

FCA Sends Banks Strong AML Message With Santander Fine

By **Tom Bushnell** (January 12, 2023)

On Dec. 8 last year, the U.K. Financial Conduct Authority announced it had imposed a nine-figure financial penalty on Santander UK PLC for failing to properly adhere to its anti-money laundering rules.[1]

The £107.79 million (\$130.99 million) penalty came almost exactly a year after another high street bank, this time National Westminster Bank PLC, known as NatWest, was fined £264.77 million (\$321.75 million) after it pled guilty to three offenses under the Money Laundering Regulations 2007.



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Before NatWest, HSBC Holdings PLC and Standard Chartered PLC were also on the receiving end of multimillion-pound FCA penalties for anti-money laundering weaknesses.

But other than positive headlines for the FCA, and financial headaches for the banks, what does this latest penalty on Santander mean? What can lawyers and AML professionals learn from it?

The Santander Penalty

Santander was found by the FCA to have breached Principle 3 of its Principles for Businesses. Principle 3 requires that a firm "take reasonable care to organize and control its affairs responsibly and effectively, with adequate risk management systems."

Sitting beneath that in the FCA's handbook is Senior Management Arrangements, Systems & Controls. The relevant parts of this require firms like Santander to have systems and controls to meet the firm's regulatory obligations and prevent the firm being used to further financial crime.

Regulatory obligations here includes the Money Laundering Regulations 2007 and 2017.[2]

The FCA found AML weaknesses in Santander's business banking portfolio. These included failures to share relevant AML information between different parts of the business, and failures to obtain sufficient information about customers when onboarding them.

Those weaknesses continued during the lifetime of customer relationships: The FCA found that Santander lacked "an effective framework within business banking for ongoing customer monitoring."

Ongoing monitoring is the obligation under the Money Laundering Regulations to scrutinize transactions during the course of a customer relationship, and to keep customer due diligence information up to date.

In retail banks, this obligation is usually discharged in four ways:

- Automated transaction monitoring, i.e., computer-generated reports that are triggered by unusual account activity;
- Manual transaction monitoring, i.e., staff reporting concerns;

- Investigations into activity highlighted by either form of monitoring; and
- Independent reviews, usually periodic or triggered by specific events.

Santander was criticized by the FCA in relation to three of these criteria. Its automated transaction monitoring system "lacked sophistication," some alerts were subject to significant delays before investigation; and at the start of the period under investigation, Santander did not carry out any periodic reviews on its business customers.

Finally, the FCA found issues with Santander's account closure processes which led, in some cases, to significant delays before suspicious accounts were closed.

Echoes of NatWest?

Followers of FCA enforcement action will likely have noticed the similarities with NatWest in *R (FCA) v. National Westminster Bank PLC* in 2021.

In December 2021, NatWest was sentenced to a fine of £264.77 million (\$321.44 million) after it had earlier pled guilty to breaches of the Money Laundering Regulations 2007.

This was the first time the FCA had chosen to use its criminal powers in relation to AML and as such it remains a landmark case.

It is vital to note that the test under the Money Laundering Regulations for criminal liability is different to the test under the FCA's handbook for regulatory liability; and that the standard of proof for criminal conviction, that the jury is sure, is higher than that for a regulatory penalty — the balance of probabilities. No criminal allegation was made by the FCA in relation to Santander.

However, the two cases highlight the struggles that large banks have had in meeting their AML obligations over the last decade. Three issues stand out.

1. The Role of Individual Customers

In both the Santander and NatWest cases, the FCA identified failings in relation to particular customers in order to shine a light on the banks' systems and controls.

In the case of NatWest, Fowler Oldfield Ltd., a gold dealer, deposited £365 million (\$443 million) into NatWest accounts over the course of five years. £264 million (\$320 million) of that was in cash, with the eye-catching detail that at one branch these deposits were sometimes made in black bin liners which would occasionally tear at the weight of the money inside.

In Santander's case, it was "customers A to F," of whom "customer A" is probably the most striking. Customer A opened an account saying it was for translation services and predicted a turnover of £5,000 (\$6,000) per month. Over time, transactions on the account hit £1.5 million (\$1.82 million) per month.

The bank came to realize that customer A might actually be a money service business but a decision to close the account was not actioned until almost two years later.

Unlike Fowler Oldfield, in relation to whom an eight-month money laundering trial of its directors recently ended, no criminal allegation has been made in relation to customer A, but both cases underline the fact that the FCA can and will use the example of individual cases to shine a light on systems weaknesses.

2. Difficulties of Ongoing Monitoring

Both cases show the large banks struggling with ongoing monitoring. For a start, NatWest and Santander's automated transaction monitoring systems were found wanting, in spite of efforts over time to improve them.

Periodic reviews did not take place as regularly as they ought to: in fact, neither Fowler Oldfield nor customer A received any during their customer relationships.

Both decisions highlight problems with the teams responsible for investigating alerts generated within the bank.

In NatWest, it was a particular bank office that was found to be lacking in experience, with the "sufficient [training] material" being "insufficiently embedded."

In Santander, the weaknesses appear to have been based on resourcing pressures.

Ongoing monitoring is clearly a resource-intensive process, but one in which the FCA is particularly interested.

3. Ongoing Efforts

Finally, both these cases took place against a backdrop of the banks knowing that they had AML difficulties and seeking to remediate them.

The statement of facts agreed between NatWest and the FCA recorded the significant efforts the bank was making during the relevant period to improve its controls and processes, including via the appointment of external specialists and the undertaking of an AML change program.

Likewise, the FCA's final notice in the Santander case notes that "having become aware in December 2012, at the start of the relevant period, of significant issues with its AML framework, Santander U.K. made various changes to its AML operating model and processes for business banking during the relevant period."

It seems that compliance with these obligations has not always come easily to large retail banks, who are trying to do just that. As Justice Sara Cockerill summed up when sentencing NatWest:

Even [NatWest's] compliance costs are enormous — the increase which has recently been made from £700 million to £1 billion for the next five years gives some hint of what is needed to properly comply with these Regulations which though demanding are of such great importance."

What About Individuals?

After the conviction of NatWest in 2021, there was some clamor for action to be taken against individuals in relation to AML failings within large banks.

This appears to miss the point. The gravamen of failures in these cases — whether serious enough for prosecution like NatWest or only for regulatory action, e.g., Santander, HSBC[3] or Standard Chartered[4] — lies in system weaknesses.

In many of these AML cases, the errors in relation to particular customers did not arise because of one or a small number of individuals within the bank. Instead, the FCA took action because of weaknesses across the banks' systems.

Indeed, part of the very rationale for having AML systems and controls and utilizing the three lines of defense model is to prevent the actions of one or a few employees from allowing financial crime to occur.

As such, it should be no surprise that the Money Laundering Regulations, both 2007 and 2017, impose liability directly on regulated firms: There are no complicated rules of attribution of the wrongdoing of individuals in order to establish corporate liability.

Nonetheless, the FCA does have the power to take action against individuals for their own conduct in relation to AML failures by firms. Perhaps it is only a matter of time before the FCA does so. Individuals caught up in such cases will draw little comfort from the FCA's robust action in these cases.

What Now for the FCA?

The Santander case shows the FCA's appetite to go after big banks for AML failings remains undiminished.

It will be interesting to see how, if at all, the FCA's approach to the enforcement of these cases changes when Mark Steward, the FCA's executive director of enforcement and market oversight, steps down in the spring.

In the meantime, the imperative on firms to ensure their AML systems and controls are adequate remains.

Senior individuals within those firms should be alive to this need and do their utmost to drive compliance, lest they want to become the subject of the FCA's next Christmas headline.

Tom Bushnell is an associate at Hickman & Rose.

Disclosure: Prior to joining Hickman & Rose, Tom Bushnell was the FCA's junior counsel for the investigation and prosecution of NatWest.

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[1] <https://www.fca.org.uk/publication/final-notice/santander-uk-plc-2022.pdf>.

[2] <https://www.hickmanandrose.co.uk/the-fcas-criminal-and-civil-powers-to-combat-money-laundering>.

[3] 14 December 2021, <https://www.fca.org.uk/publication/decision-notice/hsbc-bank-plc.pdf>.

[4] Chartered 5 February 2019, <https://www.fca.org.uk/publication/decision-notice/standard-chartered-bank-2019.pdf>.