

The 4th Anti-Money-Laundering Directive: European Efforts to Halt the Laundromat

By Dr. Matthias Spitz and Jessica Maier

In 2016, FinCEN's \$12 million fine against a sportsbook operator for "systemic and egregious violations of anti-money laundering rules"¹ and the overall increased enforcement activity of authorities in the US and EU² for AML compliance related shortcomings might have started ringing a number of alarm bells within the gambling industry.

European regulators, such as the Gambling Commission that regulates gambling in Great Britain, have just recently warned the gambling industry again of risks arising from non-compliance with AML standards.³ The timing of the Gambling Commission's announcement concurred with the entering into force of new European laws on AML: EU Member States have been expected to transpose the 4th Anti-Money-Laundering Directive of the EU⁴ (the '4AMLD') into national laws by end of June 2017 – which also includes broader requirements impacting on the gambling industry. As a consequence, (non-) compliance of gambling operations with AML requirements promises to attract even greater attention of European watchdogs over the next years. Are similar headlines and fines like the ones in the US soon to become regular features in industry news reports on European gambling operations that have neglected their AML obligations? They

might be on the horizon. This article will give a "helicopter view" on some of the key aspects of the 4AMLD and pick out national AML legislation in Germany as an example for an implementation of the 4AMLD including an overview of the new compliance requirements and risks that companies targeting the German market may be facing.

Part 1: The EU level Background

Adopting the 4AMLD in May 2015 certainly was a huge step forward in improving the effectiveness of the EU's efforts to fight money laundering ('ML') and to prevent the financing of terrorism ('TF'). In fact, the terrorist attacks that have scourged several European cities over the past years but also the revelations of the so-called "Panama Papers" have raised

awareness at EU level that it is necessary to act forcefully against ML and TF. The 4AMLD is further based on guidance provided by the Financial Action Task Force (the 'FATF') as it includes the 40 recommendations of the FATF to prevent ML and TF as per the revised FATF recommendations of February 2012⁵. For example, the FATF has recommended to subject bricks-and-mortar as well as online casinos to obtain licenses and to apply stringent customer due diligence above a customer transaction threshold of \$3,000.⁶



Gambling operations as obliged entities

The subjects of the 4AMLD are referred to as “obliged entities;” not only financial institutions and payment services providers but also a wide range of designated providers of services from the non-financial sector are listed as obliged entities. With regard to the gambling sector, the 4AMLD has considerably increased the range of obliged entities from casinos (as per the preceding 3rd AML Directive) to essentially all “providers of gambling services.” A gambling service is defined as “a service which involves wagering a stake with monetary value in games of chance, including those with an element of skill such as lotteries, casino games, poker games and betting transactions that are provided at a physical location, or by any means at a distance, by electronic means or any other technology for facilitating communication, and at the individual request of a recipient of services” (Art. 3(14) 4AML). Remarkably, this might be the first legally binding, pan-European defi-

nition of gambling. Still, EU Member States may choose to exclude certain gambling services (with the exception of casino operations) from the scope of national laws transposing the 4AMLD if they can prove that due to the nature and scale, the operation of the gambling services in question involves a low ML risk.

Risk-based approach

A key element of the 4AMLD is the so-called “risk-based approach” to AML. While the 3rd AML Directive provided a listing of predefined situations which were considered to involve a low to high ML risk, the 4AMLD follows a more dynamic approach in that ML and TF have to be assessed and mitigated at several levels, starting with a supranational assessment of the European Commission, over the Member States’ level down to individual businesses that are subject to AML regulation.

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At the EU level, the 4AMLD addresses the ‘ESAs’ – yet another of the many acronyms in the Directive which, however, does not refer to the European Space Agency but the many ‘European Supervisory Agencies’, which include the Commission and further supervisory authorities for the banking, insurance and securities sector. These agencies are instructed to complement the annual risk report of the European Commission. Further, they must design implementation guidelines and regulatory technical standards detailing, for example, conditions and tasks of central contact points as well as the risk-based supervision through the responsible national authorities.



At the same time the EU aims at harmonizing AML laws between the Member States, albeit the 4AMLD only prescribing minimum standards for the harmonization, meaning that the Member States are allowed to initiate stricter rules.

At national level, the so-called “Transparency Register” is a novelty which the Member States must implement to enhance the transparency of transactions. In this central register, details and general information about the economic beneficiaries of a transaction or entity have to be registered. This includes all individuals that hold a

minimum of 25% shareholding in a company. The 4AMLD requires the register to be open to authorities and everyone who has a legitimate interest (specifically journalists).

At company level, those that fall within the scope of national AML laws in terms of being obliged entities, which includes gambling operators, will have to conduct a risk analysis of their business and implement appropriate risk mitigation measures. These measures include risk management practices (such as internal AML policies), customer due diligence processes (commonly referred to as “Know Your Customer” – KYC), reporting of suspicious transactions to the supervisory authority, record-keeping and compliance management which may also comprise the obligation to appoint a compliance officer at management level.

¹ <https://www.fincen.gov/news/news-releases/fincen-fines-cantor-gaming-12-million-egregious-and-systemic-violations-anti>.

² e.g. the Gambling Commission’s investigations into historical weaknesses in the AML controls used by Gala Coral Group Ltd t/a Coral Racing Limited and Coral Interactive (Gibraltar) Limited <http://www.gamblingcommission.gov.uk/PDF/public-statements/Gala-Coral-Public-Statement-April-2016.pdf>.

³ <http://www.gamblingcommission.gov.uk/news-action-and-statistics/news/2017/Commission-urges-operators-to-review-when-customer-identity-checks-are-made.aspx>.

⁴ 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.

⁵ FATF, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation – The FATF Recommendations, February 2012.

⁶ The FATF Recommendations, recommendation no. 22 and interpretative note to no. 22.

⁷ <http://www.mga.org.mt/fiau-announces-extension-consultation-period-application-anti-money-laundering-counter-funding-terrorism-obligations-remote-gaming-sector/>.

⁸ Supranational Risk Assessment Report of 26 June 2017, COM(2017) 340 final.

Sanctions

The rather severe tightening of requirements to sanctions that Member States must impose certainly demonstrates the EU's determination to combat ML and TF. As an example of the significant amounts of sanctions that may hit non-compliant credit and financial institutions, it is stipulated that fines may reach up to €5 million or, more severely, up to 10 percent of the total annual turnover.

Part 2: The implementation at national level – the federal AML Act of Germany

In Germany, AML legislation lies within the competence of the Federal Government, and the law implementing 4AMLD has been rushed by the responsible department, the Federal Ministry of Finance, to come into force just in time on 26th of June 2017. Other EU Member States, like e.g. Malta, did not adhere to the EU deadline for transposing the 4AMLD but seemingly allowed themselves to prepare the new law more diligently.⁷

Following the concept of the 4AMLD, the AML Act of Germany applies to providers of gambling services – however, with some interesting exceptions: (1) land-based lottery operations, (2) slot machine gambling in arcade halls (i.e. outside casinos) and (3) retail outlets of horse race betting. The justification for the total exclusion from the scope of the AML Act appears rather thin: The Federal Government claims that the product-related risks are rather low; however, organizational risks arising from those types of gambling operations, including the risk of ownership in these operations being subverted by organized crime, have seemingly not been evaluated. While we do not wish more red tape to affect these gambling sectors, it is clear that the German AML Act is inconsistent in this respect – even more so now that the European Commission, unsurprisingly, has rated operating slot machine gambling as “moderate risk” activity in its first risk assessment⁸, i.e. as an activity that cannot be exempted from AML requirements. This acts as an example of why the harmonization effort of the EU in relation to AML standards is at risk

of ending up as one big patchwork regulation.

The requirements to internal safeguards against ML and TF under the AML Act mirror those of the 4AMLD and specifically include:

- Conducting a risk analysis at company level and implementing a risk management on the basis thereof;
- Appointment of an AML officer and a deputy;
- Vetting and training of the staff;
- Establishing of record-keeping (5 years) and procedures for suspicious transaction reporting; and
- Customer due diligence which is conditional on a transaction threshold of €2,000 in land-based gambling.

With regard to the latter, the German AML laws provide for specific KYC requirements to operators of remote gambling. Customers must be identified regardless of a particular threshold before a player account may be opened. Further, qualified means of identity verification, such as video identification or database match against data from previously undertaken face-to-face verification have to be applied in the KYC process.

The sanctions at national level again mirror the severity prescribed at EU level in establishing fines up to €1 million and allowing for the skimming of profits. German regulators have already indicated that they intend to enforce AML obligations against operators of remote gambling more stringently as a consequence of the 4AMLD.

It is therefore recommendable for gambling companies that operate across the EU to review and familiarize themselves with the AML laws implementing the 4AMLD in each European jurisdiction, to conduct a risk analysis of their business and, where necessary, to make adjustments to the company's compliance management and KYC measures. ♣



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