

THE NOTARY AND MONEY LAUNDERING

Paper

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Introduction

The ‘notary’, as an independent legal professional, is referred to specifically for the first time in Ireland in 2010 in anti-money laundering legislation. The *Criminal Justice (Money Laundering and Terrorist Financing) Act 2010* (‘the 2010 Act’) came into force in Ireland on 8 July 2010 and regulates specified professional activities of the notary.

The 2010 Act transposes the Third EU Money Laundering Directive (2005/60/EC) and associated implementing Directive 2006/70/EC into national law. The 2010 Act also gives effect to the formal recommendations set out by the Financial Action Task Force (‘FATF’). FATF is the international anti-money laundering and anti-terrorist finance body established by the G7 nations. It is noteworthy that the 2010 Act consolidates Ireland’s anti-money laundering and terrorist financing law which previously had been contained in several Criminal Justice Acts. This is to be welcomed.

The 2010 Act regulates, in part, the profession of ‘notary’ (there are no references to ‘notary public’ or ‘public notary’) in the context of the notary being an ‘independent legal professional’. This is of significance as it is a recognition of the notary public in Ireland firstly as an *independent professional* and, secondly, as a ‘legal professional’. There are three categories of ‘relevant independent legal professional’¹ governed by the 2010 Act. These are a barrister, solicitor and notary when they carry out specified ‘legal services’ as defined in the 2010 legislation.

As stated, the three professions specifically mentioned as ‘relevant independent legal professionals’ are defined in section 24 of the 2010 Act as meaning ‘a barrister, solicitor or notary’ who carry out any certain specified legal services. There are further definitions of only two of these independent legal professionals. A ‘solicitor’ is defined as a ‘practising solicitor’; a barrister means ‘a practising barrister’ and the 2010 law is silent on any definition of ‘notary’. The reason why the notary is specifically mentioned is because the

¹ Section 24 of 2010 Act

Third Money Laundering Directive of 26 October 2005 (2005/60/EC) specifically provides in Article 2 that the Directive shall, *inter alia*, apply to ‘notaries and other independent legal professionals’ in the circumstances outlined above.

The expression ‘dirty money’ is used in the context of money laundering in the Third EU Directive on Money Laundering of 2005.² The proceeds of criminal conduct are defined in wide terms.

The definition of ‘services’ in the 2010 is crucial to the understanding of the obligation of the notary in complying with the stipulations set out in the 2010 Act. Before I examine the limited definition of ‘services’ in the 2010 Act and therefore the limited obligations of the notary under money laundering legislation, the question may be posed as to what legal services is the notary public in Ireland authorised to perform?

Functions of the Notary

A notary in Ireland is authorised, among other matters, to draw, attest or certify, usually under his or her official seal:

- deeds and other documents, including conveyances of real and personal property;
- powers of Attorney relating to real and personal property situate (domestically) or in foreign countries;
- note or certify transactions relating to negotiable instruments;
- prepare wills or other testamentary documents and
- draw up protests or other formal papers relating to occurrences on the voyages of ships and their navigation, as well as the carriage of cargo in ships.

In short, the notary public in Ireland has a comparable standing in terms of authority and functions to that of a barrister or solicitor in non-contentious business.³

² Recital (1) of Directive 2005/60/EC

Regulated Services

While the notary has the same authority as a barrister or solicitor in Ireland in non-contentious business, as outlined above, it is only when the notary is performing certain specified services that he or she is subject to the rigours of the 2010 anti-money laundering legislation. Section 24 of the 2010 Act sets out the relevant regulated services, *inter alia*, that place obligations on the notary (and as a consequence thereby limits the obligations of the notary in relation to matters that do not come within the definition of ‘services’ as defined in the 2010 Act).

The regulated services constitute the provision of assistance in the planning or execution of transactions for clients who carry out any of the following:

- buying or selling land or business entities;
- managing the money, securities or other assets of clients;
- opening or managing bank, savings or securities accounts;
- organising contributions necessary for the creation, operation or management of companies;
- creating, operating or managing trusts, companies or similar structures or arrangements: or
- acting for or on behalf of clients in financial transactions relating to land.

The ‘services’ specified above are referred to in this paper as ‘the regulated services’. The obligations of a notary in relation to actions he or she must take in relation to customer or client due diligence must always be tested against these specific services.

The word ‘client’ is specifically mentioned in the Third Directive and in the 2010 Act. May the notary argue that he or she does not have a ‘client’ – but merely an appearer as the notary may be only a witness to a signature? A dictionary definition of ‘client’ is, *inter alia*, ‘the party for which professional services are rendered’ - ‘a customer’. It would be difficult for a notary to state to-day, if indeed ever, that he or she does not render a professional service.

³ E G Hall, ‘The Right Note’ (The Office of the Notary Public in Ireland), vol 104 *Gazette of the Law Society of Ireland*, (November 2010) pp. 40-43.

The definition of regulated ‘services’ is so wide that even if anyone argued that the notary was only witnessing a signature, the notary is ‘assisting’ – and the word ‘assist’ means ‘to aid or help’. The notary is certainly aiding and helping the client.

Customer Due Diligence.

In relation to regulated services, the notary must carry out customer due diligence (CDD), in general, prior to carrying out the professional service. This applies even when carrying out an occasional transaction. [See section 33 of the 2010 Act.]

There are three degrees of customer due diligence – (i) simplified due diligence; (ii) standard due diligence and (iii) enhanced due diligence. Each degree of due diligence incorporates the previous degree of due diligence but adds an additional dimension.

Simplified Due Diligence (Who Qualifies?)

Simplified due diligence – without ascertaining beneficial ownership - applies to certain designated entities set out in section 34 of the 2010 Act.

These designated entities are:

- a credit or financial institution in Ireland which is subject to the requirements of the Third Money Laundering Directive;
- a credit or financial institution in another Member State which is supervised or monitored for compliance with the Third Money Laundering Directive;
- a credit or financial institutions elsewhere than in Member States designated by the Minister for Justice and Law Reform;
- a company listed on a regulated market;
- a public body (public authorities);

- a body, whether incorporated or not, that
 - (a) has been entrusted with public functions under a provision of the treaties of the European Communities or an Act adopted by an institution of the European Communities;
 - (b) in the reasonable opinion of the notary (designated person) the identity of the body is publicly available, transparent and certain;
 - (c) in the reasonable opinion of the notary (designated person) the activities of the body and its accounting practices are transparent, and
 - (d) the body is either accountable to an institution of the European Communities or to a public authority of a Member State.
- certain insurance policies, pensions or electronic money products [See section 34 (6) and (7) of the 2010 Act].

The Minister for Justice and Law Reform has listed certain countries where the Minister is satisfied that the country listed imposes requirements equivalent to those specified in the Third Money Laundering Directive and accordingly simplified customer due diligence can be carried out in relation to a credit or financial institution in those specified countries. Pursuant to the *Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (Section 31) Order 2010*⁴ the countries listed are:

- Argentina
- Australia
- Brazil
- Canada
- Hong Kong
- Iceland
- Liechtenstein
- Mexico
- New Zealand

⁴ S.I No 343 of 2010.

- Norway
- Russian Federation;
- Singapore
- Switzerland
- South Africa
- United States of America
- The Dutch overseas territories of Netherlands Antilles and Aruba
- The French overseas territories of Mayotte, New Caledonia, French Polynesia, Saint Pierre and Miquelon and Wallis and Futuna.

In these cases, the notary should obtain identification details of the relevant person appearing before him or her to satisfy the notary that the person meets the criteria for simplified due diligence and to keep identity details on his or her file.

Standard Due Diligence

Apart from banks and others in Ireland set out in the simplified due diligence procedure as above, (and excepting ‘politically exposed persons’ (as defined below)) the following procedure is the norm in relation to regulated services provided by the notary designated as standard due diligence. This is to be carried out prior to the commencement of any regulated service.

In relation to regulated services, standard customer due diligence includes identification and verification of the identity in question and identifying, where there is a *beneficial owner*, who is not the *client*, the beneficial owner and taking adequate measures to verify his or her identity so that the notary ‘knows who the beneficial owner is’.

Standard customer due diligence may include a duty (depending on the risk of money laundering or terrorist financing) to understand the ownership and control structure of the entity or arrangement concerned where the client is a body corporate, a partnership, or a trust Finally, there is a duty ongoing monitoring of the business relationship. [See section 33 of the 2010 Act.]

First Step: Identification and Verification

The notary is obliged in relation to the regulated services in the context of what may be described as ‘standard due diligence’ to identify the customer, and verify the customer’s identity on the basis of documents – which may (or may not be) be in electronic form.

The 2010 Act states the notary (the designated person) must have ‘reasonable grounds to believe [the documents of identity] can be relied upon to confirm the identity of the customer’. This is an aspect of the money laundering risk-based approach to the legislation. The 2010 Act then defines the documents of identity as including

- (i) documents from a government source (whether or not a State government source), or
- (ii) any prescribed class of documents, or any prescribed combination of classes of documents’. [Section 33 (2) (a) of the 2001 Act.]

Examples of Documents of Identity for Individuals (Natural Persons)

The examples I am about to give are not absolute and while I understand the preference of some commentators may be for a passport – the legislation only refers to a document of identity as ‘including documents from a government source’. So documents of identity may include:

- current signed passport;
- current photo-based driving licence;
- national identity card of an EU Member State, Swiss Confederation or a Contracting Party to the EEA Agreement;
- passport of a country recognised by the Irish Government;
- refugee travel document issued by the Minister for Justice and Law Reform; or
- travel document issued by the Minister for Justice and Law Reform

As the 2010 Act does not prescribe the documents of identity as such but, as stated above, refers to ‘including documents from a government source’ any

other document of identity – even without photographic identity may be acceptable, but a notary should have, in such an instance, one or more documents including a document containing an address. In England, for example, the following are acceptable in certain circumstances:

- benefit book from the Social Welfare Authorities;
- Council Tax Bill;
- utility bill or statement;
- banking, building society or credit union statement or passbook containing a current address;
- house or motor insurance certificate;
- a statement from a member of a regulated firm – such as a solicitor attesting as to the identity of the person;
- birth certificate.

If a solicitor appears before a notary, for example, the normal rules of identity apply, but an entry in the Law Society Directory would be sufficient evidence of identity and proof of home address may not be required.

Documents of Identity relating to a Partnership

A notary should obtain information on the constituent individuals of the partnership in relation to a regulated service. This would apply to what may be termed a partnership with only a few members who would not be known to the notary and therefore should be treated as private individuals. If the partnership is well known in public or is otherwise an unincorporated business which is well known, it is suggested that the following would be sufficient:

- name;
- registered address;
- trading address; and
- nature of business.

If the partnership is within the regulated sector for the purposes of the 2010 Act, for example solicitors, auditors, external accountants, tax advisers, the

details above should be sufficient together with evidence of the identity of the person who is dealing with the notary on the matter.

Documents of Identity in relation to a company

Strictly, in relation to a regulated service (being provided by a notary), a notary should identify and verify the existence of the company and ascertain if the person instructing the notary has the necessary authority.

Accordingly, in relation to a private company – as distinct from a public company well known to the notary and to the authorities – a copy of the certificate of incorporation and names of the directors should be considered sufficient. If there is any doubt about the status of the company, some commentators have mentioned filed audited accounts as evidence of verification of ‘corporate identification’ and an appropriate printout from the Companies Registration Office. The identification and verification of overseas companies would be the same as a domestic company.

Documents of Identity in relation to a Trust

In relation to a trust, obtaining the names of the trustees and their identification and the issue of beneficial ownership all arise.

Beneficial Ownership – Standard Due Diligence

Section 33(2)(a) of the 2010 Act provides that a notary (as a designated person) must (in general) identify any beneficial owner connected with the customer in the context of a regulated service. Accordingly, on the basis of weighing up the risks of money laundering or terrorist financing, a notary is obliged to verify ‘the beneficial owner’s identity to the extent necessary to ensure that the [notary] has reasonable grounds to be satisfied that the [notary] knows who the beneficial owner is’.

‘Beneficial owner’ is defined in the 2010 Act in two contexts: first as an individual who

- ‘(a) in the case of a body corporate other than a company having securities listed on a regulated market, ultimately owns or controls, whether through direct or indirect ownership or control (including through bearer shareholdings), more than 25 per cent of the shares or voting rights in the body, or
- (b) otherwise exercises control over the management of the body.’

In the case of a partnership, ‘beneficial owner’ means any individual who

- (a) ultimately is entitled to or controls, whether the entitlement or control is direct or indirect, more than a 25 per cent share of the capital or profits of the partnership or more than 25 per cent of the voting rights in the partnership, or
- (b) otherwise exercises control over the management of the partnership.’

In relation to a trust, ‘beneficial owner’ means any of the following:

- ‘(a) any individual who is entitled to a vested interest in possession, remainder, or reversion, whether or not the interest is defeasible, in at least 25 per cent of the capital of the property;
- (b) In the case of a trust other than one set up for the benefit of individuals referred to in paragraph (a), the class of individuals in whose main interest the trust is set up operates;
- (c) any individual who has control over the trust.’

[An interest is defeasible, if it can be terminated, in whole or in part, without the consent of the beneficiary, by the happening of an event.]

If the notary realises the person appearing before the notary is not the beneficial owner, the process of identifying and verifying the beneficial owner arises.

In the circumstances where the person appearing before the notary is obviously not the beneficial owner, I submit that a certificate be obtained from the client confirming the identity of the beneficial owner. If the transaction involves a trust or partnership, strictly, a copy of the trust deed, partnership

deed or other document should be obtained. The passport of the beneficial owner or other identification should be available.

Enhanced Customer Due Diligence

Enhanced due diligence applies where a notary (a designated person) 'considers there is a heightened risk of money laundering or terrorist financing' [Section 39 of 2010 Act]. This calls for judgment on the part of a notary.

Enhanced due diligence is mandatory in respect of 'politically exposed persons' (PEPs) prior to establishing a business relationship with the customer or carrying out an occasional transaction with, for, or on behalf of, the customer or assisting the customer to carry out an occasional transaction. Section 37(1) of the 2010 Act sets out that obligation to the effect that a notary (as a designated person) must take steps to determine whether or not a customer, or a beneficial owner connected with the customer (being a customer or beneficial owner residing in a place outside Ireland) is a 'politically exposed person' or 'an immediate family member', or 'a close associate' of a 'politically exposed person'.

A 'politically exposed person' (PEP) is defined, in general, as one of the following persons, resident outside of Ireland, or a beneficial owner associated with that person, or an immediate family member, (defined in section 37 (10) of the 2010 Act) or a close associate of that person (defined in section 37 (10) of the 2010 Act) who is or has at any time in the preceding 12 months been entrusted with a prominent public function. The list of 'politically exposed persons' (PEPs) means any of the following:

- a head of state, head of government, government minister or deputy government minister;
- a member of a parliament;
- a member of a supreme court, constitutional court or other high level judicial body whose decisions are not generally subject to further appeal, except in exceptional circumstances;
- a member of a court of auditors or of the board of a central bank;

- an ambassador, charge d'affaires or high-ranking officer in the armed forces;
- members of the administrative, management or supervisory boards of State-owned enterprises

This list includes persons holding or who held within the previous 12 months a prominent position in the European Union, the United Nations, World Bank or International Monetary Fund.

As a notary may be likely to meet an immediate family member or a close associate of a 'politically exposed person' rather than the 'politically exposed person' himself or herself, it may be helpful to set out the definitions of these persons. An 'immediate family member' of a 'politically exposed person' is defined in section 37(10) of the 2010 Act as including any of the following persons:

- any spouse of the politically exposed person
- any person who is considered to be equivalent to a spouse of the politically exposed person under the national or other law of the place where the politically exposed person lives;
- any child of the politically exposed person;
- any spouse of a child of the politically exposed person;
- any person considered to be the equivalent to a spouse of a child of a politically exposed person under the national or other law of the place where the person or child resides;
- any parent of the politically exposed person;
- any other family member of the politically exposed person who is of a prescribed class.

A 'close associate' of 'a politically exposed person' is defined in section 37(10) of the 2010 Act as including any of the following persons;

- any individual who has a joint beneficial interest ownership of a legal entity or legal arrangement, or any other close business relations, with the politically exposed person;

- any individual who has sole beneficial ownership of a legal entity or legal arrangement set up for the actual benefit of the politically exposed person.

So, in relation to the 'politically exposed person', or an 'immediate family member' or 'close associate' of such a 'politically exposed person', the notary must 'determine the source of wealth and of funds' which are involved in the matter being dealt with by the notary (assuming the service being provided is a regulated service) and conduct enhanced ongoing monitoring of the business relationship where relevant. Establishing the source of funds involves asking questions of the client. It may be the notary should seek details of the person's salary. In many countries, such information should be publicly available.

Actual knowledge or 'reasonable grounds for belief' are the criteria in relation to any liability on the notary in relation to the determination of whether a customer is a 'politically exposed person', 'an immediate family member' or 'a close associate' of a 'politically exposed person'. [See section 37 (4) of the 2010 Act.]

A form of enhanced customer due diligence must be carried out where the client who is an individual does not present himself or herself to the notary in person.[See section 33(4) of the 2010 Act.]

Records to be kept by the Notary

Section 55 of the 2010 Act provides that the notary (a designated person) must keep records evidencing the procedure applied and information obtained in relation to each client or customer.

The section obliges a notary to take originals or copies of all documents used for the purpose of customer due diligence including verifying identification of clients and beneficial owners, where relevant. The 'history' of the services provided by a notary in relation to the regulated service must also be retained. Documents must be retained for 5 years.

The documents retained may be held wholly or partly in an electronic form, or other non-written form provided they are capable of being reproduced in a written form. Failure by a notary to comply with record keeping is an offence with the notary liable on summary conviction to a fine not exceeding €5,000, or imprisonment for a term not exceeding 12 months (or both), or on conviction on indictment to a fine or imprisonment for a term not exceeding 5 years (or both) [Section 55(12) of the 2010 Act.]

Duty to report

If a notary (as a designated person) knows, suspects or has reasonable grounds to suspect, on the basis of information obtained in the course of a professional transaction (a regulated service) that another person has been engaged in the offence of money laundering or terrorist financing, the notary must report that knowledge or suspicion to the Garda Síochána **and** the Revenue Commissioners. The addresses are:

An Garda Síochána

Detective Superintendent

Financial Intelligence Unit

Garda Bureau of Fraud Investigation

Harcourt Square Dublin 2

and

The Revenue Commissioners

Suspicious Transactions Reports Office, (Block D)

Ashtowngate

Navan Road,

Dublin 15

Tipping Off

Section 49 of the 2010 Act makes it an offence to tip the client off in relation to any possible investigation. Normally, a notary would not proceed further with any business with the client – once the suspicions have been notified to the authorities. However, section 23 of the 2010 Act provides that a member of the Garda Síochána not below the rank of superintendent may, by notice in writing, authorise a notary (as a designated person) to proceed with an act that would otherwise comprise money laundering. This may be deemed necessary for the purposes of an investigation into an offence.

Directions by a Garda

Section 17 of the 2010 Act provides that a member of the Garda Síochána not below the rank of superintendent may direct a person not to carry out a service or transaction. There is also provision for a court order from the District Court.

If the information is subject to ‘legal privilege’, the information need not be disclosed to the authorities.

Legal Privilege

Section 46(1) of the 2010 Act provides that nothing requires the disclosure of information that is subject to legal privilege. Having stated that position, section 46(3) of the 2010 Act provides that the protection does not apply ‘to information received from or obtained in relation to a client with the intention of furthering a criminal purpose’.

So the issue arises of what is ‘legal privilege’? While appreciating that a notary is professionally obliged to keep the affairs of clients confidential, that is not the same as ‘legal privilege’.

There is ‘litigation privilege’. These are communications made within the scope of a professional activity for contemplated or existing litigation. Communications between a lawyer and a client – (and the notary is a lawyer) – in relation to obtaining legal assistance other than legal advice – are not privileged from disclosure as they could not be stated to come within the scope of potential litigation. [See *Smurfit Paribas Bank Ltd v. AAB Finance Ltd* (1990)⁵.]

Regulatory Authority Governing Notaries

While solicitors have the Law Society, and barristers the Bar Council, it was deemed by the legislature of Ireland that the profession of notary had no obvious regulatory authority at this time. So the profession of notary has been assigned to the Minister of Justice and Law Reform as the ‘competent authority’ for notaries. The Minister has delegated that regulatory supervision to the Anti-Money Laundering Compliance Unit (AMLCU) which has significant powers over notaries in the context of the notary’s obligations in relation to anti-money laundering. The purpose of the AMLCU is, *inter alia*, to

- ensure that the notary is complying with his or her obligation under the Act of 2010;
- examine the notary’s anti-money laundering policies and procedures;
- ensure that the policies and procedure of the notary are appropriate to reduce any money laundering and terrorist financing risks.

The AMLCU is authorised to enter the premises of a notary and

- (a) may inspect the premises;
- (b) request any person on the premises to produce documents for inspection;
- (c) inspect the documents produced;

⁵ [1990] ILRM 588, Supreme Court.

- (d) take copies of those documents;
- (e) request the notary to answer questions;
- (f) remove and retain documents;
- (g) request the notary to give assistance in relation to the operation of equipment or access to the data stored within it; and
- (h) secure, for later inspection, the premises of the notary.

The Minister for Justice may prescribe a competent other than the AMLCU for the profession of notary.

Offences

The usual provisions are in the 2010 Act that a person (including a notary) who, without reasonable excuse, obstructs or interferes with an authorised officer of AMLCU in the exercise of the officer's powers, or fails to comply with a requirement or request made by the authorised officer of AMLCU, is liable on summary conviction to a fine not exceeding €5,000 or imprisonment for a term not exceeding 12 months (or both). Matters of 'legal privilege' and 'self-incrimination' are excluded from these provisions.[See sections 81 and 82 of the 2010 Act.]

Where there is a duty imposed on a notary as a designated person under the 2010 Act, there is normally a related criminal offence with the penalties specified are as set out above.

Conclusion

Each notary has a legal duty to be aware of the provisions of the 2010 Act and 'adopt policies and procedures' 'to prevent and detect the commission of money laundering and terrorist financing'. [Section 54 of 2010 Act.]

The 2010 Act is legislation of considerable complexity. Each notary should have a copy of the 2010 Act to hand. While every effort has been made to set out the law as best as possible in this paper, the notary as a legal professional must be guided by the legislation itself. End.

