Practical aspects of implementing European AML&TF requirements

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At the outset, it should be stressed that a comprehensive presentation of the above issues in the form of a lecture is not possible. However, the adopted formula of this conference allows to indicate a few key problems which Polish notaries face in connection with the requirements of the relevant directives and Polish regulations in the field of counteracting money laundering and terrorist financing (AML-TF).

At the same time, the moment we meet here coincides with quite significant legislative changes in Poland relating to the implementation of the latest Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing [AML IV Directive], which at the same time amends Regulation (EU) 648/2012 of the European Parliament and of the Council and repeals previous Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [AML III Directive].

It is also worth adding that due to the submission on 5 July 2016 by the European Commission of a proposal for a directive of the European Parliament and of the Council amending Directive (EU) 2015/849 of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC (COM (2016) 450 final) [AML V Directive] - solutions have already been implemented in the Polish law in relation to which one may assume with a high degree of probability that they shall be adopted in the new Directive [AML V].

There are so many changes in the new regulations that the Polish legislator decided to introduce a completely new legal act instead of amending and updating the Act of 16 November 2000 on counteracting money laundering and terrorist financing, which has been in force for 18 years now. This is supposed to increase its readability and transparency. New Polish regulations in the field of AML&TF were published on 12 April this year and will enter into force after the 3-month vacatio legis period.

Just as an example, it is worth noting that the Polish Act **broadens and supplements**, in accordance with the requirements of the AML IV Directive, the list of institutions obliged to

comply with the Act and to assess the risk of money laundering and terrorist financing, as well as to apply the financial security measures set forth in the Act.

It also grants the status of obligated institutions to different - other than the previous ones - categories of entities, although the list of obligated institutions specified in the Act to a large extent coincides with the list of obligated institutions defined in the currently applicable regulations. As one of the important novelties, we should mention inclusion in the list of the obligated institutions entities which conduct business activity consisting in the provision of services in the field of: exchange between virtual currencies and legal tenders or exchange between virtual currencies and intermediation in such exchange and keeping accounts in this regard, entities which conduct business activity involving provision of safe deposit boxes, as well as - apart from the banks - loan institutions within the meaning of the Act on consumer loans.

Thus, the obligation to supervise compliance with the provisions of the Act will apply to a much larger number of entities than has been the case so far.

The new Act will also affect legal professions. According to Recital 9 of the AML IV Directive, professionals providing legal assistance or tax consultancy activities should be subject to national regulations issued on the basis of Directive 2015/849 in cases where legal assistance or tax consultancy activities are performed in relation to transactions involving high risk of using them for the purposes of money laundering or terrorist financing. In this respect, the new Act stipulates that the following persons should also be recognized as obligated institutions:

- advocates, legal advisors, foreign lawyers, tax advisors, to the extent to which they provide their clients with legal assistance or tax advisory services relating to, inter alia, purchasing or selling real estates, purchasing enterprises or organized parts of enterprises, making contributions to capital companies or increasing share capital of capital companies, establishing or running a business, or managing capital companies or trusts,
- tax advisors when performing tax advisory activities other than those mentioned above, as well as statutory auditors.

It should be added that the new Act is the first one in Poland (and perhaps one of the first in Europe) which introduces **definition of virtual currency** as a digital representation of values that **is not**:

- a legal tender issued by the National Bank of Poland, foreign central banks or other public administration bodies,
- an international settlement unit established by an international organization and accepted by individual countries that are member states of that organization or cooperate with that organization,
- electronic money within the meaning of the Act of 19 August 2011 on payment services,
- a financial instrument within the meaning of the Act of 29 July 2005 on trading in financial instruments,
- a promissory note or check

- and can be exchanged in the course of business transactions to legal tenders and accepted as a means of exchange, and furthermore may be electronically stored or transferred, or be object of electronic commerce.

In this respect, the new Act also meets the obligations imposed on member states by the AML V Directive, which requires member states to impose obligations in the field of counteracting money laundering and terrorist financing on entities which provide exchange services between virtual currencies and legal tenders, and which keep virtual currency portfolios for their clients.

This means that virtual currency exchanges and entities which keep portfolios of these currencies will be required to comply with the financial security measures in the field of counteracting money laundering under the terms set forth in the Act at a similar level as other obligated institutions. The *ratio legis* of the proposed regulations indicates a desire to counteract the use of virtual currencies, for example, for terrorist financing.

To finish this introduction, it is worth adding that the new regulations include the following solutions that are important from the point of view of the daily practice of Polish notaries public:

- clarification of the rules governing inspection of the obligated institutions;
- modification of the obligated institutions' duties, including in the field of financial security measures;
- introduction of an open catalogue of elements of economic relationships or occasional transactions, which should be taken into account in the process of identifying and assessing the money laundering or terrorist financing risks related to given economic relationships or occasional transactions;

- new solutions regarding administrative sanctions imposed on the obligated institutions which do not comply with the requirements imposed by the new Act;
- creation of the Central Register of Beneficiary Owners and determining the rules of its operation (it will enter into force only in one and a half years);
- introducing regulations regarding suspension of transactions and account blocking;
- an obligation for the obligated institution to appoint a person acting as a senior manager (a so-called *compliance officer*).

So, this is it as regards new regulations. The future will show whether new regulations work in practice and how the new responsibilities translate into the reality of the notary public work.

Moving to the practical aspects of implementing the European AML-TF regulations in Poland, in the context of the Polish notaries, one cannot avoid impression that, on the one hand, as an obligated institution the Polish notary is an extremely important link in the entire anti-money laundering mechanism, yet on the other hand, the Polish notaries public have been practically left alone in terms of the available set of tools available for an effective and efficient fulfilment of the role they have been entrusted.

Looking from the point of view of experience of the Polish notaries public from the very beginning of the process of implementing the AML-FT regulations, one may make some basic insights which comprehensively reflect realities of everyday practice in our work.

First of all, from the perspective of time, listing a notary public among obligated institutions was quite a big oversight (not to say - a mistake) at the legislative stage of works. Taking into account the role of the notaries public in the Polish legal system, how deeply the notaries public are rooted in the system of legal protection bodies through the public-law nature of their duties, and how closely they cooperate with national financial authorities (let me just mention here that pursuant to separate regulations, the notaries public notify the national tax administration about every transaction by sending copies of the notarial deeds, and at the same time they act as taxpayers of taxes relating to the real estate transactions; they submit to courts and local government authorities copies of notarial deeds, and even notify the competent minister about the purchase of real estates by foreigners), it would be much more useful if they were, and they should have been listed as institutions cooperating with the General Inspector of Financial Information. Unfortunately, it is not the case (and the status of notaries public has not changed under the new Polish Act). This

leads to a whole range of practical consequences, and sometimes also just important practical difficulties.

So, since as notaries we are listed along with other obligated institutions in the field of notarial actions related to the "transactions in property values", we are subject to all requirements resulting from the regulations in force. And as professionals, that is persons carrying out their professional duties with the utmost care - we try to meet the requirements also in this area despite our modest possibilities, despite the fact that it often involves high emotional costs, and sometimes also financial costs when inspectors impose administrative fines on us for failure to comply with the obligations (very often purely formal ones or related to the timely submission of reports to the GIFI). It will not be a distortion if I mention here that apart from the recent AML training provided in the form of e-learning (which has already been gone now) and probably access to the so-called sanction list, the Polish notaries have no institutional support from the state authorities, which in any way would be helpful in fulfilment of their role in the process of counteracting money laundering. We are often asked for impossible or very difficult things, specialist knowledge, vigilance and insight. Failure to comply with the requirements involves severe penal and financial sanctions. On the other hand, we are not offered any substantial and content-related help in any form.

Undoubtedly, as a professional group, we have imposed extremely high demands on ourselves regarding the adopted internal procedures in the field of AML and TF.

The financial security measures we apply should take into account the **risk of** money laundering and terrorist financing. Assessment of this risk, on which the application of appropriate financial security measures depends, may take into account such criteria as "regular client" (of course, the vast majority of clients are regular clients with respect to whom limited financial security measures may be applied) and "high-risk clients" (luckily, this is definitely a minority, and the adopted financial security measures should be intensified, for instance request for another identity document).

Within the framework of their duties in the field of AML, the Polish notaries public must take steps in order to identify the beneficiary owners and verify their identity. This involves fairly large difficulties and a nagging obligation to use any available methods in order the identify natural persons who exert actual influence and stand behind legal persons. Taking into account a very

complicated ownership structure of companies, trusts, holdings and other business entities - meeting this obligation poses a lot of problems. It should be added that if the beneficiary owner cannot be determined using due diligence and if the notary public is of the opinion that there is risk of money laundering, the notary should refuse to perform the action. It is not entirely clear whether the mere refusal to perform the action without the simultaneous suspension of the transaction and notification of the GIFI about that suspicion leads to the responsibility of a notary or not. It is not clear what degree of that suspicion is sufficient for a given transaction to be objectively regarded as suspect and potentially related to money laundering. It is obvious that entities involved in criminal money laundering or terrorist financing do not boast of it, and the simple intuition of a notary public, as well as the potentially negative result of an ad hoc test based on exemplary criteria included in the Polish Act (economic, objective, geographical and behavioural criteria) may turn out to be insufficient or even confusing. We all know that money laundering is a crime of the highest degree of organization, often involving persons with expert knowledge of finance and banking, made without attracting attention of third parties and without publicity, which makes it extremely difficult to detect by law enforcement bodies and institutions dealing with combating economic crime. For the average market participant, but also for the average notary public - no matter how diligent and alert, having intuition and profound insight - this crime becomes invisible and seemingly harmless. On the one hand, the complexity of the operations carried out at various stages of money laundering process makes it difficult to detect that crime, and on the other hand, it makes a single operation, possibly performed at the notary public office, usually does not differ in any way from other typical operations, and does not arouse any suspicions, which de facto is the goal of persons involved in the crime of money laundering. The purpose of money laundering is to conceal the real origin of funds and attribute them the characteristics of legality by preventing detection of the origin of funds while maintaining control over them and free access to them by criminal groups, most frequently by exchanging funds for other forms of assets. As regards the notarial practice, it is especially the moment related to the placement of the "pre-laundered" money in real estate. In this type of investments, money launderers are looking for stable which allow to accumulate funds needed to finance further crimes.

Therefore, there is nothing else to be done but to stick to the definition of money laundering and to carefully apply financial security measures resulting from the Act, identify the beneficiaries and beneficiary owners using all possible methods to this end, register all transactions above thresholds and vigilantly analyse the risk of each and every transaction so as to be able to show in the event

of a possible inspection that it was performed in accordance with the law, the notary public internal procedures and due diligence.

From the point of view of notarial actions, apart from the above-mentioned placement, two moments in the process of the money laundering are of particular importance: layering and integration. The layering phase is about separating illegal income from their source (for instance by investing in various forms of assets, which is usually based on a large number of short-term and at the same time complicated transactions). The integration phase is about finding a credible (seemingly) justification for owning the accumulated assets. Repeated transactions in the same real estate and understating the sale price quoted in the notarial deed may serve here as an example. Within the framework of the next transaction, the property is resold at a higher price, and the seller gets justification for having a financial surplus. At this stage, an element of mixing legal and illegal funds may occur. This often happens under the guise of, for instance, acquisition of a bankrupt enterprise which, in circumstances that are hard to explain, suddenly begins to generate unexpected income. However, the notary public participates only in this first phase (purchase), which does not have to give rise to suspicions.

If we add to this an international element, which is very common for such transactions, particularly with entities registered in countries favouring tax optimization (tax havens, financial oases), offering zero or very low taxes with a simultaneous lack of systems registering suspicious transactions, various trusts, sea banks, trust funds helping in the transfer of money while lowering or increasing prices and wages, or ghost-banks - then we perfectly realize that the additional internationalization of the entire undertaking is aimed at hindering its detection.

This brief disquisition shows us how complicated the process of counteracting money laundering is, and how lonely the notary public is in the phase of "detecting" or "suspecting" this practice. I dare say that it is our - notaries public - professionalism and awareness of the complexity of economic processes that limits our participation in the chain of operations aimed at effective money laundering to a minimum (this thesis is partly confirmed by the GIIF statistics, discussed below).

The financial security measures applied by the Polish notaries public include primarily:

1) identification of the client and verification of his/her identity on the basis of documents or publicly available information (including all registers), and the Act lays down in more detail what this identification should include in the case of natural persons, legal persons or organizational units without legal personality, and
2) actions taken with due diligence in order to identify the beneficiary owner, and application - depending on the assessment of the money laundering and terrorist financing risk, including in particular the type of the client, business relationships, products or transactions - of the appropriate tools to verify the client identity with a view to obtain identity data, including determination of the client ownership structure and dependencies;

Any and all financial security measures should be applied before performance of the notarial action whose value exceeds EUR 15,000, regardless of whether the transaction is carried out as a single operation or several operations whose circumstances indicate that they are interrelated. If, in the notary publi opinion, there is a risk of money laundering or terrorist financing, financial security measures should be applied regardless of the transaction value, organizational form and type of the client. The client does not have to be informed about the procedure used by the notary public.

The applied security measures should be documented in the manner described by the notary public in the notary internal procedure. This internal procedure (which is a statutory requirement for each obligated institution) describes the set of rules of the notary public conduct regarding the AML obligations and should be applied by the notary public in everyday practice. Therefore, it is important that the internal standards adopted within its framework correspond to the actual possibilities as well as legal and economic reality.

Documentation of financial security measures should be kept for 5 years. It should not be attached to the relevant notarial deed. Similarly, notarial deeds should not include statements made by the client for the AML purposes (for instance regarding a politically exposed person).

As for the information and reporting obligations towards the GIFI, the notary public provides the General Inspector with information on transactions whose value exceeds EUR 15,000 and transactions whose circumstances indicate that they may be related to the AML&TF - once a month in the electronic form. At the GIFI written request, the notary public may also be obliged to immediately submit information on transactions covered by the provisions of the Act. On the

basis of a special provision, submission of such information to the GIFI is not a breach of the notary secrecy.

The notary public should complete a training in the field of tasks imposed on the notary as an obligated institution, and the document proving completion of such training may be confirmation of an e-learning course (until recently, such a course was offered by the Ministry of Finance on its website, in the GIFI section; currently, this option is not available any more), or a training organized by the notary on his/her own, which should be confirmed by a statement that the notary public became familiar with the scope of his/her tasks as the obligated institution. As far as the notary public employees are concerned, the above-mentioned training should only be completed by those who are responsible for the application of security measures. Training for the employees may be carried out by the notary public. It should be confirmed by a statement that the notary has properly trained the employees in the scope of duties of the obligated institution.

An important difference of the Polish Act is that it contains regulations absent in the provisions of the relevant European Union directives in the field of AML, which introduce additional (beside criminal) financial liability of the notary public for the violation of its provisions. To mention just an example, a severe financial penalty (in the amount not exceeding PLN 750,000) has been introduced in the cases in which an obligated institution, which includes the notary public, fails to develop an AML internal procedure, fails to register the "above-threshold" transaction, fails to fulfil the obligation to carry out the risk analysis in order to apply appropriate financial security measures, fails to apply financial security measures or even fails to fulfil the obligation of the employee participation in the training programme (up to PLN 100,000 in this case). The level of administrative penalties provided for in the new Polish Act is significantly higher.

As regards the daily AML duties, one should point to the following practical issues, which do not arise directly from the Polish Act, but are the result of consultations with the GIFI and subject of guidelines for notaries public, and whose interpretation gives rise to far-reaching problems. For a number of years, the GIFI, in spite of pressure from the notary community, refused to provide a relatively clear and lucid refinement of some provisions of the Act, so that they should fit the reality of our work and specificity of the profession. Legal terms contained in the Act, quite hermetic in their nature, often cannot be directly translated to the civil law. By way of example, how should we understand the concept of "beneficiary" in the context of the sales contract? Is it the seller because this person sells the property value and "acquires" cash? Or is it the purchaser because that person

acquires the property value and transfers cash to the seller? Where should we look for the "beneficiary" in the contract of division of property between spouses, when the division takes place without any repayments and both spouses are purchasers of the property values? The expressed doubts resulted in the above-mentioned guidelines, which have been developed jointly with the GIFI, and which help us apply provisions of the Polish Act in many aspects. And so, thanks to these guidelines:

1. a list of legal actions was developed which, regardless of the value - apart from EUR 15,000 threshold transactions - are subject to registration in the course of the transaction risk analysis, if there is a suspicion of money laundering or terrorist financing, as well as those which are not subject to registration (for instance, we do not register preliminary contracts, notary deposits paid to a special escrow account by bank transfer, or increase in the company share capital that is covered only in cash), in the case of notarial confirmation of the signature on the document - we analyse and register only transactions (for instance sale of shares or stocks in the company),
2. the risk analysis of each transaction should be carried out on an ongoing basis and may be reflected only in the notary public mind, but of course it may also be documented in the paper or electronic form. All transactions should be subject to such analysis. The second (secondary) analysis, on the other hand, is the "result of the original analyses" carried out on an ongoing basis, and should be performed periodically, and documented in the paper or electronic form. No doubt, therefore, that if this primary, ongoing analysis covering each transaction, is conducted in the paper or electronic form, there is no need to carry out periodic analyses.
3. the notary public may, but does not have to accept, a written statement on whether the client is a politically exposed person, But if the notary accepts this statement in writing, he or she should instruct the client about criminal liability for providing factually inaccurate data. Such a statement should not be included in the notarial deed, and the place of residence of the client, which after all is quite important for determining whether the client is a politically exposed person, may be determined even on the basis of a statement;

Thanks to the efforts of the notary community, some of the issues covered so far in the "guidelines" have been reflected in the new Act, which will enter into force on 12 July this year (e.g. the list of notarial actions subject to registration).

Finally, it is worth saying a few words about the partial statistical data collected by the GIFI on the basis of information provided to the GIFI by notaries public. Based on the annual activity reports of this body, published since 2004, it can be noted that:

1. notaries public are regularly controlled by the GIFI; on average, out of 20 inspections per year, 3 to 4 are inspection of notaries; the subject of those inspection are internal procedures, correctness of documentation related to the risk analysis, as well as financial security measures applied. If significant violations are found, severe financial penalties are imposed, which should take into account not only the degree of violation, but also the average annual income of the notary public;
2. as regards information submitted on transactions above threshold of EUR 15,000 - approximately 1.8% of all data comes from notaries public; the vast majority of information comes from banks and other credit institutions (about 90% per year), which is quite understandable;
3. on the basis of suspicious activity reports submitted by the obligated institutions, whereas there are 8 to 10 such reports submitted on average per year by the notaries public, advocates and legal advisors, though there is no data on how many reports are submitted only by the notaries public - the GIFI takes decisions to suspend on average 4 to 5 transactions per year;
4. as regards suspicious transactions reports - approximately 0.3% of all such reports come from notaries public.

In summary, one may say that Polish notaries public are a small but significant cog in the anti-money laundering machine. Despite their limited capabilities, they try to fulfil their role in line with the expectations.