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RISK ASSESSMENT (ML/FT) OF THE OBLIGED ENTITIES – COMMENTS IN THE CONTEXT OF ART. 27 OF THE AML ACT[1]

OCENA RYZYKA (ML/FT) INSTYTUCJI OBOWIĄZANEJ – UWAGI NA TLE ART. 27 USTAWY AML

Summary: The AML Act imposes on obliged entities the duty to identify and asses the risk of money laundering and terrorist financing (ML/FT) in relation to the operation of such entities. This Article offers an analysis of the provisions of the AML Act relating to that obligation, especially Art. 27 of the AML Act. The author indicates the subjective and objective scope of the obligation and its European origin. This study takes into consideration also the Position of the Office of the Polish Financial Supervision Authority of 15 April 2020 on risk assessment in obliged entities (collection of good practices in the area of implementation, by an obliged entity subject to supervision of the Polish Financial Supervision Authority, of appropriate risk assessment relating to the obliged entity referred to in Art. 27(1) of the AML Act) as an essential document for certain obliged entities.

Keywords: AML, identification and assessment of ML/FT risk, risk management, ML/FT risk, national payment institutions

Streszczenie: Ustawa AML nakłada na instytucje obowiązane obowiązek identyfikacji i oceny ryzyka prania pieniędzy oraz finansowania terroryzmu (ML/FT) związanego z działalnością tych instytucji. Niniejszy artykuł stanowi analizę przepisów ustawy AML odnoszących się do tego obowiązku, w szczególności art. 27 ustawy AML. Autor wskazuje zakres podmiotowy i przedmiotowy tego obowiązku oraz jego rodowód europejski. W opracowaniu

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[1] Legal status as at June 30, 2020.

zostało również uwzględnione stanowisko Urzędu Komisji Nadzoru Finansowego z dnia 15 kwietnia 2020 r. dotyczące oceny ryzyka instytucji obowiązanej (zbiór dobrych praktyk w zakresie dokonywania przez instytucje obowiązane, podlegające nadzorowi Komisji Nadzoru Finansowego, prawidłowej oceny ryzyka instytucji obowiązanej, o której mowa w art. 27 ust. 1 ustawy AML), jako stanowisko istotne dla niektórych instytucji obowiązanych.

Słowa kluczowe: AML, identyfikacja i ocena ryzyka ML/FT, zarządzanie ryzykiem, ryzyko ML/FT, krajowe instytucje płatnicze

INTRODUCTION

Identification of the risks of money laundering and terrorist financing (ML/FT) as well as their subsequent assessment is an essential element of both the Polish[2] and European system of anti-money laundering and combatting terrorist financing (AML/CFT). The obligation to identify and assess ML/FT risk, resulting from the need to meet European requirements, was introduced in the Act of 1 March 2018 on anti-money laundering and combatting terrorist financing[3] on three principal levels:

1) national,
2) institutional (relating to each obliged entity in the understanding of the AML Act),
3) individual[4].

In the first case, it refers to the duty imposed on the appropriate state authority to prepare the national risk assessment of money laundering and terrorist financing (Art. 25(1) of the AML Act) as well as the duty of its verification and possible revision (Art. 25(3) of the AML Act). The second situation on the list relates to the obligation imposed in Art. 27(1) of the AML Act on each obliged entity, that is the requirement to carry out and appropriately document the identification and assessment of ML/FT risks relating to activities of such entities, taking into account the risk factors listed in the AML Act. On the other hand, the individual level involves identification and assessment of ML/FT risks relating to specific economic relations or incidental transactions, carried out predominantly for the purpose of applying financial safeguards (Art. 33(2) of the AML Act).

[2] Such is also the opinion of the Office of the Polish Financial Supervision Authority (hereinafter: "UKNF" or "Office of KNF") in the Position of UKNF of 15 April 2020 on risk assessment inobliged entities. The Position is available at the address: https://www.knf.gov.pl/komunikacja/komunikaty?articleId=69504&p_id=18.

[3] I.e.: Dz.U. 2020, item 971; hereinafter: "AML Act".

[4] The presented list and nomenclature of specific elements was not included in the Act itself but interpreted out of specific statutory solutions.

In this study, the analysis will cover the second variant, i.e. the obligation to prepare, on paper or in electronic form, the identification and assessment of ML/FT risks relating to the activities of obliged entities[5]. This study also discusses the position of the Office of the Polish Financial Supervision Authority (UKNF) in the said area, as essential to certain obliged entities in the understanding of Art. 2(1) of the AML Act, including Banks (Art. 2(1) item 1 of the AML Act) and national payment institutions (Art. 2(1) item 3 of the AML Act).

ML/FT RISK ASSESSMENT IN THE POLISH AML ACT

I. Subjective scope of the obligation

The legislator imposes the obligation specified in Art. 27(1) of the AML Act (identification and assessment of ML/FT risks) on all obliged entities in the understanding of that Act. The catalogue of those entities was included in Art. 2(1) of the AML Act and covers the total of 25 items, wherein certain items cover groups of entities. As a result, that catalogue, *de facto*, extends to a much larger entity number. From the point of view of Art. 27(1) of the AML Act, it is irrelevant what a given entity obliged to perform statutory obligations does professionally (its objects are of no importance).

II.2. Objective scope of the obligation

The objective scope of the obligation specified in Art. 27(1) of the AML Act includes, in the first place, identification and assessment of ML/FT risks relating to the activities of entities performing such acts (obliged entity) and their appropriate documentation – preparation of a document covering specific elements. According to Art. 27(3), the risk assessments[6] mentioned above should be prepared by obliged

[5] Consideration in this area is important because the available studies in most cases focus only on the criminal law aspects of money laundering, cf.: B. Suchowierski, *Przygotowanie do przestępstwa prania pieniędzy,* Zeszyty Prawnicze 19.3/2019, p. 131-154, M. Kaczmarski, *Przeciwdziałanie praniu pieniędzy. Krytyczne spojrzenie na taktyczne i prawne aspekty zwalczania prania pieniędzy w Polsce,* Warsaw 2016. The literature directly related to this issue is unfortunately limited. One such item has recently appeared, cf.: W. Kapica (editor), M. Ćwiakowski, M. Gawroński, J. Grynfelder, W. Ługowski, R. Obczyński, A. Otto, E. Patsiotos, B. Paxford, Z. Piotrowska, J. Stolarczyk, *Przeciwdziałanie praniu pieniędzy oraz finansowaniu terroryzmu. Praktyczny przewodnik,* Warsaw 2018. AML issues also appear sometimes in the context of compliance as an area of activity important for compliance, while the available studies do not elaborate on individual AML issues, cf.: P. Eleryk, A. Piskosz-Szpytka, P. Szpytka, *Compliance w podmiotach nadzorowanych rynku finansowego. Aspekty praktyczne*, Warsaw 2019, p. 375. Finally, there are compliance studies covering AML issues, but these publications do not focus on the identification and assessment of ML/FT risk of the obligated institution, cf.: B. Jagura, B. Makowicz (scientific editing), W. Chomiczewski, M. Ciemiński, M. Diehl, K. Dulewicz, O. Filipowski, M. Gertig, P. Janecki, J. Januszkiewicz, D. Lubasz, P. Pogorzelski, K. Rajewski, P. Ryszawa, T. Sancewicz, J. Stolarek, A. Tomiczek, P. Welenc, J. Zdziarstek, *Systemy zarządzania zgodnością. Compliance w praktyce*, Warsaw 2020, p. 417.

[6] At this stage, I use statutory terminology.

entities on paper or in electronic form and revised if needed, however, at least once in 2 years. In the context of Art. 27(3) of the AML Act, one should point to the legislator's terminological inconsistency. First, in (3), the legislator uses the plural form ("risk assessments"), referring at the same time to Art. 27(1) of the AML Act, where singular form was used. Second – Art. 27(3) of the AML Act provides only for risk assessment, whereas Art. 27(1) of the AML Act for two elements – risk identification and assessment. It is beyond doubt that despite such wording of Art. 27(3) of the AML Act, the prepared document (on paper or in electronic form) should include both those elements. Such conclusion follows both from the interpretation of the provision of Art. 27(1) and 3 of the AML Act, the purpose set out in general in the AML Act and practical aspects. Set aside the point of preparing a document limited in contents, it must be indicated that the above is of particular importance in case of review of such documents. It is impossible to carry out reliable review of an implemented and documented risk assessment if the document does not cover both, strictly interrelated elements – risk identification and assessment[7].

Further elements appearing in Art. 27 of the AML Act may be divided according to the criterion of their obligatory/optional nature.

Obligatory elements include the need to take into account, proportionally to the nature and size of a given obliged entity, risk factors relating to states or geographical areas, products, services, transactions and channels of their supply (Art. 27(1) of the AML Act). UKNF emphasizes that the catalogue is not exhaustive[8]. Although Art. 27(1) of the AML Act does not contain typical expressions used in the formulation of non-exhaustive catalogues (e.g. by using the term "in particular"[9]), the content of the provision as well as, most importantly, the statutory purpose (AML/CFT) undoubtedly indicate that the catalogue is non-exhaustive. As a consequence, the factors adopted in Art. 21(1) of the AML Act should be considered necessary but not exclusive. The Office of KNF also points to other provisions of the AML Act containing essential elements to be taken into account in that context, as mentioned in Art. 43(2) of the AML Act (indications of higher ML/FT risk)[10].

On the other hand, optional elements include: the possibility to take into account the current national ML/FT risk assessment and the Report from the European Commission defining, analysing and assessing ML/FT risks on the UE level which affect the single market and relate to cross-border activities (Art. 27(2) of the AML Act). The decision whether to take those documents into consideration was left by the legislator to the obliged entity. While the optionality of considering the Report from the

[7] The relevance of including identification is also stressed by the Polish Financial Supervision Authority (KNF). KNF's position will be discussed in a further part of this article.
[8] UKNF's Position, p. 2.
[9] Construction of such type appears also in the AML Act, c.f. Art. 50(2) of the AML Act.
[10] UKNF's Position, p. 2.

European Commission does not raise significant doubts, the solution adopted in Art. 27(2) of the AML Act providing for the optionality of considering the national risk assessment must be found inconsistent with the remaining provisions of the AML Act. Both the purpose of preparing the national risk assessment (Art. 25(1) in conjunction with Art. 29(2) of the AML Act), its scope (Art. 29(1) of the AML Act), and the duty of its publication (Art. 30(2) of the AML Act) indicate that this was meant to be the principal (main, foreground) document on the national level in the area of ML/FT risk identification and assessment. As a result, there are no reasons to exclude it from the catalogue of elements to be taken into account in the identification and assessment of ML/FT risk on the institutional level (of a specific entity), especially if it covers certain elements (or directly relates to such elements) specified as obligatory in Art. 27(1) of the AML Act. Nonetheless, under the current wording of Art 27(2) of the AML Act, it is an optional element ("obliged entity may…"), and no legal obligation is attached to take that document into account in the process of identifying and assessing ML/FT risks. However, obliged entities should, on a due diligence basis, consider the document when identifying and assessing ML/FT risks related to their activities[11].

Optional risk factors are also indicated by UKNF[12]. In the opinion of the Office of KNF, the analysis may also cover, among others:

1) IT tools and systems used in the AML/CFT process and the extent of the obliged entity's dependence on those tools and external providers,
2) outsourcing of AML/CFT-related processes, as long as the entity decided to use such solution,
3) adequacy of the organisational structure and personal resources dedicated to the implementation of AML/CFT duties and staff fluctuation, including changes planned in those areas,
4) efficiency and adequacy of the internal review system[13].

Certain explanation is required regarding item 4 above. The obligation to implement internal review in the area of AML/CFT arises under Art. 50(2) item 9 of the AML Act. This provision mentions the terms of internal review and supervision of compatibility of the obliged entity's activities with the AML/CFT legislation and the rules of conduct as specified in the internal procedure. Consequently, the provision does not mention any internal review system. Existence of an internal review system in entities supervised by KNF follows from separate legal provisions. For example, Art. 64(1) item 3 of the Act of 19 August 2011 on payment services[14] provides that each national payment institution must have a risk management and internal review system (precondition to KNF's consent to engage in such activities and the validity

[11] So, also the Office of KNF, c.f. UKNF's Position, p. 3.
[12] UKNF indicates also the sources of information.
[13] UKNF's Position, p. 2 and 3.
[14] Dz.U. 2020, item 794; hereinafter: "APS."

of the authorization). Such system is specified in more detail in Art. 64a of the Act on payment services. Another example is Art. 9(1) and (3) of the Act of 29 August 1997 – Banking Law[15], where it was laid down that a bank must have a management system composed of at least a risk management system and internal review system. As a result, the use of the term "system" is legitimate in relation to entities supervised by KNF (it is legitimate according to UKNF's Position). However, it becomes inadequate when it comes to other obliged entities.

ML/FT RISK ASSESSMENT IN EUROPEAN LEGISLATION AND THE POLISH SITUATION

The introduction in the Polish AML Act of the obligation to identify and assess ML/FT risk on the level of obliged entities was a consequence (as in case of many other statutory obligations) of the implementation of the Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC[16]. Identification and assessment of ML/FT risks in obliged entities are directly referred to in Article 8 IV of the AML Directive. This provision formulates expectations about risk assessment in a way which is typical for directives – the rules are of universal, abstract nature and point to the purpose which should be accomplished on the level of national legislation. The EU legislator imposes on Member States the obligation to shape the national legal system so that:

1) obliged entities take appropriate steps to identify and assess their ML/FT risks, taking into account risk factors relating to customers, the state or geographical areas, products, services, transactions or supply channels, and such steps are to be proportional to the status and size of the obliged entity (Article 8(1) IV of the AML Directive),

2) risk assessments are documented, revised and provided to appropriate authorities and interested bodies of professional associations, wherein the appropriate authorities may decide that individual documented risk assessments are not required when a specific risk typical to a given sector is clear and understandable (Article 8(2) of the Fourth AML Directive).

The other provisions of Article 8 of the Fourth AML Directive refer to strategies, review measures and procedures serving to effectively reduce ML/FT risk and to efficiently manage such risk. As a result, they relate only indirectly to the document containing the identification and assessment of ML/FT risk in the obliged entity, as mentioned in Art. 27 of the AML Act.

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[15] Dz.U. 2019, item 2357.

[16] Hereinafter: "Fourth AML Directive."

Juxtaposition of the regime under Article 8 of the Fourth AML Directive and the regime under the AML Act in respect of ML/FT risk assessment in obliged entities leads to two principal conclusions:

1) the Polish legislator decided to adopt solutions slightly more stringent than the presumptions of the Fourth AML Directive,

2) certain contents were almost directly copied into the Polish Act, which has both advantages and disadvantages.

The first of the above conclusions is based on the fact that the Polish legislator decided not to introduce the possibility mentioned in the second sentence of Article 8(2) of the Fourth AML Directive, that is introduction of the competence to decide to abandon individual risk assessment documentation. As proved above, the obligation to identify and assess ML/FT risk in the understanding of Art. 27(1) of the AML Act was imposed on all (any) obliged entities included in the statutory list. Moreover, the Polish legislator introduced, in respect of the duty to revise the prepared identification and assessment of ML/FT risks (Art. 27(3) of the AML Act), a minimum frequency of such revisions, which was not done by the European legislator in Article 8(2) of the Fourth AML Directive.

The second question (item 2 above) refers to a direct transposition from Article 8(1) of the Fourth AML Directive to Art. 27(1) of the AML Act of the catalogue of risk factors which must be considered in the identification and assessment of ML/FT risk, and direct transposition of the construction adopted under the first sentence of Article 8(2) of the Fourth AML Directive ("[t]he risk assessments referred to in paragraph (1)…") to Art. 27(3) of the AML Act. As a result, the conclusions drawn above about the inconsistency of specific provisions of the AML Act are also valid to Article 8(1) and (2) of the Fourth AML Directive.

THE POSITION OF THE OFFICE OF KNF ON ML/FT RISK ASSESSMENT IN OBLIGED ENTITIES

By the Communication of 15 April 2020, the Office of KNF presented its position on good practices in the area of conducting by obliged entities supervised by KNF of appropriate assessment of risks relating to the obliged entities as specified in Art. 27(1) of the AML Act. UKNF's Position was published on the authority's website.

In the first place, it must be indicated that both the cited UKNF's communication and UKNF's Position clearly indicate that the importance of ML/FT risk assessment in an obliged entity is derived by the Office of KNF from the fact that identification and assessment of ML/FT risk is a document which:

1) determines the activities undertaken by the obliged entity for the purposes of AML/CFT,

2) is a starting point for the development of AML/CFT-related internal processes and internal documents governing that area,

3) has an essential impact on the awareness of exposure to ML/FT risks and appetite of a given obliged entity for such risks,

4) has an impact on the scope and methods of applying financial safeguards,

5) has an influence on the activities undertaken to mitigate the risk in specific operational areas of a given obliged entity.

In the first part, UKNF's Position presents the applicable legal regime and discusses the legislation. The following parts were devoted to solutions which were not included in the AML Act, including risk assessment methods, procedure of adopting the document prepared as a result of the identification and assessment of ML/FT risks, or even the most frequent mistakes made by obliged entities. An annex was attached to UKNF's Position, presenting example areas relating to specific risk factors indicated in Art. 27(1) of the AML Act, which should be taken into account in the ML/FT risk assessment process. Such an approach to the discussed problems is important inasmuch as it makes a precious source of information and guidelines for obliged entities.

SUMMARY

The obligation under Art. 27(1) of the AML Act, that is the requirement to carry out and document identification and assessment of ML/FT risk relating to operation of an obliged entity may be assigned key importance from the point of view of the Polish AML/CFT system. In general, the obligation was properly constructed and addressed in the AML Act. Doubts are raised by the fact that consideration of the national ML/FT risk assessment was made an optional element of the process of identification and assessment of ML/FT risk.

The subjective scope of the obligation specified in Art. 27 of the AML Act covers all obliged entities in the understanding of the AML Act. On the other hand, the objective scope covers, in the first place, identification and assessment of ML/FT risk as well as its appropriate documentation on the terms specified in the AML Act, taking into account at least the elements indicated in that Act.

When it comes to the Position of the Office of KNF, it must be pointed out that such an activity of a supervisory authority, especially in terms of specifying the provisions of generally applicable law, is useful for the market for at least two reasons. First, it offers interpretative hints applicable to statutory provisions and, second, it presents the expectations of the supervisory authority, which becomes especially vital also because that authority is responsible for the review of performance of statutory obligations. The Position of UKNF, as a specialized state authority, may also be indirectly used by other obliged entities.

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