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Should banks face criminal prosecution for breaches of Money Laundering Regulations or are civil fines effective. Analysis of the significance of the first ever criminal conviction of a bank (NatWest) for breaches of the Money Laundering Regulations

Monika Atkins

University of Greenwich, United Kingdom

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ABSTRACT

This paper uses the rare opportunity of the first ever criminal conviction in the UK of a bank for breaches of AML Regulations (NatWest) to examine the AML framework. The article investigates whether the current framework and enforcement are working in addressing the breaches. The article considers the significance of this criminal prosecution in relation to cases where civil fines were imposed, such as in the case of HSBC in 2021. In doing so, the article considers the reasons why the civil fine approach has been a preferred choice for the regulator and examines the reluctance to criminally prosecute banks. This paper takes a distinctive approach to the AML discussion as it focuses on a discussion of the novel aspect of the first ever criminal conviction of a bank in the UK, for breaches of their AML obligations under the Regulations. Additionally, it considers the effectiveness of a criminal prosecution in these circumstances as well as the impact of a criminal conviction on a Bank, not only on its reputation but also on the Banks' willingness to improve their AML compliance systems and procedures. Furthermore, this paper discusses the popular civil fine approach to breaches of AML onligations, which is in this paper demonstrated by a discussion of a record-breaking civil fine imposed on HSBC by the same regulator (FCA), in the same year as the conviction of NatWest has taken place.

"From late 2013, numerous branches started to receive millions in Fowler Oldfield cash. Staff in a number of branches and cash centres flagged concerns about the activity or submitted IMLSRs; however, staff in some other branches/centres did not do so. The non-notifiers included branches/centres which received sums between £12 and 43million and situations which included the deposit of such large sums of cash that they were brought in in black bin bags, which tore because of their weight, and sums so large that the bank's safes were inadequate to store them."[1]

1. Introduction

In 2022, NatWest[2] bank pleaded guilty and was sentenced in criminal court for three offences of breaches of the Money Laundering Regulations. The first offence was that NatWest 'failed to comply with the requirement to conduct ongoing monitoring of a business relationship with one of their commercial customers, Fowler Oldfield.'[3]; The second offence was that NatWest 'failed to comply with the requirement to determine the extent of ongoing monitoring on a risk-sensitive basis and be able to demonstrate to its supervisory authority that the extent of the ongoing monitoring is appropriate in view of the risks of money laundering and terrorist'.[4] The third offence was specifically related to the way the bank conducted its relationship with Fowler Oldfield. In particular that, NatWest 'failed to apply enhanced ongoing monitoring to its business relationship with Fowler Oldfield, in a situation which, by its nature, presented a higher risk of money laundering and terrorist financing'.[5] This led to the first-ever conviction of a financial institution under the Regulations with the court imposing a record-breaking fine of £267,772,619.95 (this is the figure after the

[1] *R (The Financial Conduct Authority) v National Westminster Bank Plc* [2021] Southwark Crown Court [51].
[2] National Westminster Bank PLC.
[3] *R (FCA) v NatWest Bank plc* [2021] Southwark Crown Court: Sentencing Remarks of Cockerill J at [2].
[4] Ibid.
[5] Ibid.

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guilty plea reduction), £460,047.04 confiscation order, and an award of £4,297,466.27 in costs to the prosecuting authority.[6]

In light of this rare criminal conviction, the aim of this article is to examine whether banks should commonly face criminal conviction for breaches of their Anti Money Laundering (AML) obligations or whether the more routinely used civil fines are sufficient. To aid this discussion, this paper will analyse the current AML framework in the United Kingdom (UK), the obligations imposed on banks as well as their compliance with these obligations. The discussion will be supported by specific examples of banks' AML breaches, specifically addressing the the two distinctive approaches by the Financial Conduct Authority (FCA). The discussion will focus on the 2021 criminal prosecution and conviction of the NatWest bank for breaches of the AML regulations.

After a brief introduction to the statutory provisions covering this area, in particular the Proceeds of Crime Act 2002 (POCA) and the Money Laundering Regulations,[7] the discussion focuses on the circumstances that led to 'the first criminal conviction of a bank under the Money Laundering Regulations.[8]' The discussion will include an analysis of the facts of the prosecution of NatWest being brought by the Financial Conduct Authority (FCA) and look at the sentencing remarks in this case. The second part of this article looks at examples of civil fines imposed on banks for breaches of Money Laundering Regulations, for example, the record-breaking fine issued on HSBC for AML breaches in 2021.[9] These different approaches taken by the Regulator in these two cases considered in this paper provide a rare opportunity to consider both, criminal and civil jurisdiction in this context.[10] Although this article concludes that the overall aim i.e., improved accountability, compliance, retribution and deference can be, in theory, achieved by either of these approaches, (leaving aside the differences in the process, evidence and standard of proof), civil fines and criminal sentences have a very different social and communicative value, with criminal sentence carrying a much more significant social stigma.[11]

The conclusion will consider whether the current approach to combatting breaches of AML obligations by banks is effective. Ultimately, the article argues that although the combination of large fines and negotiated agreements is a short-term solution, less focus on the "special status" associated with banks and more focus on criminal prosecution of banks as corporations as well as a direct prosecution of the senior managers, would ensure more diligent compliance.[12] This could be achieved by consolidated legislation and cooperation between the FCA, the National Crime Agency (NCA) and the Serious Fraud Office (SFO), as the expertise in criminal prosecution by the latter agencies would provide the FCA with the tools and confidence to not only pursue more banks as entities for AML breaches in criminal courts but also pursue criminal charges directly against individuals such as the senior management if banks fail to comply with their AML obligations.

The special status of financial institutions has been a point of discussion for many years. Most readers will remember the significance of this 'special status' of a bank in society during the 2008 banking crisis. The crisis was triggered by mortgages being commonly mis-sold to subprime borrowers. The natural consequence of this was that such borrowers eventually defaulted on their payments, which triggered a worldwide crisis.[13] This, in turn resulted in many financial institutions facing collapse unless governments stepped in to bail them out using the taxpayer's money. This led to many governments, including the UK, "bailing out" some of these financial institutions using billions of pounds of taxpayers' money.[14] The justification for this was that any prospects of recovering from the financial crisis would diminish if these large financial institutions collapsed the way many smaller businesses had done during the crisis.[15] Accordingly, the reasons for the so-called "special status" held by financial institutions was explained in the report by The Parliamentary Commission on Banking Standards in the following way,[16]

> Banks face particular challenges and responsibilities compared to other organisations. These primarily reflect the systemic risks associated with banking, and also specific regulatory requirements to mitigate conduct risk. As a result of their 'too important to fail' status, banks benefit from an implicit subsidy and the expectation of taxpayer support, leading to significant taxpayer bailouts as well as other forms of support.[17]

It can therefore be justified to expect the banking sector, which benefits systematically from its "special status" by way of monetary or other privileges, to meaningfully contribute to policing, monitoring and ultimately, the reduction of financial crime. In addition, it is because of their unique place in the society, it can be said that they are perfectly placed to support the fight against illicit finance and ultimately, crime. Unfortunately, just under two decades since the banking crisis, this paper provides examples of several alarming recent examples of breaches of banks' statutory obligations, particularly in relation to prevention of money laundering, by some of the very same institutions such as NatWest and HSBC that have benefited from large bailouts. It is clear that, despite the many regulatory efforts to make banks take more responsibility, these alarming breaches are still occurring. Therefore, it is pertinent to question whether the current approach to enforcing banks statutory obligations, particularly in relation to AML is correct. This article concludes that a fine, whether civil of criminal, in isolation, fails to provide a long-lasting solution.

This paper uses the rare opportunity of the first ever criminal conviction of a bank for breaches of AML Regulations (NatWest) to examine the AML framework. The article investigates whether the current framework and enforcement are working in addressing the breaches. The article considers the differences of this criminal prosecution in relation to cases where civil fines were imposed, such as in the case of HSBC.[18] In doing so, the article considers the reasons why the civil fine approach has been a preferred choice for the regulator and examines the reluctance to criminally prosecute banks. Further the paper will

[6] Financial Conduct Authority (FCA); ibid at 133.

[7] 2007/2017; the latest amendment to the MLRs came into force in 2020 implementing the EU's Fifth Anti-Money Laundering Directive (5MLD).

[8] *R (FCA) v NatWest Bank plc* [2021] Southwark CC: Sentencing Remarks of Mrs Justice Cockerill at [3].

[9] ibid.

[10] UK AML/CTF framework: Proceeds of Crime Act 2002 (as amended); Terrorism Act 2000 (as amended by the Anti-terrorism, Crime and Security Act 2001); The Counter-terrorism (Sanctions) (EU Exit) Regulations 2019, Money Laundering Regulations 2017 (as amended); Counter-terrorism Act 2008, Schedule 7, Financial Conduct Authority Handbook < https://www.handbook.fca.org.uk/ > accessed 07 March 2024.

[11] Simon Jack NatWest faces criminal case over money laundering (*BBC,* 16 March 2021) < https://www.bbc.co.uk/news/business-56412393 > accessed 06 March 2024.

[12] Similarly to the SM&C Regime.

[13] Such mortgages were often linked to the infamous CDOs widely sold to investors worldwide, see generally A Hudson, *The Law of Finance*, (2nd edn, Sweet and Maxwell 2013).

[14] House of Commons Briefing Paper Number 5748, 8 October 2018. 'Bank rescues of 2007-09: outcomes and cost', < https://researchbriefings.files.parliament.uk/documents/SN05748/SN05748.pdf > accessed 07 April 2024.

[15] It is worth noting that, some large financial institutions were not bailed out (see Lehman Brothers), causing panic not only within the US financial sector but also globally, see generally A Hudson, *The Law of Finance*, (2nd edn, Sweet and Maxwell 2013).

[16] Parliamentary Commission on Banking Standards, Fifth Report, 'Changing Banking for Good' (2013) < https://publications.parliament.uk/pa/jt201314/jtselect/jtpcbs/27/27ii09.htm > accessed 05 March 2024.

[17] Ibid, at 679.

[18] Financial Conduct Authority, 'Decision notice: HSBC Bank plc' (14 December 2021) < https://www.fca.org.uk/publication/decision-notices/hsbc-bank-plc.pdf > accessed 04 January 2024.

examine whether monetary fines, whether civil or criminal, imposed on banks for AML breaches work, and proposes change going forward. This paper takes as distinctive approach to the AML discussion as it focuses on a discussion of the novel aspect of the first ever criminal conviction of a bank in the UK, for breaches of their AML obligations under the Regulations. It then considers the effectiveness of a criminal prosecution in these circumstances as well as the impact of a criminal conviction on a Bank, not only on its reputation but also on the Bank's willingness to improve their AML compliance systems and procedures. In addition, this paper discusses the popular civil fine approach which is in this paper demonstrated by a discussion of a record-breaking civil fine imposed on HSBC by the same regulator, the FCA, in the same year as the conviction of NatWest has taken place.

2. Legal framework: Proceeds of Crime Act 2002 (POCA) and the Money Laundering Regulations (Regulations)

To examine whether the AML framework is sufficient in addressing these issues, it is imperative to start with the discussion of the development of the framework, followed by a discussion of the current legislative provisions. Money laundering is defined as 'the process by which the proceeds of crime are converted into assets which appear to have a legitimate origin so that they can be retained permanently or recycled into further criminal enterprises'.[19] The National Crime Agency (NCA) highlights that 'money laundering can threaten the UK's national security and prosperity, and undermine the integrity of the UK's financial system,'[20] estimating the 'scale of money laundering impacting the UK annually in the hundreds of billions of pounds'.[21] Historically, at international level, the most notable development was the Vienna Convention. Ryder states that, "the Vienna Convention represented a fundamental switch in the UN's Anti-Money Laundering (AML) policy away from targeting the manufacturing of illicit narcotic substances towards attacking the financial incentives of organised crime and criminal activities".[22] The subsequent Palermo Convention extended the AML provisions to other crimes beyond narcotics.[23]

Furthermore, the significant of the influence of the Financial Action Task Force (FATF) and their recommendations must be highlighted. The FATF was set up in 1989 with an objective to address the threat posed to financial institutions by crime and money laundering.[24] The FATF examined the "money laundering techniques and trends, reviewing the action which had already been taken at a national or international level, and setting out the measures that still needed to be taken to combat money laundering."[25]; Consequently, the FATF designed a set of Recommendations[26] "which aim to ensure a co-ordinated global response to prevent organised crime, corruption and terrorism."[27]; Presently, the FATF "reviews and monitors countries to ensure they implement the FATF Standards fully and effectively and holds countries to account that do not comply"[28]; with the majority of countries willingly engaging with this process.[29]

EU legislation harmonised AML regimes in the EEA including the UK. The first Anti-money Laundering Directive in 1991, followed by the second (2001) and third Anti-money Laundering Directives (2005) and the fourth Anti-money Laundering Directive 2015. The key piece of UK legislation implementing the EU legislation is the Proceeds of Crime Act 2002 (POCA), and the Money Laundering Regulations.[30] Prior to the Proceeds of Crime Act 2002 the offence of money laundering could be found in various acts of Parliament.[31] This was unsatisfactory, and therefore, the law was consolidated and is now fully contained in Part 7 of POCA. Part 7 not only covers the new primary offences of money laundering, but also includes provisions dealing with permitted and authorised disclosure, including in regulated sector.

The aim of AML provisions is twofold. The first aim is explained by Chiu and Wilson as "to enforce AML laws through banks (…) by imposing duties on banks to act as gatekeepers to prevent money laundering from taking place and to identify such incidents so as to help regulators carry out enforcement,[32] the second is, "to enforce anti-money laundering laws against them if they should be found to be complicit in transferring proceeds of crime".[33]

Although the discussion in this article mainly focuses on preventing money laundering, there is also some discussion of the criminal offences of money laundering committed by persons who directly launder proceeds of crime (due to the nature of the facts in the NatWest case in relation to their customer Fowler Oldfield). In such instance, POCA states that,

> A person commits an offence of money laundering if he or she conceals, disguises, converts, transfers, or removes criminal property from the jurisdiction[34] or enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person[35]; or acquires, uses or has possession of criminal property.[36]

To be a criminal property within the meaning of these provisions, 'the property must constitute a person's benefit from criminal conduct or represent such a benefit,[37] and the alleged offender must know or

[19] Crown Prosecution Services, 'Money Laundering Offences' (2 June 2021) < https://www.cps.gov.uk/legal-guidance/money-laundering-offences > accessed 06 March 2024.

[20] National Crime Agency, 'Money laundering and illicit finance' < https://www.nationalcrimeagency.gov.uk/what-we-do/crime-threats/money-laundering-and-illicit-finance > accessed 07 March 2024.

[21] Ibid.

[22] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

(Adopted 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95 Art 5(3);

Nicholas Ryder, '*Money Laundering – An Endless Cycle? A Comparative Analysis of the Anti-Money*

Laundering Policies in the United States of America, the United Kingdom, Australia and Canada'

(Routledge 2012).

[23] United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209.

[24] Financial Action Task Force, 'History of the FATF' < http://www.fatfgafi.org/about/historyofthefatf/ > accessed 25 May 2024.

[25] Ibid.

[26] Financial Action Task Force, 'Revised Financial Action Task Force Recommendations' published in February 2012 < https://www.fatfgafi.org/content/dam/fatfgafi/recommendations/Fat%20Recommendations%202012.pdf.coredownload.inline.pdf > accessed 25 May 2024.

[27] Ibid.

[28] The Financial Action Task Force, The FATF Recommendations on International Standards on combating money laundering and the financing of terrorism and proliferation, The FATF Recommendations on Money Laundering and Confiscation < http://www.fatfgafi.org/media/fatf/documents/recommendations/pdfs/Fat%20Recommendations%202012.pdf > accessed 25 May 2023.

[29] The Financial Action Task Force, 'Countries' < https://www.fatf-gafi.org/en/countries.html > accessed 25 May 2023.

[30] Money Laundering Regulations 2007, now Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, which implements the EU's 2015 Directive.

[31] such as the Criminal Justice Act 1988 and the Drug Trafficking Offences Act 1986.

[32] Iris H-Y Chiu and Joanna Wilson, '*Banking Law and Regulation*' (1st edn. OUP, 2019), p. 680.

[33] Ibid.

[34] Proceeds of Crime Act 2002, s.327.

[35] Proceeds of Crime Act 2002, s.328.

[36] Proceeds of Crime Act 2002, s.329.

[37] 'In whole or in part and whether directly or indirectly.'

suspect that it constitutes or represents such a benefit'.[38] Consequently, criminal conduct 'is conduct which constitutes an offence or would constitute an offence in any part of the UK if it occurred there.'[39]; Perhaps one of the most debated elements of the offence is the concept of suspicion. After much speculation about what would amount to suspicion for the purposes of Part 7 of POCA, the Court of Appeal in the case of *R v Da Silva* defined suspicion as 'a possibility, which is more than fanciful, that the relevant fact exists. A vague feeling of unease would not suffice'.[40] It has been confirmed that 'this is also the standard of suspicion that needs to be applied as a guiding principle by those working in the regulated sector in respect of their AML reporting obligations'.[41] This means that any bank that is involved in an arrangement they could suspect to be related to money laundering can be responsible for money laundering.

It is clear from the legislation that even those working in regulated sector can be caught by these provisions. It is equally clear from the way the legislation is drafted that even a person who does not work in regulated sector, may have an obligation to submit a Suspicious Activity Report (SAR).[42] As such, to prevent any person, including those working in regulated sector such as banks to be unfairly caught by the provisions, the legislation provides safeguards in certain circumstances. POCA states that 'money laundering offence is not committed[43] where a person makes an authorised disclosure and acts in line with the appropriate consent.'[44]; For such 'a disclosure to be authorised, it must be made to either a nominated officer,[45] a constable, or a customs officer'.[46]

So for instance, if a person working in a bank 'suspects that they are dealing with the proceeds of crime" they "can seek consent to complete a transaction by disclosing their suspicion to the UK Financial Intelligence Unit (UKFIU)'.[47] One of the key roles of the UKFIU in this respect is to scrutinise requests for a defence against money laundering (DAML) and either provide or not provide a consent.[48] It would, amount to an offence if a person proceeded with the transaction *without* such consent being granted.[49] Similarly a "required disclosure", puts the reporting obligation on those 'acting in the course of a business in the regulated sector', such as banks.[50] Such a person must: 'make a required disclosure either to the nominated officer or the UKFIU as soon as practicable after the information comes to them.'[51]; Here, the following four conditions must be met. First, the person 'knows or suspects or has reasonable grounds for knowing or suspecting that another person is engaged in money laundering'.[52] Second, 'the information or other matter on which his knowledge or suspicion is based or provides reasonable grounds for suspicion must have come to them in the course of business in the regulated sector'.[53] Third, 'they can identify the person engaged in money laundering or the whereabouts of any of the laundered property'. Finally, 'they believe, or it is reasonable to expect them to believe, that the information or other matter will or may assist in identifying the person or the whereabouts of any of the laundered property'.[54] Evidently, it is in their interest to make such disclosures to protect themselves, as a non-disclosure may lead to a potential criminal prosecution against them. It is equally important to comply with the consent regime requirements[55] in this circumstance including complying with the notice period and having an appropriate consent if they were to proceed with the transaction.[56]

Section 331 of POCA lists obligation specific to "nominated officers" in the regulated sector.[57] Under this section, 'a nominated officer is a person who is nominated within a firm, company or other organisation to submit SARs on behalf of the company to the UKFIU'.[58] Crucially, any report and information submitted by an employee to the nominated officer 'must be evaluated and the nominated officer must decide whether he or she has knowledge, or a suspicion or should have reasonable grounds to suspect money laundering in that case'.[59] Consequently, in order to submit an SAR to the UKFIU, the nominated officer must 'know or suspect (or has reasonable grounds) that another person is engaged in money laundering';[60] and 'the information or other matter on which his knowledge or suspicion is based came to him in consequence of a disclosure made under section 330'.[61] Additionally,

> He must know the identity of the other person or the whereabouts of any of the laundered property and that other person, or the whereabouts of any of the laundered property, can be identified from the information or other matter mentioned submitted to him, and that he believes, or it is reasonable to expect him to believe, that the information or other matter will or may assist in identifying that other person or the whereabouts of any of the laundered property.[62]

SARs are submitted to UKFIU, usually electronically through their SAR Online.[63] The Law Commission explains that 'SARs have a dual function: they provide the investigative authorities with details of a suspicion of criminal property and, secondly, provide the reporter with a defence to a money laundering offence.'[64]; The legislation makes it an offence[65] 'to disclose the fact that a disclosure[66] has been made or that an investigation into allegations of a money laundering offence is being contemplated or is being carried out where the disclosure is likely to prejudice any investigation'.[67] This has become to be known as the

[38] Proceeds of Crime Act 2002, s.340 (3).
[39] Proceeds of Crime Act 2002, s.340 (2).
[40] *R v Da Silva* [2006] EWCA Crim 1654, [2007] 1 WLR 303. The Court of Appeal considered the correct interpretation of *suspicion* within the meaning of section 93A(1)(a) of the Criminal Justice Act 1988 the predecessor to the Proceeds of Crime Act 2002.
[41] Ibid, Law Commission, 'Anti-Money Laundering: the SARs Regime Consultation paper' (2018).
[42] National Crime Agency, Suspicious Activity Reports < https://www.nationalcrimeagency.gov.uk/what-we-do/crime-threats/money-laundering-and-illicit-finance/suspicious-activity-reports > accessed 25 May 2024.
[43] Proceeds of Crime Act 2002, ss.327-329.
[44] Ibid.
[45] Ibid, 'a person nominated within a company, firm or other organisation to receive reports of suspicious activity.'
[46] Ibid.
[47] Law Commission,' Anti-money laundering: the SARs regime report' HC 2098 Law Com No 384 (18 June 2019), at 1.25; Proceeds of Crime Act 2002, Part 7; see Proceeds of Crime Act 2002, s.335 for consent.
[48] UK Financial Intelligence Unit, Sars in Action (July 2024) < https://www.nationalcrimeagency.gov.uk/who-we-are/publications/723-sars-in-action-issue-26/file > accessed 25 July 2024; see Proceeds of Crime Act 2002, s.338 for Authorised Disclosure.
[49] Ibid.
[50] Proceeds of Crime Act 2002, s.330, no evidence that actual money laundering actually occurred is needed; Economic Crime and Corporate Transparency Act 2023.
[51] Ibid.
[52] Proceeds of Crime Act 2002, s.330(2).
[53] Proceeds of Crime Act 2002, s.330(3).
[54] Proceeds of Crime Act 2002, s.330(3A).
[55] Proceeds of Crime Act 2002, s.335.
[56] Proceeds of Crime Act 2002, s.335, see also s.337 for protected disclosure and s.338 for Authorised Disclosure.
[57] See also Proceeds of Crime Act 2002, s.332 (other nominated officers) and s.336 (consent specific to nominated officers).
[58] Proceeds of Crime Act 2002, s.331 amended by Economic Crime and Corporate Transparency Act 2023.
[59] Ibid.
[60] Proceeds of Crime Act 2002, s.331(2).
[61] Proceeds of Crime Act 2002, s.331(3).
[62] Proceeds of Crime Act 2002, s.331(3A).
[63] National Crime Agency, 'Reporting SARs, SAR Online Portal' < https://www.nationalcrimeagency.gov.uk/ > accessed 25 June 2024.
[64] Law Commission,' Anti-money laundering: the SARs regime report' HC 2098 Law Com No 384 (18 June 2019), at 2.4.
[65] Proceeds of Crime Act 2002, s.333A.
[66] Suspicious Activity Report.
[67] Proceeds of Crime Act 2002, s.333 A.

"tipping-off" offence, which is arguably difficult to comply with in general, but in particular for those in the "first line of defence" such as cashiers, personal bankers or business relationship managers, especially when the affected customer, understandably demands to know why their transaction has been delayed or not carried out at all. It is important to remember, however, that the offence of tipping off only relates to 'the information on which the disclosure is based, which must have come to the person in the course of business in the regulated sector'[68]; and, therefore, would only apply in those circumstances. This approach is not without problems. Ryder[69] suggests that reporting obligations 'have led to the regulated sector adopting a tactic that has been referred to as 'defensive' reporting[70] and created a 'needle-in-the-haystack' problem due to the large number of SARs annually submitted.'[71]

The 2022–23 UKFIU SARs Annual Statistical Report states that 561,610 SARs and 32,073 DAMLs have been submitted that year by Banks alone.[72] Banks consistently submit the largest number of SARs per year than any other sector or provider.[73] The Financial Action Task Force (FATF) reported in 2018 that that year in the UK banks submitted almost 85% of the total SAR[74] This Report also highlighted 'concerns about the quality of reporting by all reporting entities, including banks'[75]; stating that 'during the on-site visit, some firms indicated that they were sometimes filing SARs in response to unexplained/unusual transactions without additional analysis or investigation and, at times, even without the required suspicion.'[76] Therefore, much work has been done recently by the Law Commission in order to reform and improve the SARs regime.[77] Their Recommendations include proposals for the 'creation of an advisory board with oversight for the regime, amending the regime to improve effectiveness, including new statutory guidance on a number of key legislative concepts such as "suspicion" and "reasonable excuse"'.[78] Interestingly, Chiu & Wilson argue that "the FCA should be given a share of the NCA's intelligence role in receiving and analysing suspicious transaction reports as this would potentially spread the workload in monitoring suspicious transactions and 'giving consent".[79] This is an interesting observation and it could be further argued that, in the context of this article, such a co-operation would be beneficial for both authorities. Such cooperation between the FCA, the NCA and potentially the SFO, would provide the FCA the expertise in criminal prosecution the latter agencies inherently possess. This would in turn provide the FCA with the tools and confidence to not only pursue more banks as entities for AML breaches in criminal courts but also pursue criminal charges directly against individuals such as the senior managers if banks they are responsible for fail to comply with their AML obligations. This is particularly important as the FCA only has regulatory powers and powers to impose fines.

The last tool in the AML armoury considered in this paper are the Money Laundering Regulations,[80] specifically the requirement that "the financial, accountancy, legal and other sectors apply risk-based customer due diligence measures and take other steps to prevent their services from being used for money laundering or terrorist financing'.[81] Government guidelines for businesses in relation to compliance with their obligations under the Regulations list the steps that such business, including banks must take.[82]

> The business must make sure to have adequate internal controls and monitoring systems which would alert the business if criminals try to use the business for money laundering and once aware of a potential threat, the business must take steps to prevent it and report any suspicious activity. These steps should include appointing a nominated officer and making sure that employees know how to report any suspicious activity to them; appointing a compliance officer if the business is larger or more complex; identifying the responsibilities of senior managers and providing them with regular information on ML risks; training relevant employees on their AML responsibilities; documenting and updating internal AML policies, controls and procedures; and introducing measures to make sure that the risk of ML is taken into account in the day-to-day running of your business.[83]

In this context, the criminal conviction of NatWest considered below was for breaches of Money Laundering Regulations 2007. Under the Regulations, "a relevant person" must comply with either customer due diligence or in some cases with enhanced due diligence, for instance, in relation to Politically Exposed Persons (PEPs) They must also maintain an ongoing monitoring of any business relationship under Regulations 8(1), and this was one of the regulations that NatWest breached.[84] In this respect,

> 'Ongoing monitoring' of a business relationship means(a)scrutiny of transactions undertaken throughout the course of the relationship (including, where necessary, the source of funds) to ensure that the transactions are consistent with the relevant person's knowledge of the customer, his business and risk profile; and (b)keeping the documents, data or information obtained for the purpose of applying customer due diligence measures up-to-date.[85]

Regulation 8(3) confirms that Regulation 7(3) 'applies to the duty to conduct ongoing monitoring under paragraph (1) as it applies to customer due diligence measures.' Regulation 7(3) prescribes that relevant person must "determine the extent of customer due diligence measures on a risk-sensitive basis depending on the type of customer, business relationship, product or transaction; and must be able to demonstrate to his supervisory authority that the extent of the measures is appropriate in view of the risks of ML and TF". Reg 5. defines 'customer due diligence measures' as:

> identifying the customer and verifying the customer's identity on the basis of documents, data or information obtained from a reliable and

[68] Ibid.

[69] Nicholas Ryder, 'The Financial Services Authority and Money Laundering: a Game of Cat and Mouse' (2008) 67(3) C.L.J.

[70] Ibid, p.649.

[71] Nicholas Ryder, 'The Financial Services Authority and Money Laundering: a Game of Cat and Mouse' (2008) 67(3) C.L.J. p. 652.

[72] The total number of SARs received that year across all sectors was 859,905. UK Financial Intelligence Unit (2023) < https://www.nationalcrimeagency.gov.uk/who-we-are/publications/710-sars-annual-statistical-report/file > accessed 25 June 2024.

[73] In 2021–22, banks alone submitted 637,776 SARs.

[74] Financial Action Task Force, 'Anti-money laundering and counter-terrorist financing measures: United Kingdom Mutual Evaluation Report' (December 2018), p.120.

[75] Ibid.

[76] Ibid.

[77] See Law Commission, 'Anti-money laundering' consultation and report < https://www.lawcom.gov.uk/project/anti-money-laundering/ > accessed 26 June 2023.

[78] Ibid.

[79] Iris H-Y Chiu and Joanna Wilson, '*Banking Law and Regulation*' (1st edn. OUP, 2019).

[80] The Regulations implement, in part, Directive 2005/60/EC of the European Parliament and of The Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (the Third Directive). See also The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.

[81] Explanatory Memorandum to the money laundering regulations 2007 at [2], < https://www.legislation.gov.uk/uksi/2007/2157/pdfs/uksiem_20072157_en.pdf > accessed 02 Sep 2023.

[82] HM Revenue & Customs, 'Guidance: Your responsibilities under money laundering supervision' (5 August 2013 updated 4 August 2021) < https://www.gov.uk/guidance/money-laundering-regulations-your-responsibilities > accessed 15 Sep 2023.

[83] Explanatory Memorandum to the money laundering regulations 2007 at [2], < https://www.legislation.gov.uk/uksi/2007/2157/pdfs/uksiem_20072157_en.pdf > accessed 02 Sep 2023.

[84] *R (FCA) v NatWest Bank plc* [2021] Southwark Crown Court, NatWest pleaded guilty to failing to comply with Regulations 8(1), (3) and 14(1).

[85] The Money Laundering Regulations 2007, Reg 8(2)

> independent source; identifying (…) the beneficial owner and taking adequate measures, on a risk-sensitive basis, to verify his identity;[86] obtaining information on the purpose and intended nature of the business relationship.

Regulation 14 (1) deals with 'Enhanced customer due diligence and ongoing monitoring'. Under this Regulation,

> A relevant person must apply on a risk-sensitive basis enhanced customer due diligence measures and enhanced ongoing monitoring,[87] (…) in any other situation which by its nature can present a higher risk of money laundering or terrorist financing.

Although the Regulations provide for a civil fine under Reg 42, Regulation 45(1) clearly states that,

> A person who fails to comply with any requirement in (these) regulation[88] is guilty of an offence and liable on summary conviction, to a fine not exceeding the statutory maximum; on conviction on indictment, to imprisonment for a term not exceeding two years, to a fine or to both.

In the case of NatWest, the FCA decided to pursue the criminal route. More specifically in this respect, NatWest was charged and pleaded guilty to the following offences: [89]

> Failing to comply with the requirement to conduct ongoing monitoring of a business relationship[90]; Failing to comply with the requirement to determine the extent of ongoing monitoring on a risk-sensitive basis and be able to demonstrate to its supervisory authority that the extent of the ongoing monitoring is appropriate in view of the risks of money laundering and terrorist financing; [91] and failing to apply enhanced ongoing monitoring to its business relationship with Fowler Oldfield, in a situation which by its nature presented a higher risk of money laundering and terrorist financing.[92]

To better understand why the FCA has taken the decision to pursue NatWest in criminal court instead of imposing a civil fine, it is important to look at the facts of this case in more detail.

3. Criminal prosecution: National Westminster Bank (NatWest)

Due to the significance of the first-ever criminal conviction of a financial institution in this jurisdiction for AML breaches under the Regulations, it is only prudent to discuss this case in detail.

This case concerned a customer relationship of NatWest with one of their commercial customers, a jewellery business called Fowler Oldfield, based in Bradford. The case against NatWest was that 'between 2012 and 2016, the bank failed to properly monitor the activity of this business customer as required by the Regulations'.[93] Looking at the facts more closely, Fowler Oldfield's business was described in the Know Your Business (KYB) document by the relationship manager as being,[94]

"A buyer and seller of gold, which operated by buying gold for cash obtained from Travelex and selling this gold, on the same day by pre-agreement, receiving payment by electronic transfer. The future sales were predicted to be £15 m a year."

Importantly, in the same document, due to the high risk posed by this type of enterprise, the bank explicitly stated that 'the bank would not handle any cash for this business'.[95] Incidentally, when Fowler Oldfield first applied to become a customer of NatWest, their application was refused, as the bank identified them as a high-risk cash-for-gold business operation, suggesting that the bank's safeguarding systems operated correctly at that point. However, when Fowler Oldfield made another application after liaising with the NatWest relationship manager, their application was accepted, provided the relationship manager conducted a desktop review and closely monitored the business due to the high risk.[96] However, alarmingly, NatWest has no record of the relationship manager ever having conducted a desktop review or monitored the business.[97] Equally alarming is the fact that, at some point, the nature of the business on the bank's systems was changed from "dealing in precious metals" to "wholesale of metals and ores", which triggered a downgrade of the high risk. Again, NatWest has no explanation of why this change was made or, indeed by whom, on the bank's systems.[98]

To fully appreciate the scale of Fowler Oldfield's 'operation', which the relationship manager and ultimately the bank failed to monitor, it is worth looking at the figures more closely. It can be seen from the KYB document that company sales were predicted to be £15 million a year. In reality, in the five years of banking with NatWest, 'Fowler Oldfield deposited around £365 million with the bank, of which an astonishing £264 million was in cash'.[99] It is important to stress here that, in contrast to the initial terms of their customer relationship which included the term that NatWest would not handle cash for this business, the vast majority of the transactions' deposits were, in fact, in cash. In addition, it was reported that 'the bank's automated transaction monitoring system incorrectly classified the cash deposits as cheques which carry lower money laundering risk', and therefore, these activities were allowed to continue for a long time before being detected.[100]

Ultimately, the Regulations oblige banks to,[101]

> Take appropriate measures to ensure that relevant employees are made aware of the law relating to money laundering and terrorist financing and that they are regularly given training in how to recognise and deal with transactions that may be related to money laundering or terrorist financing.

Clearly, from the bank's point of view, such large amounts of cash deposited at their branches should have raised money laundering concerns. Indeed, the evidence in the case showed 'some of the employees responsible for handling these cash deposits reported their suspicions, including submitting SARs[102]; however, no appropriate

[86] Full text "identifying, where there is a beneficial owner who is not the customer, the beneficial owner and taking adequate measures, on a risk-sensitive basis, to verify his identity so that the relevant person is satisfied that he knows who the beneficial owner is, including, in the case of a legal person, trust or similar legal arrangement, measures to understand the ownership and control structure of the person, trust or arrangement."

[87] in accordance with paragraphs (2) to (4).

[88] 7(1), (2) or (3), 8(1) or (3), 9(2), 10(1), 11(1)(a), (b) or (c), 14(1), 15(1) or (2), 16(1), (2), (3) or (4), 19(1), (4), (5) or (6), 20(1), (4) or (5), 21, 26, 27(4) or 33, or a direction made under regulation 18.

[89] HM Treasury, Home Office, 'The National Risk Assessment (NRA) of Money Laundering and Terrorist Financing' (17 December 2020) < https://www.gov.uk/government/publications/national-risk-assessment-of-money-laundering-and-terrorist-financing-2020 > accessed 25 October 2023 at [25].

[90] Between 7 November 2013 and 23 June 2016; contrary to regulations 8(1) and 45(1) of the Money Laundering Regulations 2007.

[91] Between 8 November 2012 and 23 June 2016; contrary to regulations 8(3) and 45(1) of the Money Laundering Regulations 2007.

[92] Between 8 November 2012 and 23 June 2016; contrary to regulations 14(1) and 45(1) of the Money Laundering Regulations 2007.

[93] Money Laundering Regulations 2007.

[94] *R (FCA) v NatWest Bank plc* [2021] Southwark Crown Court: Sentencing Remarks of Cockerill J.

[95] Ibid, at [30].

[96] *R (FCA) v NatWest Bank plc* [2021] Southwark Crown Court: Sentencing Remarks of Cockerill J.

[97] Ibid.

[98] Ibid.

[99] Ibid at [36,37].

[100] Ibid.

[101] Money Laundering Regulations, Regulation 24(1).

[102] *R (FCA) v NatWest Bank plc* [2021] Southwark Crown Court: Sentencing Remarks of Cockerill J at [45,46].

action was ever taken'.[103] Apart from the large cash deposits, 'the red flags that were reported included significant amounts of Scottish bank notes deposited in England, notes carrying a prominent musty smell and individuals acting suspiciously when depositing cash'.[104] Further, CCTV footage from branches showed bin bags stuffed with cash being deposited, and rather aptly, the services of security company G4S were employed by Fowler Oldfield to deliver the cash in some instances.[105]

To put this more simply, if a person arrives at a branch of a bank with a bag full of banknotes and wishes to make a deposit, the bank is required to take relevant steps to comply with their AML obligations. The aim of this legislative framework is to 'prevent the use of the financial system for the purpose of money laundering and terrorist financing'.[106] This statutory obligation aims to scrutinise large cash transactions because it is well-known that dealing in cash has always been the "method of choice" for criminals to launder their proceeds of crime into money that seems to come from a legitimate means such as, for instance, a gold buying and selling operation, as in the case of Fowler Oldfield.[107] The National Risk Assessment of Money Laundering and Terrorist Financing, carried out by the HM Treasury,[108] found that 'cash-based money laundering is still heavily characterised by the use of cash-intensive businesses to disguise criminal sources of wealth'.[89] With retail banking and those that accept cash deposits being at high risk of being targeted,[109] this Risk Assessment also found that 'although cash usage in general in the UK continues to decline, cash remains in widespread use for a variety of illegitimate purposes, and ultimately, there has been an increased demand for banknotes'.[110] This suggests that cash remains attractive to criminals as it 'continues to be seen in almost every money laundering investigation'.[111] In addition, the Risk Assessment established that 'the inherent anonymity associated with cash transactions continues to provide obstacles for law enforcement in disrupting or investigating its use for both money laundering and terrorist financing'.[112] Despite this, the National Crime Agency (NCA) reported that they seized a considerable sum of £115 million in cash as part of their project to tackle money laundering.[113] Evidently, there are some efforts by authorities to highlight the link between money laundering and cash deposits and try to tackle this issue.

Therefore, the scale and manner of the cash deposited in NatWest by Fowler Oldfield had to ultimately result in criminal convictions not only of the people involved in the actual money laundering but also for the bank for facilitating it. Unsurprisingly in this case, NatWest decided to plead guilty to all three offences the bank was charged with under the Regulations.[114] The first offence was 'failing to comply with the requirement to conduct ongoing monitoring of a business relationship.'[115]; The second offence was that NatWest 'between 8 November 2012 and 23 June 2016, failed to comply with the requirement to determine the extent of ongoing monitoring on a risk-sensitive basis and be able to demonstrate to its supervisory authority that the extent of the ongoing monitoring is appropriate in view of the risks of money laundering and terrorist'.[116] The third offence was specifically related to the way the bank conducted its relationship with Fowler Oldfield. In particular that, NatWest: [117] between 8 November 2012 and 23 June 2016 failed to apply enhanced ongoing monitoring to its business relationship with Fowler Oldfield, in a situation which, by its nature, presented a higher risk of money laundering and terrorist financing.

This led to the first-ever conviction of a financial institution under the Regulations[118] with the court imposing a record-breaking fine of £267,772,619.95 (this is the figure after the guilty plea reduction), £460,047.04 confiscation order, as well as an award of £4,297,466.27 in costs to the FCA.[119]

Leaving aside the alarming facts of this case, the obvious question that arises here is, how does this criminal fine differ from civil fines imposed on banks over the years. In other words, why is this case different. The analysis is twofold. First to address is the significance of this first ever criminal conviction of a bank under the AML Regulations.[120] Criminal prosecutions of banks as corporations have historically been avoided by the authorities.[121] However, here the gravity of this case and the compelling evidence meant that the FCA had no choice but to pursue the criminal route, rather than civil. This was somehow made easier for the FCA by the bank's guilty plea. On the face of it, the criminal conviction, together with the large fine imposed on the bank might seem like a step in the right direction for corporate prosecutions.

The second, is that the blatant failure of the Bank to monitor their transactions in this one single example illustrates the struggle of large financial institutions to put effective measures in place to safeguard from money laundering undoubtedly amplified by the large quantity of custom they attract as well as a large number of employees they employ. As such, it can be said that a full compliance in such a vast and fast environment is more an aspiration rather than an achievable goal. By way of example in this case 'the cash centre staff, branch staff, and the assistant relationship manager raised an astonishing 11 reports, and even the bank's automated transaction monitoring system made 10 alerts during the time in question without any real action being taken'.[122] In the sentencing remarks, the Court stated that there was a clear 'overreliance on and/or failure to sufficiently challenge explanations provided by the Relationship Manager' and it was not until the Bank was contacted by West Yorkshire Police in 2016 about their unconnected investigation of Fowler Oldfield for money laundering,[123] that NatWest took action by terminating the customer relationship and notifying the Regulator[124] to say that 'it had discovered 'concerns' in the management of this customer relationship'.[125] Does it mean that had they not been contacted by the police, these activities would still be continuing undetected to this day?

[103] Ibid.
[104] Ibid at [51].
[105] Ibid at [52].
[106] See Directive (EU) 2015/849 prevention of the use of the financial system for the purposes of money laundering or terrorist financing (4AMLD) amended by Directive (EU) 2018/843(5MLD); Money Laundering Regulations; see also Financial Action Task Force Recommendations.
[107] For instance, from drug deals; The National Risk Assessment (NRA) of Money Laundering and Terrorist Financing, HM Treasury, 2020.
[108] published in 2020.
[109] Ibid.
[110] Ibid at [114]; the value of total Notes in Circulation doubling between 2005 and 2017.
[111] Ibid.
[112] Ibid at [117].
[113] Ibid.
[114] In October 2021.
[115] Money Laundering Regulations 2007, Regulations 8(1) and 45(1).
[116] Money Laundering Regulations 2007, Regulations 8(3) and 45(1).
[117] Money Laundering Regulations 2007, Regulations 14(1) and 45(1).
[118] *R (FCA) v NatWest Bank plc* [2021] Southwark Crown Court: Sentencing Remarks of Cockerill J at [3].
[119] Ibid, at [133].
[120] Ibid, at [3].
[121] For corporate criminal liability see generally Tesco Supermarkets Ltd v Nattrass [1972] AC153[HL]; *DPP v Kent and Sussex Contractors* [1944] K.B. 146; Bribery Act, S 7; Criminal Finances Act 2017 for "failure to prevent" regime; for a comprehensive discussion of corporate liability and the doctrine of identification see Mark Dsouza 'The Corporate Agent in Criminal Law – An Argument for Comprehensive Identification' CLJ, 79 [2020], pp 91–119; see also M Hill Corporate criminal liability: a wider scope? 174 NLJ 8065, p.11
[122] *R (FCA) v NatWest Bank plc* [2021] Southwark Crown Court: Sentencing Remarks of Cockerill J at [45].
[123] For completeness, it is worth noting that the separate investigation by West Yorkshire Police in relation to the activities of Fowler Oldfield has led to a high-profile trial at Leeds Crown Court.
[124] Financial Conduct Authority.
[125] *R (FCA) v NatWest Bank plc* [2021] Southwark Crown Court: Sentencing Remarks of Cockerill J.

It could be said that this is not dissimilar to the findings in the 2011 report of the Financial Services Authority (FSA)[126] on Banks' management of high money-laundering risk situations in which the FSA found that 'some banks appeared unwilling to turn away, or exit, very profitable business relationships even when there appeared to be an unacceptable risk of handling the proceeds of crime'.[127] This is rather troubling, as despite the legislative, regulatory and monitoring efforts, this could be seen that not much improvement has been made in this area for over a decade.

The failings in the NatWest case are troubling, in particular in light of the finding, that despite the breaches, NatWest "acted consistently with industry standards, utilised the "Three Lines of Defence" model for compliance with AML obligations, and had policies and procedures in place to address the ongoing monitoring of its customers, which were in line with the industry guidance".[128] This would indicate that the processes that are being utilised by the industry are ineffective, in particular at branch level. Having said that, the FCA stated that 'the Group's policies and procedures did not address the need for staff to guard against overreliance being placed on relationship managers when considering suspicious activity on a customer account.'[129] In addition, it was found that that 'the Group policy stated that differential monitoring in automated systems was only required "where the capability to do so existed,'[130] and particularly disappointing was the identification of 'weaknesses in NatWest's automated transaction monitoring system in general'.[131] This is difficult to rationalise not only because this seems to be a reoccurring issue for NatWest but also because the FCA[132] places obligations on senior management in regulated firms who are subject to the Senior Managers and Certification Regime (SM&CR)[133] "to take responsibility for the firm's AML measures which includes knowing about the money laundering risks to which the firm is exposed and ensuring that steps are taken to mitigate those risks effectively".[134]

In line with the Regulations, 'firms must appoint an individual who is a member of its board of directors or of its senior management as the officer responsible for compliance with the regulations'.[135] It is clear from the Regulations that 'a relevant person must conduct ongoing monitoring of a business relationship',[136] by way of 'scrutiny of transactions to ensure that the transactions are consistent with the relevant person's knowledge of the customer, his business and risk profile as well as keep documents up to date'.[137] Importantly, one of the examples of good practice provided by the FCA is that any 'decisions on accepting or maintaining high money laundering risk relationships are reviewed and challenged independently of the business relationship manager and escalated to senior management'.[138] Evidently, this has not been followed in relation to Fowler Oldfield, indicating that the failings of the processes in NatWest were far-reaching.

To conclude this part, the criminal conviction and the scale of the fine would undoubtedly have an impact not only on the bank but also its employees and practice, and ultimately the customers. In addition, as the bank is partially state owned,[139] a criminal conviction would ultimately impact the taxpayer and the society as whole. In this context, it is imperative that agencies do not shy away from pursuing a criminal conviction as opposed to a civil fine-if the conduct is so severe that, like in this case, crosses the threshold of criminal liability and warrants criminal prosecution, this must be pursued. By their very nature, civil fines and criminal sentences have different social and communicative value, with undeniably criminal sentence carrying a much more significant social stigma. However, it is clear that "punishing" a corporation is a difficult concept, as Egan argues "a corporation cannot 'feel' at it has no conscience and cannot suffer punishment.[140]" Nonetheless, a financial institution with a criminal conviction is, at present, a rare sight.

4. Civil fines

In relation to AML breaches under the Regulations, the Explanatory memorandum to the Money Laundering Regulations states that "the sanctions would be whatever sanction the supervisors choose for general noncompliance (for example administrative penalties) in addition any non-compliance with the Regulations is a criminal offence and money laundering and terrorist financing are themselves criminal offences".[141]The FCA's approach in the NatWest case provided a rare example of the FCA's powers to enforce bank's compliance with AML legislation in criminal jurisdiction. More commonly, the FCA deals with ALM breaches by way of a civil fine. There are many examples including Santander UK, which was fined £107.7 million for repeated anti-money laundering failures,[142] Standard Chartered Bank £102.2 million for poor AML controls[143] and more recently Ghana International Bank Plc and Gatehouse Bank Plc were fined £5,829,900 and £1,584,100 respectively.[144]

An example of the civil fine discussed in more detail in this is article is the fine that FCA imposed on HSBC in 2021. The reason for this is twofold. This case was considered in the same year and by the same regulator as the criminal case of NatWest above. Secondly, both cases involve breaches of the 2007 Regulations. HSBC failed to comply with:

> Regulation 20(1)(a) to establish and maintain appropriate and risk-sensitive policies and procedures; and Regulation 20(1)(f) to establish and maintain appropriate and risk-sensitive policies and procedures for the monitoring and management of compliance with and internal communication of those policies and procedures.[145]

[126] Financial Services Authority, now Financial Conduct Authority.

[127] Financial Services Authority, ' Banks' management of high money-laundering risk situations' < https://www.fca.org.uk/publication/corporate/fsa-aml-final-report.pdf > accessed 10 Sep 2023, at 7.

[128] R (FCA) v NatWest Bank plc [2021] Southwark Crown Court: Sentencing Remarks of Cockerill J at [11]-[14].

[129] Ibid at [15].

[130] Ibid.

[131] Ibid.

[132] Financial Conduct Authority Handbook < https://www.handbook.fca.org.uk/ > accessed 07 March 2023, at 3.2.1.

[133] NatWest being subject to Senior Managers and Certification Regime.

[134] Financial Conduct Authority Handbook < https://www.handbook.fca.org.uk/ > accessed 07 March 2023.

[135] Money Laundering Regulations, 21(1)(a).

[136] Money Laundering Regulations 2007, Regulation 8.

[137] Money Laundering Regulations 2007, Regulation 8.

[138] Money Laundering Regulations, Regulation 21(1)(a); Financial Conduct Authority Handbook < https://www.handbook.fca.org.uk/ > accessed 07 March 2023.

[139] Owen Walker, UK government ceases to be NatWest's controlling shareholder (Financial Times March 2024) < https://www.ft.com/content/ae505f0e-a8a4-406e-a24a-192555c547cd > accessed 07 May 2024

[140] Egan, A 'Too Big to Fail, Too Big to Jail? A critical comparative commentary on the Enforcement of Corporate Economic Crime in the US and the UK', in Meiselles, Ryder and Viskonti (ed), *Corporate Criminal Liability and Sanctions* (Routledge 2024); see generally Haines, F 'Taming Business? Understanding Effectiveness in the Control of Corporate and White-Collar Crime', in R. Matthews (ed.), *What is to Be Done About Crime and Punishment?* (Palgrave Macmillan 2016).

[141] The Explanatory memorandum to the Money Laundering Regulations 2007 No. 2157, 1.172.

[142] Financial Conduct Authority 'FCA fines Santander UK £107.7 million for repeated anti-money laundering failures' (2022) < https://www.fca.org.uk/news/press-releases/fca-fines-santander-uk-repeated-anti-money-laundering-failures > accessed 06 March 2023

[143] Financial Conduct Authority 'FCA fines Standard Chartered Bank £102.2 million for poor AML controls' (2019) < https://www.fca.org.uk/news/press-releases/fca-fines-standard-chartered-bank-102–2-million-poor-aml-controls > accessed 06 March 2024.

[144] Financial Conduct Authority, '2022 fines' < https://www.fca.org.uk/news/news-stories/2022-fines > accessed 25 April 2024.

[145] Financial Conduct Authority, 'Decision notice: HSBC Bank plc' (14 December 2021) < https://www.fca.org.uk/publication/decision-notices/hsbc-bank-plc.pdf > accessed 20 September 2023.

Similar in some respect to the NatWest case, this case also involved breaches of the 2007 Regulations[146] and resulted in a record-breaking fine of £91,352,600 which was reduced by 30% under the settlement scheme.[147] Significantly, and in contrast to NatWest, in the case of HSBC, the penalty imposed by the FCA was a civil fine (as opposed to a fine imposed by a criminal court during sentencing after bank's guilty plea). The comparison of the differences in the circumstances and, more significantly, the different approaches taken by the FCA in these cases shed some light on the threshold required for a decision to pursue criminal, rather than civil, proceedings against a financial institution for AML breaches. Looking at the facts and breaches by HSBC in more detail, the Regulator (FCA) 'found that HSBC's transaction monitoring systems showed serious weaknesses over a period of eight years, namely between 2010 and 2018'.[148] The FCA stated that,[149]

> HSBC failed to comply with the ML Regulations because its policies and procedures for two of its key automated transaction monitoring systems were not appropriate or sufficiently risk-sensitive, and the bank did not ensure the policies that managed and monitored those systems were adequately followed.
>
> The FCA identified several specific issues, including,[150]
>
> Failure to consider whether the scenarios used to identify indicators of money laundering or terrorist financing covered relevant risks and carry out timely risk assessments for new scenarios; failure to appropriately test and update the parameters within the systems that were used to determine whether a transaction was indicative of potentially suspicious activity and failure to check the accuracy and completeness of the data being fed into, and contained within, monitoring systems.

As a result, the FCA concluded that: 'HSBC did not establish and maintain appropriate and sufficiently risk-sensitive policies and procedures to identify unusual transactions or those that may be indicative of money laundering or terrorist financing,' issuing HSBC with what is seen as a record-breaking fine for these failing.[151] As Mark Steward from the FCA aptly summarised "HSBC's transaction monitoring systems were not effective for a prolonged period despite the issue being highlighted on numerous occasions. These failings are unacceptable and exposed the bank and community to avoidable risks, especially as the remediation took such a long time".[152] As stated above, the FCA decided to apply civil sanctions in this case. HSBC made an early agreement to settle, accepting this record-breaking fine. Due to the early agreement, HSBC even benefited from a 30% discount.[153] Therefore, on the face of it, it can be argued that this is an example of an efficient and cost-effective resolution. It follows that the effectiveness of such fines must be examined. It is well known that large financial institutions, including the ones discussed in this paper, have been subject to fines for failings and breaches of AML regulations several times before.[154] For instance, NatWest has been a subject of several fines just before and during the banking crisis of 2008.[155] HSBC has also been fined multiple times.[156] Therefore, instinctively, the effectiveness of such fines may be justifiably questioned.

Conversely, in 2013, the FSA[157] famously issued large fines to financial institutions in relation to LIBOR[158] manipulation.[159] In addition to the fines, criminal prosecutions commenced against some of the individuals within the banks. Notably, the Serious Fraud Office brought charges against thirteen individuals, although only one was eventually convicted.[160] While there were four further convictions of individuals in 2017, there were never any criminal proceedings brought against an actual financial institution in the UK in this respect.[161] This not only demonstrates the difficulty associated with bringing criminal proceedings and convicting an individual in financial institutions but also the worldwide reluctance to bring criminal proceedings against an actual financial institution.[162] In an absence of an option of a prison sentence (as corporation cannot go to prison), the choice of the sanctions is limited to monetary fines and revocation of licences. However, it has always been claimed that criminal prosecutions of a financial institution would have devastating long-reaching consequences, in particular if bank's licence is revoked, not only for the financial institution and its clients but also for the stability of the financial sector globally.[163] Additionally, even in the rare cases of criminal prosecution and conviction of an individual for corporate crimes, Levi and Lord argue that "imprisonment is usually an option only for those cases in which there is clear evidence that owners personally instructed or implemented reckless or intentional business decisions".[164]

Therefore, there have been several instances where this justification has led the authorities to negotiate a Deferred Prosecution Agreement (DPA) rather than pursue actual criminal prosecution, suggesting that they are aware of their powers of prosecution.[165] In fact, this was the preferred approach of the authorities in 2012, when HSBC admitted multiple offences, the authorities in the United States decided to negotiate a DPA rather than prosecute the bank.[166] However, Ryder

[146] The Money Laundering Regulations 2007 were in force for the period in question. The Money Laundering Regulations, Terrorist Financing and Transfer of Funds (Information on the Payer) 2017 came into force on 26 June 2017.

[147] Financial Conduct Authority, 'Decision notice: HSBC Bank plc' (14 December 2021) < https://www.fca.org.uk/publication/decision-notices/hsbc-bank-plc.pdf > accessed 20 September 2023.

[148] Ibid.

[149] Ibid.

[150] Ibid at para 2.5(1) and (2).

[151] Financial Conduct Authority, 'Decision notice: HSBC Bank plc' (14 December 2021) < https://www.fca.org.uk/publication/decision-notices/hsbc-bank-plc.pdf > accessed 20 September 2023.

[152] Financial Conduct Authority, 'FCA fines HSBC Bank plc £63.9 million for deficient transaction monitoring controls' (17/12/2021) < https://www.fca.org.uk/news/press-releases/fca-fines-hsbc-bank-plc-deficient-transaction-monitoring-controls > accessed 05 Sep 2023.

[153] Financial Conduct Authority, 'Decision notice: HSBC Bank plc' (14 December 2021) < https://www.fca.org.uk/publication/decision-notices/hsbc-bank-plc.pdf > accessed 20 September 2023.

[154] See for example Financial Conduct Authority, 'FCA fines Barclays £72 million for poor handling of financial crime risks' (26 November 2015) < https://www.fca.org.uk/news/press-releases/fca-fines-barclays-%C2%A372-million-poor-handling-financial-crime-risks > accessed 02 March 2023.

[155] *R (FCA) v NatWest Bank plc* [2021] Southwark Crown Court: Sentencing Remarks of Cockerill J at [21].

[156] Financial Conduct Authority, 'FSA requires action of the HSBC Group' (08 March 2013) < https://www.fca.org.uk/publications/documents/fsa-requires-action-hsbc-group > accessed 20 September 2023.

[157] Financial Services Authority, now Financial Crime Authority.

[158] London Interbank Offered Rate.

[159] Financial Conduct Authority, 'Barclays fined £59.5 million for significant failings in relation to LIBOR and EURIBOR' < https://www.fca.org.uk/news/press-releases/barclays-fined-%C2%A3595-million-significant-failings-relation-libor-and-euribor > accessed 05 March 2023.

[160] *R v Tom Hayes* [2015] EWCA Crim 1944.

[161] D. Johnson, 'Can competition law aid the United Kingdom in its fight against financial crime?' Journal of Economic Criminology 2 (2023) 100025.

[162] See for example the case of Wirecard and the former CEO Markus Braun, J Hill & P Kirby 'Wirecard trial of executives opens in German fraud scandal' (BBC December 2022) < https://www.bbc.co.uk/news/world-europe-63893933 > accessed 06 May 2024

[163] Nicholas Ryder, 'Too Scared to Prosecute and Too Scared to Jail: A Critical and Comparative

Analysis of Enforcement of Financial Crime Legislation against Corporations in the USA and the UK' (2018) 82 J Crim L 245.

[164] Levi, M. & Lord, N. 'White-collar and corporate crime' *The Oxford Handbook of Criminology*. (OUP 2023); however, see Habib Bank AG Zurich for an example of a case where the regulator imposed a fine directly on a MLRO as well as the bank. < https://www.fca.org.uk/publication/final-notices/syed-hussain.pdf > accessed 07 June 2024.

[165] Ibid.

argues that the 'DPAs on their own are an inadequate enforcement tool against corporations for financial crime offences because they do not prevent future breaches by these offending corporations'.[167] This seems to be correct as the recent record-breaking fine HSBC was ordered to pay was due to long-term and persistent breaches which would indicate that the previous DPA did not have a desired effect.[168] Correspondingly, the Parliamentary Commission on Banking Standards stated in its 2013 Report on the 2008 Banking Crisis that,[169] too many bankers, especially at the most senior levels, have operated in an environment with insufficient personal responsibility. Top bankers dodged accountability for failings on their watch by claiming ignorance or hiding behind collective decision-making. They then faced little realistic prospect of financial penalties or more serious sanctions commensurate with the severity of the failures with which they were associated.

Consequently, the Commission recommended a 'new accountability framework focused on senior management'.[170] The Senior Managers and Certification Regime (SM&CR) was subsequently launched as one of the ways to 'improve standards in the banking sector'.[171] The aim of the regime is 'to create a new framework to encourage individuals to take greater responsibility for their actions and to make it easier for both firms and regulators to hold individuals to account'.[172] This would, in turn, 'reduce harm to consumers and strengthen market integrity by making individuals more accountable for their conduct and competence'.[173] Although the results from a survey conducted by the Prudential Regulation Authority (PRA) in 2020[174] are encouraging, showing that a vast majority of 'firms that responded reported that the SMCR had brought about positive and meaningful changes to behaviour in the industry',[175] it is disappointing that this Regime did not prevent the failures in the two cases considered in this paper. Bearing this in mind, ultimately, the Agencies (PRA and FCA) may need to revisit and reconsider how to use the regime more effectively.[176] In agreement with Johnson, Ryder, Bourton et al. who argue that "greater use by the FCA of its enforcement powers to sanction senior managers" is needed "to ensure the international competitiveness of the UK financial services sector to deter financial crime".[177]

Significantly, there have been some positive progress made in this area. By way of example, the decision notice in the HSBC case considered above highlighted that, 'HSBC has recently undertaken a large-scale remediation programme into its AML processes, which was supervised by the FCA' and has willingly cooperated with the regulator.[178] Similarly, NatWest 'is said to have invested over £700 m on financial crime since 2016 and has grown its Financial Crime and Fraud team to 5,000 members'.[179] Consequently, the word "progress" rather than an "ultimate solution" seems to be the overriding theme as it seems that issues are being identified and attempts are being made to remedy these issues. In addition, both banks have fully cooperated with the FCA, did not dispute the findings, and are at least seen to be taking steps to improve their processes. Cockerill J specifically pointed this out in her sentencing remarks in the NatWest case: 'the Bank has been attempting to improve its systems and to comply with its obligations and has had an open and constructive relationship with the FCA,'[180] which can only be a positive step in this long journey. Likewise, the recent True Cost of Compliance Report found that 'the total financial crime compliance costs for UK financial services are estimated at £34.2 billion a year, with the biggest compliance volume increases seen in internal investigations and enhanced due diligence activities 'Know Your Customer' (KYC)/ ID Verification checks".[181] Therefore, it seems that 'the financial sector is investing a huge amount of resources to meet the UK's financial crime compliance regulations".[182] Nevertheless, it is clear that each of these approaches, in isolation, is failing to provide a long-lasting solution.

5. Conclusion

In light of this rare criminal conviction, the aim of this article was to examine whether banks should commonly face criminal convictions for breaches of Money Laundering Regulations or whether the more commonly used civil fines are sufficient. Having considered the framework and enforcement against the examples of both, criminal and civil penalties imposed by the FCA for AML breaches under the Regulations, this paper concludes that on the face of it, it can be argued that the overall desired outcome was the same in both cases. The desired outcome being an improved compliance with the AML regulations and due diligence procedures, improved staff training and accountability by the staff in branches, as well as the senior management. Considering the assurances of positive steps currently being taken by each of the banks considered in this paper, it seems that the result is ultimately the same, whether a large fine is imposed by way of a criminal conviction or by way of a civil fine. Likewise, it can be argued that many will not see the difference between the two approaches; a monetary penalty against a financial institution, however imposed, is still only a monetary penalty. Arguably, a real difference cannot be felt unless bank's licence is revoked, or the criminal conviction involves a senior manager. In an agreement with

[166] See for instance, Rolls-Royce 2017 (Bribery and corruption) and Tesco 2017 (for false accounting)

[167] Nicholas Ryder, 'Too Scared to Prosecute and Too Scared to Jail: A Critical and Comparative Analysis of Enforcement of Financial Crime Legislation against Corporations in the USA and the UK' (2018) 82 J Crim L 245 at 95.

[168] HSBC have also previously been sanctioned in other jurisdictions for instance USA. The author is aware of the multijurisdictional implications here and uses this example for illustration purposes only.

[169] Parliamentary Commission on Banking Standards - Fifth Report, 'Changing Banking for Good' (2013) https://publications.parliament.uk/pa/jt201314/jtselect/jtpcbs/27/27ii09.htm > accessed 05 March 2023.

[170] Ibid, Evaluation of the Senior Managers and Certification Regime (2020), < https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/report/evaluation-of-smcr2020.pdf?la=en&hash=151E78315E5C50E70A6B8B08AE3D5E93563D0168 > accessed 20 September 2023.

[171] Ibid. The regime was extended to entities regulated by the FCA in December 2019.

[172] Prudential Regulation Authority, 'Strengthening accountability in banking: a new regulatory framework for individuals' Consultation Paper 14/14 (July 2014), < https://www.bankofengland.co.uk/prudentialregulation/publication/2014/strengthening-accountability-in-banking-a-new-regulatory-framework-forindividuals > accessed 25 October 2023, page 5.

[173] Financial Conduct Authority, 'Senior Managers Certification Regime' < https://www.fca.org.uk/firms/senior-managers-certification-regime > accessed 23 January 2023.

[174] Prudential Regulation Authority, 'Evaluation of the Senior Managers and Certification Regime report' (December 2020).

[175] Ibid. See also C. Wells, "Corporate Failure to Prevent Economic Crime - a Proposal" [2017] Crim.L.R. 6, 426–439.

[176] See for example HM Treasury, Senior Managers & Certification Regime, Call for Evidence, March 2023 < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1147932/SMCR_Call_for_Evidence.pdf > accessed 23 January 2024; The Financial Services and Markets Act 2023.

[177] N. Ryder, D. Johnson, S. Bourton, D Hall, Erratum to "Review of the Senior Managers and Certification Regime" J. Econ. Criminol. 2 (2023) 100029.

[178] Financial Conduct Authority, 'Decision notice: HSBC Bank plc' (14 December 2021) < https://www.fca.org.uk/publication/decision-notices/hsbc-bank-plc.pdf > accessed 20 September 2023.

[179] *R (FCA) v NatWest Bank plc* [2021] Southwark Crown Court: Sentencing Remarks of Cockerill J at [65].

[180] Ibid at [22].

[181] LexisNexis Risk Solutions, True Cost of Compliance Report 'Is the UK financial services sector doing enough of the right things to effectively fight financial crime' (2023).

[182] Ibid, p.3.

Ryder, Johnson, Bourton at al "there is a lack of enforcement action taken by regulators using the SM&CR.[183]"

By way of example, in other areas of financial misconduct, prosecutions were conducted directly against individuals within the financial institutions.[184] These prosecutions not only highlighted the troubling issues within the sector but also educated people working within the sector that, if their actions cross the threshold of criminal conduct, they can and will be prosecuted. However, it cannot be denied that it is difficult to punish a company with any other penalty than financial. Therefore, it can be argued that although the first criminal prosecution for breaches of AML Regulations is a step in the right direction, it is a very small step.

It is important to remember that banks play a vital role in combatting money laundering and consequently, the organised crime. Cockerill J stated in her sentencing remarks in NatWest,[185] "it must be borne in mind that although in no way complicit in the money laundering that took place, the bank was functionally vital. Without the Bank and the Bank's failures, the money could not be effectively laundered".[186] Unfortunately the pretentious status of being 'too big to fail' and 'too complex' to resolve seems to be frequently used as justification for treating financial institutions more leniently in many aspects, including criminal prosecution.[187]

Understandably, it is appealing to argue that banks have been subjected to civil fines for many decades, but despite this, continue to breach their AML obligations. It might therefore be tempting to conclude that fines, whether civil or criminal are not effective. On the other hand, it can be argued that the persistent regulatory approach and enforcement contributes to the financial sector starting to take these obligations seriously, which can to some extend be demonstrated by the fact that 'investment of a huge amount of resources to meet their obligations",[188] including investing in new technologies, but also by the numbers of Suspicious Activity Reports annually submitted by banks, which is considerably higher than any other sector. Ultimately, this article concludes that although the combination of large fines and negotiated agreements is a short-term solution, less focus on the "special status" associated with banks and more focus on criminal prosecution and direct enforcement against senior managers would inherently ensure more diligent compliance. This could be achieved by an innovative cooperation between the FCA, the NCA and the SFO, as the expertise in criminal prosecution by the latter agencies would provide the FCA with the tools and confidence to not only pursue more criminal prosecutions of banks as entities for AML breaches but also directly against individuals such as senior managers.

Declaration of Competing Interest

The authors declare that they have no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

[183] N. Ryder, D. Johnson, S. Bourton, D Hall, Erratum to "Review of the Senior Managers and Certification Regime" J. Econ. Criminol. 2 (2023) 100029.

[184] For instance two UBS employees were found guilty of insider dealing, Financial Conduct Authority, 'Two found guilty of insider dealing' (27 June 2019) < https://www.fca.org.uk/news/press-releases/two-found-guilty-insider-dealing > accessed 23 February 2023.

[185] *R (FCA) v NatWest Bank plc* [2021] Southwark Crown Court: Sentencing Remarks of Cockerill J at [123].

[186] ibid

[187] Parliamentary Commission on Banking Standards, Fifth Report, 'Changing Banking for Good,' Chapter 3.

[188] LexisNexis Risk Solutions, True Cost of Compliance Report 'Is the UK financial services sector doing enough of the right things to effectively fight financial crime' (2023), p.3