

# Germany's new gambling advertising guidelines

## Unconstitutional censorship?

In Germany, all forms of promotion of gambling services are now regulated by Guidelines for Gambling Advertising ('*Werberichtlinie*'). These new guidelines became effective on 1 February 2013 and give licensed operators more (but still restricted) options to advertise their services. However, the requirement to obtain prior approval for advertising efforts over the internet or on television has been regarded by several lawyers as unconstitutional. In December 2012, the European Commission also voiced objections. This article explains the guidelines and their practical consequences.

### 1. Legal nature

The guidelines are not an act, but an administrative regulation which substantiate the (quite ambiguous) provision on gambling advertising in section 5 of the Interstate Treaty on Gambling 2012<sup>1</sup>. Section 5 of the Interstate Treaty mainly states that advertising should take the aims of the Interstate Treaty into consideration (par. 1), should not be directed to minors or similarly periled groups and should not be misleading (par. 2). According to par. 3, advertising over the internet and television is generally prohibited, but can be allowed by the states with regard to lotteries, as well as sports and horse betting. However, television commercials are prohibited immediately before or during a sports event with regard to bets on the event. Advertising casino games remains prohibited, as well as advertising illegal gambling.

The guidelines have been issued by the newly created Gambling Board of the States ('*Glücksspielkollegium der Länder*'), based on section 5 par. 4 Interstate Treaty and section 6 par. 2 Administrative Agreement with regard to the Interstate Treaty<sup>2</sup>. It was published in the official journals of the states<sup>3</sup>. The Gambling Board consists of 16 representatives of the states, each appointed by the relevant gambling authority of the state, and can make a qualified majority decision (two thirds majority; so a dissenting state can be overruled).

According to section 1 par. 5 of the Guidelines, the established (voluntary) code of conduct of the German Advertising Council with regard to commercial communication for gambling<sup>4</sup> remains unaffected. The same applies to other acts, like the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) and the Act on the Protection of Minors (*Jugendschutzgesetz*), according to section 1 par. 4.

### 2. Main provisions

The Advertising Guidelines defines admissible forms of advertising. In section 4 par. 1, it substantiates which forms of advertising should be regarded as misleading, e.g. promoting playing to chase losses or to overcome financial troubles or social problems. Gambling also has to be properly described as a game of chance. Unfounded claims with regard to the chance to win are described as misleading. It is also prohibited to

highlight the advantages of gambling and to depreciate the absence of gambling. Gambling services should not be seen as necessities.

Advertising, especially aimed at minors or similarly periled groups (which are defined as problem gamblers or gamblers in financial troubles), is prohibited. Advertising in the media, with editorial content mainly aimed at minors, is not allowed (section 6). Advertising in cinemas is only allowed after 6 p.m. (section 9). It is also prohibited to sponsor the jerseys of youth teams (section 12 par. 2).

Advertising over telecommunication systems is, according to section 7, generally prohibited. Only within a contractual relation are telephone communication, email and SMS are allowed. Legal gambling can be promoted, if a (potential) customer calls in.

### 3. Unconstitutional censorship?

The Central Association of the Advertising Industry (ZAW - *Zentralverband der Werbewirtschaft e.V.*) heavily criticised the guidelines<sup>5</sup>. According to the settled case law of the German Federal Constitutional Court, advertising is protected by the freedom of opinion. Therefore, the requirement to obtain prior consent has been described by the Central Association as censorship. In practice, advertising efforts on a short or medium term basis would be unfeasible. The procedure, described in section 14, had no legal foundation in the Interstate Treaty on Gambling.

This is indeed problematic, as the Guidelines are not adjective law, but a quite peculiar way to interpret a legal provision (giving too much power to the administration, without a proper legal foundation). It will be interesting to see whether the Guidelines for Gambling Advertising will survive a judicial review (which seems inevitable).

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1. Erster Glücksspieländerungsstaatsvertrag, effective in 14 German states as of 1 July 2012, in North Rhine-Westphalia as of 1 December 2012 and in Schleswig-Holstein as of 8 February 2013.

2. Verwaltungsvereinbarung Glücksspielstaatsvertrag (VwVGlüStV).

3. E.g. with regard to North Rhine-Westphalia in Ministerialblatt (MBL. NRW.) 2013 No. 2, p. 15 et seq.

4. Verhaltensregeln des Deutschen Werberats über kommerzielle Kommunikation für Glücksspiele.

5. <http://www.zaw.de/index.php?menuid=98&repid=857>