

# Germany: the hottest candidate for infringement proceedings?

The complexities created by the existence of two contradictory gaming regulations in Germany are rife - for example 'online poker': a game of skill or a game of chance? - licensed and banned at the same time. Dr. Wulf Hambach and Maximilian Riege, of Hambach & Hambach law firm, discuss the regulatory complexity in Germany and the potential for EU infringement proceedings.

Germany's gambling regulation remains torn. Although the former maverick state Schleswig-Holstein (SH) officially joined the regime of the Interstate Treaty on Gambling (ITG) of the other 15 states at the beginning of 2013, the much more liberal Gaming Reform Act (GRA) has to remain applicable to regulate and supervise gambling licence holders in Schleswig-Holstein. Nearly 50 gambling licenses for online sports betting, online casinos and online poker, each valid for 6 years, were granted before the GRA was withdrawn.

The new regulatory situation is more than complex and the legal consequences are unclear. Germany's Federal Court of Justice (FCJ) has already referred four questions concerning the compliance of the German gambling regime with EU law (resolution of 24 Jan. 2013, court ref. I ZR 171/10 - digibet) to the European Court of Justice. The main question is whether the coexistence of two different regulatory systems for gambling contradicts the requirement under European law to ensure a consistent and coherent legal regime in a Member State.

The main point of conflict in the German gambling regulations is online poker. While the GRA

regulates online casinos, the ITG strictly prohibits all kinds of online casino games. Another conflict exists in the different regulation of online sports betting. While there are already 25 sports betting operators licensed under the GRA, the ITG only allows up to 20 sports betting operators for the entire German market. Furthermore sports betting operators in SH are allowed to offer different kinds of bets on sports events, while the ITG only allows bets on the final or intermediate results. In addition, the ITG stipulates a general betting limit for players: 1000 Euros per month.

## The ITG: incoherent in itself?

Another legal controversy lies in the regime of the ITG itself. It is questionable if the restrictions are proportionate and if the ITG's regulation of the different kinds of games is consistent and coherent.

Regulation of terrestrial gaming arcades and slots is relatively modest, although there is hardly any controversy that slot games offered in gaming arcades and bars have the highest addiction potential of all games of chance. The recently published draft of the new regulation for slot and gambling machines stipulates some stricter rules for these kinds of games, but does not go as far as to constitute a total prohibition of slot and gambling machines.

Through the so-called 'experimentation clause,' 20 online sports betting operators could be exempted from the general online gambling ban stipulated by the ITG. Federal sports betting licences will be granted by the ministry of the interior in Hesse. The tender procedure for issuing nation-wide sports betting licences has just entered its third and final round of assessments. Since there were more than 90 applicants who made it to the second round, it is only a

question of time before the arbitrary limitation of licenses and the somewhat confusing tender procedure, which was initially managed by the law firm that normally represents the German gambling state monopoly, will be challenged in court.

Finally, besides this partial exemption for online sports betting, all online casino games, including poker, remain prohibited. The grounds of the ITG only gives a short justification for the ban: an alleged 'high manipulation risk and the extraordinary addiction potential' would not allow a regulation of these kind of games. The authors of the ITG state that terrestrial casino games offered by state owned casinos have to suffice to meet the customer's demand.

It seems that these justifications are as short as they are superficial. Recent scientific research regarding online poker comes to different conclusions.

## Poker: a game of skill?

With regard to the alleged addiction potential the study 'Measuring and Evaluating the Potential Addiction Risk of the Online Poker Game Texas Hold'em No Limit'<sup>1</sup> shows that, at least, the most popular online poker game 'Texas Hold'em' has the same addiction potential as sports betting. Hence, addiction potential cannot be a valid argument to allow up to 20 sports betting providers in Germany while prohibiting online poker in total.

Furthermore recent court rulings in the US and Germany reanimate the general discussion as to whether poker is a game of chance. Jack B. Weinstein, Senior United States District Judge, ruled in August 2012 that 'Poker is predominated by skill rather than chance.' And in fall 2012, the 12th senate of the Finance Court of

Cologne ruled that poker is a game of skill, at least for professional players (court ref. 12 K 1136/11). These questions were raised by the head of the liberal party's parliamentary group in the Schleswig-Holstein parliament, Wolfgang Kubicki, but the ministry of the interior was not able to give a straight answer<sup>2</sup>.

And what about the alleged manipulation risk? Online casino games are often named in the context of money laundering and fraud. Jürgen Creutzmann, member of the European Parliament (EP), former rapporteur and now shadow rapporteur of the EP for the pending report on online gaming (the so-called Fox-Report), wanted to get more in-depth information on the topic. On his invitation, representatives of the European Commission, the EP, national regulators as well as scientists and industry experts came together for a workshop in the EP to discuss: 'Online Poker - Need for European Safety Standards?'<sup>3</sup> The result of the workshop was crystal clear: there is no reason not to regulate online poker. In fact, poker should be regulated not only on a national but also on an EU level, since customer protection in the EU can be achieved best if regulated national markets agree on common security standards.

Professor Friedrich Georg Schneider of Johannes-Kepler-Universität Linz, a leading expert on issues relating to the shadow economy, challenged the perceived threat of money laundering via online poker. According to his analyses, illegal gambling plays a minor role in global money laundering activities, running at approximately 0.5 per cent. In view of a study by Goldmedia on the German gaming market, he explained that, even if all online poker activities were used

**Professor Friedrich Georg Schneider of Johannes-Kepler-Universität Linz, a leading expert on issues relating to the shadow economy, challenged the perceived threat of money laundering via online poker.**

exclusively for money laundering, the total volume of laundered money would be small in comparison to other areas of the economy and therefore unattractive to criminals. He added that money laundering via online poker is associated with large outlay and high transaction costs. As the business model works with non-cash payment transactions, funds paid in have in most cases already been part of the banking circuit, and been subject to the financial institutions' money-laundering examinations before they are paid into player accounts.

Prof. Schneider's thesis was supported by Rapporteur Ashley Fox himself, who presented the draft of his long awaited Fox-Report to the Internal Market and Consumer Protection (IMCO) committee on 20 March 2013. During a conference in Brussels on 19 March he stressed that money laundering via EU regulated online gambling sites is not attractive for criminals since they would always leave "an electronic link behind, which can be traced." The 'ML issue' would therefore "not be a big problem for the regulated markets."

In addition, most regulated markets require 'safe-servers' that record all transactions and gaming behaviour, so that they are verifiable and associated with high detection risks for potential criminals. Finally, in-house safety standards are already very high, since online poker providers themselves have a vital interest in safe and fraud-free offers.

Against this scientific and factual evidence, there are more than reasonable doubts regarding the regulatory approach of the ITG, especially concerning the justification of the total ban on online poker. The future will tell if the German regulatory authorities leave the decision about EU

compliance to the ECJ and national courts, or if the minister presidents of the 16 German states and their gambling regulators take a more proactive approach.

The GRA has shown that a modern, non-discriminatory and EU law compliant regulation of online gambling can work in Germany. As a first step, the minister presidents of the 16 states could partially adopt the modern regulations from Schleswig-Holstein by opening the ITG's 'experimentation clause.' Schleswig-Holstein generated significant tax revenues from the 23 licensed casino operators. And even before online poker was allowed in Schleswig-Holstein, Germany had already become the second largest poker market in the world. The minister presidents should calculate the possible tax revenues in case of a nation-wide poker regulation. If neither scientific nor legal arguments are convincing enough for the decision makers in Germany, perhaps the financial arguments are.

All in all: if Germany's chief gambling regulators continue the ITG-track, Germany - next to France - remains the hottest candidate for infringement proceedings initiated by EU Commissioner Michael Barnier. Rapporteur Fox is already urging the EU Commission to take more action in this regard.

**Dr. Wulf Hambach** Partner  
**Maximilian Riege** Junior Partner  
Hambach & Hambach  
Contact via n.tonelli@timelaw.de

1. <http://online.liebertpub.com/doi/abs/10.1089/glr.2012.16125?journalCode=glre>
2. <http://www.ltsh.de/pressticker/2012-09/19/10-19-47-525a/>
3. <http://www.gaminglaw.eu/news/workshop-online-poker-at-the-eu-parliament-does-europe-need-uniform-safety-standards-experts-attest-providers-effective-control-mechanisms-against-fraud-attempts/>