

A silver bullet

Article by Dr. Wulf Hambach, Partner, and Yannick Skulski, Associate, Hambach & Hambach Rechtsanwälte

New State Treaty has been criticized by President of State Constitutional Court for being rather than a political compromise a bullet proof legally compliant solution.

Gambling legislation in Germany falls within the competence of the federal states. That is why all 16 German federal states have agreed on an Interstate Treaty on Gambling to establish a homogeneous Gambling regulation. The current Interstate Treaty entered into force in 2012 and will cease to be in force by the end of June this year. One of the central provisions in the current treaty is the internet ban of § 4 paragraph 4 GlüStV, which is equally disputed in the industry and between legal experts.

Whilst the federal states opted for an experimentation clause in 2012, which would enable online operators to obtain a licence for online sportsbetting in Germany, other online offers like slots or online poker remained strictly prohibited.

This will change with the ISTG 21, coming into force July 1, 2021. From this date, operators will be able to participate in a formal application process for Online Gambling Licenses. The federal states concede that the current regulation has proven unsuitable to steer the urge to play in an orderly direction. However, new operators will be forced to adhere to strict requirements that are equally challenging from a technical and from a legal standpoint. The new Interstate Treaty differentiates between three newly regulated forms of gambling: virtual slots, online-poker and online casino table games (like Roulette, Blackjack). Whilst the first two forms will be subject to a new nationwide licensing procedure,

online casino table games will be subject to the regulation of the individual federal states. Since October 15, 2020, operators have already had a first taste of the new regulation of the ISTG 21 through the so-called Interim Regime for virtual slots and online poker.

The current Interim Regime comprises of two relevant documents: “The Resolution by written circular procedure of the heads of the State and Senate Chancelleries of the Federal States” and “The Common guidelines of the supreme gambling supervisory authorities of the German Federal States with regard to the offers of virtual slot machines and online poker on the basis of the resolution by written circular procedure“. These administrative agreements contain several requirements whose fulfilment – as long as their implementation is technically feasible – shall prevent operators from being the target of any public enforcement measures and from being considered to be unreliable in a subsequent licensing procedure. Effectively this means an administrative de facto toleration of online gambling services meeting the requirements until July 2021.

Substantively the Interim Regime pre-empts most of the regulations set forth in the new ISTG 21. The following list contains the most relevant requirements that operators have to adhere to:

General requirements

- The gambling provider must have its registered place of business in a Member State of the European Union or the European Economic Area.
- Exclusion of minors and blocked players via identification and authentication (comprehensive KYC) is ensured. During the transition regime, exclusion of blocked players must be ensured via an own, provider-specific blocking system.
- Only one account per player is allowed.

- Providers must ensure that Payments into or from a player account may be made exclusively from a (banking) payment account which has been opened in the name of the player.
- Separation of player-operations funds and organiser funds is obligatory.
- Exhaustive information on stakes, winnings, losses of the previous 30 days, pay-out ratio, probability of winning and losing, contact data and how to submit a complaint must be provided.
- Definition of a domain-specific individualised monthly deposit limit (which constitutes a key change to the current Interstate Treaty) of no more than €1,000 with option to set domain-specific daily, weekly or monthly stake, deposit and loss limits.
- Gambling providers must implement a 24-hour blocking option (so called “panic-button”).
- Granting loans or playing on credit is prohibited.

Specific requirements for Virtual Slot machines:

- Prohibition of auto-play and simultaneous playing.
- Minimum five second spin duration per game.
- Maximum stake of €1 per spin.

The entry into force of the ISTG 21 will impose further restrictions on licensed providers:

- In particular, the deposit limit of €1,000 per month, which is still operator- specific under the interim regime, will then be replaced by a cross-provider deposit limit and monitored by the limit-file.
- Introduction of a central player blocking system (OASIS, currently in place only for sportsbook operators).
- Introduction of a central activity file.
- Introduction of a safe server and interface for access of information by authorities.

Connection to these systems will be mandatory for licensed

online-operators. According to official announcements, these systems should be operational by July 1, 2021. In the light of these new central files, concerns have already been raised in relation to data protection and secure technical realisation.

Furthermore, all operators applying for an online gambling license must provide a security of €5m. However, this stipulation is regarded to be unconstitutional as it may be disproportionate for smaller operators.

The new Interstate Treaty on Gambling will also replace the provisions of the current guidelines on advertising for games of chance. As a result, there will be no separate advertising licensing from July 2021, but any permission to advertise will form part of the new gambling licence.

Lastly, the new Interstate treaty establishes a new Joint Gambling Authority. However, this authority will be “built from scratch”. The Authority will be responsible for supervision and granting of licences (especially online poker, virtual slot machines, online sport bets) as well as the central systems such as the blocking system. Until the commencement of operation in January 2023, the new licensing procedures for virtual slots and online poker will be administered by the State Administration Department of Saxony-Anhalt, with online sporting betting continuing to be licensed by the Regional Council Darmstadt (Hesse).

Summary and outlook

Whilst it is welcome that the federal states recognises the need to give providers their rightful place in the legal market, the legislator has only partially succeeded in implementing the appropriate regulatory framework for this.

According to Professor Dr. Christoph Brüning, President of the Schleswig-Holstein State Constitutional Court, the new ISTG 21 raises significant legal questions that need to be clarified by national and European courts and that the new ISTG 21 will

not be the last change in the German gaming system (NVwZ 2021, page 11, "Das Online-Glücksspiel nach dem Glücksspiel-Staatsvertrag 2021").