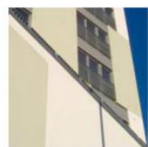




European Association of Real Estate Professions aisbl



A Guide to Directive (EU) 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (the “Fourth AML Directive”)

This guide has been prepared for CEPI-CEI member associations to assist them in monitoring the implementation of the Fourth AML Directive. It highlights points of practical importance for real estate professionals



The Fourth AML Directive aims to strengthen EU rules on anti-money laundering and terrorist financing taking into account the 2012 recommendations of the Financial Action Task Force (FATF)

- It focuses on risk assessment and takes a risk-based approach, imposing rules on due diligence which vary according to whether there is a high or low risk.
- It imposes minimum requirements, Member States are free to impose stricter requirements if they consider it necessary to do so according to the risk.
- It will increase transparency in the identification of beneficial owners, all Member States will be required to hold information on beneficial owners of all corporate and other legal entities in a national central register.
- It widens the scope of the due diligence requirements. The threshold for cash transactions for traders in goods is lowered to 10.000 EUR and domestic, as well as foreign, politically exposed persons (PEPS) are subject to enhanced vigilance measures.
- The European Commission can now identify specifically high risk third countries, requiring additional controls for clients coming from these countries
- All EU Member States have two years from when the Directive comes into force (26 June 2015) to implement its measures so that the Directive must be transposed into national law by July 2017.



What are the most important elements of the Directive for real estate professionals?

Scope of the Directive

- The Directive creates obligations for the “obliged entities” including **estate agents**. This is the same as the Third AML Directive. However, the Fourth AML Directive also contains wording in the introductory recitals to the Directive to the effect that “estate agents could be understood to include letting agents, where applicable”.
- The recitals contain a statement of reasons for the terms of the Directive, they serve for interpretation. The original proposal for the revision of the Directive included letting agents as being within the “obliged entities”. This is something to which CEPI-CEI objected as being confusing and unnecessary. This wording was removed, but replaced by the current wording above. The explanation given at the time was that this wording is intended to apply in countries where letting agents exist, leaving flexibility to other Member States as to whether or not to include letting agents in their own national measures. It is understood that this is a decision which will have to be based on the actual risks involved in a particular market and it is important that it is given careful consideration.



Risk assessment and policies

Articles 6 - 9

- The European Commission is required to conduct a risk assessment and report on those risks at EU level by 26 June 2017. This report has to be made available to Member States and obliged entities.
- Each Member State must also make a risk assessment and designate an authority to coordinate the national response to that risk.
- Obligated entities must also carry out a risk assessment, the steps to be taken concerning which must be proportionate to the nature and size of the obliged entities. These risk assessments must be documented, kept up-to-date and made available to the relevant competent authorities. Obligated entities must also have in place policies, controls and procedures to mitigate and manage effectively the risks of money laundering identified at the various levels, again proportionate to the nature and size of the obliged entities.
- Obligated entities must have in place policies, controls and procedures to manage the risks effectively. These must include the development of model risk management practices, customer due diligence, reporting, record-keeping, internal control and compliance management including (depending on the size of the business) the appointment of a compliance officer at management level and employee screening (with approval from senior management for the policies, controls and procedures put in place).



Customer Due Diligence Articles 10 - 14

Customer due diligence measures have to be applied in the following circumstances:

- when establishing a business relationship;
- when carrying out an occasional transaction that amounts to EUR 15 000 or more or constitutes a transfer of funds exceeding EUR 1 000;
- when there is a suspicion of money laundering or terrorist financing;
- when there are doubts about the veracity or adequacy of previously obtained customer identification data.

They must include:

- identifying the customer and verifying the customer's identity (before the establishment of a business relationship or the carrying out of the transaction – Article 14);
- Identifying the beneficial owner and taking reasonable measures to verify that person's identity, as regards legal persons, trusts, companies, foundations and similar legal arrangements;
- assessing and, as appropriate, obtaining information on the purpose and intended nature of the business relationship;
- conducting ongoing monitoring of the business relationship.

Obligated entities must be able to demonstrate that the measures are appropriate in view of the risks of money laundering and terrorist financing that have been identified. When assessing the risks they must take into account at least the purpose of the relationship, the size of the transaction and the regularity or duration of the business relationship.



Simplified customer due diligence Articles 15 - 17

- Where a Member State or an obliged entity identifies areas of lower risk, obliged entities may be allowed to apply simplified customer due diligence measures.
- Obligated entities must first ascertain that the business relationship or transaction presents a lower degree of risk.
- Obligated entities must carry out sufficient monitoring of the transactions and business relationships to enable the detection of unusual or suspicious transactions.
- The factors to be taken into account include the potentially lower risk situations listed in Annex II to the Directive.
- Guidelines must be addressed to the competent authorities on the risk factors to be taken into consideration and the measures to be taken in situations where simplified customer due diligence measures are appropriate.



Enhanced customer due diligence Articles 18-24

- In certain cases of higher risk, and when dealing with high-risk third countries, obliged entities must apply enhanced customer due diligence measures.
- Obligated entities must examine, as far as reasonably possible, the background and purpose of all complex and unusually large transactions, and all unusual patterns of transactions.
- The factors to be taken into account include at least the potentially higher-risk situations set out in Annex III of the Directive.
- Guidelines must be issued to the competent authorities on the risk factors to be taken into consideration and the measures to be taken in situations where enhanced customer due diligence measures are appropriate.
- For transactions or business relationships with politically exposed persons (PEPs), their family members or known close associates, obliged entities must also:
 - have in place appropriate risk management systems to determine whether the customer or the beneficial owner of the customer is a PEP;
 - obtain senior management approval for establishing or continuing business relationships with PEPs;
 - take adequate measures to establish the source of wealth and source of funds that are involved in business relationships or transactions with such persons;
 - conduct enhanced, ongoing monitoring of those business relationships.



Performance by third parties

Articles 25 - 29

- Obligated entities may be allowed to rely on third parties to meet the customer due diligence requirements. However the obliged entity which relies upon a third party still remains responsible for meeting those requirements.
- Third parties means obliged entities or others that apply supervised customer due diligence requirements (but not those established in high-risk third countries).
- Information must be obtained from the third party relied upon.

Obligated entities may comply through a group programme provided that:

- the obliged entity relies on information provided by a third party that is part of the same group.
- that group applies customer due diligence measures and rules in accordance with this Directive or equivalent the effective implementation of which is supervised at group level by a competent authority.



Beneficial ownership information

Articles 30 - 31

- Member States must ensure that corporate and other legal entities hold adequate, accurate and current information on their beneficial ownership and that those entities are required to provide information on their legal and beneficial owner to obliged entities when they are taking customer due diligence measures.
- This information must be held in a central register in each Member State.
- The information held must be accessible to obliged entities when they are carrying out customer due diligence.
- Any fees charged must not exceed the administrative costs.
- There are exemptions for access to information in exceptional circumstances, such as the risk of fraud, kidnapping, blackmail, violence or intimidation, or where the beneficial owner is a minor.
- Similar rules apply to the trustees of any express trust who must hold information on beneficial ownership regarding the trust including the identity of the settlor, trustee and protector (if any), the beneficiaries and any other natural person exercising effective control over the trust. This information must be held in a central register when the trust generates tax consequences.



Reporting obligations

Articles 32 - 38

- Each Member State must establish a Financial Intelligence Unit (FIU) to prevent and detect money laundering.
- The FIU is responsible for receiving and analysing suspicious transaction reports and other information relevant to money laundering.
- Obligated entities must cooperate with the FIU by reporting to it when the obliged entity knows, suspects or has reasonable grounds to suspect that funds are the proceeds of criminal activity or are related to terrorist financing. All suspicious activities, including attempted transactions, must be reported.
- Member States may designate an appropriate self-regulatory body of the profession concerned in the case of obliged entities including **estate agents**. Such a self-regulatory body will receive the information referred to above and forward it to the FIU.
- A self-regulatory body means a body that represents members of a profession and has a role in regulating them, in performing certain supervisory or monitoring type functions and in ensuring the enforcement of the rules relating to them.
- Obligated entities must refrain from carrying out transactions which they know or suspect to be related to proceeds of criminal activity until they have completed the necessary action and complied with any further specific instructions from the FIU or competent authorities.



Data and records

Articles 40 - 44

- Obligated entities must retain documents and information including:
 - a copy of the documents and information necessary for customer due diligence for five years after the end of the business relationship;
 - supporting evidence and records of transactions for five years after the end of the business relationship.
- Upon the expiry of the retention periods personal data must be deleted unless national law provides otherwise.
- Personal data processed by obliged entities must be used only for the purposes of this Directive, and not for commercial purposes.
- Obligated entities must provide new clients with the following information about data protection before establishing a business relationship or carrying out an occasional transaction including a general notice about the obligations of obliged entities to process personal data for prevention of money laundering purposes:
 - the identity of the controller and of his representation (if any);
 - the purposes of the processing for which the data are intended;
 - any further information such as:
 - the recipients or categories of recipients of the data;
 - whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply;
 - the existence of the right of access to and the right to rectify the data concerning him in so far as necessary.



Internal procedures and training Articles 45 -48

- Obligated entities that are part of a group must implement group-wide policies and procedures.
- Obligated entities must take measures proportionate to their risks, nature and size so that their employees are aware of the provisions adopted and data protection requirements. These measures must include special training programmes to help recognise possible money laundering operations and instructions as to how to proceed.
- Member States must make sure that obliged entities have access to up-to-date information on money laundering practices and indications leading to the recognition of suspicious transactions together with timely feedback on reports of suspected money laundering.
- Obligated entities must (where applicable) identify the member of the management board who is responsible for the implementation of the requirements necessary to comply with this Directive.



Sanctions

Articles 58 - 62

- Sanctions for the breach of national rules implementing the Directive by obliged entities must be effective, proportionate and dissuasive.
- Member States may impose criminal sanctions and lay down rules on administrative sanctions and measures (Member States may decide not to impose administrative sanctions for breaches subject to criminal sanctions).
- Sanctions and measures (for legal persons) can be applied to the members of the management body or others responsible for the breach.
- There are minimum rules on sanctions for serious, repeated or systematic breaches of the requirements on customer due diligence, suspicious transaction reporting, record-keeping and internal controls requiring.
 - a public statement which identifies the natural or legal person and the nature of the breach;
 - an order requiring the natural or legal person to stop the conduct and not repeat it;
 - withdrawal or suspension of authorisation (if applicable);
 - a temporary ban from exercising managerial functions in obliged entities (for the person responsible);
 - maximum administrative pecuniary sanctions of at least twice the amount of the benefit derived from the breach (if it can be determined) or at least EUR 1 000 000. Competent authorities may also be empowered to impose additional sanctions.
 - When determining the type and level of sanctions the competent authorities should take into account the gravity of the breach, degree of responsibility, financial strength, benefit derived, losses to third parties, level of cooperation and previous breaches.



Conclusion

The Directive makes some important changes to the scope of the rules for the prevention of money laundering and terrorist financing. Estate agents (and letting agents where applicable) are directly affected but Member States can choose to extend the rules to other professions. Any decisions have to take a risk-based approach so it is important to have an awareness and understanding of the risks in particular markets. Therefore it is important to pay close attention to the way in which these measures are implemented. CEPI-CEI member associations are encouraged to consider carefully how best the measures can be adapted to their particular national circumstances and are of course invited to direct any questions they may have about the European legislation to the CEPI-CEI Secretariat.

CEPI-CEI aisbl

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Annex I

Useful sources of information:

Full text of Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing

- http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.141.01.0073.01.ENG

European Commission webpage on financial crime

- http://ec.europa.eu/justice/civil/financial-crime/index_en.htm

Financial Action Task Force (FATF)

- <http://www.fatf-gafi.org/>