

Available online at:

<http://proceedings.lumenpublishing.com/ojs/index.php/lumenproceedings>

9th LUMEN International Scientific Conference Communicative Action &
Transdisciplinarity in the Ethical Society | CATES 2017 |
24-25 November 2017 | Targoviste, Romania

Communicative Action & Transdisciplinarity in the Ethical Society

The Notary Public and His Role in The Prevention and Fight Against Money Laundering

Liviu-Bogdan CIUCĂ

<https://doi.org/10.18662/lumproc.11>

How to cite: Ciucă, L. B. (2018). The Notary Public and His Role in The Prevention and Fight Against Money Laundering. In T. Ciulei, G. Gorghiu (eds.), *Communicative Action & Transdisciplinarity in the Ethical Society* (pp. 97-104). Iasi, Romania: LUMEN Proceedings. <https://doi.org/10.18662/lumproc.11>

© The Authors, LUMEN Conference Center & LUMEN Proceedings.
Selection and peer-review under responsibility of the Organizing Committee of the conference



This is an Open Access article distributed under the terms of the Creative Commons Attribution-NonCommercial 4.0 Unported License, permitting all non-commercial use, distribution, and reproduction in any medium, provided the original work is properly cited

The Notary Public and His Role in the Prevention and Fight against Money Laundering

Liviu-Bogdan CIUCĂ¹

Abstract

Starting from the apparently contradictory position of the notary public as professional belonging to a liberal legal profession and the qualification that art. 10 from Law no. 656/2002² [1] expressly sets out, the intention of this article is to present the arguments of both the supporters of the idea that the two positions are contradictory, as well as certain theories and elements of the laws in the matter that accept the coexistence of the two statutes. By developing and analysing the role and purpose of the professional secret, the relation between the law professional and the customer and their limitations under certain conditions, this material attempts to find the converging point of the two currents and to propose conclusions that would clarify certain controversial aspects regarding the role of the notary public in the prevention and fight against money laundering.

Keywords: *notary; fight; money laundering; professional secret.*

¹ Professor PhD, Faculty of Juridical, Social and Political Sciences, “Dunărea de Jos” University of Galați, Galati, Romania, eurom2000@yahoo.com, oanagrama@yahoo.com, 0724.56.16.47.

² The following natural or legal persons fall under the law hereto:

f) notaries public, lawyers and other persons exerting liberal legal professions, when they assist in the issue or performance of operations for their customers concerning the purchase or sale of real assets, shares or equity interests or trading fund elements, the administration of financial instruments or other assets of the customers, creation or administration of bank accounts, savings accounts or other financial instruments, organization of the subscription process of the contributions required for the incorporation, administration or management of trading companies, undertakings for collective investments in real assets or other similar structures, or, the unfolding, under the law, of other trustee activities, as well as when they represent their customers in any financial activity or regarding real assets;

<https://doi.org/10.18662/lumproc.11>

Corresponding Author: Liviu Bogdan CIUCA

Selection and peer-review under responsibility of the Organizing Committee of the conference



1. Introduction

“The Romanian public notary – in its current form – has a tradition, it did not appear out of nowhere but it was the outcome of a normal, logical and inherent evolution of a centuries old legal reality” [2].

The notarial activity, which is vital for the society’s development from the perspective of the observance and securing of the legal circuit of the documents attesting legal instruments and deeds having effects on the personal rights and patrimony, unfolds with the compliance of the principles governing this noble profession, which we shall present briefly in the article hereto, in order to present as accurately as possible this noble activity that is involved in the private law legal relations among the members of the society.

2. Theoretical Background

The notary public must perform his/her activity by complying with both the law regulating the notarial activity, Law no. 36/1995 and all the normative acts in the matter, the document issued by the notary public integrates the public authority delegated by the state to the same and the legal force provided by the law.

The legality principle is found in the very authority of the notarial act, which authority resides in its compliance with the law.

If the legal provisions are violated, the notary public is subject to civil, disciplinary or criminal liability, as the case stands.

The principle of the equality of treatment of all the citizens before the notary resides in the constitutional provisions set out in art. 16, par. 1) of the Constitution, according to which the citizens are equal before the “law and the public authorities, without privileges or discriminations”.

The confidentiality principle generated by art. 69 of Law no. 36/1995, whereby it was specified that the “Notary public and the notary office personnel are bound to maintain the professional secret as to the instruments and deeds they came across during their activity, even after their function ceased, namely after the termination of their employment, except when the law or the interested parties release them from this obligation”, generates a permanent obligation to this effect to the notary public. Whereas certain doctrine opinions opposed the reporting obligations arisen from the money laundering prevention and fighting laws to the obligation to maintain the professional secret, it must be specified that the very law text specifies that the obligations concerning the maintenance of confidentiality

disappear if the interested party or the law releases the notary from this obligation.

The principle of performing a public interest service is determined by the fact that he/she is a professional appointed by the state authority in order to fulfil a public interest service so as to ensure the legal security of the contracting parties.

The availability principle in the notarial procedures imposes that the entire notarial activity is performed upon request and not by ex officio intimation. [3]

The principle of the notary's independence and his/her abidance by the law is found in art. 3 of Law no. 36/1995 [4] which sets out that "(1) The notary public is vested to fulfil a public interest service and has the statute of an autonomous function. (4) In the exercise of and in relation to the profession, the notary public is protected by the law", the function's autonomy including its independence.

The principle of performing notarial procedures in Romanian is underlain by art. 13 from the Constitution of Romania, according to which in Romania, Romanian is the official language.

The principle of the notary public's liability for the professional activity "urges us to observe that the notary's liability for his/her instruments and deeds is much stricter and better defined than in other professions.

According to art. 72 of Law no. 36/1995, the notary public's civil liability may be committed under the provisions of the civil law, for the violation of his/her professional obligations, when he/she culpably caused a prejudice in bad faith, set out by a definitive judgment. In order to guarantee to the citizens, the recovery of the prejudice, the notaries have a civil liability insurance with the Notaries Public Insurance House; thus, if the required conditions are met, the Insurance House shall pay on behalf of the notary the prejudice caused by the same, recovering in its turn the prejudice from the culpable notary" [5].

3. Argument of the paper

The Notary Public – statute and competences

Ever since the first article of Law no. 36/1995, the Law of the Notaries Public and notarial activity [6], the lawmaker sets out that the notarial activity "provides the natural and legal persons the acknowledgement of the non-litigious civil or commercial legal relations, as well as the exercise and protection of the interests, under the law".

Concurrently, the text of the aforementioned law sets out in art. 3, par. (1) that the “Notary public is vested to fulfil a public interest service and has the statute of an autonomous function” and in par. (4) of the same article, it sets out that “in the exercise of and in relation to the profession, the notary public is protected by the law”.

Along provisions such as the one setting out that “the instrument issued by the notary public, bearing his/her seal and signature, is of public authority and bears the supporting force and, as the case stands, the legal force provided by the law”. It sets out to the notary public a special statute among the law professionals, awarding him/her the state authority in exercising the profession but also the autonomy specific to a liberal profession.

Regarding all the instruments and procedures fulfilled by the notary under art. 12 of Law no. 36/1995, the Law of the notaries public and notarial activity³ [7], it must be specified that the notary public is bound to comply with the principles set out by the Deontological code of the Romanian notaries public [8], which, at art. 2, sets out that the notarial deontological principles are:

- a) principle of legal legality and security;
- b) principle of equidistance, impartiality and independence;
- c) principle of truth, justice and good faith;

³ The notary public fulfils the following notarial instruments and procedures:

- a) elaboration of legal documents, at the parties' request;
- b) authentication of documents;
- c) notarial inheritance procedure;
- d) certification of deeds, in the cases provided by the law;
- e) legalization of the signatures on the documents, signature specimens and seals;
- f) giving certified date to documents;
- g) reception in deposit of assets, writs and documents presented by the parties, as well as of sums of money, other assets, writs or documents found on the occasion of the inheritance inventory, within the limits of the space and utilities the notary office has;
- h) protests of bills of exchange, promissory notes and cheques;
- i) legalization of documents' copies;
- j) performance and legalization of translations;
- k) issue of duplicates of the elaborated documents;
- l) trustee activities, under the law;
- m) appointment, in the cases provided by the law, of the custodian or special curator;
- n) recording and storing, under the law, of the prints of the special marking devices;
- o) certification of the procedure stages of the bids and/or their results;
- p) divorce procedure, under the law;
- p¹) issue of the European inheritance certificate;
- q) liquidation of the estate liabilities, with the agreement of all the heirs;
- q¹) issue of notarial enforceable writs;
- r) any other operations provided by the law

- d) principle of preventive justice;
- e) principle of loyalty towards the state;
- f) principle of defending and promoting the prestige of the profession of notary public;
- g) principle of continuous professional training;
- h) principle of availability;
- i) principle of confidentiality and maintenance of the professional secret;
- j) principle of non-discrimination.

From the viewpoint of both the state and the relation they have with the customers as professionals, as well as of the laws in the matter, several doctrine supporters raised the question: whether the notary public is a reporting entity or not in the viewpoint of Law no. 656/2002. If the answer to the question is affirmative, we need to seek the answer to the following question: is the notary public a reporting entity in any circumstance? and in which circumstances, as a freelance, is he/she exempt from the obligations falling to the reporting entities such as described and provided by the law?

4. Arguments to support the thesis

Is the notary public a reporting entity or not?

First of all, let's read art. 10 of Law no. 656/2002, which sets out the following:

“The following natural or legal persons fall under the law hereto:

f) notaries public, lawyers and other persons exerting liberal legal professions, when they assist in the issue or performance of operations for their customers concerning the purchase or sale of real assets, shares or equity interests or trading fund elements, the administration of financial instruments or other assets of the customers, creation or administration of bank accounts, savings accounts or other financial instruments, organization of the subscription process of the contributions required for the incorporation, administration or management of trading companies, undertakings for collective investments in real assets or other similar structures, or, the unfolding, under the law, of other trustee activities, as well as when they represent their customers in any financial activity or regarding real assets”.

We find that the text, in the case of the notary public, imposes the reporting obligation in two expressly provided circumstances, namely, when the notary gives legal assistance or represents his/her customers.

The supporters of the theory whereby the notary is a reporting entity (within the meaning of art. 10 of Law no. 656/2002) in the limiting circumstances provided by the law (only when he/she gives legal assistance and represents his/her customers) oppose it to the text from art. 12 of Law no. 36/1995, which describes many more competences. To conclude with, when the notary fulfils any other activity or competence, other than the one to represent his/her customer or to provide the same legal assistance, is not bound to fulfil the reporting procedure under the laws in force.

5. Arguments to argue the thesis

The supporters of this theory take a step further in supporting it and invoke art. 13 of Law no. 36/1995, which specifies that the “Notaries public may also provide legal consultations in notarial matters other than those concerning the contents of the documents they issue and may participate, in the capacity of specialists assigned by the parties, in the preparation and issue of notarial legal documents. “

Consequently, they assert that “From the analysis of the three law texts, art. 12 and 13 of Law no. 36/1995 and namely, art. 10 of Law no. 656/2002, undoubtedly arises that notaries public may be included in the category of the persons provided by art. 10 letter f) only when they perform activities of the kind provided by art. 13 of Law no. 36/1995”. [9].

From a practical perspective, the supporters of this theory specify on the website www.notar-expert.ro that “to not distinguish between what the law itself sets out and to establish for all notaries and in relation to their entire activity the obligation to perform the procedures provided by Law no. 656/2002, it would mean an unjustified loading of their activity with operations exceeding the legal framework of their activity, as such being subject to the risk of incurring civil and even criminal sanctions for the violation not only of general legal provisions (civil, criminal etc.), but even of their own operating law, as well as those regarding the professional secret, issue of legal documents etc. Considering the same framing logic in art. 10, letter f) depending on the ground of the performed activity, the provisions of art. 7, par. (3) of Law no. 656/2002 regarding the unenforceability of the professional secret shall not protect the notary just because he/she considered that the provisions of the law are applicable to him/her”.

6. Dismantling the arguments against

Interestingly, the supporters of the two currents establish the reporting obligations of the notary public in the matter of the prevention of and fight against money laundering, depending on the circumstance, the positioning towards one of the customers or towards all the beneficiaries of the notarial service. They support or exclude this reporting obligation depending on whether the notary public represents only one of the benefitting parties or all the parties participating in the issue of the notary document. In other words, the professional secret and the confidentiality obligation would be superior to the reporting obligation when it represents the interests of only one party participating in/benefitting from the notarial document. This, in opposition to the circumstance when he/she would position himself/herself equidistantly and impartially among all the beneficiaries of the requested service. Should this be the measure to set the mutual priority of the two obligations? The reporting obligation, namely the obligation to maintain the professional secret and to ensure the confidentiality of the discussions borne with the client and his interests. We believe that a clarification of the norm, the law texts applicable in the matter, towards a doctrine current or the other, is imperiously necessary and beneficial.

7. Conclusions

Understanding the arguments of the two currents, namely the one asserting that in all situations the notary must behave as a reporting entity under the provisions of Law no. 656/2002 and the one where they assert that only when the notary gives assistance or represents his/her customers, they are bound to fulfil the procedures set out by the aforementioned law, we wonder whether and which is the notarial procedure in which one might consider that the notary does NOT give assistance in the issue or performance of operations for his/her customers, or does NOT represent the customers in any financial operation or which concerns real assets?

We believe that in order to avoid any confusion that would conduct to the failure to fulfil certain legal obligations, without any intention to violate the law text, analysing both currents, a clear and correct formula must be found as to the interest pursued by the lawmaker from the viewpoint of the prevention of and fight against money laundering, but also from the viewpoint of the professional's equidistance, the obligation to

maintain the professional secret as well as to the legal purpose of the beneficiary of the notarial services.

This article is only intended to draw the attention on different interpretations of the same law text and to challenge theoreticians, practitioners and not lastly, the lawmaker to identify solutions meant to cast away any confusion from the perspective of the purpose pursued by Law no. 656/2002.

Perhaps a legislative modification that would expressly specify the circumstances when the notary public is considered a reporting entity, with more concrete examples, or by specifying whether in any procedure the notary is such an entity, would sufficiently clarify the general text, which attempts to be applicable to more professionals without considering certain particularities generated by the own statute or law governing the activity of each professional.

References

- [1] Law no. 656/2002
- [2] D. V. Mănescu, Preface to the Documentary. Notarial normative acts in the period 1874-1975. Notarom , Bucharest: Publishing House. 2006. p. 3, apud C. Mihailovici, Notary Public. A profession's destiny, Notarom: Publishing House, 2015. p. 7
- [3] Art. 77 par. 1) of Law no. 36/1995 “all notarial acts are fulfilled upon request”;
- [4] Law no. 36/1995 of the notary public and of the notarial activity
- [5] I. Al. Toader. Notary Public's Legal Liability in the National and European Context-Abstract” „Titu Maiorescu” University of Bucharest, Faculty of Law.
- [6] The law that transforms the notary public into a notary public, laying the foundations of the notary professional organization but also the status of the notary public.
- [7] Art. 12 of Law no. 36/1995
- [8] The Official Gazette of Romania, Part I, no. 930 from 16 December 2015, the publishing of the Decision of the National Congress of the Romanian Notaries Public no. 9/2015 for the approval of the Deontological code of the Romanian Notaries Public;
- [9] www.notar-expert.ro.