# Dual-Track Money Laundering Investigations: One-Way Traffic?

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Speaking at the Global Investigations Review Live event in London on 4th April, Mark Steward, Director of Enforcement and Market Oversight at the UK Financial Conduct Authority ("**FCA**"), addressed the audience on three subjects: partly-contested cases, recent case decisions, and AML investigations.

The final portion of Steward's speech on AML investigations was delivered "*by request*" as a somewhat reluctant coda: "*I have been asked to say something about the Money-Laundering investigations given we are now conducting 'dual-track' AML investigations…that might give rise to either criminal or civil proceedings*." In Steward's view, there should not be "*anything controversial*" about this subject. Yet from a practitioner's perspective, things are not quite so clear-cut, for two main reasons:

1. dual-track criminal and civil AML investigations raise some practical issues that Steward does not acknowledge; and
2. the FCA has indicated for several years that it intends to pursue more criminal cases for money laundering-related failings, an objective that Steward repeated in his speech. However, the FCA has not brought a single criminal prosecution under the current regulations, and only a handful under the preceding regulations. This begs two further questions: (1) is there any real utility to the FCA carrying out dual-track investigations, when the likelihood of a criminal prosecution seems so limited; and (2) ought the FCA to be pursuing these cases criminally at all?

***Double trouble: the difficulties of pursuing a dual-track investigation***

The logic for conducting dual-track processes from an investigator's point of view is reasonable. As Steward noted in his speech, "[i]*t would be inconsistent with the investigative mindset to narrow the scope of potential outcomes provided for by the law before you have made any inquiries or been able to assess the nature of the matter under investigation*." Committing at the outset to either a criminal or a civil process, when the law deliberately provides for both outcomes, would represent

an unnecessary curtailment of the FCA's enforcement powers.

However, the dual-track method is not without serious disadvantages – for both the subject and the FCA. From the FCA's point of view, a dual-track investigation must be conducted from day one with an eye to a potential criminal prosecution, even if this never materialises. This means expending considerable time and resources recording and retaining information received during the course of the investigation in accordance with the Criminal Procedure and Investigations Act 1996 ("**CPIA**"). Given that the parameters of alleged misconduct are unclear at the start of an investigation, this could prove particularly costly, and there is a risk that the FCA will receive large volumes of irrelevant information.

Perhaps the most uncomfortable demonstration of the difficulties dual track can present is dealing with interviews. An individual suspected of a criminal offence will ordinarily be interviewed under caution, in accordance with the Police and Criminal Evidence Act 1984 ("**PACE**"). Interviews in connection with the investigation of regulatory offences, on the other hand, will typically be compelled, and statements made in these interviews will not be admissible in criminal proceedings. How, then, should the FCA deal with interviews in dual-track investigations, where the subject matter under investigation cannot neatly be separated into "exclusively civil" and "potentially criminal" misconduct? Should the FCA choose one interview format, and potentially limit the other arm of its investigation, or should it try to carry out parallel caution and compelled interviews? And in the latter case, how should subjects deal with a scenario where they may be interviewed under caution, and perfectly properly exercise their right to silence, only to be compelled to answer questions on overlapping subject matter? Many of these practical complexities are dealt with on an ad hoc, investigation-by-investigation basis. Notwithstanding Steward's somewhat offhand tone, further guidance and clarity on dealing with these situations could benefit investigation subjects.

***Criminal prosecutions under the Money Laundering Regulations: the FCA's "white elephant"***

The second "*controversial*" element of Steward's speech comes from his re-stated commitment to resolve more dual-track money laundering investigations criminally, rather than civilly: "…*I think it is time that we gave effect to the full intention of the Money-Laundering Regulations which provides for criminal prosecutions…we need to enliven the jurisdiction if we want to ensure it is not a white elephant, and that is what we intend to do where we find strong evidence of egregiously poor systems and controls and what looks like actual money-laundering*."

It is a familiar message. Back in 2017, the FCA's Business Plan made a similar commitment: money laundering failures by firms or individuals would "*generally*" be pursued by way of civil enforcement, but the FCA might deploy its criminal powers if failings were "*particularly serious or repeated*[1]". However, the statistics simply do not bear this out. According to a Freedom of Information Act request submitted by Eversheds Sutherlands to the Home Office, there was not a single criminal prosecution under the current Money Laundering Regulations up to 30 September 2018[2]. By contrast, several cases which, on any view, relate to "*serious*" and "*repeated*" money laundering failings were resolved civilly in the same time frame. Of course, this may be in part due to the relative infancy of the current regulations, which have only been in force since June 2017. However, criminal prosecutions under the preceding money laundering regulations were also

exceptionally rare. The FCA's repeated threats to use its criminal powers for "*particularly serious or repeated*" money laundering failings therefore ring a little hollow.

This is not to say that money laundering offences are not criminally prosecuted: overlapping, criminal money laundering offences exist under the Proceeds of Crime Act 2002 ("**POCA**"). For those individual cases that, in the FCA's view, merit a criminal penalty, POCA offers a maximum sentence of 14 years' imprisonment, compared to just two years under the Money Laundering Regulations. However, a corporate criminal prosecution under this legislation would be virtually impossible, unless the offence could be proved against a senior "directing mind and will" of the company. By contrast, the Money Laundering Regulations are clearly designed to capture, with a potential criminal outcome, the kind of corporate money laundering failings – "*egregiously poor systems and controls*" as Steward put it - that the FCA is keen to pursue. It is surprising, then, that the FCA has not taken more opportunities to do so. Companies facing dual-track investigations may also have in mind the overwhelming statistical likelihood that the matter will be resolved civilly, and make their strategic decisions accordingly.

Steward's tacit acknowledgment that the FCA's criminal powers have been underused raises a further, interesting thought: ought the FCA to be pursuing systemic money laundering failings by way of a criminal action at all? The conclusion to his speech is illuminating in this regard. Citing Sir William Blackstone's 1765-1769 *Commentaries on the Laws of England*, Steward categorises money laundering failings as "…*a breach and violation of public rights and duties which affect the whole community…distinguished by the harsher appellation of crimes and misdemeanors*." In other words, he implies that money laundering failings of the kind envisaged by the regulations are sufficiently serious in nature that it is in some way morally incumbent upon the FCA to pursue them by way of a criminal, rather than a civil action. Perhaps Steward relies on this philosophical justification because, in reality, the practical justifications are somewhat limited: a criminal process is harder to run; harder to prove; more expensive; and, at least as far as corporates are concerned, the destination - a monetary penalty - is the same. So why not opt for a smoother ride?

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[1] FCA Business Plan 2017/2018 (https://www.fca.org.uk/publication/business-plans/business-plan-2017-18.pdf), 18 April 2017, p. 40.

[2] OIA Request referenced in article *The UK's faltering fight to tackle AML compliance* (Global Investigations Review, 16 April 2019).