

A NEW DAWN IN GERMANY

Dr Wulf Hambach and **Maximilian Riege** of Hambach and Hambach explore the dawn of a new age for online gambling in Germany as Brussels looks at the country's gaming law landscape.

For several months, gaming law experts have looked nervously to Brussels, awaiting its decision concerning Germany's new Interstate Treaty. The 'E-15 Draft' was signed by the 15 federal states in December 2011, subject to a "concluding positive statement from the EU Commission".

Accordingly, the pressure imposed by the E-15 representatives during their numerous trips to Brussels had been significant. However, the EU Commission was unimpressed and declared in its new statement: "On the basis of the information provided by the German authorities, the Commission services are not yet in a position to assess the extent of the problems identified or the suitability and proportionality of the measure proposed."

The accusation that the gaming regulation lacks scientific foundation is the leitmotif of the Commission letter. At numerous points, Brussels criticises that the assumptions made by the 15 federal states cannot be verified due to the absence of scientific surveys on the alleged risks and economic considerations. These facts are required by the European Court of Justice.

No convincing bans without evidence and data

It seems that the 15 Minister Presidents and their gaming law advisors have failed to grasp the decisive points of the letter of



warning sent by the Commission last summer. Even then, the different treatment of sports bets, online casino games and poker, the arbitrary limitation to seven sportsbetting licences, and the high tax rate imposed on gaming providers had been criticised.

previous seven – this still leaves the 21st sportsbetting applicant at an unfair disadvantage resulting in discrimination in comparison with the first 20 applicants. This not only constitutes a violation of fundamental European freedoms, but is seen to be a further unjustified encroachment

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However, the second regulatory attempt has not resulted in the lifting of the ban on online casino games and online poker. Additionally, 20 sportsbetting licenses are planned to be issued instead of the

upon the freedom of occupation guaranteed by Article 12 of the German Constitution, a fact pointed out only recently by the former president of the German federal constitutional court (BVerfG), Hans-Jürgen

Papier, in an overview on the new inter-state treaty on gambling. The same applies with regard to the planned taxation.

Finally, the unsubstantiated different treatment of games of chance with similar addiction potential, such as online sports bets and online poker, also constitutes a violation of the principle of a consistent and coherent gaming law regime.

Correspondingly, the EU Commission criticises, above all, that the legislators failed to do their homework, which would have been to provide evidence and data justifying a ban. To merely continue to repeat the addiction argument without providing any kind of evidence will not suffice, neither to justify the lottery monopoly nor the ban on online casino games and poker.

Schleswig-Holstein has done its homework

As the route taken by the 15 Minister Presidents has not brought legislative resolution, it would be high time to take a step in a different direction – to the North. In contrast to the E-15 Draft, Schleswig-Holstein actually can rely on ‘data and evidence’ – Brussels’ reply to the draft from northern Germany a year ago was as brief as it was positive in conclusion.

A study by the gaming and betting research institution, Bonner Forschungsinstitut für Glücksspiel und Wetten, from 2011 showed that online poker does not have a higher addiction factor than online sportsbetting. Due to this scientific evidence, the Schleswig-Holstein expert politician for economic affairs, Hans-Jörn Arp, CDU, finds it hard to understand why the representatives of the other federal states advocate the licensing of online sports betting, whilst at the same time propagating the ban on online poker for reasons of addiction prevention. Arp says that this cannot be explained by points of logic, but only by ideological reasoning.

The European Commission’s opinion on the draft German State Treaty identified several provisions that were deemed in conflict with the EU Treaty. In light of Schleswig-Holstein’s progressive regulatory programme, the draft treaty composed by the 15 Lander has received widespread criticism, including from the European Gaming and Betting Association (EGBA), who identified a number of components of the State Treaty that contravene EU Law.

“While the draft law appears to open the market for online sportsbetting operators from all EU Member States, it in practice reserves the market for the incumbent German monopolies. EGBA considers that several requirements in the draft State Treaty are in breach of EU law, including:

- The total number of sportsbetting licences available is limited without justification to seven, whereas the state monopoly for sportsbetting is exempt from the requirement to apply for a licence;
- An exorbitant tax of 16.67 percent of the amount wagered is imposed on all operators. This will make online wagering uneconomic, excluding

online operators and is clearly intended to protect the current state monopoly on offline bets from online competition;

- The licensing system ‘bundles’ offline and online sportsbetting together and applies a commercial viability test to would-be operators, thus putting online-only operators at an automatic disadvantage in applying for a licence;
- While privately owned land-based premises are limited to 350 per licence, no such restriction applies to outlets employed by the state-owned operators;
- Certain casino games may be offered online but only by specified casino game operators that are already operating land-based casino games in Germany;
- An illegal expansion of marketing is encouraged for the state monopoly, but marketing restrictions are placed on other operators;
- The licence fee will favour those applicants with land-based operations that attract higher margins and appears to be unrelated to the costs incurred to deliver and then maintain the licence.

Source: www.egba.eu

The next steps

Joining the Schleswig-Holstein regulatory model is possible at any time. The Schleswig-Holstein Minister President and the parliamentary party leaders of CDU and FDP in the Kiel parliament have always emphasised that the door remains open for the other federal states to endorse the Schleswig-Holstein model.

Schleswig-Holstein’s Minister of Interior Affairs, Mr Schlie, confirmed that the first

online gambling licenses would be issued by the end of April so from now on, we will bear witness to the beginning of a new age for online gambling in Germany.

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