

Interpretative Note:

Relevant Activity for Notaries



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1. INTRODUCTION

By definition, the AML/CFT obligations envisaged in the Maltese framework apply to persons or entities carrying out ‘relevant activity’ or ‘relevant financial business’ (refer to Section 2.1 ‘Who are the Subject Persons?’ of the FIAU Implementing Procedures Part I). These terms are defined in Regulation 2(1) of the Prevention of Money Laundering and the Funding of Terrorism Regulations S.L. 373.01 (PMLFTR).

When it comes to notaries, it is **paragraph (c)** of the definition of relevant activity under Regulation 2(1) that applies:

(c) notaries and other independent legal professionals when they participate, whether by acting on behalf of and for their client in any financial or real estate transaction or by assisting in the planning or carrying out of transactions for their clients concerning the –

(i) buying and selling of real property or business entities;

(ii) managing of client money, securities or other assets, unless the activity is undertaken under a licence issued under the provisions of the Investment Services Act;

(iii) opening or management of bank, savings or securities accounts;

(iv) organisation of contributions necessary for the creation, operation or management of companies;

(v) creation, operation or management of companies, trusts, foundations or similar structures, or when acting as a trust or company service provider;

Thus while notaries are included in the list of professionals who carry out relevant activity, as can be seen in the definition above, not all their services constitute relevant activities. Those services that fall outside the definition of relevant activity do not trigger AML/CFT obligations.

To assist notaries with determining whether a given service constitutes a relevant activity, and so whether AML/CFT measures such as customer due diligence and record-keeping must be carried out, the FIAU and the Notarial Council have drawn up a comprehensive list of notarial deeds and acts and categorized them accordingly. Moreover the FIAU has also identified and listed a number of services or deeds which although not categorised as relevant activities, constitute common money laundering typologies, in which case notaries should exercise vigilance and consider applying counter-measures to avoid being embroiled in money laundering operations.

The FIAU acknowledges that as public officers, notaries in Malta do not act ‘on behalf of’ clients in their professional capacity, and so this interpretative note is based on the second half of the definition of relevant activity, namely when “... assisting in the planning or carrying out of transactions for their clients concerning ... [points (i) to (v)]”. The FIAU further understands that in instances where notaries act on behalf of another person, such as when appearing on a deed by way of a power of attorney, they do so in their personal capacity and not by way of business. This falls outside the scope of the PMLFTR, in view of the definition of relevant activity, which covers only those activities which persons carry out “when acting in the exercise of their professional activities”.

Since the professional activity of a notary that falls within the scope of the PMLFTR is limited to the activity carried out when assisting in the planning and execution of transactions, it should be noted that the witnessing of signatures and authentication of documents is not considered to be a relevant activity unless specified below.

Should there be any conflict between any provisions of this document, and the Implementing Procedures or the PMLFTR, it is the Implementing Procedures or the PMLFTR that prevail, unless explicitly stated otherwise.

Finally, readers should bear in mind that the interpretations in this document are applicable to persons exercising the notarial profession in Malta. Certain services may be classified differently when carried out by other categories of subject persons.



2. LIST OF NOTARIAL ACTS AND DEEDS

The table hereunder contains a list of deeds in the left hand column, and an interpretation as to whether the service is considered relevant activity or not, in the right hand column.

2.1 MATTERS RELATING TO IMMOVABLE PROPERTY

This categorisation is based on the understanding that the buying and selling of real property (as referred to in paragraph (c)(i) of the definition of relevant activity), should not only comprise those deeds which are referred to and enrolled in the Public Registry as 'deeds of sale'. Rather, this must also include other deeds which are, in effect, akin to a deed of sale, and which should therefore be considered relevant activity. A deed would be akin to a deed of sale where the ownership or equivalent rights over the property are being transferred to another natural or legal person in exchange for a financial consideration that is equivalent to the value of the property.

Deeds classified as relevant activity would attract AML/CFT obligations if there is a payment of €15,000 or more, as this would render the deed an 'occasional transaction' (defined in Regulation 2(1) of the PMLFTR). Below this amount, the deed would not be subject to AML/CFT obligations. For example, on a deed of exchange, notaries must fulfil their AML/CFT obligations only if there is an owelty of €15,000 or more.

The constitution, conservation and cancellation of securities such as hypothecs and privileges does not constitute relevant activity.

Description of deed	Relevant activity
Deed of sale <i>This includes any other contracts which are akin to a deed of sale.</i> <i>This also includes the sale of the directum dominium, but does not include cases where the directum dominium is being sold to a party who already owns the utile dominium. This latter scenario is not considered relevant activity – see the deed below.</i>	Yes
Purchase of the directum dominium to consolidate full ownership <i>In this case, the purchaser already owns the utile dominium, and is acquiring the directum dominium to consolidate full ownership, as distinct from the deed set out above.</i>	No
Promise of sale agreement <i>This also includes a promise of assignment of rights and equivalent agreements.</i> <i>This includes any elements that are typically carried out by the notary, such as drafting the agreement, receiving or holding deposits, and the signing of the agreement by the notary and all relevant parties.</i> <i>Note that the preparation of a blank, general standard template that is not prepared for a specific buyer, and does not make reference to the price, parties or the property, is not to be considered a relevant activity.</i>	Yes
Acquisition of property by title of emphyteusis <i>This also includes an emphyteutical concession. The acquisition of a property by title of emphyteusis is equivalent to a purchase, particularly given that the consideration paid reflects the value of the property itself. For AML/CFT purposes, this is akin to a deed of sale.</i>	Yes
Redemption, conversion or revision of ground rent <i>The redemption, conversion or revision of ground rent does not constitute a new right, and any sums paid are usually relatively low. Moreover it is not a common ML/FT typology and so does not pose a risk of ML/FT.</i>	No
Constitution and renunciation of servitudes, emphyteutical conditions and praedial easements	No
Donation of immovable property <i>*Where a property is transferred partly by title of donation and partly by other title constituting relevant activity, the entire deed shall be treated as relevant activity.</i>	No*
Exchange of immovable property which involves an owelty	Yes
Partition of immovable property	No
Assignment of immovable property	No
Rescission of deed of transfer of immovable property <i>For the rescission to take effect, parties must transfer back the funds and the property. This has the same effect as a deed of sale, but in reverse, rendering it a relevant activity. Naturally, if the original deed was not a relevant activity, then its subsequent rescission is not a relevant activity (e.g.: the rescission of a deed of donation of immovable property).</i> <i>*Where a Court orders the rescission of a deed of transfer of immovable property, the subsequent deed does not constitute relevant activity. This exemption is based on the presumption that the Court considers all evidence brought before it prior to taking a decision, and as such, the rescission would be based on valid legal grounds.</i>	Yes*
Datio in solutum	No
Acquisition of ownership by accession and donation	No
Lease agreement <i>The definition of relevant activity as applicable specifically to notaries does not include matters relating to lease and lease agreements.</i>	No



2.2 MATTERS RELATING TO MARITAL AFFAIRS

An assignment of immovable property made pursuant to a personal separation or divorce settlement or pursuant to the liquidation of the community of acquests or the community of residue under separate administration (COSA) is not deemed to be relevant activity, even in cases where one spouse is acquiring the remaining undivided portion of the property from the other spouse. The transfer of the property in question is part of a process of termination and liquidation of the community of acquests, and as such is an assignment of property already owned by the community. Moreover, the abuse of separation proceedings to launder illicit funds through the purchase of property is not a common ML/FT typology.

Description of deed	Relevant activity
Assignment of immovable property consequent to a separation agreement or divorce settlement	No
Personal separation agreement	No
Pre or post-nuptial agreement	No

2.3 MATTERS RELATING TO SUCCESSION

All matters relating to succession fall outside of the scope of AML/CFT obligations, including the activities listed below.

Description of deed	Relevant activity
Drawing up and publication of a will	No
Publication of a declaration causa mortis	No
Settlement of reserved portion or of a legacy	No
Vesting of possession (immissjoni fil-pussess)	No
Drawing up of an inventory	No
Liquidation of the estate	No



2.4 MATTERS RELATING TO LOANS AND DEBT

A notary's involvement in a loan agreement is not considered a relevant activity since by definition, it does not fall within the second part of the definition of 'relevant activity' for notaries. Nevertheless, deeds such as loan agreements and constitutions of debt may be misused to facilitate money laundering, and notaries should be aware of this potential threat. Section 3 of this document deals with this in more detail.

Description of deed	Relevant activity
Loan, including by private individuals or non-bank entities.	No
Constitution of debt	No
Assignment of debt	No
Settlement of debt	No

2.5 MATTERS RELATING TO SHARES AND COMMERCIAL ENTITIES

Description of deed	Relevant activity
Distribution of assets by a company to its shareholders <i>E.g.: the distribution of company assets as part of the process of winding up or liquidation of a company. These acts form part of the management of a company/buying and selling of business entities.</i> <i>Thus, in the process of voluntary winding up or liquidation of a company, the reversion or transfer of immovable property or of any other asset from the company to its shareholders (where such transfer is carried out by means of a notarial act) shall be considered a relevant activity. Where the winding up or liquidation process has been ordered by a Court, the subsequent notarial acts shall not be considered relevant activity.</i>	Yes
Intragroup transfer of immovable property	Yes
Donation of shares	No
Transfer of shares, goodwill and business concerns <i>These acts concern the buying and selling of business entities.</i>	Yes



2.6 MATTERS RELATING TO TRUSTS, FOUNDATIONS, AND LEGAL ARRANGEMENTS

Notaries are primarily involved in carrying out a relevant activity when they are involved in the constitution of the deed of foundation (a 'notarial trust deed' in case of private foundations and a public deed in case of purpose foundations) and in the setting up of a trust through the drawing up of the 'notarial trust deed' that establishes that trust. A relevant activity is also carried out where there is a distribution of assets.

Paragraph (c)(v) of the definition of relevant activity includes all activities concerning the creation, operation or management of companies, trusts, foundations or similar arrangements or structures. It therefore also includes those services that notaries carry out when they act as trustee or company service providers in terms of the Trust and Trustees Act, Chapter 331 of the Laws of Malta (**TTA**) or the Company Service Providers Act, Chapter 529 of the Laws of Malta (**CSPA**). However, for the purposes of determining relevant activity of the notary a distinction is made between notaries acting in their capacity of Notary Public in terms of the Notarial Profession and Notarial Archives Act, Chapter 55 of the Laws of Malta and when they provides services under the TTA or the CSPA.

A Notary Public may also be a '**qualified person**' in terms of the TTA. This is regulated by the Trusts and Trustees Act (Registration of Notaries to act as Qualified Persons) Regulations S.L. 331.05 and in this capacity the notary must refer to any guidance which may be issued by the MFSA and/or FIAU on the role of the qualified person.

The TTA also makes reference to the '**depository notary**' (a role distinct to that of the 'publishing notary'). The role of the depository notary under Article 43A of the TTA is limited to the safekeeping of documents related to family trusts, and does not comprise relevant activity. Nevertheless, upon receipt of documents, the depository notary may wish to exercise vigilance to avoid involvement in or facilitation of money laundering operations.

The table below provides a list of services that are commonly provided by notaries when publishing deeds and distributing assets, and does not provide a list of all trust or corporate services covered by the aforementioned acts or by Regulation 2(1) of the PMLFTR. When notaries provide services pursuant to the TTA or the CSPA, they are to refer to the aforementioned laws and to any sector-specific guidance issued in relation to such services.

Description of deed	Relevant activity
Constitution of the deed of foundation and trust deed	Yes
Winding up (whether voluntary or otherwise) of a foundation or legal arrangement	Yes
Creation of a trust <i>This excludes acting as a trustee of a trust when this is done in terms of Article 43A of the Trusts and Trustees Act.</i>	Yes*
Settlement of property into trust <i>Including when publishing the notarial acts required to settle property (immovable or otherwise) into trust in terms of Article 43A(3) of the TTA</i>	Yes
Endowment of funds	Yes
Reversion of property to settlor of trust	Yes
Transfer of property between trustees <i>In this regard the notary's role is to identify and verify the identity of the new trustee, to seek to understand the reasons behind the change in the trustee and to identify and verify the parties involved in the trust.</i>	Yes
Payouts to beneficiaries	Yes
Acting as depository notary	No



2.7 MISCELLANEOUS

Description of deed	Relevant activity
Donation of cash/funds <i>*Please refer to Section 3 of this document.</i>	No*
Donation of receivables	No
Deed of correction and notarial corrective acts	No

3. HIGH RISK MATTERS FALLING OUTSIDE THE SCOPE OF RELEVANT ACTIVITY

The FIAU is aware that other deeds may be vulnerable to fraudulent use/ misuse by criminals, to lend legitimacy to otherwise illicit transactions. While the services provided by notaries in connection with these activities are not considered as relevant activities, and hence not subject to AML/ CFT obligations, notaries should nevertheless be vigilant and consider applying appropriate measures. This will prevent them from being misused by criminals or otherwise embroiled in money laundering operations.

3.1 CONSTITUTION OF DEBT, LOAN AGREEMENT AND OTHER MATTERS RELATING TO DEBT

A constitution of debt is intended to crystallize in writing a pre-existing debt between the debtor and the creditor, providing the creditor with an enforceable legal instrument in the case of a default in payment by the debtor, among other legal consequences. The ML/FT risk associated with this contract emanates from the possibility of misuse, whereby the alleged debtor and creditor enter into a constitution of debt regarding a **fictitious** debt, in turn providing the parties with a tool to legitimize a transfer of otherwise illegitimate funds. This is made worse by the fact that the notary publishing the constitution of debt is not typically present at the point of the creation of the allegedly pre-existing debt and is therefore not in a position to verify whether the debt is real (nor is the notary expected to do so).

Persons seeking to facilitate the laundering of illicit funds may likewise misuse loan agreements in a similar fashion. Fictitious loans are a means of placing illicit funds into the financial system, with the creditor (acting in collusion with the debtor) claiming the funds as repayments made by the debtor. Loan agreements may also form part of a complex layering process.

To mitigate the risk of attesting public faith to a fraudulent deed, notaries may wish to consider requesting information and/or documentation to substantiate or justify the alleged debt or to understand the source of the funds making up the loan and its repayments.

3.2 DONATION (INCLUDING DONATIONS OF CASH, FUNDS, AND SHARES IN BUSINESS ENTITIES) AND EXCHANGE WHERE NO OWELTY IS PAID

Contracts that evidence the donation of funds from one party to another are highly vulnerable to being misused to facilitate money laundering. The donor and the donee will enter into a deed of donation to create the appearance of a legitimate transfer or source of funds. The donee will then present the deed of donation as the source of funds, to justify a significant cash deposit or other similar transaction.

When providing services in connection with a deed of donation, the notary may take measures to detect any illicit activity and prevent themselves from being misused in such a manner. The notary may request the source of the donor's funds, in order to justify the transaction. The notary should also seek to understand why the donation is taking place. This may be done by understanding the relationship between the parties and whether there are circumstances surrounding this relationship which either reduce the risk (e.g.: a donation from a parent to a child to assist with a property purchase) or increase the risk (e.g.: there is adverse media surrounding the parties or their immediate relatives, notwithstanding the relationship).

A deed of donation may also be misused to swiftly transfer the ownership of funds from one person to another in an attempt to avoid detection or confiscation of the funds by law enforcement authorities.

For the above reasons, on a risk-sensitive basis, notaries are to treat such agreements with caution and should consider carrying out measures to ensure that they do not end up facilitating criminal offences including ML/FT.

Similarly, in the case of a contract of exchange, notaries should be vigilant to be able identify any situations where there is an obvious disparity between the values of the properties being exchanged and for any transactions aimed solely at transferring ownership for no known purpose to be detected.

The FIAU remains available to assist subject persons. Questions on the application of AML/CFT measures may be sent to queries@fiumalta.org

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