

GERMANY: MUCH ADO ABOUT (ALMOST) NOTHING



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Germany is certainly one of the most interesting markets for gambling and sports betting in Europe. However, a precise instruction for operators can hardly be given. So, none of the promised sports betting licenses has been issued in the current licensing procedure, running since 2012. The recently proposed Third Amendment to the Interstate Treaty on Gambling (Dritter Glücksspieländerungsstaatsvertrag) will not bring a solution for the current regulatory problems in Germany and not the desired clarity. The new regulation (if it will enter into force) will only be effective for 18 months, not viable from a business point of view (and much less than the promised seven years experimentation period for bookmakers). It remains open how an enduring regulatory regime will look like after 30 June 2021, the end of the current Interstate Treaty.

The attempts to properly regulate gambling and sports betting and to finally produce a mature coherent and consistent regulatory environment amount to a "Series of Unfortunate Events". Already 13 years ago, the German Federal Constitutional Court held the state monopoly with regard to sports betting as incoherent with constitutional law. 2010, the CJEU followed with decisions on several referral cases from Germany (Markus Stoss et al.). The CJEU held the sports betting monopoly to be clearly inconsistent with EU law.

Subsequently Germany finally decided to abandon its strict state monopoly system with regard to sports betting in 2012.



The German states (Länder) amended the Interstate Treaty with an experimentation clause in section 10a (experimentation period of seven years until end of June 2019) and started a licensing procedure to grant up to 20 licences. However, none of these licenses has been granted, as the non-transparent procedure has been stopped by several court decisions.

Only the German state of Schleswig Holstein (at the border to Denmark) opted for its own state Gambling Act (before acceding to the Interstate Treaty in February 2013) and issued licenses under a qualitative licensing regime not only for sports betting, but also for casino games (including Poker). The last of this Schleswig Holstein licenses expired six

years after its issuance in February 2019.

Five years ago, I compared the situation in Germany with *Waiting for Godot*, the absurdist play by Samuel Beckett. Nothing substantial has changed since then. The sports betting licensing process, which began in August 2012, is still a never-ending saga, and one can now imagine Vladimir and Estragon discussing how perfect the situation might be if betting licences had finally arrived (or at least interim permits, as proposed in the Second Amendment to the Interstate Treaty, which, however, did not become effective as of 1 January 2018).

The Second Amendment proposed only “minimally invasive” amendments to the existing regulations of the

Interstate Treaty on Gambling in a kind of formulaic compromise. However, this compromise did not work out in practice. Several state parliaments, most vocally the Schleswig Holstein parliament, did not ratify the draft. So, even the applicants which fulfilled the minimum requirements for license-holders were not granted an interim permit, let alone licenses.

However, the grey market with no properly licensed operators has shown to be quite prosperous for operators which applied for a sports betting license (and even for the operators which did not really care about licenses). According to the betting tax figures (5 % betting tax on the wager), the market share of the German state operators (which have been offering sports betting under the brand “ODDSET”) has fallen well below 3 % (so a restoration of the monopoly clearly makes no sense from a business point of view). Over the last years, almost no prohibition orders have been served on operators and betting shops. Only recently, the authorities were trying to stop sponsorship deals with bookmakers which were also offering online casino games (which are regarded as illegal under the current gambling law) under the same brand.

After much unsuccessful discussions, the German states finally agreed on a draft of a Third Amendment to the Interstate Treaty on Gambling at the meeting of the state prime ministers in March 2019. After the notification procedure with the European Commission, all 16 state parliaments will have to ratify the draft which is supposed to become effective as of 1 January 2020.

In order to win over Schleswig Holstein, this state was allowed to renew the expired Schleswig Holstein licenses. So, in essence, the new interim regulation (if the Third Amendment will eventually become effective) is not even a formulaic compromise, as it allows two different set of licenses and rules. The draft for an interim regulation in Schleswig Holstein expressly states that the Internet prohibition according to section 4 par. 4 Interstate Treaty is not applicable. In Schleswig Holstein, there would be revived licenses for casino games, while in the other 15 states online casino games still would be regarded as illegal (a quite strange, not really coherent situation).

The biggest problem remains that the states could not agree on how to regulate online casino games. Several states want to license casino games operators. Hesse proposed a new Interstate Treaty already a few years ago, which would have allowed online casino licenses to be granted. Other states, like Berlin and Hamburg, want to keep the Internet ban (without effectively enforcing it). Currently, most remote gaming operators which are offering casino games file tax returns and, well-behaved as they are, pay VAT for an illegal service.

The main change, the Third Amendment would bring, is the abolishment of the cap of 20 licenses to be granted. So, a selection procedure for the “top 20” applicants would no longer be needed (under the current regulation the best

applicants were selected under a points scheme, assessing the application and the concepts provided by the applicants). The experimentation clause would be prolonged for 18 months until the end of June 2021 (and would be prolonged for further three years until 30 June 2024, if the current Interstate Treaty remained in force after that date).

So, operators could apply for a sports betting license in 2020 which would be valid only until 30 June 2021 (or hopefully, but not very certainly until 30 June 2024). A license-holder would then have to obey all quite strict terms and conditions of a license. Under the current regulation, a licensed operator would be banned to offer any casino games and also forms of (very popular) in-play betting. Also affiliated companies could not offer casino games (which have become economically quite important for most operators).

The Third Amendment is therefore not viable from an economic point of view. In order to be attractive for operators, a license should be valid for several years (as the seven years experimentation period) and should not strangle operators, requesting a license, with economic disadvantages (without effectively suppressing illegal operators). As the market for casino games cannot be stopped, it would make more sense to properly regulate it and grant licenses. Only in a licensed market environment consumer and player protection can be safeguarded in an effective way.

According to my point of view, the German states, and if they do not succeed, then the federal parliament, are called upon to finally create an enduring coherent and consistent gambling regulation. Market participants definitely need a quantum leap (and not further two years of wibble wobble). Otherwise, the billions in revenues for the 16 German states from the games of chance offered by them are clearly endangered. Recently the Administrative Court of Munich, in a judgment, reached by our law firm, concludes that the German lottery monopoly in its current form violates both the freedom to provide services guaranteed under EU law (Art. 56 et seq TFEU), as well as the constitutionally guaranteed freedom of choice. :: CGi



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