



The Gambling Research Center informs...

(Interview with Prof. Dr. Armin Dittmann)

Prof. Dr. Tilman Becker questions Prof. Dr. Armin Dittmann, Chair of Public Law at the University of Hohenheim and Member of the Gambling Research Center

As reported by the press (e.g. Games and Business Online, June 21st, 2011), Schleswig-Holstein's Gambling Law shall be decided on in the parliament of Schleswig-Holstein in August, and shall come into effect on October 1st, 2011. At the same time, the prime ministers of the federal states have postponed signing the new State Treaty on Gambling to October, as was also reported by the press (e.g. Heise Online June 9th, 2011).

- 1. What if the Parliament of Schleswig-Holstein will have passed a new Gambling Act for Schleswig-Holstein before the meeting of the Prime Ministers will have taken place in October? Could the Prime Minister of Schleswig-Holstein then agree to a draft for a new State Treaty on Gambling at all?***

From a purely legal point of view, the Prime Minister would not be restrained from approving the draft for the State Treaty on Gambling. Indeed, – referring to article 30, paragraph 2 of the state constitution – he would also have to try to obtain consent from the federal state's government and – most of all – to have the treaty ratified by the Schleswig-Holstein parliament. Therefore, the consent of the Prime Minister on the draft State Treaty on Gambling would only make sense if he was supported by the federal government, and if it was likely for the Schleswig-Holstein parliament to follow the advice of the Prime Minister, thus agreeing to the draft. Any other scenario would be risky, giving rise to doubts on the Schleswig-Holstein's role as a reliable partner for the other federal states – even if the State Treaty on Gambling contains a reservation, stating that the approval of the parliament is required.

- 2. Assuming that the new State Treaty on Gambling will be approved by the Schleswig-Holstein parliament: What would be the effects on the Schleswig-Holstein Gambling Act, that will have already been agreed to by Schleswig-Holstein's parliament, and will have come into effect?***

If the State Treaty on Gambling would – in addition to the consent of the Schleswig-Holstein parliament – also be approved by the parliaments of at least twelve more federal states, it

would come into effect in Schleswig-Holstein on 01.01.2012. As the more recent law, it would replace the previous gambling act. As a consequence, the provisions of the State Treaty on Gambling would form the legal framework from January 1st, 2012 onwards, provided that Schleswig-Holstein does not agree upon a transitional arrangement which grants a longer transition period.

3. *If the Gambling Act was to be replaced by the State Treaty on Gambling: How would this affect the licenses that had previously been issued on the basis of the Gambling Act?*

In principal, their existence would not be affected by the change of the legal situation. They may be revoked only under the very narrow conditions of § 49 LVwVfG, possibly in conjunction with the obligation to pay compensation. Therefore, it would be advisable if the state of Schleswig-Holstein, keeping in mind that the State Treaty on Gambling might come into effect, implemented their own Gambling Act very cautiously, providing licenses with a reservation of revocation in case the State Treaty on Gambling should come into effect. Such a revocation clause could prevent that license holders claim for compensation, arguing that their trust was violated by the withdrawal of licenses.

4. *Let's return to the option of Schleswig-Holstein not joining the State Treaty on Gambling. What would such a solo attempt of Schleswig-Holstein imply in terms of consistency, which was requested by the ECJ?*

The consistency requested by the ECJ refers to that the gambling sector in Germany should be regulated free of contradiction. The regulation(s) must implement the regulatory objectives consistently, and not contradict one another. If the regulations of the State Treaty on Gambling and Schleswig-Holstein's Gambling Act can form such a consistent system, the solo attempt of Schleswig-Holstein would not be a problem at all.

However and according to the currently available draft documents, such consistency cannot be taken for granted. In particular, the restriction to a maximum of seven concessions in the State Treaty on Gambling on the one hand, and the high degree of liberalization in the Gambling Act of Schleswig-Holstein on the other, as well as the involvement of casinos in the State Treaty, but not in the Schleswig-Holstein's Gambling Act do not match.

5. *Is this an indisputable verdict?*

Considering the ECJ's previous case law, a violation of the principle of consistency can be assumed. The consistency in the entire member state must be taken into consideration, regardless of the way in which the national competences are distributed. In the words of the "Carmen Media Group decision" of the ECJ of September 8th 2010, I quote:

“(69) As for the fact that the various games of chance concerned are partially within the competence of the *Länder* and partially within the competence of the federal State, it should be recalled that, according to consistent case-law, a Member State may not rely on provisions, practices or situations of its internal legal order in order to justify non-compliance with its obligations under EU law. The internal allocation of competences within a Member State, such as between central, regional or local authorities, cannot, for example, release that Member State from its obligation to fulfil those obligations (see to that effect, in particular, Case C-417/99 *Commission v Spain* [2001] ECR I-6015, paragraph 37).”

“(70) It follows from the above that, whilst EU law does not preclude an internal allocation of competences whereby certain games of chance are a matter for the *Länder* and others for the federal authority, the fact remains that, in such a case, the authorities of the *Land* concerned and the federal authorities are jointly required to fulfil the obligation on the Federal Republic of Germany not to infringe Article 49 EC. It follows that, in the full measure to which compliance with that obligation requires it, those various authorities are bound, for that purpose, to coordinate the exercise of their respective competences.”

(source: eur-lex.europa.eu)

However, the following logic could lead to different results:

In previous case law, the ECJ conceded the individual European member states that different regulatory principles be followed, there being no need for consistency on a European scale. The ECJ has repeatedly stressed that the moral, religious or cultural factors and the negative moral and financial effects on the individual and on society that go along with gaming and betting may justify the state authorities to determine, in accordance with their own scale of values, which requirements are needed to protect the consumers and to uphold social order. Therefore, the member states are free to define their own objectives as well as the level of protection regarding gambling and betting autonomously and according to the special requirements of their territories, as long as they are proportional.

In my view, it would also be appropriate to show this kind of respect for national peculiarities to the individual member states of a federal republic, in Germany e.g. to the federal states, which are basically responsible for gambling issues.

It is quite conceivable that a (large) state may consist of several constituent states which differ in their attitudes towards gambling for moral, religious or cultural reasons. Therefore, it could be justified to have different adoptions in the constituent states about the way in which the gambling sector is organized and consequently, to accept the coexistence of diverging rules. The division of powers between the federal states, as required by the German constitution, would not be opposed to this. In addition, and – with regards to the European law – it should be kept in mind that European Law demands respect for the national identities of the member states under Article 4 TEU. Germany’s federal structure, which was designed for diversity and the acceptance of different “cultures,” is an essential component of the German constitution. Hence, it should not be excluded that the rules that are presently at the discretion of the member states could also be extended to the discretion of the constituent states of the federal state, and still be compatible with European law.

However, in case of a Schleswig-Holstein solo attempt it would be hardly possible to justify the derogation with Schleswig-Holstein’s moral, religious or cultural peculiarities. The way that Schleswig-Holstein had had common regulations with the other federal states for years would at least provide a strong counter-argument.

Consequently, it remains the conclusion that a co-existence of the State Treaty on Gambling and the Schleswig-Holstein Gambling Act – in their current draft versions – would contradict the demand for consistency.

6. *Would a lack of consistency entail a legal vacuum in Schleswig-Holstein and the other states?*

A legal vacuum would not arise, neither in Schleswig-Holstein nor in the other federal states. The violation of the demand for consistency made by European law would have only one effect: The regulations which cause the inconsistency would be inapplicable – for example the different admission regulations for admitting suppliers as ruled in the State Treaty on one hand, and in the Schleswig-Holstein Gambling Act on the other. The prevailing opinion is that the authorization for organizing the gambling sector would basically remain in the hands of both regulatory regimes. Gambling without permission would be still illegal and punishable.

However, the countries would be urged to immediately make arrangements that allow the admission of gambling providers in a consistent way, or to establish a consistent regime in any other way. This includes the option of returning to the monopoly solution.

7. *Schleswig-Holstein's Gambling Act has already been notified by the European Commission. According to press reports (Games and Business, June 21st 2011), there are three points which the European Commission considers to be critical in the Amendment of the State Treaty: The limitation of licenses for sports betting to seven, Internet blocking and non-observance of online poker. Will it suffice to improve certain points, or will the notification process impose the corresponding time limits again?*

Articles 8 and 9 of Directive 98/34/EC of 22.06.1998 include rules for the notices and statements of the Commission during the notification process, as well as the standstill periods. In my view, the text of article 9 paragraph 1 and 2 in conjunction with article 8 paragraph 1 favors the option of adopting a new duty of notification and a new standstill period in case of amendments, because significant changes in Article 9 paragraph 1 and 2 seem to have the same weight as the former version. This could mean that each draft, and also the changes in the draft during the notification process, shall be notified and a new standstill period shall begin.

On the other hand, the regulations also seem to aim at a consistent process, which does not necessarily imply that the drafts may not be altered during this process. In addition, the guideline of the Commission is only meant to inform and not to prevent the acceptance of the (amended) draft. Thus, the legal situation is not entirely clear.

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