



Administrative Measure Publication Notice

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This Notice provides select information from the FIAU's decision imposing the respective administrative measures and is not a reproduction of the actual decision.

DATE OF IMPOSITION OF THE ADMINISTRATIVE MEASURE:

16 April 2024

RELEVANT ACTIVITY CARRIED OUT:

Notary Public

SUPERVISORY ACTION:

Off-site Thematic Review carried out in 2021

DETAILS OF THE ADMINISTRATIVE MEASURE IMPOSED:

Administrative Penalty of €29,587 in terms of Regulation 21 of the Prevention of Money Laundering and Funding of Terrorism Regulations (PMLFTR) and a Remediation Directive.

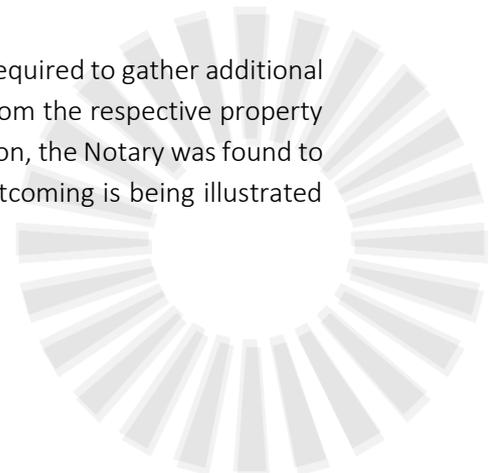
LEGAL PROVISIONS BREACHED:

- Regulations 11(9) and 11(10) of the PMLFTR and Sections 4.4.3 and 4.9.1 of the Implementing Procedures Part I (IPs);
- Regulation 15(3) of the PMLFTR and Section 5.5 of the IPs;
- Regulations 5(1) and 5(4) of the PMLFTR and Sections 3.3.1, 3.3.2, 3.3.4 and 8.1 of the IPs;
- Regulation 5(5)(a)(ii) of the PMLFTR and Sections 3.2 and 3.5 of the IPs;
- Regulations 13(1) and 13(2) of the PMLFTR and Sections 9.1, 9.2(b) and 9.3 of the IPs.

REASONS LEADING TO THE IMPOSITION OF THE ADMINISTRATIVE MEASURE:

Enhanced Due Diligence (EDD) – Regulations 11(9) and 11(10) of the PMLFTR and Sections 4.4.3 and 4.9.1 of the IPs

On occasional transactions posing a higher risk of ML/FT, the Notary was required to gather additional information and documentation to mitigate the ML/FT risks emanating from the respective property being purchased. Nevertheless, in two files reviewed during the examination, the Notary was found to have failed to conduct adequate EDD measures. An example of this shortcoming is being illustrated hereunder:



- Although the physical cash used by the purchaser to purchase the property derived from a non-reputable jurisdiction, specifically by way of donation from her mother, the Notary did not adequately verify the Source of Funds (SoF). More specifically, the Notary failed to verify whether there is an actual link/relationship between the mother and the daughter. This since, no documentation was provided to verify the purchaser's statement, particularly to prove that the individual providing the funds is actually the purchaser's mother.
- Also, the transfer of cash between the purchaser and the vendor was made prior to the promise of sale agreement, however the Notary did not provide any information nor documentary evidence as to when the actual payment occurred. Additionally, given that the funds had already been passed between the parties, the Notary had to understand why the payment was executed at an earlier stage.

External Reporting Obligations - Regulation 15(3) of the PMLFTR and Section 5.5 of the IPs

For one file relating to a property purchase of €600,000, the Notary was faced with various red flags which constituted sufficient grounds to reasonably suspect that funds could possibly be proceeds of criminal activity or that ML could have taken place, or that an attempt was made to carry out a transaction or activity related to such proceeds. Nevertheless, no STR/SAR was submitted to the FIAU. Further details on the case are being illustrated hereunder:

Background information:

The Notary was informed that the purchaser (Ms A) was to fund 10% of the property price directly from own funds and that the remaining 90% shall be funded by her partner (Mr B). Mr B's funds were stated to have been provided as a donation and that he had accumulated such funds from the sale of several properties as well as from the cash intensive businesses that he owned. Ms A was also involved in managing one of her partner's cash intensive business.

Red Flags:

While there may indeed be a legitimate rationale for such assignment, the ensuing red flags created concerns that should have been carefully assessed by the Notary.

- Over €300,000 were not paid directly neither by Ms A nor by Mr B, instead these were made through several cheques payable directly to the Notary from different third parties, which as explained by the Notary were companies and individuals related to Mr B by way of business. This practice broke the chain of money flow, allowing money to reach the end-party without a trace in the financial system.
- Although the Notary knew that money was owed to Mr B from over 5 different parties, none of the payments were substantiated with detailed information/documentation to understand the reason for lending, but rather referred to for example commercial services.
- Also, rather than the payment being remitted to the party to whom the funds were owed, such funds were instead sent directly to the Notary to fund the property purchase. Such practise allowed the bypassing of the financial system and removing any trail of funds passing between the parties.

- Mr B owned several cash intensive businesses, which are potential vehicles for the comingling of illicit funds. Considering the above-mentioned practice, such risks are increased even further.
- Inaccuracies in explanations provided, for example upon reviewing a copy of a number of cheques issued in 2019, it was noted that these pre-dated the Constitution of Debt Agreement to which such funds supposedly related to which was entered into in 2020. Thus, at the time the cheques were drawn, such debt was inexistent, or at least not constituted in writing.

Business Risk Assessment (BRA) - Regulations 5(1) and 5(4) of the PMLFTR and Sections 3.3.1, 3.3.2, 3.3.4 and 8.1 of the IPs

In reviewing the BRA, the Committee noted systemic shortcomings pertaining to the methodology adopted by the Notary at the time of the compliance examination, since it failed to:

- Adequately include qualitative elements in the assessment of the threats and vulnerabilities. By way of example, when assessing customer risk, although the BRA gave an overview of the different types of purchasers and the origin of funds used in the real estate transactions, it did not make any reference to the vendors as parties to the real estate transactions.
- Include quantitative elements in the assessment of its threats and vulnerabilities. For instance, although the BRA provided a brief overview of the customers, it did not indicate: (i) the number of customers whom the Notary assisted in a real estate transaction, (ii) the number of customers per their respective risk category, (iii) the volume and value of transactions that such customers were part of, and (iv) whether the Notary met the customers face-to-face or otherwise.
- Establish which controls were in place to mitigate the different risk factors.
- Take into consideration the likelihood of the identified risks manifesting themselves and the impact of any such manifestation, which would have ultimately led to the determination of the level of risk the Notary was exposed to. Thus the final residual risk was not even established in the BRA, and it was unclear on which basis the Notary stated that the outcome of the BRA is “low”.

Finally, it was positively acknowledged that whilst personally meeting with customers to get an understanding of risk is in fact a good and effective control, this alone however is not considered as being a sufficient in terms of law. Whilst the subjective element shall always be present, the risk-based approach cannot solely rely on subjective mitigating measures alone, hence subject persons are to ensure to incorporate a set of objective criteria as part of their risk assessment methodology.

Customer Risk Assessment (CRA) - Regulation 5(5)(a)(ii) of the PMLFTR and Sections 3.2 and 3.5 of the IPs

The Notary was expected to take into consideration all the criteria that influence the customers’ risks, in a manner that actually drives the assessment based on the risk to which such customer exposes them to. To this effect, the Committee noted that the Notary carried out the CRA through an automated tool which included a tick-box questionnaire. Nevertheless:

- The CRA templates provided for all files reviewed were partially completed. Specifically, the Notary did not select any of the applicable options under specific risk elements, hence failing to consider specific ML/FT risk as required in terms of the IPs.
- Despite having knowledge and additional information, the CRA was missing crucial considerations when formulating the risk rating of the customer. For instance, although the SoF and SoW information is provided by the client as part of the on-boarding process when completing the relative forms and questionnaires, this was not inputted into the system to generate the customer's risk rating.
- Although the automated system allowed the Notary to assess most of the ML/FT risks, it was not tailor-made to fit their specific requirements. Particularly, the tick-box approach used did not allow for the inclusion of specific risk factors pertaining to the real estate transactions such as the value of the transaction, the use of own funds or the use of third-party funds.

Therefore, after taking all of the aforementioned facts into consideration, the Committee determined that the CRA adopted was not rigorous and comprehensive enough to enable you to understand the risks posed by customers and to effectively apply the risk-based approach

Record Keeping - Regulations 13(1) and 13(2) of the PMLFTR and Sections 9.1, 9.2(b) and 9.3 of the IPs

The additional information that the Notary had, which information was essential to obtain a comprehensive understanding of the facts surrounding particular transactions, was not included in the CRAs nor recorded on their files in any other manner. This did not only extend the timeliness of the Examination but more importantly, it did not allow the Notary to realize that the information obtained was not sufficient to establish the customers' risk profiles.

Moreover, when requested to provide a log of the AML/CFT related training sessions attended in the previous three years the Notary stated that they only attend local seminars, however, they did not keep any records thereof. Therefore, the Notary was unable to demonstrate whether they had actually received any AML/CFT related training, how frequently this was received, and the nature of training received.

ADMINISTRATIVE MEASURES TAKEN BY THE FIAU'S COMPLIANCE MONITORING COMMITTEE (CMC):

When deciding on the appropriate administrative measures to impose, in addition to the specific breaches outlined above, the Committee took into consideration the importance of the obligations being breached, the level of seriousness, and at times systemic nature, of the findings identified, as well as the extent of ML/FT risk such failures could lead to. The Committee also considered the Notary's size, as well as the impact that the subject person's failures may have had on both its operations and on the local jurisdiction.

The good level of cooperation portrayed by the Notary throughout the supervisory process was also factored in, including the Notary's commitment to remediate its failures, and its statements that it had already commenced working on some action points. This was also evidenced through documentation provided. However, overall the Committee couldn't but note that, at least up until the compliance review, the failures observed confirm that the Notary has not given due regard towards its AML/CFT obligations.

After taking into consideration the abovementioned breaches by the subject person, the Committee decided to impose an administrative penalty of twenty-nine thousand, five hundred and eighty-seven Euro (€29,587) with regards to the breaches identified in relation to:

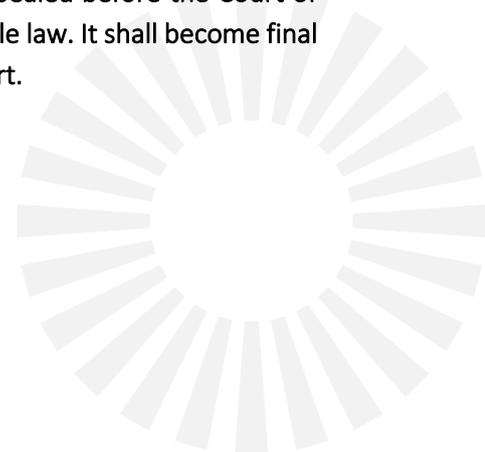
- Regulations 11(9) and 11(10) of the PMLFTR and Sections 4.4.3 and 4.9.1 of the IPs
- Regulation 15(3) of the PMLFTR and Section 5.5 of the 2019 IPs;
- Regulations 5(1) and 5(4) of the 2020 PMLFTR and Sections 3.3.1, 3.3.2, 3.3.4 and 8.1 of the 2020 IPs;
- Regulation 5(5)(a)(ii) of the PMLFTR and Sections 3.2 and 3.5 of the IPs;

Additionally, in terms of Regulation 21(4)(c) of the PMLFTR, the FIAU also served the Notary with a Remediation Directive, to be able to assess the remedial actions being implemented by the subject person in view of the breaches identified. The aim of the Directive is for the FIAU to ensure that the Notary enhances their AML/CFT safeguards and that it becomes fully compliant with the obligations imposed in terms of the PMLFTR and the FIAU's IPs. In virtue of this Directive, the Notary is expected to indicate the remedial actions that they have carried out and implemented since the compliance examination to ensure compliance following the identified breaches, this including but not limited to:

- The updating of the BRA clearly outlining how the Notary has tackled the shortcomings identified during the examination.
- Updates implemented to the CRA methodology that cater for a comprehensive understanding of ML/FT risks and that allows for the assessment to incorporate all the information considered to risk assess customers.
- To provide an update on the measures taken to ensure adequate retention of records of any occasional transaction carried out, as well as in ensuring that there are adequate record keeping systems and procedures in place which enable the timely retrieval of information and/or documentation.

The Directive served on the Notary shall ascertain that sufficient and tangible progress is achieved on the adoption and implementation of all the procedures and measures referred to above. In the event that the requested information and/or supporting documentation are not made available within the stipulated timeframes, or the Notary falls short of their obligations in terms of this Directive, the Notary's default will be communicated to the Committee for its eventual actions, including the possibility of the imposition of an administrative penalty in terms of the FIAU's powers under Regulation 21(1) of the PMLFTR.

The administrative penalty hereby imposed is not yet final and may be appealed before the Court of Appeal (Inferior Jurisdiction) within the period as prescribed by the applicable law. It shall become final upon the lapse of the appeal period or upon final determination by the Court.



Key Take aways:

- While it may very well be acceptable for a parent to set aside some funds for a child and that there may be a legitimate practical or cultural reason for paying in cash, one must still ensure that the ML/FT risks surrounding the origin of such funds are mitigated. Thus subject persons are to obtain additional information, and where necessary, to verify that the individual providing the funds is actually the parent.
- Subject persons are not prohibited from carrying out of an occasional transaction for a person linked with a non-reputable jurisdiction but, rather, they are required to apply commensurate measures targeted to mitigate and, if possible, neutralise ML/FT risks associated with that particular jurisdiction. Hence, the fact that the cash was declared in Malta does not mitigate the higher ML/FT risk. Cash is particularly susceptible to misuse for ML/FT purposes, so much so that (i) the SNRA has repeatedly considered different scenarios involving use of cash to facilitate ML/FT and (ii) Malta's NRA clearly sets out that cash presents a significant vulnerability for the country, especially within the immovable property sector.
- Subject persons need to have sound knowledge of the risks their operations are or could be exposed too. However, in addition to having such knowledge subject persons are also to assess the risks that they are exposed to because of the business relationships they engage in. This needs to be done by assessing the inherent risk which depends on the identification of the existent threats and vulnerabilities as specified by Regulation 5(1) of the PMLFTR.
- The CRA is one of the pillars of a sound AML/CFT compliance program where all the risk criteria are exhaustively considered, and an understanding of risk is obtained. The rationale which led the customer to be rated in a particular manner is to be reflected in the CRA and in turn it is to be ensured that appropriate mitigating measures/controls are applied to minimize the specific increased ML/FT risk identified. Documenting this process is important to confirm the considerations taken to arrive at the final risk score.

16 April 2024

