GERMANY: THE SAGA CONTINUES

The recent Ince decision of the Court of Justice of the European Union forced German states to rethink their long-standing incompatibility with EU law. But leading gaming law expert **Martin Arendts** doubts the "minimally invasive" changes to the current rules they've opted for will work.

The situation in Germany with regard to sports betting and gambling has been described as a never-ending story. Over the years, several courts have held the legal situation to be untenable, but so far this has not resulted in material changes.

The road to nowhere

It was more than 10 years ago that the German Federal Constitutional Court held that the regulation of sports betting was not in conformity with constitutional law and asked for new rules (which finally led to the Interstate Treaty on Gambling, effective 1 January, 2008). The main aim of the Interstate Treaty, however, was to keep the status quo and to defend the state monopoly on sports betting and gambling. The German states only tried to "repair" the most obvious flaws. In 2010, the European Court of Justice, in several decisions on referral cases from Germany[1], raised serious doubts about the compatibility of these new rules and of the monopoly with EU law.

Therefore, Germany decided to finally open up its sports betting market, at least formally. The amended Interstate Treaty on Gambling of 2012 (which is still current law) contains an "experimentation clause" in section 10a, which allows for up to 20 sports betting licences. The licensing procedure, however, developed into a complete fiasco.[2]

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The procedure was held to be discriminatory and lacking in transparency. The Administrative Court of Wiesbaden heavily criticised the conceptual design and the organisation of the licensing procedure.[3]

In its decision of 16 October, 2015, the Hessian Administrative Court of Appeal held the licensing system to be unconstitutional.[4] Therefore, the infringement of the freedom to choose one's profession, guaranteed by the German Constitution, was not justified. The court of appeal expressly held that the transfer of decision power to the Gambling Board was against the German Constitution. As a result, not a single licence has been issued under the current licensing regime (and no licence will be issued in the near future), so the experimentation clause has no practical consequences.

In his opinion of 22 October, 2015 on the Ince case (C-336/14), Advocate General Szpunar found the situation in Germany incompatible with EU law. He argued that Article 56 TFEU (freedom to provide services) precludes national criminal prosecution authorities from penalising the intermediation of bets without a national authorisation on behalf of a betting organiser licensed in another Member State. He highlighted the incoherence of national case law and the legal uncertainty for gambling operators. On 4 February, 2016, the Court of Justice of the European Union (CJEU) pronounced its Ince decision, following his line of argument.

Even before this, however, it was clear that the situation in Germany was not tenable under EU law and material changes were required.[5] In October 2015, the state

[1] Winner Wetten (C-409/06, Markus Stoss et al. (C-316/07) and Carmen Media (C-46/08).
[2] Cf. *Arendts*, Do not pass Go: The German licensing fiasco, iGamingBusiness May/June 2015, 14.
[3] Verwaltungsgericht Wiesbaden, decision of 16 April 2015, file no. 5 L1448/14.WI, and decision of 5 May 2015, file no. 5 L1453/14.WI.
[4] Hessischer Verwaltungsgerichtshof, file no. 8 B 1028/15.
[5] Cf. *Arendts*, Germany: Change is needed, iGamingBusiness November/December 2015, 19.