

The future of online poker in Germany very much relies on the definition of the game; is it based purely on luck or is it truly a game of skill?

EGAMING AT A CROSSROADS

BY DR. AXEL
FREIHERR V. DEM
BUSSCHE AND DR.
TOBIAS SCHELINSKI,
LAWYERS IN THE
HAMBURG OFFICE OF
EUROPEAN LAW FIRM
TAYLOR WESSING

POKER IS ONE OF the most popular games in Germany and is played both on- and offline by huge numbers of people. Notwithstanding this popularity, the legal status of poker is still hotly disputed: at first sight it appears to be a game of chance, and thus falls under the regulations of the German Interstate Lottery Treaty (Treaty). However, as this article shows, poker should in fact be considered as a game of skill, which has important implications for the internet gaming industry under both German and EU law.

The Treaty came into force in Germany on 1 January 2008, following a decision of the German Federal Constitutional Court, which declared that the (then current) German gambling legislation was unconstitutional. According to section 4 of the Treaty, the organising, conducting or placing of public games of chance requires a gambling licence provided by the German Federal State in whose territory the game is organised, conducted or placed. Only gambling licences for institutions or companies that are under direct or indirect control of a German Federal State are explicitly allowed in the Treaty. Consequently, a private company cannot obtain a gambling licence. The Treaty contains very strict provisions regarding gambling, for example, it prohibits online games of chance and advertisements on TV or over the internet, regardless of whether the game in question is licensed or not. One assumes that the state monopoly as the main driver behind the Treaty is not that much dependent on these comparatively new distribution channels for games.

Dubious legality

Although only in force since January 2008, the lawfulness of the Treaty has already been questioned by courts,

scholars and the European Commission. On 31 January 2008 the Commission filed a letter of formal notice to the German government asking it to verify whether some of the provisions of the Treaty, which regulates the organisation of games of chance, are compatible with Articles 43, 49, and 56 of the EC Treaty. This letter also refers to the total prohibition of games of chance on the internet. Furthermore, the administrative court of Schleswig-Holstein submitted a request for preliminary ruling to the European High Court in order to find out whether the Treaty violates the EC Treaty or not.

In addition to concerns regarding the validity of the Treaty under EC law, various scholars doubt that some provisions of the Treaty comply with the German Constitution. They are especially concerned that the state monopoly for gambling might violate the freedom of work provisions.

As it only regulates games of chance and not games of skill, the Treaty and the relevant corresponding section of the German criminal code only apply to poker if it is to be regarded as a game of chance. This article will discuss this distinction in the context of Texas Hold'em poker – the most popular variant of poker played on the internet.

Section 3 of the Treaty defines a game of chance as a game for money whose outcome totally or mainly depends on chance, which will occur if uncertain results are decisive for the outcome. If a game contains elements of skill as well as chance then the prevailing element is decisive for the classification of the game. The element of chance is considered the prevailing element if the rules allow the player only an extremely small strategic influence. A game is classified as a game of skill if the physical or intellectual skills of the players are decisive for the result.

Taking a chance or skillful play?

According to the German Federal Court, the assessment of whether a game qualifies as a game of chance or skill must be made by reference to the specific conditions of the game itself. There is only one outdated court ruling of the German Reichsgericht from 1906 concerning draw

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poker, where the court simply asserted that poker is a game of chance – full stop. Consequently, classification of Texas Hold'em poker as a game of skill or chance requires a closer look.

In Texas Hold'em poker each player receives two cards (the pocket-cards) face down, followed by a pre-flop betting round. Following the pre-flop betting round three community cards are dealt face up in the centre of the table. After a second betting round, the dealing of another single community card and a third betting round, a last single community card is dealt, followed by a fourth betting round. If all players have folded and only

one player bets, this remaining player receives the pot. If two or more players remain after the final betting round, it comes to a showdown. Here, each player plays the best hand he can make from the seven available cards.

Therefore, it is clear that chance is a factor in winning Texas Hold'em poker as a player cannot influence the quality of the cards. That said, a lot of elements of skill can still be identified in the game.

A player could, based on the cards he holds and those remaining on the table, mathematically calculate his probabilities of winning a particular round. Furthermore, after having played only a few hands even an average

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player can use different strategies and tactics during a game in order to increase his chances of winning, for example depending on the amount of stacks a player has to decide whether to play loose or tight, or a player can consider the pot-odd for the decision of calling or raising the stake.

The art of deception

It is also essential that a player is able to deceive other players in order to be successful, and the psychological aspects of the game are also of significant relevance, for example a player can choose between various psychological strategies like bluffing (meaning the player pretends to have a better hand than he actually does), semi-bluffing (in case the player thinks that his weak hand might improve in a later round) or slow-playing, which is the opposite of bluffing and means that the player has a strong hand but pretends not to.

A player also has to monitor opponents' behaviour and draw adequate inferences as to one's own chances. Based upon the amounts opponents bid, or by which they subsequently raise, a skilled player can draw conclusions as to how favourable opponents' cards might be.

Taking into account the different skills that can influence a Texas Hold'em poker game on the one hand, and the single element of chance on the other hand, the element of skill clearly prevails. Therefore, Texas Hold'em poker should be considered a game of skill. The German Interstate Lottery Treaty, consequently, does not apply to this game. Once this legal standpoint is eventually confirmed by actual court rulings, the German market will become open to private poker companies. This would turn the market upside down with dramatic consequences, not only for the German state monopoly, but also for internet gaming in Europe generally.

