

An unhappy victory

After Hesse admitted defeat and the ECJ launched an investigation into the licensing process, the end of Germany's derided State Treaty is closing in. **Robin Harrison** reports

PLANS TO LIBERALISE Germany's sports betting market were first announced in March 2011, with the revised State Treaty on Gambling coming into force in July 2012. Since then the licensing process has been dogged by delays, incompetence and court battles.

Three years on and not a single licence has been issued (although 20 were approved – see box), and the European Court of Justice has been asked to assess the legality of the regulations. This follows damning verdicts from the courts in Wiesbaden and Frankfurt. Even the Hesse interior minister, whose department is responsible for issuing Germany's 20 sports betting licences, has called for an overhaul of the treaty, admitting that the legislation is incapable of achieving its objectives.

Peter Beuth, Minister of the Interior and Sport for Hesse said the treaty was at a "dead end": "Three years of testing is sufficient to determine that the current licensing process, and indeed the treaty itself, must be changed."

The end is nigh for the State Treaty but it is a conclusion that leaves Germany's powerful lottery operators unhappy and many private operators deeply frustrated after a costly war of attrition.

Many blows have been struck against the licensing process but the Administrative Court of Wiesbaden might have thrown the knockout punch. In May, it issued a ruling

denouncing every element of the procedure. The court handles all claims filed by international operators, including the likes of bet365 and BetVictor.

Dr Stefan Bolay of Hambach & Hambach Rechtsanwälte law firm said that the decision of the Administrative Court of Wiesbaden has to be ratified by the Higher Administrative Court but looks likely to force a total rethink, particularly because the Administrative Court of Frankfurt made a similar ruling on 27 May.

"From a legal perspective, it is likely that the whole concession procedure (or at least a part of it) has to be conducted again, if no political solution will be found" Dr Bolay said. "Therefore, these latest developments seem to be the beginning of the end."

The ruling is damning, attacking the process's lack of transparency. It highlights the fact that applicants were only informed of the minimum requirements for securing a licence after they qualified for the second stage of the process. This meant operators had no idea what information to submit in the first instance. Furthermore, the treaty did not set out the technical requirements or even the licensing requirements, simply leaving this to Hesse's Ministry of Interior and Sport (HMDIS).

"The main criteria for the minimum requirements should be set out in a clear, precise and unambiguous manner, to ensure

that every applicant is duly informed and fully understands what they are being asked. It was clear that this just hadn't happened," the court said.

It also criticised the auditing and decision-making process, noting that HMDIS had failed to take minutes of meetings in which it thrashed out the process. The Administrative Court said the state should not have been left to make decisions of national importance, without direction, likely rendering its decisions void.

"There is no real outlook or prospect of when the licensing process is going to end," says Hambach and Hambach partner Wulf Hambach. "In that situation, after investing a lot of money into the project, operators have the right to think that the tender process ends with the issuing of a licence in a reasonable period of time."

It has not, which leaves operators in something of a quandary. Those that have applied for a licence, even those not approved for one of the 20, can legitimately argue that under European Union law they can continue to offer services until the process is completed. It is less clear which products, markets and bet types they can offer.

As part of the application process, operators had to submit a list of proposed bets and markets, based on vague guidelines provided by HMDIS. This could be seen as legally binding, but some states could decide to ignore these.

Schleswig-Holstein's liberal gambling



Dr Stefan Bolay,
Hambach & Hambach
Rechtsanwälte

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Frustrating progress: how the German State Treaty on Gambling has played out since March 2011

March 2011

Federal states agree to partially liberalise the market with new State Treaty on Gambling.

April 2011

Proposals to limit market to seven licensees and impose a 16.7 per cent turnover tax creates panic in the industry.

July 2011

State vote on new treaty delayed for a second time over concerns from the EU and Malta, querying its compatibility with European Union law.

Sept 2011

Rebel state Schleswig-Holstein approves liberal gaming regulations, allowing all products and unlimited licences.

Oct 2011

State Treaty on Gambling ratified by 15 of Germany's 16 federal states.

March 2012

EC voices concern but gives Germany two years to test new gambling legislation.



regime adds another question mark to an increasingly complex situation. A change of government in 2012 saw the state abandon its EC-approved liberal gaming regime – which contained no restriction on the number of licencees and products – in favour of joining the other 15 states in the State Treaty. Then a European Commission ruling batted the decision on the legality of two regimes in one country back to the German courts and a final ruling is yet to be made. Anything but a total denial of its legal status will see operators with Schleswig-Holstein licences return to

the courts in defence of the Schleswig-Holstein regime.

Troubled times

The State Treaty on Gambling has stumbled through a series of controversies, dating all the way back to March 2011 (see timeline), when the federal minister-presidents revealed they would look to reform the legislation. At the time private lottery operators expressed discontent at being prevented from re-entering the market while sports betting operators were allowed in.

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Wulf Hambach, Hambach & Hambach

June 2012

Following local elections, Schleswig-Holstein's new government pledges to scrap breakaway legislation to rejoin the State Treaty once the terms of licences expire.

June 2012

German states cut turnover tax on sports betting to five per cent.

July 2012

State Treaty comes into force as Germany's Monopolies Commission attacks it for being focused on financial, rather than social responsibility goals.

Aug 2012

Hesse Ministry of the Interior and Sport (HMDIS) launches licensing process for operators to apply for one of Germany's 20 sports betting licences.

Sept 2012

HMDIS extends licence application deadline, with operators struggling to file masses of paperwork in time and confused by the lack of transparency.

Nov 2012

HMDIS again extends application deadline, now into January 2013.

April 2013

Reports emerge that HMDIS is finally set to issue 14 of the 20 sports betting licences

Two models were proposed following an EC ruling in September 2010, which said the previous monopoly model was in breach of European Union law. One was a model similar to that which exists today, and another was something akin to the Danish model, with a 20 per cent gross profit tax. Influenced by the state lottery operators, many of whom were worried at the effect of private operators on their business, the latter was rejected by state leaders.

They have never given a justification for the limit on the number of licences. It has been the key bone of contention and the main barrier to completing the licensing process. As far back as May 2010 the German Olympic Sports Federation, with the support of the German Football Association, Football League and Foundation for Sports Support, said that while it supported state lotteries maintaining their monopoly status, it would approve the liberalisation of the sports betting market. Crucially it said that it did not believe there should be a limit on the number of licences that could be issued.

"In December 2011, the prime ministers signed the new interstate treaty. I still remember when we became aware that there was a limit of 20 licences and every legal expert said this limit cannot be justified," recalls Matthias Spitz of Melchers law firm.

The sports governing bodies became part of the Sports Advisory Board, essentially a trust of leading sports administrators, who would have a say in the the licence decision-making process alongside the Glücksspielkollegium, which was a central gambling authority made up of regulators from each state.

The Sports Advisory Board resigned in April this year, complaining it was being ignored by the Glücksspielkollegium.

The Deutsche Telekom intervention

Private operators who continue to offer their services in Germany without a local licence are commonplace under the current dysfunctional licensing regime, but the launch of an online sports betting site by a major corporation that is part-owned by the federal government – in the absence of a licence – shows just how dysfunctional it is.

In May 2012, Deutsche Telekom took the decision to amend its corporate statutes to allow it to enter the sports betting market. This saw the company partner with Österreichische Sportwetten (ÖSW), through the Deutsche Sportwetten (DSW) joint venture, in which it holds a 64 per cent stake, launching its Tippi3.de brand in the market in April this year.

However, Tippi3 managing director Jochen Weiner does not believe his company has committed any wrongdoing by launching its offering before licences have been issued.

That is not to say Weiner believes the failure of the licensing process means it is open season for others to enter the market. After all, DSW was one of the 20 applicants selected for a licence, before the process was derailed by legal challenges.

"Our approach is that the sports betting market should be regulated and we will commit to follow any regulations that come up, so we have to see what the courts decide [in relation to the current treaty].

"For Deutsche Sportwetten and Tippi3 as a consumer brand it is important that we have a level playing field, though how things will play out I can't say. We are sticking to what is in place, following the rules and will continue to do so."

But some argue that Tippi3 is not following the rules. Germany's association of state-owned lottery operators, the Deutsche Lotto- und Totoblock (DLTB) has attacked the launch, going as far as to accuse Deutsche Telekom of playing "a vile trick with Germany's regulations" and calling for government intervention to have Tippi3 taken offline.

"The German legislature has clearly established that only companies which have a licence to offer sports betting in the country – and that has always been the attitude of the federal government and the states – are allowed to do so," said the DLTB's current chiefs, Saarland Sport Toto managing directors Michael Burkert and Peter Jacoby. "Companies that establish themselves in such a way that contravenes the law are only thinking of their own business."

But Weiner dismisses this criticism.

"It is their decision what sort of press releases they put out, but it does not affect our plans. We looked into the legal situation before launching and obviously we have a different legal opinion," he says. "They have no influence on our business decisions."

While Deutsche Telekom launched Tippi3 before the completion of the licensing process, Weiner is remarkably diplomatic about the process as a whole. He refuses to comment on possible changes to the system being pushed through in the courts but does refute the fact that the process has been complicated.

"It is difficult to judge whether the situation has been handled correctly," he says. "For us the process was OK. It was complicated and there was a lot of effort needed, but [securing a licence] shouldn't be an easy win – there are 20 licences allowed and that means you have to come up with 20 winners.



From top: Jochen Weiner, Tippi3; Wulf Hambach, Hambach & Hambach; Matthias Spitz, Melchers

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May 2013

HMDIS launches tender for legal assistance as challenges from operators block the issuing of licences to the 14 selected companies.

July 2013

Hessen court issues injunction to block legal challenges from unsuccessful operators until the licensing process is completed.

Dec 2013

Germany's 16 state lotteries call for stricter federal regulations to block unlicensed casino and poker operators, and call for a swift resolution to the sports betting licensing process.

Jan 2014

HMDIS sets a new deadline for operators to submit additional information, claiming that no applicant had been successful in passing the process, despite approving 14 for licences.

June 2014

European Court of Justice claims Schleswig-Holstein's liberal gambling regime does not have any legal impact on the State Treaty, leading to renewed calls for change.

July 2014

HMDIS now claims licensing process will be completed in September, near the second anniversary of the treaty.

"It is natural that if you are not among the 20 you will want to protect your business through the courts. But we are among the 20 and that is what is important to us."

Where can it go from here?

The process is crumbling but it still has some advocates. The law firm Cornelius Bartenbach Haesemann & Partner (CBH) has represented the government in a number of cases brought by local German operators, all of whom have to appeal to the regional courts in the states in which they are based.

Regional courts in Munich, Gelsenkirchen, and most recently the Higher Administrative Court of Berlin-Brandenburg have defended the licensing process. The Berlin-Brandenburg court claimed there were "no concerns" with the process – even suggesting the lack of transparency did not damage operators' chances of securing a licence.

"Following the Administrative Courts of Berlin, Gelsenkirchen and Munich, [the Higher Administrative Court of] Berlin is now the fourth court which considers the sports betting licence process as legal. As a result, the ruling by the AC Wiesbaden from 16 April, which has been referred to in so many places, stands alone in its fundamental criticism toward the process," CBH lawyer Andreas Haupt claimed in an article on ISA.de.

Spitz at Melchers law firm does not believe this argument holds up. "The Wiesbaden court is where the battle will be won," he says. "Justification for the decisions of the Berlin and Munich courts are very sketchy, while Wiesbaden goes into detail about the issues with the process."

Hambach is confident that 2015 will prove to be a defining year, in that the treaty can only be altered. Things have reached the point of no return, he says.

"I think 2015 will be a year of action for politicians to change the system, to make it non-discriminatory and make the allocation of licences feasible for more companies," Hambach predicts. "The conditions have to be defined and it is a long political process, but I don't think that this [standstill] will last for years – it's at high noon. Deutsche Telekom is acting, and as a state company this will definitely be recognised by those who can change the laws."

Spitz says that all that needs to happen is for the Higher Administrative Court of Wiesbaden to confirm the lower court's ruling on the licensing process. "If that happens it will be difficult to heal the process," Spitz says. "The criticism of the Wiesbaden court is fundamental, attacking the whole process. I cannot imagine how these defects can be repaired."

The Glücksspielkollegium has also come in for criticism in the Wiesbaden ruling. The court said the body's set-up did not comply with Germany's Constitution, and that its decision-making process was undemocratic and lacking in reason. This has been echoed by Dr Gregor Kirchhoff, head of the Faculty for Public Law, Financial Law and Tax

Law at Augsburg University, who says that as the body makes decisions by a two-thirds majority, it does not represent the entire German population. As a result, he says, it must either be abolished or totally reformed.

"Ultimately it is not possible to fix the licensing process," Spitz says. "What the German states can do now is stop the litigation by increasing the number of licences."

If operators were allowed a fair crack at a licence, they would have nothing to complain about. This would not be the end, however. There would need to be at least an additional 35 to 40 licences, Spitz suggests, which would in turn prompt others that were scared off by the

€4.5bn
Germany 2014
sports betting
turnover

€226m
Germany 2014
tax revenue

The 20 would-be licensees

- Cashpoint (Malta)
- Admiral Sportwetten
- ODS Oddset Sportwetten Deutschland
- Oddsline Entertainment
- Primebet International
- Electra Works (bwin.party)
- Digibet
- Bet-at-home.com
- Ladbrokes International
- Bet 90
- Deutsche Sportwetten
- Personal Exchange International (mybet)
- Polco (Betfair)
- Intermedia
- Bernd Hobiger Wettbüro Goldesel
- Ruleo Alpenland
- Racebets International Gaming
- Albers Wettbörsen Deutschland
- IBA Entertainment
- Star Sportwetten

complexity, cost and lack of transparency in the process to try and join in the market.

"That means that even if the number of licences were increased, other operators could use the decision to expand the number of licences further," he suggests.

Ultimately that leaves an open market – one with a somewhat restrictive tax regime, but essentially what operators hoped for, way back in 2012.

After the referral to the ECJ, German Sports Betting Association president Mathias Dahms commented: "Over the past three and a half years the federal states have collected more than €0.5bn in sports betting taxes, without supplying the legally-required concessions. It is entirely inappropriate that this situation has dragged on for years."

The process may be drawing to a conclusion but recriminations will fly for years to come. ■

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Sep 2014

HMDIS meets its own deadline for the first time, naming the 20 preferred applicants. The likes of bet365 and Tipico, both companies with strong presences in the market, have missed out.

Sep 2014

The process is almost instantly derailed as legal challenges see the issuing of licences blocked.

Oct 2014

HMDIS fails in an appeal to the Higher Administrative Court of Wiesbaden to lift the injunction blocking the issuing of the licences.

Feb 2015

Deutsche Telekom reveals it will launch a sports betting product, leading to calls from the Deutsche Lotto- und Totoblock to have the roll-out blocked by the federal authorities.

April 2015

The Sports Advisory Board resigns over concerns that its advice is being ignored by the Glücksspielkollegium.

May 2015

A ruling by the Administrative Court of Wiesbaden describes the licensing process as flawed at every turn, prompting legal experts to proclaim the decision the "beginning of the end" for the treaty in its current form