Balancing Confidentiality, Impartiality and Compliance: AML Challenges in Malta's Notarial Practice

DR. ROBERTA BISAZZA

The reflections that follow are not presented as the product of formal academic research, nor do they purport to offer an exhaustive or empirical analysis of the subject matter. Rather, they are informed by my own subjective experience as a practicing Notary over the past twenty-nine years. Throughout this period, I have witnessed first-hand the evolution of the notarial profession alongside significant legislative and regulatory change.

Whether welcomed or resisted, such developments have required continuous adaptation from practitioners who are committed to the notarial vocation at its core. It is from this vantage point that I engage with the central theme of this article: the ongoing challenge of balancing the traditional principles of confidentiality and impartiality with the growing demands of anti-money laundering compliance within Malta's notarial practice.

It is inevitable that many of the issues discussed here have possibly been addressed in academic literature, professional writings, and theses. This article does not seek to replicate or displace such work, but rather to offer a practitioner's reflective perspective on how these competing considerations have been experienced in practice. Readers are encouraged to engage critically with the issues raised and to consult further sources in order to deepen their understanding of the complex and evolving role of the modern Notary.

The Notarial Profession is one of the oldest legal institutions, originating from early legal systems that was and still is a fundamental pillar of legal certainty:

"Notarius est persona publica cui fides instrumentorum publicorum attribuitur." This definition encapsulates the essential elements of being a Notary. *"A notary is a public person to whom the faith (or credibility) of public instruments is attributed."*

This definition gives us a clear picture of the traditional understanding of the Notary as a Public Officer entrusted with the authenticity, legality, and reliability of public instruments. Notarial documents carry public authority and enjoy a presumption of truth and legality precisely because they are drawn up by a state-appointed public officer. This historical conception has shaped the identity of the Notary for centuries and has justified the privileged legal standing accorded to notarial acts. Beyond the public faith that grants their documents the presumption of truth, the notary must strictly adhere to the principle of **confidentiality**, ensuring the protection of sensitive legal data and the privacy of the parties involved. These duties are anchored by the principle of **impartiality**, which dictates that the notary must remain a neutral advisor to all parties, ensuring that the legal act is balanced, lawful, and understood by everyone regardless of who requested the service.

Within civil law systems, including Malta's, the Notary has long been regarded as a neutral intermediary, and in certain circumstances even as a mediator, whose role is grounded in public trust, impartiality, and confidentiality. The Notary neither favours one party nor is an adversary to another. The Notary is a guarantor of legality and fairness. These principles have historically justified the privileged position occupied by Notaries within the legal system and have contributed to the strong value attached to notarial documents. The public places trust in

the notarial profession precisely because it is perceived as independent, neutral, and bound by strict ethical standards.

Over the years, however, the legal environment in which Notaries operate has changed significantly. The complex financial transactions, the globalization of markets, and the increasing sophistication of criminal networks have fundamentally altered the risks associated with legal and financial activity. The rise of money laundering and the financing of terrorism has prompted legislators to adopt increasingly comprehensive regulatory frameworks at both European Union and national level. These developments reflect a shift in public policy, whereby professionals who were once considered passive facilitators of transactions are now seen as essential gatekeepers in the prevention of financial crime.

In Malta, these developments have resulted in Notaries being classified as "Subject Persons" under anti-money laundering legislation. This classification imposes mandatory compliance obligations that extend well beyond the traditional notarial functions. The Notary is required to assess the underlying transaction, the parties involved, and the origin of funds. In this context, confidentiality and impartiality can no longer be understood as absolute or unrestricted. Where a conflict arises, the law clearly requires that anti-money laundering and counter-terrorism financing obligations prevail.

This raises an important question: how are Maltese Notaries required to balance long-standing professional principles with modern compliance duties? The notarial identity has been based on confidentiality and impartiality for centuries. These principles remain central to the profession's ethical framework. However, nowadays, these principles must work hand in hand with, and never in opposition to, the legal obligation to prevent money laundering and the financing of terrorism. One must never rely on professional secrecy as a shield to avoid compliance or to undermine regulatory objectives. Such conduct would be incompatible with the Notary's role as a subject person and inconsistent with the duties imposed by current legislation.

Confidentiality has traditionally been central to the notarial role. Clients rely on Notaries to safeguard sensitive personal and financial information disclosed during the preparation of legal documents. Professional secrecy fosters trust and encourages parties to provide accurate, complete, and honest information, which is essential for the proper execution of notarial duties. Without confidentiality, the effectiveness of the notarial function would be undermined. Impartiality is equally fundamental. The Notary is required to act independently of all parties, ensuring fairness, legality, and informed consent without favouring any individual interest.

Nevertheless, professional secrecy is not absolute, and the Notary's duties are always subject to the law. In Malta, as in other civil law jurisdictions, ethical obligations must be exercised within the limits imposed by legislation. The evolution of anti-money laundering laws makes this limitation explicit by imposing clear and binding legal duties that override professional discretion in defined circumstances. This does not diminish the importance of confidentiality, rather, it clarifies its boundaries and reaffirms that professional secrecy exists to serve lawful purposes, not to obstruct justice or facilitate illegality.

Malta's anti-money laundering framework reflects a collective effort by states to combat financial crime. This framework classifies Notaries as subject persons when they engage in what is defined as relevant activity, meaning activities that present varying degrees of risk in

relation to money laundering or terrorist financing. The principal areas of relevant activity include property transactions and other operations involving the movement or handling of funds. These transactions are particularly vulnerable to abuse. The higher the value of a transaction is, the more complex a transaction is, the more importance is given to screening for abuse.

The classification of Notaries as subject persons carries with it mandatory obligations. Notaries are required to conduct customer due diligence, assess and classify risk levels, retain records for prescribed periods, examine the source of funds and proof of funds, confirm whether and individual is politically exposed or domiciled in a high-risk jurisdiction, confirm whether an individual works in a cash intensive atmosphere and report suspicious transactions. These obligations are not discretionary and do not depend on the Notary's personal assessment of confidentiality or impartiality. They arise directly from the law and are enforceable. Failure to comply may result in serious consequences, including administrative penalties, disciplinary action, and reputational damage, all of which underscore the seriousness with which these obligations are treated.

The requirement to examine the source of funds and proof of funds represents a significant evolution in notarial practice. Traditionally, Notaries focused primarily on the formal and substantive legality of documents, the examination of the title to a property being sold, the distribution of an inheritance, planning how an inheritance is to be distributed with the formation and publication of wills and other legal matters that exist within the traditional parameters of the Notarial profession. Today, Notaries must look beyond form and assess whether a transaction may be used to conceal or legitimise illicit financial activity. This represents a fundamental shift in professional responsibility and reflects a policy decision that the prevention of financial crime is an overriding public interest. This interest justifies the imposition of duties even on professions historically associated with discretion, neutrality, and confidentiality.

One of the most sensitive issues arising from anti-money laundering compliance is the interaction between professional secrecy and the obligation to report suspicious activity. Under Maltese law, Notaries are required to submit a report when there are reasonable grounds to suspect money laundering or terrorist financing. This obligation applies regardless of the confidential nature of the information obtained. The law makes it clear that where suspicion thresholds are met, disclosure is mandatory, and failure to report constitutes a breach of legal duty.

It is therefore essential to understand that adherence to these obligations does not eliminate the principle of confidentiality but introduces clear limits where confidentiality could otherwise be misused as a means of avoidance. Confidentiality cannot be invoked to shield criminal conduct or to justify non-compliance with statutory duties. Where reporting obligations arise, the law expressly requires disclosure, and non-compliance exposes the Notary to enforcement measures that may have lasting professional consequences.
The concept of confidentiality has taken on a different dimension in recent years, particularly in light of the prohibition on tipping-off. Notaries are expressly forbidden from informing clients that a report has been filed. Disclosure of such information is not a matter of professional courtesy but constitutes a breach of legal obligations owed to the competent authorities. This demonstrates that the traditional notion of client confidentiality is, in certain circumstances, overridden by the Notary's duty to cooperate with regulatory and enforcement bodies in the prevention of financial crime.

Impartiality cannot be equated with passivity or indifference. Impartiality requires the Notary to apply the law consistently and without favour, including compliance with anti-money laundering obligations. Acting impartially means ensuring that all parties are subject to the same scrutiny and that no transaction is facilitated in breach of the law.

This inevitably raises concerns about whether anti-money laundering regulations have transformed Notaries into enforcement officers or investigators. While Notaries are not prosecutors or law enforcement agents, they are nonetheless required to identify risks and report suspicions. This gatekeeping role does not compromise impartiality but reinforces the Notary's function as a guardian of legality. Acting in the public interest to prevent financial crime is entirely consistent with the Notary's public office. The refusal to act where legal requirements are not met is not a breach of impartiality but an affirmation of professional integrity.

A further illustration of this balance between compliance with anti-money laundering law and the traditional principles of confidentiality and impartiality is the reality that professional integrity may, in certain circumstances, require the Notary to refuse to proceed with, or even effectively bring to an end, a property transaction. Such a decision may be commercially disadvantageous, practically difficult, and personally uncomfortable, yet it is an inherent consequence of the Notary's role as a subject person under anti-money laundering legislation. Where reasonable suspicion of illegal activity arises, or where the required due diligence cannot be satisfactorily completed, the Notary's duty to observe the law and to contribute to the prevention of money laundering must prevail.

In practice, this may place the Notary under significant pressure from clients eager to conclude a deal, frustrated by compliance requirements, or concerned about the financial implications of a failed transaction. The Notary may also be conscious of the loss of remuneration or the potential deterioration of a longstanding professional relationship. However, professional integrity demands that such considerations must never override legal duties. To allow financial incentives, client pressure, or fear of losing business to influence compliance would be incompatible with the Notary's public function and would undermine the trust placed in the profession.

Ultimately, the possibility of declining to act or bringing a transaction to an end demonstrates that the modern Notary's role is protective. By observing the law, respecting the legitimate boundaries of confidentiality, and exercising impartiality through consistent compliance, the Notary upholds both the integrity of individual transactions and the broader public interest in combating money laundering and financial crime.

Questions also arise regarding privacy and data protection. The collection and processing of personal data for due diligence purposes may appear intrusive; however, under GDPR and Maltese data protection law, such processing is lawful where it is necessary for compliance with legal obligations related to the prevention of financial crime. Anti-money laundering measures provide a clear legal basis for data processing, and compliance with these measures does not constitute an unlawful infringement of privacy rights.

Anti-money laundering obligations are mandatory, and while Notaries remain bound by data protection principles, these cannot be invoked to obstruct compliance. Where information is

collected for the specific purpose of fulfilling statutory duties aimed at preventing or detecting financial crime, such processing is both lawful and necessary.

Another significant responsibility entrusted to Maltese Notaries is the collection of taxes, particularly stamp duty and final withholding tax in property transactions. The amounts collected on behalf of the State are substantial, reflecting the central role Notaries play in fiscal administration. However, tax compliance alone does not eliminate money laundering risks. Funds used to pay taxes may still originate from illicit sources, and therefore anti-money laundering obligations must be applied even where transactions appear fiscally compliant and procedurally regular.

Notarial practice has undergone a profound metamorphosis, requiring significant adaptation, particularly among older generations of practitioners. Younger Notaries, who have been trained within an environment where anti-money laundering compliance is the norm, often find it easier to integrate these obligations into daily practice.

Regardless of generational differences, adaptation is unavoidable. The notarial profession, as a public office, must evolve in line with legal and societal developments. Continuous training, clear guidance, and institutional support are essential to ensure effective compliance and to prevent uncertainty or inconsistency in practice. Enforcement mechanisms, while necessary, should also serve an educational and corrective function rather than being purely punitive.

Looking to the future, the notarial profession in Malta is likely to become increasingly compliance oriented. This does not signify the erosion of traditional principles but rather their redefinition within a modern legal framework. Confidentiality and impartiality will continue to be central, but they will be exercised within clearly defined legal limits. The future Notary will be one who combines legal expertise, ethical commitment, and regulatory awareness in service of both individual clients and the broader public interest.