

DO NOT PASS GO: THE GERMAN LICENSING FIASCO

Recent court decisions have rendered the licensing procedure started in 2012 more intractable than ever, meaning Germany will likely have to restart the whole process, writes leading gaming lawyer **Martin Arendts**.

In 2012, Germany decided to abandon its strict state monopoly system with regard to sports betting. The German states (*Länder*) amended the Interstate Treaty on Gambling with an “experimentation clause” in section 10a, effective as of 1 July 2012¹, allowing up to 20 licences to be issued ahead of a planned evaluation of the legal regime (apart from this provision, the Hessian Ministry of the Interior assured applicants that no prohibition orders would be issued so long as they participated in the licensing procedure). The licensing procedure, started almost three years ago, however, still seems a never-ending story. In several court decisions, the procedure was held to non-transparent and discriminatory. In two recent court decisions of 16 April 2015, the Administrative Court of Wiesbaden also heavily criticised the design and organisation of the procedure.² The court especially mentioned the newly created Gambling Board (*Glücksspielkollegium*) which failed to substantiate its decisions. Because of these obvious conceptual problems, the grant of licenses had been stopped by pending interim protection proceedings in the courts. To date, not a single licence has been issued under the new regime, so Germany will likely have to restart the whole procedure.

The Court of Justice of the European Union (CJEU) might soon clarify the situation. In a pending referral case from Germany³ (C-336/14 - *Ince*), the CJEU will decide how gambling licenses can be granted under EU law. The First Chamber of the CJEU will hear this case on 10 June 2015. If the Court follows the referral and

the statement of the European Commission, this could mean that Germany will have to materially change the regulatory provisions and evaluate the design and organisation of the licensing procedure. As the experimentation clause allowing private operators is set to end on 30 June 2019, the remaining duration of a license will be less than four years. So, even repeating the licensing procedure under the current legal regime does not make much sense. This outcome would be similar to the situation in Liechtenstein, which also has to repeat the licensing procedure for a casino, after the EFTA Court issued an opinion on a referral by the State Court of Liechtenstein⁴.

Formal opening of the sports betting market

After the decisions of the CJEU on several sports betting referral cases from Germany in September 2010 (*Markus Stoss et al.*), Germany finally decided to give up its state monopoly system with regard to sports betting (in order to keep the much more lucrative monopoly on lotteries). The Hessian Ministry of the Interior was appointed to organise the sports betting licensing procedure and issue the licenses. Hereby, the Hessian Ministry of the Interior is instructed by the Gambling Board, which consists of one civil servant of each of the 16 German states (not appointed by the relevant state parliament and obviously

against state and federal constitutional law). The procedure is divided into two “steps”. First, applicants would be required to file information documents regarding the operator. Second, a secret information memorandum would be sent to the successful applicant, detailing further requirements. The start of the licensing procedure resulted in a kind of official grey market, with no prohibition orders served on operators which had applied for a licence. Criminal proceedings also stopped, with the exception of Southern Bavaria (leading to the *Ince* referral case).

“Do not pass Go”

The tender for the 20 sports betting licenses was published in the Official Journal of the EU on 8 August 2012. 72 applications were accepted by the Hessian Ministry of the Interior, with a further application later accepted following a court decision. Several legal battles followed in 2013 (until the Hessian Administrative Court of Appeal decided that applicants would first have to wait for a final decision to ask the court for legal remedy and interim protection). In a letter to the then remaining 41 applicants in November 2013, the ministry (as instructed by the Gambling Board) declared that none of the applicants (even the JV of several state operators, ODS Oddset Deutschland Sportwetten GmbH) fulfilled the minimum requirements (contrary to the representation of the ministry in the court cases).

In September 2014, the Hessian Ministry of the Interior sent out letters to

¹ In 14 states; North Rhine Westphalia and Schleswig Holstein followed in December 2012, respectively February 2013 (after revoking the Schleswig Holstein Gambling Act).

² Verwaltungsgericht Wiesbaden, decision of 16 April 2014, file no. 5 L 1448/14.WI, and decision of 5 May 2015, file no. 5 L 1453/14.WI.

³ Referral of the County Court (Amtsgericht) of Sonthofen (Bavaria) in two joined criminal proceedings against a betting shop operator, *Sebat Ince*.

⁴ EFTA Court, decision of 29 August 2014, Case E-24/13. In December 2014, the State Court of the Principality of Liechtenstein declared the licensing procedure as null and void. The Liechtenstein parliament (Landtag) will now decide on whether to allow several casinos.

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all remaining applicants, announcing the 20 highest-ranked applicants (according to a secret 5,000 points scheme). Before it could issue the licenses, however, the ministry was stopped by several more court decisions. The Administrative Court of Wiesbaden, in a first provisional order (“Hängebeschluss”), requested the ministry not to issue any licenses until the situation had been reviewed by the court⁵, a decision upheld by the Hessian Administrative Court of Appeal.⁶ A similar decision was issued by the Administrative Court of Appeal of Hamburg,⁷ the ruling referencing the transparency requirements under EU, quoting *inter alia* the *Costa* decision of the CJEU⁸.

Although the Administrative Court of Wiesbaden had already requested in September 2014 to inspect all relevant files of the ministry (in order to decide what an “average” application would look like and whether the selection procedure was non-discriminatory and fair), until now it has only received general files regarding the licensing procedure.

After the recent court decision of 16 April 2014, it is now very unlikely that any licences will be granted soon. The Administrative Court of Wiesbaden held that the legal basis of the licensing procedure was not clear enough and that player protection should

be an overriding reason behind it. It also highlighted that the requirements were non-transparent and ambiguous, as in the second step alone, nearly 600 questions were posed by the applicants. The whole procedure was so flawed that no lawful decision could be expected.⁹

The Ince case

In the Ince case, the District Court of Sonthofen *inter alia* asked the CJEU to clarify the criteria for a licensing procedure (such as when these have to be published etc.). In its statement to the CJEU, the European Commission followed the line of argument put forward in the referral, that although the betting shop operator was of Turkish nationality, the freedom to provide services of the bookmaker (licensed in the EU Member State of Malta) had been infringed (par. 18 et seq.). Under the monopoly system (before the aforementioned experimentation clause became effective as of 1 July 2012), criminal sanctions were contrary to EU law, as a permit to transfer bets to a private operator could not be granted. The German government argued that Bavaria had opened a permit testing procedure (*Erlaubnisprüfverfahren*), however without adapting national law to the case law of the CJEU (just sending out a checklist on request) and without

granting a single permit. The Commission was clearly unconvinced. It argued that a legal situation contrary to EU law would first need to be adapted to conform with EU law, otherwise, the prohibition on granting licences to non-state operators and imposing criminal sanctions for illegal gambling were unjustified.

With regard to the current situation, the statement of the Commission is even more devastating. As the licensing procedure does not appear to end, the national court would first need to evaluate if the duration of the procedure was sufficient. If licenses were not granted within a reasonable time frame, a factual prohibition on the offer of these services would persist. According to the Commission, this is clearly against EU law, so a criminal sanction could not be imposed.

Analysing EU law and the relevant case law, the Commission has concluded that at the very least, minimum requirements would have to be published ahead of the deadline to apply for a license. Otherwise, interested parties could not reasonably decide whether to participate in a licensing procedure and therefore a fair and non-discriminatory procedure could not be guaranteed. Here, no detailed licensing requirements were published in advance, so the transparency requirements were not fulfilled.

⁵ Verwaltungsgericht Wiesbaden, decision of 17 September 2014, file no. 5 L 1428/14.WI

⁶ Hessischer Verwaltungsgerichtshof, decision of 7 October 2014, file no. 8 B 1686/14.

⁷ Oberverwaltungsgericht Hamburg, decision of 22 September 2014, 4 Bs 189/14.

⁸ CJEU, decision of 16 February 2012, C-72/10 and C-77/10.

⁹ Verwaltungsgericht Wiesbaden, decision of 16 April 2014, file no. 5 L 1448/14.WI.

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