NatWest in the dock

News broke on 16 March [2021] that the Financial Conduct Authority (FCA) has started criminal proceedings against National Westminster Bank Plc for alleged offences relating to the adequacy of procedures in place to prevent money laundering. [1]

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It is alleged that between 11 November 2011 and 19 October 2016 NatWest failed to adhere to the requirements of regulations 8(1), 8(3) and 14(1) of the Money Laundering Regulations 2007 (MLR 2007). In essence, these regulations require an institution to determine, conduct, and demonstrate risk-sensitive due diligence and ongoing monitoring of its relationships for the purposes of preventing money laundering. Under regulation 45 of the MLR 2007, failure to comply with the regulations enumerated above can result in criminal liability.

The fact that the FCA has chosen to bring proceedings under the MLR 2007, rather than the specific anti-money laundering legislation under the Proceeds of Crime Act 2002, suggests that it has identified alleged regulatory oversights rather than an active involvement in money laundering, albeit regulatory oversights that potentially invoke criminal liability.

Despite the age of the regulations, this is the first time that the FCA has initiated a criminal prosecution under them. The MLR 2007 themselves have since been superseded, by the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, amended to reflect changes in the Fifth EU Anti Money Laundering Directive. The fact that the prosecution is being bought under the MLR 2007 is not unusual since they were law across the period of the alleged offending but one has to question the practical criminal applicability of regulations that have only been used once in more than 10 years.

Finally, it is interesting that the corporate has been charged rather than any individuals, i.e. employees at the bank. As was established in the recent attempted prosecution of Barclays Bank, in that case by the Serious Fraud Office and for fraud offences, asserting criminal liability against a corporate can be far from straightforward.

In the NatWest case, FCA alleges that around UK£365 million was paid into the customer's accounts, of which around UK£264 million was in cash. It is impossible to know how many suspects were originally under investigation but individuals at the bank would have managed these transactions. Were any eyebrows raised, were any suspicious activity reports (SARs) filed and, if so, did the National Crime Agency (NCA) grant consent for any of the transactions? What can be said with certainty is that the FCA will have properly applied its own guidance and the relevant principles in line with the Code for Crown Prosecutors and concluded that the evidential and public interest tests have been satisfied in relation to the corporate.

In relation to potential outcome, it is worth noting that a deferred prosecution agreement (DPA) was never an option. While the Crime and Courts Act 2013 (CCA 2013) does allow for a DPA in relation to an offence under regulation 45 of the MLR 2007, it is only available to a designated prosecutor, namely the Director of Public Prosecutions and the Director of the Serious Fraud Office, so not to anyone in the FCA. However, there is scope under the CCA 2013 for the Secretary of State to designate further prosecuting authorities the power to enter into DPAs: perhaps the FCA will be granted it in future.

Note

1. https://www.fca.org.uk/news/press-releases/fca-starts-criminal-proceedings-against-natwest-plc

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