

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. This is buttressed by Malta's status as a full member of the EU and signatory to the main international multilateral treaties which tackle 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 which were not members of FATF.

Following the government's commitment in the mid-1990s to tighten the country's legal and regulatory regime and close the legal loopholes caused by the absence of adequate laws and regulations to criminalise money laundering activities, much progress has been achieved in enhancing the country's legislative framework. Malta does not appear on any international blacklist and cooperates fully with the FATF and the Organisation for Economic Cooperation and Development.

As part of its fight against money laundering and terrorist financing, Malta has ratified the 1999 United Nations Convention for the Suppression of Terrorism Financing, the 1988 UN 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 Basel Committee Statement of Principles, the International Organisation of Securities Commissions' 1992 report and the FATF's 40 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 the money laundering regime is contained in two pieces of legislation, namely the Prevention of Money Laundering Act (Act XIX of 1994, as amended; Chapter 373 of the Laws of Malta) (PMLA) and the Prevention of Money Laundering and Funding of Terrorism Regulations (PMLFTR). The PMLA establishes the foundations for the legal framework by introducing basic legal definitions, laying down the procedures for the investigation and prosecution of money laundering offences, and establishing the Financial Intelligence Analysis Unit. The regulations, on the other hand, flesh out

the substantive provisions relating to the offences, and clarify the systems and procedures to be adopted by subject persons in the course of their business activities.

The existing regulations, which were promulgated on July 31, 2008 (LN 180 of 2008) and subsequently amended by Legal Notice 328 of 2009, implement the provisions of the European Third Money Laundering Directive, bringing Malta in line with the minimum prevention of money laundering standards implemented on a pan-European level. These regulations were produced following the circulation of a consultative document that the FIAU published, which invited industry feedback on the proposed regulations.

Besides these sources of law, credit and financial institutions are further aided by the availability of detailed guidance notes such as those published by the Institute of Financial Services in Malta in August 2010 which have been reviewed and endorsed by the FIAU, as well as those published by the Malta Financial Services Authority relating to specific sectors of the financial services industry, together with the implementing procedures published by the FIAU in May 2011, as amended in August 2011. This legal framework is further complemented by other unrelated legal instruments, such as the provisions of the Dangerous Drugs Ordinance 1939 (as amended in 1994), which criminalises the handling of money in drug-related offences, and the Cash Control Regulations (LN 149 and 411 of 2007) promulgated on June 15, 2007 under powers conferred by the External Transactions Act, which requires any person entering or leaving Malta, or travelling 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.

Notable Developments

- I. In April 2008, the EU Member States participating in the EU Committee on the Prevention of Money Laundering and Terrorist Financing agreed to a list of third countries to be considered to have equivalent prevention of money laundering systems to those applicable in the EU. This list was endorsed by the FIAU in December 2008 for the purposes of causing the equivalent third countries to be treated as “reputable jurisdiction/s” for the purpose of the PMLA and the PMLFTR. The list currently comprises Argentina, Australia, Brazil, Canada, Hong Kong, Japan, Mexico, New Zealand, The Russian Federation, Singapore, Switzerland, South Africa and the United States. This list is based on the satisfaction by third countries of certain objective criteria and may be updated from time to time in particular in the light of public evaluation reports adopted by the FATF, FSRBs (FATF Style regional Bodies), the IMF or the World Bank according to the revised 2003 FATF Recommendations and Methodology.

It is noteworthy that, although the list does not explicitly include countries which benefit from mutual recognition through the implementation of the Third Money Laundering Directive, such as French, Dutch and UK overseas territories and

countries (e.g. French Polynesia, New Caledonia, Jersey, Guernsey, Isle of Man, Aruba and The Netherlands Antilles), the fact that such mutual recognition exists automatically qualifies these jurisdictions to be treated as equivalent and reputable jurisdictions.

- II. In June 2010, the promulgation of Act VII of 2010 introduced an additional method of investigation which may be utilised by the Attorney General, namely the monitoring order, whereby the Attorney General may, upon reasonable suspicion that a person/ legal entity is guilty of a money laundering offence, apply to the Criminal Court for a monitoring order. In terms of such an order, the relative bank/s will be required to monitor the transactions or banking operations being carried out through the bank account(s) of the said suspected person/s. The Attorney General may request such order before, during or after the commission of the suspected offence.
- III. On the 20th May 2011, the FIAU issued Implementing Procedures in terms of the provisions of the PMLFTR, the implementation of which was to be effected by subject persons by no later than the 30th September 2011. The purpose of the said Implementing Procedures is to assist subject persons in their understanding, implementation and fulfilment of their obligations under the PMLFTR with a view to ensuring a more practical application of the relevant principles and rules through a more uniform interpretation.

Material elements of the offence

The PMLA makes a clear distinction between the offence of money laundering and the underlying criminal activity, 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:

- I. 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.
- II. 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.
- III. Acquiring property with the knowledge that such property is derived from criminal activity or any participation therein.
- IV. Retaining, without reasonable excuse, property with the knowledge that such property is derived from criminal activity or any participation therein.
- V. 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. It is possible, however, for such person to use the defence that the offence was committed without their knowledge and that they 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 the company, reflecting the provisions of the Third Money Laundering Directive. Since there have been few convictions for 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 advisers; real estate agents; notaries and lawyers; trust, fiduciary and company service providers; nominee companies; casino licensees; 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 who conduct 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.

Subject persons' general duties and obligations

The regulations impose a number of duties on the subject person, namely identification and customer due diligence, internal recordkeeping, 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 source, must be produced and this must be verified to ensure that the applicant is indeed who they claim to be. If the applicant is acting on behalf of another person, both persons must be identified. In terms of the regulations, the identity of the applicant/s for business should ideally be verified before the establishment of a business relationship or the carrying out of an occasional transaction; however, the regulations permit verification to be completed during the establishment of a business relationship provided that this is necessary for the continued normal conduct of business, the risk of money laundering and/or the funding of terrorism is low and that verification is completed as soon as reasonably practical after initial contact.

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 Third Money Laundering 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 jurisdiction; 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 terrorist funding, 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 terrorist funding 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 terrorist funding. 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 terrorist funding. 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.

An exemption from the reporting obligations contained in the regulations is afforded to certain subject persons (such as lawyers and tax advisers) where the information has been received or obtained in the course of ascertaining the legal position for their clients or performing their responsibilities of defending or representing such clients in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings.

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 €50,000 or to imprisonment for a term not exceeding two years, or to both such fine and imprisonment.

The Financial Intelligence Analysis Unit

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

The FIAU has three main responsibilities:

- I. It receives information from subject persons in respect of transactions suspected of involvement with money laundering or terrorist financing, analyses such information and reports thereon.
- II. It exchanges information and cooperates with local and 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.

Notwithstanding the provisions of the Professional Secrecy Act 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 which the unit may from time to time request. 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.

The Attorney General's 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 to provide access to any place for the purpose of searching for any material relevant to the said suspected offence. Such an investigation order cannot be countered 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 money 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.

Following an amendment in 2010, the Attorney General may request a monitoring order, whereby the Attorney General may apply to the Criminal Court for a monitoring order on the basis of reasonable suspicion that a person/ legal entity is guilty of a money laundering offence. The order, if upheld by the court, would require the relative bank/s to monitor the transactions or banking operations being carried out through the bank account(s) of the suspected person/s. This order may be requested at any time before, during or after the commission of the suspected offence and has increased the tools available to the Attorney General in tackling money laundering related crimes.

Penalties

A person found guilty of any money laundering offence is liable, on conviction, to a fine not exceeding €2,330,000, or to imprisonment 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 imprisonment for a period not exceeding two years, or both such fine and imprisonment. Persons who fail to make the declaration, or who make a false declaration under the Cash Control Regulations may be liable to a fine equivalent to 25 per cent of the cash (but not exceeding €46,587) as well as the forfeiture of cash in excess of the €10,000 limit, or all the said cash, where it is in the form of an indivisible monetary instrument.