
Gazing into the crystal ball: 2018 regulatory outlook for Germany

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Germany has become notorious for its dysfunctional regulation of igaming under the Interstate Treaty on Gambling, the overarching regulatory framework which broadly bans online gambling with the exception of state lottery products and a restrictive licensing regime for sports betting. Regulatory enforcement of compliance with AML and data protection laws may be seen as the dark clouds ahead for the igaming industry in 2018. Recent announcements of Germany's northernmost state Schleswig-Holstein to (again) push for a broader reform of gambling regulation, however, suggest that there is also a silver lining on the regulatory horizon.

This article takes a look into the regulatory "crystal ball" to foresee the three key regulatory challenges the igaming industry will be facing next year...

AML – a "big stick" for regulators?

The deadline for implementing the EU's 4th Anti-Money-Laundering Directive (the '4AMLD') has already expired on 26 June 2017, and the federal Anti-Money-Laundering Act (the 'AML Act') came into force on that same day.¹ Whilst the AML Act excludes significant parts of land-based gambling, including retail lotteries and slot machine gambling in arcade halls, sports betting and online gambling in general are subject to the scope of the law.

The new key requirements also affect gambling operations, including the obligation to implement a risk management that is based on a comprehensive risk analysis of the business of vulnerabilities to money laundering and financing of terrorism, internal safeguards such as appointment of an AML officer, vetting and training of staff as well as thorough requirements to KYC and restrictions to payments.² The latter might cause compliance teams across the igaming industry quite a headache in that any anonymous means of payments, such as cash

vouchers, are banned and the amount of credit card transactions will be limited – unless the gambling operator can match the card owner with the owner of the customer account (sec. 16(4) AML Act).

Some igaming operators might be tempted to argue that they are only subject to the regulations of their country of residence, even if services are provided to customers in Germany and payment transactions originate from Germany.

In contrast, German regulators have a very clear-cut view on the issue. They consider German regulations – including AML – to apply if gambling services are provided to customers in Germany through a Germany-facing website. Some regulators, like the regulator of Lower Saxony in Northern Germany, have already stated that they consider the new AML law to be a "big stick and enforcing AML compliance is seen as a "chance to finally crack down on the unlawful online gambling sector", as one of the regulators put it in a conversation with one of the authors.

Indeed the sanctions provided for in the AML Act may be serious. In severe, systematic cases, fines may reach up to EUR 1 million or involve the skimming of the twofold benefit obtained from an AML offence (sec. 56(2) AML Act). It is noteworthy that the jurisprudence of many appeal courts is known to be rather "regulator-friendly", making it more likely that they would also rubber-stamp AML enforcement measures.³

As a consequence, companies operating in

¹ An overview of the 4AMLD is included in Spitz/Maier, The 4th Anti-Money-Laundering Directive: European efforts to halt the laundromat, *American Gaming Lawyer*, 2017 Fall Issue.

² For a more detailed overview of the AML Act, see Hofmann/Spitz/Maier, Implementing the 4th AML Directive: New challenges ahead for the German market, *European Gaming Lawyer*, 2017 Spring Issue.

³ As an example for more recent "anti-gambling" jurisprudence: Higher Administrative Court of Lower Saxony, decision of 17 August 2016, file no. 11 ME 61/16. The Higher Administrative Court is the appeal court in administrative jurisprudence.

Germany are well-advised to mitigate risks from AML enforcement by seeking ways to adapt to the new regulations in a business-friendly way.

The GDPR – not just a bad omen!

You certainly do not need a crystal ball to foresee that the implementation of the General Data Protection Regulation (the 'GDPR')⁴ will become one of the big regulatory challenges the gaming industry will be facing in 2018 – yet, tighter rules on the processing of personal data for many in the gaming industry appear to be more of a bad omen than a legal reality. Since the GDPR is a regulation, its rules will be directly apply within the EU upon its entry into force on 25 May 2018.

The GDPR aims at harmonising the data protection law within the EU not only by modernising the legal framework for data protection law, but also to unify the diverging practice of data protection agencies across the EU.⁵ Consequently, the GDPR emphasises the requirement of consent (Art. 6 GDPR) of the individual affected by the processing of data. A consent that comprises the purpose of the transfer of personal data has to be obtained, unless, for example, the data transfer is necessary

to fulfil a contract with the individual concerned. It is stipulated that the request for consent has to be presented in a manner which is clearly distinguishable from other matters in an "intelligible and easily accessible form" (Art. 7(2) GDPR) – failing which the corresponding declaration shall not be binding and, hence, the consent cannot be deemed to be obtained. Albeit it remains to be seen how the Member States will transpose these requirements in detail, it appears highly questionable whether common practice with the registration process, where the consent to data processing is "hidden" somewhere in the T&Cs, will suffice from May 2018 onwards. This also applies to the data processing through third parties.

Transferring data to third countries – you shall not pass!

Another key restriction applies to so-called "third countries". Essentially, personal data may only be transferred from EU-based operations if the third country where the recipient is located ensures an adequate level of data protection (Art. 45 GDPR). Where the European Commission has not confirmed the adequacy of data protection standards, personal data may

only be transferred to a third country if appropriate legal safeguards, such as binding corporate rules, standard data protection or contractual clauses, are in place.

The amounts of administrative fines for infringement of GDPR requirements can be massive as they may range up to EUR 20 million or 4% of the total worldwide annual turnover of the preceding financial year, whichever is higher (Art. 83 GDPR).

It is foreseeable that the German Data Protection Commissioners – who in the past have not shied away from using sharp words in their criticism of social media giants or the Safe Harbor Agreement with the US for shortcomings in data protection⁶ – will not waste time in enforcing the new rules.

Considering the significant risks that may arise from non-compliance, including financial risks from sanctions and jeopardising existing licences that tie in with data protection rules, it is recommended to review data protection policies and measures in due time before May 2018.

Gambling regulation under the Interstate Treaty: There's no vision there at all

Roughly a year ago, in October 2016, the Prime Ministers of the German states agreed on an amendment to the Interstate Treaty on Gambling (the 'Interstate Treaty'). A pivotal part of the Interstate Treaty, the licensing process for sports betting, has been held to infringe EU law, including the freedom to provide services and the principle of transparency.⁷ As a consequence, none of the 20 licences for sports betting have been issued to date. Rather than implementing

4 Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=DE>

5 Cf. the 9th recital of the GDPR: "The objectives and principles of Directive 95/46/EC remain sound, but it has not prevented fragmentation in the implementation of data protection across the Union, legal uncertainty or a widespread public perception that there are significant risks to the protection of natural persons, in particular with regard to online activity."

6 E.g. the Data Protection Commissioner of Schleswig-Holstein: <https://www.datenschutzzentrum.de/artikel/221-ULD-empfeht-nach-dem-WhatsApp-Facebook-Deal-Wechseln.html#extended>; <https://www.datenschutzzentrum.de/artikel/952-Safe-Harbor-ist-keine-ausreichende-Grundlage-fuer-Datenebermittlung-in-die-USA-Schlussantrag-im-Verfahren-vor-dem-EuGH-spricht-deutliche-Sprache.html#extended>

7 Including the Court of Justice of the EU in the judgment of 4 February 2016 in case C-336/14, *Sebat Ince*.

a more visionary reform of the Treaty – as suggested by the state of Hesse⁸ – the majority pushed for a so-called “minimally invasive reform” which would broadly conserve the Interstate Treaty. The corresponding Amendment Treaty⁹ removes the limit to 20 sports betting licences and provides for the issuance of up to 35 “interim licences” to all the applicants that had passed stage 2 of the licensing process as of 1 January 2018 – provided that those applicants comply with key restrictions under the Interstate Treaty, including the ban on online casino and dropping important bet types in in-play betting. Further, the Amendment Treaty reserved the right of the German states to return to a state monopoly in gambling after its expiry in 2021. Consequently, enthusiasm within the industry about these regulatory prospects for 2018 has been very limited – to say the least.

Gaming in the North – Günther is coming

Germany’s northernmost state Schleswig-Holstein (‘SH’) already played a rebel role in 2011, when it refused to sign the Interstate Treaty and enacted its own Gambling Act which closely resembled the Danish model. This year, a surprising turn in state elections brought the political parties responsible for the original SH Gambling Act – Conservatives and

Liberals – back in power. As for the SH Government’s agenda in gambling policy, newly elected Prime Minister Daniel Günther seems to be determined to seek a new approach. The agreement of the government coalition (which also involves the Green party) states:

“The coalition will not approve of the Second Interstate Treaty Amending the Interstate Treaty in parliament. Schleswig-Holstein will terminate the Interstate Treaty on Gambling and, together with other states (e.g. Hesse, Rhineland-Palatinate and North Rhine Westphalia), it will seek a viable, EU law-compliant solution for the entire sector of sports betting including online casino gaming as well as poker gaming which will be oriented towards the regulations of the Gambling Act Schleswig-Holstein that has been in force until 2013.”¹⁰

Schleswig-Holstein 2.0

Since the Amendment Treaty must be ratified by all 16 state parliaments in Germany by 31 December 2017, SH not ratifying the Amendment Treaty will cause the “minimally invasive reform” to fail. It is expected that this will lead to a continuation of the status quo in 2018, i.e. an unregulated German market in sports betting and online casino – a situation which, however, most of the igaming operators have been able to handle well over the past decade.

SH’s initiative is also likely to give fresh impetus to a broader political discussion throughout 2018 about reasonable regulation of gambling, including the licensing of online casino and sports betting.

To conclude, even if, gazing into the crystal ball, some dark enforcement clouds overshadowing the area of compliance may be visible, there is also a silver lining on the licensing horizon which might provide new opportunities to the igaming industry in Germany.

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⁸ The Guidelines for Modern Regulation of Gambling of the Hessian Minister of the Interior of 8 October 2015 are available at: <https://www.hessen.de/pressearchiv/pressemitteilung/hessen-macht-konkrete-vorschlaege-fuer-eine-moderne-gluecksspielregulierung-0>

⁹ The “Second Interstate Treaty amending the Interstate Treaty on Gambling” of 28 October 2016.

¹⁰ The SH coalition agreement is available in the German language at: <http://www.fdp-lv-sh.de/sites/default/files/uploads/2017/06/16/koalitionsvertrag2017print.pdf>