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Note

This newsletter is a general guide. It is not a substitute for professional advice which takes account of your specific circumstances and any changes in the law and practice.

Subjects covered change constantly and develop.

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Anti-money laundering (AML) and Sanctions

The decision in *XTX Markets Technologies Limited v Mazars* (District Judge Avant, Central London County Court, unreported, 1 August 2023) involved a firm of accountants which had decided not to act for Russian clients due to the complexities of compliance with Russian sanctions legislation which is constantly evolving (most recently, The Russia (Sanctions) (EU Exit) (Amendment) (No. 4) Regulations 2023) – even when the claimants and their Ultimate Beneficial Owner (UBO) were not subject to sanctions.

The Kremlin, Moscow.

Is it lawful to refuse to act even for non-sanctioned Russians?

The claimants alleged that this constituted discrimination under sections 13 and 29 of the Equality Act 2010. The claimants' application for summary judgment was dismissed and the issue will have to be determined at trial. Space does not permit a full analysis here, but firms which make a similar decision as a matter of policy should analyse their rationale and ensure that this is reflected in their Practicewide Risk Assessment (PWRA).

The Office of Financial Sanctions Implementation (OFSI) published its Annual Review 2022-23. Meanwhile the US Office of Foreign Assets Control (OFAC) has published a brief tutorial on how to use OFAC's Sanction List Search tool to assess potential matches to sanctioned persons.

The Money Laundering and Terrorist Financing (Amendment) Regulations 2023 (in force 10 January 2024) provide that the starting point for the risk assessment of UK domestic Politically Exposed Persons (PEPs) is that the customer or potential customer presents a lower level of risk than a non-domestic PEP; firms should review their policies, controls and procedures.

The Money Laundering and Terrorist Financing (High-Risk Countries) (Amendment) (No.2) Regulations 2023, in force from 5 December 2023, substitute the list of high-risk third countries specified in Schedule 3ZA of The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLR 2017) adding Bulgaria, Cameroon, Croatia, Nigeria, South Africa and Vietnam and removing Albania, Cayman Islands, Jordan and Panama to reflect changes in FATF lists.

Firms should consider how they ensure that they reflect these changes in their handling of current matters and the enhanced customer due diligence requirements in regulation 33(1) of the MLR 2017. When auditing files for firms under regulation 21 we have noted a number of instances where it would be difficult to say that the enhanced due diligence requirements, either for PEPs or High Risk Third Countries (or both), have been met: is the due diligence being applied *enhanced*?

Economic Crime and Corporate Transparency Act 2023 (ECCTA)

The Government has published *Guidance on money laundering reporting obligations in relation to the DAML exemption provisions introduced by the Economic Crime and Corporate Transparency Act 2023*.

When the Bribery Act 2010 came into force, law firms were active in advising clients on the provisions but, in our experience, rather less so when considering its application to their own practices. Law firms may be at relatively low risk under these provisions (but not immune), but the same cannot be said of ECCTA; under section 196 firms could be guilty of fraud and other economic crimes where a 'senior manager' is deemed to have committed those crimes, and under section 1999 for failure to prevent fraud. It is clear from the number of dishonesty cases in the Solicitors Disciplinary Tribunal that this risk is not illusory, even in the best-run firms.

Firms should be considering what policies and procedures and training are appropriate. We can assist.

Links to the above can be found on www.legalrisk.co.uk/News and further resources on www.legalrisk.co.uk/AML.

ECCTA also introduced changes to company law and registration of information at Companies House.

A website has been launched containing useful information. See also the Addendum to the Legal Sector Affinity Group Guidance.

Europol has published a report, *Cryptocurrencies: Tracing the Evolution of Criminal Finances*. This identifies the areas of criminal activity and money laundering in which use of cryptocurrency is predominant with case studies.

Conflicts of interest

There are relatively few English reported cases on conflicts of interest in law firms compared with the United States. In particular there are few reported examples in the UK of what constitutes a 'related matter'. When providing training, we find overseas cases can provide useful illustrations (despite differences in conduct rules), and a recent example is a Canadian case, *The City of Winnipeg v 3177751 Manitoba Ltd, 2023 MBCA 100.*

Another US source which may be of interest to some of our readers, not just in the US, is the New York Bar Formal Opinion 2024-1: *Ethical Issues Arising from the Representation of Two or More Bidders Competing for the Same Asset.* The Opinion contains examples which may be useful for training. We have provided specialist conflicts training to many large firms.

Links to the above and other cases and conduct rules for many jurisdictions can be found on www.legalrisk.co.uk/Conflicts.

Professional indemnity insurance (PII)

In *Axis Specialty Europe v Discovery Land Company LLC and others* [2024] EWCA Civ 7 the Court of Appeal has dismissed insurers' appeal against the decision of Knowles J on the meaning of 'condoning' dishonesty, and on the aggregation of claims under a policy under the SRA Minimum Terms and Conditions of professional indemnity insurance (MTC). Insurers are seeking leave to appeal on the aggregation issue, under which, broadly, multiple similar claims may be subject to a single limit of indemnity.

Aggregation is one of the more common coverage issues on which we are instructed, and we have acted in substantial arbitrations where this has been an issue. It can be relevant in a variety of circumstances, such as acting for multiple buyers in the purchase of units in leasehold property, and investment schemes. Key to managing this risk is identifying the firm's exposure to multiple similar claims, particularly where there is a volume of similar work which may appear very profitable at the time, but expose the firm way beyond its indemnity limit.

An article by Frank Maher on this and other coverage issues and how to avoid them, *Mind the (SRA) Insurance Gaps*, is in New Law Journal N.L.J. 2024, 174(8054), 7. (Subscription, but a free trial is available.)

We have considerable experience of advising firms on how to manage successor practice issues under the MTC. This is an area where mistakes can render a firm uninsurable, but it is often possible to avoid the risk if care is taken. Surprisingly the effect of the successor practice provisions is widely misunderstood within the profession: they do not make a successor practice liable for the acts and omissions of a prior practice but instead create an obligation to insure it. A recent example of falling into this error (obiter) can be found in *Pead v Prostate Cancer UK and Others* [2023] EWHC 3224 (Ch).

Legal professional privilege

We believe that legal professional privilege is an important consideration for law firms instructing us in relation to regulatory and disciplinary matters, including anti-money laundering audits under regulation 21 of the MLR 2017.

While it is generally now accepted that legal professional privilege *may* apply to internal communications with a law firm's general counsel or equivalent, the informality of internal communication means that boundaries may easily be crossed. An illustration of some of the issues, albeit with different laws on privilege, can be found in a recent US decision in *Bonde v. Wexler & Kaufman, PLLC* , 2023 WL 8527672 (S.D.N.Y. Dec. 8, 2023).

Communication with non-solicitors will never be privileged (save in the context of litigation privilege).

Transfer of files on closure of a firm

We continue to encounter issues in this area. Client files are not assets of a firm, only the WIP is, and the files are therefore not the firm's to sell. It is up to the client where the file goes. The Court of Appeal's 2017 decision in *Budana* made it clear that it is safer to transfer files by novation (requiring the client's agreement) than by assignment. Where there is a CFA to be transferred, unwitting termination may make costs irrecoverable, and a payment on the transfer of Personal Injury files must be framed so as to avoid a referral fee that offends LASPO.