

GERMANY: CHANGE IS NEEDED

As forecast by legal experts three years ago, the federal licensing procedure in Germany is clearly dead in the water. However, a clear decision by the CJEU reinforcing the recent opinion of the Advocate General in the *Ince* case is needed to force the other German states to follow Hesse's proposal for a "modern gambling regulation" that would bring the Interstate Treaty into compliance with EU law, writes leading gaming law expert, **Martin Arendts**.

In 2012, Germany decided to formally open up its sports betting market. The Interstate Treaty on Gambling of 2012 contained an "experimentation clause" within section 10a, allowing for the issue of up to 20 sports betting licences. The licensing procedure however developed into a fiasco¹, without a single licence since being issued under the new regime.

Both the procedure and the newly created Gambling Board (*Glücksspielkollegium*) have been criticised in recent court decisions. In his opinion of 22 October 2015 on the *Ince* case, Advocate General Szpunar found the situation in Germany to be incompatible with EU law. This opinion is not binding, but if the CJEU follows him, Germany would finally have to finally implement the requirements under EU law and amend the Interstate Treaty accordingly. Such an amendment for a "modern gambling regulation" was recently proposed by the state government of Hesse.² More changes are needed. Just stating within the Interstate Treaty that the licensing procedure has to be transparent and non-discriminatory does not fulfill the criteria of the CJEU if not put into practice.

The never-ending licensing procedure

The Hessian Ministry of the Interior was appointed to organize the sports betting licensing procedure on behalf of the German states. The Ministry, however, is instructed by the Gambling Board, and has had to fulfil binding orders contrary to its political conviction. The Gambling Board consists of one representative from each of the 16 German states³, with their

representatives voting on the tender and the procedure before the later states joined. These civil servants were not appointed by the relevant state parliament.

The Gambling Board heavily interfered in the licensing procedure, holding secret meetings and even passing resolutions without giving any reasons (against the transparency requirements under EU case-law⁴). One of the heavily disputed points of the licensing procedure was whether ODS Oddset Deutschland Sportwetten GmbH ("ODS"), a joint venture of several state operators (with sports associations as

"In October 2015, the Hessian Administrative Court of Appeal expressly held that the transferral of decision-making power to the Gambling Board was against the German Constitution."

minority shareholders), should be allowed to participate. The Board were not able to reach a clear decision on this question (a drawn vote of five for, seven against and four abstaining), without giving any reasoning. As ODS was ranked in the "Top 20", this decision was decisive.

In November 2013, the ministry (under instruction from the Gambling Board) informed the then remaining 41 applicants that none of them (even state-owned

ODS) fulfilled the minimum requirements (contrary to the prior representation of the ministry in several already pending court cases). The Hessian Minister of the Interior, Peter Beuth, recently complained that Hesse had to implement decisions of the Gambling Board that it regarded as legally problematic, and requested an amendment of the Interstate Treaty (which led to the proposed modern gambling resolution by Hesse Cabinet).

Bavarian Constitutional Court: Interstate Treaty provisions unconstitutional

In its decision of 25 September 2015, the Bavarian Constitutional Court declared several provisions of the Interstate Treaty on Gambling, respectively the consent of the Bavarian Parliament to the Interstate Treaty, as unconstitutional.⁵ According

to the court, the cap of 20 sports betting licences cannot be lifted by the Conference of the Prime Ministers, so the Interstate Treaty would have to be amended (which requires the consent of all state parliaments). The court also declared the Guidelines for Gambling Advertising (*Werberichtlinie*)⁶ as unconstitutional.

The court, however, upheld the position of the Gambling Board. Under constitutional law, it would have to be regarded as

¹ Cf. Arendts, Do not pass Go: The German licensing fiasco, *iGamingBusiness* May/June 1025, 14.

² <http://germangaminglaw.blogspot.de/2015/10/hesse-proposes-fundamental-changes-to.html>

³ The State of North Rhine Westphalia joined in December 2012, the State of Schleswig-Holstein revoked its Gambling Act and finally joined in February 2013.

⁴ Cf. Arendts, The creation and application of gaming license case law, *WOGLR* November 2012, 10.

⁵ Bayerischer Verfassungsgerichtshof, file no. Vf 9-VII-13, Vf 4-VII-14 and Vf 10-VII-14.

⁶ Cf. Arendts, Germany's new gambling advertising guidelines, *WOGLR* February 2013, 7.

acceptable that one state did not have the right to veto a majority decision of the Gambling Board. The court also argued that the Gambling Board did not possess the discretion to regulate and formulate gambling policy. This argument is a little bit surprising, given the decisive influence of the Gambling Board to date into account.

“In his opinion of 22 October 2015, Advocate General Szpunar agreed that Article 56 TFEU precludes national criminal prosecution authorities from penalizing the intermediation of bets without a national authorisation on behalf of a betting organiser licensed in another Member State.”

However, just three weeks later, the Hessian Administrative Court of Appeal expressly disagreed with the Bavarian Constitutional Court’s arguments.

Hessian Administrative Court of Appeal: Gambling Board unconstitutional

In several court decisions, the Administrative Court of Wiesbaden heavily criticized the conceptual design and the organisation of the licensing procedure.⁷ The court especially mentioned the Gambling Board, which failed to substantiate its decisions. In its decision of 5 May 2015, the court ordered the State of Hesse not to issue licences to the “Top 20” licence applicants before the court had decided on the action of the unsuccessful applicant, ranked 21st during the second phase of the licensing procedure, Betkick Sportwettenservice GmbH.

The State of Hesse appealed this first instance decision, but lost. In its decision of 16 October 2015, the Hessian Administrative Court of Appeal held the licensing system to be unconstitutional.⁸ Therefore, the infringement of the freedom

to choose one’s profession, guaranteed by the Constitution, was not justified. The Court of Appeal expressly held that the transferral of decision-making power to the Gambling Board was against the German Constitution. According to the constitutional structure of the Federal Republic of Germany, state authority is exercised on federal as well

as on state level. The creation of a “third level” – the Gambling Board as an institution of the states, not belonging to the federal level nor to one state – runs contrary to this constitutional structure. The court also highlighted the fact that the Gambling Board can instruct the State of Hesse in the sports betting licensing procedure. The Gambling Board is also not a “service organ” of the State of Hesse, as the decision of the board is binding. Therefore, a decision of the Gambling Board cannot be regarded as a decision of the State of Hesse.

The Hessian Court of Appeal therefore expressly disagreed with the Bavarian Constitutional Court, which held that one state could transfer some of its authorities to another state.

Contrary to the Bavarian Constitutional Court, the Court of Appeal also held that the Gambling Board was not democratically legitimized, due to there being no direct link between this institution and the people

of the Federal Republic or of one of its states, with there also being no checks and balances on the decision-making processes of the Gambling Board.

The Court of Appeal also highlighted several flaws in the licensing procedure. Although it was fine to divide the procedure in two phases, the whole procedure was regarded by the court as non-transparent. The tender document mentioned the “economically most favourable application” as the decisive criterion. This goes against the Interstate Treaty, under which the most suitable applicants should be granted a licence. The court also criticised the weighting of the points scheme as being clearly against the specifications of the Interstate Treaty.

The imminent CJEU decision on the *Ince* case

In its statement to the CJEU on the *Ince* case, a referral from the District Court of Sonthofen in Bavaria⁹, the European Commission argued that a legal situation contrary to EU law would initially have to be adapted to achieve conformity with EU law.¹⁰ If licences were not granted within a reasonable time frame, a prohibition on offering these services would factually persist. According to the Commission, this is clearly against EU law, so a criminal sanction could not be imposed.

In his opinion issued on 22 October 2015, the Advocate General agreed. Article 56 TFEU (on the freedom to provide services) precludes national criminal prosecution authorities from penalizing the intermediation of bets without a national authorisation on behalf of a betting organiser licensed in another Member State. He also highlighted the incoherence of

⁷ Verwaltungsgericht Wiesbaden, decision of 16 April 2015, file no. 5 L 1448/14.WI, and decision of 5 May 2015, file no. 5 L 1453/14.WI.

⁸ Hessischer Verwaltungsgerichtshof, file no. 8 B 1028/15.

⁹ Referral of the County Court (Amtsgericht) of Sonthofen in two joined criminal proceedings against a betting shop operator, *Sebat Ince*.
¹⁰ Cf. Arendts, Do not pass GO: The German licensing fiasco, *iGamingBusiness* May/June 1025, 14, 15.

national case law and the legal uncertainty for gambling operators. Therefore not only under the former monopoly system, but also under the current licensing regime, criminal sanctions are against Article 56 if a national court has established that this licensing procedure does not comply with general principles of EU law.

With regard to the licensing procedure, the Advocate General points to settled case-law, that a licensing system must be based on objective, non-discriminatory criteria known in advance, in order to circumscribe the authorities' ability to exercise their discretion in an arbitrary manner. According to the Advocate General, Directive 2014/23/EU on the award of concession contracts, although not directly applicable, may give guidance in these matters (particularly with respect to potential conflicts of interest and the impartiality of the procedures to be reviewed).

Where from here?

The licensing procedure in Germany is now clearly "dead", as already forecasted

by experts three years ago. In October 2015, Hesse decided to break cover and openly demand major changes to the Interstate Treaty, the state government passing "guidelines for a modern gambling regulation", under which online poker and casino games would be authorised, regulated and taxed.

A cap on the number of licences is also very difficult to justify legally. Beuth, the Hessian Minister of the Interior who requested the amendment to the State Treaty, argued that the limitation on the amount of sports betting licences to be granted should be abolished, and advocated for "qualitative licensing", meaning that every applicant who fulfilled the licensing criteria should be granted a licence. With no deadlines or need to rank applicants, this qualitative licensing would be far more straightforward.

The Hesse guidelines also propose that the strict monthly limitation on personal wagers to €1,000 a month be abolished, based on the argument that self-limitation

would be more effective.

The Gambling Board, held to be unconstitutional by several courts, should be replaced by a joint institution of the German states (*Anstalt des öffentlichen Rechts*). But at present, however, the other German states are not inclined to follow this proposal of Hesse, and this may only change following a clear decision by the CJEU.

Martin Arendts, M.B.L.-HSG, is an expert on gaming law and EU law. He represents Sebat Ince in the criminal proceedings in Germany and before the CJEU (C-336/14). He can be reached by email: gaminglaw@anlageanwalt.de.



iGAMING BUSINESS

INTELLIGENCE CENTRE

The Intelligence Centre provides access to a large online, digital resource containing key pieces of iGaming Business's past, present and future material. This resource is designed to provide you with the tools and resources to improve your business performance.

ACCESS TO THE INTELLIGENCE CENTRE INCLUDES:

- All iGaming Business research reports available in a digital format.
- Exclusive content from industry partners including H2 Gambling, PWC, Deloitte, Morgan Stanley and more.
- Content that covers the entire discipline of iGaming
- Access to full webinar and conference archive
- Print and digital copies of iGaming Business/iGaming Business North America
- Print and digital copies of European Gaming Lawyer Magazine
- News analysis – an exclusive service designed to exploit the behind the scenes and facts on industry developments and breaking news.

Email info@iGamingBusiness.com or call +44 (0) 20 7265 4189 for more information.