



GERMANY: WIND OF CHANGE?

While participants in Germany have been operating under undoubtedly challenging conditions since the last Interstate Treaty in 2012, the failure to grant the sports betting permits, the continued existence of Schleswig-Holstein licences and pressure from the EC to reform the regime are creating momentum for significant change in this huge market, argues **Christian Mayer** of Noerr LLP.

THE RATHER LAME track *Wind of Change* by the German band Scorpions will forever be linked with German unification and the city of Berlin. Currently another change is dawning – it looks as if the obvious contradiction between Germans being able to engineer the best cars in the world but appearing unable to implement a functional gambling regime will soon be resolved (and not only because the past weeks have shown that the German car industry is not as infallible as widely assumed). The reality of the current situation in the German gambling market is that it is not as bad as outside observers may assume, and it is improving. There are also valid reasons to believe that a significant change in the German gambling regulation is possible. Let's just hope that this new new era in German gambling regulation is blessed with a better soundtrack than the Unification!

No doubt, the procedure to grant the online sports betting licenses is a complete mess. The tender procedure was initiated in August 2012 and a decision on the fortunate applicants was announced in September 2014. But still there is no end in sight to the procedure. The first judgments by the Administrative Court of Wiesbaden and others left no doubt that

the decision announced last year suffered from more than just minor legal defects. The competent authority for the licensing procedure, the Ministry of the Interior in Hessen, chose a two-step licensing procedure with a pre-selection after the first round. But according to the latest court rulings by the competent Administrative Court of Wiesbaden (cf. VG Wiesbaden, 17.04.2015, 5 L 1448/14.WI), the authority failed to meet the requirements for a fair, transparent and non-discriminatory procedure. Hence the September 2014

GlüStV (2012) in its core. The "core" of the amended GlüStV is a seven-year experimental phase during which 20 sports betting licences should be granted. That is the main "liberalisation" of the new GlüStV in comparison to the previous Interstate Treaty entered into by the German *länder* in 2008. But even now after nearly three years, the authorities have not been able to grant the 20 private sports betting licenses. Hence the old unlawful state monopoly on sports betting, criticized by the ECJ in 2010 (cf. Joined Cases C

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decision of the Ministry of Interior on the licences will most likely be repealed and the licensing procedure restarted.

However, the Administrative Court in Wiesbaden did not only criticise the execution and the design of the licensing procedure but also the licensing regime within the Interstate Treaty on Gambling (GlüStV) itself. The Administrative Court of Wiesbaden challenges the new

316/07, C 358/07 to C 360/07, C 409/07 and C 410/07 Stoß and Others), is still active and preserved by the new GlüStV. Besides, the Bavarian Constitutional Court also recently declared other aspects of the GlüStV (2012) to be unconstitutional and void.

During the last year of the current procedure, the upside to this legal impasse has been a nationwide suspension of

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any formal enforcement against illegal gambling operations and advertising. This suspension and all its ensuing effects have even recently been “legalised” and approved by the Higher Administrative court in Munich. It is therefore legal today to provide online sports betting services in Germany and advertise these services even on television and over the internet despite the fact that no licences – neither for the operations nor the advertising – have yet been granted. As this suspension is legally linked to the licensing procedure, it will have to last either until the licences are finally granted or until a new GlüStV has been established. Either way, the suspension will most likely last for at least another year.

Furthermore, general regulatory inconsistency still remains within Germany of having one state (Schleswig-Holstein) that has issued betting and casino licences, the latter including online poker. These licences were granted by the Federal State of Schleswig-Holstein, and even though the Gambling Act in Schleswig-Holstein was revoked on 24th January 2013, these licences are due to last for a minimum period of six years. These licences are limited to the territory of Schleswig-Holstein, but Schleswig-Holstein rejoined the GlüStV-territory and under the GlüStV, there is no provision that would allow for the cessation of such licences. So in the end we have a significant amount of licenses

that will be valid for another four years even though they contradict and interfere with the current national gambling regime.

On top of and in relation to all these developments, Germany was formally issued by the European Commission with a pilot letter detailing its widespread objections to the current gambling regime. In this, the European Commission – which has always taken a highly critical stance toward the German regulatory framework – has asked Germany to reconsider its gambling regulations, as well as what steps it intends to take to end its sports betting monopoly and bring its legislation into compliance with EU law.

The pilot approach is the start of a structured dialogue on the issue and the first step toward possible infringement proceedings that could ultimately force Germany to abandon its strict gambling regime. The EC’s expressed concerns leave little doubt that the German gambling regime has to be generally revised, and early stage discussions on a new Interstate Treaty on Gambling have already begun among the German states. A look at the history of the gambling regime in Germany shows that any action initiated by the EU led eventually, step by step, to a more liberal Interstate Treaty on Gambling.

All these recent legal developments should encourage the gambling industry to seize on this momentum and push the regulatory regime in Germany to new

level. In the current situation, legal online casino services under a German licence are possible, as there are several arguments that can be relied upon even today when battling with German regulators in court. In tandem with political efforts that have recently been initiated by Hesse, this campaign for a fully regulated iGaming market will eventually be as successful as the push for the inclusion of sports betting in the last GlüStV was. The German gambling regime can – and must – change, so let us set sail and take advantage of this *Wind of Change*.



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