

TIME Law News

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**Latest developments in German and International Law of the TIME-Industries
Telecommunication - IT - Media & Entertainment**

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1. Sports, Betting, Online Poker & Co. BGH Refers German Gambling Regulations to the ECJ

by [Dr. Wulf Hambach](#) and [Maximilian Riege](#). The German version of this article has been published at Legal Tribune Online (<http://www.lto.de/recht/hintergruende/h/bgh-beschluss-i-zr-17110-gluecksspielregulierung-vorlage-eugh-staatsvertrag-schleswig-holstein/>)

Not only the Commission, but also the BGH now has its doubts regarding the German gambling system. Does the special act in Schleswig-Holstein on its own render void the inter-state treaty between the other federal states? And what happens now that the new Schleswig-Holstein government has decided to join the inter-state treaty after all? Wulf Hambach and Maximilian Riege think that there is a danger of a new negative ruling from Luxembourg. On Thursday, the BGH (the German federal court of justice) suspended the proceedings in a competition law suit brought by the state-run lottery company of North-Rhine Westphalia (West-Lotto) against a private internet gambling provider. The judges in Karlsruhe have referred to the European Court of Justice as many as four questions concerning the compliance of the German legal regime with EU law (resolution of 24 Jan. 2013, court ref. I ZR 171/10 – *digibet*). In the order for reference, the issues in discussion are the two regulatory systems which currently are in place simultaneously in Germany. The regulations of the [GlSpielG SH \(Schleswig-Holstein gambling act\)](#) and the [GlÜStV \(inter-state treaty on gambling\) concluded by all other federal states](#) vary considerably, in particular in the area of internet gambling.

This is why the BGH asks the ECJ whether the coexistence of these two different gambling regulatory systems in Germany contradicts the requirement under European law to ensure a uniform and consistent legal regime in a member state (the so-called consistency and coherence requirement). Under the new government, Schleswig-Holstein today furthermore has returned to the inter-state treaty. So what next?

No peaceful coexistence of two systems?

Whilst in Schleswig-Holstein online sports betting as well as online casino games such as online poker are permitted, the other federal states only allow a maximum of 20 online sports betting providers to register for a licence, subject to significantly more restrictive conditions. In those federal states, online casino games continue to be banned entirely.

The BGH itself has stated that "the different regulations which originate from the federal system within a member state are not to be regarded as incoherent restrictions of the freedom to provide services, provided that they do relate to sectors which are not harmonized within the EU, such as gambling. In any case, it should not lead to an incoherence of the restrictions applicable in the rest of the German territory if their

suitability is only insignificantly impaired by a more liberal legal regime in one single smaller federal state."

However, it seems that the 1st Civil Senate is not absolutely certain in this assessment. According to the Court's case law, the gambling provider against whom the law suit has been filed acted in violation of competition law up until 31 December 2011 when the new inter-state treaty came into effect. However, since the changes in the law, the Court thinks that the question is whether "German gambling law is still in compliance with European Union law." This is why the judges in Karlsruhe have referred this question to the ECJ.

In its statement dated 07 December 2012, the European Commission had already been very clear and had voiced significant doubts regarding the compliance with European law: "The Commission does not see how the simultaneous existence of two different regulatory systems for the same type of service could fulfil the requirement of 'coherently and systematically restricting betting activities'." As a logical consequence, the [Commission openly threatened Germany with the opening of infringement proceedings](#).

The Nordic backward flip - so what now?

Even though the new state government in Kiel decided in a parliamentary resolution of today that Schleswig-Holstein will join the inter-state treaty of the other federal states, and that the GlSpielG SH will be abolished, this decision will, according to the Ministry of the Interior, come into effect on 8 February at the earliest, so that legally, further licences may be issued.

However, the pending withdrawal of the act will not solve the problem. The 26 sports betting licences and 23 casino game licences issued up to now under the GlSpielG SH will remain valid for their entire six year terms. This means that the GlSpielG SH will continue to apply to this extent.

This is another scenario for which the 1st Civil Senate asks the ECJ for a clarification under European law. However, the Senate states that "it is in compliance with Union law if admissible regulations for the gambling area on which the federal states of a country have agreed will only take effect in one of the federal states after a transition period of several years, even if this will in the meantime impair the effectiveness of these regulations in the rest of the national territory. This should at least apply if the impairment is only insignificant."

However, the mere number of licences issued makes it clear that it will not be possible, even for the future regulation of sports betting in Germany, to transfer the 26 sports betting licences from Schleswig-Holstein into the then nationwide legal framework of the GlStV, because the inter-state treaty only allows the licensing of a maximum of 20 sports

betting providers - not to mention the other 23 providers of casino games who have been granted a licence in the most northern German federal state.

Many open questions remain

In the current proceedings, the BGH does not deal with all relevant issues relating to the German gambling law regime. For instance, the Senate does not address the question as to why only 20 sports betting licences are intended to be issued under the GlüStV. It remains to be seen how the denial of a licence for the 21st sports betting provider applying for a licence for the German market will be justified if such provider fulfils all admission criteria of the currently ongoing tender procedure under the GlüStV.

On this issue, the European Commission had already pointed out that it was unable to see how the restriction of the total number of licences could be suitable to direct the consumers' demand into a controlled system and to combat crime and fraud. Furthermore, the decision taken on Thursday does not address the question as to the assessment under European law of the fact that the German state lottery monopoly is still justified, among other reasons, with the combat of addiction, even though private providers at the same time are permitted to offer games such as slot machines and sports betting in gaming arcades or on the internet which are known to be more relevant in the context of addiction. The justification of a complete ban on online casino games, even though online sports betting has, at least partially, been legalised in Germany, has not been made the object of the decision from Karlsruhe either.

The only gambling act which complies with European law - withdrawn

These issues relating to the German gambling regulation will probably continue to occupy the German, and most likely also the European, courts, even though the fact that the German gambling regulations do not comply with European law was determined by [the ECJ as recently as in 2010 in Carmen Media \(case C-46/08\)](#). In a similar case, the Luxembourg judges decided today that the Greek gambling monopoly also violates European law, as it contradicts the requirements of a uniform and consistent regulation of gambling (cases C-186/11 and C-209/11).

With today's referral to the ECJ, the BGH therefore merely seems to be opening a new chapter in the legal dispute regarding the German gambling law regime. It remains to be seen whether and how the ECJ, the German courts and the European Commission will assess the new legal situation in Germany. In view of the new legal regime, the VGH (higher administrative court) of Baden-Württemberg has already voiced doubts with regard to the compliance with European law of the German gambling regulations, and therefore decided in favour of a private provider of online games of chance in summary proceedings (resolution dated 10 Dec. 2012, court ref. 6 S 3335/11).

The only thing that is certain is that the coalition of SPD, Grüne and Süd-Schleswigscher Wählerverband has today decided that the only gaming act in Germany which had been unconditionally classified as complying with European law, i.e. the GlSpielG SH, will be withdrawn, in order for Schleswig-Holstein to be able to join the GlüStV which faces considerable concerns under European law. Observers who are so inclined, and probably also the ECJ and the European Commission, will ask themselves: Why?

Dr. Wulf Hambach is founding partner, Maximilian Riege is senior associate at the law firm Hambach & Hambach in Munich. The authors specialise inter alia in gaming law.

2. The potential addiction risk of Texas Hold'em Online-Poker

In cooperation with GAMING LAW REVIEW AND ECONOMICS, this edition of TIME Law News is pleased to point you to the article: [Measuring and Evaluating the Potential Addiction Risk of the Online Poker Game Texas Hold'em No Limit, published in GAMING LAW REVIEW AND ECONOMICS, Volume 16, Number 12, 2012](#): (paper free until 12 February 2013)

The article presents the results of the corresponding study, which has been empirically validated by inter-disciplinary experts.

The key result of the study is the classification of the potential addiction risk of Texas Hold'em poker as medium, which is in the same level as sports betting.

The study's findings raise questions about the need for pan-European regulation of poker. It also adds to doubts regarding the consistency and coherence of German gambling regulation.

While the most northern German state Schleswig-Holstein has already licensed more than twenty online casino operators, including the leading online poker providers, the new German Interstate Treaty on Gambling still stipulates a legal ban of online casino games. The ban includes online-poker, and thereby leaves this huge market unregulated. Furthermore, the inconsistent national regulatory frameworks for online-poker in the EU leave players and providers "with a high degree of legal uncertainty" [regarding the implications of this scenario, see article on FCJ's referral to the ECJ, page 2 of this TIME Law News].

The study points out that despite an online-poker ban, Germany has become the second largest online-poker market worldwide. As a consequence of the ban and the inconsistent national regulatory frameworks for online-poker in the EU, players are "forced" into grey or black markets, which is detrimental not only to the fight against gambling addiction and money laundering, but also to the states' ability to raise tax revenues.

The study's results call for an unbiased review of the level of regulation for the online gambling market and the online-poker market in particular. The study hopefully makes some European and German politicians re-consider strong positions against the regulation of online-poker on both the national and EU levels.

Politician or not, TIME Law News highly recommends the article to all interested readers <http://online.liebertpub.com/doi/pdfplus/10.1089/glre.2012.16125> (paper free until 12 February 2013)

3. In-house News

IT Security Law Specialist, Fellow from Stanford University's Transatlantic Technology Law Forum (TTLF) joins Hambach & Hambach's IT & Gaming Law Team



Axel Knabe earned his law degree from the University of Mannheim in January 2007. Between May 2007 and May 2009, he successfully completed the compulsory two-year long clerkship program in Germany and became eligible for admittance to the German bar (Ass.iur.). During this time he was, among other things, a law clerk at a Federal District Court in the state of Rhineland-Palatinate. Between November 2008 and April 2009 Knabe worked at the law firm Berliner, Corcoran & Rowe LLP in Washington, D.C. as an international fellow. His work there mainly focused on questions of Foreign Sovereign Immunity Law, International Trade Law, Commercial Law and IT Law. From March 2010 to December 2012, Mr. Knabe worked as a research assistant at the Chair for Public Law, Security Law and Internet Law at the University of Passau, Germany. Mr. Knabe is a doctoral candidate at the Chair for Public Law and Legal Philosophy at the University of Mannheim, Germany and became a Non-Resident Fellow at [Stanford University's Transatlantic Technology Law Forum \(TTLF\)](#) in January 2011. In August and September of the same year, Knabe resided at Stanford University as a TTLF Visiting Fellow.

The main areas of focus of his consultation services are: Gaming and gambling law, General administrative and European law, Data protection law and IT law.



Hambach & Hambach is pleased to announce the appointment of

[Dr. Stefan Bolay](#) as Salary Partner

and

[Maximilian Riege](#) as Junior Partner



Publication announcement:



Hambach & Hambach is delighted to announce that by the end of the thrid quarter 2013 a leading publication for gaming and gambling law in the media will be released. Editors will be aside from Dr. Wulf Hambach one of the leading experts for european law Prof. Dr. Rudolf Streinz (University of Munich) and Dr. Marc Liesching (probably the leading expert in the field of youth protection law). The publishing house C. H. Beck announced this publication as usefull guideline and handbook for judges, gambling authorities and official prosecutors as well as for media companies and lawyers. For more information in German please click [here](#).



Dr. Wulf Hambach will speak on the following conferences:

4. – 5. February 2013 | London, Great Britain

[Legal Gaming in Europe](#)

Bullet Business

5. February 2013 | London, Great Britain

[World Regulatory Briefing \(WrB\) UK](#)

Clarion Gaming

5. – 7. February 2013 | London, Great Britain

[ICE 2013](#)

Clarion Gaming

25. – 26. April 2013 | Resort Schwielowsee, Potsdam,Germany

[Sports Gaming Summit](#)

SPONSORS

9. – 11. July 2013 | Barcelona, Spain

[World GES 2013](#)

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6. Editorial Details

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