



BY MATTHIAS SPITZ

The 3rd Amendment Treaty

Another chapter in never-ending story of sports-betting regulation in Germany?

On March 21, 2019, the prime ministers of the 16 German states agreed to an amendment of the overarching regulatory framework for gambling in Germany, the Interstate Treaty on Gambling (the “Interstate Treaty”).

This amendment, the so-called 3rd Amendment Treaty, authorizes local regulators to issue new licences for retail and online sports-betting in Germany. Material restrictions to sports-betting operations, such as a limited scope of available bet types and a limits on stakes, however, remain in place. It is yet to be seen whether licensing conditions will be viable, or whether the 3rd Amendment Treaty is yet another chapter in the never-ending story that the regulation of sports-betting in Germany is.

The previous chapters tell a story of failed attempts of the German states and their state-owned lottery companies to monopolize sports-betting. Under the first Interstate Treaty of 2008, privately owned betting operations were outlawed, however, jurisprudence of the Court of Justice of the EU (the “CJEU”) in precedent cases *Placencia*¹ and *Gambelli*² led the state governments to conclude that the expansionist business activities of the state lotteries cannot be

reconciled with the overarching statutory objective of player protection and, hence, were legally inconsistent. As a consequence of permanent jurisprudence of the CJEU, such inconsistent restrictions contravene the market freedoms and must not be applied. Operators of sports-betting therefore can invoke the freedom of services under the EU Treaties to justify operations in the unregulated (grey) market for sports-betting in Germany. This situation persists up until today.

With another iteration of the Interstate Treaty of 2012, the monopoly in sports-betting had been abolished, but the new treaty only provided for a limited number of up to 20 licences for sports-betting. Experts had warned that the selection process for the 20 licensees was vulnerable to legal challenge. After years of litigation, the judgment of the CJEU of 2016 in case *Ince*³ suggested that the licensing process had been non-transparent, therefore violating EU, which

finally gridlocked the licensing process. No licences have been issued under the Interstate Treaty of 2012 up until today, even though 35 sports-betting companies (online and retail) have been confirmed to satisfy the licensing criteria.

Since the public tender for the 20 licences and the term of the legal basis for the licensing process were set to expire in June 2019, the prime ministers of the German states were under pressure to agree on a solution. The 3rd Amendment Treaty is the result of years of negotiations between the German states — and it may turn out to be a rather meagre result.

The amendment essentially only consists of a handful of provisions that, one, remove the limit to 20 licences for sports-betting, and two, extend the term of the legal provisions for licensing sports-betting until June 2021. This authorizes local regulators to issue a number of licences for sports-betting from January 1, 2020, onwards which, in theory,

is unlimited. Geographically, licences will be valid in the whole of Germany.

What at first glance may seem like great opportunity for sports-betting companies, may yet turn out to be another chapter in the never-ending story of the Germany regulation of sports-betting. Sports-betting companies have been operating in the unregulated German market for over 20 years, which led to a sophisticated range of products that customers in Germany are used to. As an example, in-play betting on football (soccer) matches is a particularly popular betting product.

The Interstate Treaty, however, restricts “betting on occurrences during a live sports event” which can be interpreted as referring to in-play (sec. 21(4) Interstate Treaty). As an exception, bet types relating to the result of a sports event are considered to be permissible during a match. Regulators will have to clarify how exactly the legal definitions are to be interpreted in the context of the licences to be issued. From an industry perspective, a solution involving

white-listing of bet types would clearly be undesirable as it would likely lead to a very narrow range of permissible bet types which again is not viable in online betting. Further, it would significantly hamper the online betting industry’s ability to creatively react to changing customer demands.

A further key restriction, the monthly 1,000 limit (CAD\$1,511) on stakes per customer, also remains in the wording of the law under the 3rd Amendment Treaty. If implemented literally, high rollers would be deterred from licensed operations and most likely move to black market operations in the online sector. In the past, the regulators had indicated during the failed licensing process that they would be willing to apply some creativity so as to soften this restriction. Whether the regulators will be willing to re-interpret the stakes limit into a deposit limit (which is the more common form of self-limitation in other regulated markets in the EU) remains to be seen.

Regulators are expected to publish licensing requirements in mid-2019.

Notwithstanding the viability of these restrictions, compliance requirements of payment services requirements and advertising partners may still force betting companies to file applications for licences in early 2020. Even though the operators applying for such licences may have to grapple with restrictions, there is a silver lining: The Interstate Treaty is set to expire in June 2021 as a whole and, according to press statements after the Conference of the Prime Ministers on March 21, they are poised to negotiate a more ambitious Interstate Treaty involving further licensing opportunities from 2021 onwards. **CGL**

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1. CJEU, judgment of November 6, 2003 in case C-243/01, Gambelli.
2. CJEU, judgment of March 6, 2007 in case C-338/04, Placanica.
3. CJEU, judgment of February 4, 2016 in case C-336/16, Ince



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