SAR wars: A new approach?

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Further to *Bailiwick of Guernsey Consent Regime* guidance issued in April 2023 (**Guidance**), a recent change in approach from the Guernsey Financial Intelligence Unit (**FIU**) is set to make the difficult role of Money Laundering Reporting Officer (**MLRO**) more challenging.

The FIU have previously adopted a generally helpful, informed and risk based approach in considering consent requests. Typically the FIU would grant consent to institutions to act where it was satisfied there was no real risk of money laundering, having considered the facts of the matter including any response, or lack thereof, from relevant foreign agencies to information it had shared.

Recent experience suggests that the FIU no longer intends to exercise independent consideration of the underlying suspicions in responding to consent requests, rather it will adopt the more limited approach of only granting consent where the FIU identifies an interest to law enforcement to do so.

This takes us to the key passage of the FIU's Guidance issued by the FIU at section (3):

> *"As was made clear by the Guernsey Court of Appeal in Chief Officer of Customs & Excise v Garnet Investments Ltd[1] the purpose of the Consent Regime is to provide an opportunity for law enforcement to give an exemption from criminal liability by consent where it is in the interests of law enforcement to do so."*

Garnet was the first in a series of cases before the Guernsey courts that attempted to identify solutions in the application of various elements of Guernsey's somewhat unique anti-money laundering framework.

As has been identified (with rare critical comment) by the Guernsey courts in subsequent decisions, once a Suspicious Activity Report (**SAR**) has been reported to the FIU, the disclosing institution is unlikely to action any transactions without the FIU's express consent because to do so would put the institution and its relevant employees at risk of committing a substantive money laundering offence. As is well understood in Guernsey, what this means in practice is the suspected person is prohibited from transacting, with such '*informal freezes*' lasting months, possibly years and, in some unfortunate cases, decades!

The threshold for a reporting institution to make a disclosure is low, requiring the MLRO to "think that there is a possibility, which is more than fanciful, that the relevant facts exist."[2] Understandably, where the consequences of an MLRO getting it wrong is the risk of criminal prosecution, they tend to "play it safe"[3] and report. In such instances, monies may be informally frozen based on nothing more than the suspicion of a conscientious employee, without any independent oversight by a Court.

Whilst there can be no sympathy for money-launderers, the FIU's *volte face* on its approach to granting consent creates significant problems both for the person caught in an informal freeze and the financial institutions with that relationship. It effectively strips away the last semblance of independent oversight and removes what, historically, was a useful circuit-breaker for MLROs in situations where the likelihood of money laundering was very low, but the facts did not allow for a suspicion to be negated.

Reporting institutions have an obligation to keep their suspicion under review and should, wherever possible, try to address the concerns that they have by making appropriate enquiries with a view to negation. That said, a reporting institution is not able to, and cannot be expected to, undertake an investigation akin to that undertaken by law enforcement authorities to make a determination on provenance of funds. They simply do not have the breadth of intelligence solutions available to them and often will not have sufficient information to completely satisfy themselves on provenance in order to negate suspicion. Put simply, unless it becomes blatantly obvious that funds are not the proceeds of crime, an MLRO is unlikely to negate a suspicion at the risk of getting it wrong and facing a criminal conviction. Unlike an MLRO the FIU carries no such risk when making its consent decision.

What does the FIU's new stance mean for the reporting institution?

Where a disclosure has been made, and a suspicion remains, a consent request to undertake an act (that without consent would constitute a criminal offence), should always be submitted. It then becomes a matter for the FIU to determine if the requested act(s) are in the "*interests of law enforcement*".

While we can surmise what may fall in or out of the remit of the "interests of law enforcement", in practice we are seeing a significant narrowing of matters to which the FIU will give consent, and which predominantly go to:

- maintaining assets
- making certain necessary third party fee payments, and;
- entering into transactions which maintain or increase the value of assets.

More fundamentally, with the adoption of this latest approach it is difficult to envisage the FIU now granting consent to transfer assets away as it has done historically, to bridge the gap between a very low level of suspicion and negation of it.

How Collas Crill can help

If you are a reporting institution or customer impacted by Guernsey's consent regime, please get in touch with our specialist team who would be happy to advise you.

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[1] [2011-12 GLR 250]

[2] Hazel Liang v RBC Trustees (Guernsey) Limited [Guernsey judgment 20/2018] & L and Others v Credit Suisse AG, (Guernsey Branch) [2023] GRC 026

[3] L and Others v Credit Suisse AG, (Guernsey Branch) [2023] GRC 026

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