



GERMANY

Hope and fear for the online gambling industry – the EU has to intervene... again

The European gambling market remains a regulatory construction site, and Germany is anything but innocent in this regard. Whilst large parts of Europe have in the meantime passed modern gambling acts geared towards competitiveness and player protection, the German federal states have shifted into reverse gear by amending the inter-state treaty on gambling (I. GlüÄndStV, or E-15 model) that will be adopted by at least 15 of the 16 federal states; up to now, the state gambling act initiated by the CDU and FDP is still effective in Schleswig-Holstein – an act which industry experts consider to be a milestone as, among other issues, it regulates both the online poker and online casino market. Nevertheless, the governing coalition in Kiel, consisting of SPD, Die Grünen and Südschleswigscher Wählerverband (SSW), is preparing to repeal the act and to join the inter-state treaty on gambling, which continues to concern the European Commission – in contrast to the applicable state law. During the summer, the independent monopoly commission which advises the federal government, had also

criticised the provisions of the treaty, and had praised the Kiel act.

Betting providers are questioning tender procedure

In the meantime, the front against E-15 has been growing: the European Gaming and Betting Association (ECBA) has filed an objection with the EU Commission, requesting that the Commission initiate infringement proceedings against the Federal Republic of Germany¹. Secretary General, Ms Sigrid Ligné, said that Germany is currently preparing to issue licences on the basis of a highly controversial tender process. According to ECBA, there is increasing evidence “that this process is not intended to fulfil the real purpose of an open, fair and transparent trans-European tender process.” One of the aspects which has recently been under discussion is the neutrality of a law firm in Cologne which advises the companies of the German Lottoblock whilst, at the same time, organises the issue of licences under the new inter-state treaty on gambling.

During the notification proceedings in the spring, the Commission, in view of E-15, repeatedly criticised the bill's

discrimination of sportsbetting providers, and online poker and casino games, as well as the arbitrary decision to issue 20 licences nationwide. The Commission had explicitly left open the option of initiating infringement proceedings. According to Commission statements, the German states have failed to show why online poker and casino games have particular potential for player addiction and how they constitute a specific money laundering risk. A response from Brussels on repealing the act is expected soon.

There is no justification which would comply with European law for the states' decision to move into 'reverse gear', and in particular for the discrimination of online poker in comparison with online sports bets; a 'no' vote from Brussels is probably as inevitable as the initiation of infringement proceedings against the E-15 monster.

Award for the Schleswig-Holstein gambling supervision

On the other side of the regulatory scale, the authors of the Schleswig-Holstein act – which is oriented around the successful Danish model and also regulates the poker and casino segment – have documented how player protection and abuse prevention

¹ (<http://www.ecba.eu/de/press/614>)

can be reconciled with attractive gaming options. A short glance to London proves the international importance of this legislation where, in mid-October 2012, during the autumn conference of the International Masters of Gaming Law (IMGL), Guido Schlütz, head of the gambling supervision at the Kiel Ministry of the Interior was presented with the award for "Gaming Regulator of the Year" in Europe. IMGL is an association of more than 300 experienced gaming law experts, including members of state supervision and regulatory authorities, university professors and gaming lawyers, and is represented in 38 countries worldwide as well as in 32 US states. One of the previous winners of the IMGL Award is Morten Ronde, who, as the former head of the legal department of the Danish gambling supervisory authority, is considered as the father of the Danish regulatory model. In his award speech, Ronde compared Schlütz to a successful beekeeper who during his work had vigilantly kept in view all those involved in the process, in order to avoid being stung. He described the Schleswig-Holstein act as a positive further development of the Danish model.

Which system will 'win the race' in 2013 is, again, up to the German courts and Brussels. The recently elected government in Schleswig-Holstein wants to repeal the state's lauded Gaming Reform Act (GRA) to join the ITG regime, but it is proving more difficult than some thought. In fact, Schleswig-Holstein's Ministry of the Interior just announced that it is bound by law to comply with the act and issue licences for sportsbetting and online casino games as long as the GRA is in force (at least until January 2013). Germany's other 15 federal states still prohibit all kinds of online casino games but a tender procedure for 20 possible online sportsbetting licences was published in the Official Journal of the EU and was open for application until September 4, 2012. At the end of June 2012, the federal parliament (Bundestag) adopted an amendment to the German Horse Betting and Lottery Act (RWLG)

that stipulates a tax burden of five percent of turnover on sportsbetting in Germany. Moreover, a draft Directive on Advertisement for the gambling industry is being monitored by the advertisement and gambling industries. Shifts in the industry are also apparent given the new draft German Anti-Money Laundering Act, which stipulates strict requirements for online gaming providers, a direct reaction to recent regulatory reforms.

Schleswig-Holstein's GRA

To date, the GRA remains in force despite the May election of a new left-wing coalition that is firmly against the law. When the government came into office, opponents of the gambling liberalisation process were vocal. The head of the Social Democrats, Ralf Stegner, proclaimed that the time of the "Las Vegas in northern Germany" is over before it really started. But they were mistaken. So far, seven sportsbetting licences have been issued, and more may follow. In July, Schleswig-Holstein's minister of the interior, Andreas Breitner, admitted what experts predicted: it takes more to repeal a law than bold announcements; in this case, at least two parliamentary sessions and a notification to the EU Commission. According to restrictions, the GRA cannot be repealed before the end of the obligatory standstill period of at least three, possibly four months after notification. A moratorium to stop the assessment of licence applications before the GRA is formally repealed faces severe constitutional obstacles. Nonetheless, the government maintains its intention to repeal the GRA and join the ITG. However, since the GRA remains in force, the Ministry of the Interior must continue to assess applications and issue licences. Otherwise, the administrative court in Schleswig-Holstein has the power to order the Ministry of the Interior to issue a licence. Two gambling providers have already taken legal action to force the Ministry of the Interior to issue a decision on their application. The most likely scenario is that the GRA will remain in force until at

least the end of 2012. Moreover, there is only a one-vote majority in the governing coalition, so some politicians might wonder if it is a smart move to repeal the GRA that is compliant with constitutional and EU law in order to join an inter-state treaty which faces strong criticism.

The ITG and the RWLG

The new inter-state treaty on gambling (ITG) came into force as of July 1, 2012, since 14 federal states (all except Schleswig-Holstein and North Rhine-Westphalia) ratified the ITG in their regional parliaments. Contrary to Schleswig-Holstein's GRA, the ITG prohibits online casino games and restricts the online sportsbetting market to 20 providers and a trial period of seven years. The arbitrary limitation of 20 sportsbetting providers and differing regulation of online casino games, raises fundamental concerns in regards to the freedom to provide services and coherence principle stipulated in EU law. The Germany Monopoly Commission, an independent committee authorised by the German Federal Government, criticised the regulatory approach of the ITG and questioned its viability to fight the grey and black market, as well as questioning its compliance with constitutional and EU law. It was argued that the trial period should also apply to online casino games, since there is no reliable proof that online casino games have a higher addiction potential than sports betting. Moreover, the Monopoly Commission argued that a taxation system based on gross profit as stipulated in the GRA would be more appropriate for the gambling sector than the turnover tax model of the RWLG. Despite criticism, the Ministry of the Interior of Hesse (the authority in charge of managing the application procedure) opened a tender procedure for gambling providers to apply for one of the 20 sportsbetting licences. The requirements are comparable to those in Schleswig-Holstein. Applicants must prove reliability, expertise and, in the second stage, their performance

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potential. Applicants will have to provide a sales concept, a profitability concept, a security concept, a social concept and a payment concept. However, different to the Schleswig-Holstein licence requirements: each licence holder must provide a security deposit in the form of an unlimited bank guarantee of €5 million which may be increased to €25 million. In addition, the sportsbetting provider must name at least two persons to represent the applicant's IT and business department. These persons have to provide a CV that proves at least five years experience, including a diploma in IT or business studies. The first stage of the tender procedure ended on September 4, 2012.

Once a deadline is missed, a provider's last hope is the reopening of the tender procedure if there are not enough successful applications for licences. However, this remains at the regulator's discretion. In the context of the tender procedure, another issue raised concerns the law firm CBH's management of the tender procedure. This law firm is the legal advisor of the state owned German gambling monopoly Deutscher Lotto- und Totoblock. The conservative party in Schleswig-Holstein is concerned about a conflict of interest and demands CBH be excluded from the tendering procedure. Nonetheless, licences for 15 German states should be issued before the end of the year, and we will know then how serious states take the intention to open the German sportsbetting market to private operators. But it will be the next few years that show if the ITG complies with Constitutional and EU law. A comparison between GRA and ITG shows that German gambling regulation is far from "coherent and consistent", two key requirements stipulated by the European Court of Justice for an EU law compliant national gambling regulation. Schleswig-Holstein has issued seven sportsbetting licences based on the GRA's conditions. In addition, 49 licence applications (28 for sportsbetting and 21 for online casino games) are still pending. The other 15 German states are about to licence up to 20 sportsbetting providers

based on the ITG's conditions but still want to exclude online casino game operators from the German market.

Draft Advertising Directive

Advertising is a key tool to channel customers to the regulated market. However, drafts numbers one and two of a directive on advertising for the gambling industry contains restrictions that stakeholders call 'censorship'. The directive refers to all parties involved in advertising. This is a fundamental change to the existing 'rule of separation' in German advertising law. The most controversial issue is that the draft requires regulatory approval for each advertising campaign. The authority will assess each campaign and issue permission on a case-by-case basis. The criteria for each permission will be: i) content, ii) distribution channel, iii) presentation of warnings and safety instructions, iv) addiction potential, and v) whether the campaign channel players to the regulated market. Recently, there were indications that the draft could be revised and requirements for advertising campaigns softened. A final version is expected by the end of the year.

Anti-Money Laundering Act (Geldwäschegesetz, GWG)

As a reaction to the recent developments, the federal German government adopted a new draft German Anti-Money Laundering Act. If ratified in the German parliament (Bundestag), the draft would increase the GWG's scope to include licensed operators and agents of online games of chance. Banks and financial institutions, as well as issuers and acquirers involved in payment proceedings related to online gaming, would have to comply with additional monitoring and control requirements. According to the draft, gambling providers will be obliged to take measures to avoid money laundering and financing of terrorism and install appropriate risk management. The draft only allows one player account per player, per gaming provider. Gambling providers would be obliged to fully identify the player before registering and establishing an account.

In addition, transactions from a player's payment account to his player account and vice versa would only be allowed via certain transaction methods.

Conclusion

Whilst there are growing indications that the rest of Europe is also following modern and now award-winning regulatory models, such as the ones in Denmark and in Schleswig-Holstein, German legislation continues to be characterised by a strict attitude of denial, which will probably lead directly into new EU infringement proceedings.



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