



## **Anti-Money Laundering and Terrorist Financing Legislation**

### **Obligations on the Notary**

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#### **Introduction**

The 'notary', as an independent legal professional, was referred to specifically for the first time in Ireland in anti-money laundering legislation in 2010. 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, other legal professionals and other designated persons. The 2010 Act was amended by the Criminal Justice Act 2013 ('the 2013 Act') and the two Acts may be cited together as the Criminal Justice (Money Laundering and Terrorist Financing) Acts 2010 and 2013 ('the Acts').

The 2010 Act transposed the Third EU Money Laundering Directive (2005/60/EC) and associated implementing Directive 2006/70/EC into national law. The 2010 Act also gave 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 consolidated Ireland's anti-money laundering and terrorist financing law which previously had been contained in several Criminal Justice Acts.

The 2013 Act made some minor changes to the 2010 Act.

The Acts regulate, in part, the profession of ‘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’<sup>1</sup> governed by the Acts. 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 Acts are silent on any definition of ‘notary’. The reason why the notary is specifically mentioned is because the 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 ‘proceeds of criminal conduct’ are at the heart of the legislation and that expression is defined as meaning ‘any property (real or personal including money, choses in action and intangible or incorporeal property) that is derived from or obtained through criminal conduct (‘conduct that constitutes an offence’) whether directly or indirectly, or in whole or in part’. [Section 6 of 2010 Act].

A person commits an offence if the person engages in any of the following acts in relation to property that is the proceeds of criminal conduct:

- (i) concealing or disguising the true nature, source, location, disposition, movement or ownership of the property, or any rights relating to the property;
- (ii) converting, transferring, handling, acquiring, possessing or using the property;

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<sup>1</sup> Section 24 of 2010 Act

- (iii) removing the property from, in bringing the property, into the State, and

the person knows or believes (or is reckless as to whether or not) the property is the proceeds of criminal conduct. [Section 7 of 2010 Act]

Failure by a notary (and other professionals) to carry out relevant due diligence and to report suspicious transactions are offences.

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.

### **'Regulated' Services**

While the notary has the same authority as a barrister or solicitor in Ireland in non-contentious business, it is only when the notary is performing certain specified services that he or she is subject to the rigours of the anti-money laundering legislation. Section 24 of the 2010 Act sets out the relevant regulated services, *inter alia*, that place obligations on the notary.

The 'regulated' services constitute 'the provision of assistance in the planning or execution of transactions for clients concerning 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 or 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 2013 Act (section 5) amended the 2010 Act (section 25) by making it clear that a notary, solicitor and barrister are 'designated persons 'only' as respects the carrying out of the services above.

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. The 'notary' is also described in the relevant Directives and in the 2010 Act as an 'independent legal professional'.

The definition of regulated 'services' is so wide that even if anyone argued that the notary was only witnessing a signature, the notary may be arguably 'assisting' – and the word 'assist' means 'to aid or help'.

As stated above, several critical words are of significance in the relevant Money-Laundering Directives. Such include the words 'participate', 'assist' and 'execution'. Article 2 of Directive 2005/60 employs these words in the following statement of the application of the Directive.

' This Directive shall apply to ....

(3) the following legal or natural persons acting in the exercise of their professional activities:

(b) notaries and other 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 execution of transactions for their client concerning the:

- (i) buying and selling of real property or business entities;
- (ii) managing of client money, securities or other assets;
- (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 trusts, companies or similar structures.'

In the context of the above activities, the notary must ask himself or herself if he or she is participating or assisting in the execution of the transaction in question. The words 'participate' and 'assist' are not defined.

The writer considers that the anti-money laundering provisions of the Acts apply to notaries – whether the notary has an appearer or a 'client' in relation to what are described here as 'regulated services'

## **General Offences**

Section 7(1) of the 2010 Act provides as follows:

' A person commits an offence if –

(a) the person engages in any one of the following acts in relation to property that is the proceeds of criminal conduct:

- (i) concealing or disguising the true nature, source, location, disposition, movement or ownership of the property, or any rights relating to the property;
- (ii) converting, transferring, handling, acquiring, possessing or using the property;
- (iii) removing the property from, or bringing the property into, the State, and

(b) the person knows or believes (or is reckless as to whether or not) the property is the proceeds of criminal conduct'.

'Property is defined in the widest possible terms.

As stated earlier, 'criminal conduct' means –

- (a) conduct that constitutes an offence;
- (b) conduct occurring in a place outside the State that constitutes an offence if it were to occur in the State.' [Section 6 of Act of 2010]

‘Proceeds of criminal conduct’ means ‘any property that is derived from or obtained through criminal conduct whether directly or indirectly, or in whole or in part...’ [Section 6 of Act of 2010]

The legislation is stated to be on a risk-based approach. So, a notary must make a reasoned assessment of the risks and be able in the context of ‘regulated business’ to demonstrate that he or she undertook due diligence where required.

Of great significance to notaries and other legal professionals is the criminal offence of failure to report suspicious transactions. Section 42 of the 2010 Act specifies as follows:

- (1) ‘A designated person who knows, suspects or has reasonable grounds to suspect, on the basis of information obtained in the course of carrying on business as a designated person, that another person has been or is engaged in an offence of money laundering or terrorist financing shall report to the Garda Síochána and the Revenue Commissioners that knowledge or suspicion or those reasonable grounds.’

Few notaries (hopefully) may actually reach the stage of actual ‘knowledge’ of a client or appearer being involved in money laundering as defined. But the notary has a duty to report where he or she ‘suspects’ the client or appearer has been or is engaged in money laundering.

The word ‘suspects’ (as a verb) has been considered by courts in England and Wales. The Court of Appeal (England and Wales) (Civil Division) (per Lord Justice Longmore) considered the meaning of the word ‘suspects’ in *Jayesh Shah and Another v HSBC Bank (UK) Ltd* [2010] EWCA Civ 31. The Criminal Division of the Court of Appeal (England and Wales) in *R v Da Silva* [2007] 1WLR 303 considered that the essential element of the word ‘suspect’ and its affiliates was that

‘the defendant must think there is a possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease would not suffice.’

The courts in the *Shah* case above had rejected a dictionary definition offered by a lower court to the effect that in relation to the meaning of ‘suspicion’ –

‘any inkling or fleeting thought that the property might be the proceeds of [crime] will suffice’.

Section 42(9) of the 2010 Act provides that except as provided by the provision in the legislation on disclosure not being required in relation to a matter subject to ‘legal privilege’ (section 46), a person who, inter alia, fails to report a suspicious transaction to the authorities shall be guilty of an offence and liable on summary conviction to a fine not exceeding €5,000 or imprisonment for a term not exceeding 12 months or both. On conviction on indictment, such a person is liable to a fine or imprisonment for a term not exceeding five years or both.

Section 46 of the Act of 2010 provides an exception to the disclosure requirement for information that is subject to legal privilege. However section 46(3) provides that no protection is afforded to information received from or obtained in relation to a client with the intention of furthering a criminal purpose.

There is no case law in Ireland, England and Wales on the extent to which legal professional privilege attaches to a notary. If the notary argues he or she is a mere authentication agent, there is the argument that legal professional privilege would not apply. This matter is considered later in this paper.

### **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 2012<sup>2</sup> the countries listed are:

- Australia
- Brazil
- Canada
- Hong Kong
- Iceland
- India
- Japan
- Liechtenstein
- Mexico
- Norway
- South Korea
- Singapore
- Switzerland
- South Africa
- The United States of America
- The Channel Island and the Isle of Man
- The Dutch overseas territories of Netherlands Aruba, Curacao, Sint Maarten
- 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 keep identity details on his or her file.

### **Standard Due Diligence**

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<sup>2</sup> S.I No 347 of 2012.

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**

Under the general law a notary should verify the appearer’s identity as a matter of course.

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 we are about to give are not absolute and while we understand the preference of some commentators 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:

- confirmation from an electoral register search that a person of that name lives at that address.

If a solicitor appears before a notary, for example, the normal rules of identity apply, but an entry in the Law Society Directory should 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.

In relation to a partnership, names of all the partners should be available.

### **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. The beneficial owner should be ascertained where relevant.

### **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 a considered view 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). Further the notary must 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 particular 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 (FIU)

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)<sup>3</sup>.]

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<sup>3</sup> [1990] ILRM 588, (Supreme Court).

## **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;
- (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.

## **Further 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