

# worldonline gamblinglawreport

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# Schleswig-Holstein v 15 states: the legal battle turns political

The German State of Schleswig-Holstein recently approved a liberal gambling law, ignoring the wish of the 15 other federal states to agree on a new Interstate Treaty on Gambling (ITG), which advocates tight gambling regulation and a limited number of operators. Dr. Wulf Hambach and Dr. Stefan Bolay, of Hambach & Hambach *Rechtsanwälte*, analyse the latest developments and discuss how this legal battle has turned into a fierce political debate.

One month after the ratification of the Schleswig-Holstein Gambling Reform Act, on 14 September 2011, which legalises major parts of the online gambling market, Schleswig-Holstein's leading newspaper *Lübecker Nachrichten* reported 'a wave of online gambling operators' intending to apply for a 2012 remote licence in Schleswig-Holstein and already making deals with regional sports clubs such as VfB Lübeck. What triggered this new wave?

A quick flashback: on 17 December 2010, the Conservative-Liberal coalition government engaged in a heated debate with the Social Democrats (SPD) in the plenary hall. The discussion was triggered during the first reading of the Kiel model Act, based on the Danish model for the regulation of gaming. It was this path-finding look towards the north which the authors of the Kiel draft, Christian Democratic Union (CDU) economics expert Hans-Jörn Arp and Free Democratic Party (FDP) chief strategist Wolfgang Kubicki, were accused of by the SPD. The criticism in the Kiel Parliament was that they had bet on a dead horse. The reason: in autumn 2010, the EU Commission had admitted for examination an EU

state aid complaint relating to the lower taxation of online games in comparison to terrestrial games. In this context, the Danish reform project, which had obtained international praise, initially got caught in the web of the terrestrial casino lobby.

Ten months later: during a conference in Copenhagen on 3 October 2011, organised by the Danish Gaming Supervisory Authority on the topic of 'Licence Application Proceedings in the Area of Online Gaming', the institution's Head, Ms Birgitte Sand, commented with great satisfaction on the recent decision from Brussels - the EU Commission had withdrawn the terrestrial gambling machine industry's complaint against the relatively low tax rate of 20% on the gross proceeds, i.e. the tax rate which is also being used in the Kiel model. The EU Commission's line of argument: high taxes for Danish online providers would undermine the effects of the liberalisation. The EU Commission held that the low tax rate for online games was state aid but nevertheless complied with EU law, as the positive effects of the liberalisation of the market outweighed the impact on competition. So, the objections relating to EU state aid law raised by the SPD against the Kiel model during the December reading have recently been brushed away by the EU Commission. The head of the Danish authority used a line of argument similar to the one used by Arp and Kubicki, i.e. that the huge black market in the area of online sports bets and online casinos has to be countered by attractive legal offers. The providers of online games had until 17 October to file their applications with the Danish authority.

Back in Germany, the FDP supports in other German states

the route taken by Schleswig-Holstein with regard to the regulation of gaming. As early as mid-September, the spokesman for legal politics of the FDP parliamentary party in the Parliament of Saxony, Carsten Biesok, commented on the unilateral passing of a gaming act by the Kiel coalition government, saying that the decision in Kiel was 'a clear signal to the leaders of the federal states' negotiation teams to finally move up a gear and agree on a new inter-state treaty on gaming'. Should an agreement on a new ITG not be possible on the German state-level, Biesok said, the State of Saxony would be forced to follow the example of Schleswig-Holstein and pass its own gaming legislation.

In a comment on the internet and blog newspaper *Freie Welt*, Christian Dürr, Head of the FDP parliamentary party in Lower Saxony, recently added to the debate and demanded that the states no longer block a reasonable solution. "Discussions must take place between all German federal states", he said. "Our objective is still a uniform nationwide regulation. We should try to avoid a patchwork of laws. However, if the SPD in particular continues to refuse to consent to a legally safe solution, we will, as a last resort, be forced to give preference to a solution among individual states." He believes that the proposed regulations of the other federal states do not comply with EU law. The EU Commission criticised the latest suggestion of these states as recently as July 2011. This is why the concept will have to be revised. The Schleswig-Holstein Act, on the other hand, has been given the go-ahead. Dürr says that work has yet to be done with regard to regulatory politics: "The tax rates must be designed in a manner which allows companies to work

profitably. We intend to make providers leave the grey market and establish themselves legally in Germany. France has shown how it doesn't work: in that country, the model failed due to excessive tax rates and a wrong basis for the calculation of the tax." He argues that, in the past, the liberals have always argued from a regulatory point of view and will continue to do so. "This topic is not about developing a sharper profile, but about a reasonable solution for consumers and, ultimately, also for taxpayers and charities", Dürr stresses.

The newspaper *Chemnitzer Freie Presse* reported some time ago that, in the 'race for the betting millions' in Germany, the liberals in Saxony are prepared to break up the uniform route taken by the federal states, and to follow their own path. This is not surprising, as the Kiel Act is clearly more liberal than the new suggestions which were discussed during the annual conference of the state secretaries in Quedlinburg, at the end of September. Casino games, including poker, are, for instance, to remain prohibited. However, according to Biesok, there is no reason 'to fall behind the level set by Schleswig-Holstein'. If nothing is changed in the gaming draft with regard to online poker, the finance ministers of the federal states will allow the billions in turnover forecast for the future to bypass the German Treasury, as they are in an area of illegality and a grey market. For this purpose, certified providers and clear rules are required. From the point of view of regulatory politics, the only convincing regulation is the Schleswig-Holstein Act for the revision of the ITG. A glance across the border to neighbouring countries shows that this can, initially, only be a - doubtlessly important - step in the right

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direction.

In August last year, the Dutch Government Commission explicitly advocated the legalisation of online poker. The legalisation and regulation of online poker is even more important than that of sports betting. According to the expert advisory committee for games on the internet, legalisation should be limited to poker as it is the only format for which demand exists and which is suitable for such steering mechanisms. The fact that most German federal states are still barking up the wrong tree can be seen in the users' actual gaming activities. At the moment, they mainly demand online poker and online live bets. This means that it is necessary to channel the gaming instinct in these areas - which after all comprise four million players - by means of regulation. The plans suggested by SPD and CDU members to furnish existing German casinos with licences for online poker are unrealistic as casinos have their strengths in the offline area. However, only providers with international experience and a global background have the technical know-how and market experience to present good offers for the online community.

Back to the present: what is the outcome of the Prime Ministers' meeting in Schleswig-Holstein last week, in which they consulted on the new ITG? Not much, as expected. The 15 German federal states - except Schleswig-Holstein - agreed on rather cosmetic modifications and decided that online casino games, particularly poker, should remain prohibited. The ITG now stipulates a limit of 20 sports betting licences (instead of 7 in the former draft), a turnover tax of 5% (instead of 16.66%) and a monthly limit of €1,000 (instead of €750) on gambling amounts. As expected,

serious concerns regarding the compliance of this amended ITG with EU law remain, since the EU Commission had raised fundamental concerns which have not yet been dispelled - specifically, the arbitrary limitation of the amount of licences and, most importantly, the German regulation's lack of overall coherence. Therefore, the pending notification of the modified ITG will show if cosmetic modifications are sufficient to resolve the EU Commission's concerns.

The 15 German federal states intend to sign the ITG during the Prime Ministers' meeting on 15 December 2011 - it is expected to come into force by July 2012. However, there are indications that some of the 15 states are not yet sure if the modified regulation system will prevail. Two federal states, Hesse and Lower Saxony, added a protocol statement to the agreement which demands an investigation into the legality of the transmission of live casino games from land-based casinos on the internet.

How did Schleswig-Holstein react? The pioneer of gaming regulation in Germany abstained from the agreement and did not join the ITG. On the contrary, it has introduced its own Gaming Reform Act, set to enter into force on 1 January 2012 (licences will take effect by 1 March 2012). Therefore, Schleswig-Holstein is maintaining its 'maverick' position - a position upheld by the EU Commission. This is not the case for the draft ITG, which shows its inconsistency and incoherence by not regulating poker, the game most demanded by German online users.

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