

*The application of confidentiality, professional secrecy
and data protection provisions within the context of
AML/CFT*

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The **FIAU** is responsible for the:

collection, collation, processing, analysis and
dissemination of *information* to combat
ML/FT

*Confidentiality
and
Professional Secrecy*

Confidentiality provisions in PMLA/PMLFTR:

- FIAU
- Police Liaison Officer
- Investigating, prosecuting, judicial and administrative
- *Subject Persons*

Duty of confidentiality of FIAU

- any information relating to the affairs of the FIAU
- any information relating to any person, physical or legal

Except

- when authorised to do so under any of the provisions of the PMLA
- for the purpose of the performance of their duties or the exercise of their functions under the PMLA
- when specifically and expressly required to do so under a provision of any law
Article 34(1) of the PMLA)

Tipping Off

- Disclosure to the person concerned or to a third party that an investigation is being carried out by the FIAU
- Disclosure that information has been transmitted to the FIAU by a subject person
- Disclosure that the FIAU has transmitted information to the police for investigation

(Article 33 of the PMLA)

- **Duty of confidentiality of Police Liaison Officer**

“... bound to keep secret and confidential any information that may come to his knowledge as a result of his duties ... and shall not disclose such information to any person other than a member of the FIAU in the course of the exercise of his functions ...”

(Article 24(2) of the PMLA)

- **Duty of confidentiality of investigating, prosecuting, judicial and administrative authorities**

“... shall protect and keep confidential the identity of persons and employees who report suspicions of ML/FT either internally or to the FIAU”

(Regulation 15(14) of the PMLFTR)

Duty of confidentiality of *subject persons*

- when filing a STR (PMLFTR)
- investigation order (PMLA)

When filing a STR

subject persons, their officials or employees shall not disclose to the *person concerned* or to a *third party* that

- an investigation is being or may be carried out
- that information has been transmitted or may be transmitted to the FIAU

(Regulation 16(1) of the PMLFTR)

A breach is punishable by
fine max. €50,000 and/or
imprisonment max. 2 years

Exception

*The fact that a lawyer, notary, legal procurator, accountant, auditor, and tax advisor is seeking to dissuade a client from engaging in an illegal activity **shall not** constitute tipping off.*

(Regulation 16(3) of the PMLFTR)

Permissible Disclosures

- (a) to a supervisory authority
- (b) between subject persons undertaking relevant financial business
- (c) between certain subject persons undertaking relevant activity
- (d) between certain professional categories of subject persons referred to in (b) and (c) above

(Regulation 16(2) of the PMLFTR)

Investigation order

Subject persons shall not disclose the fact that an investigation is being undertaken and shall not make any other disclosures likely to prejudice the investigation

(Article 4(2) of the PMLA)

A breach is punishable by
fine max. €11,600 and/or
imprisonment max. 1 year

Obligations emanating from PMLA/PMLFTR

VS.

Professional secrecy/confidentiality
provisions in PSA/Criminal Code/other laws

Duty of Confidentiality/Professional Secrecy

- Criminal Code
- Professional Secrecy Act
- Banking Act
- Financial Institutions Act
- Investment Services Act
- Insurance Business Act
- Trust and Trustees Act

Criminal Code

If any person, who by reason of his calling, profession or office, becomes the depository of any secret confided in him, discloses such secret, shall on conviction be liable to a fine and/or imprisonment

(Article 257 of the Criminal Code)

Professional Secrecy Act

Persons falling within the scope of Article 257

- *members of the medical profession*
- *advocates, notaries and legal procurators*
- *accountants and auditors*
- *employees and officers of credit and financial institutions*
- *trustees, officers of nominee companies*
- *investment services licence holders*
- *stockbrokers*
- *insurers, insurance agents, managers, brokers and sub-agents*
- *officials and employees of the state*

(Article 3(1) of the PSA)

Professional Secrecy Act

Secret Information:

- *Information considered secret under law*
- *Information which is described as secret by the person giving it*
- *Information which is reasonably considered to be secret as a result of the circumstances in which it is communicated, the nature of the information and the standing of the person receiving it*

(Article 2(3) of the PSA)

Subject Persons are required to:

- provide information to the FIAU when so requested (Articles 30, 30A of the PMLA)
- file STRs when they have a suspicion of ML/FT (Regulation 15(6) of the PMLFTR)

Do these duties conflict with the duty of secrecy that subject persons owe to their clients?

Article 30(2) of the PMLA: information to be provided to the FIAU *notwithstanding* anything contained in the Professional Secrecy Act and any obligation of secrecy or confidentiality under any other law

Criminal Code

The depository of a secret shall not be in breach of secrecy obligations if such person is *compelled by law* to disclose such secret to a *public authority*

(Article 257 of the Criminal Code)

... referred to in PMLA

For the purposes of Article 257 disclosures made to the FIAU shall be deemed to be a disclosure of information to a *public authority* *compelled by law*

(Article 30(2) of the PMLA)

Regulation 15(12) of the PMLFTR: any *bona fide* communication or disclosure made by a subject person shall not be treated as a breach of the duty of professional secrecy or any other restriction upon disclosure of information

What is a *bona fide* communication?

Article 6A(c) of the Professional Secrecy Act: duty of professional secrecy shall not be breached where disclosure in good faith is reasonably necessary to prevent, reveal, detect or prosecute the commission of criminal acts

Additionally

Regulation 15(6) of the PMLFTR requires subject persons to support a STR with relevant identification and other documentation

Information disclosed to the FIAU shall only be used in connection with investigations of ML/FT.

Professional Privilege

When *auditors, external accountants, tax advisors, lawyers, notaries and legal procurators* receive or obtain information

- in the course of ascertaining the legal position of their client
- in performing their responsibility of defending /representing their client in judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings

they shall not have the obligation to report knowledge or suspicions of ML/FT.

(Regulation 15(10) of the PMLFTR)

Ordre des barreaux francophones and
germanophones & Others

VS

Conseil des Ministres

C-305/05, (ECJ Grand Chamber) 26th June 2007



“The reporting obligations apply to lawyers only insofar as they advise a client in the preparation or execution of certain transactions—essentially those of a financial nature or concerning real estate – or when they act on behalf of and for a client in any financial or real estate transaction. As a rule, the nature of such activities is such that they generally take place in a context with no link to judicial proceedings and consequently, those activities fall outside the scope of the right to a fair trial. Moreover, as soon as lawyers acting in connection with a financial or real estate transaction are called upon for assistance in defending a client or in representing such a client before the courts, or for advice as to the manner of instituting or avoiding judicial proceedings, those lawyers are exempt from the reporting obligations, regardless of whether the information has been received or obtained before, during or after the proceedings. An exemption of that kind safeguards the right of the client to a fair trial”.

Data Protection

Article 2 of the DPA

processing of data: collection, recording, organisation, storage, adaptation, alteration, retrieval, gathering, use, disclosure by transmission, dissemination or otherwise making information available etc

Article 7 of the DPA

requirements for the proper processing of data by the data controller

Article 9(c) of the DPA

processing is allowed where it is necessary for compliance with a legal obligation to which the controller is subject

Article 23(1)(d)

provisions of art. 7, *inter alia*, of the DPA shall not apply when a law specifically provides for the provision of information as a necessary measure in the interest of the prevention, investigation, detection and prosecution of criminal offences



Reg. 15(6) PMLFTR & Art. 30, 30A PMLA

Confidentiality:

- *prohibition of disclosure*
- *permissible disclosures*

Professional Secrecy:

- *sources of the duty*
- *duty to report/provide information*
- *exceptions to the rule*
- *professional privilege*

Data Protection:

- *applicability*

Contact Details

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