

NEW eGAMING REGULATION IN GERMANY



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The 2nd Inter-State Treaty amending the Inter-State Treaty on Gambling (“ISTG 18”) is the next chapter in a history of failed attempts to regulate the growing gambling market in Germany. Instead of a complete overhaul of the German gaming regulations the federal states opted for “minimally invasive” changes, keeping the failed ISTG from 2012 (“ISTG 12”) mostly in place.

I. Background

The first mutual gambling regulation of the German federal states was the Inter-State Treaty on Lotteries. However, in 2006 the Federal Constitutional Court held the ban on private sports betting operators contained therein as unconstitutional. Consequently, the federal states replaced it with the ISTG 08, which undertook the modifications demanded by the Federal Constitutional Court, but kept the monopoly on sports betting. However, in 2010 the CJEU ruled that this was not in conformity with EU law due to a lack of coherence. With the ISTG 12 the German federal states then tried to partially liberalize the sports betting market with an experimentation clause foreseeing 20 licenses for an experimental phase of 7 years until June 30th, 2019. But the licensing process was a complete failure. None of the 20 licenses was granted. The issuance was stopped by several court rulings.

II. The ISTG 18

The ISTG 18 has been signed on March 16th, 2017, by the heads of the 16 German federal states and shall enter into force on January 1st, 2018, if all federal states deposit their ratification certificates until December 31st, 2017, at the state chancellery of the chairperson of the prime minister conference. The key aspects are:

- The limitation of 20 sports betting licenses is lifted.
- The experimental phase is extended until June 30th, 2021 (the

regular termination date of the ISTG 18). In case of a prolongation of the ISTG 18, the experimental phase is extended until June 30th, 2024. This prolongation requires an approval of at least 13 of the 16 federal states.

- Those 35 sports betting operators who fulfilled the minimum requirements of the information memorandum of October 24th 2012 and thereby managed to come into the second round of the licensing procedure pursuant to the ISTG 12 ("Top 35") are issued an interim statutory licence, which is limited to one year until December 31st, 2018, and revocable at any time. It is conditioned upon the Top 35 providing a security of EUR 2.5 million each.
- All other sports betting operators may apply for a licence in a new licence procedure from January 1st, 2018, onwards for the remaining of the experimental phase. The Top 35 also have to apply for such a licence for the time after the expiry of their interim statutory licenses. The licence requirements of the ISTG 18 are largely the same as in the ISTG 12. E.g., the requirements of a provision of a security of EUR 2.5 million and of the payment of a concession fee are still in place. Further, the controversial ban on live betting still exists.
- The federal state of North Rhine-Westphalia will be competent for the new licence procedure instead of Hesse.
- The ban of online-casino games (including online-poker) remains despite the fact that Germany is the second biggest market for online-casino games.
- A return to the state monopoly after 2021 (or 2024) is still possible.

III. Assessment

The European Commission considers the ISTG 18 as still not coherent and unfair, which is true. It is discriminative and the participation in the licensing procedure is economically unattractive. The remaining ban on online-casinos (including online-poker) is not suitable to reach the aims of the ISTG.

1. Unfair advantage for the Top 35

The issuing of interim statutory permits to the Top 35 discriminates unjustified sports betting operators who have not taken part in the initial licensing procedure of 2012 or have not managed to come into its 2nd round. These operators have to apply for a licence in the new licence procedure starting on January 1st, 2018, before they can enter the German market. The EU-Commission fears this may take at least one year (until the expiry of the interim statutory licenses). The licensing procedure of 2012 lasted for three years before courts stopped it. The competence-shift from Hesse to North Rhine-Westphalia, whose authorities have no experience with such a procedure, may make things even worse. Considering this, the granting of the new licenses might be not as swift as the federal states expect. It could take several years instead of "only" several months, if it will be successful at all. At the time when the non-Top 35 sports betting operators will receive their licenses, they will enter a market with up to 35 competitors who have already achieved a settled market position. This may result in severe competitive disadvantages for the non-Top 35 operators and may therefore be a restriction to the free movement of services.

Moreover, a distinction between the Top 35 and non-Top35 operators seems not to be justified given the fact that the initial licensing procedure 2012 was found by courts as unconstitutional and not in compliance with EU law due to a violation of the principle

of equality, the prohibition of discrimination and the principle of transparency. Those violations continue to have an effect with the distinction made by the interim statutory licenses and therefore restricts unjustifiably the free movement of services.

2. Economic unattractiveness

The acquiring of a licence for a legalized offer may not be economically attractive. The experimental phase has been shortened from initially 7 years to 3.5 years. Originally, the state monopoly was suspended for seven years in the ISTG 12 in order to evaluate the effects it has on achieving the objectives of the ISTG 12, especially which effects a liberalization of the sports betting market has for the combating of the black market and an increase of consumer and youth protection. These effects have to be assessed in only 3.5 years (from January 1st, 2018, to June 30th, 2021) pursuant to the ISTG 18. The extension to June 30th, 2024, requiring an approval of at least 13 federal states cannot be assumed as given fact. Moreover, the licence term does not start on January 1st, 2018, but only at the time licenses are actually granted. At the same time, the economic environment is more competitive due to a potentially unlimited number of licensed operators.

In light of the substantially shortened term of the licenses in a more competitive economic environment, the requirements of a bank guarantee of EUR 2.5 million and of the payment of a concession fee may hinder the economic sustainability of an acquiring of a licence. This applies even more to the use of the interim statutory licenses with a term of only one year and a revocability at any time. Adding to the legal uncertainty is the fact that applicants do not have a legal claim to an issue of a licence. Even if they fulfill all requirements, the competent administrative body of North Rhine-Westphalia could still deny them a licence. This opens the doors way to abuse and discrimination. Along comes the ban on live betting which is the most attractive offer and therefore mainly used by illegal operators. Hence, in an overall view the set of licence requirements seems to be inappropriate for a canalization of the black market and for an increase of consumer and youth protection. Therefore, it most likely violates EU law.

3. Incoherence of the ban of online-casinos

The ban of online-casino games (including poker) is not in accordance with EU law. During the pilot procedure concerning the ISTG 12 started by the EU-Commission against Germany in June 2015, the latter stated that the ISTG does not meet its objectives in the gambling sector, namely consumer and youth protection. A pilot procedure precedes an infringement procedure. In the notification process, the EU-Commission remarked that according to the case law of the CJEU member states have to prove the suitability of all measure restricting the free movement of services to reach their aims and to lead to a coherent regulation. Hence, the German federal states have to prove the suitability of the complete ban of online-casino games – including online-poker – for reaching the aims of the ISTG. They have not rendered such prove to date, even though they had agreed during the notification process for the ISTG 12 to provide an evaluation until July 2014. This date is long gone.

To justify the ban of online-casino games the German authorities refer to the allegedly high risk of manipulation, of development of gambling addiction and of money laundering. However, these claims are not supported by facts. The assumption

that online-casino games are prone to manipulation, gambling addiction and money laundering is rather false. Modern technology can be used to monitor the participants' gaming activity. Moreover, only a coherent regulation legalizing such games and providing authorities with suitable enforcement measures may mitigate such risks, and not a ban, which authorities are not able to enforce and with which they have no possibility to control the compliance with youth and consumer protection measures. The unregulated market grows from year to year. In 2013 an amount of € 17 billion was staked, raising from € 9 Billion in 2012 and € 5 billion in 2011. A market of this size may only be monitored with a licensing regime providing for a canalization into a legal market. By the refusal of a regulation and the simultaneous enforcement deficit, the German states do a disservice to the objectives of the ISTG. In the black market, the risks for consumers flourish. Therefore, the EU-Commission denoted the ban of online-casino games a "non-bearable solution".

Moreover, to combat the growing market German authorities try to execute the ban by issuing injunctions mainly against providers licensed in other EU member states rather than against operators seated in third countries because they cannot get hold of third country operators. But this ignores the compliance of the EU operators with the youth and consumer protection regulations of their seat member states.

4. The right of Hesse to terminate its participation in the ISTG Hesse has already expressed its doubts about the practicability of the ISTG 18. In 2015, the state government of Hesse issued "Guidelines for a modern Gambling regulation in Germany", including not only a licence regime for (online-) sports betting, but also for online-casino games. Hesse argued that for the purpose of consumer and youth protection a regulation of online-casino games is mandatory. Although questioning the practicability of the ISTG 18 in light thereof, Hesse still signed it. It has, however, a right of termination, if the negotiations about the introduction of a licensing regime on online-casino games fail, which the federal states have agreed to undertake.

Another potential candidate for exiting the ISTG 18 is Schleswig-Holstein. Originally, this federal state did not take part in the ISTG 12. Instead, it established its own gambling regulation, including a licensing regime for online-casino games. Only after a change of government, Schleswig-Holstein joined the ISTG 12. With elections coming up, another change seems possible. Other states could follow suit.

IV. Conclusion

With the ISTG 18 the German federal states missed again an opportunity to establish a coherent and up-to-date legal framework for eGambling in Germany. They did not implement the necessary adjustment of the legal framework to today's and foreseeable future challenges, but only fixed the most glaring problems of the ISTG. While the dropped limitation on sports betting licenses is to be welcomed, the introduction of the interim statutory permits deepens the incoherent nature of the German gambling regulations by discriminating all non-Top 35 operators. A legalization is unattractive under the given licensing requirements. The ban of online-casino games ignores the reality and is therefore not suitable to reach the aims of the ISTG. An online-casino games market of the size existent in Germany – which makes it the second largest in the

world – may not be controlled with a ban. It may only be effectively monitored with a licensing regime providing for a canalization into a legal market. Hence the ISTG 18 does not comply with EU law. Therefore, the CJEU's INCE ruling still applies. Prohibitive actions and criminal prosecution may not be applied as long as the German gambling regulations are not in conformity with EU law. In the light of the EU Commission's remarks during the notification process, a satisfactory outcome of the pending pilot procedure against Germany seems unlikely. In fact, expecting the start of an infringement procedure might be more realistic. :: **CGI**

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- 5 See footnote no. 2.
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