



BY DR. MATTHIAS SPITZ



The inter-state regulation of igaming in Germany – a never-ending story?

A new chapter has recently been opened in the seemingly never-ending story of the regulation of igaming in Germany by the judges of the Federal Administrative Court (the ‘Court’). In the litigation of companies linked to 888 against interdiction letters of a local regulator, the Court confirmed that the ban on online casinos complies with EU law – a legal area that has been embattled before courts for more than a decade. The applicability of national restrictions to igaming vs. the scope of EU internal market freedoms are at the core of that legal struggle.

Since the Prime Ministers of the German states are currently negotiating on a proposal to reform the Interstate Treaty on Gambling, the overarching restrictive framework for the regulation of gambling in Germany, the timing of the judgment certainly was unfortunate

– or maybe intentional. The proponents of the Interstate Treaty, including a number of executives of the state lotteries, have hailed the judgment as a landmark victory. For years, the state lottery companies of Germany have been agitating against

the licensing of igaming as they perceive it to be a threat for the legal justification of the state monopoly in lotteries.

The judgment in case “888”

Two EU-based entities linked to 888

were litigating against an interdiction letter which ordered them to cease operating online casinos, online sports betting and scratch cards in the territory of the German state issuing that letter.

For more than a decade Operators of online casinos have justified operating lawfully in the German market by invoking the freedom to provide services under Article 56 of the Treaty on the Functioning of the EU. Since the regulation igaming is not harmonized and broadly exempt from EU e-commerce rules, the regulatory approach to igaming is for each EU Member State to decide – which has also been recognized by the Court of Justice of the EU (the ‘CJEU’)¹. However, it has also been clarified in constant jurisprudence of the CJEU that restrictions to the freedom of service are only justified if they are implemented in a consistent and systematic manner and that they must comply with the principle of proportionality.² The latter requires that any national restriction must be suitable for ensuring that the objectives pursued by setting up a restrictive regulatory system will be achieved and must not go beyond what is necessary for that purpose. In 2010, the German state monopoly on sports betting has been considered to breach those requirements in a series of judgments of the CJEU.³

In the judgment of 26 October 2017, in contrast, the Court considered the German ban on online casinos to satisfy these requirements, arguing more generally that a ban in principle is suitable to protect players from the dangers of gambling and that the level of protection is at the discretion of each EU Member State.⁴

However, evidence on the developments in the igaming market over the past years has been ignored.

Constant growth in the unregulated online casino sector in Germany suggests that the ban has failed to be implemented since 2012 and that the protection of players and minors has not been achieved under the German regulations. Instead, the grey market has grown considerably – as an example, gross gaming revenue in online casinos has grown from 201 mn EUR in 2011 to 1,165 mn EUR in 2015 according to official statistics.⁵

In practice, the judgment is likely to increase the appetite of regulators for enforcement against online casino operations, though it is clearly outdated with regard to the relevant facts. At the political level, it is likely to be used as an argument by some state governments to keep online casinos banned, thereby preserving the monopolistic approach of the present regulation.

Inter-state gambling politics

Since the legislative competence to regulate gambling is vested in the 16 German states (and not in the federal government) with many of them pursuing very different agendas in gambling policy, inter-state negotiations on a reform of the regulation of igaming are complicated – which may be reminiscent of the political struggles in other federally organized countries like the US.

On the political map, the states governed by the German Conservative Party generally tend to be more open to a market friendly approach, whereas states led by the German Labor Party tend to follow a more restrictive approach. At this stage, a north-south axis of three of German states is pushing for a broader reform including a licensing system for online casinos. At this stage, three scenarios for the future of igaming regulation seem plausible:

(1) No reform: Although the current regulation is dysfunctional, its supporters among the state governments and state lotteries might try to preserve the status quo by stalling the inter-state negotiations until the Interstate Treaty ultimately expires in June 2021.

(2) Comprehensive reform: This scenario would require an inter-state consensus on the implementation of a licensing system for online casinos which, however, is more unlikely as a result of the Court’s judgment.

(3) Regulatory patchwork: This appears the more likely scenario at this stage with each state being allowed to decide whether to license online casinos or not, assuming that some states will insist on regulating online casinos. Although the regulation of online casinos on a state-by-state basis would seem impractical, it would allow the online casino industry to gain a regulated foothold in the German market which again is an overall positive perspective as compared to the present situation.

It is expected that a proposal will be presented at the Prime Ministers’ conference in fall 2018 which might bring more clarity. From then, it is likely to take at least 1 ½ years until any new Interstate Treaty is implemented into state law – accordingly, the never-ending story around the regulation of igaming may be expected to continue ...**CGI**

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1. E.g. CJEU, judgment of 8 September 2009 in case C-42/07, *Santa Casa*.

2. E.g. CJEU, judgment of 15 September 2011 in case C-347/09, *Dickinger Ömer*.

3. E.g. CJEU, judgment of 8 September 2010 in case C-46/08, *Carmen Media*.

4. Federal Administrative Court, judgment of 26 October 2017, file no. 8 C 18.16, “888”.

5. A comprehensive overview is provided in the “Fact-based evaluation of the Interstate Treaty on Gambling”, p. 106 at <https://gluecksspielstudie.de/download/193/>