

GERMANY: WAITING FOR CERTAINTY

The CJEU's recent decision in the Digibet case has only served to create more legal uncertainty around the German licensing process, writes leading gaming lawyer **Martin Arendts**.

The situation in Germany at the moment with regard to sports betting and gambling increasingly resembles a scene in *Waiting for Godot*, the absurdist play by Samuel Beckett. The licensing process, which began two years ago, is becoming a never-ending saga, and one can now imagine Vladimir and Estragon discussing how perfect the situation might be if licences had finally arrived.

The Court of Justice of the European Union (CJEU), in its recent Digibet decision, also did nothing to resolve legal uncertainties, but made legal predictions even more intricate. The CJEU did not dwell on the proportionality of the restrictive provisions of the Interstate Treaty on Gambling, which, however, will be a topic of a new referral from Germany (Ince case).

The background

In 2012, Germany decided to abandon its strict state monopoly system with regard to sports betting (after the CJEU, in its decisions of 8 September 2010, held the sports betting monopoly to be inconsistent with EU law). The German states (Länder) amended the Interstate Treaty with an experimentation clause in section 10a and started a licensing procedure to grant up to 20 licences.

However, after two years and after several court decisions (with even more to come), not a single licence has been granted. It is quite obvious that the whole procedure does not fulfil the criteria of the CJEU. There is no factual reason for the maximum amount of 20 licences (there are rumours

this number might be increased to 40 to meet the expectations of the remaining applicants). The fact that the detailed licensing criteria have not yet even been published is even more significant.

The State of Schleswig-Holstein at first did not follow the other 15 German states, and opted for a more liberalized system (without a maximum amount of licences, also allowing online casino games and poker). However, after state elections in 2012, which led to a new state government, Schleswig-Holstein joined the Interstate Treaty. The Schleswig-Holstein Gambling Act ceased to be in force with effect from 9 February 2013, shortly after the referral of the Digibet case by the Federal Court of Justice to the CJEU in January 2013. The authorisations, issued before to operators, remain valid.

The Hessian Ministry of the Interior was appointed to organise the sports betting licensing procedure under the experimentation clause, and to issue the licenses on behalf of the newly created gambling board (Glücksspielkollegium). The tender for the 20 sports betting licences was published in the Official Journal on 8 August 2012. More than 100 applications were filed with the ministry. After the second step, however, the procedure came to a standstill, while first legal battles were fought in 2013 (until the Hessian Administrative Court of Appeal, in its *BetVictor* decision of 28 June 2013, decided that applicants first would have to wait for a final decision to ask the court for legal remedy and interim protection).

In November 2013, in a letter to the remaining 41 applicants, the ministry (as instructed by the gambling board) declared that none of the applicants, not even the state operators which had applied, fulfilled the minimum requirements (contrary to the representation of the ministry in the court cases which stated that 14 applicants had fulfilled the requirements of step two). In January 2014, the applicants were requested to submit additional information and documents by 14 March 2014.

In the meantime, state-owned ODS ODDSET Deutschland Sportwetten GmbH (ODS), had asked the Administrative Court of Wiesbaden to be granted a licence. In its interim decision of 20 December 2013 the Administrative Court of Wiesbaden requested the Hessian Ministry of the Interior to accelerate the licensing procedure and decide on the application of ODS within three months. It held that the ministry had to decide on the application within reasonable time and that there was no comprehensible reason why the ministry could not do so. However, the Hessian Administrative Court of Appeal now repealed this decision, arguing that ODS had to wait for a final decision.

The court of appeal pointed to the fact that applicants could bring an action for failure to act (*Untätigkeitsklage*). In a partial judgment for a private operator, the Administrative Court of Wiesbaden already had decided that ministry had to decide on the application within three months. However, the court allowed for an appeal to clarify the procedural situation.

An end to the legal dispute is not near. If the ministry will eventually decide to issue licences, and not to re-start the whole

procedure, it first has to send out rejection letters, and to wait for two weeks to finally send out licences. In the meantime, most rejected applicants will certainly ask for interim legal protection. I also expect that licence-holders will file suits against incidental provisions of their licences, regarded to be too restrictive.

The Digibet decision

The CJEU, in its recent Digibet decision of 12 June 2014, did not help to clarify the legal situation in Germany. This case was heard by the Third Chamber (not the Grand Chamber as the previous referral cases from Germany). After an oral hearing on 2 April 2014 and without an opinion of the Advocate General, the CJEU only answered some questions of the Federal Court of Justice. It reiterated that it is the obligation of the national court to verify whether the restrictions satisfy the conditions of the Court's case-law concerning their proportionality. So the Federal Court of Justice, if taking this remark into account, would have to refer the case back to the trial court to determine the facts (and whether these are compatible with the freedom to provide services). Unfortunately, the CJEU did not further dwell on the proportionality requirements and did not develop more practicable criteria.

With regard to the consistency requirement, the CJEU held that even assuming that the more liberal legislation in Schleswig-Holstein may have undermined the consistency of the policy of prohibiting games of chance in the other Länder, the application of that more liberal legislation was limited temporally to less than 14 months and geographically

to a single Land. Thus, the existence for a limited period of more liberal rules does not seriously affect the appropriateness of the restrictions on games of chance applicable in all the other Länder to achieve the legitimate public interest objectives pursued. Thus, the Court of Justice observes that the other 15 Länder were not required to change their legislation in that field simply because a single Land had followed a more liberal policy for a limited period.

So, would the CJEU have decided differently, if the two different sets of rules would have co-existed for two years or if two Länder had opted for a liberal policy? It also does not help national courts, if the CJEU tries to distinguish the Digibet case from its previous Carmen Media decision, also a preliminary ruling on a referral from Germany. I fear that the consistency requirement becomes largely inoperative, if you have to distinguish between vertical consistency (Land and Federal authorities) and horizontal consistency (relationships between the Länder). Should there really be no consistency requirement in the "horizontal relationship" between the Länder? As the Schleswig-Holstein example proved, an Internet ban is clearly not proportionate, as there is no overriding requirement in the public interest, as less restrictive measures seem to work better and more effectively.

Operators and authorities tried to interpret the Digibet decision in their interests. The attorney for WestLotto, the plaintiff in the Digibet case, argued that the CJEU confirmed the consistency of the Interstate Treaty with EU law (which it clearly did not). Politicians of the former Schleswig-Holstein government, on the

other hand, tried to interpret that the CJEU held the Schleswig-Holstein Gambling Act to be in conformity with EU law (which the CJEU also did not do). In referral cases, the CJEU also refrains from declaring national law as inconsistent with EU law. So, practical guidance for the national courts is, from my point of view, essential to support the functioning of EU law.

With regard to the current sports betting licensing procedure in Germany, a new referral in a criminal case could prove interesting. In the Ince case, the District Court of Sonthofen inter alia has asked the CJEU to clarify the criteria for a licensing procedure, namely: "When are the selection criteria to be published?" In the quite detailed referral questions, the court also points to several inconsistencies, including the fact the same law firm advises the Hessian Ministry and the lottery operators, the ministry first accepting 14 applications then later arguing that the minimum requirements have not been fulfilled, and that state operator ODS does not fulfill the obligation of separation between organised sport and the operation of sports bets. We await the ruling with interest.



Martin Arendts is one of the leading gaming lawyers in Germany. He is a General Member of the International Masters of Gaming Law and regularly writes for national and international legal publications. Recently, he dealt with several administrative law, constitutional law, criminal law, unfair competition law and trademark proceedings in connection with sports betting, lotteries and poker.