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# THE GAMBLING LAW REVIEW

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## Chapter 8

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# GERMANY

*Heiner Kahlert*<sup>1</sup>

### I OVERVIEW

#### i Definitions

Broadly speaking, German gambling laws apply only to games of chance. Those are defined, both under criminal and administrative law, as games in which winning is dependent solely or predominantly on chance, and in which odds are acquired in exchange for a consideration.<sup>2</sup>

In order to determine whether winning is dependent predominantly on chance, courts look at the average player, not at particularly skilled or experienced ones.<sup>3</sup> If a game's outcome is predominantly determined by skill ('game of skill'), it is not caught by general gambling legislation. However, if a game of skill is organised commercially and offers the opportunity to win cash or goods prizes, its operation requires a licence from the competent authority (Section 33d(1) of the Commerce Regulation Act). Likewise, amusement arcades or similar businesses require a licence even if they offer only games of skill with or without the opportunity to win cash or goods prizes (Section 33i(1) of the Commerce Regulation Act). While those provisions of the Commerce Regulation Act may be regarded as gambling laws, games of skill will not be dealt with further in this chapter.

As to the element of consideration required by the above definition of games of chance, a direct link is required between the consideration and the chance of winning, in other words the chance of winning must be acquired by virtue of the consideration and without any further requirements. Therefore, entry fees that merely grant access to a game do not fulfil this requirement.<sup>4</sup> Furthermore, at least under criminal law, there is a *de minimis*

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2 From the perspective of administrative law, see Section 3 (1) of the German Interstate Treaty on Gambling 2012; from the perspective of criminal law, see BGHSt 2, 274, 276.

3 See, for example, BGHSt 2, 274, 276 et seq.

4 For criminal law: BGH NJW 1987, 851, 852; for administrative law: BVerwG, NVwZ 2014, 889, 891.

exception whereby games of chance presuppose a consideration that is not negligible.<sup>5</sup> It is disputed whether the same holds true for administrative law purposes.<sup>6</sup> If one follows the arguably prevailing opinion that the *de minimis* exception exists also in administrative law, games predominantly determined by chance but with no or negligible consideration do not fall under the general gambling laws, but only under Sections 33d or 33i of the Commerce Regulation Act.

Finally, according to legal doctrine, genuine commercial activities such as insurance contracts and speculative financial products generally do not fall under gambling laws.<sup>7</sup> One might say that such financial products are not considered ‘games’ within the meaning of the above definition of games of chance, unless they are materially gambling in disguise of financial products.<sup>8</sup> However, administrative courts have held that bets on future stock exchange prices are covered by the definition of gambling contained in the German Interstate Treaty on Gambling.<sup>9</sup>

Recognised examples of games of chance are (in case of non-negligible consideration): lotteries and draws; sports and horse betting (including spread betting and pool betting, and arguably fantasy leagues);<sup>10</sup> dice games; poker (disputed for Texas Hold’em tournaments); blackjack; rummy; roulette; and gaming machines.

Recognised examples for games of skill are: skat, duplicate bridge, chess and darts (unless the sporting element outweighs the entertainment aspect).

For the sake of simplicity, games of chance (i.e., those games subject to general gambling laws) are hereinafter referred to as ‘gambling’.

## ii Gambling policy

It is not an easy task to summarise the German gambling policy. Gambling laws are spread over different legislative acts on federal and state levels. Not all legislators have pursued the same gambling policy in recent years. In addition, with the German Interstate Treaty on Gambling of 2012 (Gambling Treaty 2012), which today is the core instrument of German gambling law, the same legislator takes different approaches with respect to different types of gambling. In some instances, it is open to debate whether there are policy reasons behind the deviating approaches or whether these are due to the fact that some stakeholders were more successful in their lobbying activities than others.

This being said, broadly speaking, the policy is that most gambling is subject to a restrictive legal regime. For some types of gambling, there are state monopolies (e.g., bigger lotteries and, in many states, casinos). For all other gambling, private operators need a licence

5 It is disputed what the limit is, see Heine/Hecker, in: Schönke/Schröder (eds.), *Strafgesetzbuch*, 29th edition 2014, Section 284 StGB para. 8.

6 See Dietlein/Hüsken, in: Dietlein/Hecker/Ruttig (eds.), *Glücksspielrecht*, 2nd edition 2013, Section 3 GlüStV paras 5 et seq.

7 See Heine/Hecker, in: Schönke/Schröder (eds.), *Strafgesetzbuch*, 29th edition 2014, Section 284 StGB para. 11.

8 Dietlein/Hüsken, in: Dietlein/Hecker/Ruttig (eds.), *Glücksspielrecht*, 2nd edition 2013, Section 3 GlüStV para. 2.

9 OVG Münster, decision of 6 November 2009, Case 13 B 723/09, para. 21; VG Karlsruhe, ZfWG 2010, 220 et seq.

10 See VGH München, MMR 2010, 498, 499; left open in BVerwG, NVwZ 2014, 889.

(or different licences, as the case may be) from the competent authorities. In some cases, the number of available licences is limited (e.g., 20 sports betting licences). In any case, an applicant must meet (usually strict) substantive requirements to be granted a licence. Also, for many forms of gambling there is no legal entitlement for a licence even if the substantive requirements are met.<sup>11</sup>

- The proclaimed objectives pursued with this strict approach towards gambling are
- a* to fight gambling addiction;
  - b* to direct the human play instinct into orderly and supervised channels and to counter the emergence and expansion of illegal gambling on black markets;
  - c* to protect minors and players in general;
  - d* to fight fraud and other crimes associated with gambling; and
  - e* to protect the integrity of sports competitions against dangers emanating from sports betting.<sup>12</sup>

### iii State control and private enterprise

In principle, there is a state monopoly on lotteries (including draws). The most important lotteries are operated exclusively by the 16 German states or by companies owned by them. Private operators can only apply for a licence for smaller lotteries (restrictions include: at most two draws per week; not more than €2 million as maximum proceeds; and no regular jackpot).

In addition, a state monopoly exists in many German states for casinos. In other states, private operators can also apply for a licence, however such licences are often limited in number.

Likewise, sports betting in the Federal Republic of Germany<sup>13</sup> has traditionally been a state monopoly. The Gambling Treaty 2012 introduced an experiment of seven years, where 20 licences were to be granted (open to state-owned and private operators). However, those licences still have not been granted to date. After the competent authority picked 20 operators through a multi-stage allocation process, other operators went to court and had the granting of the licences stopped by the Supreme Administrative Court of the state in question, which held that the allocation process was non-transparent and discriminatory and thus illegal. Therefore, the state-owned operator is still the only licence-holder for sport-betting.<sup>14</sup> However, the Court of Justice of the European Union ruled in February 2016 that as long as the allocation process is not completed, private sports betting operators may not be sanctioned simply because they do not hold a licence.<sup>15</sup> Therefore, they can currently offer sports betting without holding a licence, provided that they meet the substantive requirements for obtaining such licence.

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11 See, in particular, Section 4(2)(3) Gambling Treaty 2012.

12 See Section 1 Gambling Treaty 2012.

13 In contrast, the last government of the former German Democratic Republic (GDR) issued a number of sports betting licences to private operators. These licences continue to be valid, but they are limited in scope to the territory of the former GDR and they do not include an entitlement to offer online sports betting, see BVerwG NVwZ 2011, 1319, 1325.

14 According to Section 29(1)(4) Gambling Treaty 2012, the state-owned operator's licence is valid until one year after the 20 licences have been granted.

15 Decision of 4 February 2016, Case C-336/14.

**iv Territorial issues**

Both the Federal Republic of Germany and the 16 states have certain legislative and administrative competences in the field of gambling. As a result, while gambling not authorised by the competent authority is a federal crime, whether or not the required licences will be granted is determined by federal or state laws, depending on the type of gambling in question. There is federal administrative law, mainly on horse betting, gaming machines and amusement arcades. State legislation includes further provisions on horse betting and on amusement arcades. In addition, it covers lotteries, sports betting, casinos and all other types of gambling not regulated by federal law, as well as commercial brokering of gambling products.

The German state of Schleswig-Holstein had a special status between 1 January 2012 and 8 February 2013 because, during that time, it was not a party to the Gambling Treaty 2012 but rather enacted its own gambling laws on the basis of which it granted 23 licences for online casinos and 25 licences for sports betting operators. Even though Schleswig-Holstein is now a party to the Gambling Treaty 2012, the licences already granted remain valid and will continue to be governed by the old legal regime, which means that they can be prolonged repeatedly for four years. This is significant for online casino licences in particular, as no other such licences exist in Germany. However, it remains to be seen whether the licences granted by Schleswig-Holstein will be found to also cover the participation of players from other German states.<sup>16</sup>

**v Offshore gambling**

German authorities have ordered offshore operators to cease offering and advertising their gambling products in Germany. Those orders were based on the same provisions that are also applicable to operators seated in Germany. Courts have held that such course of action does not violate public international law, at least if the offshore operator also targets Germany with its products.<sup>17</sup>

Allegedly, more than 100 prohibition orders have been issued by German authorities against offshore gambling operators.<sup>18</sup> However, to the author's knowledge, there has not been a case yet in which a prohibition order against an offshore gambling operator was enforced if the operator failed to make sure (e.g., through geolocation tools) that its gambling products were not accessible from Germany territory.

This being said, Section 9(1)(2) No. 4 of the Gambling Treaty 2012 provides a legal basis for prohibiting banks and other financial service providers from being involved in monetary transactions linked to illegal gambling. While it seems that no such prohibition order has been issued yet, there is a political discussion to take this step if offshore providers ignore prohibition orders.

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16 In injunction proceedings, the Supreme Administrative Court of North-Rhine Westfalia appeared to assume that only players from Schleswig-Holstein may be accepted, see OVG Münster, ZfWG 2015, 52 et seq.

17 VG Düsseldorf, decision of 18 May 2009, Case 27 L 1139/08, paras 63 et seq. (upheld by OVG Münster, decision of 3 December 2009, 13 B 776/09, para. 30); VGH München, decision of 19 July 2011, Case 10 CS 10.1923, paras 53 et seq.

18 See [www.ndr.de/nachrichten/investigation/Staat-attackiert-Gluecksspielindustrie-im-Netz,gluecksspiel248.html](http://www.ndr.de/nachrichten/investigation/Staat-attackiert-Gluecksspielindustrie-im-Netz,gluecksspiel248.html).

It is difficult for German authorities to order internet service providers in Germany to ensure that websites of offshore gambling operators cannot be accessed from Germany. Even though the Gambling Treaty 2008 contained a specific provision to this effect, courts have annulled orders against a domain registrar<sup>19</sup> and an access provider,<sup>20</sup> *inter alia*, because German internet legislation provides that they are not liable for third-party content unless they purposefully cooperate with the content provider in order to engage in illegal actions. While orders against host providers might have better chances to withstand legal scrutiny because host providers are liable under German internet laws as soon as they know or should know about illegal content stored on their servers, offshore gambling operators will avoid Germany-based host providers, so the possibility of issuing an order against such host provider is rather theoretical. It should be noted that the Gambling Treaty 2012 no longer contains a specific provision for orders against internet providers. However, the blanket clause of Section 9(1)(2) arguably provides a sufficient legal basis, and it is argued by commentators that orders are now also possible against registrars and access providers because Section 9(1)(2) does not refer to internet legislation (as opposed to the 2008 edition).<sup>21</sup>

## II LEGAL AND REGULATORY FRAMEWORK

### i Legislation and jurisprudence

Pursuant to Sections 284, 287 of the Criminal Code, it is a criminal act to organise, hold, advertise or provide the equipment for public<sup>22</sup> gambling without authorisation by the competent authority. The same applies to abetting or inciting any such activity. Likewise, for all types of gambling governed by the Gambling Treaty 2012, Section 4(1) thereof makes it an administrative offence to organise or broker<sup>23</sup> public gambling without authorisation by the competent authority.

Importantly, Section 4(2)(3) of the Gambling Treaty 2012 expressly states that there is no legal entitlement to receive a licence even if the applicable requirements are met. Rather, the competent authority has discretion whether or not to grant a licence. However, as always in German administrative law, the competent authority must exercise this discretion in a lawful way, which, *inter alia*, requires that any decision be proportionate and not arbitrary.

Whether or not the competent authority may grant the required licence is determined by the applicable administrative law provisions. The legislative framework is fragmented for different types of gambling as follows:

*a* horse betting: Horse Betting and Lottery Act and Section 27 of the Gambling Treaty 2012;

19 VG Düsseldorf, MMR 2012, 846 et seq.; VG Köln, ZfWG 2012, 56 et seq.

20 VG Düsseldorf, ZfWG 2012, 50 et seq.

21 Oldag, in: Dietlein/Hecker/Ruttig (eds.), *Glücksspielrecht*, 2nd edition 2013, Section 9 GlüStV para. 39 et seq.

22 A game of chance is regarded as public within this meaning also if it is played in a club or closed group in which games of chance are organised habitually, see Section 284 (2) Criminal Code.

23 It is disputed to what extent brokering is also covered by Section 284 Criminal Code.

- b* gaming machines: Sections 33c, 33e et seq. of the Commerce Regulation Act and, if they are located in amusement arcades, also Sections 24 *et seq.* of the Gambling Treaty 2012;
- c* casinos: casino Acts of the 16 German states;
- d* sports betting: Gambling Treaty 2012, in particular Sections 4a *et seq.*, 10a and 21; and
- e* lotteries and draws: Gambling Treaty 2012, in particular Sections 10 and 12 *et seq.*; lotteries and draws on fairs with prizes of low values are governed by Section 33d *et seq.* of the Commerce Regulation Act.

As mentioned in Section I.iii, *supra*, lotteries and draws are organised as a state monopoly, as are casinos in some of Germany's states. While a limited number of private operators can obtain a licence for sports betting, the licence allocation process is stuck. More liberal licensing approaches are taken in the area of horse betting, gaming machines and amusement arcades.

With respect to jurisprudence, the most important decisions in recent years have been those that addressed concerns as to the legality of the legislative framework for gambling, and that led to revisions of the same. First of all, the German Constitutional Court decided in 2006<sup>24</sup> that a state monopoly on sports betting is acceptable only if the state consistently pursues, legally and factually, the aim of fighting the dangers of gambling addiction. In particular, a monopoly violates the German Constitution if the state-owned sports betting monopolist extensively advertises its products. This judgment led the German states to enact the Gambling Treaty 2008. However, three judgments of the Court of Justice of the European Union<sup>25</sup> paved the way for the German Federal Administrative Court to rule in 2010 that the Gambling Treaty 2008 violated EU law (and once again constitutional law) for a lack of coherence given that the state-owned sports betting provider engaged in image promotion contrary to the aim of limiting gambling.<sup>26</sup>

## ii The regulator

Even for those areas of gambling that are governed by federal legislation, the regulating authorities are those of the German states. Criminal offences are prosecuted by public prosecutors subordinated to the respective state's ministry of justice. Gambling licences fall within the competence of state administrative authorities. Which authority is competent for a given licence depends on the form of gambling and the state concerned.

Sections 9a(1) and (2) of the Gambling Treaty 2012 provide that for certain matters one state is competent to take decisions that also effect other states (e.g., the state of Hesse is competent for sports betting licences). In such cases, however, it is not truly the one state that makes the decision. Rather, pursuant to Section 9a(5–8), the decision is effectively delegated by that state to the 'gambling council', which comprises one member from each of the 16 German states. The gambling council decides with a majority of two thirds of its votes, and its decisions are binding for the competent authority of the state that takes the respective decision to the outside. However, the Supreme Administrative Court of Hesse has

24 BVerfGE 115, 276 et seq.

25 Cases C-409/06, C-316/07 and C-46/08.

26 BVerwG NVwZ 2011, 554.



ruled in injunction proceedings (concerning the allocation of sports betting licences) that the concept of the gambling council violates the German Constitution.<sup>27</sup> While this decision only applies to Hesse, it remains to be seen how long the gambling council will remain in place in its current form.

### iii Remote and land-based gambling

Except for the Gambling Treaty 2012, gambling legislation in Germany does not address online gambling expressly. The prevailing opinion, therefore, is that any games of chance (as defined in Section I.i, *supra*) offered on an online basis fall under the Gambling Treaty 2012, including virtual gaming machines<sup>28</sup> and horse betting.<sup>29</sup>

Section 4(4) of the Gambling Treaty 2012 prohibits online gambling, but Sections 4(5) and 27(2) contain certain exceptions from this general prohibition (see Section II.v, *infra*).

Interestingly, in some German states, the approach is somewhat antithetic when it comes to commercial brokering of gambling products: in those states, brokering is allowed only on a remote basis, in other words, land-based brokers are prohibited.<sup>30</sup> The background to this seemingly contradictory approach is that courts had previously criticised the great increase in number of gambling brokers, which called into question the coherence of the policy to limit gambling.<sup>31</sup>

### iv Land-based gambling

Card games, roulette, slot machines, etc., are available in casinos, which in some German states are subject to a state monopoly while in others can be run by licensed private operators. There are casinos in all German states. The total number in Germany is currently 67. Section 20(1) of the Gambling Treaty 2012 requires that the number of casinos is limited by the states, but it does not indicate what the limit should be.

Horse betting is available at racing courses and in betting shops, which can act as betting operators themselves or merely broker bets for third parties. Sports betting is likewise available in betting shops, the number of which is limited in each state (different limits apply depending on the state concerned). Gaming machines are available predominantly in amusement arcades, but also in certain types of pubs or restaurants.

Sports betting shops may not be located in the same building or building complex as amusement arcades or casinos.<sup>32</sup> Likewise, there cannot be more than one amusement arcade

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27 VGH Kassel, NVwZ 2016, 171, 172 et seq.

28 See Dietlein/Hüsken, in: Dietlein/Hecker/Ruttig (eds.), *Glücksspielrecht*, 2nd edition 2013, Section 33c GewO para. 5.

29 See Section 27(2) GlüStV 2012 and Ennuschat, in: Dietlein/Hecker/Ruttig (eds.), *Glücksspielrecht*, 2nd edition 2013, Section 27 GlüStV para. 19.

30 See Rietdorf, in: Schulte/Kloos (eds.), *Handbuch Öffentliches Wirtschaftsrecht*, Section 18 para. 115.

31 See Schmitt, in: Dietlein/Hecker/Ruttig (eds.), *Glücksspielrecht*, 2nd edition 2013, Section 19 GlüStV para. 39.

32 Section 21(2) Gambling Treaty 2012.

in a building or building complex.<sup>33</sup> Moreover, a minimum distance must be kept between amusement arcades.<sup>34</sup> The applicable minimum distance differs from state to state and is currently between 100 and 500 metres.

**v Remote gambling**

The Gambling Treaty 2012 takes a more liberal approach towards online gambling than the 2008 edition. Pursuant to Sections 4(5) and 27(2), the competent authority may grant the authorisation for land-based lotteries to be made accessible to gamblers online (by the operator of the lottery or by third parties), and for sports and horse betting to be brokered or even operated online (i.e., without any land-based operations). However, such authorisation may only be granted if certain specific requirements are met. For example, the operator must ensure that minors and blocked players do not gain access. Also, the stakes per player must not exceed a certain amount per month (usually €1,000), and there may not be multiple draws within a short period of time.

Other forms of gambling, for example, casino games, may not be offered online (see for the exception of Schleswig-Holstein, Section I.iv, *supra*). However, it is doubtful whether the strict prohibition of online casinos is compliant with EU law, given that authorisations for online sports betting may now be granted.<sup>35</sup>

With respect to horse betting, it should be noted that pursuant to Section 27(1)(2) of the Gambling Treaty 2012, brokering bets for foreign totalisators or bookkeepers can be permitted only if the foreign totalisators or bookkeepers hold a German horse betting licence. This, in turn, is practically impossible, because it would require that the profits of the totalisator are exclusively used for horse breeding in the German State concerned (Section 1(3) of the Horse Betting and Lottery Act) or, respectively, that the foreign bookkeeper has land-based operations in Germany and meets some further requirements (Section 2(2) of the Horse Betting and Lottery Act). It remains to be seen whether this provision will withstand legal scrutiny under EU and constitutional law. Apparently, some state authorities take a pragmatic approach and do not request that the foreign totalisators or bookkeeper hold a German licence.<sup>36</sup>

**vi Ancillary matters**

As mentioned above, Section 284 of the Criminal Code penalises providing equipment for public gambling if such gambling has not been authorised by the competent authority. However, this requires that the person providing the equipment knows that no authorisation has been granted. Hence, the mere production or sale of gambling equipment such as poker card, roulette tables, etc., does not by itself constitute a crime.

With respect to gaming machines, Section 33c (1)(2) of the Commerce Regulation Act provides that only gaming machines permitted by Germany's national metrology institute

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33 Section 25(2) Gambling Treaty 2012.

34 Section 25(1) Gambling Treaty 2012.

35 See Rietdorf, in: Schulte/Kloos (eds.), *Handbuch Öffentliches Wirtschaftsrecht*, Section 18 para. 45.

36 See on this issue Rietdorf, in: Schulte/Kloos (eds.), *Handbuch Öffentliches Wirtschaftsrecht*, Section 18 para. 65.

may be used. This permit presupposes that the machine does not allow inappropriately high losses in a short period of time. While the production and sale of other machines is not prohibited, they cannot legally be operated in Germany.

As to the individuals involved, the principle is that gambling licences may only be granted if the licensee (in case of a legal entity: the individuals responsible) is reliable in the sense that the licensee is likely to act in accordance with the applicable laws. Even though there are differences in details, this principle can, for example, be found in Section 4a(4) No. 1 of the Gambling Treaty 2012 (for sports betting licences), Section 14(1)(2) of the Gambling Treaty 2012 (for smaller lotteries and draws), Section 33c(2) No. 1 of the Commerce Regulations Act (for gaming machines), Section 3(1) of the Implementation Act to the Horse Betting and Lotteries Act and further state legislation for other types of gambling.<sup>37</sup> In case of betting shops for horse betting, not only the owner needs a licence but also all persons that operate or broker bets on the owner's behalf (Section 2(2)(1) of the Horse Betting and Lotteries Act).

### III THE LICENSING PROCESS

#### i Application and renewal

The licensing process depends on the type of gambling concerned and on the state for which a licence is sought (except for the few cases in which the Gambling Treaty 2012 provides that one state grants a licence also for the other 15 states). It is therefore not possible to outline 'the' application process in the framework of this chapter.

For purposes of illustration, in the case of sports betting, a centralised allocation process was conducted by the state of Hesse for all states, and required, *inter alia*, that the applicant provides information on its corporate structure, on its concepts for IT safety, prevention of gambling addiction and economic feasibility, and a declaration that it is not involved in the operation or brokering of illegal gambling. However, the Supreme Administrative Court of Hesse has ruled that the procedure used violates the German Constitution, and it remains to be seen what will be put in place instead.

Irrespective of the process to be followed, the principle is that gambling licences are granted for limited periods of time (see Section 9(4) and Section 24(2)(2) of the Gambling Treaty 2012). Also, licences are revocable if the requirements for the licence are no longer met after the licence has been granted.

#### ii Sanctions for non-compliance

As already indicated in Section II.i, *supra*, pursuant to Sections 284 and 287 of the Criminal Code, it is a crime to organise, hold or provide the equipment for public gambling that is not authorised by the competent authority. Sanctions range from a fine to imprisonment of up to two years (slightly different sanctions apply in case of illegal horse betting, see Sections 5 and 6 of the Horse Betting and Lotteries Act). If illegal gambling is organised commercially or by a criminal organisation, the sanction is imprisonment of between three months and five years. Advertising illegal gambling is subject to a range of sanctions from a fine to imprisonment

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37 See Postel, in: Dietlein/Hecker/Ruttig (eds.), *Glücksspielrecht*, 2nd edition 2013, Section 4 GlüStV para. 101.

of up to one year. In addition, based on Section 286 of the Criminal Code, a criminal court may order confiscation of any of the offender's equipment used for the illegal gambling, as well as any proceeds that he or she derived therefrom. Individual gamblers may be sanctioned with a fine of up to half a year's salary or imprisonment of up to six months (Section 285 of the Criminal Code).

Apart from criminal sanctions, administrative fines can be imposed not only for illegal gambling but also for licensed operators who breach applicable rules. The same applies to financial service providers who violate an order that prohibits them from being involved in the transfer of funds in connection with illegal gambling activities. The range of fines largely depends on the legislation of the state concerned. In many states, fines can be as high as €500,000.

In addition, Section 9(2) Gambling Treaty 2012 provides that if an order by the competent authority is not complied with, the authority may impose a coercive penalty payment with the aim of making the addressee of the order comply with it. The addressee may not only be a gambling operator, but also third parties whose services are necessary for the gambling to be operated, for example, financial service providers or internet service providers. The coercive penalty payment shall be at least as high as the economic interest of the addressee in not complying with the order.

#### **IV WRONGDOING**

Wrongdoing associated with (legal or illegal) gambling is mostly caught by federal criminal laws. In particular, this is true for money laundering (Section 261 of the Criminal Code) and fraud (Section 263 of the Criminal Code). With respect to match fixing, the Federal Court of Justice has ruled that a person commits fraud if he or she places a bet on a match of which he or she knows that it was fixed. Anyone involved in the fixing of the match is abetting said fraud.

Any licensed operator who failed to take appropriate precautions against wrongdoing in its organisation is likely to lose its license for a lack of reliability.

#### **V TAXATION**

Lotteries (including draws) are taxed with 20 per cent of the net price of the tickets (Section 17(1) of the Horse Betting and Lotteries Act). Horse and sports bets are taxed with 5 per cent of the bets if they are organised in Germany or the gambler has his or her residence in Germany and places the bet in Germany (Section 17(2) of the Horse Betting and Lotteries Act).<sup>38</sup> The tax debtor is the organiser of the lottery or bet. Any turnover to which the foregoing taxes apply is exempted from the general VAT.

Taxes on casinos are based on the gross return from the gambling, in other words the difference between the gamblers' bets and their wins. The tax rate differs from state to state

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<sup>38</sup> The latter alternative may lead to double taxation for offshore organisers of horse or sport betting, which raises doubts as to the legality of this provision, see Birk/Brüggemann, in: Dietlein/Hecker/Ruttig (eds.), *Glücksspielrecht*, 2nd edition 2013, Section 17 RennwLottG para. 28.

but is generally around 80 per cent. Casinos are not exempted from VAT (which is based on the entire turnover), but the casino tax is credited against the VAT.<sup>39</sup> In some states, there is also a tax on the *tronc*, in other words, the tip at the roulette table; it is used for charitable projects and the rate is around 5-10 per cent.

The turnover from gaming machines (other than in casinos) is subject to VAT (currently 19 per cent). In many states, an entertainment tax is levied on top. While tax rate and tax base for such entertainment tax vary, between 10–20 per cent of the turnover seems to be a widespread approach.

Gamblers' winnings are, in principle, free of tax (however, profits derived from those winnings, e.g. interest, are taxable). By contrast, earnings as a professional player of games of skill are subject to income tax. For this reason, the distinction between games of chance and games of skill is also important for tax reasons. In this respect, it is noteworthy that the Federal Finance Court has ruled in 2015 that a professional poker player must pay taxes for winnings from Texas Hold'em and Omaha tournaments.<sup>40</sup> While this seems to contradict the prevailing view on criminal and administrative law according to which poker is not a game of skill, the Federal Finance Court highlighted that the definition of gambling is not necessarily determinative for tax law. A constitutional complaint against said judgment is currently pending before the Federal Constitutional Court.

## VI ADVERTISING AND MARKETING

Pursuant to Section 284(4) of the Criminal Code and Section 5(5) of the Gambling Treaty 2012, advertising illegal gambling is prohibited and even a criminal offence. This also applies to advertising illegal offshore gambling.

As far as licensed gambling is concerned, Section 5(1) of the Gambling Treaty 2012 requires that the extent and manner of any advertising be aligned with the objectives of the Gambling Treaty 2012; this is further detailed in guidelines on advertising issued by the German states collectively. As per Section 5(4) of the Gambling Treaty 2012, advertising may not be targeted at minors or other endangered groups. Advertising is generally prohibited on TV and in the internet pursuant to Section 5(3) of the Gambling Treaty 2012, which, however, provides that the competent authority may exempt lotteries, horse betting and sports betting from this prohibition. Even in case of such exemption, advertising betting on a specific sports event immediately before or during live TV coverage of that event is not allowed.

In addition, Section 26(1) of the Gambling Treaty 2012 provides that the outer appearance of amusement arcades may not serve as advertising for the games available and may not create an additional incentive for gaming.

Violation of the rules on advertising of legal gambling may lead to administrative fines.

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39 Diegmann/Hoffmann/Ohlmann, *Praxishandbuch für das gesamte Spielrecht*, 2008, para. 200.

40 BFH, ZfWG 2016, 37 et seq.

## VII THE YEAR IN REVIEW

The most important developments in 2015 and 2016 concerned the regulatory framework on sports betting. In May 2015, the Supreme Administrative Court of the state of Hesse halted the process for allocation of 20 licences because it violated the German Constitution.<sup>41</sup> In February 2016, the European Court of Justice ruled that as long as the allocation process has not been concluded, sports betting operators may not be sanctioned simply because they do not hold a licence.<sup>42</sup> In April 2016, an Administrative Court in the state of Hesse ruled that the limitation to 20 licences lacks justification, and therefore ordered that the claimant in this proceeding must be granted a licence, as well (which would be the 21st licence, given that Hesse had already selected 20 other operators to whom it would grant licences).<sup>43</sup>

## VIII OUTLOOK

Given the recent developments just outlined, it is very likely that the German states will once again have to revise the Gambling Treaty. In particular, they will have to address the shortcomings of the current framework on sports betting licences. However, as EU law requires gambling law to be coherent in its entirety, in other words, for all types of gambling, it might also be necessary to assess whether different approaches to certain types of gambling are justified under EU law. In particular, it appears difficult to justify why lotteries are regulated very restrictively in a state monopoly while gaming machines are subject to a comparatively liberal regime, given that the addictive potential of gaming machines seems to be decisively higher than that of lotteries.

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41 VGH Kassel, NVwZ 2016, 171, 172 et seq.

42 Decision of 4 February 2016, Case C-336/14.

43 VG Wiesbaden, decision of 15 April 2016, Case 5 K 1431/14.WI.

## Appendix 1

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# ABOUT THE AUTHORS

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Heiner Kahlert studied law at Bucerius Law School in Hamburg (Germany) and at Victoria University of Wellington (New Zealand). He holds a PhD from the University of Zurich in the field of arbitration.

Having worked as a freelance and trainee lawyer for several major international law firms, Dr Kahlert is now an attorney at Martens Rechtsanwälte, a boutique law firm well known for its expertise in sports law and dispute resolution. He focuses on the sports and entertainment industry as well as on start-ups in the IT and CSR sectors. His main fields of practice are sports and media law, IT law, competition law and arbitration.

Apart from advising sports bodies on issues of sports betting, Dr Kahlert was involved (in one of his previous law firms) in a number of cases concerning administrative prohibition orders against leading offshore gambling operators. In addition, he clerked with the state of Hamburg's administrative authority competent, *inter alia*, for horse betting.

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