

Key Elements of the 4th Anti-Money Laundering Directive No. 2015/ 849 (EU) and its General Implementation until 2017

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After several years of partially controversial discussion, the 4th Anti-Money Laundering Directive No. 2015/ 849 of the EU (4th AMLD) entered into force on 26 June 2015. Consequently, EU Member States have to transpose the 4th AMLD into national law by 26 June 2017.

Recasting the existing EU Anti-Money Laundering regime based on recommendations of the Financial Action Task Force (FATF)¹ the EU Member States have committed to, the 4th AMLD emphasises again the necessity to apply a multi-level Risk Based Assessment (RBA) founded on a multi-level evidence driven identification and categorisation i.e. of money laundering risks for the respective businesses and professions of the “obliged entities” (OE). The said multi-level RBA will be prepared by an analysis conducted by the EU Commission jointly with the European supervisory authorities EBA (banking sector), EIOPA (insurance sector) and ESMA (financial and securities markets). Based on this joint analysis, the EU Commission is instructed to provide the Member States with the respective findings and recommendations to give material guidance to the Member States and the national obliged entities for their respective required national analysis and measures to effectively counteract Money Laundering risks in specific business situations. How severe such risks are

finally evaluated by the public authorities on EU and national level will depend on the cooperation of the OEs to describe their specific business situations also in comparison of other sectors covered by the 4th AMLD. Since there are no European supervisory authorities for the gambling sector (yet) the said cooperation of the respective OE is and will be essential for a evidence based and balanced RBA.

However, the RBA mechanism set forth in the latest AML Directive does not aim or provide for a full harmonisation but sound common minimum standards for effectively preventing money laundering and terrorist financing within the EU. This clear move away from an out-dated box ticking, policy driven AML approach will allow Member States to adopt or retain in force stricter provisions within the limits of EU law, e.g. with respect certain sectors, transactions, provision of information or customers. As reasonable and legitimate as such opening clause may be in terms of flexibility to adapt EU law to national specificities it cannot the risks of misuse by a Member State cannot be ruled out, i.e. to restrict cross-border trade by exceptions to the so called territoriality principle² generally applied in EU AML legislation.

Whether the aforementioned legitimate goals of the 4th AMLD could be reached will strongly depend on the national legal implementation and application in the Member States honouring the principles of coherence and commensurability to avoid over-regulation and economical misallocation of resources.

The 4th AMLD generally extends the personal scope of the new European AML regime to all gambling operators, i.e. in the online gambling sector, as newest OEs in order to harmonise the relevant national legal frameworks with respect to regulated and non-regulated gambling within the EU. Furthermore, as several studies³ have shown, promoting and extending regulated gambling increases the necessary efforts and transaction costs from a criminal's perspective and thereby makes it less attractive for money laundering

activities. However, with the exception of casinos, Member States may exempt providers of certain gambling services based on the results of risk assessment.⁴

The key material elements of the 4th AMLD address geographic, customer and transaction risk at different levels and different timely stages of the Customer relation. Related to gambling operators this means the following duties:

- * Customer Due Diligence (CDD) when establishing the business relation to a customer ("know your customer", KYC),* i.e. online gamblers, by general checking and verification of the customer's identity and verification, reporting to responsible authorities)

- * CDD in the course of continued business relations, e.g. regular KYC checks without a cause or in case of noticeable problems, recording of respective findings and reporting to responsible authorities, IT based monitoring of cash or online transactions of the gambler),

- * Organisational duties of the gambling operator, e.g. appointment of an AML Officer and implementation of an independent internal audit unit each with direct reporting line to the management bodies, implementation of IT based monitoring and risk management systems, reporting to responsible authorities.

The German AML legislation in the Light of the Key Elements of the 4th AMLD

The compliance in Germany with the key elements of the 4th AMLD offers a mixed picture:

Many of the material key elements described above are already covered by the latest amendments of the Geldwäschegesetz (German AML and CTF Act, GwG) in August 2015. In addition to general due diligence and operational requirements stipulated for all OEs, sections 9a to 9c constitute specific compliance

rules for – licensed – online gambling providers and agents of online gambling services with very limited exception⁵. Oriented on the globally applied model of AML stages namely Placement, Layering and Implementation of illegally generated funds⁶, the GwG requires for effectively preventing (potential)

* *Placement activities:* a graded identification of the online gamblers and a risk matrix comprising of KYC profiles and scores,

* *Layering activities:* implementation of IT based monitoring and risk management systems, regular KYC checks without a cause or in case of noticeable problems, recording of respective findings and reporting to responsible authorities, transfer of funds on legally permitted methods of payment⁷ after identification of the online gambler only,

* *Integration activities:* ensuring transparency of payment flows, cooperation with banks offering payment and e-money services and card providers.

However, the current limitation of the methods of payment is stricter than the requirements of the 4th AMLD. Furthermore, a RBA of the GwG with respect to online gambling is only rudimentarily perceivable if at all. There is no evidence-based categorisation of the risk exposure of the various types of online gambling such as e.g. online poker in comparison to sport betting with respect to manipulation or pathological gambling.

Even more complex and inconsistent with the goals and principles of the 4th AMLD is the personal scope of the GwG due to the specific scattered picture of granted licences for gambling operators under the regime of the Glücksspielstaatsvertrag (Interstate Treaty on Gambling) and the still applicable, more liberal Gesetz zur Neuordnung des Glückspiels (Gaming Reform Act) of the Federal Land Schleswig-

Holstein. Whereas i.e. online poker is (still) prohibited under the Glücksspielvertrag, a limited number of respective licenses have been granted in Germany under the latter law and are valid until 2019.⁸ In addition, business activities of online poker providers licensed by another EU Member State in Germany as one of the biggest online gambling markets worldwide are tolerated though.

In order to avoid a shadow economy for various types of online gambling, to apply an effective, coherent and also risk-based national legal regime in Germany as required by the 4th AMLD, and last, but not least, contribute to a level playing field within the EU, the German Länder (Federal States) as responsible legislators are well-advised to follow a broader approach on licensing online gambling providers. Current concerns against regulating of further types of online gambling as allegedly prone to money laundering activities could be addressed by duly considering the available evidence on risk exposure provided by various studies and the complementary implementation of technical measures (e.g. only one account per online gambler per provider, transaction limits, implementation of KYC principles for all methods of online payment) to be easily monitored by external auditors such as the Technische Überwachungsvereine (Non-Profit Technical Inspection Bodies).⁹

- 1) FATF Recommendations dated 16 February 2012
- 2) Article 38 of 4th AMLD
- 3) Levi, Money Laundering Risks and E-Gaming, (2009); Bonner Institut für Glücksspiel, Online Poker (2011), Schneider/ Perent/ Clement, Online Poker: Mögliche Geldwäsche und deren Prävention (2013),
- 4) Article 2 of 4th AMLD
- 5) Section 16 para. 7 GwG
- 6) Placement relates to inserting illegal funds, layering relates to hiding the illegal origin of the inserted illegal funds and integration relates to the reinvestment of illegal funds into legal assets, e.g. real estate,

securities.

7) see section 9c GwG

8) For details see e.g. Hambach/ Riege, „Confused:the state of online gambling in Germany“, World Online Gambling Law Report (August 2012), „Germany: the hottest candidate for infringement proceedings?) , World Online Gambling Law Report (March 2013)

9) see for details footnote 4

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