

PREVENTION OF MONEY LAUNDERING

Introduction

In line with Malta's international commitments to combat Money Laundering¹, The Prevention of Money Laundering and Funding of Terrorism Regulations, 2003 (the Regulations) have been issued [by means of L.N. 199 of 2003 and subsequently amended by L.N. 42 of 2006] in virtue of article 12 of the Prevention of Money Laundering Act². The text of the said Regulations is closely based on the provisions contained in Directive 2001/97/EC³.

The said Regulations have repealed the earlier Prevention of Money Laundering Regulations, 1994⁴.

What is caught under the Regulations?

The Regulations seek to set down rules, procedures and training guidelines to combat money laundering and funding of terrorism⁵ activities in those circumstances when a client or prospective client, whether acting as principal or agent, and whether a legal or natural person, approaches certain Subject Persons as defined in the Regulations with the intention of seeking to form a 'business relationship' or to carry out a transaction with such Subject Person in the ambit of such Subject Person's trade, business, employment or profession.

A 'business relationship' is defined as being any arrangement between 2 or more persons, at least one of whom should be acting in the course of his trade, business,

¹ Essentially, the Prevention of Money Laundering Act attempts to prevent the conversion, transfer, concealment, disguise, acquisition or retention of any kind of movable or immovable property deriving directly or indirectly from 'criminal activity' as defined in the said Act as well as to prevent the attempt or aiding and abetting of such acts. Thus, money laundering is an independent offence which implies that a person may be charged and found guilty of money laundering even if acquitted in respect of the underlying criminal activity. The term 'criminal activity' is defined by the Act as including *inter alia* the following offences: drug offences, dealing in slaves, blackmail, crimes affecting public trust, theft, fraud, crimes against the Customs Ordinance, crimes against the Exchange Control Act and others.

² Chapter 373 of the Laws of Malta.

³ Of the 4th December, 2001.

⁴ These had been issued by means of L.N. 195 of 1994 and amended subsequently by L.N. 156 of 2000 and L.N. 298 of 2002.

⁵ As defined in sections 328F and 328I of the Criminal Code.

employment or profession, as the case may be, the purpose of which is to facilitate a frequent or habitual course of dealings between the said persons and the total amount of any payment/s to be made in the course of that arrangement is not known or capable of being ascertained at that particular point in time.

The Regulations also seek to regulate 'one-off transactions' defined as being any transactions (including the opening of an account and a safe custody facility) other than those carried out in the exercise of an established business relationship.

What business activities/professional services are caught under the Regulations?

The Regulations apply to any legal or natural persons carrying out any of the following business activities/professions:

- business of banking authorized (or required to be authorized) under the Banking Act;
- business of an electronic money institution authorized (or required to be authorized) under the Banking Act;
- activities carried out in terms of the Financial Institutions Act that are authorized (or required to be authorized) in terms of such Act;
- business of life assurance authorized (or required to be authorized) under the Insurance Business Act or under the Insurance Brokers and Other Intermediaries Act;
- investment business carried on by a person or institution licensed (or required to be licensed) under the Investment Services Act;
- collective investment schemes licensed (or required to be licensed) under the Investment Services Act;
- any activity carried on pursuant to a valid stockbroker's license issued under the Investment Services Act;
- any activity carried on pursuant to a valid license of a Recognised Investment Exchange issued under the Financial Markets Act;
- any activity associated with a business falling within the above list;
- auditors, external accountants and tax advisors;
- real estate agents;
- notaries and other independent legal professionals in relation to assisting their clients in the planning or execution of transactions concerning the:
 - buying and selling of real property or business entities;
 - managing of client money, securities or other assets;
 - opening or management of bank, savings or securities accounts;
 - organization of contributions necessary for the creation, operation or management of companies; or

- creation, operation or management of trusts, companies or similar structures.

To whom are the Regulations directed?

Accordingly, the Regulations target the following Subject Persons:

- bankers;
- financial institutions;
- foreign exchange bureaux;
- insurance companies;
- insurance brokers and intermediaries;
- collective investment schemes and unit trusts;
- investment advisors;
- stockbrokers;
- auditors and external accountants;
- tax advisors;
- real estate agents;
- notaries; and
- independent legal professionals.

Duties applicable to Subject Persons to prevent Money Laundering and the Funding of Terrorism

The Regulations lay down that any Subject Person as defined above is required to adopt the following procedures and systems before entertaining a business relationship with a client/prospective client:

- maintaining customer due diligence including identification procedures, record-keeping procedures and internal reporting procedures as detailed below;
- taking appropriate measures, from time to time, to make employees⁶ aware of the provisions of the Prevention of Money Laundering Act, of the Regulations and of any applicable policies maintained by such Subject Person in virtue thereof; and
- providing such employees, from time to time, with training in the recognition and handling of transactions carried out by, or on behalf of, any person who is, or appears to be, engaged in Money Laundering.

Subject Persons should not keep anonymous accounts or accounts in fictitious names in circumstances where the true beneficial owner is not known.

⁶ Defined as being such employees whose duties include the handling of any of the activities listed above.

Penalty for breaching the Regulations

Any Subject Person found guilty of breaching the provisions of the Regulations shall be guilty of an offence and, on conviction, shall be liable to a fine (*multa*) of up to € 46,600 or to imprisonment of up to 2 years or to both such fine and imprisonment.

In the case where the contravention of the Regulations is committed by a body or other association of persons (whether corporate or unincorporated), the Financial Intelligence Analysis Unit (FIAU) is authorized to impose an administrative penalty of not less than € 1165 and not more than € 4660. It should be noted that the said penalty may be imposed by the FIAU without recourse to a Court hearing and either as a one-time penalty or on a daily cumulative basis until compliance provided that, in such case, the penalty cannot exceed € 46587.

Defence in proceedings taken against Subject Person for breach of the Regulations

In proceedings taken against a Subject Person for breaching the Regulations it shall be a good defence for the Subject Person to show that:

- he took all reasonable steps; and
 - exercised all due diligence,
- to avoid the commission of the offence.

In determining whether a Subject Person has breached the Regulations, the Courts shall take into consideration:

- any relevant guidelines or procedures issued, approved or adopted by the Financial Intelligence Analysis Unit⁷ (FIAU) with the concurrence of any relevant supervisory authority regulating the Subject Person in question; and
- in default of such guidelines or procedures, any other relevant guidance issued by a body which regulates, or is representative of, any trade, profession, business or employment carried out by such Subject Person.

Personal liability

If a breach of the Regulations is committed by a legal person (e.g. a body or other association of persons, whether corporate or unincorporate), the Regulations provide that any person who, at the time of the commission of the breach, was a director,

⁷ The main function of the FIAU is to receive reports of suspected money laundering transactions and to send analytical reports thereon to the Commissioner of Police if there are reasonable grounds to suspect money laundering transactions.

manager, secretary or other similar officer of such legal person, or any person who purported to act in any such capacity, such be liable, on conviction, to the above-mentioned penalties in his personal capacity.

The only defence for such person is to prove that:

- the offence was committed without his knowledge; and
- he exercised all due diligence to prevent the commission of the offence.

Customer Due Diligence including Identification Procedures

In each of the following scenarios, a Subject Person is required, as soon as reasonably practicable⁸ after contact is first made with the client/prospective client, to request such client/prospective client to produce satisfactory⁹ evidence of his identity and to subsequently verify such evidence or, alternatively, a Subject Person is required to take such measures as will produce such evidence of identity:

1. Case 1 (negotiations): any case where negotiations take place between a Subject Person and a client/prospective client with a view to the formation of a business relationship as defined;
2. Case 2 (suspicion): any case where, in respect of any transaction, any person handling the transaction suspects that the client/prospective client is, or may be, engaged in Money Laundering;
3. Case 3 (single large transaction): any case where, in respect of any transaction, money is to be paid by or to the client/prospective client in excess of € 11647; and
4. Case 4 (series of transactions): any case where, in respect of 2 or more transactions, it appears from the beginning or at any later stage to anyone dealing with any of the transactions that:

⁸ The Regulations provide that, in determining what is 'reasonably practicable', all circumstances are to be taken into consideration including, in particular:

- the nature of the transaction such that the Subject Person is able to establish the client's business profile; or
- whether or not it is possible to obtain the evidence before commitments are entered into or before money is exchanged; or
- in relation to a transaction (or a series of transactions) that exceed € 11647, the earliest stage at which there were reasonable grounds for presuming that the total amount payable would exceed € 11647.

⁹ The Regulations lay down that evidence of identity shall be deemed to be 'satisfactory' if:

- it is reasonably capable of establishing that the client/prospective client is the person he claims to be; and
- it satisfies the person who obtains the evidence that it does, in fact, establish that the client/prospective client is the person he claims to be.

- (i) the transactions are carried out by the same person and are of similar character; and
- (ii) the total amount in respect of all such transactions exceeds € 11647.

NOTE

IF SUCH EVIDENCE OF IDENTITY CANNOT BE OBTAINED OR THE SUBJECT PERSON KNOWS OR SUSPECTS THAT THE TRANSACTION MAY BE RELATED TO MONEY LAUNDERING OR THE FUNDING OF TERRORISM, THEN THE TRANSACTION CANNOT PROCEED OR, ALTERNATIVELY, MAY ONLY PROCEED IN ACCORDANCE WITH ANY DIRECTION MADE BY THE FIAU.

HOWEVER, WHERE TO REFRAIN FROM PROCEEDING WITH THE TRANSACTION IS IMPOSSIBLE OR WHERE THE SUBJECT PERSON DEEMS THAT REFRAINING MAY FRUSTRATE ANY EFFORTS OF INVESTIGATING A SUSPECTED MONEY LAUNDERING OPERATION, THEN THE SUBJECT PERSON MAY PROCEED WITH THE TRANSACTION PROVIDED THAT IMMEDIATELY AFTERWARDS HE LODGES A REPORT WITH THE FIAU.

The said customer due diligence including identification procedure should be repeated if, at any stage, doubts arise or changes have occurred in the circumstances surrounding the transaction.

NOTE

SUBJECT PERSONS ARE DUTY-BOUND TO EXAMINE WITH *SPECIAL ATTENTION* AND TO THE EXTENT POSSIBLE:

- THE BACKGROUND AND PURPOSE OF ANY COMPLEX OR LARGE TRANSACTIONS; AND
- TRANSACTIONS THAT ARE PARTICULARLY LIKELY, BY THEIR VERY NATURE, TO BE RELATED TO MONEY LAUNDERING OR THE FUNDING OF TERRORISM.

SUBJECT PERSONS SHALL ALSO PAY SPECIAL ATTENTION TO BUSINESS RELATIONSHIPS AND TRANSACTIONS WITH PERSONS, COMPANIES AND UNDERTAKINGS FROM A NON-REPUTABLE JURISDICTION.

Due Diligence including Identification Procedures: payment by post or by electronic means

If a client/prospective client needs to effect payment and, in the circumstances, it is reasonable that payment be effected by post or by electronic means or for the details of the payment¹⁰ to be sent by post, to be given over the phone or by any other electronic means, the fact that payment is debited from such client's/prospective client's account held in his name at a bank or other credit institution is deemed to constitute the required evidence of identity.

A Subject Person is required:-

- (i) to verify the details of payment accompanying a transfer of funds against independently sourced documents. However, for payments under € 1165 the paying institution may determine the extent of such verification; and
- (ii) in the event that, when receiving inward funds, information required by the Regulations is missing or incomplete, a Subject Person may either reject the transaction or, alternatively, ask for complete information to be submitted. When the transaction is rejected or when circumstances warrant that the funds be made available to the beneficiary without the complete information being received, then the Subject Person is duty-bound to report the matter immediately to the FIAU.

Procedures (i) and (ii) above shall not apply when the funds are transferred by the use of a credit or debit card or other similar payment instrument where a unique identifying number allowing the transaction to be traced to the payer accompanies the transfer or when both payer and payee are acting on their own behalf and are duly licensed or otherwise authorized.

It should be noted that this presumption shall not operate in relation to Case 2 above (i.e. where there are suspicions as to the circumstances of the payment) or when the payment is made in the course of opening an account with a bank or other credit institution.

Identification Procedures: transactions on behalf of another

¹⁰ *'Details of payment'* is defined as including the name, address (or national identity card number as verified) and account number of the applicant for business and, where an account number is not available, then a unique identifying number allowing the transaction to be traced back to the applicant shall be used.

Where a client/prospective client is, or appears to be, acting on behalf of another, a Subject Person is required to use all reasonable¹¹ measures to establish and verify the identity of the principal over and above the client/prospective client's identity. In this regard, a written declaration from the client/prospective client in which he discloses the identity of his principal supported by all relevant documentary evidence including evidence as to the principal's identity and a power of attorney authorizing the client/prospective client to act on his principal's behalf shall be deemed sufficient.

In addition, if the principal is a body corporate, body of persons or other form of legal entity, a Subject Person is required to obtain satisfactory evidence of the identity of:

- all the directors (or, where no directors exist, of such persons vested with the administration and representation); and
- all shareholders holding 25% or more of the equity shares or holding a share of 25% or more of the total contributions made to the principal or of the total assets of the principal as the case may be ('qualifying shareholder')¹². If any 'qualifying shareholding' is held under a nominee, trustee or other fiduciary arrangement, then duly authenticated evidence of the identity of the underlying ultimate beneficial owners should also be obtained.

Where the applicant for business is acting on behalf of a body corporate, a body of persons, trust or any other form of legal entity or arrangement in which there is a qualifying interest as defined above held under a nominee, trustee or other fiduciary arrangement, a Subject Person shall not undertake any business with or provide any service to any such applicant for business unless that applicant for business discloses the identity of the beneficial owners or beneficiaries of the qualifying interest and produces the relevant authenticated identification documentation. Such disclosure procedures shall also apply where there are changes in beneficial ownership or beneficiaries.

Where the client/prospective client is itself acting as a trustee or under any other fiduciary arrangement, a Subject Person shall not undertake any business with such client/prospective client unless duly authenticated documentary evidence is obtained as to the identity of the underlying ultimate beneficial owners.

¹¹ The Regulations provide that, in determining what is 'reasonable', regard shall be had to the best practice for the time being followed in the relevant field of business.

¹² This requirement does not apply to (i) companies listed on a recognized stock exchange (ii) domestic public authorities (iii) state corporations or (iv) any other category of customers who present a low risk of money laundering or the funding of terrorism.

NOTE

IF SUCH EVIDENCE OF IDENTITY CANNOT BE OBTAINED, THEN THE TRANSACTION CANNOT PROCEED OR, ALTERNATIVELY, MAY ONLY PROCEED IN ACCORDANCE WITH ANY DIRECTION MADE BY THE FIAU.

HOWEVER, WHERE TO REFRAIN FROM PROCEEDING WITH THE TRANSACTION IS IMPOSSIBLE OR WHERE THE SUBJECT PERSON DEEMS THAT REFRAINING MAY FRUSTRATE ANY EFFORTS OF INVESTIGATING A SUSPECTED MONEY LAUNDERING OPERATION, THEN THE SUBJECT PERSON MAY PROCEED WITH THE TRANSACTION PROVIDED THAT IMMEDIATELY AFTERWARDS HE LODGES A REPORT WITH THE FIAU.

It should be noted that a client/prospective making a false declaration as to whether he is acting on behalf of other/s or not shall be guilty of an offence and, on conviction, shall be liable to a fine (*multa*) of up to € 46587 or to imprisonment of up to 2 years or to both such fine and imprisonment.

Customer Due Diligence including Identification Procedures: exemptions

A Subject Person need not take any steps to obtain evidence of any person's identity as outlined above in the following circumstances:

1. where there are reasonable grounds for believing that the client/prospective client is a person who is authorized or who is licensed to carry out the transaction or who is otherwise licensed under the laws of a reputable jurisdiction;
2. where any transaction is carried out with a third party following an introduction effected by such a duly authorized/licensed person as provided in (1) above;
3. in relation to life insurance business where the premium is payable in 1 instalment and does not exceed € 2330;
4. in relation to life insurance business where the premium is payable periodically but does not exceed € 1165 in any calendar year; and
5. in relation to insurance policies in respect of pension schemes taken out in virtue of a contract of employment or of the insured's occupation.

In respect of (1) and (2) above, the Subject Person should ensure that identification documents are available or may be made available if so requested by the relevant authorities.

With regards to (3) – (5) above, such policies cannot contain any surrender clauses and cannot be utilized as collateral for loans.

The above exemptions do not apply in circumstances falling with Case 2 (suspicion) as detailed above.

Record-keeping Procedures

Subject Persons are required to keep records of the following matters in relation to any business relationship or one-off transaction/s:

- the nature of the evidence of a person’s identity including:
 - (i) a copy of the evidence of identity; or
 - (ii) such information authenticated by the client/prospective client as would enable a copy of the evidence of identity to be obtained; or
 - (iii) in any case where either of the above is not reasonably practicable, sufficient information to enable the details as to a person’s identity contained in the relevant evidence to be re-obtained, and
- details relating to all transactions carried out by the client/prospective client in question; and
- in the case of complex or large transactions or transactions that are likely, by their nature, to be related to money laundering or the funding of terrorism, a record of the findings of the examination of the background and purpose of such relationships and transactions.

The said records are to be retained for 5 years commencing from such date when the transaction or, as the case may be, from such date when all dealings taking place in the course of the transaction were completed. These records are to be made available to the FIAU (and to such other Authorities as may be allowed by Law) on a timely basis.

Internal reporting Procedures

The Regulations require Subject Persons¹³ to provide for the designation of a ‘reporting officer’ to whom reports are to be lodged by other members of the company/firm concerning any matter giving rise to a knowledge or to a suspicion that another person is engaged in Money Laundering.

¹³ It is interesting to note that the Regulations also require supervisory authorities to provide for such internal reporting procedures. However, failure by a supervisory authority to maintain such procedures will not constitute an offence but may be subject of disciplinary proceedings against the officials or employees concerned.

It shall be the reporting officer's duty (or another employee designated by the Subject Person) to consider all such reports lodged in the light of the relevant information for the purpose of determining whether or not the report does give rise to a knowledge or to a suspicion of a Money Laundering transaction.

The reporting officer should have reasonable access to any information held by the Subject Person for the purpose of giving due consideration to such reports as outlined above.

If the reporting officer determines that there is, or may be, a Money Laundering transaction, he is obliged to report the matter to the FIAU as provided below.

Any official or employee of a Subject Person contravening this provision shall be guilty of an offence and, on conviction, shall be liable to a fine (*multa*) of up to €46587 or to imprisonment of up to 2 years or to both such fine and imprisonment.

Customer acceptance Policy

The Regulations as amended also require Subject Persons to develop and establish effective customer acceptance policies and procedures that, whilst not restricting business activities, should at least contain:-

1. a description of the type of customer that is likely to pose higher than average risk;
2. the identification of risk indicators such as the customer background, country of origin, business activities, linked accounts or activities and public or other high profile positions; and
3. the requirement for an enhanced customer due diligence for higher risk customers¹⁴ including procedures to establish the source of wealth and funds involved in the business relationship or transaction/s.

The said procedures should enable a Subject Person to determine whether an applicant for business is a politically exposed person¹⁵. Business relationships with politically exposed persons residing overseas shall require the approval of senior management.

¹⁴ The FIAU in consultation with the relevant supervisory authority may determine that certain Subject Persons apply simplified procedures where the risk of money laundering or the funding of terrorism appears low and where adequate checks and controls are already otherwise applied.

¹⁵ Defined as meaning natural persons (including their immediate family members) who are or have been entrusted with prominent public functions.

Duty to report Money Laundering and funding of terrorism

Where a Subject Person or a supervisory authority obtains information and is of the opinion that such information indicates that a person may have been engaged in Money Laundering or in the funding of terrorism, the Regulations provide that such Subject Person or supervisory authority, as the case may be, shall be exonerated from the duty of professional secrecy and, as such, shall, as soon as is reasonably practicable (but not later than 3 working days from when the suspicion first arises), disclose that information and the relevant identification document to the FIAU.

NOTE

AUDITORS, EXTERNAL ACCOUNTANTS, TAX ADVISORS, NOTARIES AND OTHER INDEPENDENT LEGAL PROFESSIONALS ARE EXEMPT FROM THE ABOVE OBLIGATION TO REPORT IF THEY RECEIVE OR OBTAIN SUCH INFORMATION IN THE COURSE OF ASCERTAINING THE LEGAL POSITION FOR THEIR CLIENT OR PERFORMING THEIR RESPONSIBILITY OF DEFENDING OR REPRESENTING THAT CLIENT 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.

Where, following a submission of a disclosure as detailed above, or for any other reason as is allowed by law, the FIAU demands additional information, a Subject Person is required to comply as soon as is reasonably practicable (but not later than 5 working days from when the demand is made) unless that Subject Person makes representations justifying why the requested information cannot be submitted within the said time. In this case, the FIAU, at its discretion and after having considered such representations, may choose to extend the dead-line as is reasonably necessary to obtain the information.

It should be noted that a Subject Person who contravenes the provisions of this regulation or who fails to disclose information as required shall be liable to an administrative penalty of not less than € 233 and not more than € 2330.

Such administrative penalties can be imposed by the FIAU without recourse to a Court hearing and may be imposed either as a one time penalty or on a daily cumulative basis until compliance provided that in the latter case the accumulated penalty cannot exceed € 11647.

Any information so disclosed to the FIAU shall only be utilized by the FIAU in connection with the investigation of Money Laundering.

Rules applicable to casino licensees

In addition to complying with the provisions of the Regulations, casino licensees are subject to the following additional obligations:-

1. to ensure that all patrons are satisfactorily identified before entering the casino;
2. to identify -- by the production of an identification document -- any person who, whilst in the casino:-
 - (i) exchanges cash, a cheque or bank draft (whether drawn on a local or foreign credit institution);
 - (ii) makes a credit or a debit card payment for chips or tokens in excess of € 4659;
 - (iii) exchanges cash, chips or tokens after playing a game or games in excess of € 4659;
3. to ensure that the particulars of any person who exchanges chips or tokens in excess of € 4659 is matched with and cross-referred to the particulars relating to the identity of the person exchanging cash, cheques or bank drafts or making a credit or debit card payment in exchange for those chips or tokens and shall further ensure that chips or tokens are derived from winnings made whilst playing a game or games at the casino;
4. to ensure that the procedures established in 2 and 3 above are also applied in cases where in any one gaming session a person carries out transactions which are individually for an amount of less than € 4659 but which, in total, exceed this value; and
5. to record the particulars relating to the identity of any person playing game/s in the casino when the casino licensee has any knowledge or suspicion that such person is, or may be, engaging in money laundering or in the funding of terrorism.