

The conflict area of reliability under gaming law as a special license requirement for sports betting, online poker and virtual slot machine games

Article by Dr. Wulf Hambach, Partner, Phillip Beumer, Associate, Yannick Skulski, Senior Associate and Christian Reidel, German Lawyer at Hambach & Hambach Rechtsanwälte

On July 1st, 2021, the State Treaty on the New Regulation of Gaming in Germany (State Treaty on Gaming 2021 – GlüStV 2021) came into force. Now the permission for an event of sports betting, online poker and virtual slot machine games is granted on application. If the specific requirements are met, there is a right to approval. However, if the competent authority nonetheless refuses to grant the license, the applicant is liable for damages under certain circumstances.

One of these „special licensing requirements“ pursuant to Section 4a GlüStV 2021 is the so-called “extended reliability“ pursuant to Section 4a (1) No. 1 GlüStV 2021, which will be discussed below. Particular attention will be paid to the reliability under gaming law within the meaning of Section 4a (1) No. 1 lit. b) GlüStV 2021.

I. Enhanced reliability as part of the special licensing requirements for sports betting, online poker and virtual slot machine games

The special licensing requirements, in particular the extended reliability, must first be assessed from the perspective of

risk prevention – and not from that of sanctioning. The aim is to protect business transactions. The determination of the extended reliability is subdivided as follows:

The first aspect of extended reliability pursuant to Section 4a (1) no. 1 lit. a) GlüStV 2021 is full disclosure of the applicant's ownership and shareholding structure. Absolute transparency must also be ensured with regard to the respective shareholding ratios of the applicants, provided these do not fall below a certain threshold. As a second aspect, according to No. 1 lit. b), the applicant and the responsible persons commissioned by it must possess the reliability and expertise required for the organization of public games of chance and must guarantee that the event is carried out properly and in a manner that is comprehensible to the gaming participants and the licensing authority. In the case of legal entities and partnerships, all persons authorized to represent the entity must meet the requirements of reliability and expertise. According to No. 1 lit. c), thirdly, the lawful origin of the funds required for the organization of public games of chance must also be demonstrated and, finally, No. 1 lit. d) requires that neither the applicant himself nor an enterprise affiliated with him nor a person controlling the applicant nor a person controlled by the person controlling the applicant organize or broker unauthorized games of chance.

II. Origin and Meaning of the Term "Reliability" or "Unreliability"

The term "reliability" used in Section 4a (1) no. 1 lit b) GlüStV 2021 is in itself a central concept of trade law (cf. Streinz, NVwZ – Extra 3/2022). This is an indeterminate legal concept that is fully reviewable by a court and does not grant the authority any discretion. The term "unreliability", which is a prerequisite for a trade ban, also comes from trade law. According to Section 35 (1) of the German Trade Regulation Act (GewO), a person is unreliable if, based on the overall

picture of his or her behavior, there is no guarantee that he or she will properly carry out the trade he or she is engaged in in the future. Due to the serious consequences of a trade ban for the trader, a particularly responsible weighing up must take place between the trade authority measures that are indispensable for the proper functioning of the economy and the interests of the trader. The competent authority must assess past conduct and ultimately make a prognosis decision on the basis of proven facts in the specific individual case. All behavior is relevant in this respect, insofar as conclusions can be drawn from it for the activity applied for (cf. Streinz, NVwZ – Extra 3/2022).

It is thus the authority's very own task to fully ascertain the facts of the case, to evaluate individual criteria and also to weight them according to the type and severity or number of violations, as well as to uphold the principle of proportionality in its prognosis decision, so that an official intervention can be foreseeable and determinable. The obligation to be heard resulting from § 28 VwVfG means that the opportunity must be given to comment on specific objections in order to be able to eliminate or eliminate existing (alleged) deficits after clarification of the legal and factual situation.

It is of great importance that the burden of proof for the existence of those facts which justify the prognosis of unreliability lies with the competent authority (cf. Becker, ZfWG 1/2022). Facts must therefore be proven and speculation is prohibited.

The explanatory notes to the GlüStV 2021 state that the required reliability (under gaming law) of the applicant and the responsible persons is modeled on the reliability under commercial law, which means that the reliability under commercial law undergoes a "modification" under gaming law due to the special features of gaming law. It is therefore necessary to clarify by way of statutory interpretation which

conduct in the area of gaming law should specifically lead to reliability or unreliability, whereby the principles set out above also apply in the area of gaming law.

III. Individual aspects of (modified) reliability under gaming law

A predefined catalog of indicators for reliability or unreliability under gaming law within the meaning of Section 4a (1) no. 1 lit. b) GlüStV 2021 does not yet exist. In any case, it must be assessed in the specific individual case whether the applicant and the responsible persons offer a guarantee that they will organize and carry out the gaming offer permitted to them properly and in compliance with all regulatory requirements of GlüStV 2021 as well as the content and ancillary provisions of the license. Reliability does not mean infallibility, however, which is why the licensing authority may not refrain from weighting any violations of the law. Nor may a "bad actor clause" ("good conduct clause") be applied through the "back door", because such a clause was not part of the GlüStV 2021 and would also be an expression of an inadmissible sanctioning concept and would not serve to avert danger.

In each specific case, a final conviction for a criminal offense under Section 284 StGB would therefore necessarily have a negative impact on the licensing procedure or on a license that has already been granted. However, a violation of legal requirements that are sufficiently specific, foreseeable and transparent will also trigger the same negative consequence for the provider in question. However, formal prohibition orders under the "old" state treaty cannot be relied upon as a decisive factor; rather, the authority must assess the underlying facts independently, because the prognosis decision is based exclusively on facts. Insofar as foreign decisions are to form the basis of a declaratory procedure, the authority must ensure that the procedural rules applied by foreign authorities can be brought into line with

the essential principles of German law. The positive decision on unreliability must be based on a legally binding decision by an authority or a court (cf. Becker, ZfWG 2002, p. 114 ff.).

The applicant's or provider's willingness to be regulated, which must be proven, is of decisive importance in the authority's "prognosis decision" with regard to reliability, because the key objective of the GlüStV 2021 is to steer gambling offers towards legal gambling offers and their provision by appropriate gambling providers. This willingness to regulate must be expressed in the behavior of the applicant. The decisive factor is compliance with the requirements of the GlüStV 2021 – which are admittedly questionable from a legal point of view – as specified in the guidelines, the response to sufficiently precise complaints and the prompt elimination of actual deficits – in cooperation with the licensing authority (see Streinz, NVwZ – Extra 3/2022). In order to demonstrate the willingness to regulate, supra-mandatory efforts such as voluntary audits are likely to be extremely helpful, which can thoroughly check and establish compliance with all relevant gaming law requirements.

It is also important that the institute of "self-cleaning", which is known from public procurement law (Section 125 GWB), must be taken into account analogously for reasons of proportionality. This opens up the possibility, and thus takes account of the principle of proportionality, of disproving an unreliability that has actually been proven and restoring the guarantee of proper performance of the organizer's activities. In this context, self-cleaning means that concrete technical, organizational and personnel measures have been taken, that clarification has been provided through active cooperation with the competent authority, and that effective compensation for damage has been provided. The burden of proof for this lies with the applicant, the evaluation of the self-cleaning efforts with the authority. If an applicant no longer poses a

threat that must be prevented under GlüStV 2021 because the self-cleaning process has been successfully completed, it will be difficult to accuse him of past unreliability (cf. Becker, ZfWG 2002, p. 114 ff.). This is also in line with the legal concept of Section 35 (6) sentence 1 GewO.

An applicant who has already permissibly offered corresponding games of chance relevant to the assessment of reliability in Schleswig-Holstein, has consistently had the required reliability certified will be able to duly assert this, in particular insofar as there are no relevant objections, when deciding on the required reliability, also in the case of an application for a license for games of chance pursuant to the GlüStV 2021 (cf. Streinz, NVwZ – Extra 3/2022). The formal administrative act of granting the license is less decisive in this regard than the expression of the organizer's continued willingness to submit to the supervision of the licensing authority and the applicable regulations. In this context, it is likely to be of eminent importance that the entry into force of the State Treaty on the New Regulation of Gaming in Germany on July 1, 2021 marks a turning point, which means that the competent authorities must base their "risk prognosis" on a new foundation, as violations of the old legal situation can no longer justify an unfavorable prognosis without the addition of further circumstances. Thus, it can no longer be held against an applicant that he did not seek a corresponding license under the GlüStV 2012. This is because such a license was not available at all.

Pursuant to Section 4a (1) lit. d) GlüStV 2021, the fact that "unauthorized gaming is organized or brokered" is an argument against reliability. In view of the diversity of international gaming regulations, it remains questionable, for example, according to which legal system the permissibility or impermissibility of organizing or brokering games of chance should be determined in the case of an applicant domiciled abroad (cf. Becker, ZfWG 2002, p. 114 et seq.). Pursuant to

Section 4 GlüStV 2021, a game of chance is organized or brokered where the player is given the opportunity to participate. If a company based in Germany as the applicant does not comply with applicable German law, it is regularly to be classified as unreliable. The same is likely to apply to a company based abroad that does not provide services for the German market but offers unauthorized gambling in contravention of the law of the market there. This is justified by the fact that it is at least anything but impossible that the person who is guilty of violations in one (gaming) legal system will also not behave in a legally compliant manner in another gaming market. And the prognosis of a legal violation in the future, supported by facts from the past, establishes unreliability under commercial law. For a transitional period, the heads of the state and senate chancelleries of the Federal States agreed by circular resolution of September 8, 2020, on a joint procedure for assessing the reliability of providers, so that after the GlüStV 2021 comes into force, companies can offer games of chance that are eligible for approval even before it comes into force, without running the risk of having to fear adverse consequences for the subsequent assessment of their reliability (cf. on this Becker, ZfWG 2002, p. 114 ff.). Providers should be offered a "transition to the regulatory framework of the GlüStV 2021" insofar as they actually already adapt their business practices to the anticipated future legal situation and limit their offerings accordingly (cf. item 4 of the circular resolution of the heads of the state and senate chancelleries of the federal states dated September 8, 2020). The situation becomes problematic if the foreign applicant offers gaming that is permitted under the law of its state, but which is not permitted in Germany or was not permitted in Germany before the GlüStV 2021 came into force. Insofar as the gaming permitted there does not radiate to the German market, i.e., players cannot participate in it from Germany, an unreliability will be unproblematic to reject. A danger that must be "averted" does not exist in this respect. The

situation changes considerably, however, if a company offering gaming that is permitted abroad also makes its services available to players in Germany. Provided that there have been no violations in the past, the assessment of reliability or lawfulness becomes difficult. This is particularly the case if, according to the law of the foreign country, the “place of play” is not the residence of the respective player, but the place where the company’s computing power takes place. A participation of German players who play games of chance of a foreign provider on the territory of the Federal Republic of Germany, which cannot be authorized there, will not be reproachable to the same, because it cannot be obligated to initiate active defensive measures for the protection of one or many foreign legal systems. So far, there is no obligation for so-called geolocation. If, however, a company based abroad and holding a foreign license offers a German-language range of games of chance that are legal at the company’s registered office but cannot be licensed in Germany, and promotes this by means of targeted advertising in Germany, the competent authority is likely to want to draw conclusions about reliability from this if the achievement of economic advantages is placed above legal requirements (cf. again Becker, ZfWG 2002, p. 114 ff.).

However, the GlüStV 2021 also has implications for attribution relationships based on group law. Can a third-party unreliability influence the reliability assessment of the applicant? This applies in any case if the third-party conduct allows conclusions to be drawn about the applicant’s own personality and there is a legal or economic relationship between the two. If a trader, as the person responsible, is under the influence of a third party that endangers the interests of the general public, he can now also become unreliable himself as a result of this influence of the unreliable third party if he is unable to eliminate such an influence or even admits to such an influence. This is of particular importance in cases of so-called straw man

relationships, where both the straw man and the backer are judged. In the case of an unreliable backer, the unreliability of the straw man arises simply from the fact that he allows such a person to engage in commercial activity. In the case of legal entities, the unreliability is ultimately due to the conduct of natural persons, i.e. the conduct of their legal representatives. Section 4a (1) no. 1 lit. d) GlüStV 2021 – in contrast to the previously described attribution of unreliability of third parties under commercial law – does not rely on a concrete influence of the unreliable party on the applicant: Rather, for three types of relationships between the applicant and the third party, such possibilities for influence by the third party are simply assumed on the basis of a corporate or other contractual relationship. The attribution in the context of gaming law should seek to prevent the assumption of “reliability“ through the splitting of an entrepreneurial activity when viewed in isolation, even though the group as a whole is not law-abiding and attempts to exploit its (in itself completely legal) fragmentation under company law in order to isolate itself from current or past actions. Section 4a (1) no. 1 lit. d) specifies certain corporate relationships under company law for gaming law and typified paths of influence and control, which is why the competent authority only carries out a purely formal examination of the shareholding relationships. Precisely because of the diversity of corporate and contractual constructions (worldwide), it must be possible for the applicant to prove, in order to maintain proportionality, that despite a connection to a third company typified in Section 4a (1) No. 1 lit. d) GlüStV 2021, it is ensured through personnel, organizational and contractual arrangements that the possible unreliability of the affiliated company has no effect on its current and future compliance with the law. Thus, an applicant should not be sanctioned for a third party’s disobedience of a standard without gaining anything for the integrity of the gaming market (see again Becker, ZfWG 1/22).

IV. Liability for damages in the case of wrongfully rejected applications despite reliability under gaming law

On the basis of the foregoing, it becomes clear that the competent authority must take into account a particularly high number of factors in its decision with regard to the gambling law reliability test in a specific individual case. If the authority comes to the decision that the legal licensing requirements are met, it must also grant the license applied for, because there is then a direct entitlement to this.

A particular area of conflict can arise, however, if the so-called Gaming College of the Federal States, which decides on the respective applications, nonetheless rejects applications or fails to reach a decision even if the licensing requirements are met. Irrespective of the fact that its legal legitimacy is more than questionable, the Gaming College, as the coordinating body of the Federal States in gaming regulation, is bound by law in accordance with Article 20 (3) GG. Arbitrary decisions are thus eliminated. In this context, unlawful resolutions by the Gaming College are therefore extremely problematic and ultimately the starting point for potential claims for damages or official liability claims if, despite the existence of reliability under gaming law and the other requirements, the majority of the Gaming College votes against an application or – as already written – no decision is reached and an application is therefore not granted. This is because, if the requirements are met, there is a right to approval, which the gaming college must approve in accordance with the principles of the rule of law. There is no room for “discretion” here.

An additional potential for conflict also arises from the fact that, pursuant to Section 27p (9) sentence 9 GlüStV 2021, the competent authorities are to be bound by the decisions of the Gaming College. Due to the legality of administration, the question arises as to how “bound” authorities are to deal with it if the Gaming College does not reach a decision on an

application or wrongfully rejects an application. It remains to be seen whether the courts will have to address this issue in the future.

V. Concluding Remarks

Due to the fact that there is no predefined catalog of indicators for reliability or unreliability under gaming law, the competent authority must always make a risk prognosis in the specific individual case. However, infallibility cannot be demanded. Any violations of the law must be weighted, with the principle of proportionality being of eminent importance. The caesura effect of the entry into force of the State Treaty on the New Regulation of Gaming in Germany on July 1, 2021 is likely to mean that the licensing authority will have to base its old risk forecasts on new foundations, as violations of the old legal situation can no longer justify an unfavorable forecast without the addition of further circumstances.