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Suspicious Activity Reporting in the United Kingdom and the United States: Statutory Obligations of Auditors, and Optimal Harvesting of Information

Abstract

Purpose.

This study evaluates the advantages and disadvantages of auditor mandatory suspicious activity reporting versus the exercise of professional judgement in the anti-money laundering regimes of the United Kingdom (UK) and the United States (US).

Design/methodology/approach

The research draws upon the following sources. First, statistics provided by the UK National Crime Agency (NCA) regarding Suspicious Activity Report (SAR) filing rates. Second, anti-money laundering legislation in the US and UK. Third, statements made in the political domain in the US, particularly those which raised constitutional concerns during the progress of the Patriot Act 2001. Finally, statements and recommendations by a UK Parliamentary Commission enquiring into the effectiveness of the suspicious activity reporting regime.

Findings

The UK reporting regime does not accommodate professional judgment, resulting in the filing of SARs with limited intelligence value. This contrasts with discretionary reporting in the US: voluntary reporting guides and influences auditor behaviour rather than mandating it. Defensive filing by UK auditors (DAMLs) has increased in recent years but the number of SARs filed has declined.

Originality

The study evaluates auditor behavioural responses to legislative regimes which mandate or alternatively accommodate discretion in the reporting suspicion of money laundering. Consideration of constitutional and judicial activism in this context is a novel contribution to the literature. For its theoretical framework the study uses Foucault's concept of discipline of the self to evaluate auditor behaviour under both regimes.

Keywords.

Money laundering; auditor professional judgement; Suspicious Activity Report; Bank Secrecy Acy 1970; Patriot Act 2001; Proceeds of Crime Act 2002.

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1. Introduction

In October 1931 Alphonse "Scarface" Capone was convicted of tax evasion in the District Court of the United States for the Northern District of Illinois, Eastern Division. Evidence of money laundering was provided by his lawyer and bookkeeper, Edward J. O'Hare: investigation by the Special Intelligence Unit of the Treasury Department was conducted by the forensic accountant Frank Wilson (Czarniawska, 2012). The case against Capone was based on information contained in ledgers in which receipts and payments of bribes had been recorded by his bookkeeper, Jake "Greasy Thumb" Gusik. Today, under United States (US) legislation O'Hare and Gusik would have been able (but not compelled) to file Suspicious Activity Reports (SARs) with the Financial Crimes Enforcement Network (FinCEN) regarding their client's activities. FinCEN is a bureau of the US Department of the Treasury, its stated mission to safeguard the financial system from illicit use and to combat money laundering through the collection, analysis, and dissemination of financial intelligence to prosecutorial authorities (Pacini *et al*. 2019). Capone's prosecution illustrated the sometimes-conflicted role of the auditor (Mitchell *et al*. 1998). O'Hare owed a duty of confidentiality to his client, and the gangster had relied upon this silence. However, he subsequently agreed to co-operate with the Treasury, identifying Gusik who would provide the evidence upon which Capone's prosecution for tax evasion would be brought.

This study contributes to the literature regarding auditor anti-money laundering reporting obligations, providing a critique of applicable legislative frameworks in the US and the United Kingdom (UK) (Di Gabriele and Huber, 2015; Huang, 2015; Norton, 2018). The regimes are compared for the following reasons. First, the US has a written constitution whereas the UK does not. This constrains the ability of the legislature to extract information from auditors through increasingly intrusive legislation; the US Supreme Court acts as a counterbalance to legislative activism in the auditor-client confidentiality space. This contrasts with the UK where judges in the highest court, the Supreme Court, have no authority to strike down legislation, or to hold the legislature to account (other than through the limited process of judicial review), or to protect privacy or the confidentiality principle in the auditor-client relationship. Second, US anti-money laundering laws, specifically the Currency and Foreign Transactions Reporting Act 1970 (hereafter the Bank Secrecy Act 1970) and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct

Terrorism Act 2001 (hereafter the Patriot Act 2001) accommodate professional discretion in the reporting process, and a *de minimis* rule applies: transactions below a certain monetary threshold do not need to be reported. The UK does not provide for discretion and does not have a minimum reporting threshold rule. Finally, non-compliance by UK auditors with the reporting regime embodied in the Proceeds of Crime Act 2002 can result in criminal prosecution; in contrast in the US, auditors do not face this ever-present risk unless actively involved in criminality as accomplices or accessories after the fact under the general law (Dellaportas, 2013).

The research questions are as follows. First, what are the optimal ways of ensuring engagement by auditors with statutory anti-money laundering reporting regimes? This raises a contrast between 'tick box' compliance on the one hand, and the exercise of professional judgement on the other (Martens and McEnroe, 1992). Second, by which methods can the intelligence content of SARs be assured, and Proceeds of Crime Act 2002-enabled defensive filing avoided? (Firth et al. 2012; Gullkvist and Jokipii, 2013). Third, how do the UK and US statutory regimes compare in achieving these objectives? The next section provides a literature review of the role of information in anti-money laundering reporting regimes in the US and UK. Section 3 examines suspicious activity reporting in the US, and the constitutional constraints to which it is subject. Section 4 critiques the suspicious activity reporting regime in the UK. Section 5 provides options for reform of the UK SARs legislative framework. Section 6 concludes.

2. Role of information in suspicious activity reporting regimes: literature review

Du Rietz (2018) proposed that a distinction should be drawn between knowledge and information in accountability settings, based upon a body of work that has treated information as knowledge (the power to act), and information as control. The strength of information in its ability to contribute to knowledge depends in part on its origin, convergence with other accounts, and use in contradicting and disproving alternative sources. Suspicious Activity Reports (SARs) are the main source of information which informs Financial Intelligence Units (FIUs) such as the NCA in the UK and the Financial Crimes Enforcement Network (FinCEN) in the US regarding the presence of money laundering. However, if the source- the auditor, lawyer, or other professional who filed it- has ulterior objectives such as defensive filing or client retention, the evidential value of informational content may be weakened. Effective

engagement by auditors in the reporting process, and the informational veracity of SARs, may be compromised (Humphrey and Moizer, 1990). Norton (2018) described how over-filing has become a significant problem in the UK, resulting in an excessive volume of SARs with low intelligence value being submitted. This coincides with earlier findings by Takats (2011) that excessive reporting, or "crying wolf", can dilute informational content and how, paradoxically, more reports can mean less useful information.

Roberts and Scapens (1985) proposed that accounting information can be flawed, highlighting certain issues and concealing others. However, a legal obligation to disclose does not necessarily enhance the evidential weight of that which would otherwise have been disclosed voluntarily, informed by professional judgement (Yeoh, 2014; Rose, 2020). Information facilitates accountability and control; SARs provide statistics regarding the level of suspicious activity reporting across sectors, including accountants and tax advisors, lawyers, estate agents, brokers, and commodities dealers. A diminution of reporting in one sector relative to others draws the attention of FIUs; questions will be asked of the relevant professional body as to why the decline has occurred and what measures, for example enhanced compulsory training, will be put in place in response. As Du Rietz (2018, at p588) observed, the fact that others may know your performance induces self-discipline. Law and accountancy practices are routinely audited for the robustness of anti-money laundering safeguards, and wider regulatory compliance (Windsor and Warming-Rasmussen, 2009).

Information is essential for the effectiveness of anti-money laundering regimes: without it, it becomes difficult for FIUs to identify the sources of illegal money and its destination. A word common to the US and UK legislation is 'suspicion'. Section 312 of the Patriot Act 2001 uses it in the context of due diligence programmes implemented by financial institutions through which money laundering is detected and reported. In the UK Proceeds of Crime Act 2002, sections 327, 328, and 329 create three principal money laundering offences where the alleged offender knows or suspects that property constitutes or represents benefit from any criminal conduct. The word is subjective, defined in the Cambridge Dictionary as 'A belief or idea that something may be true'. It is further elucidated: 'A feeling or belief that someone has committed a crime or done something wrong'. Auditors cannot detect criminality: they often lack the forensic skills or educational training to do so (Rezaee and Burton, 1997). Suspicion and the reporting of it reflects a subjective interpretation of information based upon professional judgement. It may be quantitative: the 'facts and figures' for use by shareholders to determine the financial health of a business. It may be qualitative: intuition that an ostensibly

lawful corporate transaction or structure, or an owner's behaviour or reluctance to furnish additional explanation, conceal underlying criminality.

3. Suspicious Activity Reporting in the US

In the US, the 2018 National Money Laundering Risk Assessment Report by the Treasury stated that domestic financial crime, excluding tax evasion, generates approximately $300 billion of proceeds for potential laundering. The crimes generating the bulk of illicit proceeds were identified in the Report as comprising fraud, drug trafficking, human smuggling, human trafficking, organised crime, and corruption (Javaid and Arshed, 2022). The anti-money laundering framework is contained in the Bank Secrecy Act 1970, the Patriot Act 2001, and subsequent legislation. The former imposes upon financial institutions an obligation to report to the US Treasury suspicions of money laundering (Abel and Gerson, 2001). It comprises a 'Know Your Client' requirement, as well as record-keeping obligations. The latter was introduced primarily in response to the September 11, 2001, terrorist attacks on the Twin Towers of New York City's World Trade Center, and imposes an obligation to file SARs when there is suspected money laundering.

Auditors in the US are not required to design audit procedures to detect criminal activity which may have an impact upon financial statements but if detected, their first point of reporting is to the management of the company being audited and not to FinCEN. Auditor reporting obligations are set out in the Statement of Auditing Standards (SAS) no. 54; the obligation to file a SAR was imposed on financial institutions in 1996. Under the Patriot Act 2001, SARs must be filed by auditors employed in financial institutions and although the wider accounting profession is not specifically covered, auditors are at liberty to voluntarily file (Romaniuk *et al.* 2007). FinCEN encourages engagement with the reporting system instead of mandating it by requiring filing in all circumstances regardless of an auditor's interpretation of facts. Under the Securities Exchange Act 1934, Congress enacted the Private Securities Litigation Reform Act 1995, or the Tort Reform Act. The Act requires auditors to implement procedures which enable them to identify clients' illegal acts that have a "direct" and "material" effect on financial statements. Only if they are dissatisfied with management's remediation of the illegal act is there an obligation to report it to the company's board of directors.

As part of this research, statistics were requested from FinCEN relating to the filing behaviour of US auditors. The response received was thus: "The SAR Stats feature on our website makes statistics on certain SAR data available to the public. Information that would be indicative of a voluntary filing or filings filed by accountants specifically would not be available via SAR stats, nor would FinCEN be able to provide those statistics". The lack of statistics for SARs filed, investigated, and which lead to successful prosecutions, is a substantial failing and has been the subject of sustained criticism in the political and academic domains (Wallmeier and Helmig, 2019). However, one of the principal foci of this paper was an enquiry into the legislature's influence upon auditor reporting behaviour: caselaw and judicial comment on constitutional aspects provide rich qualitative data which compensates for the lack of quantitative statistical material.

3.1 Constitutional dimensions to compelled disclosure, and searches.

Laws which affect the auditor- client relationship, for example those which mandate the reporting of confidential information, are subject to constitutional constraints. Although there is no explicit right to privacy under the Constitution, the 4th Amendment provides the right of privacy for a person and their possessions against unreasonable searches, the 5th a privilege against self-incrimination, and the 9th a vaguer statement that 'enumeration of certain rights shall not be construed to deny or disparage other rights retained by the people'. This last Amendment was interpreted by Justice Goldberg in Griswold v. Connecticut 381 U.S. 479 (1965) as a basis for applying the Bill of Rights to protect privacy in ways not specifically identified in the first eight Amendments. In Latigo Ventures v. Laventhol and Horwath 876 F. 2d 1322, 1327 (71h Cir. 1989), Circuit Judge Posner commented;

> 'Relations of trust and confidence between accountants and client would be destroyed if the accountant were duty-bound to make continuous public disclosure of all the client's financial adversities. And the costs of auditing would skyrocket to compensate the accounting profession for the enormous expansion in potential liability, not to mention the increase in the costs of publication'.

Again, in Barker v. Henderson, Franklin, Starnes and Holt 797 F. 2d 490 (7th Cir. 1986), Circuit Judge Easterbrook observed;

> 'Law firms and accountants may act or remain silent for good reasons as well as bad ones'.

To infer from the silence of a professional firm a conspiracy to defraud would be to expand the scope of liability far beyond that already established in caselaw. In United States v. Arthur Young and Co., U.S. 805, 818 (1984), it was observed in the Court of Appeals that:

> 'If a person feels secure that his statement will be held in confidence, he will speak much more expansively and fully than he would otherwise. An audit client or [that client's] attorney who is concerned that the client's confidence to his auditor will be scrutinized by the Internal Revenue Service [IRS] will be much more guarded with his information than otherwise, and the auditor will learn much less'.

On appeal by the Internal Revenue Service the United States Supreme Court, whilst deciding that auditor tax working papers were not privileged, affirmed that the integrity of securities markets derived in part from full and frank disclosure, made on a confidential basis. Protection of information discovered during the client-advisor relationship was necessary, not only because of the trust which it engendered between the parties, but also because it was a prerequisite to the efficient functioning of markets (Healy and Palepu, 1993). Negative information would not be kept secret or held back; the client could be more accurately advised regarding possible remedial measures or, should law-breaking have deliberately or accidentally taken place, how best this could be negotiated or settled with the relevant authorities. Judicial concerns expressed in *obiter dicta* in established caselaw found resonance in political statements made during the progress of the Patriot Act 2001 through the US Congress and its subsequent renewal, and are considered next.

3.2 Client confidentiality in the political domain

The principle of client confidentiality has been supported in the political arena (Levinthal and Fichman, 1988). During a Congressional debate in the Senate in May 2011 on the proposed extension of the Patriot Act 2001, there was political opposition to a law perceived to be excessive in entitling the state to access and store private information. During the debate Democrat Senator Wyden of Oregon observed: 'I know Americans believe we ought to only use Patriot Act powers to investigate terrorists or espionage-related targets. Yet section 215 of the Patriot Act, the so-called business records provision, currently allows records to be collected on law-abiding Americans without any connection to terrorism or espionage. If we cannot limit investigations to terrorism or other nefarious activities, where do they end?'

Republican Senator Rand Paul of Kentucky also commented:

> 'Jefferson said if we had a government of angels, we wouldn't have to care or be concerned about the power that we give to government. Unfortunately, sometimes we don't have angels in charge of our government. Sometimes we can even get a government in charge that would use the power of government in a malicious or malevolent way, to look at the banking records of people they disagree with politically, to look at the religious practices of people they disagree with. So it is important that we are always vigilant, that we are eternally vigilant of the powers of government so they do not grow to such an extent that government could be looking into our affairs for nefarious reasons'.

These criticisms illustrate concern about the potential misuse of information for political purposes. The default position is that there should be no general entitlement of the state to demand information: instead, it should be requested for precisely defined purposes, for example to combat terrorism. This section has explained how auditor professional judgement forms a significant component of the anti-money laundering reporting process in the US. Client confidentiality, and the objective of encouraging full and frank disclosure by clients, are touchstones for the judiciary and politicians when new legislation is proposed. In the UK in contrast, anti-money laundering legislative activity is not subject to constitutional constraints- the UK lacks a written constitution- nor judicial oversight (Murkens, 2021). The legislative framework is considered next.

4. Suspicious Activity Reporting in the UK

In the UK, the principal anti-money laundering statutes are the Proceeds of Crime Act 2002 as amended by the Crime and Courts Act 2013, and the Serious Crime Act 2015. Under the 2002 Act auditors are obliged to 'know their clients', and to submit a SAR when they suspect that money laundering is about to, or has, taken place. SARs are stored in the ELMER database, under the auspices of the NCA. Statutory provisions lack a *de minimis* rule and do not accommodate discretionary reporting. The Proceeds of Crime Act 2002 established two distinct regimes for the filing of suspicions about criminality generally, and money laundering specifically. The first requires institutions in the reporting sectors, including auditors, to file a SAR relating to suspicions that arise concerning criminal property or money laundering. In R. v. Da Silva [2006], it was acknowledged that 'suspicion' is not defined in the 2002 Act. The

Court of Appeal defined suspicion of money laundering as being a possibility which is 'more than fanciful', that the other person was or had been engaged in, or benefited from, criminal conduct and that the suspicion formed was 'of a settled nature'. There does not need to be anything amounting to evidence of the suspected money laundering; the threshold for suspicion under the 2002 Act is generally considered to be low. The second regime allows persons and businesses generally, and not just those in the reporting sectors, to avail themselves of a defence against money laundering charges by seeking the consent of the NCA to undertake an activity (a 'prohibited act') about which they have concerns.

A Defence to Anti-Money Laundering (DAML) application can be made under section 335 of the Proceeds of Crime Act 2002, and the NCA will either approve the transaction proposed by the client within seven working days or instruct the filer not to proceed with it. If consent is given, then the transaction can go ahead. If it is later found to involve a prohibited act, then the auditor will have a defence to a charge of money laundering. In effect, instead of exercising discretion and forming a view, auditors can now pass this responsibility to the NCA. Under the Criminal Finances Act 2017, the NCA has power to apply to a magistrates court for Further Information Orders in the course of money laundering enquiries. By these orders information can be demanded from regulated persons (which includes auditors) following the filing of a SAR. Under the Act, the NCA can seize suspected criminal property without bringing a prosecution, through an Unexplained Wealth Order. This device has been used in respect of UK assets held by Russian oligarchs following Russia's invasion of Ukraine in February 2022.

4.1 SARs in the UK: systemic weaknesses and political criticism

In a report produced by the House of Commons Home Affairs Select Committee, 'Proceeds of Crime. Fifth Report of Session 2016/2017' the following statement was made regarding failings in the SARs filing process:

> 'We have become deeply concerned for some time that the ELMER system for Suspicious Activity Reporting (SARs) is heavily overloaded and therefore rendered completely ineffective. The ELMER system currently processes 381,882 SARs [last year] despite being designed to manage only 20,000 [yearly] and, of this figure, only 15,000 are looked at in detail. We have reminded the Government time and again that it must be replaced. The failure of ELMER has made the SARs system a futile and impotent weapon in the global fight against money laundering and corruption'.

In 2018, the UK Home Office requested the Law Commission to review limited aspects of the anti-money laundering regime.

It subsequently made 19 recommendations to improve the effectiveness and efficiency of the SARs regime, amongst which the following are significant. The consent regime should be retained since it provided useful intelligence to the NCA. The "all crimes" approach to money laundering should be retained, but with statutory guidance to be provided to ensure that information of limited intelligence value would be sifted out. The current situation in which there is no *de minimis* rule should be retained.

4.2 SARs in the UK: statistical evidence

In June 2019, a Law Commission enquiry set up by the UK Home Office to investigate the SARs regime reported that money laundering costs every household £255 a year. (The Law Commission is the statutory independent body created by the Law Commissions Act 1965 to keep the law of England and Wales under review and to recommend reform where it is needed). Statistics produced during the period 2012-2022 by the NCA suggest a paradox. Although the volume of SARs filed across all reporting sectors has been rising year on year, the number filed by the accounting profession has been consistently low; despite sporadic improvement it continues to underperform most other reporting sectors (Norton, 2018). In its 2019 Annual Report, the NCA stated that the number of SARs filed by lawyers and accountants remained low relative to other sectors. According to reports issued by the NCA between 2012-2015, of all SARs submitted by sectors including credit institutions (the largest filers), independent legal advisors, estate agents and trust or company service providers, accountants filed 2.06% in 2012, 1.71% in 2013, 1.39% in 2014, 1.21 in 2015, and 1.06% between October 2015 and March 2017. In 2019 accountants submitted 5,055 SARs: a percentage contribution to total SARs filed in that year of 1.06%. This reflected a fall of 1.65% on the previous contribution to the overall percentage for the year 2017-2018. In its latest annual report of 2022, the NCA reported that during the period April 2020 to March 2021, 4,673 SARs were filed by accountants, constituting 0.63% of the overall figure, representing a decline from 2019-2020 of 12.61%.

During the period April 2021-March 2022, 5,863 SARs were filed by accountants, representing 0.65% of the total and an increase of 25.47% on the previous year. However, during this latest period reported by the NCA, most other sectors showed an increase on the previous year's figures, in most cases greater than that achieved by accountants. For example, credit institutions – building societies- showed a percentage increase on the previous year of 90.80%, other credit

institutions 37.88%, independent legal professionals 29.07%, trust or company service providers 53.85%, and other sectors not covered under the Money Laundering Regulations 179.24%. Improvement in accountants' reporting volume did not substantially increase relative to other reporting sectors during this latest period, these having improved filing rates by significantly greater percentages. Although a rising tide lifts all ships, the latest NCA report shows that other sectors have risen to a greater extent than that achieved by accountants (the reports do not distinguish between auditors and accountants). The previous two sections have explained and critiqued anti-money laundering legislation in the US and the UK. The next section draws upon the US experience to make suggestions for improvement of the UK SARs reporting regime, and to enhance auditor engagement.

5. The UK SARs regime: options for reform

Literature discussed in section 2 illustrated the importance of information to anti-money laundering regimes. It populates the SARs databases in the US and the UK, providing the sole point of reference for software which searches for key words and phrases. It informs FinCEN and the NCA regarding the degree of engagement by regulated sectors, including auditors, as manifested in the year-on-year volume of SARs filed. It informs government regarding money laundering techniques utilised by organised crime in the context of specific crimes such as illegal narcotics, prostitution, and terrorism (Cassella, 2003). This in turn informs allocation of future funding to those areas of crime experiencing an upsurge, and potentially a diminution to those in which it is static or declining. Statistics regarding performance of the UK reporting system provided in section 4 evidence an underperforming regime; further, a significant percentage of crimes are not investigated. The question for legislatures is how to extract intelligence-rich information from auditors (Humphrey *et al.* 1993; Funnell, 2003). Discretionary reporting underpins applicable US legislation: compulsion would abrogate the constitutional framework applicable to the auditor-client relationship. There is also a *de minimis* rule, although even in this context professional judgement is retained. Minor transactions which fall below the threshold but which, when pieced together with others, suggest the presence of money laundering, may still be reported through a SAR. The Proceeds of Crime Act 2002 mandates auditor reporting: there is no discretion, no exercise of professional judgement, and failure to comply according to section 333 may result in criminal

prosecution. In the US, in contrast, there is a subtle use of power underpinning legislation which eschews the compulsory approach taken in the UK and is subject to the constraints of a written constitution which has no UK equivalent. Foucault (1988, p.19) characterised laws as technologies of domination in which government stipulates a mode of behaviour and mandatory compliance (Smith, 2000). In contrast, the exercise of judgement constituted a technology of the self implying self-regulation, and modification or adjustment of one's behaviour by reference to external rules, regulations, norms, or expectations.

If auditors are given reporting discretion, as is the case under the US Banking Act 1970 and Patriot Act 2001, then they accept responsibility should withholding information subsequently prove to have been mistaken. Judgement which proves to have been flawed does not risk fines or imprisonment, as is the case under the UK regime, but instead sanctions by a professional body (Ariail *et al.* 2020), public opprobrium should it reach the media, and possibly, loss of a license to practice. For Foucault (1993, pp.203-4) the exercise of power shapes the field of action of others (Habermas, 1994). It is not used to mandate actions, which would constitute domination: instead, technologies of the self are used to make individuals responsible for the consequences of their professional judgement (Lazzarato, 2000; O'Malley, 1996). Auditors may be compelled through threat of sanctions to file SARs and to comply with a statutory reporting regime (Hoskin and Macve, 1986). Firms must dedicate financial resources to compliance and develop internal processes by which evidence of suspicious behaviour is channelled, scrutinised, formatted, and then ultimately filed through an online portal. Internal systems for ensuring that this is done become part of a licensing process: firms must prove to professional bodies that these are effective and efficient and comply with codes of conduct, and training of personnel through Continuous Professional Development which must be undertaken each year. Addison and Mueller (2015) suggested that in the field of audit the major players- the big four accountancy firms- must appear to be guided by principles of professional ethics to pre-empt governmental intervention through legislation, or pro-actively deal with "the regulatory skirmishes that occasionally disturb the cosy relationship between the accounting industry and the state" (Sikka and Willmott, 1997, p. 155).

Paradoxically, by enabling auditors to request a DAML, responsibility for evaluating the intelligence content of information is shifted to the FIU. The NCA disclosed that in the 2017-2018 financial year it received over 460,000 SARs, representing a 9.6% increase on the previous year, and a record number. However, this increase was in part attributable to defensive filing whereby persons make a SAR even if the suspicious nature of the transaction is

questionable, to protect themselves against the risk of committing a criminal offence under section 330 of the Proceeds of Crime Act 2002. Consequently, there has been an increase in the filing of low intelligence value SARs which has added to the strain on the NCA whilst leaving other crimes undetected, as acknowledged in the report by the Law Commission in 2019. Between April 2018 and March 2019, the number of SARs received across all sectors increased by 3.13% from 463,938 in 2017-2018 to 478,437. However, during the same period there was an increase in DAML requests from 22,619 to 34,534: a 52.72% increase. For the accounting sector the number of DAMLs filed increased from 266 (2020-2021) to 364 (2021-2022), a 73% increase. In the most recent NCA report, the turnaround time for responding to DAML requests has deteriorated from 2.82 days in the period 2020-2021 to 3.1 days in 2021-2022, a decline of 10%. DAMLs evidence defensive filing by reporting sectors generally and by accountants specifically. This reflects a reality that there is no scope for the exercise of professional judgement and every suspicion, however weak, must be reported or advance approval obtained from the FIU in the form of a DAML.

6. Conclusion

In the UK, auditors are statutorily required to file SARs for all suspicious transactions, however trivial. The paradox is that although mandatory reporting lies at the heart of the UK regime, engagement has been declining according to NCA statistics. Defensive filing has increased significantly, as evidenced by the year-on-year statistics for DAMLs. A recent decline in turnaround times provides early indication of systemic stress which is likely to worsen in the future. The greater the specificity of the law in prescribing what an auditor can and cannot do, the lesser the space in which professional judgement can be exercised (Collins *et al.* 2012). For example, if *all* suspicious activities must be reported, then this necessarily precludes a *de minimis* rule. This raises a contrast between 'tick box' compliance on the one hand, and professional judgement on the other. Martens and McEnroe (1992) emphasised the position of public trust held by auditors and the need to opine on substance when in practice the reporting environment is "rules dominated" at the cost of a neglect of substance. It was shown in section 5 how defensive filing in the UK has been increasing significantly in recent years, ceding the scrutiny function from auditors to the NCA (Firth *et al.* 2012; Gullkvist and Jokipii, 2013). This has human resourcing implications for the FIU, exacerbating an already stretched system

in which a substantial proportion of SARs are uninvestigated. Absence of professional discretion may also contribute to the low intelligence content of SARs. This coincides with the finding by Mugarura (2020), that, whilst financial institutions cannot be allowed to operate in a lawless environment, there is a need to ensure that businesses are able to conduct their activities with minimal but effective regulatory interference.

In the UK there has been political criticism of the SAR reporting process and the quality of information filed. The Law Commission Report of 2019 identified failings, resulting in nineteen recommendations for change. In the US in contrast, auditors are not defined as 'financial institutions' under the Bank Secrecy Act 1970 and accordingly are not compelled to file SARs. Guidance notes issued by FinCEN encourage engagement through voluntary filing, and assumption of the risk of consequences of failure to report should this subsequently prove to have been erroneous. In this way auditor reporting behaviour is shaped and guided through a discretionary reporting route: power is exercised subtly and unobtrusively (Foucault, 1878, 1979). The US reporting regime comprises obligatory and voluntary reporting routes, safe harbour protection, and a proactive judiciary and political establishment intermediating in the space between client confidentiality and the duty of the state to protect its citizens from criminality generally and terrorism specifically (Baldwin, 2002). In the UK, this space is unoccupied: the judiciary must apply the law as it is written and do not have a constitution against which legislation such as the Proceeds of Crime Act 2002 can be tested.

For the UK SARs regime to become more effective, auditors could be empowered to exercise reporting discretion, perhaps with a *de minimis* threshold. Discretion not to report trivial transactions has been repeatedly advocated by professional bodies and yet the UK legislature has repeatedly rejected this for being overly complex, even though it has been successfully applied in the US since the Banking Act 1970. Self-guidance, empowerment and responsibilisation configure power as a strategic game in which the state shapes the conduct of auditors whilst not curtailing their liberty or professional judgement (Foucault, 1988). In making auditors responsible for the quality of the SARs filed and providing a voluntary reporting route, this may reduce defensive filing and improve the intelligence content of information stored in the database. In terms of how professional bodies should negotiate future proposals for legislative reforms, the US experience is instructive. If future laws are used to extract ever-increasing amounts of data, legislative activism should be critiqued on ethical and market efficiency grounds as per judicial reasoning in the US. Legislative conservatism rather

than ever-expanding mandatory reporting obligations, combined with responsibilisation of auditors, should be the default position.

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