

ADVERTISING IN GERMANY: What lies ahead for the licensees?

HOLDERS OF THE NEW LICENCES FOR ONLINE SLOTS AND POKER IN GERMANY ARE LIKELY TO FIND THEIR ADVERTISING OPTIONS LIMITED, WITH THE AFFILIATE, INFLUENCER AND OUT-OF-HOME CHANNELS ALL SUBJECT TO RESTRICTIONS.



“ IT APPEARS HIGHLY PROBLEMATIC, BECAUSE IT IMPOSES ON OPERATORS THE OBLIGATION TO CONTINUOUSLY CHECK THEIR AFFILIATES ”

About 10 months after the application procedures for virtual slot machines and online poker began, the first permit has now been granted and more permits are likely to follow in the near future. It is therefore time to look ahead and deal with the actual content of the licences. Among other things, the ancillary provisions on advertising for virtual slot machines and online poker are likely to be a topic of discussion.

INITIAL SITUATION

Advertising for public games of chance has to comply in particular with the provisions of § 5 ITG 2021. Accordingly, advertising for permitted games of chance is generally allowed, but must comply with the further requirements of § 5 ITG 2021. This regulates, on the one hand, the content of the advertising and, on the other hand, the necessary measures for the protection of vulnerable groups. For example, advertising for games of chance may not be excessive, may not be directed at minors, and no revenue-, deposit- or stake-based remuneration may be agreed or paid for advertising via affiliate links. Furthermore, virtual slot machines and online poker may not be advertised on TV, radio or the internet between 6am and 9pm

Despite the partly very detailed requirements of § 5 ITG 2021, the ancillary provisions of the licences introduce further advertising restrictions, some of which go beyond the wording of the law.

BAN ON INFLUENCER MARKETING AND FURTHER RESTRICTIONS

- The most striking additional provision is the ban on influencer marketing. This is to be understood as the planned interaction of a licensee with “social media multipliers” and is prohibited without exception. This is based on the assumption that the licence holder has no influence on the content and presentation of the advertising measures when using influencers and thus no effective protection of players and minors can be guaranteed.

However, it was disregarded that the protection of minors and vulnerable groups

could also have been achieved through detailed regulation of the cooperation between licensee and influencers. In addition, the term influencer is not very well defined. In practice, the demarcation of influencers from the testimonials of the operators is likely to be of particular importance, as is the question of how to deal with the licence holders’ own channels. When using testimonials and marketing via their own channels, the assumption that the organisers have no influence on the content and presentation of the marketing measures is no longer tenable.

- Affiliate marketing is only to be possible under the condition that only gambling offers from licence holders are linked on the affiliate’s website. Even though this ancillary provision may well be in the interest of channelisation and the licensees may also have a vested interest in ensuring that their affiliate partners do not link to black market offers, it appears highly problematic from a legal point of view, because it imposes on operators the obligation to continuously check their affiliates.
- The licences do not just contain further restrictions for the digital space, as far-reaching restrictions are also introduced for the offline world. Advertising for virtual slot machines and online poker in public spaces (out-of-home advertising) is to be completely prohibited. The blanket ban is also justified by the protection of minors. However, it was again disregarded that a milder means would have been available. For example, time-controlled advertising could have been allowed and oriented to the embargo time. ■

OUTLOOK

Some of the ancillary provisions on advertising meet with considerable legal concerns. The discussion will probably focus in particular on the question of proportionality and the legal basis of individual ancillary provisions. It is to be hoped that a practical and, above all, legally secure advertising regulation can be found with the future competent authority, the Joint Gambling Authority of the Länder.