

Interpretative Note: Relevant Activity for Lawyers



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1. INTRODUCTION

Independent legal professionals are bound by their own professional rules to act with integrity and uphold the law. They are also bound to comply with anti-money laundering obligations in several situations.

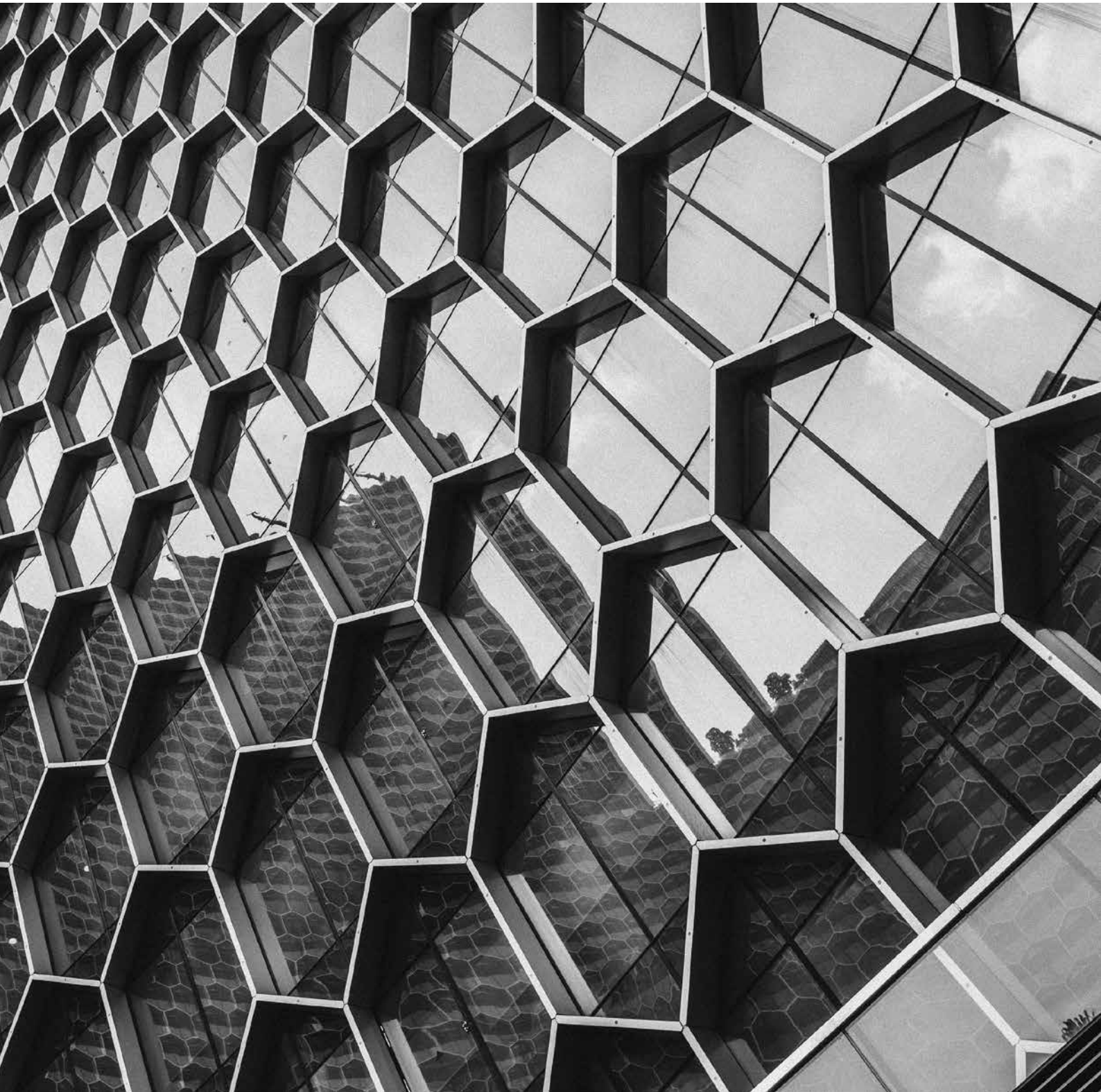
By definition, the AML/CFT obligations envisaged in the Maltese legal and regulatory framework, primarily the Prevention of Money Laundering Act Cap. 373, the Prevention of Money Laundering and Funding of Terrorism Regulations S.L. 373.01 (PMLFTR), and the FIAU Implementing Procedures, apply to persons 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 PMLFTR.

Although lawyers are included in the definition of relevant activity, lawyers provide a vast array of services, not all of which constitute relevant activity.¹ Those services that fall outside the definition of relevant activity do not trigger AML/CFT obligations.

The purpose of this guidance document is to assist independent legal professionals to meet their obligations under the PMLFTR and FIAU Implementing Procedures by explaining when a legal professional is deemed to be a subject person, and by providing an interpretation of the term 'relevant activity', as applicable to lawyers.

This guidance note has been drafted in conjunction with the Chamber of Advocates and forms part of a broader set of guidance on the implementation of lawyers' AML/CFT obligations.

¹ . Refer to sub-paragraph (c) of the definition of relevant activity under Regulation 2(1) of the PMLFTR.



2. A BRIEF OVERVIEW OF MONEY LAUNDERING

Money laundering and the funding of terrorism (ML/FT) are criminal activities posing a serious threat to society and fuel other criminal activity. Historically, lawyers have been and continue to be targeted by criminals for their expertise, and for the reputability associated with the legal profession, in order to assist criminals with laundering their illicit funds.

Money laundering is generally described as the process by which the illegal nature of criminal proceeds is changed, concealed or disguised so that the proceeds appear to come from a legitimate source. Chapter 1 of the FIAU Implementing Procedures Part I provides a more detailed explanation of money laundering and funding of terrorism, including the definitions at law.

There are, however, three acknowledged phases to money laundering: placement, layering and integration.

Placement: Cash and other assets generated from crime are first introduced in the financial system. This is the point when proceeds of crime are most apparent and at risk of detection. Banks and other financial institutions are known to have developed detection systems and are therefore less prone to being misused by criminals as the first port of call for placing the proceeds of their crime. Criminals may target non-financial businesses, such as legal professionals, to place their proceeds within the financial system, particularly because their practices commonly deal with client money.

Layering: Once placement occurs, the proceeds of crime are in the financial system. Launderers will attempt to obscure the origins of the proceeds by creating complex layers of transactions. These transactions often involve different entities, such as companies and trusts, and can take place in multiple jurisdictions. Independent legal professionals may, likewise, be targeted for their professional services at this stage.

Integration: Once the funds have been distanced from the source, money launderers are able to make the funds appear legitimate. These are re-entered into the economy through what appear to be normal business or personal transactions. A legal professional may be targeted to assist, for instance, with purchasing real estate, setting up a trust, acquiring a company, or even to settle litigation, among other activities.

Subject persons must, therefore, apply appropriate due diligence measures, including transaction scrutiny, to prevent their services from being misused at any stage of the money laundering cycle.

3. SCOPE OF THE PMLFTR

The PMLFTR and this guidance note cover independent legal professionals and, therefore, apply to firms or sole practitioners who exercise the legal profession in Malta under applicable laws and provide legal services to other persons in the exercise of their professional activities.

The obligations do not cover legal professionals employed by a public authority or working in-house, and who do not provide legal services in their personal capacity beyond their employment.

The obligations envisaged in the PMLFTR apply to legal professionals when they carry out **relevant activity**. The term 'relevant activity' is defined in Section 4 of this document.

When lawyers only provide services that fall outside the definition of relevant activity, they are not considered subject persons and, hence, are not subject to the PMLFTR.

On the other hand, when lawyers provide a mix of services, some or all of which constitute relevant activity, they immediately become subject persons with AML/CFT obligations, irrespective of the volume that such work represents.

The AML/CFT obligations themselves, such as customer due diligence and reporting, would need to be carried out with respect of those specific services that constitute relevant activity. Likewise, when compiling the replies to the Risk Evaluation Questionnaire, lawyers should only consider those statistics, activities and clients that fall within the scope of relevant activity.





Becoming a subject person

Lawyers are generally deemed to be open to providing clients with any legal service that they are, by virtue of their admission to the bar, authorised to provide. This means that lawyers are deemed to be open to provide 'relevant activities' as part of their practice. However, not all lawyers provide services that are considered relevant activity. This may be the consequence of a conscious decision that the lawyer has made not to accept briefs or engagements that would require them to provide these services, or simply because clients have not requested them to provide these services.

Lawyers become subject persons once they provide a service that falls within the definition of a relevant activity. However, lawyers ought to be prudent in this regard, and if they are interested in providing services that fall within this scope, especially if they pursue opportunities to provide these services, then they ought to be prepared for that eventuality to ensure that they can comply with all AML/CFT obligations.

If lawyers intend to carry out relevant activity – that is, they are willing to provide services that fall within the definition of a relevant activity – they are expected to have all AML/CFT policies and procedures in place prior to accepting briefs or engagements of this nature from clients.

This is intended to ensure that lawyers are immediately in a position to meet their AML/CFT obligations when onboarding their first client, who requires that they provide services falling within the definition of relevant activity. This would be done by, among other matters, having an understanding of the risks and red flags associated with the service to be provided, being able to carry out a business and customer risk assessment, and all necessary customer due diligence measures.

Without having the appropriate knowledge and procedures already in place, it is highly unlikely that lawyers will be able to draw up an appropriate business risk assessment and customer risk assessment, and carry out commensurate customer due diligence measures, without delaying or disrupting the service to be provided. Consequently, it would be highly unlikely for these lawyers to detect any suspicions of ML/FT or proceeds of crime, and could potentially end up being embroiled in a criminal operation.

Having all procedures and policies in place would allow lawyers to strike a balance between accepting new clients or new engagements from existing clients, while remaining compliant with all their AML/CFT obligations at law with respect to relevant activities.

At such initial stages, client acceptance policies (including policies for accepting new matters from existing clients) and the business risk assessments need not be overly complex and may be built on incrementally as lawyers broaden the scope of their activities and undertake more relevant activities. Subject persons who do not offer *“complex products, services or transactions, and with limited or no international exposure, will not require a complex or sophisticated assessment”*, as set out in further detail in Chapter 3.3.2 of the FIAU Implementing Procedures Part I.



Once a lawyer or legal firm becomes a subject person, they must register on the FIAU's Compliance and Supervision Platform for Assessing Risk (CASPAR), and ensure that they respond to the Risk Evaluation Questionnaire ("REQ") when this becomes due.

Lawyers are deemed to become subject persons when they undertake relevant activity. They are, therefore, bound at law to register on CASPAR during that year and to complete the REQ for that year. If, in any subsequent year, the same lawyer or legal firm does not undertake any relevant activity, they need not complete the REQ for that year but must nevertheless indicate, through the CASPAR system itself, that they have not undertaken any relevant activity throughout the reporting year.

4. RELEVANT ACTIVITY AS APPLICABLE TO LAWYERS

The broad range of services that lawyers in Malta provide is not listed exhaustively, or defined at law or in any other written document.

At times, lawyers also find themselves in situations when the initial service being provided, such as litigation, does not constitute relevant activity but, as the case develops, they may be involved in structuring or assisting in the implementation of a transaction. It is therefore not always self-evident when lawyers can be the subject of the regulations.

This makes it impractical to list services comprehensively according to whether they constitute relevant activity or not. Given the complexity of services that may be provided, and even the range of services that may be needed in a single given case, it is ultimately up to the individual lawyer or legal firm to determine, on a case-by-case basis, whether that particular service falls under the definition of relevant activity. However, to assist practitioners with determining whether they are subject persons, and to ensure that AML/CFT rules are applied consistently among the sector, this document shall set out to explain the definition of relevant activity insofar as it may apply to lawyers within the local context.

When it comes to lawyers, it is paragraph (c)(i)-(v) of the definition of relevant activity under Regulation 2(1) of the PMLFTR which 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;

In terms of the definition above, AML/CFT obligations are triggered under two circumstances:

when lawyers act on behalf of and for their client in any financial or real estate transaction;

or

when lawyers assist in the planning or carrying out of transactions for their clients concerning the activities listed under points (i) to (v) above.

The following sections explain the above in more detail.

4.1 WHEN LAWYERS ACT ON BEHALF OF AND FOR THEIR CLIENT IN ANY FINANCIAL OR REAL ESTATE TRANSACTION

Acting ‘for and on behalf of a client’

It is inherent in the lawyer-client relationship that lawyers act on behalf of and for their client and not in their own name. As such, the term ‘on behalf of or for their client’ is intended to cover specific scenarios when the lawyer acts under a specific mandate from the client, and not simply under normal client instructions.

Thus, the lawyer would be acting ‘for and on behalf of a client’ when acting under a mandate or a form of power of attorney, and when the client is not the person to appear on the contract or the deed of transfer, but it is the lawyer (or the lawyer’s representative under some form of sub-delegation clause) who appears.

This includes situations when:

- i. the lawyer (or the lawyer’s representative as sub-delegatee of the lawyer) acts as the mandatary of the client pursuant to a general or specific mandate or power of attorney;
- ii. the lawyer acts as a nominee or a front for an undisclosed principal²; and
- iii. the lawyer receives funds in escrow or disburses funds to complete or facilitate the completion of a transaction.

‘Financial or real estate transaction’

Financial transaction: A transaction when there is a transfer of funds, including the placement, transfer or withdrawal of funds. This includes the transfer of cash or funds from a bank account to another. For this purpose, funds should include any currency or other unit of value.

Real estate transaction: A transaction that involves the disposal or acquisition of immovable property³ by title of sale or emphyteusis or by any other title when the transfer is akin to a deed of sale. The latter refers to any deed when ownership, or equivalent rights over property, are being transferred to another person in exchange for a financial consideration that is equivalent to the value of the property.⁴ It also includes an exchange of immovable property.

Real estate transactions would attract AML/CFT obligations when there is a payment of €15,000 or more, which would render the transaction an ‘occasional transaction’ (defined in Regulation 2(1) of the PMLFTR). Below this amount, the transaction would not be subject to AML/CFT obligations. For example, with respect to the exchange of immovable property, lawyers must fulfil their AML/CFT obligations if there is an equalisation payment (owelty) of €15,000 or more.

The rescission of all these deeds is also considered to be relevant activity, unless the rescission has been ordered by a Court of Law.

Services provided in relation to immovable property transactions do not constitute relevant activity if the subject matter is limited to:

- a. the redemption, conversion or revision of ground rent;
- b. the donation or partition of immovable property; or
- c. the transfer of immovable property from one (former) spouse to the other, pursuant to a personal separation and/or liquidation of the community of acquests, or a divorce settlement, including when one (former) spouse is acquiring the remaining undivided portion of a property from the other spouse.

2. Undisclosed only to third parties – as part of customer due diligence requirements, subject persons must always identify their client and beneficial owner(s) (where applicable) in terms of Regulation 7 of the PMLFTR.

3. The term immovable property has the same meaning as set out in the Civil Code (Chapter 16) of the Laws of Malta.

4. Subject persons are to bear in mind that AML/CFT obligations are triggered when the threshold for an occasional transaction is met. This means that, in the case of a sale of immovable property, AML/CFT measures need not be undertaken when the consideration is less than €15,000.



4.2 WHEN A LAWYER ASSISTS IN THE PLANNING OR CARRYING OUT OF TRANSACTIONS FOR THEIR CLIENTS CONCERNING THE ACTIVITIES LISTED UNDER POINTS (I) TO (V) OF PART (C) OF THE DEFINITION OF RELEVANT ACTIVITY

The terms ‘planning’ and ‘carrying out’ comprise all the services and actions that are necessary for a transaction to be carried out, whether in preparation for the transaction, or as part of the execution. This could include the provision of advice on how best to structure transactions, the drafting of documents, such as contracts and statutory instruments, the receipt of funds, and the registration of documentation when this is necessary to provide the service or execute the transaction. These aspects are specified in more detail below.

- (i) When a lawyer assists in the planning or carrying out of transactions for a client concerning the buying and selling of real property or business entities

Planning and carrying out of transactions

The term ‘planning or carrying out of transactions’ goes beyond the mere advisory role on legal rights and obligations, and involves:

- i. at the **preparatory** stage, assistance in the preparation, arrangement or design of the transaction; and
- ii. at **closing**, the implementation, performance, execution and completion of the steps that may be necessary for the transaction to come to fruition.

The term ‘planning or carrying out transactions’, therefore, includes any of the below, whether the lawyer is acting alone or with other advisors:

- the design and planning of a transaction to bring about specific commercial and economic outcomes;
- the drafting of contracts or agreements that give effect to the design and planning of those outcomes;
- the reviewing and re-drafting of such agreements and contracts;
- assisting in the negotiations on behalf of a client on the commercial terms of a transaction; and
- assisting the client in the implementation and execution of a transaction (e.g., by facilitating the transfer of funds).



Buying and selling of real property

This has the same meaning as set out above under ‘Real estate transactions’. Thus, it covers a transaction that involves the disposal or acquisition of immovable property by title of sale or emphyteusis, or by any other title when the transfer is akin to a deed of sale, as well as an exchange of immovable property, as explained above. The same exceptions apply.

When the service is provided in relation to aspects that are beyond the planning, design, structuring, financing or execution of such a transaction, this does not constitute relevant activity. The list below provides examples of subject matter that falls outside the scope of relevant activity, and which is commonly provided by lawyers in Malta:

- i. explanations or advice on guarantees or warranties affecting the client, or the liability to which the client is or may be exposed;
- ii. explanations or advice about the client’s contractual rights under a preliminary agreement;
- iii. explanations or advice on the root of title to property or whether the property is encumbered by any real rights or security interests, or whether the property is subject to any real rights in favour of third parties, including any servitudes in favour of a dominant tenement, or similar non-transactional matters, such as rights or obligations;
- iv. explanations or reviews of the Notary’s research on the root of title of the property; and,
- v. generally, any other matter that does not involve assistance in the planning and design of the transaction (including funding methods) or the implementation of the transaction.

Buying and selling of business entities

The purchase and sale of business entities includes the transfer of registered companies or partnerships, or of parts thereof or shares therein, as well as the transfer of goodwill and business concerns.

As with the buying and selling of real property, where the service is provided in relation to aspects that are beyond the planning, design, structuring, financing or execution of such a transaction, this does not constitute relevant activity. This includes:

- i) reviewing agreements for aspects that do not relate to the transaction or funding methods, such as guarantees or warranties affecting the client;
- ii) explanations or advice on liability;
- iii) providing advice or drafting provisions to ensure conformity with local laws and regulations; and
- iv) the filing of share transfer forms, which have already been completed by other entities, with respect to a transaction that has already taken place without the lawyer’s involvement.

General exclusions

The following fall outside the scope of relevant activity:

- transfers of business entities, or shares therein, and/or immovable property from one spouse to the other pursuant to a personal separation and/or liquidation of the community of acquests, or a divorce settlement;
- assistance in post-contract services – such as assistance in completing documentation for registration with public authorities to give notice of a transaction (or an event that is the consequence of the transaction);
- assistance with all acts that are a consequence of the transaction having been implemented and have become effective at law; and
- assistance with transactions or activities that would under normal circumstances constitute relevant activity, but which have been ordered by a court of law and the service or activity is undertaken directly in compliance with such a court order (*See also Out-of-Court Settlements below*).

- (ii) When a lawyer assists in the planning or carrying out of transactions for a client concerning 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

The management of client money, securities or other assets comprises services that go beyond the mere holding of funds received for the eventual execution of a transaction on which a lawyer may be advising. It covers situations wherein the lawyer invests or otherwise applies the client's assets, with a view to increasing or safeguarding their value, or the application of client monies or assets to the purchase or disposal of other assets. This may also include the passive holding of investments for a client without any underlying legal service attached to the monies held in a client account.

When the service provided is one that is licensed or required to be licensed under the Investment Services Act (Chapter 370 of the Laws of Malta), it is deemed to be a 'relevant financial business' in terms of the PMLFTR, requiring the carrying out of AML/CFT obligations. Licensees must comply with the requirements of the aforementioned Act, the PMLFTR and any other applicable rules.

Paragraph (ii) of the definition of relevant activity also captures services that fall outside the scope of the aforementioned investment services licensing regime, such as when assets or monies are invested in instruments that are not listed in the Second Schedule of the Investment Services Act (e.g., immovable property, precious metals and works of art, among others). This too is deemed relevant activity, requiring AML/CFT obligations to be carried out.

Receiving funds on account of legal, professional, judicial or other fees does not constitute the management of client monies and is not considered to be relevant activity.



Preventing misuse of the lawyer's client account

Client accounts held by professionals such as lawyers are attractive to criminals and money launderers since the lawyer's name lends trust and legitimacy to a transaction. Hence, the misuse of client accounts by criminals is a known money laundering typology. The FIAU does not regulate the use of the client account, however this section provides practical guidance to assist lawyers to ensure that they do not unwittingly participate in facilitating money laundering in this manner.

Limiting the use of the client account

Firstly, lawyers should avoid permitting the use of their client account when they are not providing any legal services. In this regard, lawyers may wish to avoid disclosing the details of their client account, unless this is necessary in order to carry out a specific service, which they are fully aware of and in agreement with. Likewise, lawyers should discourage clients from passing the details on to third parties.

Using the client account only as necessary

To prevent misuse, client accounts should only be used to hold client money for legitimate transactions, which are incidental to the legal services provided. Lawyers should know who they are receiving funds from and should ensure that the value is commensurate with the purpose for which they are intended. It is considered good practice to cross-check information about payments received against the services being provided.

When a transaction is aborted, and given there is no suspicion of ML/FT or proceeds of crime, funds should be transmitted back to the client through the same channels and in the same manner in which they were received. If this is not possible and if still there are no suspicions of ML/FT, lawyers should seek to transfer funds to another account in the client's name held by a bank or financial institution in a reputable jurisdiction. Lawyers should avoid transferring unused client funds to third parties designated by the client; such requests are typically indicative of money laundering.

Lawyers should ensure that their account is not used in lieu of a banking or payment account in order to facilitate payments or transfers of funds, thereby providing a shadow banking service.

Finally, lawyers should seek to comply with the client account rules of the profession's regulator from time to time when this is applicable.

Limiting funds received in the client account

Lawyers should consider limiting incoming funds if they do not come from an account held in the client's name from a local or EU/EEA bank or financial institution, or one held in a reputable jurisdiction. Lawyers should likewise be careful about the ML/FT risk associated with the use of cash and cash deposits into client accounts, and may wish to consider accepting only electronic transfers of funds. When in doubt of the source of the funds, it would be in the lawyer's interest to enquire further and obtain relevant information. Lawyers should avoid receiving funds from any sources that may give rise to concern to them.

Prior acceptance of client instructions

Lawyers should be satisfied that funds received through the account are for purposes that the lawyers have explicitly agreed to. Likewise, the lawyer should scrutinise client instructions and ensure that funds are only transferred out of the client account in the manner and to the beneficiaries that have been agreed to, and these instructions should make logical and economic sense. Importantly, the transfer of funds to third parties should be in line with the transaction being carried out.

- (iii) When a lawyer assists in the planning or carrying out of transactions for a client concerning the opening or management of bank, savings or securities accounts

This covers any form of assistance provided by lawyers to a client to open or manage bank accounts or securities accounts, such as accompanying the client to a bank to open these accounts or using their contacts within these institutions to facilitate the opening of an account.

This type of assistance falls within the ambit of relevant activity and brings about AML/CFT obligations on the lawyers undertaking these activities. This also includes advice given to clients in connection with where and how to open bank accounts and providing advice on the management of these accounts, without necessarily operating those bank accounts themselves.

Acting as a signatory on such an account is also relevant activity, irrespective of whether lawyers can move funds with their sole signature or whether other signatures are required.

- (iv) When a lawyer assists in the planning or carrying out of transactions for a client concerning the organisation of contributions necessary for the creation, operation or management of companies

and

- (v) When a lawyer assists in the planning or carrying out of transactions for a client concerning the creation, operation or management of companies, trusts, foundations or similar structures, or when acting as a trust or company service provider

These activities include what have become known as corporate support services. In some cases, these services are provided as part of a larger transaction and are intended to facilitate the completion of a transaction; in other instances, they are provided as a service in their own right. In either case, these services constitute relevant activity.

These services include:

- a. assistance and planning to organise contributions necessary for the creation, operation and management of companies.

This involves any assistance or facilitation by a lawyer for the promoters of a company to make the necessary initial contributions for the establishment of a company; and, subsequently, for that company to be managed and operated. This includes any form of contribution, whether it is made in the form of (i) share capital; (ii) debt capital; (iii) hybrid capital; or (iv) in kind. Lawyers facilitate these services by allowing the client's account to be used to receive fund transfers for these contributions. The latter is indeed relevant activity. In line with the above guidance on the use of the client's account, lawyers should remain alert and vigilant when disproportionate contributions are made, particularly at company formation stage. This would include capital contributions that are not commensurate to the declared or disclosed objectives or purpose of the company at the time of onboarding, and may be indicative of money laundering.

The operation or management of companies also includes liquidation of companies. Lawyers acting as liquidators, or assisting liquidators in insolvency or winding up proceedings, are deemed to be carrying out relevant activity. This is the case even when the lawyer is appointed as such by a court or tribunal.



b. assistance in the planning or carrying out of the creation of (i) companies; (ii) trusts; (iii) foundations; and (iv) similar structures.

The involvement of lawyers in the setting up of companies, trusts and other entities includes:

- i. the selection of the type of commercial entity that would most meet the client's requirements;
- ii. the drafting of the constitutional documents for companies, trusts, foundations or other legal arrangements;
- iii. submitting documentation with the relevant registries to formalise the formation of the company.

These activities are considered to be relevant activities that render the lawyer a subject person.

Lawyers are reminded of their obligation under Article 3 of the Company Service Providers Act (Cap. 529) to notify the FIAU that they are acting as company service providers by way of business. The notification form is available on the FIAU website and must be duly completed prior to providing any such services. They should also refer to any guidance for company service providers issued under the Company Service Providers Act and the PMLA.

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

The FIAU notes that there are other activities or deeds that are highly vulnerable to fraudulent use/misuse by criminals to lend legitimacy to otherwise illicit transactions. While the services provided by lawyers in connection with these activities are not subject to AML/CFT obligations, lawyers may nevertheless wish to be vigilant to avoid being misused to facilitate money laundering.

5.1 CONSTITUTION OF DEBT

A constitution of debt is meant to crystallise 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 for the lawyer arises from the possibility of misuse of this legal instrument by the client, 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 legitimise a transfer of otherwise illegitimate funds.

This risk may be compounded by the fact that the lawyer representing the client, or the Notary publishing the constitution of debt (where applicable), are not typically present at the point of the *creation* of the alleged pre-existing debt, and are therefore not always in a position to verify whether the debt is real.

To mitigate the risk of being misused by launderers through a constitution of debt, lawyers may wish to consider requesting information and/or documentation to substantiate or justify the alleged debt.

5.2 DONATION OF CASH / FUNDS

Deeds or private writings that evidence the donation of funds from one party to another are highly vulnerable to being misused to facilitate money laundering. A deed of donation may be drawn up by a lawyer at the client's request, and signed by two parties (the donor and the donee), to create the appearance of a legitimate source of funds.

The deed would then be exhibited by the donee to financial institutions or other subject persons to justify a significant cash deposit or other similar transaction, whereby the same donee claims the donation to be the source of funds.

A lawyer may wish to consider requesting the source of the donee's funds to justify such a transaction, particularly when the sum is of significant value or being made in unusual circumstances. The lawyer may, moreover, wish to understand why the donation is taking place, particularly by understanding the relationship between the parties and whether there are circumstances surrounding this relationship that 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.

5.3 SHAM LITIGATION AND OUT-OF-COURT SETTLEMENTS

Litigation and dispute resolution services are outside the scope of AML/CFT regulation. However, it may constitute *sham litigation* if the subject of the dispute is fabricated (there is no actual claim and the litigation is merely a pretext to transfer the proceeds of crime from one entity to another, possibly, but not necessarily, through a client account) or if the subject of the litigation is a contract relating to criminal activity that a court would not enforce.

There is a possibility that clients set up, or are knowingly involved in, fabricated civil claims in courts of law. The existence of the dispute would be used to legitimise what could well be a fabricated claim. In most instances these would be disputes between parties acting in collusion, and they would tend to be settled between these parties so that the settlement would itself be fabricated.

The parties would then agree to settle the claims amicably, with funds being transferred to the claimant as part of the settlement. The recipient of the funds would then attempt to use the civil suit, including a record of the court proceedings, as evidence of the purpose of the transaction, when requested to do so by a financial institution or other subject person to justify the source of funds.

Lawyers should be aware of the possibility that civil cases may be misused in this manner, and may wish to be wary of any unusual circumstances surrounding these settlements to ensure that they do not end up facilitating the laundering of proceeds of crime.

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Questions on this document or on the application of AML/CFT measures may be sent to **queries@fiaumalta.org**

Financial Intelligence Analysis Unit
65C, Tower Street,
Birkirkara BKR 4012,
Malta

Telephone: (+356) 21 231 333
Fax: (+356) 21 231 090
E-mail: info@fiaumalta.org
Website: www.fiaumalta.org