



The hot topic in the EU of the end of 2015 and the start of this new year is without any doubt the shake-up of the EU rules applicable to the processing of personal data. This article intends to shed light on new provisions that, once finally adopted, will impact lotteries and gambling operators. Processing of customer data, extensively done by online gambling operators to attract new customers and push their customers to play more, will no longer be possible in the same way.

That comes in addition to the recent judgment of the Court of Justice of the EU, in the C-362/14, Maximilian Schrems v Data Protection Commissioner (about the use of data by Facebook), in which the Court annulled the European Commission's Decision¹ that laid down the safe harbor principles allowing the transfer of personal data from the EU to the USA under Article 25(1) of the current

panies based on both sides of the Atlantic are no longer allowed to directly transfer the personal data obtained in the EU to their US establishment. Such an automatic transfer could be found in breach of EU law (and hence be suspended by national Data Protection Commissioners) considering that, absent of Decision 2000/520, nothing demonstrates that the Commission finds that the USA ensures an adequate level of protection of the EU residents in the processing of their personal data³.

Personal Data Protection rules are currently provided for in the DPD. It must be emphasized that actual rules are laid down by a Directive. A Directive is an EU legislative instrument that requires, in principle, an implementation in the national legal framework of the EU Member States in order to produce legal effect. Moreover, such text is binding on the Member States as to the objectives to be achieved, but Member States maintain discretion as to the means to be carried out to meet the purpose of the Directive. This leads to diverging national regulations, even though they are all aimed at the same purpose. The overhaul of the EU data protection laws leads to the adoption of two new legislative texts that aim to substitute and complement the current regime. The first one takes the form of a Directive, i.e. the prospective Directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data (this text is not addressed in this article), the second (and the text with the most significant importance for all companies in the EU) will be adopted in the form of a Regulation⁴. Unlike a Directive (and hence the actual DPD), a Regulation is a legislative text that does not need to be implemented into national law to have legal effect in a Member State. As such, a Regulation is entirely and directly binding on all EU Member States, hence producing legal effect in the Member

Overhaul of the EU Personal Data Protection Laws: Why this is an opportunity for well-prepared Lotteries and more a problem for online gambling operators.

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Directive on personal data protection (“DPD”)². The ruling of the CJEU is of great importance, as it implies that all transfers of personal data from companies based in the EU to US companies may be challenged since the USA is not anymore presumed to ensure a level of protection equivalent to the protection guaranteed within the EU in accordance with Article 25(6) DPD. Moreover, com-

1 Decision 2000/520.

2 Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

3 The EU and the US are however currently negotiating new safe harbor principles.

4 (The prospective) Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation).

States independently from any national law. That is to say that Member States and natural and legal persons have the obligation to comply with the letter of the Regulation as soon as it comes into force. That is already a significant modification for the Member States of the EU and the market.

The future General Data Protection Regulation (“GDPR”) sets multiple obligations upon lottery operators and provides enhanced rights to citizens. Lotteries should already prepare their compliance with the prospective GDPR. The GDPR must yet receive the final vote from the European Parliament and the Council of the EU, but a final compromise agreement has been reached between all EU legislative institutions on 15 December 2015. The text is moreover not likely to suffer from any amendments in the coming weeks.

We outline in the next paragraphs of this text the (new) rights that citizens are entitled to, the main obligations impacting lotteries and other gambling operators, and the steps required for lotteries to meet those new obligations.

First, we start with the new rights granted to consumers. One of the new rights, coming from the case law of the CJEU⁵, is the “right to be forgotten.” This is the data subject’s right to request the data erasure to either the controller and/or the third party to whom the data have been disclosed in case, for example, data are no longer necessary for the processing purpose for which they were collected; data have not been duly processed; there is a decision or judgment ordering the data erasure by a court or a regulatory authority in the EU; or the data subject withdraws its consent. A second addition is the right to “data portability.” This grants to the data subject the right to receive an electronic copy of the data undergoing the processing in a commonly used format and that allows further use of the data (by e.g. another controller or processor). Additionally, data subjects benefit from the following new rights: right to have an electronic and intelligible copy of the data transmitted and intelligible information on whether their data are processed, the period during which they will be stored, whether they are transferred to a third party, the details of the data protection supervisory authority to lodge possible complaints and the rights to request the erasure or modification of the data transferred; right to object to the processing of the data in particular situations, such as objection to the processing of personal data for marketing purposes; the right to lodge a complaint with the national supervisory authority; and the right to initiate pro-

ceedings against the controller and/or the processor of the data, either before the Courts of the Member State of establishment of the controller or the place of residence of the data subject.

We now turn to the obligations that must be met by companies acting as data controllers or processors. The most significant principles applicable to the processing of personal data lotteries are subject to under the future GDPR are outlined in the subsequent paragraphs of this article.

Lottery and gambling operators (that qualify as data “controllers” under the GDPR) are allowed to process data if at least one of the following situations applies (among other things): (i) controllers have received the data subject’s consent. The final text of the GDPR now requires this consent to be unambiguous (and explicit in case of sensitive data); (ii) the processing is necessary for performing a contract of which the data subject is a party (which is most likely to be the case especially with regard to online gambling activities); (iii) processing is required to follow legally-binding rules under national law to which the controller is subject (and typically applicable to lottery and gambling operators since they are usually subject to specific national legislation requirements in fields such as player accounts and customer due diligence). The burden of proof relating to this consent must in any case be borne by the controller/processor. Moreover, should lotteries or gambling operators receive the data subject’s consent in a written statement concerning other issues/aspects as well, then lotteries must be able to demonstrate that the consent given for the processing of data is clearly identifiable and distinguishable from the statements applicable to the other concerns. To illustrate this obligation, we can put forward that, taking account of the fact lottery operators active in the EU are in principle, and especially with regard to their online activities, subject to national legal obligations such as setting up player accounts or checking players’ identity and, in particular, given that the 4th Anti-Money Laundering Directive⁶ now obliges all gambling operators to conduct (under certain conditions) customer due diligence (entailing, especially, the collection of their customers’ personal data and the effective beneficial owner’s identity) lotteries, as well as other gambling operators, will have to restrict the processing to the extent necessary for the purpose for which the data has been gathered (e.g. should data be provided for AML purpose, such data may not be used for commercial purposes - unless otherwise approved by the data subject).

5 See C.J.E.U., Google Spain, C-131/12, 13 May 2014.

6 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

Lotteries and gambling operators are also subject to the obligation to process data lawfully, transparently and fairly and to keep and record data in a form that allows its limited storage (with an exception under specific conditions, longer-period storage allowed when data are processed for archiving purposes in the public interest e.g. for historical or statistical purposes), including the obligation to maintain data up-to-date. Operators must collect data for strictly limited purposes and perform a proportionate processing of the data i.e., not processing the data beyond what is necessary to attain the purpose it has been gathered for (“data minimization”). Furthermore, data controllers will have to carry out the measures necessary for the data subjects to perform their rights. This includes for instance the implementation of internal policies, measures and procedures to comply with the following: providing the data subjects with information on the processing of their data (see above), replying to their information requests, informing about the right to lodge a complaint, the right to erasure, to withdraw their consent, to make any modification to their data; and finally, notifying the national supervisory authority and the data subjects of any high risk breaches that may impact the confidentiality and security of the data provided. The obligation to keep due documentation to demonstrate that the processing and gathering of data is/has been performed in compliance with the GDPR is also part of the general obligations imposed upon lotteries.

Most of the lotteries and gambling operators are likely to fall under the obligation to designate a Data Protection Office (“DPO”) who must be involved in all issues relating to the protection of personal data. Secondly, lotteries will have to perform an impact assessment. The aim here is to assess risks that could arise from personal data processing and that could impact the data subject’s rights and freedoms (e.g. discrimination, fraud, financial loss, theft ...). This obligation also entails possible periodic reviews to demonstrate that the processing is still being performed in due compliance with the data protection impact assessment. Moreover, lotteries will face the obligation to obtain the prior authorization or conduct a prior consultation of either the DPO or, in the absence of a DPO’s appointment, the supervisory authority before the processing of the data to ensure the data processing is compliant with the GDPR and to limit the risks involved when, for example, the impact assessment shows the processing is likely to give rise to risks due to the nature, scope and purposes of the processing operations or when the DPO or the supervisory authority deems it necessary to carry out a prior consultation. Lotteries and gambling operators must also implement all required

measures to guarantee that the processing of the data is secured and as well, to implement policies and measures (technical and organizational) to demonstrate that data is processed in compliance with the GDPR’s provisions. This obligation entails setting up data protection measures by default, i.e. measures automatically processing the required data and that do not go further than what is necessary, and data protection measures by design, i.e. measures created having regard to specific processing features (including the scope, nature and purposes), with the aim of protecting data subjects’ rights and ensuring a high level of security given the likelihood that such processing creates risks and damages to data subjects’ rights and freedoms.

For online gambling operators the application of the new anti-money laundering rules and the GDPR will most likely be much harder and have a more important impact on their business. In the UK, some betting operators did already express concern about the burden it will create for them. They have used the data of customers in various, often more aggressive ways, like online direct advertising and monitoring of the player behavior. The new rules will no longer allow them to do so in the same manner, which will as such be a benefit for the average consumers.

Last but not least, the amount of the fines for non-compliance with the GDPR can now reach up to 4% of the controller/lottery’s global annual turnover.

To sum up what has been outlined above, as from the final adoption of the GDPR (that is likely to occur in the coming weeks), all EU Member States and data controllers (hence including lotteries) will have two years to carry out all procedures, policies, impact assessments, appointments, to abide by the rules laid down by the new GDPR. In view of the sanctions lotteries may face in case they are found in breach of the GDPR and the workload required to ensure a strict compliance with this new legislative instrument, any loss of time appears to be very detrimental to lotteries’ business, image and solvency. While it will also be an issue for lotteries, a reason why the European Lotteries Association is already paying attention to it and talking to the authorities in a constructive manner, the spectre of a 4% of global annual turnover fine is hanging over the private gambling and betting operators, especially the online operators, who have extensively used their customer data to enhance their business. ■