Home Office open consultation on anti-money laundering and counter-terrorist finance

Response by R3, the UK's insolvency trade body, June 2016

Introduction

1. R3 is the trade body for the UK insolvency profession. Our members range from senior partners at global accountancy firms to practitioners who run their own small and micro businesses, and specialist insolvency lawyers. Insolvency practitioners have significant expertise and are highly qualified and regulated professionals, who operate under a comprehensive framework of statutory duties.

Insolvency practitioners have extensive powers to investigate and, under civil litigation, pursue those involved in fraudulent activities, but these powers are not sufficiently appreciated or utilised. The powers of insolvency practitioners include: the ability to interview anyone with relevant information under compulsion, and to compel answers; search and seizure of property and evidence associated with fraud; the ability by Court Order to take over the financial affairs/property of an individual or company conducting fraud without notice; obtaining freezing orders; overturning transfers to third parties, and prevent a person leaving the country by obtaining a passport order.

Executive summary

2. R3 believes that the removal of the SARs consent regime would cause significant harm. The aim of the regime is to trap proceeds of crime and there should be no diminution of such a policy. A lack of government resources shouldn't affect a scheme which has the potential to return considerable sums of money. Furthermore, even if not acted upon at the time of the SAR itself, the evidential look back is invaluable in many cases, sometimes years later.

3. R3 believes that moving the focus of SARs reporting from *transactions* to entities would be a harmful change. Our members undertake considerable amounts of investigatory work and believe that a focus on transactions is critical. A paper trail is the best way to identify those committing fraudulent activities, including terrorist organisations. We believe that such a shift would risk losing huge amounts of intelligence. Transactions are vital clues which lead to uncovering, and providing evidence, against terrorist and crime groups.

Responses to the questions

4. R3 has provided a response to those questions where our members, who investigate, pursue and recover fraudulent monies have relevant expertise. Not all of the questions in the consultation have been answered by R3. Our answers to the questions posed in the consultation are set out below.

Q.1 The Government is seeking views on the change in focus of the SARs regime from one on transactions to one on the entities responsible for money laundering and terrorist financing.

5. The insolvency profession believes that a focus on transactions is critical to successfully discovering criminal activity. Transactions provide the basis of an investigation, and tend to point to other criminal transactions. They indicate patterns, and more importantly, provide evidence, without which it is impossible to secure a conviction in court. Furthermore the market data in crypto currencies, which are becoming more widespread, are transaction based, and entities are not easily

visible for reporting purposes in that arena without significant investigation such that valuable information might be lost if there is a move to entity based reporting.

6. A focus on entities would be much more difficult to impose and carry out. R3 believes there would be a great risk of undermining potential recoveries and a huge loss of intelligence if a shift in focus to entities was to occur.

Q.4 The Government is proposing to provide legislative cover to support better data sharing within the private sector.

7. R3 encourages better data sharing within the private sector but the experience of our members indicates that better information sharing within the public sector should be the priority. The biggest problem in investigations and securing disruption to criminal financial activities is currently the blockage of information between government departments. Whilst gateways exist there is a fear of use such that the most conservative approach is always taken often meaning that the gateway is wholly blocked, or blocked for a period such that no effective action can be taken.

8. While R3 agrees that increased cooperation among the private sector in sharing data would be extremely beneficial, we believe that there may be a number of barriers. In particular, competition among firms would be a serious obstacle to sharing information, particularly regarding data relating to customers or other confidential information. R3 believes that a third-party, such as CIFAS, should be involved to oversee the sharing of such information.

Q.4 (b) What benefits would you see from having the ability to develop SARs in partnership/report jointly with other private sector entities?

9. R3 believes this would be a positive development and one which would be beneficial in insolvencies. As it currently stands, an insolvency practitioner and lawyer working on the same insolvency case have to file separate confidential reports to the NCA, and then Insolvency Practitioner files a separate report to the Insolvency Service which provides information on suspicion of fraud or director misconduct. This causes unnecessary duplication and adds to costs. This practice also prevents providing a complete picture as both sides are reporting from their individual points of view, rather than looking at the full story.

Q.5 Under the EU 4th Anti-Money Laundering Directive (4AMLD), Financial Intelligence Units are required to have a power to request further information in relation to a SAR. How should such information be gathered, and should it be regarded as part of the overall SAR?

10. **Q.6 The Government wants to support the financial sector in dealing with suspected proceeds of crime held in suspended bank accounts.**

(a) What new powers are required to allow the criminal funds held in UK bank accounts to be forfeited more easily?

11. When funds are frozen by a bank and the entity which is the account holder has disappeared or ceased to respond it would be helpful to have a procedure whereby tainted funds could be seized without having to have the account holder served/notified if they cannot be traced. At present the NCA Civil Recovery & Taxes Team can already access tax and obtain a significant proportion of the

funds with tax and penalties and interest. However, importantly, the insolvency regime already has the power to seize criminal funds held in bank accounts. Insolvency practitioners have the ability by court order to take over the financial affairs and property without notice of those conducting fraud. When appointed, an insolvency practitioner can take suspended funds out of bank accounts in cases where the entity has been wound-up. They can also investigate the fraud and communicate and compensate victims through the insolvency regime. This is a very 'resource-light' means of retrieving the money and distributing it to appropriate parties.

(b) What safeguards should be put in place around any new powers in order to protect innocent account holders?

12. If powers are given to government there would have to be significant efforts made to engage with the account holders (who may simply be ill/incapacitated) and a potential to claw back funds if they can later show the money is not tainted and they had good reason not to engage. This could operate much like the regime for solicitors' client accounts where unclaimed funds can be paid to charities who give an indemnity so that if a claim is later made they are repaid. However, if insolvency is used (and so less government resource), insolvency practitioners are qualified and highly regulated professionals, and operate under a comprehensive framework of statutory duties. As a third-party, insolvency practitioners take responsibility for the funds, and without any, or only minimal cost to the government. The insolvency profession have expertise in undertaking these kinds of investigations and the necessary checks, and will return the suspended money to victims (including HMRC) after costs.

13. R3 believes that further improvements could be made to the powers of insolvency practitioners which would allow greater returns. When banks suspend an account on suspicion, after a specified number of days if no resolution is reached, an insolvency practitioner should be appointed by default to deal with the case. This could be done on a strict rota basis, as used by the Official Receivers or Proceeds of Crime panel, which would prevent an expensive tender process which so cripples the POCA panel of Receivers. This would increase the speed and amount of money returned to victims of money laundering and crime.

(c) In uncontested cases, should administrative forfeiture be permitted, in the same way that POCA already enables the administrative forfeiture of cash?

14. R3 agrees that this should be permitted, subject to the safeguards set out above.

Q.7 What do you see as the benefits of introducing a power to require individuals to explain their sources of wealth?

15. The principle benefit of such a power would be as a useful tool in tackling money laundering and terrorist-financing crime. Currently the primary means of investigating an individual's wealth is through the tax regime and this is slow, cumbersome and largely ineffective.

Q.10 The Government is considering the introduction of a power to enable the Government to designate entities of primary money laundering concern.

(a) What benefit would such powers provide? What would be the impact of such power on firms in the regulated sector? What legal resources should be available for designated entities who wish to challenge their designation?

16. The introduction of such measures has the potential to improve prevention. For firms in the regulated sector, it has the potential to focus their attention on real money laundering compliance. However, safeguards would have to be put in place. Entities should be able to appeal the designation on judicial review.

Q.11 What benefit would you see in the provision of power, similar to the provisions for cash seizure, to allow seizure and forfeiture of other forms of readily movable property such as high value jewellery or previous metals?

17. R3 agrees with this proposal. We believe that this would be of benefit by extending the powers to sensibly include other valuable assets.

Q.12 What benefit would you see in enabling the administrative forfeiture of the proceeds of crime in uncontested cases, following an initial hearing at a magistrates' court? Should a limit be set on the value of property that could be administratively forfeited, and what should that limit be?

18. Enabling the administrative forfeiture of the proceeds of crime in uncontested cases would lower the costs involved. However, R3 believes that there should be an effective appeals procedure in place to ensure appropriate safeguards.

Q.13 If we amend the investigative powers within POCA so they can be sought earlier in the investigative process, and make applications and administration more flexible, what would be the impact on your business?

19. Minimal. Whilst it would be a good idea such that where appointments are made it would improve the recovery of assets, in practice there are very few POCA appointments and each one is subject to a cumbersome individual tender process despite the fact the POCA panel had already tendered for their place on the panel.

Q.14 In addition to the proposals in this Action Plan, are there additional powers than UK law enforcement agencies should have to tackle money laundering?

20. Money laundering and fraud are staggeringly expensive problems for the UK economy. Insolvency practitioners have extensive powers to investigate and recover assets from third parties as well as perpetrators and, under civil litigation, pursue those involved in these activities, but their expertise is not sufficiently appreciated or utilised. R3 believes that insolvency practitioners can provide the much needed extra capacity and additional processes required to boost the fight, and can tackle cases unlikely to otherwise be progressed by government or law enforcement. Practitioners are generally only paid from recoveries and also provide reporting to victims and compensation in the form of dividends if recoveries are made.

21. We believe the powers of the Secretary of State should be extended to include the ability to issue petitions to make individuals bankrupt in the public interest, as can be done for companies. This

would provide a further method via which returns could be made to creditors and victims, and protect the public. Unincorporated entities trading to the detriment of the public can then be shut down and it would also deter dishonest traders from setting up a new business in the future. R3 also believes that directors of companies wound-up in the public interest should face automatic individual public interest petitions for their bankruptcy and/or disqualification from acting as a director.

22. R3 would also like to see the re-introduction of criminal bankruptcy which enabled the courts to make a criminal bankruptcy order against a defendant where loss or damage was suffered by another person/s as a result of the offence committed by the defendant and where the amount exceeded £15,000. The Government should re-introduce the courts' power to impose criminal bankruptcy orders on defendants as a means to tackle and disrupt fraudulent activities and increase recoveries for victims.

R3, Association of Business Recovery Professionals
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