

# Sports, Betting, Online Poker & Co. – BGH Refers German Gambling Regulations to the ECJ

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Not only the Commission, but also the BGH now has its doubts regarding the German gambling system. Does the special act in Schleswig-Holstein on its own render void the inter-state treaty between the other federal states? And what happens now that the new Schleswig-Holstein government has decided to join the inter-state treaty after all? Wulf Hambach and Maximilian Riege think that there is a danger of a new negative ruling from Luxembourg. On Thursday, the BGH (the German federal court of justice) suspended the proceedings in a competition law suit brought by the state-run lottery company of North-Rhine Westphalia (West-Lotto) against a private internet gambling provider. The judges in Karlsruhe have referred to the European Court of Justice as many as four questions concerning the compliance of the German legal regime with EU law (resolution of 24 Jan. 2013, court ref. I ZR 171/10 – digibet). In the order for reference, the issues in discussion are the two regulatory systems which currently are in place simultaneously in Germany. The regulations of the „GlSpielG SH (Schleswig-Holstein gambling act) and the GlüStV (inter-state treaty on gambling) concluded by all other federal states“:<http://www.lto.de/recht/hintergruende/h/neuregelung-de>

s-gluecksspiels-15-bundeslaender-setzen-aufs-falsche-pferd/  
vary considerably, in particular in the area of internet gambling.

This is why the BGH asks the ECJ whether the coexistence of these two different gambling regulatory systems in Germany contradicts the requirement under European law to ensure a uniform and consistent legal regime in a member state (the so-called consistency and coherence requirement). Under the new government, Schleswig-Holstein today furthermore has returned to the inter-state treaty. So what next?

\*No peaceful coexistence of two systems?\*

Whilst in Schleswig-Holstein online sports betting as well as online casino games such as online poker are permitted, the other federal states only allow a maximum of 20 online sports betting providers to register for a licence, subject to significantly more restrictive conditions. In those federal states, online casino games continue to be banned entirely.

The BGH itself has stated that „the different regulations which originate from the federal system within a member state are not to be regarded as incoherent restrictions of the freedom to provide services, provided that they do relate to sectors which are not harmonized within the EU, such as gambling. In any case, it should not lead to an incoherence of the restrictions applicable in the rest of the German territory if their suitability is only insignificantly impaired by a more liberal legal regime in one single smaller federal state.“

However, it seems that the 1st Civil Senate is not absolutely certain in this assessment. According to the Court's case law, the gambling provider against whom the law suit has been filed acted in violation of competition law up until 31 December 2011 when the new inter-state treaty came into effect. However, since the changes in the law, the Court thinks that

the question is whether „German gambling law is still in compliance with European Union law.“ This is why the judges in Karlsruhe have referred this question to the ECJ.

In its statement dated 07 December 2012, the European Commission had already been very clear and had voiced significant doubts regarding the compliance with European law: „The Commission does not see how the simultaneous existence of two different regulatory systems for the same type of service could fulfil the requirement of ‚coherently and systematically restricting betting activities‘.“ As a logical consequence, the „Commission openly threatened Germany with the opening of infringement proceedings“:<http://www.lto.de/recht/hintergruende/h/deutscher-gluecksspielvertrag-entspricht-nicht-europaeischen-vorstellungen/>.

\*The Nordic backward flip – so what now?\*

Even though the new state government in Kiel decided in a parliamentary resolution of today that Schleswig-Holstein will join the inter-state treaty of the other federal states, and that the GlSpielG SH will be abolished, this decision will, according to the Ministry of the Interior, come into effect on 8 February at the earliest, so that legally, further licences may be issued.

However, the pending withdrawal of the act will not solve the problem. The 26 sports betting licences and 23 casino game licences issued up to now under the GlSpielG SH will remain valid for their entire six year terms. This means that the GlSpielG SH will continue to apply to this extent.

This is another scenario for which the 1st Civil Senate asks the ECJ for a clarification under European law. However, the Senate states that „it is in compliance with Union law if admissible regulations for the gambling area on which the federal states of a country have agreed will only take effect

in one of the federal states after a transition period of several years, even if this will in the meantime impair the effectiveness of these regulations in the rest of the national territory. This should at least apply if the impairment is only insignificant.”

However, the mere number of licences issued makes it clear that it will not be possible, even for the future regulation of sports betting in Germany, to transfer the 26 sports betting licences from Schleswig-Holstein into the then nationwide legal framework of the GlüStV, because the interstate treaty only allows the licensing of a maximum of 20 sports betting providers – not to mention the other 23 providers of casino games who have been granted a licence in the most northern German federal state.

\*Many open questions remain\*

In the current proceedings, the BGH does not deal with all relevant issues relating to the German gambling law regime. For instance, the Senate does not address the question as to why only 20 sports betting licences are intended to be issued under the GlüStV. It remains to be seen how the denial of a licence for the 21st sports betting provider applying for a licence for the German market will be justified if such provider fulfils all admission criteria of the currently ongoing tender procedure under the GlüStV.

On this issue, the European Commission had already pointed out that it was unable to see how the restriction of the total number of licences could be suitable to direct the consumers' demand into a controlled system and to combat crime and fraud. Furthermore, the decision taken on Thursday does not address the question as to the assessment under European law of the fact that the German state lottery monopoly is still justified, among other reasons, with the combat of addiction, even though private providers at the same time are permitted to offer games such as slot machines and sports betting in

gaming arcades or on the internet which are known to be more relevant in the context of addiction. The justification of a complete ban on online casino games, even though online sports betting has, at least partially, been legalised in Germany, has not been made the object of the decision from Karlsruhe either.

\*The only gambling act which complies with European law – withdrawn\*

These issues relating to the German gambling regulation will probably continue to occupy the German, and most likely also the European, courts, even though the fact that the German gambling regulations do not comply with European law was determined by „the ECJ as recently as in 2010 in Carmen Media (case

C-46/08)“:<http://www.lto.de/recht/nachrichten/n/gluecksspielstaatsvertrag-eugh-haelt-deutsches-staatsmonopol-fuer-nicht-mehr-gerechtfertigt/>. In a similar case, the Luxembourg judges decided today that the Greek gambling monopoly also violates European law, as it contradicts the requirements of a uniform and consistent regulation of gambling (cases C-186/11 and C-209/11).

With today's referral to the ECJ, the BGH therefore merely seems to be opening a new chapter in the legal dispute regarding the German gambling law regime. It remains to be seen whether and how the ECJ, the German courts and the European Commission will assess the new legal situation in Germany. In view of the new legal regime, the VGH (higher administrative court) of Baden-Württemberg has already voiced doubts with regard to the compliance with European law of the German gambling regulations, and therefore decided in favour of a private provider of online games of chance in summary proceedings (resolution dated 10 Dec. 2012, court ref. 6 S 3335/11).

The only thing that is certain is that the coalition of SPD,

Grüne and Süd-Schleswigscher Wählerverband has today decided that the only gaming act in Germany which had been unconditionally classified as complying with European law, i.e. the GlSpielG SH, will be withdrawn, in order for Schleswig-Holstein to be able to join the GlÜStV which faces considerable concerns under European law. Observers who are so inclined, and probably also the ECJ and the European Commission, will ask themselves: Why?

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