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Filing a Suspicious Report After a Transaction: Position in Ireland Under New Law

Posted on 07 December 2009 by Peter Oakes

The general principle across Europe (founded upon Article 24 of the 3rd EU Money Laundering Directive) is that institutions and persons covered by the Directive ('covered person') must not carry out a transaction which they know or suspect to be related to money laundering or terrorist financing until a report has been filed with their Financial Intelligence Unit. A covered person breaches the law if it fails to comply with this strict requirement. However the Directive permits a covered institution to file its report after the transaction, notwithstanding their suspicion, providing that to refrain from the transaction:

- is impossible; or
- is likely to frustrate efforts to pursue the beneficiaries.

The proposed new Irish money laundering and terrorist financing law (Criminal Justice (Money Laundering & Terrorist financing) Bill 2009) appears to go further than that required by the Directive. The wording of the Irish law is likely to cause great confusion to covered persons, senior management and money laundering reporting officers when they attempt to justify why they did not report prior to carrying out a 'suspicious transaction'.

The Irish law requires a covered persons (known as a 'designated person' in the Irish law) to file a report where they are suspicious, have reasonable grounds to suspect or have knowledge of money laundering or terrorist financing. Failing to do so may result in an unlimited fine and imprisonment of up to 5 years (section 42(9)). However, Section 42(7), which is grounded on Article 24, allows a covered person to report after the transaction or service has occurred if:

- (i) it is not practicable to delay or stop the transaction or service proceeding;

or

- (ii) the covered person is of the reasonable opinion that failure to proceed with the transaction/service may result in the other person suspecting that a report may be (or may have been) made or that an investigation may be commenced or is being conducted.

The application of point (i) is no doubt more straightforward than point (ii) and is clearly within the text of Article 24(2). An example of point (i) might include circumstances where a transaction, thought to be suspicious, is necessary to prevent counterparty failure (e.g. shares settled through a clearing system). Another example might be where bank staff are suspicious of a customer making a deposit. Filing a report before performing either transaction is arguably impracticable.

Point (ii) is expected to cause covered persons much consternation. It essentially requires covered persons to have, based upon a reasonable examination of the circumstances, a belief or opinion, for example, that its customer will suspect that the customer has or will be reported for a money laundering/terrorist financing offence to justify the reason for not reporting prior to undertaking the transaction/service.

A heavy onus is placed upon a covered person which seeks to reply upon section 42(7)(ii). It is up to the covered person to demonstrate that the opinion is reasonable. If it cannot discharge its burden, then it commits an offence. Detailed reasons supporting the decision of the covered person should be kept. Unless the covered person is certain of the legal robustness of its opinion, it should seek independent advice. This area of the law requires both legal and operational input. Senior management (including the money laundering reporting officer) should take responsibility for making a decision under section 42(7)(ii) and not leave this decision to junior staff to decide. The majority of staff and covered persons should not be assumed to be sufficiently aware of the basis for forming reasonable opinions. Therefore the risk of criminal prosecutions against both the employer and the staff member should not be understated. The fact that someone honestly, but incorrectly, reached an unreasonable opinion is no defence to a breach of section 42(7). This last point was made in the early stages of a high profile 'tipping-off' case in the UK a few years ago.

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