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The Prevention of Money Laundering and Funding of Terrorism Activities in Malta

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Malta's international obligations

Malta's commitment to the fight against money laundering and the funding of terrorism is firmly rooted in the country's interest in safeguarding its role as a reputable financial services centre, and buttressed by the country's status as a full member of the European Union and signatory to the main international multilateral treaties intended to tackle the affliction of money laundering in the world's financial markets

Although not a member of FATF, Malta does form part of MONEYVAL, or the Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures (formerly PC-R-EV), established in September 1997 by the Committee of Ministers of the Council of Europe to conduct self- and mutual-assessment exercises of the anti-money laundering measures implemented in Council of Europe countries not being members of FATF.

Following a commitment made by the government in the mid-1990s to tighten the country's legal and regulatory regime to close the legal loopholes that existed in the absence of adequate laws and regulations to criminalize money laundering activities, much progress has been achieved in enhancing the country's legislative framework. Malta does not appear on any international blacklist whatsoever and co-operates fully with the FATF and the OECD.

As part of its fight against money laundering and the financing of terrorism, Malta has ratified the 1999 UN Convention on the Suppression of Terrorism Financing, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime. There have also been successful efforts by Maltese financial institutions at implementing industry-accepted standards and procedures, such as the Basle Committee Statement of Principles, IOSCO's 1992 report, and the FATF's *Forty Recommendations on Money Laundering and Nine Special Recommendations on Terrorist Financing*.

Legislation on Prevention of Money Laundering and Funding of Terrorism Activities

Malta's prevention of money laundering regime is summed up in two statutory instruments, namely the Prevention of Money Laundering Act¹ (Act XIX of 1994, as amended) ("PMLA") and the Prevention of Money Laundering and Funding of Terrorism Regulations (the "Regulations"). The PMLA establishes the foundations for the legal framework by introducing basic legal definitions, laying down the procedures for

¹ Chap. 373 of the Laws of Malta



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the investigation and prosecution of money laundering offences, and establishing the Financial Intelligence Analysis Unit. The Regulations, on the other hand serve to flesh out the substantive provisions relating to the offences, throwing light on the systems and procedures to be adopted by subject persons in the course of their business activities.

The existing Regulations, which were promulgated on the 31st July 2008 (LN 180 of 2008) and subsequently amended by Legal Notice 328 of 2009, serve to implement the provisions of the Third EU Directive², bringing Malta in line with the minimum prevention of money laundering standards implemented on a pan-European level. These regulations were published following the circulation of a Consultative Document published by the Financial Intelligence Analysis Unit which invited the industry's feedback to the proposed regulations.

Besides the above sources of law, Credit and Financial Institutions are further aided by the availability of detailed Guidance Notes published by the Malta Financial Services Authority in relation to specific sectors of the financial services industry.

This legal framework is further complemented by the provisions of other unrelated legal instruments, such as the provisions of the Dangerous Drugs Ordinance 1939 (as amended in 1994), which criminalizes the handling of money in drug-related offences, and the Cash Control Regulations (LN 149 and 411 of 2007) promulgated on the 15th June 2007 in virtue of powers conferred by the External Transactions Act³, which requires any person entering or leaving Malta, or transiting through Malta with an amount of cash (including monetary instruments) amounting to € 10,000 to report such cash to the Customs Department on a prescribed form.⁴

Material elements of the offence

The PMLA makes a clear distinction between the offence of money laundering and the underlying criminal activity in order to ensure that the offence of money laundering may subsist even in the absence of a judicial finding of guilt for the criminal activity from which the property or other proceeds are derived. Besides, a conviction in respect of the underlying criminal offence does not exclude a separate charge and conviction in respect of the money laundering offence.

The material element of the offence must consist in any of the following actions and must be accompanied by the associated intentional element as indicated below:

² Directive 2005/60/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing- O.J. 309/16- 25.11.2005

³ Formerly the Exchange Control Act- Chap. 233 of the Laws of Malta

⁴ This regulation also repealed the Reporting of Cash Movements Regulations, 2004 (LN 463 of 2004)



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- Converting or transferring property, with the knowledge that such property is derived from criminal activity or participation in such activity, for the purpose of concealing or disguising the origin of the property or assisting a person involved in criminal activity.
- Concealing or disguising the true nature, source, location, disposition, movement, right over or the ownership of property with the knowledge that such property is derived from criminal activity or any participation therein.
- Acquiring property with the knowledge that such property is derived from criminal activity or any participation therein.
- Retaining without reasonable excuse property with the knowledge that such property is derived from criminal activity or any participation therein.
- Any attempt at or complicity in any of the above matters or activities.

Money laundering offences may be committed by any person including companies or other legal persons. In the latter case, guilt is attributed by way of vicarious liability to every person who, at the time the offence was committed, was a director, manager, secretary or other similar officer. However, it is possible for such person to raise the defence that the offence was committed without his/her knowledge and that s/he exercised all due diligence to avoid its commission. Criminal liability for companies is therefore based on vicarious liability. This position is, however, expected to be amended so that lack of knowledge will no longer constitute a defence where there is a lack of supervision or control by a senior official of that company, reflecting the provisions of the Third European Directive.

Since there have been few convictions of money laundering, there is a lack of jurisprudence to provide guidance on issues relating to the nature of proof required for the successful conviction of money laundering offences.

Subject Persons

Subject persons include auditors; accountants; tax advisors; real estate agents; notaries and lawyers⁵; trust, fiduciary and company service providers; nominee companies; casino licensees⁶; any person trading in goods whenever payment is made in cash and exceeds € 15,000 in a single operation or in several operations which appear to be linked. The term also includes persons conducting the business of banking, financial institutions, long term insurance, investments services, services to collective investment, any activity of a regulated market and that of a central securities depository and other related services.

⁵ Whether by acting on behalf of and for their client in any financial or real estate transaction or by assisting in the planning or execution of transactions for their clients concerning the: (i) buying and selling of real property or business entities (ii) managing of client money, securities or other assets (iii) opening or management of bank, savings or securities accounts; (iv) organisation of contributions necessary for the creation, operation or management of companies; (v) creation, operation or management of trusts, companies or similar structures, or when acting as a trust or company service provider.

⁶ Licensed in terms of Article 3 of the Gaming Act, Chap. 400 of the Laws of Malta



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Subject Persons' General Duties and Obligations

The Regulations impose a number of duties on the subject person namely identification and customer due diligence, internal record keeping, internal and external reporting and employee instruction and training.

Identification is necessary when a business relationship is going to be formed or every time a transaction is carried out, and must be made as soon as reasonably practical after contact is first made with the applicant for business. Satisfactory evidence of the applicant's identity, established on the basis of documents, data or information obtained from a reliable and independent source⁷, must be produced and this must be verified to ensure that the applicant is indeed who he claims to be. If the applicant is acting on behalf of another person, both persons must be identified.

Financial institutions therefore cannot keep anonymous accounts or other types of accounts where the owner is not identified and known. Identification is mandatory before conducting a one-off transaction equal to or in excess of €15,000. The implementation of the provisions of the Third EU Directive has introduced new provisions which cater for scenarios where simplified customer due diligence may be undertaken by the subject person in certain specific circumstances, including those where the applicant for business is similarly subject to prevention of money laundering legislation in another EU Member State or in another reputable jurisdiction⁸; where the applicant is listed on a regulated market within the EU; in respect of "pooled accounts"; in respect of certain public authorities or bodies; and in respect of any other applicant for business representing a low risk of money laundering or the funding of terrorism.

Similarly, the Regulations require the Subject Person to conduct enhanced customer due diligence based on a risk-sensitive basis and in situations which, by their nature, can present a higher risk of money laundering or the funding of terrorism, such as where the applicant for business is not physically present for identification purposes.

Subject persons are also required to pay special attention to any threat of money laundering or funding of terrorism that may arise from new or developing technologies or from products or transactions that might favour anonymity, and take such measures as shall be appropriate to prevent their use in money laundering or funding of terrorism.⁹

A subject person is obliged to designate a reporting officer who will determine whether the facts reported to him raise a suspicion of money laundering or funding of terrorism. Records of identity and records of all business transactions carried out by subject persons must be kept for at least five years from the date on which the relevant financial business or relevant activity was completed.

⁷ Regulation 7 (1) of the Regulations

⁸ Determined by the FIAU at its sole discretion

⁹ Regulation 11(5)



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Penalties applicable to Applicants for Business

An applicant for business who is found guilty of making a false declaration or a false representation or who produces false documentation shall be liable to a fine not exceeding fifty thousand euro (€50,000) or to imprisonment for a term not exceeding two years or to both such fine and imprisonment.¹⁰

Financial Intelligence Analysis Unit

Created by amendment to the PMLA in 2001 as a body corporate having a distinct legal personality, the Financial Intelligence Analysis Unit is national central agency charged with the responsibility to enforce the provisions of the Prevention of Money Laundering Act in Malta and responsible for the collection, collation, processing, analysis and dissemination of information of suspected money laundering or terrorist financing related activities, thus supporting the domestic and international prevention of money laundering and financing of terrorism law-enforcement efforts.

The FIAU has three main responsibilities:

- (i) it receives information from subject persons in respect of transactions suspected to be involved with money laundering or related to the financing of terrorism, analyses such information and report thereon.
- (ii) It exchanges information and co-operates with local and international authorities and with other international authorities, either spontaneously or through memoranda of understanding;
- (iii) It oversees compliance by subject persons with the provisions of the PMLA and the Regulations.

It is noteworthy that, notwithstanding the provisions of the Professional Secrecy Act¹¹ and/or any obligation of secrecy or confidentiality under any other law, the depositary of confidential information is obliged to communicate to the FIAU any information requested by the Unit from time to time. In effecting such disclosure, the subject person is also duty-bound to keep confidential the fact that any disclosure has been made to the FIAU. Any breach of this obligation could render the subject person liable to a fine of €50,000, imprisonment for a term of up to two years or to both such fine and imprisonment.

With a view to facilitating the fleshing out of further clarification of the Regulations, the Financial Intelligence Analysis Unit is granted the authority to issue binding procedures and guidance as may be required for the carrying into effect of the provisions of the Regulations, which shall apply to persons carrying out relevant financial business or relevant activity, provided that such procedures and guidance are issued with the concurrence of the relevant supervisory authority/ies.

¹⁰ Regulation 7 (10)

¹¹ Chap. 377 of the Laws of Malta



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The Attorney's General Office

The Attorney General may, if he has reasonable cause to suspect that a person is guilty of a money laundering offence, apply to the Criminal Court requesting the issue of an Investigation Order providing access to any place for the purpose of searching for any material relevant to the said suspected offence¹². Such Investigation Order cannot be opposed by the issue of a warrant of prohibitory injunction.

The Attorney General may also apply for an Attachment Order in the same circumstances, which may be issued together with an Investigation Order and has the effect of attaching, in the hands of the garnishees, all moneys and other movable property due or belonging to the suspect.

The Order will require the garnishee to declare in writing to the Attorney General, within 24 hours of service of the Order, the nature and source of all money and other movable property so attached. The suspect is prohibited from transferring or disposing of any movable or immovable property. The Attorney General may make similar applications for Investigation and Attachment Orders or for a Freezing Order when it receives a request by the judicial or prosecuting authority of any place outside Malta.

MONEYVAL has expressed confidence in the soundness of Malta's confiscation regime¹³ although it has also expressed the view that *"implementation could be improved"*.

Penalties

A person found guilty of any money-laundering offence is liable, on conviction, to a fine not exceeding €2,330,000, or to imprisonment¹⁴ for a period not exceeding 14 years, or to both such fine and imprisonment. Non-compliance with the obligations imposed on subject persons in the Regulations entails a fine not exceeding €46,600 or to imprisonment for a period not exceeding 2 years, or to both such fine and imprisonment.

Persons failing to make the declaration or making a false declaration required in terms of the Cash Control Regulations may be liable to a fine equivalent to 25% of the cash (but not exceeding € 46,587) as well as the forfeiture of the cash in excess of the €10,000 limit, or all the said cash, where it is in the form of an indivisible monetary instrument.

Note to readers: The contents of this article are intended for general information purposes only and should in no way be construed as legal advice.

¹² Article 4, Prevention of Money Laundering Act, Chap. 373 of the Laws of Malta

¹³ Vide the Third Round Mutual Evaluation Report on Malta published on the 14th September 2007-
[http://www.coe.int/t/dghl/monitoring/moneyval/Evaluations/round3/MONEYVAL\(2007\)05Summ-MLT3_en.pdf](http://www.coe.int/t/dghl/monitoring/moneyval/Evaluations/round3/MONEYVAL(2007)05Summ-MLT3_en.pdf)

¹⁴ Article 3 (1), Prevention of Money Laundering Act, Chap. 373 of the Laws of Malta



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Zammit & Associates- Advocates is one of Malta's leading legal practices specialising in commercial and corporate law, mergers and acquisitions, investment and financial services regulation, e-commerce law, employment law, immovable property law, vessel registration and finance.