

Confused: the state of online gambling in Germany

The German online gaming market is in a state of transition following the newly elected coalition government in Schleswig-Holstein and the recently enacted Interstate Treaty. The situation in Germany is far from clear in regards to online gambling as Dr. Wulf Hambach and Maximilian Riege, of Hambach & Hambach law firm explain.

There are two coexisting, but different regulatory regimes in Germany: the Gaming Reform Act (GRA) from Germany's northern state, Schleswig-Holstein and the new Interstate Treaty on Gambling (ITG). Recent drafts, acts and directives demonstrate that gambling operators have to be open to new developments in the German market.

The recently elected government in Schleswig-Holstein wants to repeal the 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 licenses for sports betting and online casinos games as long as the GRA is in force. Germany's other 15 federal states still prohibit all kinds of online casino games but a tender procedure for 20 possible online sports betting licenses was published in the Official Journal of the EU and is open for application until 4 September 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 5% turnover for all sports betting offers in Germany. Moreover, a draft Directive on Advertisement for the gambling industry is being monitored by the advertisement and gambling

industry. 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. The following analysis will address some of the core elements of Germany's new gambling regulation.

Schleswig-Holstein's GRA

To date, the GRA remains in force despite the election in May of a new left-wing coalition 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 sports betting licenses 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 license applications before the GRA is formally repealed face severe constitutional obstacles.

Nonetheless, the government maintains its intention to repeal the GRA and join the ITG. It plans to hold the first parliamentary hearing in the first session after the summer break on 24 August 2012. However, since the GRA remains in force, the ministry of the interior must continue to assess

applications and issue licenses. Otherwise, the administrative court in Schleswig-Holstein has the power to order the ministry of the interior to issue a license. 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 interstate treaty which faces strong criticism.

The ITG and the RWLG

The new Interstate treaty on Gambling (ITG) came into force as of 1 July 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 sports betting market to 20 providers and a trial period of 7 years. The arbitrary limitation of 20 sports betting 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 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 bets. 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 sports betting licenses. The requirements are comparable to those in Schleswig-Holstein. Applicants must prove reliability, expertise and in the second stage their performance 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 license requirements: each license 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 sports betting 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 5 years experience, including a diploma in IT or business studies.

The first stage of the tender procedure ends on 4 September 2012. Once the deadline is missed, a provider's last hope is the re-opening of the tender procedure if there are not enough successful applications for licenses. 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 known to be the legal advisor of the state owned German gambling

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.

monopolist '*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, licenses 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 sports betting 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 sports betting licenses based on the GRA's conditions. In addition 49 license applications (28 for sports betting and 21 for online casino games) are still pending. The other 15 German states are about to license up to 20 sports betting providers based on the ITG's conditions but still want to exclude online casino game operators from the German market.

Draft Advertising Directive

Advertisement is a key tool to channel customers to the regulated market. However, the first draft 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 advertising 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) does the campaign channel players to the regulated market.

Recently there were indications that the draft could be revised and requirements for advertising campaigns softened.

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.

Dr. Wulf Hambach Partner
Maximilian Riege Senior Associate
Hambach & Hambach
W.Hambach@timelaw.de
M.Riege@timelaw.de