

# Special Report: Schleswig-Holstein's Gambling Act





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### Introduction

On September 14 Schleswig-Holstein became the first German state to pass legislation regulating online gambling. In this report GamblingCompliance examines the new Gambling Act, translating pertinent clauses and putting the law into its political context.

When Schleswig-Holstein's parliament came to vote on a new gambling bill in September, the final count was incredibly close. It passed by a single vote, as the slim majority of the ruling coalition of conservative Christian Democrats and free-market Free Democrats was enough to push it through. The news was celebrated by German-facing online firms, with around 40 expected to apply for its broad suite of games and accept its 20 percent gross revenue tax. However, during a vigorous parliamentary debate, some of the bill's supporters underlined that the preferred route was still an agreement with the other 15 German states and to sign up to a compromise on the new Interstate Treaty on Gambling. Significantly, although Schleswig-Holstein's law will enter into force on January 1, 2012, licences will only take full effect from March 1, 2012, leaving the door open for a German-wide consensus before then.

Some of the main concerns in the debate were over increased gambling addiction through liberalising the market, breaching federal solidarity and, as collateral damage from this, being thrown out of Germany's lottery grouping, the Deutscher Lotto-und Totoblock (DLTB). There were also criticisms that the act was only a political tool to be used against the other states.

Indeed, if Schleswig-Holstein sticks with its regulation it may be difficult for the other 15 regions to create a coherent and consistent regulation of gambling, as is required by the EU jurisprudence. This is because, among the last minute changes to the act, Paragraph 35, section 2 has been amended to ensure tax revenues from German gambling accepted outside Schleswig-Holstein will still pour back into the state's coffers. In practice, this seems to imply that the Schleswig-Holstein lawmakers expect future licensees to operate throughout Germany.

Legal experts agree that the ramifications of this amendment are untested.

Furthermore, Schleswig-Holstein's state lottery faces having to leave the DLTB as payback for its government introducing a more liberal approach. In this case the lottery would lose the right to participate in the DLTB's common jackpot pool, which would make its lottery products significantly less attractive.

On the other side, supporters of the Schleswig-Holstein model have talked up the fiscal benefits from bringing previously unlicensed online operators into a regulated market. They also pointed out that Schleswig-Holstein's bill received no major criticism from the European Commission, while the plans of the other 15 regions were hit by a detailed opinion.

Gambling is set to remain a politically charged issue in Germany's northernmost state, particularly with an election fast approaching in May next year.

The opposition Social Democratic Party (SPD) in Schleswig-Holstein has already threatened to overturn the new gambling law and rip up companies' licences if it takes power.

Further attention will now also turn to the reaction of the remaining states. All 16 state premiers are scheduled to meet at the end of October in Schleswig-Holstein to thrash out further details, with a view to voting on a new Interstate Treaty by December 16, 2011. With such a tight time schedule and so much work left to do, the coming months in Germany will continue to be dynamic.

## **SECTION ONE: General Provisions**

### **Paragraph 1 Objectives of the Act**

### **Paragraph 2 Scope**

### **Paragraph 3 Definitions**

### **Paragraph 4 Event permit**

### **Paragraph 5 Sales permits**

#### **Overview Section One**

To ensure that games are operated in a proper, fair, responsible and transparent manner, players are protected from fraud, and the criminality deriving from gambling is defeated are the first objectives of the act. A further aim of the law is to channel players into a legal market, to protect young people, to prevent gambling addiction and to protect the integrity of sports. During the debate on the draft, one of the most important arguments of the supporters of the act was that the enactment does not mean the liberalisation of gambling, but is only the regulation of an already existing market. According to this, the goals of providing for fair and regulated gambling games as well as channelling players into the regulated gambling market were paramount.

The forms of gambling regulated under Schleswig-Holstein's Gambling Act are:

- Lotteries
- Land-based casinos (some games remain under scope of the Casino Act).
- Online casinos
- Betting

Paragraph three, section one contains the definition of skill games as a form of casino game and, therefore, includes it under the scope of the law. Casino games with a banker (black jack, roulette and baccarat) are exempt from the Gambling Act and remain under the scope of Schleswig-Holstein's State Casino Act. The law does not include slot machines, which is likely because a separate gaming arcade act is planned to be drafted. According to Werner Kalinka, interior affairs speaker of the CDU, a gaming arcade act will be tabled in parliament in November, 2011.

The law distinguishes between two types of licence:

- An organising licence (an event permit)
- A distribution licence (a sales permit)

Importantly, the law contains a reliability requirement towards future licensees, which is left to be fleshed out later on in a state decree. According to German gaming law expert Dr Jörg Hofmann from the law firm Melchers Rechtsanwälte, Heidelberg, Schleswig-Holstein's Ministry of Interior Affairs will be publishing a decree outlining more specific requirements along with technical standards for online operators at the beginning of 2012.

Originally, under the first iteration of the gambling bill, licences would have been granted for a period of two years; however, under the final version of the act, the licence period was increased to six years, after which the licence can be extended for four years, indefinitely. As criticised by Monika Reinhold, a representative of the Green Party, licences will take effect from March 1, 2012, two months before parliamentary elections – which might change Schleswig-Holstein's political makeup markedly – without having a retraction clause for licences included in the law. This theoretically means that Schleswig-Holstein licences, once granted, could stay protected for six years. However, the opposition has already threatened during the law's debate to contest the regulation should they come to power after the elections.

## **SECTION TWO: Approval Process**

### **SUBSECTION ONE**

#### **Lotteries**

**Paragraph 6 Regional lotteries**

**Paragraph 7 Class lotteries**

**Paragraph 8 Sales permit**

**Paragraph 9 Brokering requirements**

#### **Charitable lotteries**

**Paragraph 10 Permit for charitable lotteries**

**Paragraph 11 Hosting of charitable lotteries; sale of charitable lotteries**

**Paragraph 12 Game schedule, costing and conducting of event**

**Paragraph 13 Use of net proceeds**

**Paragraph 14 Type and content of permit**

#### **Small lotteries and prize-linked savings**

**Paragraph 15 Small lotteries**

**Paragraph 16 Prize-linked savings**

#### **Overview Subsection One**

The lottery remains a state monopoly. The justification for this, which can be found in Paragraph six, section one, is the prevention of manipulation and fraud. This differs from the 2008 Interstate Treaty's justification based on gam-

bling addiction, an argument that was widely criticized as lottery games carry a very low addiction risk compared to other forms of gambling. However, the distribution of lottery tickets (including online lotteries) will be accessible for private operators according to Paragraph eight and nine of the act.

Regarding the lottery, the biggest concern is that with the approval of a separate state Gambling Act Schleswig-Holstein will be thrown out from the Deutscher Lotto-und Totoblock (DLTB), the federal organization of state lottery and sports betting monopolies. If this does transpire, Schleswig-Holstein's lottery operator - NordwestLotto Schleswig-Holstein GmbH & Co. KG - would lose the right to participate in the common jackpot pool with the other states, which would make its lottery much less attractive and, therefore, would more than likely result in decreased revenues.

According to paragraph three of the law: "The various provisions for lotteries are applied accordingly for tote betting." This means that the lottery will retain its exclusive right to offer tote betting.

Erwin Horak, the president of the DLTB, announced after the approval of Schleswig-Holstein's Gambling Act that as a result there is a legal possibility to exclude the state's lottery from the DLTB, as one of the rules of the block is to operate according to the Interstate Treaty valid at the time. However, this would have to be a decision of the lottery operators of the other states.

In reaction to this threat, Hans-Jörn Arp, the deputy leader of the CDU parliamentary group for Schleswig-Holstein, requested Erwin Horak to resign. In Arp's opinion: "Horak's goal is to split the Deutscher Lotto-und Totoblock" and is "thus unsuitable as a leader". Arp also added that Schleswig-Holstein "never questioned" the lottery monopoly, on the contrary its aim is "to strengthen the lottery through introducing new distribution channels".

## **SUBSECTION TWO**

### **Casinos**

#### **Physical Casinos**

##### **Paragraph 17 Requirements for casinos, player exclusions, blacklists and data processing**

#### **Online Casinos (Online Casino Games)**

##### **Paragraph 19 Permit for operators of online casino games**

##### **Paragraph 20 Distribution licence (Sales permit)**

#### **Overview Subsection Two**

The law differentiates between physical casinos and online casinos. Casino games with a banker (black jack, roulette, baccarat) stay under the scope of Schleswig-Holstein's state Casino Act. The state Casino Act provides that only companies of private law whose majority shares belong or entirely belong to the state of Schleswig-Holstein or companies of public law that have their seat in Schleswig-Holstein can obtain a licence in the state. However, online licences for other casino games such as poker and slots, in theory, will be obtainable under the newly approved act, as these games are not banked games and, therefore, subject to the provisions of the new law.

Under Paragraph 19, section one, foreign operators will be allowed to apply for a licence if they are based in the EU or the EEA. The original wording of the law, according to which operators were required to have their “registered office, central administration or principal place of business” in one of the EU/EEA states has been changed to “registered office, central administration or place of business”, which means that to have a place of business in the above mentioned areas will be all that is sufficient. The draft law’s provision in Paragraph 19, section four, which created a streamlined process, was dropped. This means that EU or EEA licensed operators will not be assumed to have fulfilled the application requirements by simply being licensed in another EU/EEA member state.

For a distribution licence (sales permits), the bank guarantee shall amount to €1m and “it can be adjusted by the relevant authority to the amount corresponding to the expected average game revenues over a period of two weeks up to a maximum of €5m”.

It is important to note that the practical effect of paragraph two, section two, according to which games with a banker (black jack, roulette, baccarat) would stay under the state’s Casino Act, would be that online licences would be bound to a land-based licence for those games. The draft of the Interstate Treaty notified to the European Commission on April 15, 2011 contains a similar provision for online casino licences. According to paragraph 20, section three of the treaty, each federal state would be allowed to authorise one casino to move its products online. As the European Commission indicated in its detailed opinion according to the ruling of the Court of Justice of the European Union, to require operators of online casino games to have a permanent seat in Germany is a restriction on the freedom of services and as such it has to be indispensable to achieve the goals of the regulation.

## **SUBSECTION THREE**

### **Betting**

**Paragraph 21 General requirements for betting**

**Paragraph 22 Permit for betting companies**

**Paragraph 23 Distribution licence (Sales permit)**

**Paragraph 24 Betting regulations and betting book**

### **Overview Subsection Three**

The most important difference from the current draft of the Interstate Treaty is that the number of licences under Schleswig-Holstein’s law will be unlimited. Paragraph three, section four was amended in the final version of the act in order to allow for betting games only on sport events and the development (in-play betting) or outcome thereof. According to the aim of the law, to protect the integrity of sports, in its latest version the act provides for a fine of up to €100,000 for match fixing under Paragraph 21, section three.

Under Paragraph 22, section one, foreign operators will be permitted to apply for a licence in cases where they are based in the EU or the EEA. Again, the original wording of the law, according to which operators were required to have their “registered office, central administration or principal place of business” in one of the EU/EEA states has been changed to “registered office,

central administration or place of business". This means that to have a place of business in the EU/EEA will be all that is sufficient. However, the provision allowing EU and EEA based operators to fast-track applications - assuming that they fulfil "the various requirements according to Paragraph 1(2)" and "the various reasons for refusal according to Paragraph 2 do not exist" - was dropped in the final version of the law. Distribution licences (sales permits) require a bank guarantee amounting to €1m which can be raised up to €5m corresponding to the expected average betting revenue over a period of two weeks.

The German Bundesliga welcomed Schleswig-Holstein's new law. According to Christian Seifert, head of the business management of the football Bundesliga, if Germany would open up its betting market, the league could receive from €100m up to €300m more revenues per year from advertising. As noted above, the lottery remains the sole tote operator.

## **SECTION THREE**

### **Protection Of Players**

**Paragraph 25 Information requirements**

**Paragraph 26 Advertisements**

**Paragraph 27 Protection of minors, protection of players and declaration**

**Paragraph 28 Social concept**

### **Overview Section Three**

According to Paragraph 26, "the nature and extent of advertising of public gaming must be appropriate and must not be in conflict with the objectives of Paragraph one". The law notes that the Ministry of Interior Affairs is entitled to provide for further regulation regarding advertising. According to Paragraph 28, section three, the licensing authority will deliver a biannual report on player protection and safety measures taken by operators.

## **SECTION FOUR**

### **Gaming Supervision, Licensing Control And Supervision Of The State**

**Paragraph 29 Responsible Licensing and Supervisory Authority**

**Paragraph 30 Supervisory powers**

**Paragraph 31 Advisory Board**

**Paragraph 32 Fees**

**Paragraph 33 Coercive measures**

### **Overview Section Four**

According to Paragraph 29, the responsible licensing and supervision authority is the Ministry of Interior Affairs. An advisory board will be established as well to help the ministry.

Licensing and supervision fees will be determined later on in a decree. Coercive measures taken by the supervision authority are regulated by the State Public Administration Act. The penalty payment can amount up to €250,000.

## SECTION FIVE

### Gaming Duty

**Paragraph 34 Earmarked / targeted lottery taxes**

**Paragraph 35 Duty liability, purpose of duty**

**Paragraph 36 Duty rate, basis for assessment**

**Paragraph 37 Accrual of duty**

**Paragraph 38 Parties liable for duty**

**Paragraph 39 Registration**

**Paragraph 40 Duty recovery**

**Paragraph 41 Duty purpose**

**Paragraph 42 Revenue from duty**

**Paragraph 43 Responsible tax authorities**

**Paragraph 44 Notification requirements**

**Paragraph 45 Notification to responsible authority**

**Paragraph 46 Obligation to keep and retain records**

**Paragraph 47 Inspection**

### Overview Section Five

Paragraph 34 contains the tax earmarked from the lottery operator Nord-westLotto Schleswig-Holstein. The law provides for the index of the organisations and purposes tax revenues from the lottery will go towards. These purposes are, among others, the combating of gambling addiction and supporting of sports. The tax rate will be stipulated in a further decree.

Importantly, under the general rules of gambling taxation, Paragraph 35, section two was inserted among the last amendments:

“Gambling is considered to be operated under the scope of this act, if an operator licensed under this act makes these games in accordance with the requirements available outside of the scope of this act to persons who are resident or have their usual address in the Federal Republic of Germany. In this sense it is considered to be distribution if a game subject to a licence is made available in accordance with the requirements without the necessary licence.” This would practically mean that Schleswig-Holstein would receive tax revenues from bets offered throughout Germany, if based on a Schleswig-Holstein licence. As Dr Jörg Hofmann from Melchers Rechtsanwälte told Gambling-

Compliance, this clause is no authorisation to operate online games in the rest of Germany. According to Hofmann, "the said clause intends to safeguard tax revenues from the turnover made by Schleswig-Holstein licensees and thereby tolerates offering online gambling and betting in other federal states even if a licence of Schleswig-Holstein is not recognised and such offerings could be considered as unlawful".

As long as effective ISP and payment blocking measures are not in place there will be a practical possibility to offer games throughout Germany. However, Schleswig-Holstein licensed operators' right to offer games online will be likely left to be tested in court should any such occasion arise. If this does occur, it will be similar to the case of ex-East-Germany gambling licences. However, the case law regarding these licences is disparate and not settled. For example, in a case dealt with by the Federal Supreme Court in November 2010, the court reversed injunctions against bwin; meanwhile, the German Federal Administrative Court in Leipzig found in June 2011 that bwin is only entitled to offer its products based on its East-German licence in the territory of the old East-Germany. Although not primarily focused on the east German grandfather licence, there was also a ruling in Germany's Federal Supreme Court in September which upheld the legality of the current blanket ban on internet gambling, which has to be followed by each operator in the market throughout Germany.

The general tax rate under the act is 20 percent on gross gambling revenues. Land-based casinos will be subject to taxation under Schleswig-Holstein's Casino Act. A further exception from the general taxation rate will be online casino games without a banker - they will fall under a 20 percent turnover tax.

Five percent of tax revenues from online gambling will be used for combating gambling addiction.

## **SECTION SIX**

### **Transitional And Final Provisions**

#### **Paragraph 48 Transitional provisions**

#### **Paragraph 49 Entry into force, Entry out of force**

### **Overview Section Six**

Importantly, under Paragraph 48 and 49 the law provides that it will enter into force on January 1, 2012. However, licences granted based on this law will only take full effect from March 1, 2012, with gambling tax being charged from March 2012 on as well.

With these transitory provisions law makers wanted to emphasize their readiness to a federal solution. In the debate on September 14, 2011 Wolfgang Kubicki, the parliamentary leader of FDP, was posed the question what would happen to the Schleswig-Holstein licences in the case where federal regulation of the 16 states would be agreed on. In his answer, Kubicki stated that in that case, "Schleswig-Holstein licences would be easily transferable into a federal licence as Schleswig-Holstein would not enter an agreement with the other states which is fundamentally different from the 'Schleswig-Holstein way'".

## About GamblingCompliance

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