

# [Actions that the mlro of bcd should take](https://assignbuster.com/actions-that-the-mlro-of-bcd-should-take/)

## Introduction

AMoneyLaundering Reporting Officer (MLRO) is an officer within a firm or practice that has been nominated to make disclosures to the National Crime Agency (NCA), formerly the Serious Organised Crime Agency (SOCA), under the Proceeds of Crimes Act (POCA) 2007 and theTerrorismAct (TA) 2000. It is provided under Regulation 20 of the Money Laundering Regulations 2007 that if an MLRO receives an internal disclosure of suspected money laundering or terrorist financing, they are required to consider the disclosure and decide whether the grounds of suspicion are sufficient enough to pass the disclosure onto NCA (Ellinger et al; 2011: 98). Since the MLRO of BCD Bank has received an internal money laundering suspicion report from Christian, they will be required to consider whether the matter should be passed onto NCA. Given that Radovan Rankovich (RR) is allegedly wanted by the authorities in the Ukraine for criminal actions against the state, and has received a recent transfer of ? 15 million from a Corporate Service Provider in Cyprus, it is likely that this would warrant a disclosure to NCA for investigation. In accordance with this, the MLRO will be required to file a Suspicious Activity Report (SAR) with NCA and subsequently liaise with them to deal with this matter accordingly (Ellinger et al; 2011: 97). Part 7 of POCA makes it a requirement for banks to make a disclosure to NCA if they reasonably suspect that a person is involved in money laundering (s. 329). If the MLRO fails to make such a disclosure then he or she may be found criminally liable under this Act for afailureto disclose (s. 331).

This is because a person commits an offence under s. 329 if they; acquire, use or have possession of, criminal property. Since a bank would fall within the scope of this section, it is possible that BCD Bank would be subject to criminal proceedings if they failed to take the appropriate action and thus make the relevant disclosures. If the MLRO does not believe that the grounds of suspicion are sufficient to report the matter to NCA, then the MLRO will be required to make further inquiries (International Monetary Fund, 2011: 65). Once the MLRO has made a report to NCA, the report will be ‘ protected’ under s. 337 so that nothing in the report shall be taken to breach any restriction on the disclosure of information. Given that BCD Bank may have engaged in money laundering by allowing RR’s transactions to take place, they may have a defence under s. 338 if they make demonstrate that they made the disclosure as soon as possible. Similar provisions also apply under the TA if the person is also suspected of terrorist financing. As Christian has received a text message stating that RR is wanted by the authorities in the Ukraine for criminal actions against the state, it is likely that the MLRO will also be required to comply with the provisions under the TA for a reasonable suspicion of terrorist financing. An obligation to report under the TA will therefore arise which means that the MLRO will be required to disclose the identity of RR, any information that relates to the matter and the whereabouts of the laundered property.

There are two different types of report that may be made by the MLRO, namely protected reports and authorised reports. A protected disclosure is made by a person during the course of their trade, profession or employment. This type of disclosure is generally made by a person who is carrying our professional activities. An authorised disclosure is made by a person who is about to commit a prohibited act or has already committed a prohibited act (Bastable and Yeo, 2011: 108). Since the bank has already dealt with the property that is suspected of being laundered, it is more appropriate for an authorised disclosure to be made. The MLRO will also be required to obtain consent from NCA under ss. 335 and 336 to determine whether Christian can action any further transfers out of RR’s account. This will be done by making a ‘ consent report’ to NCA, which will then block any transactions for seven working days. If NCA gives consent to the MLRO, the MLRO will then be able to give consent to Christian to carry out the transactions (Bastable and Yeo, 2011: 108). If NCA refuse consent, however, the proposed transactions will be frozen for a further 31 days, unless consent is granted during that period; R (on the application of UMBS Online Ltd [2007] WL 1292620.

The Risks and Issues for the Bank

This particular issue regarding RR is likely to be problematic for the BCD Bank as they will want to act in the best interests of their customer, namely RR, so that they remain in business with them whilst at the same time they are required to fulfil certain obligations imposed upon them by law. Because BCD will be required to disclose their suspicions even if RR has not acted in a criminal manner, this will have a damaging effect upon RR’s reputation and as put by Hislop (2009); “ absent bad faith, little more than a “ bad feeling” can trigger a banks disclosure obligations under POCA 2002, with in some cases catastrophic commercial consequences for the customer and a damning of his hitherto “ good name” in the business community.” If the banks suspicions are incorrect, this can be significantly detrimental for RR. As such, the bank will need to be careful that they are striking a balance between the interests of RR with its duties to disclose. In the recent case ofSHAH and another v HSBC private bank (UK) Ltd (2009) EWHC 79 (QB)the implications Part 7 has upon the rights of the individual and the banking business was clearly highlighted.

Here, it was demonstrated that where a bank makes a SAR inrespectof a suspicious transaction, they may not be provided with protection if the customer decides to challenge the banks suspicions in the future. This is so, despite the fact that a criminal offence may have been committed if the bank failed to make such a disclosure. Customers will have a right to challenge the banks suspicions with the bank then being required to prove that the suspicion was reasonable. It may be difficult to determine how the bank can justify making a disclosure since it was made clear by the court in this case that “ the defendant must think that there is a possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease would not suffice.” The bank will therefore be taking a risk in many any disclosure, especially this one since it will have to be shown that the text message was sufficient enough for a disclosure to be made. Furthermore, even if the circumstances do render a disclosure justified, the bank’s decision may still be challenged which can be costly and time consuming. InK Ltd v National Westminster Bank plc[2007] 1 WLR 311it was noted by the Court that; “ to intervene between a banker and his customer in the performance of the contract of mandate is a serious interference with the free flow of trade. But Parliament has considered that a limited interference is to be tolerated in preference to allowing the undoubted evil of money-laundering to run rife in the commercial community.”

Therefore, even though such a disclosure may interfere with the relationship between the bank and RR, such interference will be necessary if it will be likely to prevent money laundering from taking place. The bank needs to be clear that an interference of RR’s account is appropriate on the circumstances, since a frozen bank account for a period of time has in the past been considered a ‘ grave injustice’ in the case ofSquirrell Limited v National Westminster Bank plc (Customs and Excise Commissioners intervening[2006] 1 WLR 637. Here, the customer’s funds were frozen resulting in the customer being unable to afford the legal fees it would cost to challenge the decision. Therefore, if RR’s funds were frozen, which subsequently prevented RR from challenging the decision; it is unlikely that this would be deemed appropriate by the court. In accordance with this, it has been said that the test for suspicion is “ a purely subjective matter” (Medroft, 2010: 190). The decision as to whether the suspicion is reasonable will therefore depend upon whether Christian actually believed that the transaction was suspicious. If it cannot be found that this is the case, the interference cannot be considered justifiable and a breach of the customer’shuman rightsmay also be established as inK Ltd.

The bank will therefore be required to consider whether ‘ reasonable grounds’ do actually exist, having regard to the elements constituting market abuse offences (Hudson and Hutchinson, 2009: 1). There are many inherent risks that are associated with disclosures and as such, it is vital that the bank is aware of its exact rights and obligations. InSHAHthe court found that the bank did not act in an unreasonable manner which is likely to be the case in the instant situation. As such, it will most likely be difficult for RR to show that the bank had not acted in good faith. However, it could be argued that there was an unreasonable delay by the bank to make the disclosure under s. 338(2). As a result of this, the bank could be exposed to liability for breach of itsduty of care(Medroft, 2010: 190). Whether this is acceptable remains an arguable subject but as expressed by Benjamin (2007: 62); “ here the objective is not informed consent to risk but combating crime.” Accordingly, it is therefore generally accepted that a bank’s interference will be justified on public policy grounds. The bank will still be subjected to many risks when making a disclosure, nonetheless, and must therefore consider whether the consequences of making a disclosure can be justified (Ellinger et al. 2010: 114).

In addition, if the bank decides to make a disclosure, they must be careful not to allow the customer to find out as they can be found liable for ‘ tipping off. This is another issue that may arise since a customer could become aware that a disclosure has been made simply due to the fact that their account has been suspended. It could be said that the bank is in a difficult situation as whatever option it takes, sanctions may still be imposed. As one judge noted inGoverner & Company of the Bank of Scotland v A Ltd [2000] Lloyd’s Rep Bank 271, 287;“ the bank may commit a criminal offence if it pays or if it refuses to pay.” Furthermore, if the bank makes a disclosure based on its suspicions, which later turn out to be unfounded, the bank risks civil liability for breaching its contract with its customer (Ellinger et al: 2010: 114). This is because the bank will have frozen the customer’s account which would have prevented payments from being made in and out of the account. Because the banks have a significant burden imposed upon them when it comes to dealing with money laundering, some attempt has been made to ensure that banks acting in good faith will not face criminal liability. For example, it was held by the court inC v S [1999] 2 All ER 343that “ it would not normally be an abuse of process to prosecute a bank which was doing no more than obeying a court order for disclosure.” Still, it is necessary for the bank to consider all of the risks before considering whether to make a disclosure or not.

Overall, it is necessary on the facts for the MLRO of BCD Bank to make a disclosure to NCA since it does appear that the suspicions are reasonable. This is based upon the transaction of ? 15 million that was made recently as well as the text message that Christian has received. Whilst the bank would be required to examine the potential issues with disclosing such information and freezing the account of RR this appears necessary and in the public interest. It will most likely prevent money laundering activities from taking place and will ensure that Christian, the MLRO and the bank are complying with their obligations.

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