their bonds for new ones with less than half the nominal value and a longer term. The claimants did not consent but still had their bonds swapped. The Greek Government, based on the Act and the majority vote, issued a decision binding all other bondholders to the exchange. The claimants have sued the Hellenic Republic for their loss.

German courts cannot judge over foreign sovereign acts

The claims may be inadmissible due to Greece's state immunity. Under this principle, courts cannot assess the legality of foreign sovereign acts, as states are equal and do not judge over each other. German courts look into this first before even examining their jurisdiction. State immunity only applies to sovereign acts (unless the state has waived it), but not to a state's fiscal acts.

The crucial point in the Greek bondholder disputes is, therefore, whether the claims relate to sovereign or fiscal acts of Greece. In its March decision the BGH reiterated that this distinction depends on the nature of the state act in dispute: Did the state exercise its sovereign power or did it act like a private person? Core sovereign acts are exerting foreign or military power, legislation, police force and the administration of justice.

State immunity prevents bondholders' tort claims against Greece, but perhaps not contractual claims

In the BGH case the claimants had only asserted claims in tort, asserting Greece had wrongly exchanged their bonds. The BGH stated that when a state raises capital by issuing government bonds this is not a sovereign act. However, the Greek Bondholder Act and the Ministerial Council decision, declaring the majority vote binding on all bondholders, were sovereign acts and hence Greece could rely on its state immunity.

Claimants in other cases have also asserted contractual claims under the bonds for performance (payment) or damages for non-performance. The BGH did not need to decide whether state immunity also applies to such claims. Three Higher Regional Courts later reached different views on this question. The courts in Oldenburg and Cologne held that Greece cannot rely on state immunity for contractual claims under the bonds. The Act and the Ministerial Council decision could not change the character of the legal relationship under the bonds; they could only make the obligations under the bonds lapse.

The Schleswig Higher Regional Court disagreed, stating that Greece's non-payment under the bonds as such is not relevant, but the reasons for the non-payment (i.e. the Act and Ministerial Council decision) are. These sovereign acts had shaped the bond conditions and could not be separated from the state acting as a contracting party. The claim was based on the alleged unlawfulness of the Act and government decision, and a foreign court judging on this point was exactly what the principle of state immunity was intended to prevent.

German courts have no jurisdiction anyway

The Cologne and Oldenburg courts still dismissed the actions for lack of jurisdiction of the German courts under the old Brussels Regulation.[2] The court in Schleswig held the same view, although this was not relevant anymore, after finding that state immunity applied.

All three courts discussed several arguments to deny jurisdiction. In summary: the claimants' home courts did not have jurisdiction under the rules for consumers[3] as these require a contract concluded between the consumer and the defendant, whereas the claimants had acquired the bonds from their banks by assignment. Jurisdiction could also not be based on a place of performance in Germany,[4] as Greece would have to fulfil the bond obligations in Athens, within the Bank of Greece's giro system.

COMMENT

We are seeing an increasing number of disputes on state immunity, since states have become more engaged in the financial sector, following the financial crisis.

It looks very unlikely that German courts will decide on the substance of the bondholders' claims. Even if Greece is unable to rely on state immunity, the courts' views on lack of jurisdiction will probably hold. This would obviously be different if the bond conditions contained a German jurisdiction clause.

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1 Greek Act no. 4050/2012 of 23 February 2012.

2 Regulation (EC) 44/2001. This applies as the actions were initiated before 10 January 2015.

3 Articles 15(1) (c), 16(1) of the Regulation.

4 Article 5 no. 3 of the Regulation.

Ireland

IDENTIFYING THE IRISH "CONSUMER"

Stapleford Finance Ltd v Lavelle [2016] IEHC 385

A recent decision develops the meaning of a "consumer" under Irish law. The fact that a loan is being used to invest in a commercial transaction does not necessarily preclude a borrower from being considered a consumer where the investment is for personal (eg pension) purposes. The purpose of a loan is the key question, but its size is not necessarily determinative of the answer (a large loan could be used for personal purposes). The High Court also concluded that it was not readily apparent that the term "consumer" should be restrictively interpreted for the purposes of national consumer protection legislation. This decision confirms again that financial institutions ought to take a sophisticated approach towards customer categorisation, with it being prudent to fully test factors which might otherwise suggest an individual is a non-consumer.

Consumers have added protection under Irish financial services law

Generally under Irish financial services law, a person will be considered to be a consumer when acting outside his or her trade, business or profession. Applying this definition in specific cases has given rise to difficulties and considerable case law in recent times, with borrowers seeking to test the limits of the definition in order to benefit from special protections afforded to consumers and potentially avoid loan repayments.

Ex-trader claims to be a consumer

The defendant was employed as a trader in London for eleven years, during which time he accumulated considerable wealth. He wanted to diversify his savings and put in place pension type investments. He sought advice from Anglo Wealth Management which introduced him to Quinlan Private, a private investment fund. The defendant invested in a number of commercial transactions promoted by the fund but, for tax reasons, he borrowed from Anglo Irish Bank (**Anglo**) to fund certain investments rather than investing his own money. Overall, he entered into five facility agreements with Anglo, drawing down seven loans in total. When the defendant failed to repay the loans, Anglo sought summary judgment, in the Irish High Court, against him in the sum of close to EUR 6 million.

In his defence, the defendant claimed that he was acting as a consumer for the purposes of all the loans and that the mandatory statutory requirements for the protection of consumers had not been met. Consequently, he argued, the loans could not be enforced against him.

Scale of the borrowing not determinative

Baker J found that the purpose of a loan is its defining or identifying characteristic and not the quantum of the loan, observing that "it is perfectly possible for a person to borrow a very substantial amount of money for the purposes of acquiring a private residence or a holiday home for personal use and in that circumstance, such a person would be readily identified as a consumer."

This finding is significant as previous cases appeared to suggest that the size of the loan was a factor to be taken into consideration when determining whether or not someone was acting as a consumer.[1]

A person borrowing to invest in a commercial transaction may still be a consumer

While the plaintiff (to whom Anglo's rights had been assigned) referred to a number of previous cases in which persons who entered into loans for commercial investment purposes were not considered to be acting as consumers, Baker J did not consider these authority for the proposition that a person who borrows money to

make a personal investment in a commercial transaction can never be a consumer. According to Baker J, there were a number of factors that distinguished the present case from those earlier cases. Specifically, the defendant had borrowed so that he could invest in a fund which would own or manage property investments. He did not directly purchase or develop property himself nor was he engaged in the business of the underlying assets.

Baker J held that the question of whether a person who borrows money to make a personal investment in a commercial transaction is acting as a consumer is one that may not readily be determined on a summary hearing.

Meaning of "consumer" does not have to be strictly construed

The plaintiff relied on the judgments of the Court of Justice of the European Union (**CJEU**) in *Benincasa v Dentalkit*[2] and *Gruber v Bay*[3] to argue that the test of whether or not a person is a consumer must be strictly construed. Both of these cases concerned the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters which allows certain derogations from the general rule on jurisdiction in the case of consumers. The CJEU's judgments in those cases were partially based on the fact that a provision which derogates from a general rule should be interpreted strictly. According to Baker J, it is not apparent that the definition of a consumer for the purposes of national consumer protection legislation should also be strictly construed.

Parties' characterisation of the loans not determinative

The plaintiff also relied, *inter alia*, on a certificate signed by the defendant stating that he was not acting as a consumer and that the relevant facility was being advanced for the purposes of his trade, business or profession. He had also confirmed that he understood the effect and importance of the certificate and was advised to take, and had been given the opportunity to take, separate legal advice.

Baker J observed that it is well established at law that the question of whether a person is a consumer is a matter to be determined objectively and irrespective of the characterisation that the parties have applied. She held that the defendant had made out an arguable defence that he could have been a consumer for the purpose of each of the loans and that the characterisation of the loans was not a matter that should be resolved at summary hearing.

Progress, but not much clarity

For many credit agreements as well as other types of contracts, the question of whether the borrower is acting as a "consumer" can be of critical importance. Consumers are afforded specific statutory protections not available to other borrowers under a diverse array of legislative measures. These additional protections have resulted in a considerable amount of case law on the topic as borrowers seek to use the protections as a shield in enforcement actions.

Baker J's judgment in *Stapleford Finance Ltd v Lavelle*[4] develops the case law on the significance of the size of a loan and whether a borrower who takes a loan to make a personal investment in a commercial transaction can be acting as a consumer. While the judge's finding that the size of a loan is not determinative of whether someone is a consumer appears correct, it does not make the assessment of whether a borrower is acting as a consumer any easier.

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McCann FitzGerald

[1] *Ulster Bank Ireland Ltd v Healey* [2014] IEHC 9.

[2] C-269/95 *Benincasa v Dentalkit* [1997] ECR I-3763.

[3] Case C-464/01 *Gruber v Bay* [2005] ECR I-439.

[4] *Stapleford Finance Ltd v Lavelle* [2016] IEHC 385.

Luxembourg

AUTO-LAUNDERING: LUXLEAKS IMPACT ON SUSPICIOUS TRANSACTION REPORTING

Decision of 12th Chamber of the District Court of Luxembourg, No 1981/2016, 29 June 2016

On 29 June 2016, the Luxembourg criminal court rendered its decision in the famous case known as the "Luxleaks case". While most of the attention focused on whether the former PwC employees should be considered as whistle-blowers (yes) and whether, as such, they could be cleared from any sanction (no), the decision of the Luxembourg criminal court is also interesting in that it found the former PwC employees guilty of money-laundering. This finding has implications for financial institutions' suspicious transaction reporting obligations.

"Auto-laundering"

Auto-laundering refers to a particular type of self-laundering (*blanchiment pour soi-même* [1]) whereby the author of a criminal offence also commits the offence of money laundering by the mere detention or use of property deriving directly from his crime, whatever that property might be (in the Luxleaks case, it consisted of documents which were considered stolen).

Employees steal confidential documents

Two ex-employees of PwC Luxembourg and a journalist were prosecuted following the revelation, in the media, of material relating to clients of PwC in Luxembourg and covered by professional secrecy. The prosecution revealed that the former employees had accessed, without proper authorisation, documents regarding the corporate structures of many international companies and also "Advance Tax Agreements" (or **ATAs**) negotiated by PwC on behalf of their clients. These documents had been provided to the journalist by the ex-employees by a download on an email account.

While the journalist was acquitted of all charges, the ex-employees were convicted of domestic theft (*vol domestique*), unauthorised access to an IT data system, breach of professional secrecy and money-laundering.

Why money laundering?

By possessing the relevant documents fraudulently obtained (and thereby holding the proceeds of those offences), the Luxembourg criminal court held that the former employees committed an act of money-laundering (*blanchiment détention*). The rationale of the court derives from the broad legal definition of money-laundering – the former employees had committed offences which qualify as predicate offences, held and used the proceeds of those offences and hence also committed the money-laundering offence.

COMMENT

The two main issues at stake in this case were the degree of protection offered by article 10 of the European Convention on Human Rights (more specifically, the right to receive information) to whistle-blowers and whether the theft offence could be committed in the absence of appropriation of any tangible property (only data was "stolen").

Although the issue of money laundering was ancillary in this case, the court's decision is nonetheless a good illustration of auto-laundering.

Under Luxembourg law and more generally, under the 4th EU AML Directive,[2] the term "money laundering" covers a wide range of different activities such as the concealment, disguise, conversion, transfer, acquisition, possession or use of property derived from criminal activity.

While some money-laundering activities require acts which are usually distinct from the material acts of the

predicate offence itself (such as the activities of concealment, disguise or transfer), others such as the possession or use of property derived from criminal activity are the natural consequence of the predicate offence.

The incrimination of auto-laundering may affect the obligations of those in the financial sector and other entities subject to anti-money laundering regulations. Pursuant to article 5(1) (a) of the Luxembourg act of 12 November 2004 on the fight against money laundering and terrorist financing (the **AML Act 2004**), these entities are required to inform without delay, on their own initiative, the State Prosecutor[3] when they know, suspect or have reasonable grounds to suspect that money laundering or terrorist financing is being committed or has been committed or attempted (a suspicious transaction report (**STR**)).When money laundering is suspected, two different scenarios are possible:

- The institution has suspicions/knowledge that money laundering activities have been committed without having any specific knowledge or suspicions as to which predicate offence may have been committed. In this case, article 5(1) (a) of the AML Act 2004 makes clear that the obligation to file an STR applies regardless of whether the institution can determine the predicate offence.
- The institution has suspicions/knowledge that a client has committed a predicate offence. In this case, professionals should carefully assess whether these suspicions could amount to suspicions of a parallel money-laundering offence being committed, including a potential auto-laundering offence. This may occur even in the absence of any acts of concealment or disguise of property and even if no money or other valuable assets are at stake.

[1] Self-laundering covers not only auto-laundering but also cases where the author of the predicate offence instigates the money laundering and is therefore found guilty of this money-laundering offence as an accomplice.

[2] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing. This directive has not yet been implemented in Luxembourg at the date of this article.

[3] More precisely, the financial intelligence unit of the office of the State Prosecutor at the Luxembourg District Court.

ENFORCEMENT OF PLEDGE OVER SHARES IN LUXEMBOURG IRRESPECTIVE OF WHETHER SECURED DEBT DUE – UPDATE

Update following the decision of the Luxembourg Court of Appeal, n°42760 and n°429971, 27 January 2016 and upholding the order of the First Judge of the District Court of Luxembourg sitting in summary proceedings matters, N°356/2015, 15 July 2015.

In the November 2015 edition of the European Finance Litigation Review, we commented on a decision concerning whether a pledge governed by the Luxembourg law of 5 August 2005 on financial collateral arrangements, as amended (the **Collateral Act**) could be enforced even in circumstances where the secured obligation was not yet due and payable and where the creditor had not claimed the repayment of the secured debt.[1]

The First Judge ruled that, in light of the Collateral Act, in addition to a failure to reimburse the secured obligation, parties may agree to other triggering events for enforcement of a pledge (which is what the parties had done here). The court rejected the debtor's application for suspension of the enforcement of the pledge.

The Luxembourg Court of Appeal agreed and took an even stronger approach: in light of the provisions of the Collateral Directive[2] and of the Collateral Act which aim at ensuring that the financial collateral arrangements cannot be challenged and provide only for an *a posteriori* control of the conditions in which financial collateral arrangements are enforced, as a matter of principle, summary proceedings may not purport to

suspend the effects of the enforcement of a financial collateral arrangement.

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[1] Order rendered by the First Judge of the District Court of Luxembourg sitting in summary proceedings matters (order N°356/2015, 15 July 2015).

[2] Directive 2002/47/EC of 6 June 2002.

Netherlands

PROVIDERS OF FINANCIAL PRODUCTS LIABLE FOR INTERMEDIARIES WITH INADEQUATE LICENSING

Dutch Supreme Court, 2 September 2016, ECLI:NL:PHR:2016:2012 & ECLI:NL:PHR:2016:2015

In misselling litigation where a financial institution's investment product was sold to retail investors by a referral agent (rather than by the bank directly) the Dutch Supreme Court ruled that retail investors must be compensated by the financial institution for any losses resulting from the investment product if they prove: (i) that they were advised by an unlicensed referral agent; and (ii) the financial institution was aware or should have been aware of them having been so advised by that agent. Under these circumstances the duty of care of financial institution extends to ensuring that advisors of potential customers have obtained the required licenses.

"*Effectenlease*" 2009 compensation scheme

During the 1990's several Dutch financial institutions sold financial products that allowed retail investors with modest financial means to purchase securities with borrowed money (also known as *effectenlease*). The products were very popular and lucrative at first, due to stock markets being favourable. However, subsequent poor performance of global stock markets and, to a lesser extent, changes in fiscal law on tax deducability of interest on loans resulted in losses for a significant number of retail investors, consisting of the interest investors had paid and a residual debt resulting from the value of the portfolio being insufficient to repay the loan.

An explosion of civil litigation ensued, resulting in Dutch courts ruling that financial institutions were under a duty of care towards these retail investors. The court found that, based on that duty of care, providers of *effectenlease* products should have: (i) researched the financial position of potential investors; (ii) warned potential investors of the risk of a residual debt; and (iii) advised clients who could not bear the burden of that residual debt to refrain from entering into the *effectenlease* product.

This does not mean, however, that investors have to be compensated for the total amount of their losses. The Dutch courts found that investors (including retail investors), should have understood (part of) the risks of investing with borrowed money. Therefore they were in part to blame for their own losses.

On 5 June 2009[1] the Dutch Supreme Court sanctioned a compensation scheme under which investors would be partially compensated for their residual debt and, in cases where the *effectenlease* product had caused an unacceptable burden, for paid interest. Since then most cases have been settled accordingly.

Supreme Court widens scope of bank liability

In judgments on 2 September 2016, the Dutch Supreme Court took a significant step away from the guidance it had provided in 2009. It considered a case in which the *effectenlease* product was sold to retail investors through a referral agent, not by the financial institution directly.

Under applicable Dutch law at the time of the *effectenlease* products being sold, referral agents were only allowed to inform potential investors about general characteristics of financial products, not provide advice (for which a special licence is required). Financial institutions were obliged to refrain from accepting clients that were introduced by any person, who, without having the required licence, had provided such advice.[2]

The retail investors argued that they should receive more compensation than the compensation scheme provided for because they had been advised by an unlicensed

referral agent and because the financial services provider was or should have been aware of the referral agent providing advice.

The Supreme Court agreed with the retail investors and ruled that selling the *effectenlease* product was in violation of Dutch law if the retail investors proved: (i) that they were advised by (an unlicensed) referral agent; and (ii) that the financial institution was aware or should have been aware of them having been advised. The Supreme Court held that under those circumstances retail investors are entitled to full compensation of all interest and residual debt, regardless of whether the *effectenlease* product had constituted an unacceptable burden.

In addition, the Supreme Court ruled that the retail investor need not prove that the financial institution was or should have been aware of the referral agent not having been licensed. According to the Supreme Court it stands to reason that a professional party, like the financial institutions, must ensure that advisors of their potential investors have obtained the required licences.[3]

COMMENT

Prior to the September judgments most former investors had exercised or were close to exercising their final appeals. In most cases settlements were being reached based on the compensation scheme sanctioned in 2009. In its September judgments, the Dutch Supreme Court has introduced the possibility for retail investors in *effectenlease* products to receive full compensation of all losses regardless of the financial impact on their individual situation.

It is notable that the Dutch Supreme Court ruled that financial institutions have an obligation to research whether their clients' advisors had obtained the required licences. This demonstrates that financial institutions have a duty of care that under certain circumstances may extend to reviewing advisors of potential customers.

The recent judgments may reignite litigation and are a significant setback in bringing closure to the *effectenlease* cases in the Netherlands at a time when public concern was finally subsiding.

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[1] Dutch Supreme Court, 5 June 2009, ECLI:NL:HR:2009:BH2815, ECLI:NL:HR:2009:BH2822, ECLI:NL:HR:2009:BH2811.

[2] Article 41 of the Dutch Further Regulation on the Supervision of the Securities Trade 1999.

[3] Supreme Court, 2 September 2016, ECLI:NL:HR:2016,2012, paragraph 5.6.3.

Spain

COURT DISMISSES INVESTOR CLAIMS RELATING TO RESTRUCTURED BANK

Three recent Spanish pro-bank judgments dismissed misselling claims by investors in a financial entity which was rescued by the Spanish State during the financial crisis. Non-reliance and disclaimer clauses included in the contractual documentation, the publicly available information on the actual financial position of the financial entity at the time of the investment, and the causal link between the post-sale legislative activity and the final loss of the investment were key to dismiss the investors' claims.

The global financial crisis that started in 2008 caused the value of Spanish real estate assets to plunge. Financial entities with large exposures to the real estate market were thus badly affected. There followed intense legislative activity aimed at strengthening the solvency of Spanish banking entities. As was reported in the media,[1] there followed increased investment interest in Spanish banking assets.

In 2010, as part of a restructuring, two Galician saving banks (*cajas de ahorro*) merged into Novacaixagalicia, with a net worth (according to records) of EUR 1,771 million.

The merged savings bank did not comply with new core capital ratio requirements, so Novacaixagalicia sought capital investment from investors. During early 2011, marketing documentation was prepared for that purpose (the **Documents**). The Documents contained certain disclaimers regarding the statements made, and the financial information provided, about the savings bank.

By September 2011, not enough investment had been forthcoming, so Novacaixagalicia requested 100% of the necessary funds from the National Restructuring Fund (**NRF**). As a condition of that funding, Novacaixagalicia (still a savings bank) had to transfer its financial activity to a bank and, accordingly, the bank NCG Banco, S.A.U. (**NCG**) was incorporated. Before investing in NCG, the NRF asked three independent entities to carry out due diligence on NCG to assess the value of the business transferred from Novacaixagalicia to NCG.

It was concluded that Novacaixagalicia's business value was EUR 181 million, not EUR 1,771 million (as was stated on 29 November 2010, when the merger into Novacaixagalicia occurred). The NRF invested EUR 2,465 million in NCG on 30 September 2011, obtaining 93.16% of NCG's share capital, while Novacaixagalicia obtained the remaining 6.84% of NCG's share capital in exchange for the transfer of its banking business.

After the NRF investment, several Galician companies and individuals acquired a minor participation in NCG's capital from the NRF (the **Private Shareholders**). In June 2012, NCG's annual accounts reflected the accounting adjustment due to the difference in value of Novacaixagalicia's business (ie, from EUR 1,771 million to EUR 181 million) (the **Adjustment**). Subsequent financial and legislative events caused the NRF to redress the balance between the capital and the net worth by reducing NCG's capital to zero, and increasing NCG's capital with new funds for the purposes of providing it with new financial resources. This reduction and simultaneous increase of capital meant that the Private Shareholder's participation in NCG was lost. They sued NCG and the NRF for damages on, essentially, the following grounds: (i) they believed that they were investing in a sound bank, given the assertions contained in, among others, the Documents; (ii) both NCG and the NRF hid that it was necessary to make the Adjustment; and (iii) the NRF was aware of new legislation (requiring additional capital requirements), that was to cause the loss of the Private Investors investment at the date of the execution

of NCG's shares sale and purchase agreement entered into by the Private Investors (the **SPA**).

The Galician Court of Appeal has decided in favour of the NRF and NCG. Of importance in the Court's reasoning was that:

- The Documents contained a disclaimer which specifically stated that any investors would have to make their own legal and financial assessment of the transaction.
- The SPA stated that there were no guarantees as to the future value of the acquired shares, and it contained non-reliance wording.
- The Private Investors were sophisticated investors who had access to professional advice concerning how to assess the risk of the relevant investments, as well as the economic and political context in which the investments were made.
- The information contained in the Documents was out of date, since NCG's value had changed dramatically between the date of the Documents and the date of purchase of the shares.
- The need for an Adjustment in NCG's annual accounts was foreseeable, in light of the dramatic difference between Novacaixagalicia's value in November 2010 (EUR 1,771 million) and in September 2011 (EUR 181 million).
- The cause of the Private Shareholders' loss was the reduction and simultaneous increase of capital made by the NRF; this was necessitated by legislation, of which the NRF was not aware when the Private Shareholders brought their shares.

COMMENT

These rulings confirm that it is difficult for sophisticated investors in high risk investments, against a backdrop of political and financial turmoil, to escape their contractual bargain. A party that signs up to a risky investment, accepts contractually that it has done its own due diligence and has not relied on the information provided, cannot, absent any deliberate misrepresentations, complain if the investment does not progress as it had hoped.

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[1] http://www.wsj.com/articles/SB10001424052702304858104579262001343600012

Switzerland

NO PRIVILEGE FOR INVESTIGATION DOCUMENTS PRODUCED BY EXTERNAL LEGAL ADVISORS

The Swiss Federal Supreme Court has ruled that reports and interview notes produced by external legal advisers during internal inquiries into anti-money laundering violations are not protected by attorney-client privilege.

The case concerned an investigation by the Office of the Attorney General of Switzerland (**OAG**) into a former bank employee suspected of money laundering and document forgery while working as a client advisor at a bank.

The OAG ordered the bank to produce all minutes of management and board meetings at which the allegedly corrupt banking relationships had been discussed, as well as all documents arising out of the bank's own internal investigation. The internal investigation had been conducted with the help of external legal counsel. On appeal, the bank argued that the draft report of the investigation and underlying interview notes produced by external counsel were covered by legal privilege and thus protected from disclosure.

The Swiss Federal Supreme Court ruled that neither the draft investigative report nor the interview notes were covered by legal privilege, and notes of employee interviews could not be withheld on self-incrimination grounds unless the interviews had been conducted under threat of criminal penalties.

Under Swiss law, legal professional privilege does not apply to in-house counsel. This decision is striking because the court refused to apply privilege to documents produced by external counsel during a bank's internal investigation.

Reassuringly however, the court confirmed that legal advice provided during a bank's anti-money laundering inquiry would be privileged. Therefore the legal advice in the draft investigative report could be, and was, redacted. In addition, the court confirmed that investigation documents produced in anticipation of defending criminal proceedings would be covered by privilege.

Source: Global Investigations Review

Judgment:
http://www.polyreg.ch/bgeunpub/Jahr_2016/Entscheide_1B_2016/1B.85__2016.html

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United Kingdom

CORPORATE CRIMINAL LIABILITY RISK INCREASES

A proposed new UK law contains the largest expansion of UK corporate criminal liability since the Bribery Act 2010 and one of the most significant overhauls of money laundering and proceeds of crime legislation in the last decade. Of particular note for financial services is the proposed new strict liability criminal offence of failing to prevent the facilitation of tax evasion by "associated persons". The proposed offence has extra-territorial effect and will catch foreign firms and foreign tax evasion (as well as UK firms and UK tax evasion). Banks will need to undertake thorough risk assessments to inform the creation of prevention policies and procedures to benefit from the only defence – that of having "reasonable" prevention procedures in place.

Corporate facilitation of tax evasion

The UK Criminal Finances Bill[1] incorporates two "failure to prevent facilitation" offences – one for domestic tax evasion and one for evading foreign taxes. A company commits an offence if it fails to prevent an "associated person" from committing a UK or foreign tax evasion facilitation offence (a **TEFO**). Facilitating in this context broadly means criminally assisting others (eg clients) to evade taxes. The associated person must be acting in their capacity as an associated person of the company (so the offence would not be committed, for example, if the associated person was acting in a personal capacity).

There is already a criminal offence of facilitating UK tax evasion, but it is difficult to hold companies liable for this offence under the existing rules for attributing individuals' criminal conduct to a company. The Bill makes it much simpler to attach criminal liability to a company by focusing on the controls that the company has in place to prevent associated persons from facilitating tax evasion.

Another big change is the creation of the offence for failing to prevent the facilitation of foreign tax evasion. There is, however, a dual criminality requirement – both the tax evasion, and the facilitation, must be offences under both the relevant foreign law and English law. Accordingly, the offence will not apply in relation to foreign tax crimes committed in jurisdictions with more onerous tax criminal laws than the UK's, if the conduct would have fallen short of being criminal in the UK.

Meaning of "associated person" very wide

The definition of an "associated person"[2] is wide. The new offence envisages a bank potentially being held criminally responsible for the acts not just of its employees, but also agents, or any entity providing a service for it or on its behalf in the UK or overseas (eg a foreign tax advisor, offshore accounting firm, broker, trustee or company director service provider, nominee service provider and notary).

Dishonesty required by evader and facilitator

There must be both criminal tax evasion (by a third party) and criminal facilitation (by the "associated person"), ie deliberate and dishonest action or omissions. If the associated person is only proved to have accidentally, ignorantly or even negligently facilitated tax evasion then the failure to prevent offence is not committed by the company. However, it is not necessary for the tax evasion and facilitation offences to have been prosecuted in order for the company to be liable for "failure to prevent".

UK and foreign companies in the frame

The UK tax offences will catch UK and foreign firms. The foreign tax offence will catch UK firms, and also foreign firms if: (i) the foreign firm carries on business

in the UK; or (ii) some or all of the facilitation happens in the UK.

This means that banks with UK branches will be caught by these new rules to the same extent as UK banks, even if there is no other nexus with the UK: so a U.S. bank will be caught by these rules if its Singaporean employee working in Hong Kong commits a tax evasion facilitation offence for an Australian client, simply because it has a London branch.

Strict liability – subject to one defence

For a company, the new offence is one of strict liability, subject only to the defence of having "such prevention procedures as it was reasonable in all the circumstances to expect [it] to have in place" or it was not reasonable to expect the firm to have such procedures in place. In reality all financial institutions will need to have reasonable prevention procedures in place.

This concept will be familiar to those involved with implementing "adequate procedures" in the context of the Bribery Act 2010. The UK Government has stated that it expects "rapid implementation" with companies expected to have a clear timeframe and implementation plan on entry into force of the Act (currently estimated to be 2017).

Banks, at a senior level, will need to:

- conduct a full risk assessment of their global businesses;
- identify their "associated persons" and the attendant risk of such persons facilitating tax evasion;
- consider introducing or revising current "prevention procedures";
- consider training needs for both staff and associated persons and devise a suitable programme;
- review contracts with third party service providers; and
- seek legal advice should any current practices by associated persons come to light during the risk assessment process which are a cause for concern.

Draft HMRC Guidance[3] provides some worked examples and six guiding principles for designing prevention procedures.

The Bill[4] also contains changes to the Suspicious Activity Report (**SAR**) regime, enhanced proceeds of crime powers, new disclosure powers to combat money laundering, and the Unexplained Wealth Orders regime. These are dealt with below.

Suspicious Activity Reports – information sharing

The Bill allows for information sharing between POCA regulated firms where there is a suspicion of money laundering, either on the firms' own initiative or at the request of the National Crime Agency[5] (**NCA**). The Bill sets out the requirements for such an information sharing request (including that the NCA grants permission) and provides for a joint report to be submitted following information sharing that would fulfil both firms' reporting obligations. Firms who share information under these provisions are also protected from civil liability for breach of any confidentiality obligations.

While well intended, and requested by some firms, one wonders what appetite there will be for firms to share or request such information from each other. The power could be very useful where firms' interests align. On the other hand, the decision to submit a SAR is often finely balanced; MLROs may not always agree and one firm may feel it is obliged to submit a SAR if the other is intending to.

Suspicious Activity Reports – extended moratorium period

A firm must request approval from the NCA to engage in activity relating to property it suspects as being the proceeds of crime. Currently the NCA may refuse its consent. If this occurs, the refusal has the effect of stopping the activity occurring for up to 31 days – the so-called "moratorium period". The Bill provides for the moratorium period to be extended for additional 31-day periods – up to a maximum of 186 days (ie six months).

A potential six-fold increase in the moratorium period may raise concerns in time-critical transactions. However, as long as refusal of consent by the NCA remains the exception rather than the norm, firms may

consider it to be the lesser of two evils. There had been talk of an end to the consent-based system; however, the Government's consultation response,[6] published alongside the Bill, states "the Government does not intend to remove the consent regime at this time".

Unexplained Wealth Orders

The Bill introduced the Unexplained Wealth Order (**UWO**) regime which, although targeted at individuals, is relevant to firms.

A UWO is an order granted by the High Court at the request of an enforcement authority relating to specific property. A UWO requires the respondent to provide a statement setting out the nature and extent of their interest in the property and how they obtained the property (in particular how it was paid for). As the Bill stands, a UWO may only be granted where the court is satisfied that there are "reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient" to allow the respondent to obtain the specified property.

A UWO may only be issued: (i) to a politically exposed person (**PEP**) (but not including EEA PEPs); (ii) where the court has reasonable grounds to suspect that the respondent is, or has been, involved in serious crime; or (iii) where a person connected with the respondent has been involved in serious crime.

UWOs will have retrospective effect in that they can be issued in respect of property acquired before the Criminal Finances Bill came into law. Neither the property nor the individual subject to a UWO need to be based in the UK.

A failure to respond to a UWO creates a presumption that the property in question is recoverable in civil proceedings. The Bill provides that a criminal offence is committed if a respondent gives a false or misleading statement in response to a UWO, with a maximum penalty of two years' imprisonment. Information disclosed pursuant to a UWO can only be used in criminal proceedings in limited circumstances (eg where the response differs from other evidence given by the respondent).

UWOs and financial services

While UWOs are likely to be used primarily as a tool to expose illicit wealth, tax evasion or corruption, it is interesting to note that (along with the SFO, HMRC and NCA) the FCA has been granted the power to apply for such an order. What appetite the FCA will have for its new powers is hard to predict.

UWOs will be of significance to a firm's private clients. To support the UWO regime, a court may grant interim freezing orders in respect of property subject to a UWO. Undoubtedly, financial services firms will be on the receiving end of such injunctions. Moreover, given the extensive extra-territorial scope of UWOs, a client with little or no UK connection may be surprised to find themselves and their property subject to such an order.

Additional disclosure powers

The Criminal Finances Bill provides for disclosure orders to be used in money laundering investigations. Such orders are already available in confiscation and fraud proceedings. A disclosure order may be served on a third party (such as a bank) to compel the disclosure of relevant information. Information supplied by an individual or firm pursuant to a disclosure order cannot be used against them in criminal proceedings.

Again, the impact of these new powers will depend on how enthusiastically regulators seek disclosure orders. One can imagine UK regulated financial services firms being viewed as a comparatively easy source of information (compared to non-UK based individuals) in money laundering investigations.

What next?

Given the current political climate, it is hard to see the Criminal Finances Bill not making it onto the statute book in one form or another. The obvious question for firms, given the Bill's potentially significant impact, is when it will become law. The latest indication from the Government is that it intends the Bill to be enacted by Spring 2017 and to come into force in Autumn 2017. Given the internal work that will need to be undertaken particularly regarding the "prevention procedures" for the new failure to prevent facilitation of tax evasion offence, firms are advised to start getting ready now.

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[1] http://services.parliament.uk/bills/2016-17/criminalfinances.html

[2] http://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0075/cbill_2016-20170075_en_11.htm#pt3-pb1-l1g36

[3] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/560120/Tackling_tax_evasion_-_Draft_government_guidance_for_the_corporate_offence_of_failure_to_prevent_the_criminal_facilitation_of_tax_evasion.pdf

[4] http://services.parliament.uk/bills/2016-17/criminalfinances/documents.html

[5] http://www.nationalcrimeagency.gov.uk/

[6] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/559958/Action_Plan_for_anti_money-laundering_and_counter-terrorist_finance_-_consultation_on_legislative_proposals__print_.pdf

General EU developments

EUROPE-WIDE ASSET FREEZING TO INCREASE – BANKS MUST BE READY

From 18 January 2017 claimants will be able to apply for a European Account Preservation Order (**EAPO**), a new, and potentially potent, weapon in their litigation armoury. EAPOs are available in "cross-border" civil and commercial proceedings to enable a claimant to freeze funds in a defendant's bank account across 26 Member States by submitting a standard form paper application to a court in just one of those Member States.

International banks operating in the participating Member States will have to get to grips with implementing EAPOs. The administrative requirements and obligations on banks are potentially significant.

More European accounts likely to be frozen

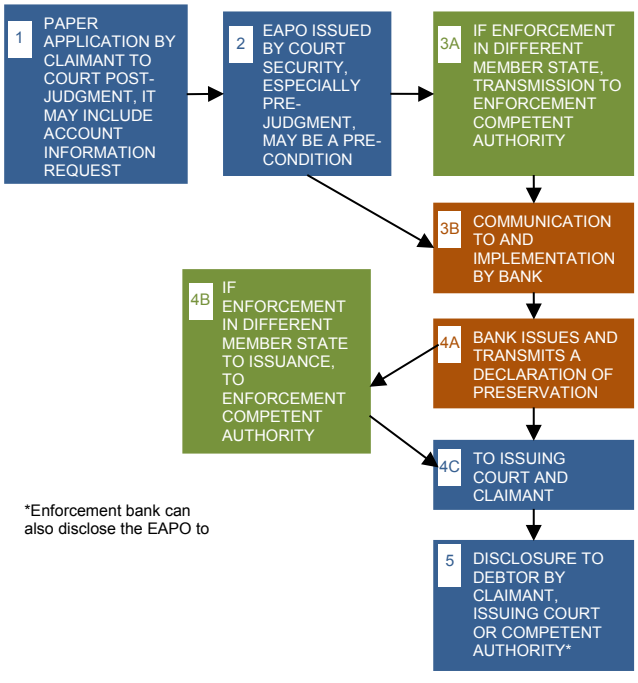
A claimant faced with a defendant who has multiple accounts across Europe will no longer have to incur the cost and delay of making separate national freezing applications. For example, a Belgium claimant in proceedings in Milan will be able to seek an EAPO from the Italian court and that Italian order will be effective for freezing monies held in a defendant's Spanish, German, Luxembourg and French bank accounts. The claimant no longer needs to go through the process of prioritising from which jurisdictions relief might most effectively and efficiently be sought. This may mean that more European accounts are frozen in future.

Obligations on banks

International banks operating in the participating Member States will have to freeze accounts "without delay" and (unless there are exceptional circumstances) issue compliance declarations within three working days of implementation. For post-judgment EAPOs, banks may also be required to conduct searches to identify any accounts it holds for a defendant. Banks will therefore need to understand which accounts and funds may be caught in each participating Member State. They will also need robust internal processes to ensure compliance within tight deadlines, with any EAPOs or information requests.

This burden is compounded by the fact that banks will not be able to adopt a uniform pan-European policy in response to this legislation due to its numerous references back to national law. Instead, specific local law advice will be required on its implementation and impact in different Member States with potentially the force of any EAPO granted varying from one jurisdiction to another.

The EAPO Process



Set-off for banks

The EU Regulation which introduces EAPOs[1] does not expressly address a bank's right of set-off (eg what happens to a bank's right of set-off where a defendant has two accounts at a bank, one account in credit and the other in debit, and the account in credit is attached by an EAPO). The Regulation simply provides that the EAPO has the same rank as an "equivalent national order" in the Member State of enforcement. Member States have had to inform the Commission about any ranking conferred on equivalent national orders under national law. For example, in Belgium, contractual set-off provisions stipulated by banks will be protected by the provisions of the Financial Collateral Law (the Law of 15 December 2004) and remain unaffected by an attachment.

This is an issue that banks will wish to have clarified in all relevant jurisdictions.

Bank liability

Banks may potentially have liability to the claimant and defendant for performing their obligations under the Regulation defectively (eg erroneously preserving more funds than specified in the EAPO or the wrong funds or incorrectly issuing its declaration of implementation). Any liability of the bank for failure to comply with its obligations under the Regulation is governed by the law of the participating Member State of enforcement. In addition, the bank may also have liability to the defendant, the claimant and third parties pursuant to other statutory or contractual provisions or other obligations.

UK and Denmark

EAPOs are not available to all claimants or from all Member State courts. The UK and Denmark took the decision not to opt into this Regulation. Accordingly, the UK and Danish courts will not issue EAPOs, and bank accounts held in these jurisdictions will not be subject to these orders. Unusually, Recital 48 to the Regulation seeks to introduce a nationality restriction on claimants. Only those claimants domiciled in participating Member States can apply for an EAPO (thereby excluding UK, Danish and non-EU claimants). However, the Regulation still impacts UK, Danish and non-EU businesses as their accounts in the 26 participating Member States may be frozen. The accounts of UK (at least pre-Brexit) and Danish consumers are not subject to pre-judgment EAPOs.

Are Member States ready?

The Regulation requires participating Member States to have certain national measures in place to enable EAPOs and information requests to be implemented in practice (eg to have designated which authorities are able to obtain account information and receive, transmit and serve EAPOs). In some jurisdictions (eg France) this is relatively straightforward as the existing national preservation system is quite similar to that found in the EAPO regime. By contrast, in other jurisdictions, where there is not such alignment, it may well be that the 18 January 2017 deadline for such measures to be in place will not be met.

Conclusion

The Regulation is likely to increase the burden on banks operating across Member States. They will have to implement and respond to such orders and will need to do so expeditiously. Banks will need to review their customer terms and conditions as well as their systems and processes for implementing such orders.

Much will depend on the volume of orders sought and how Member State courts exercise their numerous discretions under this ambitious legislation.

WHERE ON THE WEB

Regulation (EU) 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters:

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0655&from=en

Commission Implementing Regulation (EU) 1823/2016 of 10 October 2016 establishing the forms referred to in this Regulation:

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016R1823

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[1] Regulation (EU) 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters (Regulation). See also Commission Implementing Regulation (EU) 1823/2016 of 10 October 2016 establishing the forms referred to in this Regulation.

European Finance Litigation Review: consolidated index

FCA published draft guidance regarding how it will exercise its new competition powers (Feb ’15)

Key contacts

If you require advice on any of the matters raised in this document, please call any of our Litigation and Dispute Resolution partners, your usual contact at Allen & Overy, or Karen Birch.

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