



GUIDANCE NOTE

Common Issues related to the Money Laundering Reporting Officer

Introduction

The Financial Intelligence Analysis Unit (FIAU) receives questions on the Money Laundering Reporting Officer (MLRO) on a regular basis. In an effort to provide additional complementary guidance on the role of the MLRO, the FIAU is issuing this document which summarises, in a concise manner, the replies to some of the most common issues, concerns and queries that arise in relation to the MLRO.

The FIAU trusts that this will enhance subject persons' understanding of the importance of this role and ensure that anyone appointed as MLRO or holding the said position is able to exercise the associated functions in an effective manner. It is worth highlighting that this document is not to be read in isolation but is to be read together with the Implementing Procedures and any other guidance issued by the FIAU on the MLRO.

This Guidance Note is being issued in terms of Regulation 17 of the Prevention of Money Laundering and Funding of Terrorism Regulations.

Independence & Autonomy

An MLRO must be allowed the necessary independence and autonomy to carry out the functions associated with this role in an effective manner. However, the MLRO remains accountable for any decision taken or otherwise during the fulfilment of the functions associated with this role. While the Implementing Procedures – Part I provide that the MLRO should be able to communicate directly with the subject person's Board of Directors, this does not mean that the MLRO is outside the normal hierarchy or reporting lines of the subject person, and it is perfectly acceptable for the MLRO to be directly answerable to someone other than the Board of Directors¹. Reviews and checks by an independent audit function² focusing on how the MLRO is carrying the functions assigned, and regular reporting to the Board of Directors on the MLRO's activities, with the necessary safeguards to ensure that sensitive information is not disclosed unnecessarily, further ensure said accountability.

On the other hand, it must be appreciated that the MLRO carries out a very sensitive function and should therefore be able to do so without any undue influence. This also bearing in mind the nature of the information the MLRO handles, in terms of reports and requests for information received from the FIAU. Thus, it would be unacceptable if the MLRO were to be subject to duress, undue influence and superfluous checks and requirements to disclose information on (i) the cases being handled or to determine the outcome of a case in a particular manner, or (ii) on particular requests for information received from the FIAU and how the same are to be replied to.

While there are no restrictions on the internal circulation of information related to reports and requests for information, it must be appreciated that the sensitive and confidential nature of this information demands that it be disclosed on a need-to-know basis only. Sharing of information within the subject person or, to the extent that is allowed by law, within a group context is to be encouraged³. However, this does not necessarily entail that all and sundry should be in the know. By way of example, when reporting to the Board of Directors the use of statistical data may be sufficient to provide the said body with an overview of the work done by the MLRO whereas within a group context the expectation would be that any information is shared between MLROs. Thus, what at times may come across as undue reticence by the MLRO may be only a means to limit any unwarranted disclosure of information to third parties outside of the subject person or, worse still, the disclosure of information

¹ One would expect the MLRO to communicate even possible concerns through the subject person's normal reporting lines. The possibility to communicate directly with the Board of Directors is to be used when the MLRO is either being stonewalled by their line manager or is otherwise concerned about their superiors.

² A subject person's independent audit function may not necessarily coincide with one's internal audit function or even require the establishment of an internal audit function where this is not otherwise mandated. The said function can also be carried out by duly qualified and competent third-party service providers.

³ Subject persons are to consult Section 8.2.2. of the Implementing Procedures – Part I which sets out under what circumstances information on Suspicious Transaction Reports (STRs) can be shared within a group-context. Even in situations where this is not possible, as is the case with gaming companies and subject persons, the activities of which are regulated by the Virtual Financial Assets Act, there would be nothing as such prohibiting the sharing of information on possible new risks, trends and typologies noted by the MLRO of one group entity and which may be of relevance to other group entities. What the FIAU would like to stress is that the Prevention of Money Laundering and Funding of Terrorism Regulations (PMLFTR) set out when it will be considered that there will be a group in existence. It may not always be the case that the relation between two or more entities be considered a group for the purposes of the PMLFTR, even if colloquially it is referred to as such.

to subject person's officers and employees who may be involved in reports or requests being worked upon by the MLRO.

It is unacceptable for anyone within the subject person to pressure the MLRO not to exercise their own discretion as to whether a report should be submitted with the FIAU or not. While the MLRO may seek advice or consult on internal reports received, it is ultimately up to the MLRO to decide the outcome thereof. Not even members of the subject person's Board of Directors or an equivalent management body should interfere with the MLRO in this regard. Interference with the MLRO may have serious repercussions on the individuals who try to do so. This may be in terms of administrative sanctions and the communication of the interference to other supervisory authorities with an impact on one's good standing. The same applies when replying to FIAU requests for information. The MLRO should have the necessary freedom to communicate all relevant data, information and documentation to the FIAU, irrespective of what anyone else may believe or consider warranted.

What remedies does the MLRO have should one feel that the necessary independence and autonomy is being limited or otherwise undermined? The steps that an MLRO should take in such a situation should be in-line with the issue being faced and the extent being faced. At times it may be enough to explain to one's seniors the requirements at law of anyone holding the position of MLRO.

However, it may be that explanations alone are not enough, in which case it is important for the MLRO to document the reasons for any course of action taken. It is important to remember that the MLRO can also have recourse to the subject person's internal whistleblowing procedures or even to the external whistleblowing unit of the FIAU. There may also be instances where the MLRO decides to resign, in which case it is important for the MLRO to correctly disclose the reasons for resignation in the communication provided to the FIAU in terms of Section 5.1.3 of the Implementing Procedures – Part I. Any such communication must be provided directly by the MLRO and not by the subject person on his behalf. The information given is subject to the confidentiality and non-disclosure obligations by which the FIAU and its officers are bound in terms of Article 34 of the Prevention of Money Laundering Act.

In addition, it is also important to point out that Regulation 15A of the Prevention of Money Laundering and Funding of Terrorism Regulations (PMLFTR) provides an ulterior means through which an MLRO may seek redress against any discriminatory treatment that may be meted out for filing a report with the FIAU.

Conflicts of Interest

The Implementing Procedures – Part I make repeated references to the need for the individual appointed as MLRO to avoid conflicts of interest, whether real or potential. While this document, in line with the Implementing Procedures, acknowledges that there might be situations where there is no other viable alternative, the FIAU is often questioned as to why the MLRO function should be kept separate and distinct from the business activities of the subject person. Indeed, at times the MLRO, even if not directly responsible for a given business line, is vested with authority to refuse the on-boarding of customers or the continuation of business relationships with customers who have been reclassified in terms of money laundering and/or funding of terrorism (ML/FT) risk.

The FIAU's position in this regard can be easily explained by reference to the often quoted 'Three Lines of Defence' model where the MLRO is responsible for overseeing whether decisions taken by the first line of defence, i.e. the customer-facing staff, reflect and respect the subject person's AML/CFT policies, controls, procedures and measures. Considering that most MLROs also carry out a compliance monitoring function, having the MLRO revisiting the decisions taken with respect to a given customer or relationship would undermine the very basis of the 'Three Lines of Defence', as one cannot be asked to police oneself. Therefore, in situations where the MLRO has a conflict of interest with any other functions carried out for the subject person, it becomes even more important for there to be regular independent checks and reviews to ensure that the subject person's AML/CFT policies, controls, procedures and measures are effectively being adhered to.

Outsourcing, Secondment & Employment

The FIAU has repeatedly addressed the question as to whether an MLRO can be outsourced, i.e., whether an individual other than an officer or an employee of the subject person can act as the MLRO. The reply has always been in the negative other than for those instances that are provided for under Section 5.1.2(a) of the Implementing Procedures – Part I. However, the FIAU has at times noticed that outsourcing agreements are being repackaged as secondment agreements. The FIAU wishes to highlight that the only situation where secondment would be possible is in the scenario considered under paragraph (iv) of Section 5.1.2(a) of the Implementing Procedures – Part I.

The FIAU has occasionally received questions as to whether an MLRO can be employed on a part-time basis. While there is no restriction on whether one can hold the post of MLRO with two or more subject persons based on a part-time employment relationship, it is important that subject persons bear in mind that they will be questioned as to how they have established that an MLRO will be able to carry out the functions associated with the role in an effective manner if they are working for different subject persons on a reduced basis. The Implementing Procedures – Part I already refer to the issues of confidentiality and time commitment which are crucial aspects to consider so that Regulation 15 and Regulation 16 of the PMLFTR are effectively adhered to.

Even where initially such an arrangement may prove to be effective, it is the responsibility of the subject person to ensure that from time to time it reconsiders and assesses the effectiveness of the arrangement. One needs to consider the volume of transactions processed (if any); the volume of internal reports generated for the MLRO's determination; the volume and quality of the requests for information received from the FIAU etc. Furthermore, the results and recommendations of any internal review carried out with respect to the MLRO function need also to be considered. All these are aspects that will be considered by the FIAU when assessing to what extent the subject person's arrangements ensure that it has effective reporting procedures in place. The more subject persons an individual services as MLRO, the more unlikely it will be that this individual is doing so in effective manner.

When acting as an MLRO, the above considerations with respect to time are not only relevant within the context of multiple part-time appointments as MLRO but also when the officer holding the post of MLRO has other roles within the subject person.

Knowledge, Skills & Expertise

The Implementing Procedures – Part I consider that one of the elements for the MLRO to be considered as having the necessary seniority and command is for the said officer ‘to be knowledgeable of the ML/FT risks faced by the subject person and of the measures, policies, controls and procedures implemented to mitigate those risks’. It is difficult to envisage how the MLRO would be able to provide the necessary challenge and properly consider if a report needs to be filed with the FIAU without the appropriate knowledge and understanding. Therefore, when selecting an individual to act as MLRO, the subject person needs to understand the individual’s expertise, experience, skills and qualifications in the area to allow it to decide whether the individual will be an effective element within its AML/CFT framework. The sector and industry within which the subject person is active and its particular business model need to be considered as well. A professional qualification as a lawyer, auditor or accountant cannot per se be considered enough as this does not necessarily translate into a proper appreciation of ML/FT risks, trends and typologies.

There are cases when the appointment of an individual as MLRO requires the prior approval of a supervisory authority, which approval is only granted once the authority is satisfied that the individual possesses the necessary knowledge, skill and expertise to take on and meet the responsibilities associated with the MLRO function. However, it must be understood that this approval does not mean that the MLRO’s activity and effectiveness cannot be questioned and assessed by the FIAU. One must bear in mind that the individual would have received regulatory approval based on one’s past experience, track record and academic qualifications, as well as on the basis of an assessment by the supervisory authority as to whether these are enough to mitigate the perceived ML/FT risks of the subject person and its projected business model. Whether this assessment proves to be correct will depend very much on how the MLRO effectively goes about fulfilling his obligations and tasks on a day-to-day basis. Unlike the authority that would have granted regulatory approval, the FIAU questions and considers whether the MLRO is fit for purpose based on what it sees during its supervisory activity and based on the MLRO’s track record with the FIAU’s Intelligence Section. It is on this basis that the FIAU may conclude that the MLRO does not in reality possess the necessary skills to fulfil the functions associated with the role and that therefore they cannot be considered as possessing the necessary seniority and command. This can translate, amongst others, into actions aimed at having the MLRO replaced.

In addition, there have been instances where the FIAU noted that the selected MLRO was not even fluent in the English language and had to be assisted by an interpreter. While this may not necessarily reflect on the individual’s competence and expertise in ML/FT, subject persons need to bear in mind that the MLRO is the main contact point for the FIAU’s Intelligence Section and may be privy to very sensitive information. The MLRO should therefore be able to communicate with the FIAU independently without the need of any go-between.

Tying in with the need to choose someone with the right qualifications, skills and experience, is the complimentary need for the subject person to ensure that its MLRO is provided with training opportunities. This will allow the said MLRO to keep up with developments in AML/CFT and in the area of the subject person’s activities in so far as this may be relevant to the MLRO’s duties and functions. Not only do legal and regulatory requirements change but the introduction of new products, services and technologies will most likely provide new opportunities to all those who are ill-intentioned to abuse the subject person for their own illicit ends.

Personal Liability

In June 2020, the FIAU informed subject persons of amendments to the PMLFTR that sought to address technical compliance shortcomings within the said regulations that were identified by MONEYVAL assessors during the 5th Round Mutual Evaluation of Malta. Through these amendments, the FIAU's power to impose administrative penalties on directors or other similar officers was extended to allow the imposition of administrative penalties on, amongst others, the MLRO⁴. Apart from the ability to impose administrative penalties, the FIAU can also recommend to the relevant supervisory authority that the MLRO be suspended or precluded from exercising the role within the current or any other subject person.

Personal liability of the MLRO is intended to:

- Ensure that there is an effective deterrent to those who would otherwise take on the role of MLRO without sufficiently considering what this entails.
- Further encourage MLROs to keep abreast of any developments which may impact the obligations associated with the role and those of the subject person they work for in that role.
- Ensure MLROs dedicate the necessary time and attention to fulfilling their obligations with the necessary level of skill and care.
- Hold MLROs accountable for AML/CFT contraventions in cases where, through an act or omission, has caused or contributed to AML/CFT breaches by a subject person.

The FIAU is aware and appreciates that the introduction of personal liability for MLROs, in a market where resources are limited, has contributed to additional difficulties in terms of recruitment, and that this has deterred MLROs, even those with the best of intentions, from taking on or retaining the position.

However, it is true that the introduction of personal liability highlighted the need for a change in the way the role of the MLRO may have been perceived. This shows the significant importance attached to it and the central role this function plays within both a subject person's and the wider AML/CFT framework. The MLRO's personal liability does not exempt the subject person from its own responsibilities as it remains primarily responsible to ensure adherence with all AML/CFT obligations and especially to:

- Choose a duly qualified, experienced and skilled individual to act as MLRO who can effectively handle the tasks assigned given the nature and size of the subject person's activities.
- Put the selected individual in a position to effectively carry out the tasks by providing the necessary resources, such as correct frameworks and training.

Under what circumstances would the MLRO's personal liability be triggered?

Regulation 21(7) of the PMLFTR sets out the circumstances under which the MLRO's liability may be triggered. Two elements need to be present:

- There has to be a breach by a subject person of its AML/CFT obligations; and
- The MLRO must have contributed to or caused the said breach wilfully or through gross negligence.

⁴ Administrative penalties can range from a minimum of one thousand Euro (EUR1,000) to a maximum of two hundred and fifty thousand Euro (EUR250,000).

The FIAU needs to make it clear

that this provision cannot be relied upon where the MLRO did everything possible to address the breaches in question, including escalating the matter internally. It can be applied where it is clear that the MLRO could have done more to address a situation that is quite serious in nature.

Based on the core functions of any MLRO referred to in Section 5.1.1 of the Implementing Procedures – Part I, the following is a list of the main instances where the FIAU would consider if the conditions for the imposition of an administrative penalty on the MLRO are met or otherwise:

- The MLRO repeatedly and systematically fails to reply, or replies late, to requests for information received from the FIAU despite the fact that the subject person provided the MLRO with the necessary resources to comply with this obligation and granted the MLRO access to data, information and documentation in line with the requirements of the Implementing Procedures – Part I.
- The MLRO does not bring to the attention of the subject person's senior management that additional resources are required for the functions associated with the said role to be carried out and executed in a correct and efficient manner.
- The MLRO does not bring to the attention of the subject person's senior management blatant issues with respect to its AML/CFT programme, including issues with its resources, policies, procedures, measures and controls which are significantly undermining the subject person's ability to effectively mitigate ML/FT risks and detect unusual and suspicious transactions, notwithstanding that he has knowledge of the same.
- The MLRO does not take action to implement remedial actions related to aspects of the functions associated with the role, which were expressly entrusted to him and for which resources were duly provided by the subject person.

Though not exhaustive, the list gives a clear indication of what the FIAU considers as being significantly serious as to trigger the personal liability of the MLRO. What must be borne in mind is that there is no automatic presumption of liability for identified AML/CFT breaches, but it is the FIAU which is required to build a case, and would have to demonstrate on a balance of probabilities a connection between the breach and the MLRO's actions or lack thereof.

In this context, there are various actions that an MLRO can take to at least mitigate one's liability. Ensuring that one remains up to date with the developments both in AML/CFT and with respect to the activities carried out by the subject person, will show a willingness by the MLRO to carry out their role in an effective manner.

Even more important is that the MLRO documents any actions taken to highlight and, where possible, address issues that are hampering the effective performance of the role (e.g. advising senior management about the need for additional resources or for the acquisition and deployment of automatic transaction monitoring systems). This may include highlighting how any issues brought to the fore through internal reviews were not resolved and what additional actions needed to be taken.

Record Keeping

The Implementing Procedures – Part I already lay down directions about which records need to be kept with respect to any decision taken by the MLRO when considering internal reports and deciding if a report with the FIAU needs to be filed.

However, the FIAU emphasises that records need to:

- Be kept in order on file, be it physical or electronic, and in a manner that is easily retrievable when they are requested to be produced by the authorities.
- Contain sufficient information explaining the reasoning behind the decision taken by the MLRO, for ease of reconstructing and understanding the scenario.
- Demonstrate a consistent approach to the decisions being taken by the MLRO.
- Document the reasons why it was impossible for the MLRO to act in keeping with the requirements of the Implementing Procedures – Part I. As this may prove to be a mitigating circumstance, including any possible obstacles encountered and the actions taken to address or attempt to address any such obstacles.

Record keeping should therefore not be overlooked as it can prove to be an important aspect of the MLRO's activity.

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