

Learning from Mistakes: Recent Court decisions on failed gambling licensing procedures

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In several court cases, the Court of Justice of the European Union (CJEU) has developed detailed criteria on how gambling licenses can be granted under EU law. Recently, in several Member States of the EU, respectively the EEA, national courts were called to apply these criteria. In Germany, Austria and Liechtenstein courts held that national gambling licensing procedures did not fulfill the transparency criteria under EU law, expressly quoting the relevant case-law of the CJEU. They therefore revoked decisions to grant casino licenses or stopped a licensing procedure. In Liechtenstein, the State Court decided that selection criteria for the single casino license had to be published before the deadline to apply for a license. Quite similarly, the Austrian Federal Administrative Court revoked decisions of the Austrian Ministry of Finance to grant new casino licenses in three cases, also arguing that the licensing procedures were not transparent enough. With regard to the sports betting licensing procedure in Germany, several courts pointed to the transparency requirements under EU law and effectively stopped the licensing procedure in interim protection proceedings,¹⁾ arguing that these requirements were not fulfilled.

Criteria of the CJEU: guidelines for licensing procedures

From the basic freedoms and the principles of equal treatment and non-discrimination, the CJEU formed a concept of how gambling licenses should be awarded under EU law.²⁾ As the main part of this concept, the CJEU developed a very detailed obligation of transparency. Especially after the Costa decision,³⁾ in which the CJEU recapitulated the criteria, these guidelines can be regarded as settled case-law (and already have been quoted by several national courts). In its decisions of 21 July 2015, the Austrian Federal

Administrative Court argued that the CJEU had sufficiently clarified the legal situation. In its upcoming Ince decision (Case C-336/14) the CJEU might clarify further details.

The CJEU argues with the effectiveness of EU law, requesting effective judicial review. Thereby, the CJEU connects material law with procedural law as it points to the obligation of the licensing authorities to exercise their powers of discretion in a transparent manner, so that the impartiality of the procedures can be monitored afterwards by a court. According to the CJEU, the licensing procedure has to be transparent and must be based on objective, non-discriminatory criteria known in advance.⁴⁾

First of all, the obligation of transparency concerns the authority. A duty of transparency shall enable the authority to ensure that the principles of equal treatment and non-discrimination are complied with.⁵⁾ Additionally, in order to enable the impartiality of the procedures to be monitored, the authority has to base each decision on reasoning which is accessible.

Apart from that, transparency is even more important for potential applicants. The whole licensing procedure must be transparent, in order to allow competition and the impartiality of the licensing procedures to be reviewed. The obligation

1 For the situation in Germany (licensing procedure as a "never-ending story") see Arendts, No Clarity without Transparency: CJEU to decide on the sports betting licensing procedure in Germany, EGR Spring 2015, 26.

2 For a summary of these criteria see Arendts, Guidelines for gambling licenses under EU law, EGR Winter 2013, 16.

3 CJEU, decision of 16 February 2012 – Joined Cases Costa and Cifone – C-72/10 and C-77/10.

4 Sporting Exchange decision, para. 50; Carmen Media Group decision, para. 87; Costa decision, para. 56.

5 ECJ, Commission v Italy – C-260/04, para. 24.

of transparency implies that all the conditions and detailed rules of the licensing procedure must be drawn up in a clear, precise and unequivocal manner. To review this requirement, the CJEU refers to a “reasonably informed tenderer exercising ordinary care” as a standard. This “reasonably informed tenderer” should understand the exact significance of the conditions and rules and interpret them in the same way.

Liechtenstein: cancellation of the casino licence

In January 2012, the Liechtenstein government granted Wolfgang Egger, one of the two applicants, the license for the single casino licence under the Liechtenstein Gaming Act (Geldspielgesetz). The deadline for the casino licence application was 31 March 2011. An evaluation sheet with the detailed selection criteria were notified with the government afterwards in April 2011, but not published. The two applications received by the deadline were ranked according to the points scheme of the evaluation sheet. The other applicant, which was not awarded the licence, filed an action against the decision of the government to award the licence to the applicant with the higher points (1771,92 out of a total 2405, compared to 1744,01 points for the plaintiff).

The Administrative Court of Liechtenstein held that the procedure did not fulfil the transparency criteria and declared the licence to be null and void.⁶⁾ In its decision, the Administrative Court of Liechtenstein extensively quoted the Costa decision and applied the criteria of the CJEU. The fact that the weighting of the selection criteria was determined retroactively infringed the requirement of “criteria known in advance”.⁷⁾ The applicants could not foresee how the different criteria were evaluated in the selection process, as they did not know the points scheme. Even the suspicion of a biased behaviour, caused by the non-objective determination of selection criteria, could amount to a breach of the prohibition of discrimination.⁸⁾ The court pointed to the fact that the identity of an applicant might be known from news coverage. Therefore, the court concluded that the licensing procedure

infringed the principle of equal treatment and the obligation of transparency.⁹⁾ It mentioned that the licensing procedure had to be re-started.

The unsuccessful applicant appealed this decision, arguing that the licence should be granted to him instead (without a re-start of the procedure, as he was the only applicant fulfilling the licensing criteria). On the appeal, the State Court of Liechtenstein (as constitutional court) revoked the decision of the Administrative Court in December 2012.¹⁰⁾ However, the Administrative Court did not grant the claimant the license (but upheld its decision to cancel the decision of the Liechtenstein government).¹¹⁾ The court argued that there was no sufficient weighting of the selection criteria.

The claimant filed an appeal against this second decision of the Administrative Court, still arguing that the license should be granted to him. On 8 November 2013, the State Court decided to refer several questions to the EFTA Court, especially with regard to the transparency obligation under European law. It also asked the EFTA Court whether procedural mistakes can be remedied.

In its decision of 29 August 2014, the EFTA Court confirmed the importance of the transparency obligation.¹²⁾ So, a material change of the weighting of the licensing criteria was not allowed. The national court should decide on legal remedies, taking into consideration that the granting of a license should be free of arbitrariness and discrimination.

Taking the reasoning of the EFTA Court into consideration, the State Court finally dismissed the appeal.¹³⁾ The State Court held that the decision of the Administrative Court to demand a re-start of the licensing

procedure was not arbitrary. The perception of the Administrative Court that already the tender was so faulty that a re-start was required, was well founded. The State Court pointed to the emphasis of economic benefits (which were only mentioned as secondary aims in the law) and of the casino location in the tender documents (weighting of the points). The emphasis on criteria which are not accepted as justification reasons would indirectly infringe the basic freedoms.

The faults in the procedure could not be remedied. A retroactive change of the licensing criteria would infringe the transparency obligation. Simply deleting the overweighted criteria would create a new procedural fault. The State Court follows the line of arguments of the Administrative Court that selection criteria cannot be changed after the deadline for the application. Here, the points scheme was significant for the decision of the government to grant Egger the license. No reason was given for the weighting of the criteria.

The granting of the license was therefore unlawful. The claimant could not ask that the license was granted to him, but could only claim damages (government liability).

Austria: cancellation of three casino licenses

In three decisions of 21 July 2015, the Austria Federal Administrative Court cancelled decisions of the Austrian Ministry of Finance to grant new casino licenses in Vienna and Lower Austria.¹⁴⁾ The court argued that not all selection criteria were published in advance. Although the main criteria were mentioned in the tender documents, the sub criteria (which were relevant for the final selection of the successful applicant) were not published and not notified to interested parties.

The Federal Administrative Court held that all criteria and the weighting of the criteria had to be known to potential applicants, in order to enable them to prepare their applications. The court pointed to the fact that the sub criteria, used to select the successful applicant, were not even mentioned in the tender documents.

6 Verwaltungsgerichtshof (VGH) Liechtenstein, decision of 31.5.2012 – VGH 2012/030.

7 VGH Liechtenstein, para. 5.1.

8 VGH Liechtenstein, para. 5.2.

9 VGH Liechtenstein, para. 5.3.

10 Staatsgerichtshof (StGH), decision of 11 December 2012, file no. StGH 2012/114.

11 VGH Liechtenstein, decision of 31 May 2012, file no. VGH 2012/030.

12 Case E-24/13.

13 StGH, decision of 16 December 2014, file no. StGH 2013/044.

14 Bundesverwaltungsgericht, decisions of 21 July 2015, file no. W139 2010500-1/81E, W139 2010504-1/74E and W139 2010508-1/71E + W139 2010508-2/41E.

The obligation of non-discrimination and transparency were therefore not fulfilled.

Although the Federal Administrative Court did not allow an appeal (arguing that the legal questions were settled by the CJEU), the Austrian Ministry of Finance announced that it filed an appeal with the Federal Administrative Court of Justice (Verwaltungsgerichtshof).

Germany: Licensing procedure as a "never-ending story"

In 2012, Germany decided to open up its sports betting market. The new Interstate Treaty on Gambling of 2012 contains an experimentation clause in section 10a which allows for up to 20 sports betting licences. The Hessian Ministry of the Interior was appointed to organize the sports betting licensing procedure. Even before the start of the licensing procedure, the European Commission criticized that the licensing criteria were not clear enough and should therefore be specified in the tender. The tender for the 20 sports betting licenses was published in the Official Journal of the EU on 8 August 2012. However, the selection criteria were not notified and still remain a secret. Applicants which survived the first step of the licensing procedure had to assure that they were not publishing the documents (a information memorandum and several forms). This clearly not transparent procedure has been heavily criticized already three years ago. The gambling board (Glücksspielkollegium), which instructs the Hessian Ministry, held secret meetings and even passed resolutions without giving any reason. One of the heavily disputed points of the licensing procedure was the question whether ODS GmbH, a

joint venture of several state operators (with sports associations as minority shareholders), was allowed to participate. The gambling board could not reach a clear decision on this question (a draw vote of 5 : 7 : 4), without giving any reasoning. As ODS GmbH was ranked in the "Top 20", this decision was decisive.

After several legal battles the Hessian Ministry of the Interior sent out letters to all applicants in September 2014, announcing the 20 highest ranked applicants (according to a 5,000 points scheme). Before it could issue the licenses, however, the ministry was stopped by several court decisions. The Administrative Court of Wiesbaden, in a provisional order, requested the Hessian Ministry not to issue any licenses. This decision was upheld by the Hessian Administrative Court of Appeal. A similar court order was pronounced by the Administrative Court of Appeal of Hamburg. In May 2015, these decisions have been fortified by the Administrative Court of Frankfurt am Main and the Administrative Court of Wiesbaden. The courts, inter alia, pointed to the danger that criteria, if not published in advance, might be adapted to the then know applicants. The whole procedure, not just the first step, was regarded as clearly non-transparent.

Lessons Learned?

As the recent cases in Germany, Austria and Liechtenstein show, mistakes are almost bound to happen (although the criteria of the CJEU were already established before the relevant deadlines). National authorities were clearly not aware what transparency in a licensing procedure would mean in detail. Just stating in the relevant act that the licensing procedure had to be transparent and non-discriminatory certainly does not fulfill the criteria of the CJEU, if not put into practice. With regard to Germany, you might even argue that faults in the licensing procedure were included on purpose (as some states and state operators were quite happy with the status quo and did not want to open up the market).

A limitation of the amount of licenses to be granted may generate even more faults.

In this case, the procedure usually has to be structured in two steps (like the sports betting licensing procedure in Germany) and in a long-lasting procedure with deadlines. At least, all applicants (which eventually survive the first step) have to be judged according to a points scheme, in order to reach a clear ranking of the best applicants. Here, the weighting of the criteria and the awarding of the points will most certainly be the cause of a legal debate. As most states still argue that gambling is not a normal economic activity, it seems to be a little bit contradictory to stress the importance of economic benefits in the selection criteria and require the applicants to hand in business plans with high profits.

In order to avoid the problems associated with a points scheme, Liechtenstein has already announced that it would not re-start a licensing procedure for a single casino license, but allow an indefinite number of casinos. In Germany, the Hessian Minister of the Interior, Peter Beuth, also argued that the limitation on the amount of licenses to be granted should be abolished. Beuth advocated "qualitative licensing", meaning that every applicant which fulfilled the licensing criteria should be granted a license. With no deadlines and not need to rank applicants, this qualitative licensing would be much easier. At the moment, however, the other German states are not inclined to follow this proposal.

Failed licensing procedures can turn out to be quite costly. The State Court of Liechtenstein already expressly mentioned government liability, if a licensing procedure proves to be faulty. A licensing procedure, lasting for years and requiring a workload of concepts and other documents, can cost the applicants a small fortune (which they might like to get reimbursed).

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15 European Commission, letter of 20 March 2012 in the notification procedure 2011/0188/D (reaction of the Commission to the response of a Member State notifying a draft regarding a detailed opinion).

16 Verwaltungsgericht Wiesbaden, decision of 17 September 2014.

17 Hessischer Verwaltungsgerichtshof, decision of 7 October 2014.

18 Obergerverwaltungsgericht Hamburg, decision of 22. September 2014.

19 Verwaltungsgericht Frankfurt am Main, decision of 27 May 2015, file no. 2 L 3002/14 F.

20 Verwaltungsgericht Wiesbaden, decision of 5 May 2015, file no. 5 L 1453/14 Wl.