



THE EFFECT OF THE 4TH EU ANTI-MONEY LAUNDERING DIRECTIVE ON LOTTERIES

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Money laundering and terrorist financing practices is a world-wide phenomenon that touches all sectors of society. Authorities are aware of the size of this problem and have tried to establish different international bodies to fight against money laundering and terrorist financing, and also adopt recommendations and regulations in order to reduce such criminal behavior. This is the case of the OECD Financial Action Task Force ('FATF') which counts as Members countries from the all the different continents (e.g. Germany, UK, Mexico, New-Zealand, USA, etc.). In an earlier article in this magazine "The new FATF recommendations on combating Money Laundering in the Gambling sector: the need for Lotteries to take the lead in the debate" (by Philippe Vlaemminck & Beata Guzik), we emphasized the need for Lotteries to take a leading role in the further implementation of AML rules.

Indeed the money laundering phenomenon has recently been highlighted in the USA with the Las Vegas Sands casino case where the Sands' CEO Sheldon Adelson has agreed to pay a fine of USD 47 million in order to avoid criminal prosecutions for failure to report to the USA anti-money laundering authorities deposits of several million dollars in suspected drug money through several transactions designed to avoid any potential detection. The US anti-money laundering law obligates any company to report suspicious transactions to the competent authority. Similar obligations and procedures are set out by the 3rd and future 4th Anti-Money Laundering Directives ('AMLD') adopted by the European Union as analysed further in the course of this article.

It has long been recognized that casinos and other betting activities can be used for criminals to launder money acquired illegally. These activities are monitored by agents of law enforcement, as are emerging gaming platforms on the internet. Moreover, it is now being recognized that social gaming, virtual currencies, and new app's that enable commerce of kinds that used to be considered safe from money-laundering also need to come under the scrutiny of legal authorities. In fact, this has already been taken into consideration by the FATF which has issued a set of Recommendations to fight

against money-laundering practices where it states: "Countries and financial institutions should identify and assess the ML/TF risks that may arise in relation to the development of new products and new business practices, including new delivery mechanisms, and the use of new or developing technologies for both new and pre-existing products" (Recommendation 15.1).

This issue has also been raised by Morgan Stanley (see Morgan Stanley Blue Paper, Social Gambling – Click Here to Play, 14 November 2012) which emphasizes that: "In some virtual worlds and games, the virtual currency used is relatively liquid and can be exchanged easily on secondary markets for real money. This is likely to raise concerns about the possibility of money laundering via social games. Money laundering regulation on social games may include requirements to verify the occupation, source of funds, business interests, and credit history of customers if the management has reasonable suspicion that the customer is high risk for money laundering or terrorist financing."

As mentioned in our previous article on 5 February 2012, the European Commission published a proposal for a 4th AMLD. This proposal aims to consider all gambling operators as "obliged entities," which is to say that casino, betting and lottery operators will be subject to the different procedures and requirements laid down within the future 4th AMLD. So far, only casino operators were specifically targeted by the text of the 3rd AMLD (although it has to be emphasized that certain national legislations have already gone further and imposed the different anti-money laundering obligations upon other gambling operators additional to casinos). The discussion about whether Lotteries, or more in general, operators of games with low pay out and/or lower risk, need to be fully covered, is still on going (see later).

Lotteries will therefore have to prepare their staff and to implement mechanisms and internal procedures in order to comply with the new requirements set out by their national legislation implementing the 4th AMLD. Amongst the different preparation steps, lotteries will have to retrain their staff in order to raise their awareness in

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terms of money laundering, as well as carry out strong and secure mechanisms in terms of reporting, information sharing, customer identification, staff education, etc. Several internal tasks will also have to be performed. Such tasks concern record-keeping, organising of training programmes for employees, appointing dedicated staff and compliance officer, drafting policies, etc.

National authorities will also have to play a role in the transposition of the 4th AMLD. Indeed, the 4th AMLD provides some latitude to Member States regarding the transposition of the EU instrument into national law. Such margin of implementation is particularly illustrated by the carrying out of a tailored and flexible risk-based approach to, amongst other things, the identification mitigating and understanding of the risks which remain within the competence of the EU Member States. Moreover, other examples of this margin of discretion granted to Member States can be seen regarding the establishment of a national supervisory authority; the obligation for gambling operators to receive the authorisation to operate by the authorities of the state where they want to provide their services; as well as in terms of sanctions to be applied and their degree of severity, etc.

Given the current version of the 4th AMLD, lotteries will have to adopt a pro-active behavior regarding, in particular, their Customer Due Diligence ('CDD') obligations. In the current state of the EU text, lotteries could be subject to a threshold of EUR 2,000. That is to say that lottery operators will have to perform their customer identification duty when a customer engages stakes and receives winnings for an amount equal to or exceeding EUR 2,000. It has to be emphasized that certain operators have pointed out that Member States should be free to decide, in the implementation of the Directive, whether this threshold applies both to the engagement of stakes and the granting of winnings or only to one of the said situations. Discussions are still ongoing regarding this issue. Moreover, it has to be pointed out that in the case that an operator suspects a client of money laundering or terrorist financing behavior, the same procedures will have to be implemented regardless of the amount spent or won. Customer identification is not the sole procedure that has to be implemented. Lottery operators will have to identify the beneficial owner, perform a permanent monitoring of the transactions, collect and assess information regarding the intended nature of the business relationship, report suspicious behaviors to the competent Financial Investigation Unit, etc.

Besides the basic CDD obligations, the current provisions of the 3rd AMLD as well as the provisions of the proposal for a 4th AMLD in its current state allow certain obliged entities to reduce the burdens imposed by the Directive. Indeed, as it is already provided for by the 3rd AMLD, the proposal for a 4th AMLD maintains its provisions allowing the implementation, at national level, of Simplified CDD obligations for activities presenting lower risks of money laundering or terrorist financing. Lotteries could use this opportunity to demonstrate to their national authorities that certain games they offer, particularly low pay-out games, generate lower risks of money laundering and terrorist financing justifying the implementation of Simplified CDD measures.

Given the above, lotteries should demonstrate there is a clear dif-

ference between the products/services they offer and other types of gambling activities such as casino games, instant lotteries, sports betting (with the exception of 'pool betting') and social gaming, as it is commonly agreed that basic lottery games (i.e. draw games) involve lower risks than the other aforementioned types of game. Applying the above mentioned Simplified CDD will enable lotteries to save costs and enhance their relationship with their customers but will require lotteries to demonstrate to the national body in charge of the implementation of the Directive, through the performance of a risk assessment for all types of games and before the implementation of the 4th AMLD, that given the lower risks of money laundering and terrorist financing generated by certain of the games they provide, lotteries should be subject to Simplified CDD obligations.

Furthermore, what is mentioned above can also be applied to the different distribution channels given that online gambling activities generate more risks than offline gambling due to the specific characteristics inherent to the online offer (i.e. permanently accessible, lower controls, different environment, etc.). The CJEU itself recognised the said difference in the Carmen Media case and confirmed further that online gambling is just another form of distribution channel and not a new type of game (CJEU, Zeturf). The differentiation mentioned above, should also be performed between online and offline gambling activities considering that the latter do present lower risks of money laundering and terrorist financing. There is a clear necessity for lotteries to avoid having types of game presenting different degrees of risk subject to the same CDD procedures. This aspect should also be borne in mind by national authorities in charge of the risk assessment.

Besides Simplified CDD, lotteries could also be subject to Enhanced CDD which implies the implementation of stricter controls. This procedure applies in different situations, e.g. when a customer falls within the definition of Politically Exposed Persons ('PEPs') or for games presenting higher risks of money laundering and terrorist financing. For example, considering the risks of match-fixing inherent to online sports betting, such activity is likely to be subject to the Enhanced CDD requirements.

Finally, it has to be recalled that the 4th AMLD has not received any final vote so far. Nevertheless, lotteries and other gambling operators should prepare themselves now to implement the different CDD mechanisms, internal procedures, as well as the risk assessments of their games. As already mentioned, there is a clear need to demonstrate that all types of game should not receive the same treatment and that accordingly, certain low-risk games provided by lotteries would allow them to be subject to lighter CDD requirements.

Although discussions are not over yet, lotteries should be prepared to face the new challenges that will most likely be brought by the 4th AMLD by coupling expert legal counsel, tax advisors, cooperation with other operators, and the use of the different instruments provided by institutions experienced in the fight against money laundering and terrorist financing, such as the FATF of the OECD. An anticipative and cautious preparation will enable lotteries to save time, money and to develop and strengthen their relationships with customers without any doubt. ♦