



Anti-money laundering and counter terrorism financing (« AML-CTF ») in the real estate sector

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AML-CTF obligations: combating money laundering and terrorism financing (« ML-TF »)

I. Introduction

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I. Introduction

1. The real estate sector
2. Scope of professionals subject to AML-CTF obligations
3. AML risks linked to the real estate sector

1. The real estate sector

➤ Overview of the Real estate sector:

- 8.1 % of the country's gross value added ("GVA") with €4.1 billion in 2019.
- Sector very fragmented:
 - more than 6 500 companies involved in real estate related and construction activities;
 - more than 50 000 employees.
- Combined production value exceeded €14 billion in 2019.

➤ Real estate agents:

- 2 329 real estate agents;
- combined turnover of €2.6 billion in 2018;
- high volume of and value of transactions.

➤ Real estate developers:

- large volume and value transactions;
- overall produced volume by the construction sector in Luxembourg in 2019 of €8.6 billion.

Source : National Risk Assessment 2020 of Ministry of Justice

2. Scope of professionals subject to AML-CTF obligations

- Pursuant to Article 2 (1) 10. and 10bis. of the Luxembourg law of 12 November 2004 on the fight against money laundering and terrorist financing (the “**2004 Law**”), Anti-Money Laundering and Countering the Financing of Terrorism (“**AML-CTF**”) **requirements apply to real estate agents and real estate developers** (the “**Real estate professional**”).
 - Real estate agents ⇨ within the meaning of the law of 2 September 2011 regulating the access to the professions of craftsman, salesman, industrial as well as to some liberal professions, as amended (the “**Law of 2011**”):
 - established or acting in Luxembourg;
 - including when acting as intermediaries in the letting of immovable property but only in relation to transactions for which the monthly rent amounts to EUR 10,000 or more.
 - Real estate developers ⇨ within the meaning of the Law of 2011:
 - established or acting in Luxembourg;
 - including when they are acting, in their capacity as intermediary, involved in purchase and sale transactions of immovable property.

2. Scope of professionals subject to AML-CTF obligations

- Progressive inclusion of the Real estate professionals within the 2004 Law:
 - As of 2004 for **real estate agents**, including since 25 March 2020, when acting as intermediaries in the letting of immovable property (rent amount \geq EUR10,000)
 - As of 25 March 2020 for **real estate developers**.
- The Real estate professionals will thus **need to comply with all relevant AML-CTF obligations** contained in the 2004 Law (*i.a.* CDD obligations, internal organization and cooperation obligations with competent authorities) for the following operations :
 - Real estate agent's transactions in his capacity as intermediary as well as Real estate agent's transactions involving the letting of real estate, but only in respect of transactions where the monthly rent is equal to or greater than EUR 10,000;
 - Real estate developers' property transactions.
- The *Administration de l'enregistrement, des domaines et de la TVA* ("**AED**") is the **supervisory authority in charge of ensuring compliance** by the Real estate professionals with their AML-CTF professional obligations (Article 2-1(8) of the 2004 Law)
- The AED has published a Guide specifically addressing the AML-CTF obligations of Real estate professionals (the "**Guide**").

3. AML risks linked to the real estate sector

➤ High inherent risk of the real estate sector:

- Sector sizeable and fragmented;
- Representing a large value of Luxembourg's GVA.

➤ High global risk of the real estate sector:

- Involvement of **large monetary transactions**;
- Possibility to **conceal the true source of the funds**:
 - directly through physical persons or via layering of the transaction involving multiple legal entities;
- **Products** particularly **suited** to laundering:
 - Physical assets such as land and houses enable storage of monetary value and potential to reap returns;
- Large number of customers (many with legitimate activities) which **offers a level of anonymity to criminals**:
 - Ability to obscure the ultimate beneficiary.

3. AML risks linked to the real estate sector

- **Vulnerability amplified** because Real estate professionals, acting as intermediaries in real estate transactions, are as such **particularly exposed to ML/TF**, especially given their central role in the facilitation of transactions.
- Agents can be deliberately used to:
 - **disguise the identity of the beneficial owner;**
 - **manipulate the market value of a property** and allow a criminal to launder illicit money;
- With non-resident clients **geographical risks** adding another layer of opacity to the source of money.



II. Main AML-CTF obligations

1. Customer Due Diligence
2. Adequate internal organizational requirements
3. Cooperation requirements

1. Customer due diligence

- A. Risk Based Approach
- B. KYC (“Know your customer”) practices
- C. Reliance on third parties
- D. Archiving documents and data



1. Customer due diligence

A. Risk-based approach

➤ Real estate professionals are required to take appropriate measures to identify, assess and understand **global ML-TF risks they present and to:**

- Take into account all relevant risk factors before assessing their global risk level;
- Identify the types of mitigation measures to be implemented when carrying out their own risk assessment.

➤ Real estate professionals are also required to understand **individual ML-TF risks** by conducting Customer Due Dilligence (CDD) on **a risk-sensitive basis**, depending on the type of customer, business relationship, product or transaction.



- The risk-based approach **does not allow a firm to simply waive its obligations** in this field (no 'tick the box' approach).
- Real estate professional **must** consider all relevant risks of the transaction (see next slide for risk factors).
- Real estate professional will be required to justify and to document their classification as well as the extent of the CDD measures.

➤ **Real estate professional are accountable of the entire risk analysis process !**



1. Customer due diligence

A. Risk-based approach

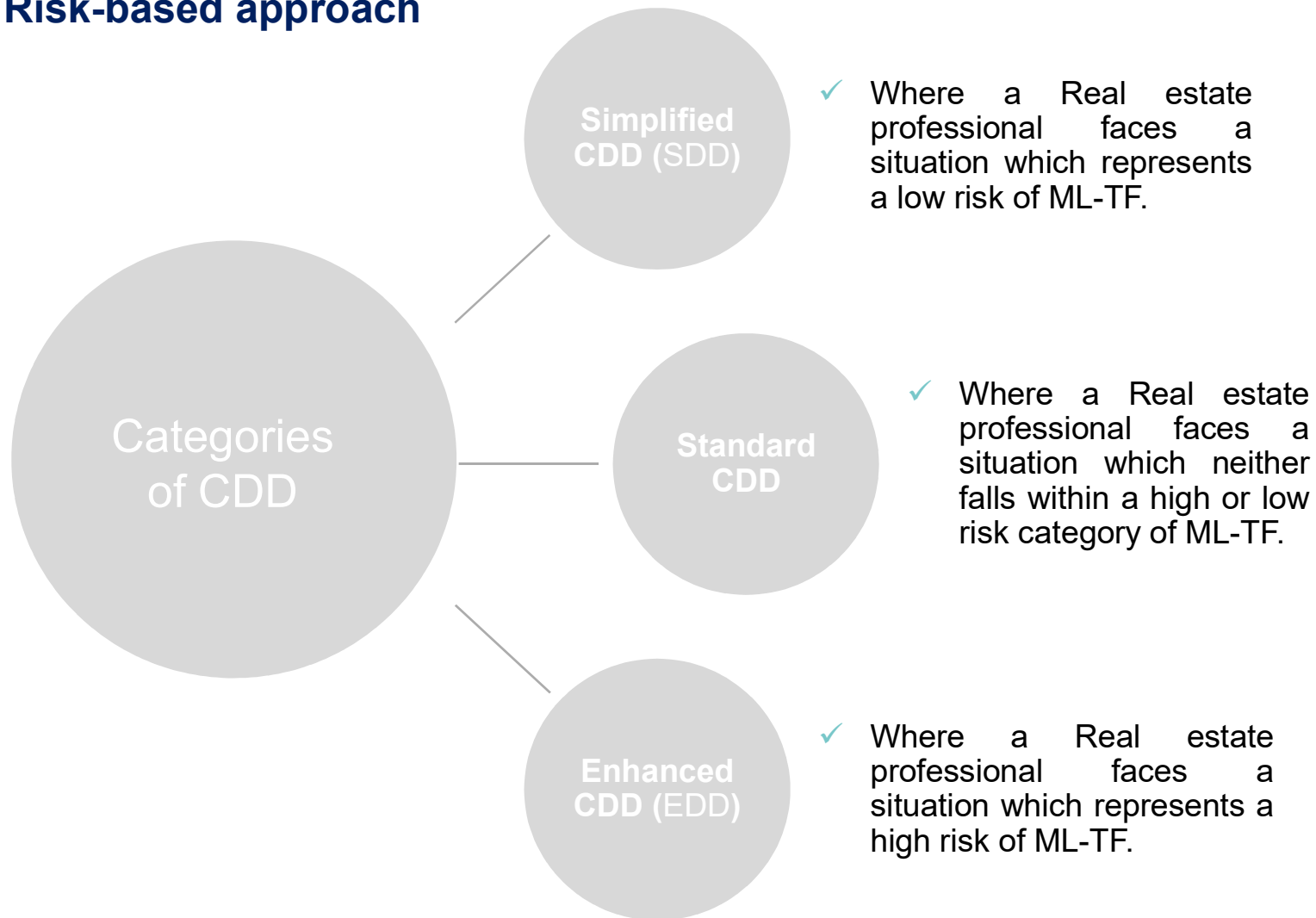
- List of **risk variables** to be considered as minimum when determining to what extent CDD measures should be applied:
 - **the purpose of a relationship;**
 - **size of transactions undertaken;**
 - **the regularity or duration of the business relationship.**

- **Additional relevant risk factors** to be considered can be found:
 - In Annexes III and IV of the 2004 Law;
 - The AED Guide provides **for specific risk factors for Real estate professionals**
 - Website of the AED => section "Money laundering" => sub-section "Prevention and awareness":



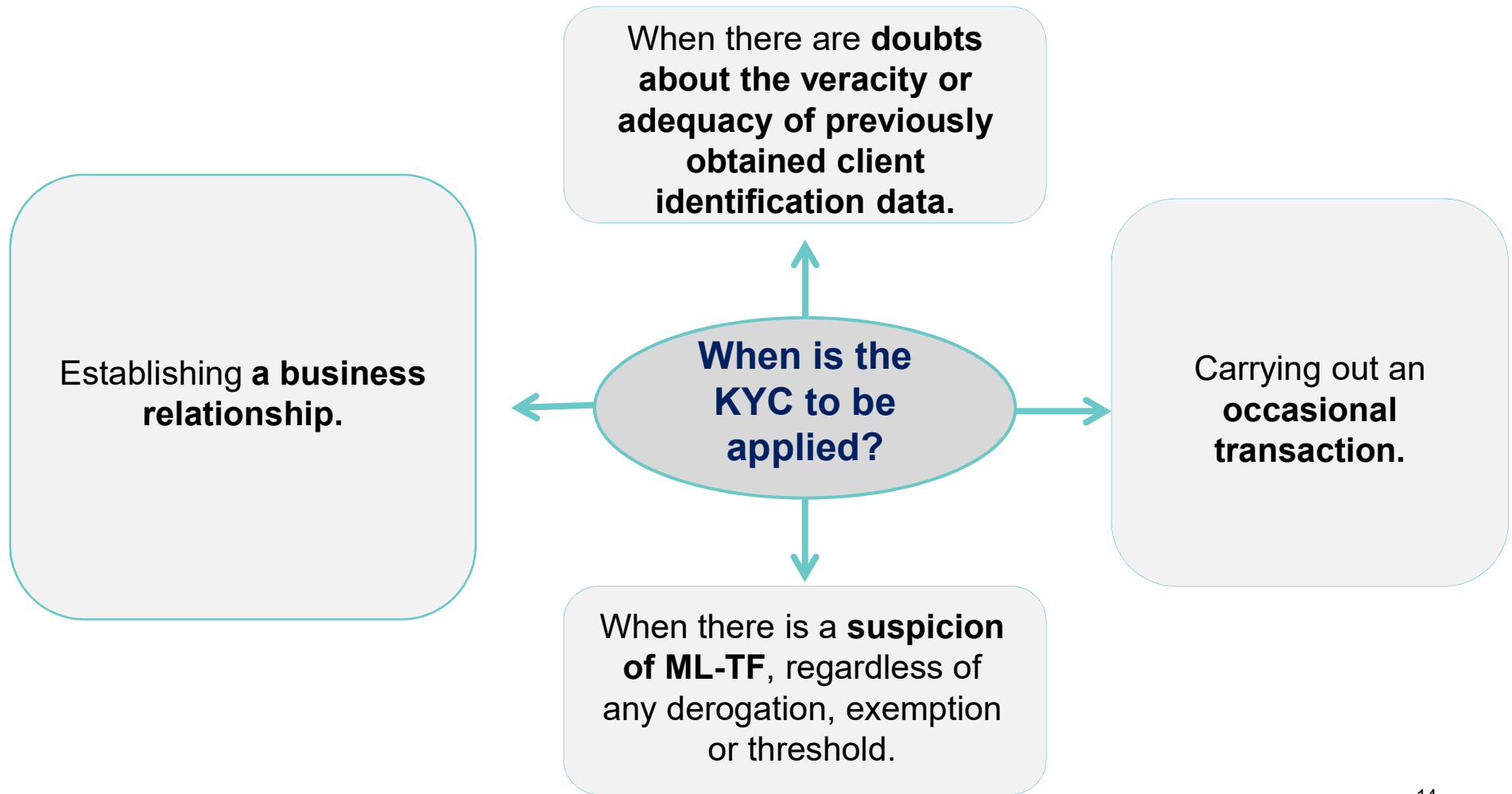
1. Customer due diligence

A. Risk-based approach



1. Customer due diligence

B. KYC practices



1. Customer due diligence

B. KYC practices

➤ Identification and verification of identity of the customer, agent and BO

- **The customer (may be a natural or legal person):**

- Concept of **“ongoing business relationship”**:

- ✓ professional or commercial relationship **which is established in the context of the professional activities** of the Real estate professionals and which is expected, at the time when the contact is established, to have an **element of duration**;

- **Specific provisions** for Real estate transactions:

- ✓ Article 3(2) of the 2004 Law : CDD measures apply to both the purchasers and vendors of the property

- **The agents/proxy holders of the customer** (*i.e.* the persons purporting to act on behalf of the customer):

- ✓ the Real estate professional shall be provided with the proxy of the person acting on behalf of the customer, as well as verify the agent’s identity through evidencing documents of which he must keep copies.

1. Customer due diligence

B. KYC practices

➤ Identification and verification of identity of the customer, agent and BO

- **The BOs:**

- pursuant to the 2004 Law, the concept of “**BO**” refers to:

“any natural person(s) who ultimately owns or controls the customer or any natural person(s) on whose behalf a transaction or activity is carried out”

- BOs of legal entities shall include **at least**:

- ✓ the **natural person(s) who ultimately owns or controls a legal entity through direct or indirect ownership** of a sufficient percentage of the shares or voting rights or ownership interest in that entity or through control via other means, other than a company listed on a regulated market that is subject to disclosure requirements consistent with Union law or subject to equivalent international standards which ensure adequate transparency of ownership information.
 - ✓ a **shareholding of 25 % plus one share** or an ownership interest of more than 25 % in the customer held by a natural person **shall be an indication of direct ownership** (also applicable when held by a corporate entity, which is under the control of a natural person(s), or by multiple corporate entities, which are under the control of the same natural person(s)).

1. Customer due diligence

B. KYC practices

➤ Identification and verification of identity of the customer, agent and BO

- What if no BO can be identified ?

→ Article 1(7)(a)(ii) of the 2004 Law provides that: *“if after having exhausted all possible means and provided there are no grounds for suspicion, no natural person is identified under the aforementioned scenarios or if there is any doubt that the person(s) identified are the BOs, the natural person who holds the position of senior managing official”*.

- According to FATF recommendations, this should include:

- Chief Executive Officer (CEO);
- Chief Financial Officer (CFO);
- Managing or Executive Director;
- President; or

→ The natural person(s) who has significant authority over a legal person’s financial relationship (including financial institutions that holds accounts on behalf of a legal person) and the ongoing financial affairs of the legal person.



1. Customer due diligence

B. KYC practices

➤ Which documents need to be obtained in order to identify the “customer”?



- AED Circular n°792 and Circular n°792 bis further detail the obligation of identification of the customer
- AED Guide provides for specific forms to be used to comply with KYC requirements
- *Identification and verification of the customer’s identity: natural person*

	Identification data	Verification document
Natural persons (client, agent, BO)	<ul style="list-style-type: none"> ○ Minimum identification data: <ul style="list-style-type: none"> - first name and surname; - nationality; - date and place of birth; - address. 	<ul style="list-style-type: none"> ○ Official identification papers certifying the identity of the person. <ul style="list-style-type: none"> - According to the AED Guide, it must be mentioned on such document: <ul style="list-style-type: none"> → The date of the meeting with the client → The name of the KYC officer ○ Other verification in relation to the identity of the customer: <ul style="list-style-type: none"> - depending on the risk assessment: <ul style="list-style-type: none"> → obtain supporting evidence of the client’s residence address; → establish contact with the client (e.g. registered mail), etc.

1. Customer due diligence

B. KYC practices

- Which documents need to be obtained in order to identify the “customer”?
 - *Identification and verification of the customer’s identity: legal person*

	Identification data	Verification document
Legal persons	<ul style="list-style-type: none"> ○ Minimum identification data <ul style="list-style-type: none"> - denomination; - legal form; - address of the registered office; - official national identification number, where relevant; - directors or person exercising similar positions; - provisions governing the power to bind the legal person; - authorization to enter into a relationship. ○ Identification of the agent: <ul style="list-style-type: none"> - same information as for a natural person 	<ul style="list-style-type: none"> ○ Obtained a signed declaration of the client. ○ Depending on the risk assessment: <ul style="list-style-type: none"> - examining the last management reports and accounts; - verifying if the company is subject to dissolution, insolvency, liquidation, etc.; - checking public or private databases on companies; - visiting the premises or otherwise establishing a direct contact. ○ Trusts and other legal arrangements: <ul style="list-style-type: none"> - trust deed or equivalent identification documents of trustees, settlors, person exercising effective control over the trust and/or beneficiaries. ○ Verification of the agent’s powers and identity ○ Verification of documents (e.g. articles of association, RCS extract, structure chart, etc.)

1. Customer due diligence

B. KYC practices

- Which documents need to be obtained in order to identify the “customer”?
 - *AED recommendation depending on the type of transactions:*

For all operations	Renting
<ul style="list-style-type: none"> ✓ Description of the property ; ✓ Cadastral data ; ✓ Plans ; ✓ Photos of the property; ✓ Sales agreement; ✓ Bank agreement; ✓ Notarial deed for the property; ✓ Professional contact details of the notary. ✓ Information on the means of financing used by the client (cash, bank transfer, bitcoin, other). 	<ul style="list-style-type: none"> ✓ Description of the nature of the transaction: the rental contract; ✓ Evidence of the professional activity both for the owner and the tenant (e.g. employment contract) ; ✓ Salary slips for the last three months (for the tenant); ✓ Information on the means of financing used by the client (cash, bank transfer, cheque, bitcoin, other). ✓ Description of the property ; ✓ Cadastral data ; ✓ Plans ; ✓ Photos of the property.

1. Customer due diligence

B. KYC practices

- **Conducting an ongoing monitoring of the business relationship**
 - **Regular verification and update of the documents and information provided:**
 - obligation to “program” a regular update on the basis of the risk assessment = **risk based approach**;
 - obligation **to update without delay** if risks so require;
 - obligation to apply CDD procedures **at appropriate times** to existing customers on a risk-sensitive basis.
 - Ongoing assessment of the risk profile.

1. Customer due diligence

B. KYC practices

➤ Simplified customer due diligence

- The Real estate professional may apply SDD measures in situations presenting a **lower risk** of ML-TF where:
 - The Real estate professional **has ascertained** that the business relationship or the transaction presents a lower degree of risk.
 - The Real estate professional identified areas of lower risk

- The Real estate professional will always have to determine, **on a risk sensitive basis**, whether the relevant relationship or transaction may trigger the application of SDD measures:
 - factors **set out** under Annex III of the 2004 Law

- **Periodic monitoring** shall be carried out with respect to the business relationship so as to ensure that the conditions allowing SDD remain applicable. In case of doubt regarding the applicability of SDD, the Real estate professional may need to reclassify into CDD or EDD.

1. Customer due diligence

B. KYC practices

➤ Enhanced customer due diligence

- **Categories which entail the automatic application of EDD measures are for the most part:**
 - When dealing with natural persons or legal entities established in countries identified by the European Commission as high-risk countries, as set out in Delegated Regulation (EU) 2020/855 and in the 2004 Law (or FATF guidance)
 - In transactions or business relationships with politically exposed persons (“PEPs”) (including foreign and domestic PEPs)

- **General example to apply enhanced due diligence in case of unusual transactions**
 - Example of unusual transactions:
 - ✓ **larger transaction** than what the Real estate professional would normally expect based on its knowledge of the customer, the business relationship or the category of client to which the customer belongs;
 - ✓ According to AED when the client is never **physically present** and the Real Estate Professional has never physically met the client;

 - In its Guide the AED has set out a few examples in which EDD is appropriate



Generally speaking the Real estate professional needs to be able to demonstrate at all times that the AML measures that he applies are in accordance with the risk associated to the clients he is dealing with.

1. Customer due diligence

C. Reliance on third parties

Third party introducers	Outsourcing
<ul style="list-style-type: none"> ○ Limited to initial due diligence measures ○ The Real estate professional shall ensure that the third party is either: <ul style="list-style-type: none"> - a professional within the meaning of Article 2 of the 2004 Law; or - a professional applying <i>i.a.</i> CDD requirements and record-keeping requirements that are equivalent with those laid down by the 2004 Law and by AML 4 and supervised in a manner consistent with Chapter VI Section 2 of AML 4; ○ results on admissibility of third party introducers have to be documented and archived; ○ obligation to have a written engagement; ○ information obtained from the third party shall meet the CDD requirements. ○ the third party shall provide, immediately upon request, relevant copies of identification and verification data and other relevant documentation on the identity of the customer or the BO to the firm. 	<ul style="list-style-type: none"> ○ there are no requirements with respect to the third party; ○ not limited to initial due diligence measures; ○ procedures have to be put in place at the level of the outsourcee; ○ at the professional's level, policies indicate applicable process in case of outsourcee and set out criteria for the choice of a delegate; ○ apply regular controls on the outsourcees' work.

1. Customer due diligence

D. Archiving documents and data

➤ Which documents?

- Documents relating to the **identification** and **verification** of **identity**.
- Documents **relating to transactions**.
- Including **any results of analysis carried out** and **internal reports**.
- Archiving: on any data support provided data can be used as evidence in judicial proceedings or investigations.



➤ How long?

- **Retention periods:** 5 years after the end of a business relationship or of an occasional transaction (but exception if necessary for the purposes of prevention, detection or investigation of money laundering and terrorist financing, or supervising authorities shall require the further retention of records for a period not exceeding 5 years).
- **The 10 year retention** period of the Luxembourg Code of Commerce remains applicable to information and documents regarding clients. After this period the Real estate professional is under the obligation to delete the relevant information and documentation.

2. Adequate internal organizational requirements

- A. Obligation to enact written internal procedures
- B. Obligation to train and inform their employees and themselves
- C. Obligation to appoint a Compliance Officer (person in charge of AML-CTF)



2. Adequate internal organisational requirements

A. Obligation to enact written internal procedures

- The professional is obliged to set up an internal organization that is adequate and proportionate to the size of his company in the context of his professional activity.
- This obligation implies the implementation of an internal procedures manual in order to prevent the risks of money laundering and terrorist financing.
- Such manual contains:
 - The description of the risk analysis adapted to the activity of professionals in the real estate sector and taking into account the results of the NRA and the SNRA.;
 - The description of the internal procedure in place to prevent the risks of ML-TF;
 - The staff AML-CTF training policy; etc.
 - The conditions of nomination of the person in charge of the AML-CTF (“**Compliance Officer**”).

2. Adequate internal organisational requirements

B. Obligation to train and inform their employees and themselves

- The Real estate professional must:
 - ensure that the relevant employees participate in training sessions held at regular intervals;
 - in particular persons that are in direct contact with customers and the Compliance Officer.

2. Adequate internal organisational requirements

C. Obligation to appoint a Compliance Officer (person in charge of AML-CTF)

- **The Real Estate Professional must appoint:**
 - a Compliance Officer in charge of AML-CTF and ensure the **compatibility** of the function with multiple responsibilities.
 - the Compliance Officer is generally speaking the contact person between the Real Estate Professional and the competent authorities.
 - depending on the size and nature of the business of the Real Estate Professional, the Compliance Officer needs to have the necessary internal authority and resources to ensure the application of the various AML obligations.

- **Confirmation of the importance of such organisational requirements by the Administrative Courts (*Tribunal administratif* (2e ch.), 19 November 2015)**
 - The Court emphasized the obligation for real estate agents to have an adequate internal organization in order to comply with its legal obligations in terms of AML-CTF and the need to proceed to the appointment of at least one person in charge, at the management level, of monitoring AML-CTF risks relating to the clients (Compliance Officer)
 - The *Tribunal administratif* confirmed as such an administrative fine of 2'500 EUR imposed by the AED on the relevant estate agent for the breach of such requirements

3. Obligation to cooperate with the relevant authorities

- A. Active and passive cooperation
- B. Concrete steps of active cooperation



3. Obligation to cooperate with the relevant authorities

A. Active and passive cooperation

➤ Active cooperation

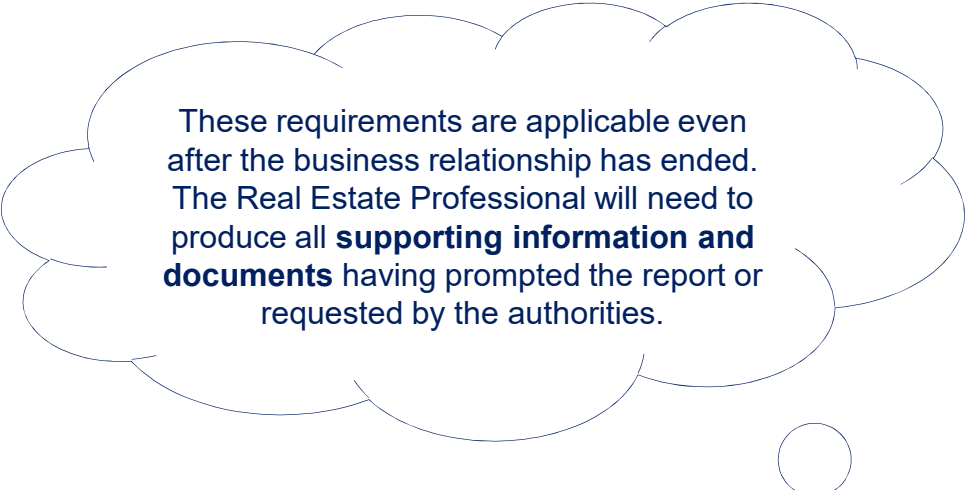
- Requirement to cooperate fully by informing the CRF **without delay, on own initiative**, where the Real estate professional **knows, suspects or has reasonable grounds to suspect** that ML-TF is being or has been committed or attempted.



- This is applicable even where no business relationship was established and in the case of attempted suspicious transactions.
- No requirement to qualify the offence.
- **Enhanced monitoring** of relationship for which a suspicious activity report was filed.

➤ Passive cooperation

- Requirement to fully cooperate with the CRF **upon request** and with the AED as the case may be e.g. be able to determine existing or past relationships/transactions with a person.



These requirements are applicable even after the business relationship has ended. The Real Estate Professional will need to produce all **supporting information and documents** having prompted the report or requested by the authorities.

3. Obligation to cooperate with the relevant authorities

B. Concrete steps of active cooperation

➤ **Who ?**

The Compliance Officer

➤ **When ?**

Knowledge and/or reasonable grounds to suspect; one clue is enough (no in-depth analysis, no qualification under criminal law by the Real estate professional);

➤ **How ?**

Make a suspicious activity report to the CRF on its [goAML portal](#).

- Please note that a business relationship subject to a report of suspicion with the CRF must be monitored with EDD.
- In case of new indications, Real estate professional shall carry out a complementary suspicious transaction report.



3. Obligation to cooperate with the relevant authorities

B. Concrete steps of active cooperation

➤ Consequences of cooperation with the CRF

- **General principle of “no tipping off”:** you must not inform the client or a third party that the suspicious transaction report has been filed (also applicable in case of passive cooperation).
- **Suspension of the transaction:** you must refrain from executing transactions which you know or suspect to be related to ML-TF before reporting such transaction to the CRF.
- The **employee having provided the information on the relevant client must be protected** from being exposed to threats or hostile action, and in particular from adverse or discriminatory employment actions if made in good.

3. Obligation to cooperate with the relevant authorities

B. Concrete steps of active cooperation

➤ **Current situation : not satisfactory**

- Only 7,34% of suspicious activity reports sent to the CRF by the Real estate professional (for AED & OAR covered sectors).
- In 2019 only 43 real estate agents registered on goAML !
- Only 10 suspicious activity reports sent by real estate agents in 2019 !

(Source : CRF Rapport d'activité 2020 sur l'année 2019)



III. Sanctions for non-compliance with AML-CTF duties

III. Sanctions for non-compliance with AML-CTF duties

Criminal sanctions	Administrative sanctions
<p>Criminal sanctions: between EUR 12.500 and EUR 5.000.000.</p> <p>Conditions for the applicability of a criminal sanction?</p> <ul style="list-style-type: none"> → evidence of the material element of the offence; → evidence of the criminal intention: no criminal sanction <u>for mere negligence.</u> 	<p>The sanctions/measures which may be applied by the AED:</p> <ul style="list-style-type: none"> ✓ withdrawal or suspension of the authorisation of establishment; ✓ warning, reprimand or fine; ✓ maximum administrative pecuniary sanctions of twice the amount of the benefit, derived from the breach, where that benefit can be determined up to EUR 1,000,000 at the most.



Questions & Answers