"To report or not to report?"

The duty to report suspicious transactions

and other obligations under the PMLFT Regulations

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LEGAL INSTRUMENTS

- **The Prevention of Money Laundering Act (Cap 373)**
  - Part I – Criminalizes the offence of money laundering
  - Part II – The establishment of the Financial Intelligence Analysis Unit (FIAU)
- **The Prevention of Money Laundering and Funding of Terrorism Regulations (2008)**

INTERNATIONAL DEVELOPMENTS

United Nations:
1988 Vienna Convention
1999 New York Convention
2000 Palermo Convention
2001 Security Council Resolution 1373

Council of Europe:
1990 Strasbourg Convention
2005 Warsaw Convention

FATF:
1990 - 40 Recommendations
2001 - 9 Special Recommendations

European Union:
1991 - First Directive
2001 - Second Directive
2005 - Third Directive

LOCAL DEVELOPMENTS

1994	Introduction of offence of money laundering
1994	PML Regulations applicable to financial sector
1998	Obligations extended to casinos
2003	PML Regulations – new categories of subject persons (non-financial sector)
2005	Shift to an "all-crimes regime"
2006	Introduction of offence of funding of terrorism
2008	PMLFT Regulations – new categories of subject persons
2009	Clarification with regards to PCCs and affiliated insurance

SUBJECT PERSONS

"Relevant financial business"

- Business of banking/electronic money institution
- Activity of financial institutions
- Long-term insurance business, affiliated insurance business and PCCs
- Investment services
- Administration services to Collective Investment Schemes
- Collective Investment Schemes marketing their units or shares
- Activity of persons registered under Special Funds (Regulation) Act
- Activity of a regulated market and a central securities depositary
- Branches conducting such activities where head office is outside Malta
- Activities associated with business above

"Relevant activity"

- Auditors, accountants and tax advisors
- Real estate agents
- Notaries and independent legal professionals (certain transactions)
- Trust and company service providers
- Nominee companies acting in relation to dissolved companies
- Persons providing trustee and fiduciary services
- Casino licensees
- Persons trading in goods when payment is made in cash in an amount equal to or exceeding €15,000
- Activities associated with business above

DUTIES OF SUBJECT PERSONS

MAIN DUTIES

- Customer due diligence (broadened by 2008 Regulations)
- Record-keeping
- Internal and external **reporting** obligations
- Training

OTHER DUTIES

- Maintenance of statistical data
- Establishment of policies and procedures
- Screening of new employees

When does the duty to report arise?

- A subject person "**knows**" *OR*
- A subject person "**suspects** or has reasonable grounds to suspect" … that …

1. A transaction or a person is or may be connected or related to ML/FT *OR*
2. That ML/FT has been, is being or may be committed or attempted

(Regulation 15(6))

REPORTING

- Report to be filed by MLRO or designated employee
- As soon as is reasonably practicable but not later than 5 working days from when the suspicion first arose

OTHER PROVISIONS

Regulation 15(1): Complex or large transactions having no apparent economic visible lawful purpose and other transactions which are particularly likely, by their nature, to be related to ML/FT → **Findings to be made available to FIAU**

Regulation 15(7): Obligation to refrain from carrying out a transaction unless such action is not possible or is likely to frustrate investigation efforts

If transaction is effected just the same → **Inform FIAU immediately**

Power of FIAU to demand information from:

- The disclosing subject person or any other subject person
- Any supervisory authority
- Any Government Ministry, department, agency or other public authority
- The police
- Any other person
- Foreign FIUs

The Dilemma – "To report or not to report"

A BALANCING ACT

Painstakingly scrupulous = defensive reporting

vs

Liberal and highly tolerant = failure to report

New clients and one-off transactions:

- Client refuses or appears reluctant to provide information
- Inconsistencies in information provided by client
- Request that transaction is rushed with promises of providing information later
- An unusually large cash transaction
- Unwillingness to provide source of funds
- Explanation for business and/or amount involved is not credible
- Series of transactions structured just below regulatory threshold
- Transactions or activities having no apparent purpose or which make no obvious financial sense, or which seem to involve unnecessary complexity
- Unnecessary routing of funds through third parties
- Unrealistic wealth compared to client profile

RED FLAGS

Existing clients:

- Transaction is different from the normal business of the client
- Size or frequency of activity or transaction is not consistent with the normal activities of the client
- Pattern of transactions has changed since the business relationship was established
- Money transfers to high-risk jurisdictions without reasonable explanation (not consistent with client's usual foreign business dealings)
- Sudden increases in the frequency or value of transactions of a particular customer without reasonable explanation
- Movement of funds that give rise to a loss or lower rate of return without any visible compensating benefit

LEGAL & FINANCIAL PROFESSIONALS

Lawyers, notaries, accountants, auditors, tax advisors …

- May be used unintentionally and unwittingly in layering stage of ML
- Perform perfectly-legitimate activities which however give rise to the possibility of abuse
- Professionals offer the appearance of legitimacy to criminals’ financial operations
- Corporate vehicles and trusts conceal ownership and source of funds
- Intermingling of illicit funds with normal activity

An interesting foreign case:

A foreign national presented five bank cheques (total of US$ 1.6million) to be credited to newly-opened accounts with two separate banks. The source of funds was stated to be sale of property in an African country through the client's real estate company.

BOTH BANKS reported on the basis of:

1. The scale of the operation and
2. Lack of supporting data

Steps in the right direction:

- A compliance culture – a shift from perceiving reporting as being a regulatory burden
- More awareness that professional services may be used abusively
- More vigilance in acceptance of business and reporting of suspicious transactions
- Continuing disclosure even after a report is made
- Promptness in reporting
- Less defensive reporting

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