A number of pensions providers have been warned by the Financial Conduct Authority (FCA) that they may be breaking competition law.

The warning will have been a wake-up call to those receiving it. But it must be seen as a reminder to pensions providers, independent financial advisors and others working in financial services that if they are not legally compliant they are running a major risk of prosecution.

Compliance has to be seen as something worthy of immediate attention. As a firm that specialises in such matters, we can make sure that firms are legally compliant – and help them mount the best possible defence if they are found not to be.

Sensitive
As of April 2015, the FCA has been responsible for enforcing provisions of the Competition Act 1998. The FCA observed that a number of pensions providers were failing to ensure that commercially sensitive information was not disclosed to competitors. Firms were not observing competition law when it came to marketing arrangements, leading to a lack of confidentiality among providers.

Announcing the warnings, the FCA added that the firms concerned had agreed to strengthen their competition compliance by:
• Reviewing and self-assessing the arrangements that the FCA expressed
concern about.
• Introducing, reviewing or updating
their competition compliance
protocols.
• Ensuring that all key staff receive
competition law training.

Aware
Those who have received the warnings
may consider themselves fortunate that
they have effectively escaped without
punishment. Such a lenient approach
is rare. Punishments for recklessness,
carelessness or ignorance of the law in
this sector can be high.

Those involved in selling any type
of financial product have to be fully
aware of all aspects of the law as it
applies to them.

Commentators have been warning
for over a year that the mis-selling
of pensions could be the next boom
industry for lawyers who made a hefty
income out of the PPI scandal. PPI
has cost the banks and associated
companies huge amounts of money.
Many in pensions may believe “It
couldn’t happen here”. But they would
do well to think again.

Concerns
The FCA has already expressed
concerns about the potential for
annuities to be mis-sold. It has stated
that it feels many retirees are not given
enough information when it comes to

Investigation
If it is you who becomes the subject of
an investigation, you need to be able to
account for your actions robustly and
in detail. This is where the right legal
representation is important. Having
represented professionals in all areas
of the financial products market, we
understand that it is not always easy to
ensure you obey the law in your field of
business. There is no magic formula that
makes it 100% certain that your staff,
agents and other representatives are
acting within the law at any given time.

But by seeking advice on how
to be legally compliant, a firm or
independent financial advisor can
benefit from strong and appropriate
compliance procedures: procedures
which will reduce the risk of any
breaches of the law and provide
a strong argument against any
accusations made by the FCA or any
other investigating body.

Defence
By creating procedures that are
devised, drafted and, whenever
necessary, revised after careful
examination of the way a company
or individual functions in financial
markets, a compliance policy can
be the ultimate defence against
wrongdoing in what is a demanding
and involved area of work.

Should the FCA or any other
body proceed with a prosecution,
any compliance procedures that are
in place can form part of a defence.
But such a defence has to be handled
by solicitors with financial crime
expertise. Only such experts will be
able to dissect prosecution arguments,
make the most productive use
of disclosure procedures, extract the
maximum possible value from
evidence and use the likes of expert
witnesses to produce the strongest
arguments to counter claims made
against their client.

Experience
We speak from experience when we
say that everyone from independent
financial advisors through to the
largest institutions need the best,
most appropriate, legal advice when
it comes to allegations of
wrongdoing.

The FCA is certainly not going to
walk away from pensions. If anything,
what it has learnt recently is more
likely to make it take a longer, closer
look at how those in the pensions
industry behave. This means that
everyone working in pensions will
have to be able to show that they have
taken all possible steps to prevent
wrongdoing.

Only then will the FCA be satisfied
that the pensions industry is working
as it should. Failure to convince the
FSA of this could see the industry
paying a high price....far higher
than the price tag attached to any
compliance policy.
The Serious Fraud Office (SFO) has closed its investigation into allegations of fraudulent conduct on the foreign exchange market. Aziz Rahman examines why investigations are dropped – and how defence teams can influence this.

After reviewing more than half a million documents and using thousands of man hours, the SFO has brought to an end its investigation into the foreign exchange market (forex).

In announcing its decision, the SFO declared that “there were reasonable grounds to suspect the commission of offences involving serious or complex fraud”, which has to be taken as a strong indicator that its investigators are convinced they haven’t got to the bottom of the matter.

Yet, in explaining its decision, the SFO added that “based on the information and material we have obtained, there is insufficient evidence for a realistic prospect of conviction”.

Code
Prosecutors do not take the decision not to prosecute lightly. But they have to follow the Crown Prosecution Service’s (CPS) Full Code Test in deciding whether to prosecute. Under this, a body such as the SFO must consider whether there is both sufficient evidence to prosecute and whether a prosecution is in the public interest.

The prosecutor has to examine the quality of the evidence as well as the likely defence that will be mounted against the allegation and how this will affect the chances of a conviction.

In short, the prosecution must, according to the Full Code Test, “be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge.” This means that prosecutors have to consider admissibility of evidence and its impact on the chances of a successful prosecution.

When it comes to the issue of public interest, prosecutors have to think about the seriousness of the offence, how much blame the accused can carry for the offence – how culpable he was – and the harm to the victim as well as the impact on the wider community. Having thought about these matters, prosecutors then have to decide whether a prosecution is a “proportionate response”.

Defence
All these factors, it must be remembered, are important when it comes to prosecutors deciding whether to prosecute: the ending of the forex investigation is proof of that. Yet they are also grounds for a switched-on defence solicitor to stop a prosecution in its tracks.

By arguing that there is no public interest in a prosecution or by challenging the quality or admissibility of evidence, a defence team can have a prosecution ended on the grounds that there is no case to answer.

It is unlikely that those making the decision to prosecute will agree instantly with a defence team’s arguments about either evidence or public interest.
But defence arguments can – and do – tip the balance between prosecutions going ahead or being abandoned. If a seed of doubt can be placed in the CPS’ mind that charging a person is not a proportionate response, is not in the public interest or does not have a realistic prospect of conviction then it increases the likelihood of the case being dropped.

Arguments
Such arguments have to be researched meticulously and delivered powerfully and convincingly by a defence. After all, if prosecutors are firmly of the belief that they have strong evidence of wrongdoing, a defence team will have to have a powerful counter-argument that either questions or rebuts the quality of that evidence or shows that a prosecution is not in the public interest.

The potential is always there to challenge the prosecutors. Whether the forex investigation reached the stage of such challenges being made is not crystal clear. But while the SFO has abandoned hope of bringing to book those responsible for wrongdoing over forex, it does not mean it will always give in.

Warning
Forex is a form of investment fraud and such cases are often lengthy, complex and challenging for prosecutors. If anything, the forex investigation should be seen as a warning to companies and individuals about the risks of investment fraud.

Recent years have seen estimates for investment fraud vary from £1.2 billion a year to many times that amount. The authorities believe the figure is far higher than the official reports show and reports of investment fraud having risen by 75% in 2013 went unchallenged; indicating that the problem is a growing one.

For that reason, it would be surprising if the SFO were to decide to divert its energies away from investment fraud. For one reason, tackling investment fraud is one of its main aims. For another, investment fraud is a problem that needs tackling. And for a third reason, there does appear to be the political will to tackle it, despite what some people have to say about the lack of power afforded the SFO.

Expertise
For all these reasons, anyone suspected of investment fraud needs the right legal expertise: a legal team that can use every available detail to demonstrate honesty, can explain the nature of the defendant’s work and outline the motivation behind his behaviour.

Skilled use of disclosure to obtain all relevant material, shrewd deployment of expert witnesses and use of evidence to show a track record of principled behaviour can all help paint a picture of a defendant whom is far from the criminal the prosecution portray.

Such tactics are essential should an investment fraud case go to trial. But, as we have outlined here, there are arguments to be made and techniques to be employed that can even stop it going that far.

APPROACHES TO ACQUITTLA

Two men have just been acquitted in a major money laundering trial. Here we look at the scope defence teams have in such cases to rebut prosecution claims.

After reviewing more than half a million documents and using thousands of man hours, the SFO has brought to an end its investigation into the foreign exchange market (forex).

The Hong Kong-based co-defendants had been accused by the Serious Fraud Office (SFO) of knowingly channelling money through Zetland Fiduciary Services; a company providing transaction services to companies and wealthy individuals. Prosecutors alleged that 67-year-old Mr Sutherland, Zetland’s owner and chairman, had received £3.7M for laundering for an Australian high-pressure share salesman and his associates, who had already been convicted and jailed.

But Mr Sutherland’s defence demonstrated, using documents entered in evidence by the SFO itself, that he did not receive such an illegal payment. The defence successfully argued that the prosecution had not followed the money trails, understood the services that Zetland provided or analysed the evidence available.

Scope
The SFO had clearly believed it could gain prosecutions against the two men – and yet they failed. So what scope is there for a strong and ultimately successful defence in a money laundering case?

Part 7 of the Proceeds of Crime Act 2002 (POCA) contains three main money laundering offences; each carrying penalties of up to 14 years imprisonment. They are:

- Section 327 – concealing, disguising, converting or transferring criminal property, or removing it from the jurisdiction. This is the easiest way for the Crown to proceed when someone is suspected of laundering the proceeds of their own criminal activity.

- Section 328 - entering into, or becoming concerned in an arrangement to facilitate the acquisition, retention, use or control by or on behalf of another person, of criminal property knowing or suspecting that the property is criminal property. This offence is used when the launderer is not the principal offender in the criminal conduct.

- Section 329 - acquiring, using or having possession of criminal property. This will often be used to prosecute an
Prosecutors alleged that 67-year-old Mr Sutherland, Zetland’s owner and chairman, had received £3.7M for laundering for an Australian high-pressure share salesman and his associates

‘end user’; someone who buys something, such as a car, from a criminal.

Property
The prosecution must prove that the assets are ‘criminal property’. This is defined in §340(3) as property which represents a benefit from criminal conduct, either directly or indirectly, in whole or in part, so long as the launderer knows or suspects that the property represents such a benefit.

To prove any of the three POCA offences mentioned above, the Crown must show, therefore, that the money derived from crime and that the suspect knew or suspected that it did.

Where the prosecution is unable to show or explain to the jury what the exact underlying criminal offence was, it will have to rely on circumstantial evidence to try and prove that the money is ‘criminal property’.

In R v Anwoir [2008] 2 Cr. App. R. 36 the Court of Appeal found that in that sort of case the prosecution had two ways of proving that the property was ‘criminal property’. It could show that it derived from a specific crime or it could argue that, from the circumstances, the “irresistible inference” could be drawn by the jury that it could only be derived from crime.

Suspicion
In R v Da Silva [2006] EWCA Crim 1654, 11/7/06 the Court of Appeal considered a trial Judge’s direction to the jury on the word ‘suspicion’. Generally there should be no jury direction on what it means but in law ‘suspecting’ means that “there is a possibility, which is more than fanciful that the relevant facts exist. A vague feeling of unease would not suffice.”

Circumstantial evidence produced by the prosecution can initially appear conclusive. But a defence can, either through cross-examination or evidence from the defendant or an expert witness, show that there are other ‘co-existing circumstances’ which weaken the prosecution’s inference.

Rebutting inferences in such cases can be a major part of defending. An expert witness, for example a forensic accountant, can explain why a cash flow or certain losses can have an innocent explanation rather than be a sign of wrongdoing. Seeking disclosure of all available evidence – including that seized and then discarded by prosecutors – can also be a major weapon when it comes to building a strong case and challenging prosecution claims.

Arrangements
Section 328 has produced some interesting case-law. But in a nutshell, it usually comes down to common sense and whether the prosecution has departed from it in order to seek a conviction.

In R v Geary [2011] 1 WLR 1634 the Court of Appeal considered that the natural and ordinary meaning of ‘arrangement’ - to which it referred must be one which related to property which was ‘criminal property’ at the time the arrangement began to operate upon it. It did not extend to property which was originally legitimate but became ‘criminal’ only as a result of the carrying out of the arrangement. In that case G was handling money which was going to be hidden from a spouse in a divorce case and could, at that point, have become criminal property. The case was more recently approved in the Supreme Court in R v GH [2015] 2 Cr. App. R. 12.

Such a case indicates the extent to which prosecutors will try to adapt the legislation to suit their case. This can lead to defence teams having to devote plenty of time to challenging the assumptions and claims of prosecutors. But the legislation and the relevant case law does offer defence teams plenty of opportunities to challenge and ultimately demolish prosecution arguments.

The Zetland case may have been a major, high-profile case. But it is a reminder to everyone facing money laundering accusations of all sizes that there is always scope for a “switched on” defence to take apart prosecution allegations.
Amazon and eBay are to be held liable for the VAT fraud committed by the overseas sellers that use the websites. Those based overseas who sell on the sites but pay no VAT are costing HM Revenue and Customs (HMRC) millions of pounds in unpaid taxes – and the government is on to them.

The chancellor has given HMRC the power to warn such sellers that what they are doing is in breach of UK law and order them to pay the VAT that is owed. If the VAT HMRC believes should be paid is not paid within 30 days, eBay and Amazon can be held liable for the missing tax.

The Treasury estimates this measure will bring in £875m in lost VAT receipts over the next four years. It is a significant amount although estimates say that the total cost each year to the public purse amount although estimates say that the total cost each year to the public purse of VAT abuse is somewhere between £1 billion and £1.5 billion.

Attention
This government reaction comes at a time when increasing numbers of non-European Union sellers – most notably from China – are taking to Amazon and eBay to sell goods while making no attempt to pay VAT. But the issue of VAT fraud in general is one that is attracting ever more government attention.

VAT fraud prosecutions are usually brought under Section 72 of the Value Added Tax Act 1974. But cases can also be brought under the Fraud Act 2006; which was introduced to make it easier to mount a successful fraud prosecution.

While VAT fraud cases may differ in complexity they usually involve the prosecution attempting to prove that a person with a business either did not pay enough VAT or reclaimed more than they were entitled to. The arguments can be complex, with defence and prosecution disputing issues such as the falsification of invoices and whether particular people were involved in the VAT fraud – and, if so, whether they were knowingly or unknowingly involved

Evidence
Rahman Ravelli has always believed that the best way to defend a person against VAT fraud allegations is to collate all the available evidence as early as possible; including that which the prosecution does not intend to use. Such a tactic can involve shrewd use of disclosure. What is then needed is an astute analysis of all evidence in order to mount a strong defence that seeks to demolish the prosecution’s claims.

It is a situation that requires lawyers with experience of both straightforward tax evasion and knowledge of complex, sometimes multinational, tax arrangements. Having represented clients facing VAT fraud allegations in a wide range of business sectors, we believe in using analytical and investigative skills, forensic accountants and professional experts to build a case that challenges prosecution assumptions and provides strong reasons to explain a client’s actions.

Complex
VAT fraud has become an area that has seen increasingly complex criminal operations being carried out in the last two decades. Missing Trader Intra Community (MTIC) VAT frauds – also known as carousel frauds – have proved to be major criminal operations involving complex trading networks designed to import goods VAT free, sell them on at a price that includes VAT but then never pay that VAT to HM Revenue and Customs.

Large chains of traders, various companies and even importation and re-export of the same goods were all used in MTIC frauds.

As with the Amazon and eBay VAT evasion now, the government recognised the problem of carousel fraud and took action. In 2007, it introduced the ‘reverse charge’ on certain high-value goods that were being used on MTIC fraud, which required buyers to pay VAT direct to HMRC.

This had a deterrent effect and the instances of MTIC fraud dropped. But this only meant that those looking to commit VAT fraud changed their methods; with carbon credits becoming a preferred option for the suspect. Once again, the government moved to close VAT loopholes. But not before huge VAT frauds had been committed involving carbon credits – and very often involving innocent people who were duped into buying carbon credits by those committing the fraud.

Millions
Rahman Ravelli has been involved in some of the country’s largest and high profile VAT Fraud prosecutions involving hundreds of millions pounds. We are fully aware of the extent to which innocent traders can come under suspicion – and of the best ways to establish their innocence.

There can be little doubt that the government sees the overseas online sellers as a VAT source that needs to be tapped as soon as possible. But it is looking at all aspects of UK trade, regardless of where it originates, as a possible source of taxes. HMRC is now looking at VAT with regard to eBay and Amazon but it would be foolish for anyone else in business to feel that this means that their VAT affairs will not come under scrutiny.
The calls for legislation to rein in the banks have been lengthy since the banking collapse almost a decade ago. Now, we have Section 36 of the Financial Services (Banking Reform) Act 2013, which makes it an offence for those performing a senior management function to bring down a financial institution through their reckless acts or omissions. This came into force on 7th March 2016.

It could be called some kind of progress as it does, after all, seek to hold people to account. But for now the “jury is still out” on whether it will be a truly effective piece of legislation or a sop to those who demanded something be done to prevent the recklessness of the past.

Financial penalties and sentences of up to seven years do indicate that it has the power to punish those who fall foul of it. Yet, there appears to be the feeling that such sanctions are unlikely to be used.

Section 36 makes it clear that, for a prosecution, an act or omission by an individual must have caused the failure of a financial institution. The individual, it must also be proved, has to have been aware at the time that their act or omission could cause the institution to fail. Proving this, according to some commentators, could be difficult.

**Liable**

For example, we need to know how bad the act or omission has to be to make a person liable under Section 36. The defendant’s behaviour must presumably fall below that of someone in a senior management role and recklessness has to be involved. Yet if incompetence is not enough for a prosecution – while, surprisingly, dishonesty does not have to be proved - there appears very narrow scope for a likely conviction.

It has to be asked, therefore, does Section 36 go far enough? Has it the teeth to be effective or is its bark worse than its bite?

For a start, a successful Section 36 prosecution will not have to merely show that a decision contributed to the failure. It has to be proved that it caused the failure.

This throws up all manner of difficulties when it comes to securing a prosecution. Financial decisions are often made by committee, many are agreed over time following lengthy collaboration and the input of many people. Pinning an institution’s failing on one person could be difficult: isolating one senior employee for blame and then finding the evidence to show recklessness may take huge amounts of both skill and good luck on the part of investigators.

Many in the banking industry have said that they have learned their lessons. The argument goes something along the lines of “Yes, we made mistakes and yes, we weren’t prosecuted for them but everything is just fine now. Leave us to it.” In such a climate, it is hard to see how the banks and the people running them are going to make full and frank disclosures about any wrongdoing in the future.

**Deterrence**

It may be the case that those drafting this piece of legislation hope its main value will be in deterring recklessness rather than prosecuting it. That remains to be seen. But clearly Section 36 looks, at this stage, like something which could prove difficult to implement in order to bring reckless bankers to book.

In a financial world that has seen numerous scandals in recent years, Section 36 appears well intentioned but inadequate. It may well prove to have deterrence value. But it is hard to see how it can possibly lead to the prosecutions that many commentators feel we should already have witnessed due to Libor, forex and so many other examples of wrongdoing in the banking sector.
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