Definitions

June 28th 2021

Emma-Jane Williams

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Money Laundering

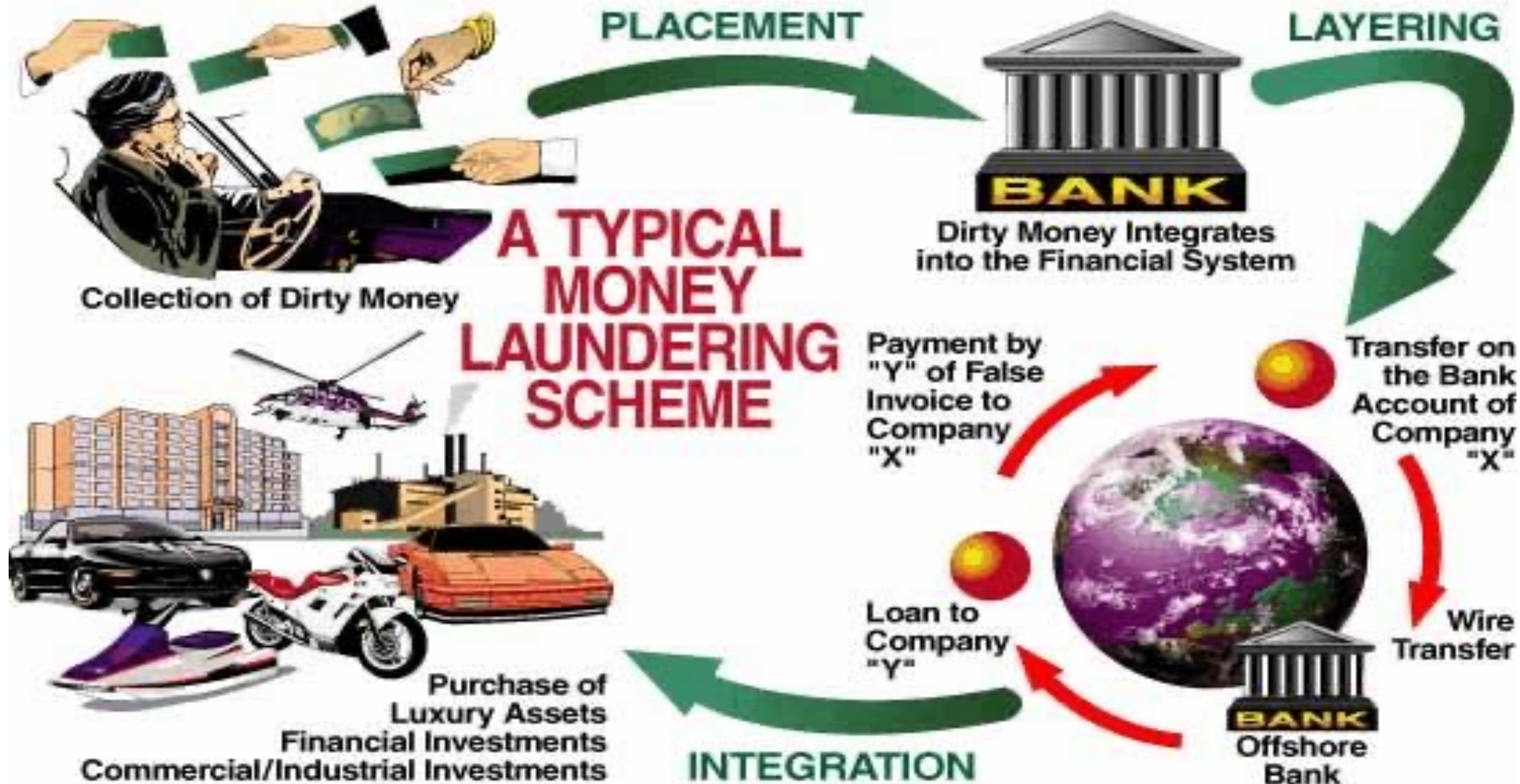
- Processing dirty money
- Oxygen of criminality
- Organised crime
- Terrorism

AML

- Prevent ML
- Disrupt organised
- Forfeiture
- Criminalise the use of dirty money

ML Crime

- All encompassing
- Benefits (saved costs, regulatory failures, tax evasion, bribery, corruption)



PLACEMENT
LAYERING
BANK
Dirty Money Integrates into the Financial System
Collection of Dirty Money
A TYPICAL MONEY LAUNDERING SCHEME
Payment by "Y" of False Invoice to Company "X"
Transfer on the Bank Account of Company "X"
Wire Transfer
Loan to Company "Y"
BANK
Offshore Bank
Purchase of Luxury Assets
Financial Investments
Commercial/Industrial Investments
INTEGRATION

3 step process

Step	
Placement (cash in)	• Front company
Layering (move)	• Transfer to bank accounts
Integration (keep moving)	• Purchase high value goods

Use of lawyers at different stages of ML

Placement
- arrive at office with cash

Layering
- fraudulent debt collection

Integration
- sell/transfer property

Article 1

Money Laundering v. Terrorist Financing

Money Laundering

- Source is always illegal
- Process to make illegal funds appear legitimate
- Proceeds of crime – benefit from illegality

Terrorist Financing

- Source may not always be illegal
- Process by which to raise money for illegal political purposes
- Future/ongoing individual/organised groups to fund terrorism – enable illegality

International Actions

Growth of ML 1980s and 1990s

Prevent ML

United Nations

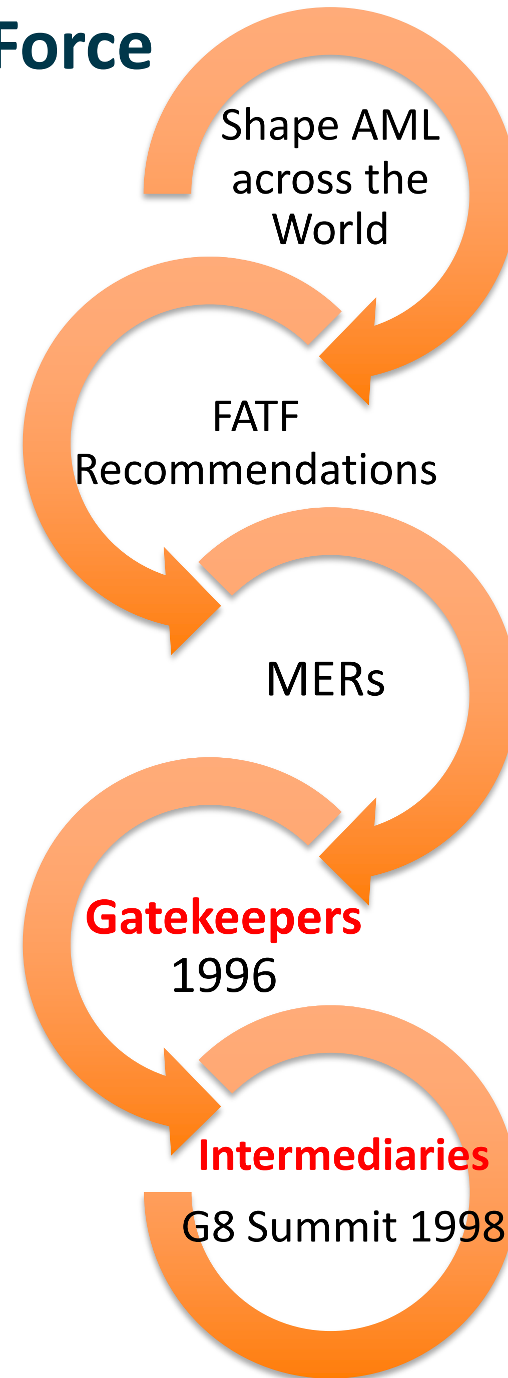
Council of Europe

G10

G7

Financial Action Task Force

Financial Action Task Force



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EU Directive Led Development of AML

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1st Directive

banking sector

ID and Report

2nd Directive

extended to gatekeepers

3rd Directive

CDD, PEPs, FIUs

4th & 5th Directives

risk assessment
registers

6th Directive

Harmonise definition of ML crime

Extended penalties

Extended definition of aiding and abetting

Legal Sector Exemptions

Competent Authorities

Special Treatment of Legal Profession as Gatekeepers

1. AML only applies to vulnerable legal services

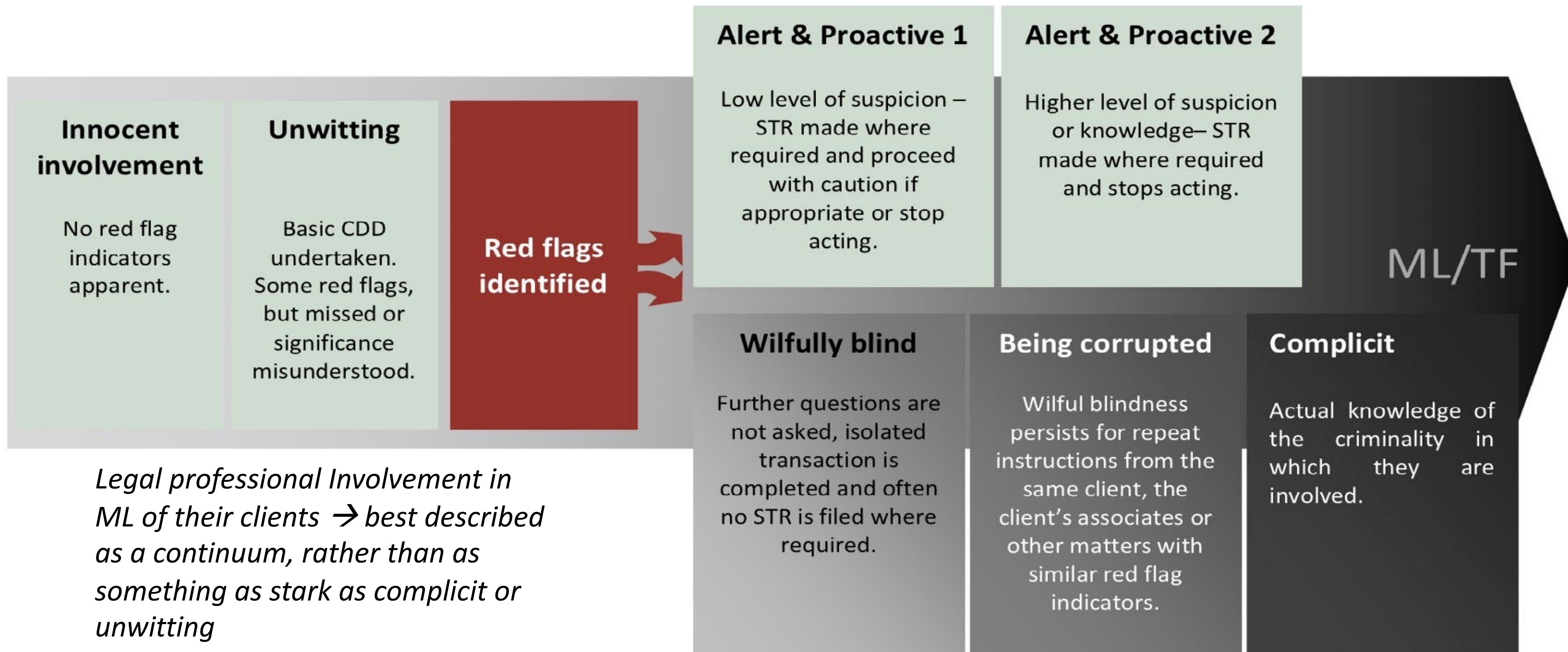
Apply AML to vulnerable legal services which include:

- the provision of assistance in the planning or execution of transactions for clients concerning any of the following:
  (i) buying or selling land or business entities;
  (ii) managing the money, securities or other assets of clients;
  (iii) opening or managing bank, savings or securities accounts;
  (iv) organising contributions necessary for the creation, operation or management of companies;
  (v) creating, operating or managing trusts, companies or similar structures or arrangements;
- acting for or on behalf of clients in financial transactions or transactions relating to land

2. Exception from reporting duty where legal professional privilege

Report ML suspicions except if legal professional privilege applies/ascertaining the legal position

Legal Profession Involvement in ML



Legal professional Involvement in ML of their clients → best described as a continuum, rather than as something as stark as complicit or unwitting

6AMLD

- Single definition of predicate offence – acts that constitute ML offence
- Tax crimes, environmental crime and cyber-crime, piracy, fraud, murder
- Aiding, abetting, inciting, attempting are all captured
- Non-natural persons
- Minimum 4 year penalty (up from 1 year)
- Police and judicial co-operation in cross-border matters
- Failure to supervise offence
- Risk is broadened

ML/TF offence – 6AMLD - 4 years

Livelihood /Fines

Very low knowledge thresholds

So much could be at stake…

Reputation

Proceeds of nearly all crime

Risk extends beyond AML-regulated legal services

Development and Organisation of Training for Lawyers on Anti-money Laundering and Counter Terrorist Financing (AML-CTF) Rules at EU Level

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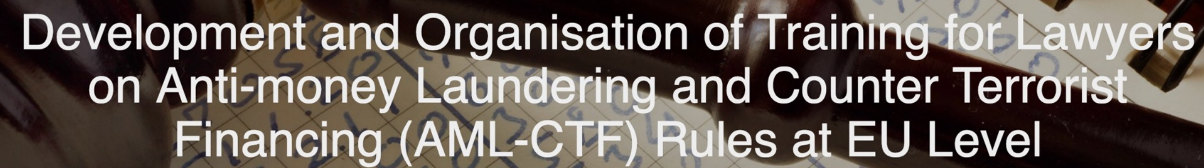
Thank you!



A risk-based approach

June 28th 2021

Emma-Jane Williams

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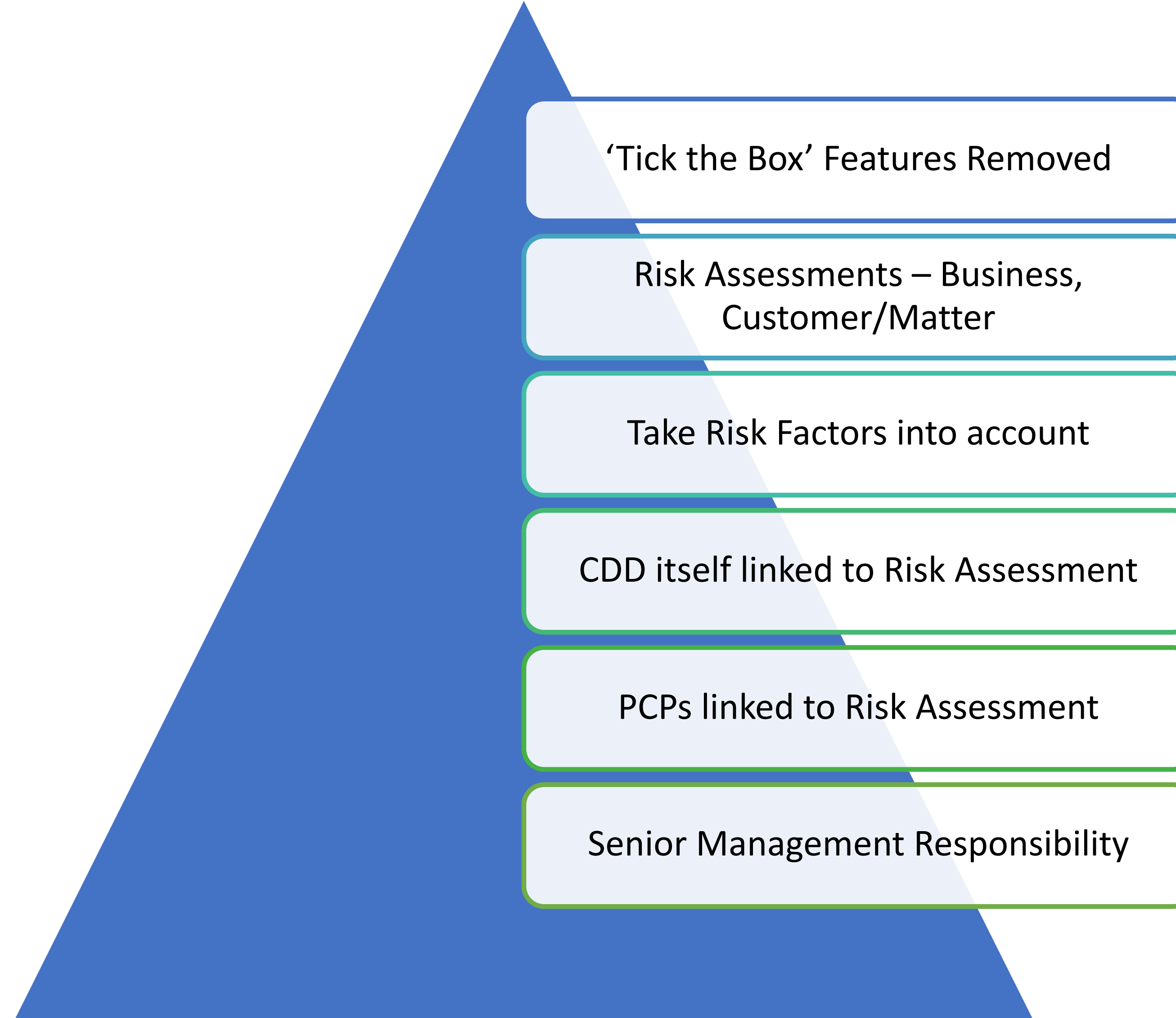
4th Directive – Move to Risk Based Approach



Risk Assessment – Article 8

- Customer
- Product/Service
- Countries/Geographical
- Transaction Type
- Delivery Channel

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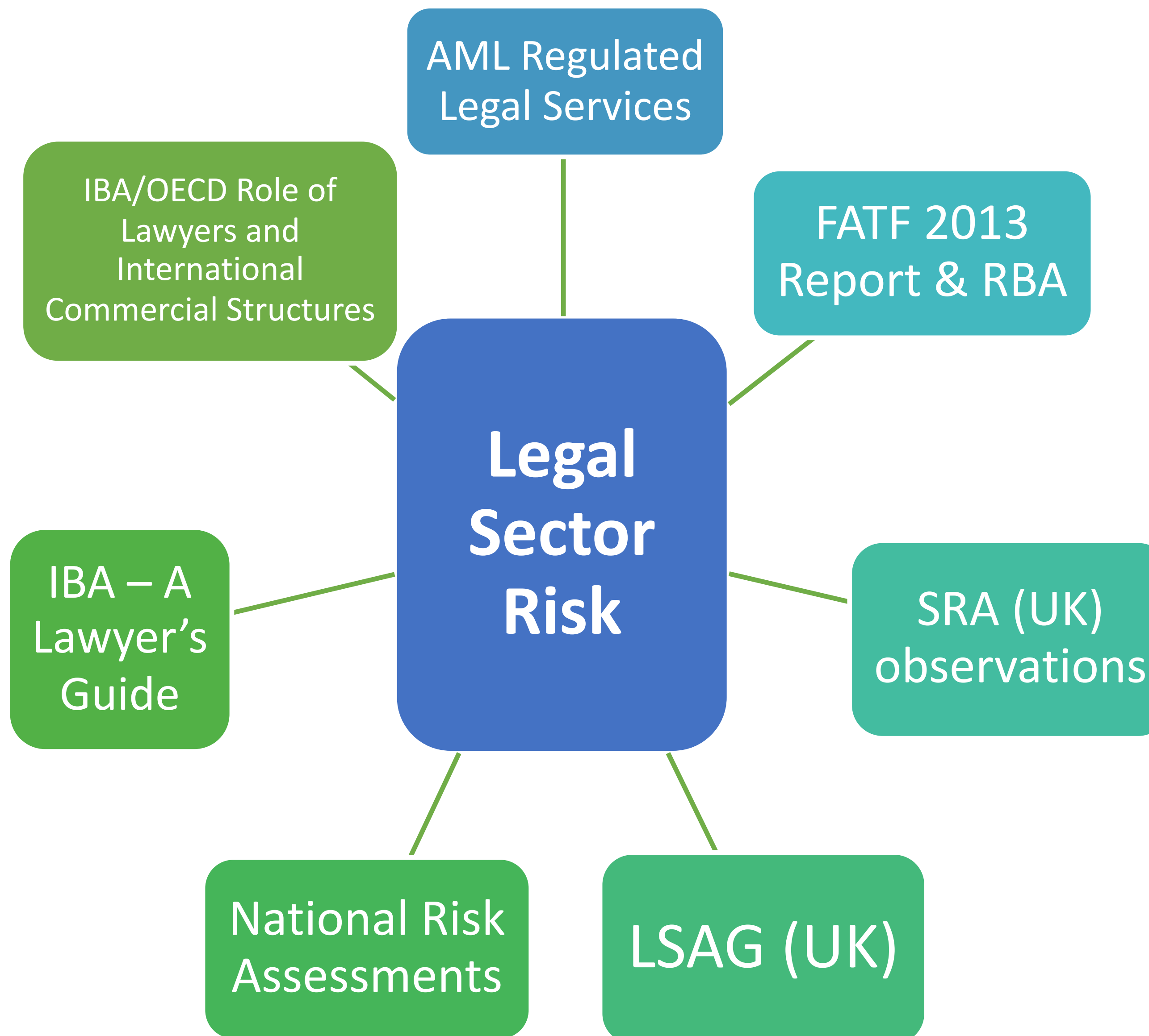

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What is the ML/TF Risk in the Legal Sector?

Typologies

- misuse of client accounts;
- purchase of real property;
- creation of trusts and companies;
- management of trusts and companies;
- managing client affairs and making introductions;
- undertaking certain litigation; and
- setting up and managing charities.

Red Flags

- **Client** → overly secretive, someone else directing, high-risk countries
- **Source of funds** → unusual, disproportionate amounts of private funding/cash, foreign country with no connection, payment procedures change, high-risk countries, multiple/foreign bank accounts, company funds private expenditure
- **Choice of solicitor/firm** → at a distance, without experience for complexity, refusals by other lawyers
- **Instructions** → unusual, speed/pressure, needs introductions to banks, complicate ownership structures, structures with multiple countries, absence of supporting documentation, investment with no financial advantage, back-2-back transactions, abandoned transactions, unexplained last minute changes, retainer is to exclusive use client account without provision of legal services, litigation settled too easily/quickly

Case Study: How RBA is transposed in Ireland

AN OVERVIEW OF AML DUTIES & KEY RESOURCES 2018

Infographic 1

BUSINESS RISK ASSESSMENT

SECTION 30A
Key resources:
Section 2 2018 Guidance, follow step-by-step approach & adapt sample BRA, see infographic 2.

→ Firm's BRA is relevant to PCP development →

↑ Conduct firm's Business Risk Assessment ↑

POLICIES, CONTROLS AND PROCEDURES (PCP)

SECTION 54
Key resources:
Section 3 2018 Guidance & adapt sample PCP

RESPONSIBILITIES OF SOLICITORS' FIRMS SENIOR MANAGEMENT

SENIOR MANAGEMENT 'BUY-IN' ESSENTIAL
Senior Management must approve BRAs and approve and keep under review PCPs
Key resources:
Section 3C and Section 2 Step 4 of 2018 Guidance

→ Develop existing AML internal policies to bring into line with 2018 Act →

→ Develop Customer Risk Assessment processes/ templates for fee earners →

CUSTOMER RISK ASSESSMENT

SECTION 30B
Key resources:
Section 4 2018 Guidance & adapt sample CRA Forms
- Risk Factor Questionnaire
- Document Your Thought Process

← When complying with statutory AML obligations follow your firm's PCPs and CRA. See infographic 3, which details your statutory CDD. ←

RESPONSIBILITIES OF SOLICITORS' FIRMS' EMPLOYEES

(SOLICITORS AND NON-SOLICITORS)
NB Section 54(2) and 54(10) applies PCPs to any person in a solicitors' firm involved in providing an AML-regulated legal service (e.g. sole practitioner, partners, associates, fee earners, trainees, executives, secretaries and receptionists)
Key resources:
for a full list of statutory solicitor AML, see infographic 3.

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Case Study: Business Risk Assessments in Ireland

Development and Organisation of Training for Lawyers on Anti-money Laundering and Counter Terrorist Financing (AML-CTF) Rules at EU Level

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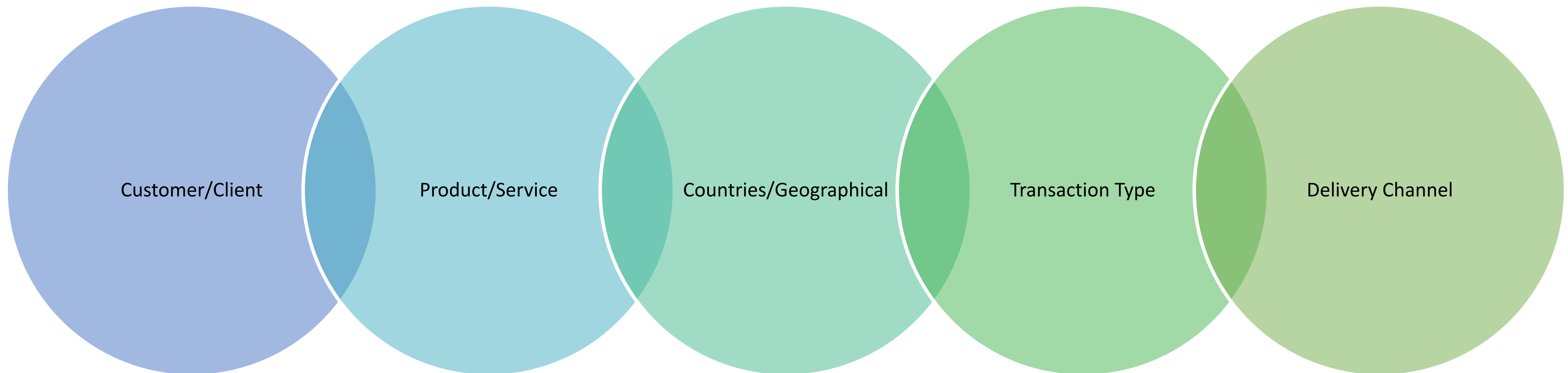
Business Risk Assessment → Specific Inherent Risk Factors



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Business Risk Assessment → Sample Adaptable Form

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Business Risk Assessment - Law Society of Ireland Sample Form - **Version 1**

FIRM NAME: **MLRO NAME:**

VERSION CONTROL:

Date	Change	Name of person reviewed by

General Overview of Firm & Legal Sector ML/TF Risk	
General Overview of Firm	Include a general paragraph regarding the overall size and nature of your firm and provide information about the following. • No. of partners/staff • Is there a high staff turnover at the firm? • Type of Firm – E.g. Niche corporate firm, specialist services, full service, high volume conveyancing firm • Types of Work undertaken – regulated/non-regulated? Mostly Property? Litigation? Probate? Wills? • Type of clients • Geographical location of the firm – rural, urban, high levels of crime? • International element to your business? • Any other ML/TF risks specific to your firm?
Credible sources of information about legal sector ML/TF risk	Section 30A requires that regard is had to specific sources of information about risk factors particular to the legal sector. These are currently detailed in 'Step 1 – Develop your knowledge of ML/TF risks inherent in legal services' Section 2 – 2018 Guidance. Include here: • a list of the sources of information about legal sector ML/TF risk (and update should new risks emerge) • in general terms, your firm's exposure to legal sector ML/TF risk set out in credible sources of information You can provide detail below about specific inherent ML/TF risk factors to which your firm is exposed.
Specific Inherent ML/TF Risk Factors	
Customer Risk Factors	**Information about the firm's assessment of ML risk inherent in its customer base.** Include here a note of your assessment of Customer Risk Factors. Ensure you reach an overall conclusion e.g. does your customer base pose a high, medium or lower inherent ML risk? Depending on your firm's size and business, you may be able to categorise types of customers into varying categories of risk to be mitigated differently in your PCPs. A (non-exhaustive) list of questions to ask yourself in completing this section: • Do you provide your clients/customer with AML-regulated legal services? • High turnover of clients (higher risk) or a stable existing client base? (lower risk) • High proportion of one-off clients/deals? (higher risk) • Do you know your clients personally? If not, what additional steps do you take to mitigate the risks that this poses? • Mostly face-to-face or non- face-to-face contact with clients? (non-face-to-face =

Business Risk Assessment - Law Society of Ireland Sample Form - **Version 1**

Overall Conclusion	Include here a note of your overall conclusion. A (non-exhaustive) list of questions to ask yourself in completing this section: • A note of the firm's responses to risk factors, what is the overall conclusion/summary regarding the inherent ML/TF risk applicable to the firm? • Does the nature, scale and complexity of the AML-regulated legal services provided by the firm put it at a higher, medium or lower risk of being used for the purposes of money laundering? Why?

Case Study: Risk Based PCPs

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AN OVERVIEW OF AML DUTIES
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Key resources:
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Risk-Based PCPs – Sample Adaptable Forms

BUSINESS RISK ASSESSMENT SECTION:

Section 54(3)(k) requires PCPs which detail internal systems and controls to identify emerging risks and keep business-wide risk assessments up to date.

The partners believe (Firm Name) is at a high/medium/low risk of being mis-used by clients to launder the proceeds of crime. This is based on the outcome of the firm's Business Risk Assessment (attached) and the following factors:

- Types of Work undertaken – Mostly AML-regulated legal services/non-regulated legal services. Mostly Property? Litigation? Wills/Executry?
- Analysis of the typical client base and type of services provided
- High turnover of clients or a stable existing client base?
- High proportion of one-off clients/deals?
- Mostly face-to-face or non-face-to-face contact with clients?
- International element to the business - especially from non-EU countries with request to transfer funds to client account from accounts outside the EU
- Source of clients – referrals, walk-in or internet advertisement

Accordingly, our business risk assessment is summarised as follows:

(1) Client demographic is low risk because:

- a stable existing client base
- low turnover of clients
- meeting clients face-to-face is the normal practice
- clients normally resident in Ireland or very much connected with Ireland
- clients normally do not have complex ownership structures/trusts

The firm has controls in place to mitigate and manage potential departures from our typical low risk client demographic.

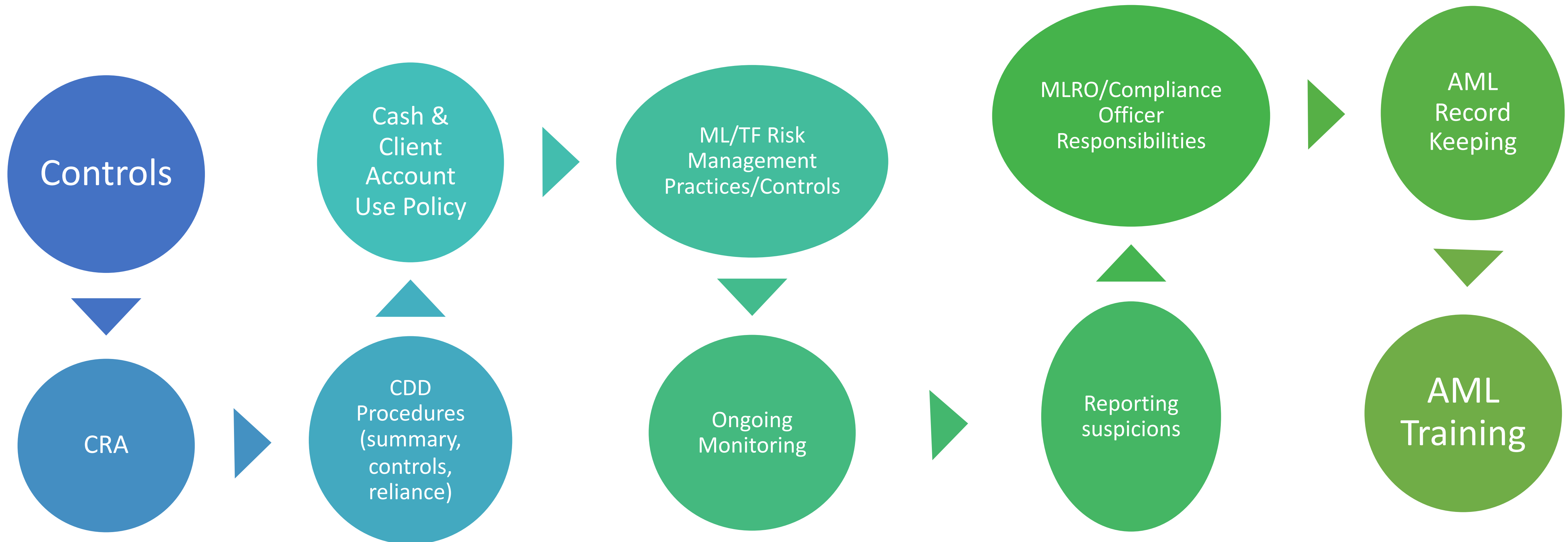
(2) Legal services are also low risk:

- non-complicated financial or property transactions/trusts
- it would be unusual for payments to be made to or received from third parties
- payments made by cash are rare
- transactions with a cross-border element are rare

The services we provide and our client base is relatively simple, involving few unusual services with most clients falling into similar categories.

The firm has controls in place to mitigate and manage potential departures from our typical low risk legal services.

Risk-Based PCPs – Control Sections to include



Risk-Based PCPs – Sample Controls…

It is important that all staff are aware of the serious consequences for failure to comply with statutory AML duties when the firm provides an AML-regulated legal service. It is a crime not to comply with statutory AML duties. It is equally important for all staff to ensure that they do not unwittingly commit the offence of money laundering by not being alert to money laundering red flags.

Irrespective of whether an AML-regulated legal service is being provided, a solicitor must always remain alert to the risk of unwittingly committing the substantive offence of money laundering or terrorist financing. See further Chapters 2 and 9 of 2010 Guidance and Section 2 of the 2018 Guidance.

Verifying the identity of all clients irrespective of whether an AML-regulated legal service is provided

It is the firm's policy to follow the Law Society's best practice guidance to verify the identity of **all** clients irrespective of whether statutory AML CDD arises.

Key responsibilities of staff therefore include (but are not limited to):

- Conducting an adequate Customer Risk Assessment and appropriate CDD on clients and transactions;
- Staying alert to potential money laundering or terrorist financing activity;
- Reporting any suspicious activity in respect of clients or transactions to the firm's MLRO;
- Avoiding discussing any potential or actual reports of suspicion with clients or any third parties ("Tipping off")
- Referring any queries or requests from An Garda Siochana, Revenue, CAB or the FIU to the MLRO or Senior Management;
- Undertaking any AML-related training provided by the Firm;
- Keeping appropriate records of all AML related activity;
- Exercising extreme caution in relation to the acceptance of cash or the provision of firm's client account details. All staff must adhere to policies in relation to cash and client accounts.
- Ensuring that they do not unwittingly commit the offence of money laundering by being alert to money laundering red flags.

ML/TF RISK MANAGEMENT PRACTICES/CONTROLS

This section should detail

- the firm's approach to mitigate the ML/TF risk they identified in their Business Risk Assessment
- how additional controls can be applied
- the level of personnel permitted to exercise discretion on the risk-based application of the AML legislation, and the circumstances under which that discretion may be exercised
- the CDD requirements to be met for simplified, standard and enhanced due diligence
- if outsourcing of CDD obligations or reliance will be permitted, and on what conditions
- the circumstances in which delayed CDD is permitted
- how you will restrict work being conducted on a file where CDD has not yet been completed
- when cash payments will be accepted
- when payments will be accepted from or made to third parties
- the manner in which ML/TF suspicions are to be dealt with in a firm

Document your thought process if ML/TF red flags are present

PCPs can include the following information about what to do when ML/TF red flags are present to ascertain the ML/TF risk - the approach of documenting your thought process to ascertain money laundering risk.

When red flag(s) are present, staff may find it helpful to document their thought process, this approach allows solicitors to place all relevant circumstances in context and follow the FATF's (Financial Action Task Force) recommended method for interpreting red flags/indicators of suspicion which is as follows:

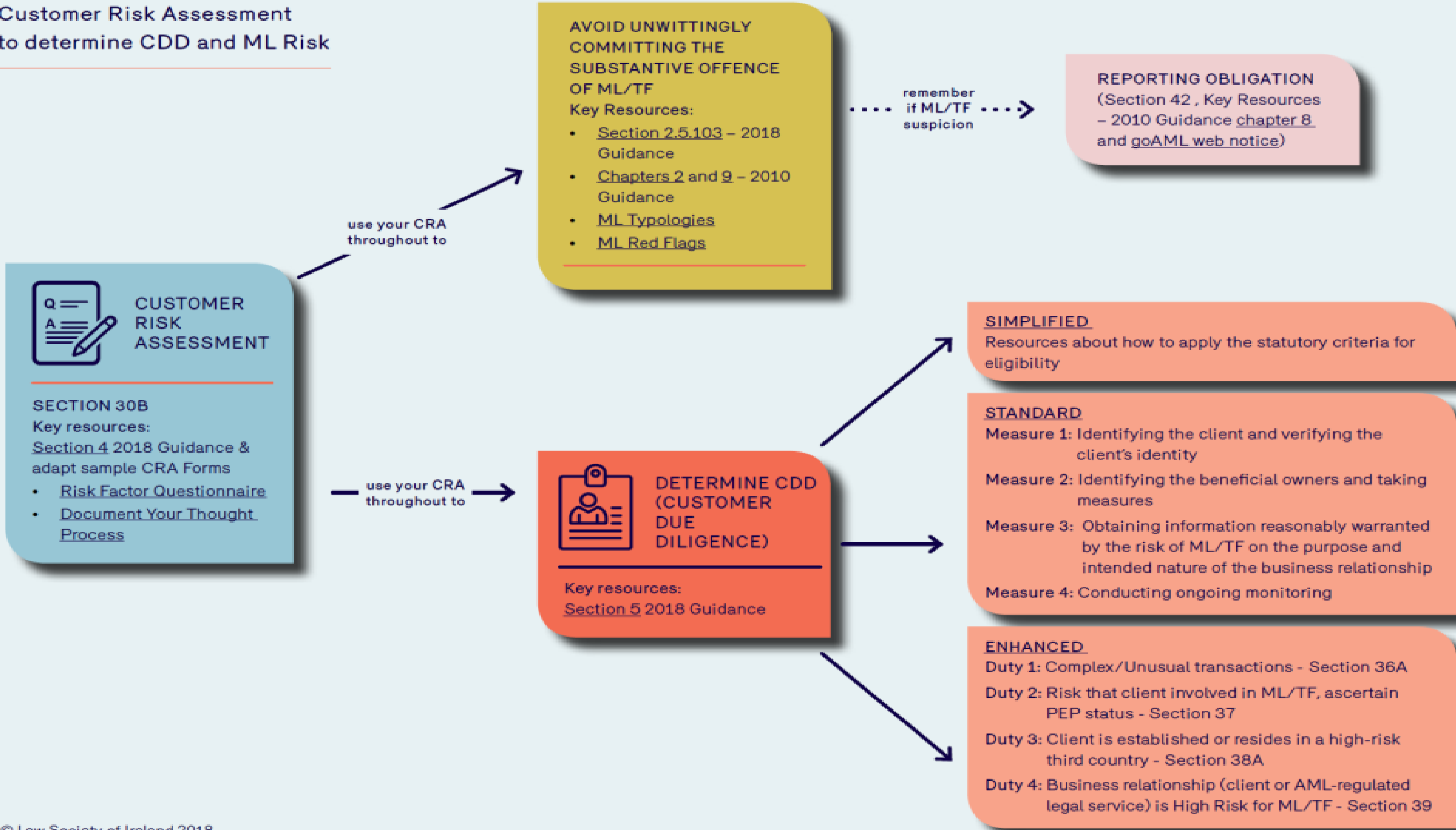
> "...the methods and techniques used by criminals to launder money may also be used by clients with legitimate means for legitimate purposes. Because of this, red flag indicators should always be considered in context. The mere presence of a red flag indicator is not necessarily a basis for a suspicion of ML or TF, as a client may be able to provide a legitimate explanation. These red flag indicators should assist legal professionals in applying a risk-based approach to their CDD requirements of knowing who their client and the beneficial owners are, understanding the nature and the purpose of the business relationship, and understanding the source of funds being used in a retainer. Where there are a number of red flag indicators, it is more likely that a legal professional should have a suspicion that ML or TF is occurring."

When red flag(s) are present, the firm may decide not to take on new instructions, and/or a solicitor may cease to act and/or a report may be statutorily required.

This is how the firm assesses and manages its money laundering and terrorist financing risk.

Development and Organisation of Training for Lawyers on Anti-money Laundering and Counter Terrorist Financing (AML-CTF) Rules at EU Level

Case Study: CRAs in Ireland



Customer/Matter Risk Assessment - RFQ

CLIENT RISK	NOTES
STATUS OF CLIENT • How well do you know your client and background? • Is your client known to you personally/existing client, or new business relationship? • Is your client a PEP? • Has your client been introduced to you by a 3rd Party? Is the instruction from your client channelled through a 3rd party? If so, why? • Are you aware of your client having any links to criminality?	
FACE-TO-FACE CONTACT • Have you met with your client face-to-face or is it a non-face-to-face transaction? Non-face-to-face is a factor suggesting potentially higher risk. • If non-face-to-face, are you comfortable there is a legitimate reason for this and what is the reason?	
LOCATION OF CLIENT • Where is your client based? Locally/Ireland/EU/other international location? • Is your client based/resident/linked to a high risk jurisdiction/high risk third country? • Does your client have connections to a jurisdiction where ML controls may not be as tight as in the EU? Are funds being sent to/from any of these places?	
ID & ADDRESS VERIFICATION • Has your client provided acceptable standard ID and address verification? • Has your client provided acceptable non-standard ID and address verification? • Have you been able to confirm the authenticity/professional status of the certifier of any copies of ID/address verification? • Has your client been cooperative in the process or have they delayed providing ID and address verification / appeared reluctant to do so?	
FINANCIAL PROFILE OF CLIENT • Does the stated source of wealth / source of funds and the amount of money involved stack up with what you know of your client, for example given their age and occupation? (if no, or other ML/TF risks arise, enhanced CDD may require establishing source of wealth and source of funds) • Is your client involved in / run a high risk or high cash turnover business? Is there the potential that the funds are from untaxed income? Is there a potential the funds are the proceeds of fraud/social welfare fraud?	

AML-REGULATED LEGAL SERVICE RISK	NOTES
TYPE OF LEGAL SERVICE • Could the type of transaction be used for the purposes of money laundering or is it at a higher risk of money laundering? - Eg. Will / Power of Attorney - lower risk - Estate Agency / Conveyancing / Commercial Property - higher risk • Does the transaction make sense or is it overly complex given the underlying nature of the business being conducted? • Does it make sense that your client has asked your firm to carry out this type of transaction? (e.g. is it within your area of expertise/local geographical area?)	
VALUE OF LEGAL SERVICE/ASSET/TRANSACTION • Does the value of the transaction appear to fall within the financial means of your client, given their income and savings?	
SOURCE OF FUNDS • Is the source of funds clear and identifiable? • Are funds coming from a recognised financial/credit institution (e.g. a loan or mortgage) or are they personal funds? If no loan or mortgage, enquire into the source of wealth. It may be prudent to ask for some supporting evidence to confirm the information provided and then reconsider the ML/TF risks involved. • Is any funding coming from overseas? From where? From who? Connection to client? • Are any of the funds being paid by a third party otherwise unconnected to the transaction? • Does your client seek to change the source of funds at the last minute? • Has your client paid excess funds into your client account? Why/How? • Is it being proposed that funds come from outside the EU and gain entry to the EU financial system for the first time via your client account? • Could the client be trying to route funds through the solicitor without an underlying transaction? [N.B. This would be contrary to the Solicitors' Accounts Regulations and solicitors' firms should not provide a banking service for their clients: *"Client accounts should only be used to hold client money for legitimate transactions for clients, or for another proper legal purpose. Money-launderers will seek to route 'dirty' money through a solicitor's client account in order to 'clean' it, either by asking for the money to be returned or by purchasing a clean asset with the funds."* (Paragraph 9.13 – 2010 Guidance)] ***N.B. Standard CDD requires solicitors to understand the client's source of funds/wealth. <u>Evidence</u> of source of funds/wealth is only required if there is a high ML/TF risk and, in such circumstances, solicitors must consider whether any documentation could possibly negate the risk that the solicitor might themselves unwittingly commit the substantive offence of ML/TF by proceeding.*** *Please see further 'Do I need to obtain evidence or "determine" the source of funds?' and 'Establishing source of wealth and funds' in Section 5 - 2018 Guidance*	
DESTINATION OF FUNDS • Has your client requested that proceeds of a transaction be paid to someone other than a lender or themselves? • Are proceeds of a transaction to be paid to an overseas account?	

Navigating Legal Sector

RED FLAG INDICATORS

As outlined in Chapter 4 the methods and techniques used by criminals to launder money may also be used by clients with legitimate means for legitimate purposes.

Because of this, red flag indicators should always be considered in context. The mere presence of a red flag indicator is not necessarily a basis for a suspicion of ML or TF, as a client may be able to provide a legitimate explanation.

These red flag indicators should assist legal professionals in applying a risk-based approach to their CDD requirements of knowing who their client and the beneficial owners are, understanding the nature and the purpose of the business relationship, and understanding the source of funds being used in a retainer. Where there are a number of red flag indicators, it is more likely that a legal professional should have a suspicion that ML or TF is occurring.

SRBs and law enforcement may also find these red flag indicators to be useful when monitoring the professional conduct of or investigating legal professionals or their clients. Where a legal professional has information about a red flag indicator and has failed to ask questions of the client, this may be relevant in assessing whether their conduct was complicit or unwitting.

CRA – Sample 'Document Your Thought Process' Adaptable Forms

FORM 1

INITIAL ASSESSMENT OF RISK:	LOW (Standard CDD)	MEDIUM (Standard CDD)	HIGH (Do not proceed or Enhanced CDD)
Please note below reasons for your initial ML/TF risk assessment: Please document the CDD measures to be applied, have been applied and any compliance decisions taken: **NB** If there is a risk client is involved in ML/TF, ascertain whether they have PEP status and, if they are a PEP, apply section 37 enhanced CDD.			
SIGNED BY:	DATE:		

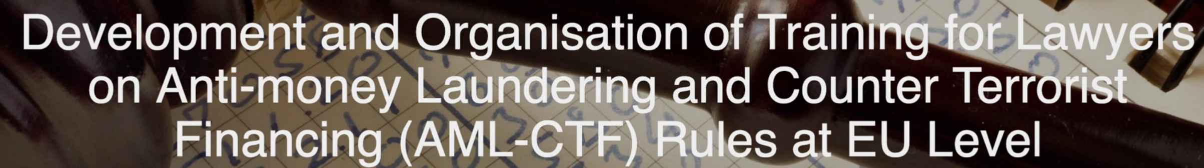
FORM 2

INTERIM/ONGOING RISK ASSESSMENT –IF ANY RISK FACTORS CHANGED?	LOW (Standard CDD)	MEDIUM (Standard CDD)	HIGH (Do not proceed or Enhanced CDD)
Please note below reasons for your assessment: *(If no chance, quick note stating such, signed and dated – this evidences that a review has been undertaken and consideration given)* Please document the CDD measures to be applied, have been applied and any compliance decisions taken:			
SIGNED BY:	DATE:		

FORM 3

FINAL RISK ASSESSMENT – HAVE THERE BEEN ANY LAST MINUTE CHANGES THAT GIVE CAUSE FOR CONCERN?	LOW (Standard CDD)	MEDIUM (Standard CDD)	HIGH (Do not proceed or Enhanced CDD)
(Ideally, should be undertaken before monies are transacted/enter the client A/C) Please note below reasons for your assessment: *(If no change, quick note stating such, signed and dated – this evidences that a review has been undertaken and consideration given)* Please document the CDD measures to be applied, have been applied and any compliance decisions taken:			
SIGNED BY:	DATE:		

Thank you!



Customer Due Diligence (CDD)

June 28th 2021

Alain Claes

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Customer due diligence – why ?

- So that you are in a better position to identify suspicious transactions
  - if you know your customer
  - and understand the reasoning behind the instructions they give you

Customer due diligence – the issues

- Who is my client?
- What does my client want to do?
- What does my client do?

Customer due diligence – structure

- Who needs to be identified?
- What kind of information should be gathered?
- How to verify the obtained information?
- When should identification and verification take place?
- What should be done if these obligations cannot be fulfilled?

Customer due diligence – Who ?

- No obligation to conduct CDD for retainers involving activities outside the scope of the directive.
- However

Customer due diligence – Who ?

1. Client
2. intermediary, agent or representative
3. Ultimate beneficial owner

Customer due diligence – Who ?

1. When establishing a business relationship
2. When carrying out an occasional transaction

Customer due diligence – Who ?

3. a suspicion of money laundering or terrorist financing
4. doubts about the veracity or adequacy of previously obtained customer identification data
5. occasional transactions in cash amounting to EUR 10 000 or more when trading in goods
6. for providers of gambling services

Customer due diligence – What ?

- Depends on the member state implementation
- To consider:
  - natural person
  - legal person
  - trust , a fiduciary or a similar legal arrangement

Customer due diligence – How to verify?

- based on documents, data or information obtained from a reliable and independent source,
- where available,
  - information obtained through electronic identification means,
  - information obtained through relevant trust services

Customer due diligence – How to verify?

- in order to obtain sufficient assurance that they know the persons concerned.
- In doing so, the subject entities shall consider the risk level identified

Customer due diligence – When ?

- before either of these events:
  - either when establishing a business relationship
  - or when carrying out certain occasional and defined transactions

Customer due diligence – When ?

- although Member State may allow:
  - during the establishment of a business relationship
  - as not to interrupt the normal conduct of business,
  - where there is little risk
  - as soon as practicable

Customer due diligence – agent ?

- Identification of intermediary, agent or representative (any person purporting to act on behalf of the customer)
  - Identify and verify identity of that person (as for the client itself)
  - Check authorization to act on behalf of clients

Customer due diligence – what does he want?

- obtaining information on the purpose and intended nature of the business relationship
- Determination of the risk profile
- List of variables to consider

Customer due diligence – what does he do?

- Update (ongoing monitoring)
  - at appropriate times on a risk-sensitive basis,
  - when the relevant circumstances of a customer change,
  - when the obliged entity has any legal duty

Customer due diligence – types

- One size doesn't fit all
- on the basis of a risk-based approach
- Two types:
  - Simplified CDD
  - Enhanced CDD

Customer due diligence – always?

- simplified customer due diligence measures:
  - ascertain that the business relationship or the transaction presents a lower degree of risk
  - sufficient monitoring of the transactions and business relationships to enable the detection of unusual or suspicious transactions

Customer due diligence – types

- Simplified CDD
  - a non-exhaustive list of factors and types of evidence of potentially lower risk, which could lead to SDD, and are to be considered.
  - They are divided into three categories :
    - customer type,
    - transaction type,
    - and geography

Customer due diligence – types

- Enhanced CDD
  - complex transactions
  - unusually large transactions
  - transactions conducted in an unusual pattern
  - transactions without an apparent economic or lawful purpose

Customer due diligence – types

- Enhanced CDD
  - a non-exhaustive list of factors and types of evidence of potentially higher risk, which could lead to EDD, and are to be considered.
  - They are divided into three categories :
    - customer type,
    - transaction type,
    - and geography

Customer due diligence – What if ?

- If identification and/or verification cannot be complied with :
  - do not establish or maintain a business relationship (end of intervention)
  - do not carry out transactions for it;
  - if necessary, report to FIU
- Unless

Customer due diligence – What if ?

- not obliged for lawyers to do so when :
  - ascertaining the legal position of the client (= *advice*);
  - defending or representing the client in or in connection with judicial proceedings, including providing advice on instituting or avoiding such proceedings (= *litigation*)
  - the exception is strict

Customer due diligence – always?

- Reliance on third parties
  - Provided that the third party is situated in a Member State or third country that:
    - apply customer due diligence requirements and record-keeping requirements
    - have their compliance supervised

Customer due diligence – always?

- Third party
  - provides information
  - and makes supporting documents available
- the ultimate responsibility for meeting those [CDD] requirements shall remain with the obliged entity which relies on the third party

Customer due diligence – Written policies, controls and procedures

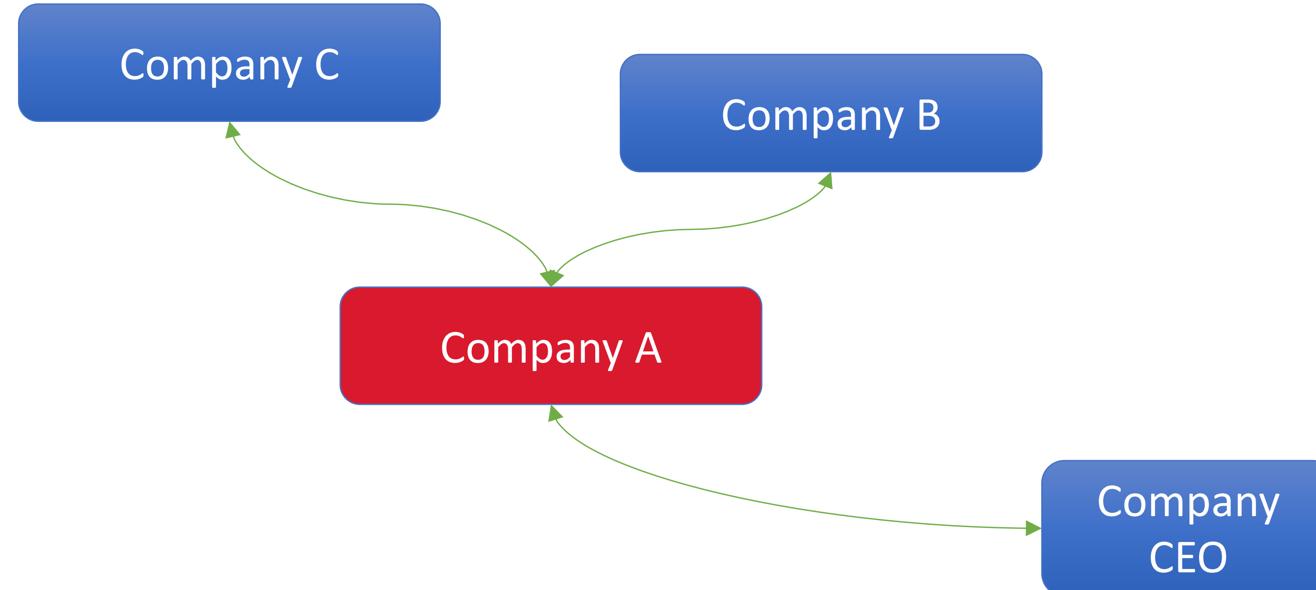
- have written policies, controls and procedures as part of the risk assessment of their practices, and particularly in relation to CDD.
- important or useful to record in writing
- special rules for law firms which are part of a group

Customer due diligence – example

- Consulted by Company A represented by Mr John Doe
  - Amendment of the articles of association: protection against dismissal for director who is also CEO
  - Capital increase with 50,000 EUR by new shareholder (Company CEO) without voting rights

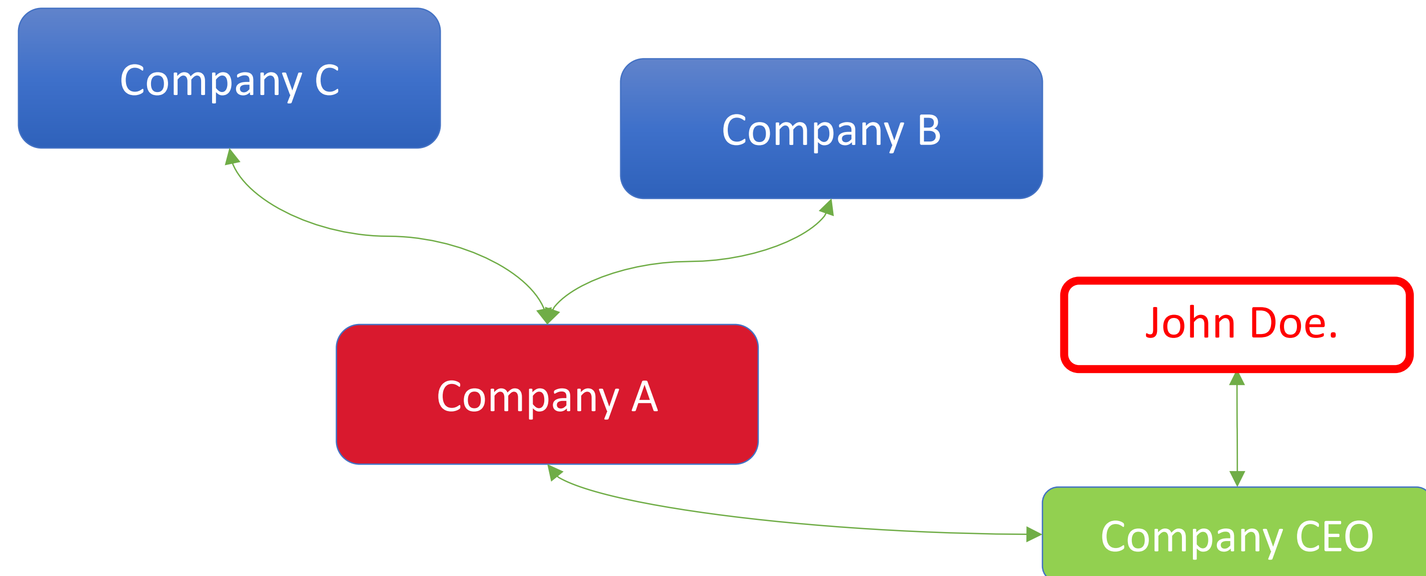
Customer due diligence – example

- Board of directors of Company A



Customer due diligence – example

- Contact was Mr. John Doe – identification of intermediary, agent or representative



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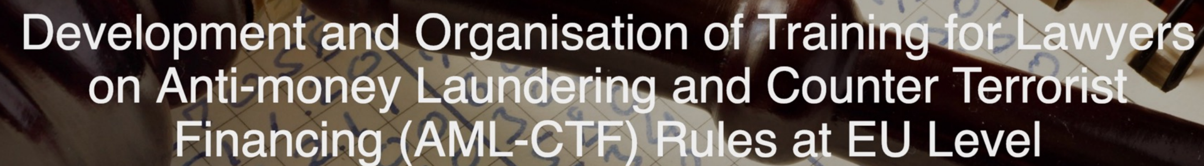

Beneficial Ownership (UBO)

June 28th 2021

Alain Claes

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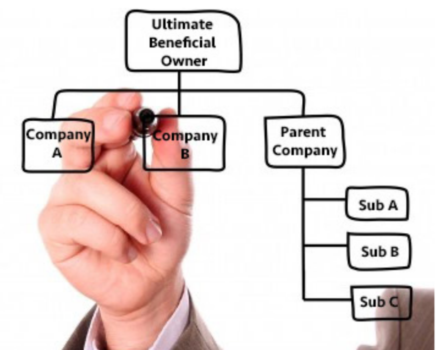
Beneficial owner - concept

- 'beneficial owner' means
  - any natural person(s) who ultimately owns or controls the customer
  - and/or the natural person(s) on whose behalf a transaction or activity is being conducted



Beneficial owners - categories

- Corporate entities
- Trusts
- legal entities such as foundations, and legal arrangements similar to trusts

Corporate entities

- Natural person(s)
  - ultimately owns or controls a legal entity
    - direct or indirect ownership of a sufficient percentage of the shares or voting rights or ownership interest
    - control via other means
    - Other than a company listed on a regulated market

Corporate entities

- If no person under point (i) is identified, or if there is any doubt that the person(s) identified are the beneficial owner(s),
- the natural person(s) who hold the position of senior managing official(s),

Trusts

- all following persons:
  - (i) the settlor(s);
  - (ii) the trustee(s);
  - (iii) the protector(s), if any;
  - (iv) the beneficiaries or the class of persons in whose main interest the legal arrangement or entity is set up or operates;
  - (v) any other natural person exercising ultimate control over the trust by means of direct or indirect ownership or by other means;

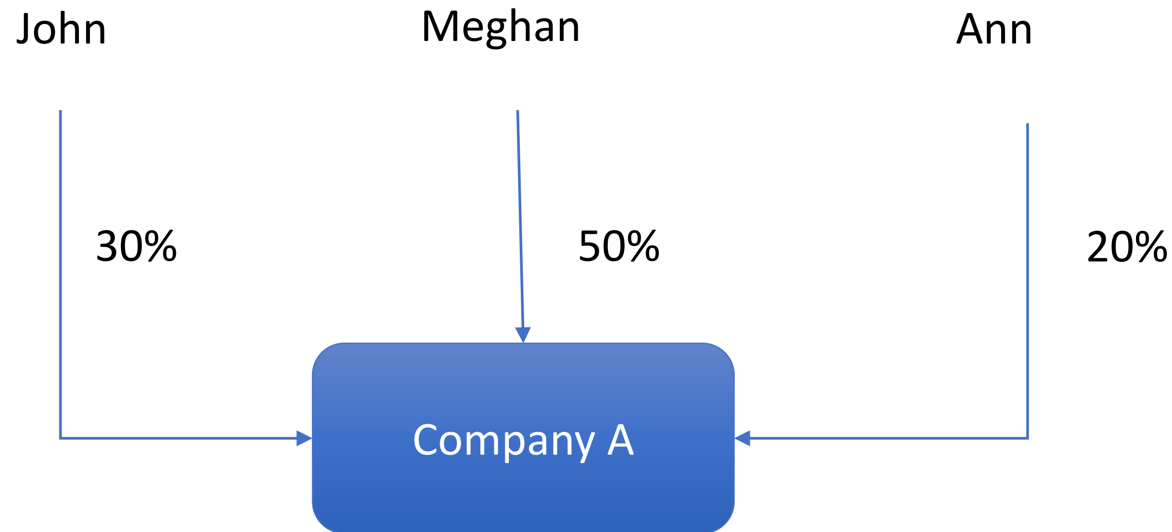
legal entities such as foundations, and legal arrangements similar to trusts,

- all following persons:
  - natural person(s) holding equivalent or similar positions to those referred to for trusts

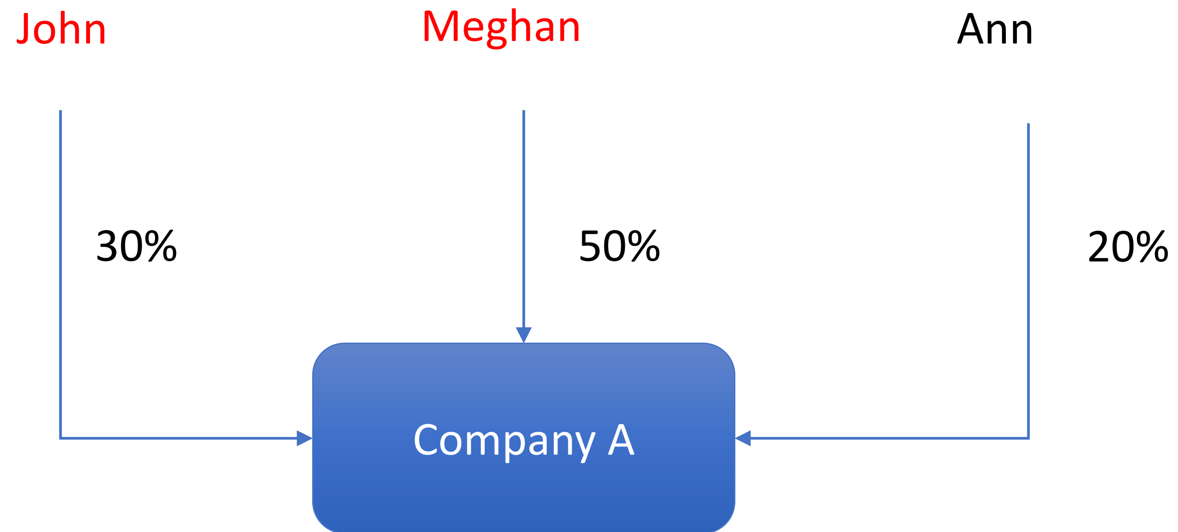
beneficial ownership registers

- Required for member states
- Lawyer should not rely exclusively on information from the register
- Obligation to report discrepancy (lawyer-client confidentiality)

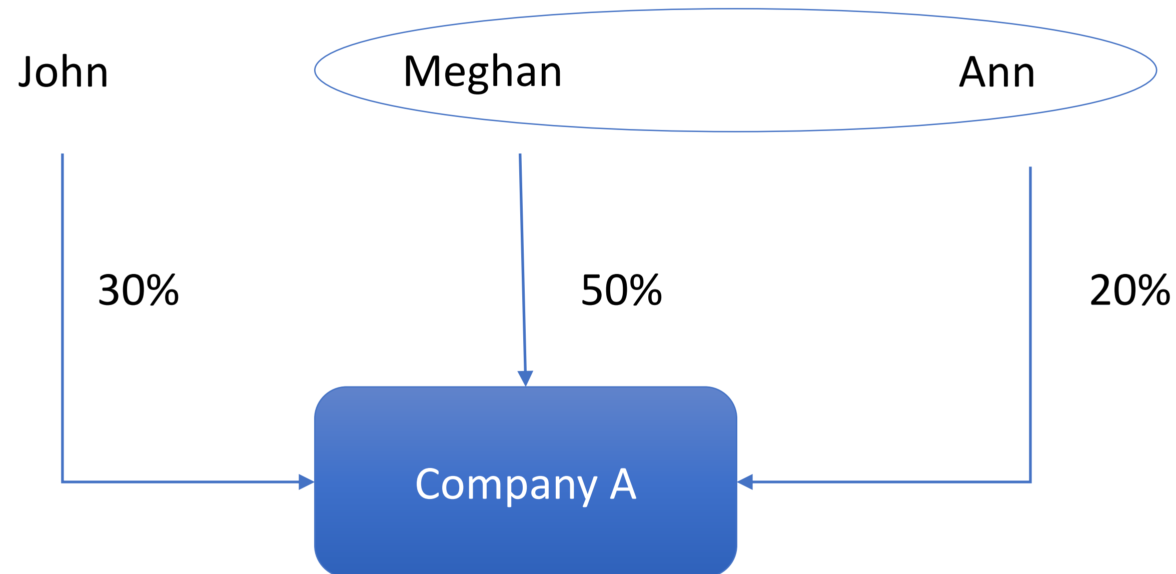
Examples



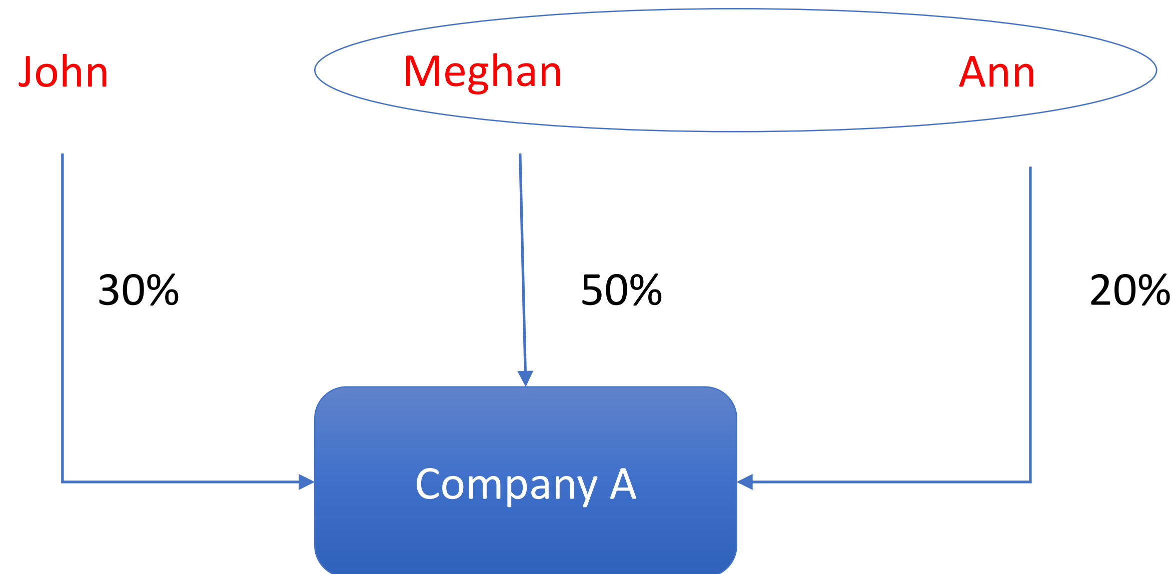
Examples



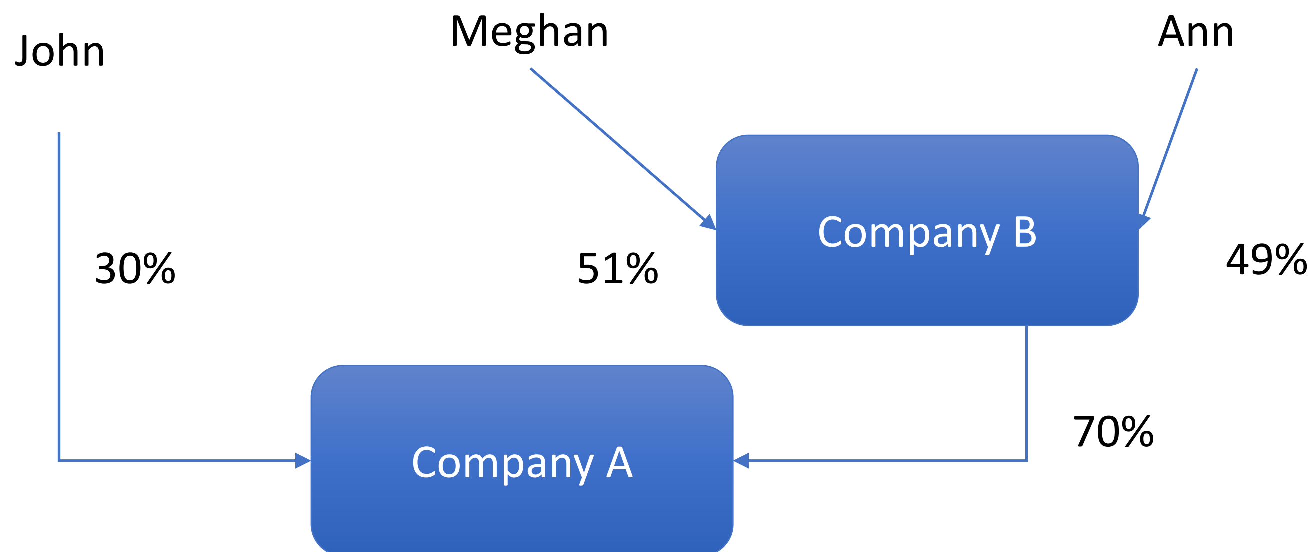
Examples



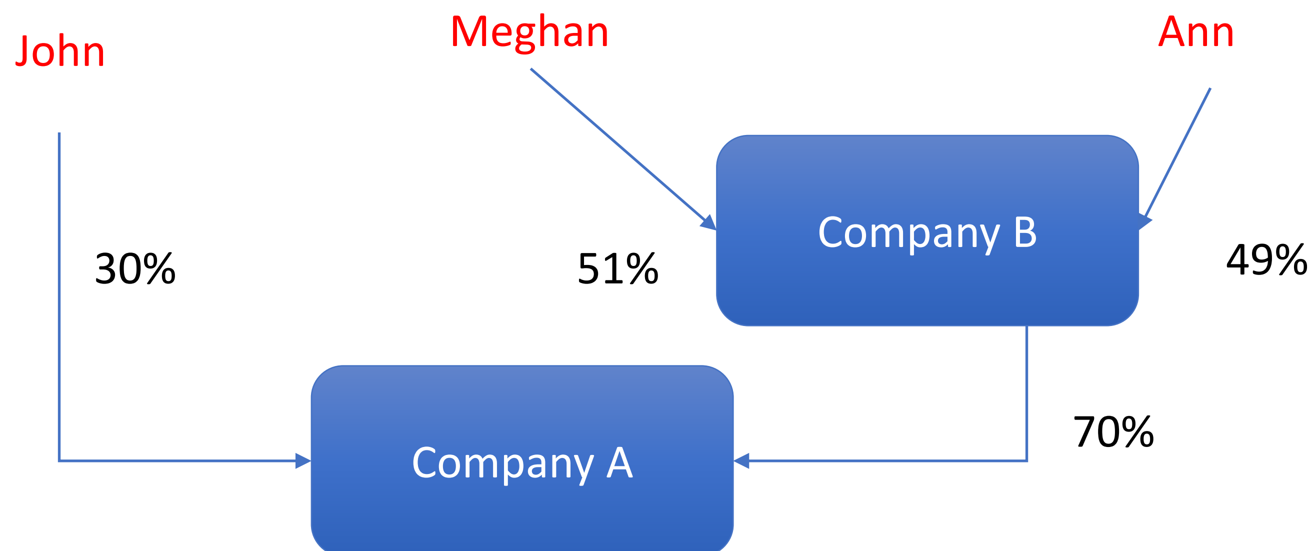
Examples



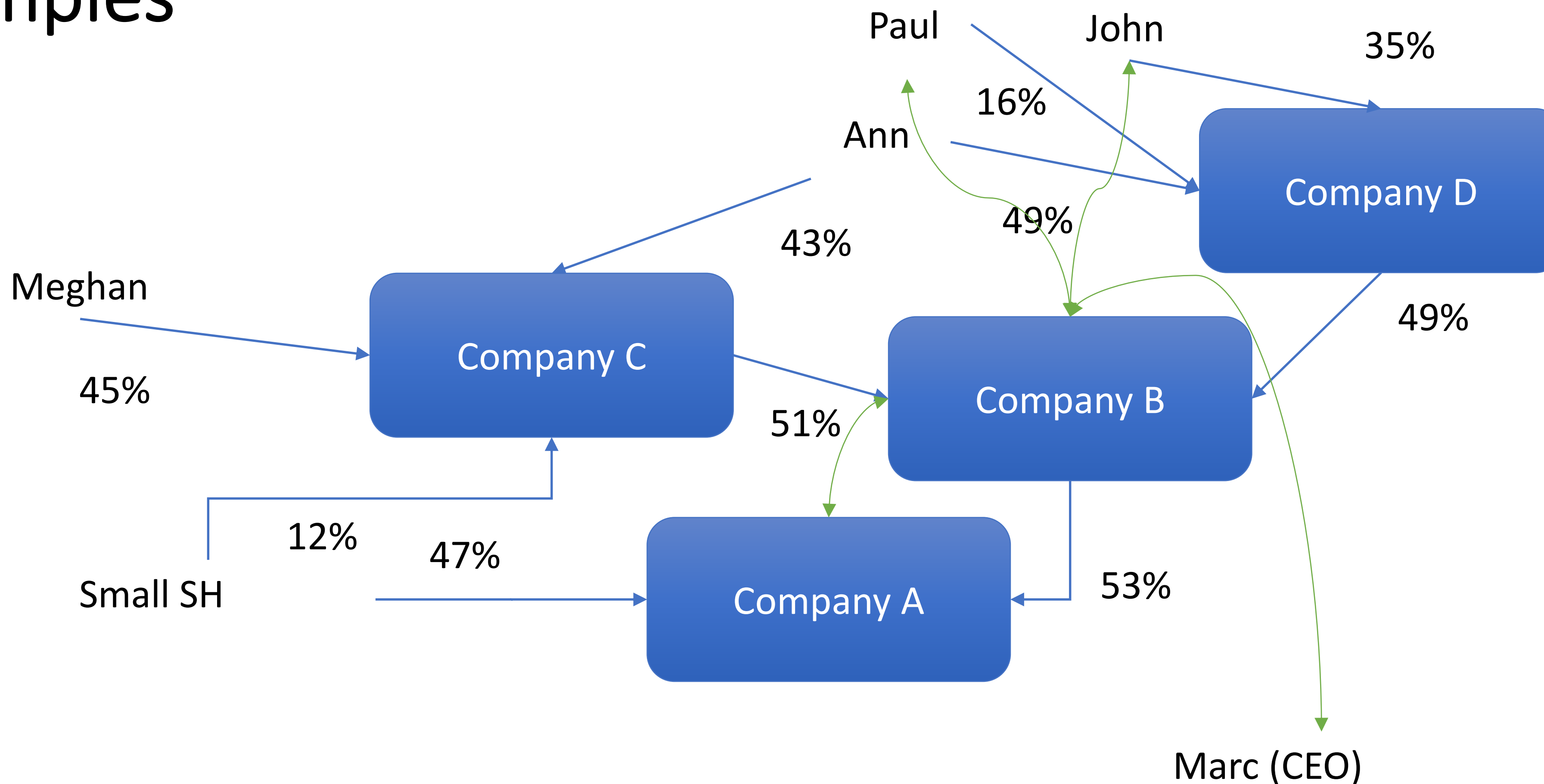
Examples



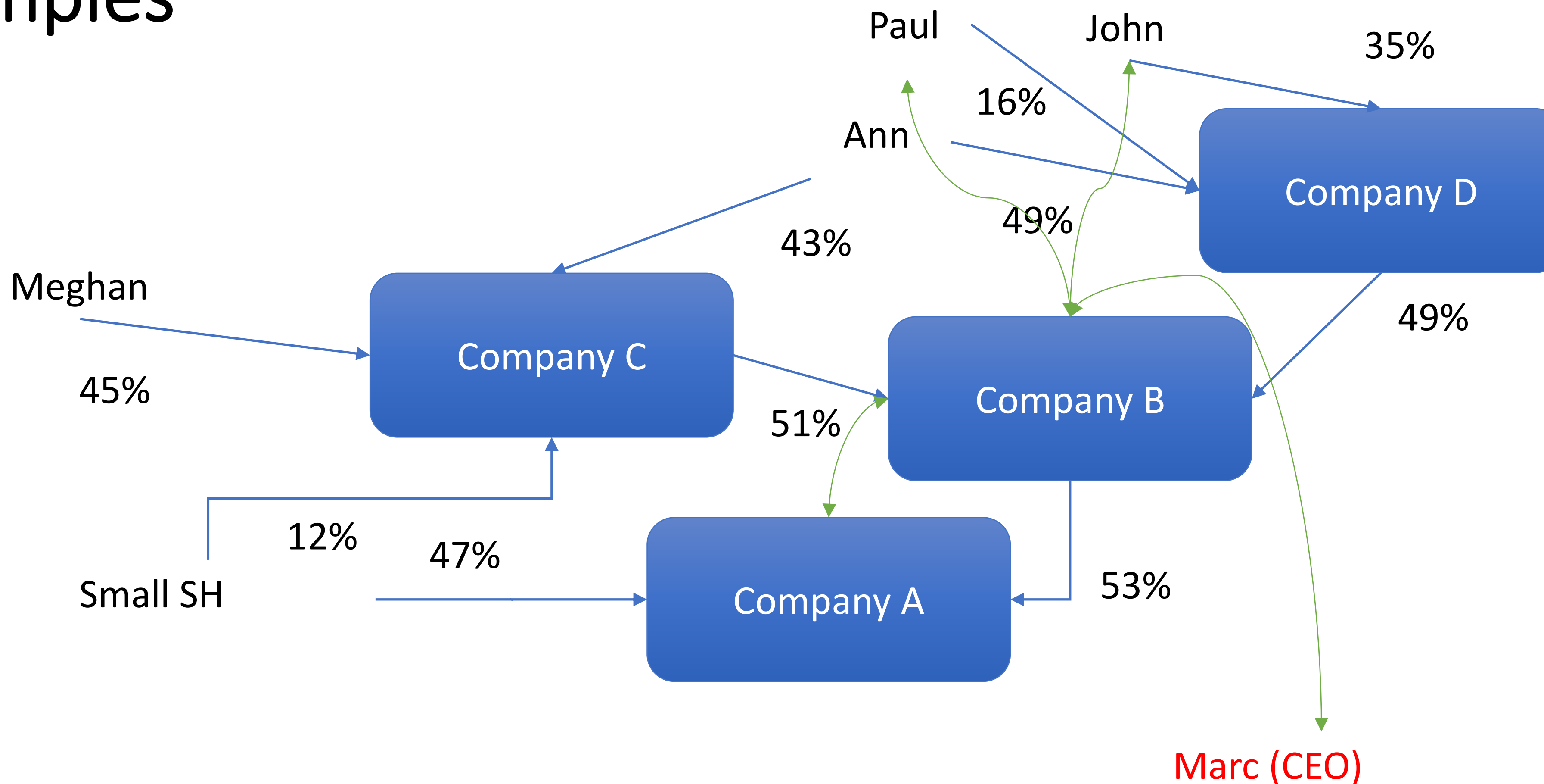
Examples



Examples



Examples



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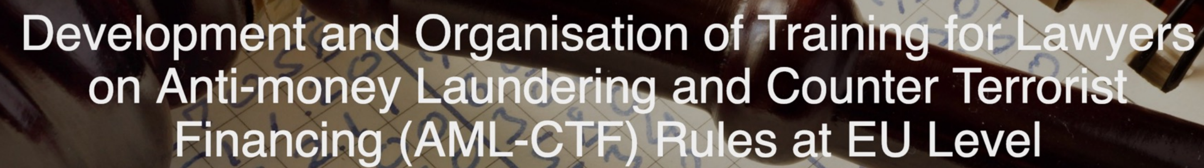

High-risk third countries, PEPs, non face-to-face clients and other red flags

June 28th 2021

Emma-Jane Williams

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High Risk Third Countries – Enhanced CDD Measures

- Article 18.1 and Article 18a
- Obtain → Additional information on customer, intended nature, source of funds/wealth, reasons for transactions, Senior Management approval, enhanced ongoing monitoring AND
- Also apply one or more additional measures such as additional enhanced CDD, enhanced reporting mechanisms, limitation of business relationships/transactions with natural persons/legal entities from third countries

High Risk Third Countries - List

- 7 May 2020 list
- Afghanistan, The Bahamas, Barbados, Botswana, Cambodia, Democratic People's Republic of Korea (DPRK), Ghana, Iran, Iraq, Jamaica, Mauritius, Myanmar, Nicaragua, Pakistan, Panama, Syria, Trinidad and Tobago, Uganda, Vanuatu, Yemen, Zimbabwe
- Consider other reports The World Bank, Transparency International and UN Sanctions lists

PEPs – who are they?

- Article 3.9 – PEP definition
- Article 3.10 - Close associates/family members
- Article 20a (5AMLD) – now includes prominent public functions (MS lists)

PEPs – Enhanced CDD Measures

- Article 20(a) - Have appropriate risk management systems, including risk-based procedures, to determine dealing with a PEP

- Article 20(b) – Obtain Senior Management approval, establish source of wealth/funds (take adequate measures), enhanced ongoing monitoring

FAQ - To what extent should I enquire into source of funds/wealth?

- Low/Medium = CDD 3→ Understand/Obtain Info/Asking Questions
- High ML Risk = Enhanced CDD → Evidence/Is source of wealth legitimate?
- Always be prudent → examine supporting documents for consistencies/red flags
- Caution → funds accessing EU for first time via a client account or cash
- Cannot provide a banking service
- Source of funds unclear → make enquiries and legality of funds may need to be evidenced
- Sometimes, if high risk, will documentation ever be able to negate risk of ML for the lawyer?

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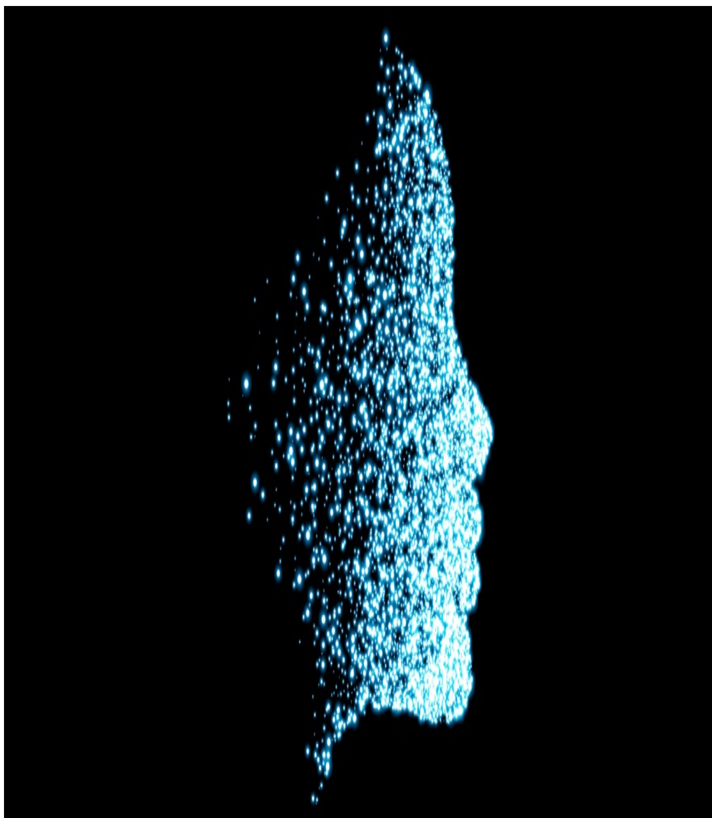
Non-face-to-face instructions are a high risk factor/red flag

"non-face-to-face business relationships or transactions, without certain safeguards, such as electronic ~~signatures~~ identification means, relevant trust services as defined in Regulation (EU) No 910/2014 or any other secure, remote or electronic, identification process regulated, recognised, approved or accepted by the relevant national authorities"

How can I remain AML compliant during Covid-19 crisis if I can't meet clients in person?



Step 1 – Risk Assess and Document

Step 2 – Take a pragmatic approach to the non-face-to-face risk factor

Step 3 – Adopt new ways to verify client identity where feasible

- Video Conferencing with Photographic ID Selfie Approach

Other red flags …

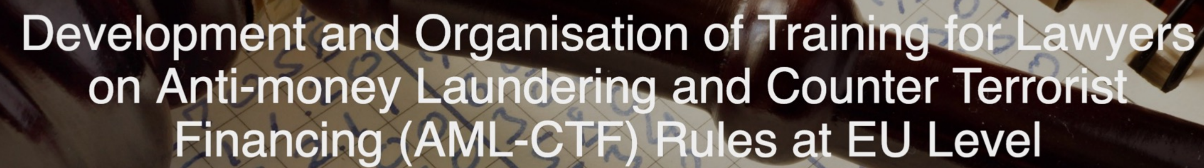
Typologies

- misuse of client accounts;
- purchase of real property;
- creation of trusts and companies;
- management of trusts and companies;
- managing client affairs and making introductions;
- undertaking certain litigation; and
- setting up and managing charities.

Red Flags

- **Client** → overly secretive, someone else directing, high-risk countries
- **Source of funds** → unusual, disproportionate amounts of private funding/cash, foreign country with no connection, payment procedures change, high-risk countries, multiple/foreign bank accounts, company funds private expenditure
- **Choice of solicitor/firm** → at a distance, without experience for complexity, refusals by other lawyers
- **Instructions** → unusual, speed/pressure, needs introductions to banks, complicate ownership structures, structures with multiple countries, absence of supporting documentation, investment with no financial advantage, back-2-back transactions, abandoned transactions, unexplained last minute changes, retainer is to exclusive use client account without provision of legal services, litigation settled too easily/quickly

Thank you!



Reporting obligations

June 28th 2021

Claudio Cocuzza

Avvocato (Italy)

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Suspicious Transaction Report

From the 90s ➡ AML discipline to prevent the organised crime from investing in clean economy

Progressive extension ➡ also private entities become **obliged entities**

2001/97/EC «*II EC-Directive*» of December 4, 2001 ➡ Reporting obligations for **lawyers** and **notaries** (art. 2a, 5)

Directive 2015/849/UE as amended by 2018/483/UE «*V UE-Directive*» now in force (arts. 32-39)

Suspicious Transaction Report (STR) (art. 33) ➡ when obliged entities **know, suspect or have reasonable grounds to suspect** that funds are the proceeds of criminal activity or are related to terrorist financing

Definition of suspicion and its consequences

Suspicion ➡ internal process based on customer due diligence

precautionary measure

It begins with a **clue** and ends
- → when the doubt is clarified
- → when it is confirmed ➡ **STR**

⬇

Professionals shall **refrain** from carrying out transactions they suspect are related to money laundering until the STR is completed. If impossible, they shall **inform the FIU immediately** after the transaction (art. 35)

How and when to file a STR

Lawyers and notaries can address a STR alternatively to:

- **Financial Information Units (FIUs)** (art. 32) ➡ established by each Member State
- **Self-regulatory body of the profession (SRB)** (art. 34.1) ➡ it connects the professionals to the national FIU (if established)

The Suspicious Transaction Report is to be filed «***promptly***» (art. 33.1) and **without disclosing the information to the customer or to third parties** (art. 39.1)

Exemptions from STR

Exemption for lawyers and notaries (art. 34.2)

Information obtained while:

- ascertaining the legal position of the client or
- defending or representing the client in a judicial proceeding or
- the information concerns a judicial proceeding

→ before / during a judicial proceeding

«Legal position»: STR obligations and lawyer-client confidentiality

What are the **limits** of the **ascertainment** of the **legal position**?

Advocate General Maduro's conclusions (Case C-305/05)

«If the purpose of the ascertainment is merely to help the client organise his activities 'in compliance with the law' and subject his objectives to the rules of law, it must be regarded as advice and exempted from any obligation to inform, irrespective of the context in which it is provided»

Exemption when (i) the lawyer is **INDEPENDENT** from the customer's will and instructions

and (ii) acts in the interest of the client **and** within the framework of the rule of law

How to determine if a transaction is suspicious

Indications are provided by:

- **EU-Directive** — arts. 10-23
- **Guidelines** adopted by
  - the FIUs
  - public authorities of Member States
  - national bodies of the profession
  - IBA, ABA and CCBE: «*A Lawyer's Guide to Detecting and Preventing Money Laundering*» October, 2014
- **FATF Guidances**
  - «*National Money Laundering and Terrorist Financing Risk Assessment*» 2013
  - «*Guidance for a risk-based approach for legal professionals*» 2019

How to determine if a transaction is suspicious

Warning signs / *«red flags»:*

- **Customer's behaviour** ➡ too well informed about AML / reluctant to give information
- **Structure of the transaction** ➡ disproportionate / not logical
- **Financial flows** ➡ payments from third parties / «by the back door»
- **Geographical elements** ➡ high risk countries are involved: (Afghanistan, Bahamas, Barbados, Botswana, Cambodia, North Korea, Ghana, Iran, Iraq, Jamaica, Mauritius, Mongolia, Myanmar, Nicaragua, Pakistan, Panama, Syria, Trinidad and Tobago, Uganda, Vanuatu, Yemen, Zimbabwe) indicated by Commission delegated Regulation (EU) n. 2016/1675 as lastly amended by n. 2020/855
- Politically Exposed Persons **PEPs** ➡ Art. 3 (9) EU-Directive
- List of persons/groups/entities **subject to EU financial sanctions:** https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions_en

Practical suggestions

- ✓ Never be misled by the **appearence** of a client
- ✓ Do **not rely on CDD** made by **third parties**
- ✓ Bear in mind the **consequences of a breach** of AML discipline ➡ professional and criminal profiles
- ✓ Leave a **written proof** to show your **good faith**
- ✓ **Monitor customers' profiles**
- ✓ Attribute an AML **risk index** to the transaction
- ✓ Adopt an **AML policy tailored to your firm**
- ✓ **Training**
- ✓ **Intelligent use of social media**

«DAC 6»

2018/822/UE Directive on Administrative Co-operation

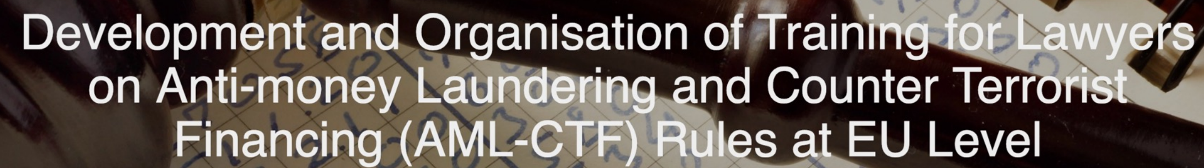
Intermediaries (including lawyers and notaries) ➡ obligation to file information on **reportable cross-border arrangements** with the competent authorities

provide a tax advantage

Possible co-existence of STR and report of cross-border arrangements

Same cases of exemption for lawyers and notaries

Thank you!



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Data protection

June 28th 2021

Rupert Manhart

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Legal basis for the processing of personal data

Art 41 (1) AMLD: *The processing of personal data under this Directive is subject to Directive 95/46/EC [GDPR], as transposed into national law.*
→ see also Art 43 AMLD.

Art 6 (1) GDPR: *Processing shall be lawful only if and to the extent that at least one of the following applies:*
(c) processing is necessary for compliance with a legal obligation to which the controller is subject;
(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
→ Client’s consent is not required.

Restricted use of data

Art 41 (2) AMLD: *Personal data shall be processed by obliged entities on the basis of this Directive only for the purposes of the prevention of money laundering and terrorist financing as referred to in Article 1 and shall not be further processed in a way that is incompatible with those purposes. The processing of personal data on the basis of this Directive for any other purposes, such as commercial purposes, shall be prohibited.*

→ Any other use, such as marketing or profit, is prohibited.

Information

Art 41 (3) AMLD: *Obliged entities shall provide new clients with the information required pursuant to Article 10 of Directive 95/46/EC before establishing a business relationship or carrying out an occasional transaction. That information shall, in particular, include a general notice concerning the legal obligations of obliged entities under this Directive to process personal data for the purposes of the prevention of money laundering and terrorist financing as referred to in Article 1 of this Directive.*

→ Information according to GDPR and general notice of information

Exemption to right to access data

Art 41 (4) AMLD: *In applying the prohibition of disclosure laid down in Article 39(1), Member States shall adopt legislative measures restricting, in whole or in part, the data subject's right of access to personal data relating to him or her to the extent that such partial or complete restriction constitutes a necessary and proportionate measure […]*

→ Tipping off is prohibited (see also Art 23 GDPR).
→ Particular legislation of relevant Member State.

Duration of data storage

Art 40 (1) AMLD: *Member States shall require obliged entities to retain the […] documents and information […] for a period of five years after the end of the business relationship with their customer or after the date of an occasional transaction. […]*
Upon expiry of the retention periods […], Member States shall ensure that obliged entities delete personal data, unless otherwise provided for by national law […]. Member States may allow or require further retention […]. That further retention period shall not exceed five additional years.

→ Five years plus five additional years if required by national law.

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Lawyer-Client Confidentiality

June 28th 2021

Christian Bluhm

(lawyer, Germany)

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Lawyer-client confidentiality

The core principles

- The confidentiality of lawyer and client is one of the most important **core values** and cornerstones of the work of a lawyer.
- It is also on of the **core principles of the lawyer-client relationship**.
- It is an essential right, that is also anchored in **European law**.

Lawyer-client confidentiality

ARTICLE 8 of the European Convention on Human Rights

Right to respect for private and family life

Paragraph (1)

"Everyone has the right to respect for his private and family life, his home and his correspondence."

Lawyer-client confidentiality

ARTICLE 6 of the European Convention on Human Rights

Right to a fair trial

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…"

The Lawyer-client confidentiality

European Case Law

Internationally recognized principles:

The International Bar Association has published International Principles on Conduct for the Legal Profession, and Principle 4 states:

"A lawyer shall at all times maintain and be afforded protection of confidentiality regarding the affairs of present or former clients, unless otherwise allowed or required by law and/or applicable rules of professional conduct."

The Lawyer-client confidentiality

Breaches of confidentiality

- One of the most important basic duties of the lawyer is his **duty to maintain complete secrecy and the protection of the attorney-client privilege**
- **Is it justifiable to breach confidentiality for reporting obligations and for suspicious transaction reporting (STR)?**
- The conflict between the lawyer's duty of confidentiality and the obligation to report suspicious transactions is evident.
- How can the conflict be resolved?
- What do breaches in confidentiality look like?

Lawyer-client confidentiality

Breaches of confidentiality

- However, **breaches are necessary** to effectively combat money laundering and terrorist financing
- It goes without saying that **exceptions to confidentiality must be subject to strict standards**
- Such standards are regulated in European law and in European case law as well (and in National Regulations as well)

Lawyer-client confidentiality

European Law

4th AML-Directive (EU) 2015/849 of 20th May 2015 of the EU-Parliament of the council

Art. 33 (reporting obligations)

Art. 34 (2)(Reporting obligations and conflicts of the independent legal professions)

Art. 37 (No liability for the fulfillment of STR-obligations)

Lawyer-client confidentiality

Art. 33 (reporting obligations) of the 4th AML-Directive

"1. Member States shall require obliged entities, and, where applicable, their directors and employees, to cooperate fully by promptly:

(a) informing the FIU, including by filing a report, on their own initiative, where the obliged entity knows, suspects or has reasonable grounds to suspect that funds, regardless of the amount involved, are the proceeds of criminal activity or are related to terrorist financing, and by promptly responding to requests by the FIU for additional information in such cases; and

(b) providing the FIU, directly or indirectly, at its request, with all necessary information, in accordance with the procedures established by the applicable law.

All suspicious transactions, including attempted transactions, shall be reported.

2. The person appointed in accordance with point (a) of Article 8(4) shall transmit the information referred to in paragraph 1 of this Article to the FIU of the Member State in whose territory the obliged entity transmitting the information is established."

Lawyer-client confidentiality

Art. 34 (2) () of the 4th AML-Directive

(Exceptions from reporting obligations)

“Member States shall not apply the obligations laid down in Article 33 (1) to notaries, other independent legal professionals, auditors, external accountants and tax advisors only to the strict extent that such exemption relates to information that they receive from, or obtain on, one of their clients, in the course of ascertaining the legal position of their client, or performing their task of defending or representing that client in, or concerning, judicial proceedings, including providing advice on instituting or avoiding such proceedings, whether such information is received or obtained before, during or after such proceedings.”

Lawyer-client confidentiality

Art. 37 of the 4th AML-Directive

(No liability for the fulfillment of STR obligations)

"Disclosure of information in good faith by an obliged entity or by an employee or director of such an obliged entity in accordance with Articles 33 and 34 shall not constitute a breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, and shall not involve the obliged entity or its directors or employees in liability of any kind even in circumstances where they were not precisely aware of the underlying criminal activity and regardless of whether illegal activity actually occurred."

The Lawyer-client confidentiality

European Case Law

1. **Case AM & S Europe Limited v. Commission of the European Communities 155/79, Judgement of the European Court of Justice of 4th February 1982**

"Community law, which derives from not only the economic but also the legal interpenetration of the Member States, must take into account the principles and concepts common to the laws of those States concerning the observance of confidentiality, in particular, as regards certain communications between lawyer and client. That confidentiality serves the requirements, the importance of which is recognized in all of the member states, that any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it."

The Lawyer-client confidentiality

European Case Law

2. Case Akzo Nobel Chemicals Ltd. + Akcros Chemicals Ltd. v. Commission of the European Communities, T-125/03 & T-253/03 (Joined Cases), Judgement of the 30th October 2003

"…professional privilege is intimately linked to the conception of the lawyer's role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs."

The Lawyer-client confidentiality

European Case Law

3. Case C-305/05 of the Court of Justice of the European Union, Judgement of 26th June 2007

Ordre des barreaux francophones et germanophone and others v. Conseil des ministres

From the reasoning of the decision:

The court stated that an exemption of that kind safeguards the right of the client to a fair trial.

The reporting obligations do not infringe the right to a fair trial as guaranteed by Art. 6 of the European convention on Human rights and Art. 6 (2) of the TEU.

The Lawyer-client confidentiality

European Case Law

3. Case C-305/05 of the Court of Justice of the European Union, Judgement of 26th June 2007

Ordre des barreaux francophones et germanophone and others v. Conseil des ministres

From the reasoning of the decision:

- **the reporting obligations apply to lawyers only in so far as they advise their client in the preparation of execution of certain transactions (for example financial transactions)**
- **the nature of such activities (suspicious transaction reporting) is such that they take place in a context with no link to judicial proceedings**
- **consequently those activities fall outside the scope of the rights to a fair trail which was basic of the claim**
- **as soon as the lawyer is called upon for assistance in defending or representing the client before the courts, or for advice as to the manner of instituting or avoiding judicial proceedings, that lawyer is exempt from reporting obligations, regardless of whether the information has been received or obtained before, during or after the proceedings.**

The Lawyer-client confidentiality

European Case Law

4. Case Application No. 12323/11 of the European Court of Human Rights, Judgement of 6th March 2013 (6th December 2012); Michaud v. France

From the reasoning of the decision:

- **Art. 8 ECHR protects the fundamental right to professional confidentiality**
- **requiring lawyers to report suspicious transactions did not amount to excessive interference with that right**
- **general interest served by combating money-laundering, and on the guarantee provided by the exclusion from the scope of the obligation of reporting provided by Article 34 (2)**
- **National law can be different: French law e.g. has put in place a filter to protect professional confidentiality, by ensuring that lawyers do not submit their reports directly to the FIU, but to the president of the Bar.**

The Lawyer-client confidentiality

Conclusion – When should a breach of confidentiality be allowed?

1. Only when the lawyer processes a mandate within the meaning of Art. 2 of the 4th AML-Directive

- **these are mandates with a fundamentally increased risk of money laundering**
- **these are transactions in which the FATF or the EU-Commission in their supranational risk analysis assume increased risks for money laundering**
- **only 25-30 % of all lawyers are obligated**

The Lawyer-client confidentiality

Art. 2 of the 4th EU-Directive (Obligated Lawyers)

Article 2

1. This Directive shall apply to the following obliged entities:

(1) credit institutions;

(2) financial institutions;

(3) the following natural or legal persons acting in the exercise of their professional activities:

(a) auditors, external accountants and tax advisors;

(b) notaries and other independent legal professionals, where they participate, whether by acting on behalf of and for their client in any financial or real estate transaction, or by assisting in the planning or carrying out of transactions for their client concerning the:

(i) buying and selling of real property or business entities;

(ii) managing of client money, securities or other assets;

(iii) opening or management of bank, savings or securities accounts;

(iv) organisation of contributions necessary for the creation, operation or management of companies;

(v) creation, operation or management of trusts, companies, foundations, or similar structures;

The Lawyer-client confidentiality

Conclusion – When should a breach of confidentiality be allowed?

2. General exception to the suspicious transaction reporting requirement

The principle is that lawyers do not have to report if they have obtained the information from legal advice or in court proceedings (Art. 34 (2) 4th AML-Directive)

The Lawyer-client confidentiality

Conclusion – When should a breach of confidentiality be allowed?

3. Exception from the exception from reporting obligations

Confidentiality does not apply when a lawyer is

- **knowingly assisting, aiding or abetting unlawful conduct of their clients**
- **laundering money or to assist with terrorist funding**
- **committing a criminal offence**
- **normally be disciplined by the professional regulatory authority concerned**

The Lawyer-client confidentiality

Conclusion – When should a breach of confidentiality be allowed?

4. National special rules

- Member states can define the reporting obligations even more precisely
- depends on the specific definition of the member state, how individual they have defined the crime of money laundering
- in Germany, for example, the law has determined suspicious facts in certain real estate transactions, which must always be reported regardless of legal secrecy
- this is the case, for example, when the price of a property is disproportionately either above or below the market value
- or when real estate is resold within a very short time without a legal reason to do so

The Lawyer-client confidentiality

Conclusion – When should a breach of confidentiality be allowed?

5. Result

- **Outside those strictly defined boundaries, the directive's requirements on reporting do not apply, and the usual rules of lawyer-client confidentiality do apply**
- **Lawyers must therefore carefully check whether they are required to report**
- **And they must carefully check whether they are not breaking their legal duty of confidentiality (Art. 33, 34 of the 4th AML-Directive)**

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Thank you for your attention!

Cross border issues

June 28th 2021

Rupert Manhart

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Introduction

Issues arising

- if a lawyer works for clients in other jurisdictions,
- if the lawyer or the client has a presence in another jurisdiction or
- if the lawyer cooperates with a lawyer in another jurisdiction.

AMLD provides a minimum standard to be implemented within the EU

- Some Member States have implemented higher standards and/or have implemented different methods.

Additional particular issues arise when working with third countries.

Example 1: Reliance on third parties

- Member States may permit obliged entities to rely on third parties to meet the customer due diligence requirements (Art 25 AMLD).
- If they apply customer due diligence requirements and record-keeping requirements that are consistent with the AMLD and if they are supervised in a manner consistent with the AMLD (Art 26 (1) AMLD)
- Prohibition as regards high-risk third countries (Art 26 (2) AMLD)

Example 2: Suspicious transaction reporting and lawyer-client confidentiality

- In some Member-States, STRs are to be filed to the FIU directly, in others they have to be filed to self-regulatory bodies (Art 34 (1) AMLD).
- Scope and application of lawyer-client confidentiality provisions is defined by national law and may be different (Art 34 (2) AMLD)
- Need to check them carefully before filing an STR.

Example 3: Access to information

- Documents (e.g. identification documents, beneficial ownership information, corporate memoranda, corporate registers etc) may be in foreign languages and need to be translated.
- Differences in legal provisions may make understanding corporate structures difficult.
- Access to foreign company registers and beneficial ownership registers may not be available.

Example 4: Group-wide policies

Art 45 AMLD: Member States shall require obliged entities that are part of a group to implement group-wide policies and procedures, including data protection policies and policies and procedures for sharing information within the group for AML/CFT purposes.

Obliged entities that operate establishments

- in another Member State shall ensure that those establishments respect the national provisions of that other Member State.
- in third countries where the minimum AML/CFT requirements are less strict than those of the Member State, shall implement the requirements of the Member State to the extent that the third country's law so allows.

Thank you!

Sanctions

June 28th 2021

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(lawyer, Germany)

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Sanctions

Why should we sanction violations of the obligations on anti-money-laundering?

Sanctions

Why should we sanction violations of the obligations on anti-money-laundering?

- **Deterrence**
- **Punishment**
- **Prevention**
- **Withdraw admission (Fit & Proper)**

Sanctions

What constitutes an offence?

How should violations of the obligations on anti-money-laundering be sanctioned?

Sanctions

How should violations of the obligations on anti-money-laundering be sanctioned?

To answer this question, it is necessary to look at the kind of violation:

Are the breaches:

- **serious?**
- **repeated?**
- **systematic?**

Or is it a:

- **first offence?**
- **minor violation?**
- **no damage?**

Sanctions

Which unfulfilled obligations are necessary to sanction?

Violations of the three basic duties:

- risk management
- duties of due diligence
- suspicious transaction reporting

Sanctions

How should violations of the obligations on anti-money-laundering be sanctioned?

EU-Law (4th AML-Directive)

- **Art. 59 (2)(minimum sanctions)**
- **Art. 60 (4)(level of sanctions)**
- **Art. 61**

Sanctions

Which unfulfilled obligations are necessary to sanction?

- Customer due diligence (Art. 10 to 24)
- Suspicious transaction reporting (STR) (Art. 33 to 35)
- Recording-keeping (Art. 40)
- Internal controls (Art. 45 to 46)
- National regulations can sanction other violations as well: for example, obligation to prepare a risk analysis as part of risk management (Art. 8)

Sanctions

Article 59 (2) of the 4th AML-Directive

"...the administrative sanctions and measures that can be applied include at least the following:

(a) **a public statement** which identifies the natural or legal person and the nature of the breach;

(b) **an order** requiring the natural or legal person **to cease the conduct and to desist from repetition** of that conduct;

(c) (where an obliged entity is subject to an authorisation, withdrawal or suspension of the authorisation;

(d) a **temporary ban against any person** discharging managerial responsibilities in an obliged entity, or any other natural person, held responsible for the breach, from exercising managerial functions in obliged entities;

(e) **maximum administrative pecuniary sanctions of at least twice the amount of the benefit derived from the breach** where that benefit can be determined, or at least € 1.000.000."

Sanctions

Article 60 (4) of the 4th AML-Directive

"Member States shall ensure that when determining the type and level of administrative sanctions or measures, the competent authorities shall take into account **all relevant circumstances**, including where applicable:…

(a) the **gravity and the duration of the breach**;

(b) the **degree of responsibility** of the natural or legal person held responsible;

(c) the **financial strength** of the natural or legal person held responsible, as indicated for example by the total turnover of the legal person held responsible or the annual income of the natural person held responsible;

(d) the **benefit derived from the breach** by the natural or legal person held responsible, insofar as it can be determined;…"

Sanctions

Article 60 (4) of the 4th AML-Directive

"Member States shall ensure that when determining the type and level of administrative sanctions or measures, the competent authorities shall take into account all relevant circumstances, including where applicable: …

(e) the **losses to third parties caused by the breach**, insofar as they can be determined;

(f) the **level of cooperation** of the natural or legal person held responsible with the competent authority;

(g) **previous breaches** by the natural or legal person held responsible."

Sanctions

- The 4th AML-Directive (Art. 59,60) sets minimum standards for the sanctioning of violations of AML-obligations
- National regulations can go further than the minimum regulations of the EU-Directives
- In doing so, they must also observe their special features in national laws

Sanctions

Which sanctions can member states regulate in their national laws on this basis (of the 4th AML-Directive)?

- **Sanctionless measures**
- **Sanctioning measures and orders**

Sanctions

Sanctionless measures by the supervising authority

- **Giving advice**
- **Giving instructions**
- **Giving measures for improvement**
- **Giving orders to fulfil obligations without deadline**
- **Giving orders subject to a deadline**

Sanctions

Sanctioned measures by the supervising authority (for example by the bar)

- **Issuing a warning (without a penalty fee)**
- **Issuing a warning with a penalty fee**
- **Prohibition of a business or a transaction**
- **(Temporary) prohibition to conduct certain mandates/business (for example real estate business)**
- **Provisional professional ban**
- **Withdrawal of admission to practice as a lawyer (ultima ratio)**
- **Impose a fine**
- **“Name and Shame” on the website of the supervisory authority (notices of decisions)**

Sanctions

Sanctioned measures by the supervising authority (for example the bar association)

The decision to impose the measure must always be proportionate

Sanctions

Sanctioned measures by the supervising authority (for example the bar association)

- **Imposing a fine depends on the severity of the violation**
- **Consideration of sentencing must be examined**

Sanctions

Sanctioned measures by the supervising authority (for example the bar) - Sentencing Considerations

- **First offence or repeated offence**
- **Post-offence behavior and cooperation in investigating the violation**
- **Active repentance**
- **Risk of Repetition**
- **Severity of the violation (how serious is the breach?)**
- **Income of the lawyer/drawn pecuniary advantage**

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Thank you for your attention!

Case Studies

June 28th 2021

Rupert Manhart

Emma-Jane Williams

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Scenario 1
- new client by email
- Litigation for breach of contract/recovery of funds/family law settlement
- Copy invoice/settlement agreement provided
- Settles relatively quickly with little or no legal work
- Various countries involved

Scenario 2
- Client resides in US
- Existing client referral
- Holiday home
- No financing
- Bank statements provided but money from company

Scenario 3
- No financing
- Proposed transfer funds from 3rd party bank account in Uganda
- Urgent
- No Identity Verification

Scenario 4
- Client resides in in US
- No financing
- No bank account in MS → use solicitor account?
- family reside locally

Scenario 5
- -Mortgage from MS bank
- Small percentage in savings

Scenario 6
- Client resides in EU
- Moving to another MS
- Sale of current home and savings
- Existing client referral
- Has not met in person yet/No identity verification

What if?...

Scenario 4 –client opens bank account in MS, evidence of pension lump sum and is establishing in MS?

Scenario 5 – client arrives with savings in cash?

Scenario 6 – funding is transferred from a company?

Will you provide the legal service?

DECISION TIME

DOCUMENT your analysis

Red flags assist solicitors in applying a risk-based approach to their CDD requirements of knowing their client, understanding the nature and the purpose of the business relationship, and understanding the source of funds

Mere presence of a red flag not necessarily basis for suspicion ***[Is there a legitimate explanation?]***

A number of red flags ***[More likely a solicitor should have a suspicion of ML]***

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5 Step Approach to navigate red flags

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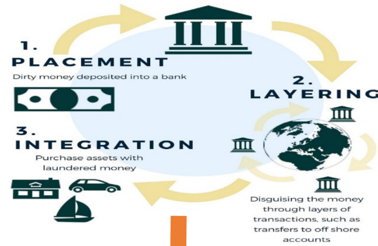
1. Understand what ML is

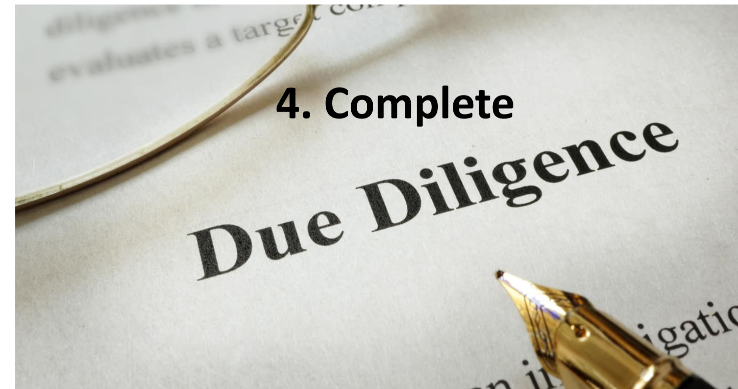


2. Identify red flags

3. Will you provide the legal service?

DECISION TIME

If yes →



4. Complete

5. Does it all add up? Are there new red flags?

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Thank you!