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i. Who is battling the windmills - the monopolists or the private providers of sports bets?

Attorney-at-Law Dr. Wulf Hambach, Hambach & Hambach Rechtsanwälte

"Battle of the windmills" is the title in Manager Magazin of 19th October 2006 for a report by Rita Syre on the **Dow Jones Media Workshop with the title "Sportwetten am Wendepunkt?" ("sports betting at a turning point?")**. Syre compares the situation of the state's fight against the opening of the markets with Don Quijote's battle against his imaginary foes – the windmills. The author did not choose the metaphor from literature incidentally, because it was the President of the Football Bundesliga Club TSV 1860 Munich, Stefan Ziffzer, who used this image during the event in Frankfurt and probably received the greatest amount of applause for the following apt choice of words: "*If we stick to the state monopoly, money will spill across the borders*", the qualified political economist said, because the betting market has been a global market for a long time. Ziffzer: ***"The state once again is fighting a battle against windmills."***

If one believes the monopolists, it is not they, but rather private providers of betting who are fighting the windmills. Because: According to Ministerialrat (Undersecretary) Heinrich Sievers, the factual and legal situation is fairly easy. Syre on this: *"Sievers, who is responsible for gambling in the Hessian Ministry of the Interior, fans the flames with his handout. The Ministerialrat stated uncompromisingly that, after the decision by the Federal Constitutional Court, private sports betting offers provided in Germany are not only 'illegal', but that these private offers are a 'euphemistic synonym' for 'criminal sports betting offers'."*

In Sievers' the one-and-a-half page paper it also says: ***"Only unreliable soldiers of fortune from Germany and other EU countries operate illegally in Germany."***

Just one day later, Erwin Horak (President of Lotto Bayern) took the same line during a hearing in the Bavarian Parliament on the subject of sports betting: He said that information and advertising restrictions, which had been imposed upon the state-owned monopolists by the Federal Constitutional Court, have already been fulfilled. The powerful former press spokesman of the Bavarian Minister of Finance Horak, who not only is the boss of Lotto Bayern and plays a leading role in the state-owned sports betting provider Oddset, but also is responsible for nine gambling houses, considers the monopoly to already comply with European Laws before the background of the measures taken by his Lotto authority. For all new, i.e. post-Constitutional-Court cases, he considers the legal situation to be resolved (compare http://www.csu-landtag.de/binaer/statement_horak.pdf; the position paper on the dangers of addiction in sports betting and gambling which was

introduced by Lawyer Dr. Wulf Hambach during the hearing in the Bavarian Parliament and which has been compiled in co-operation with the London Remote Gambling Association, can be downloaded here: http://www.csu-landtag.de/binaer/CSU.pdf).

This view was also taken by Westlotto lawyer Dr. Manfred Hecker and others during the media workshop. Heckers opinion can be read in detail in the Zeitschrift für Wett- und Glücksspielrecht (magazine for betting and gambling law), where he explains that § 284 StGB (German Criminal Code) could now be consequently applied after the decision by the BVerfG of March 2006 and that any doubts as to the compliance of this provision with European Laws have been eliminated. In particular, he holds the opinion that the March 2006 decision by the BVerfG represents a turning away from the BVerfG's decision of 27th April 2005 (1 BvR 223/05) according to which the question of the compliance of § 284 StGB with European Laws due to the doubts with regard to community law in connection with EU bookmakers could hardly be solved without submitting the case to the ECJ. This decision taken last year could "confidently be treated as waste paper" (compare ZfWG 2006, page 38).

Thus the following has allegedly been determined: The sports betting monopoly does comply with European Laws already, and the § 284 provision from criminal law can allegedly be doubtlessly applied by all courts to ALL private sports betting operators and procurers.

Now here is the crucial question: Has the factual and legal situation really been solved, are the private sports betting providers thus really battling the windmills or are the statements by the monopolists rather a symbol of their hopeless battle against the windmills?

A current decision obtained by the Austrian betting operator Wettcorner (represented by Hambach & Hambach) on 12th October 2006 before the Landgericht (Regional Court) of Munich I, rather speaks in favour of the latter.

On the background of the proceedings, the **LG of Munich I (ref. 5 Qs 32/06)** says the following:

> *After the Bavarian State Ministry of the Interior, in its notification of 20th May 2005, denied the application filed by the company Wettcorner Software, demanding the declaration that it would continue to be allowed to accept (online) sports bets through accepting offices in Bavaria and procure them to the company licensed in Austria as a bookmaker, and also denied the subsidiary application for the granting of a licence for the Federal State of Bavaria for the procurement of sports bets to a bookmaker licensed within the EU territory, the Bavarian Administrative Court in Munich, after corresponding action had been filed on 07th June 2006, overruled the*

> *notification of the Bavarian State Ministry of the Interior dated 20th May 2005 and decided that the Federal State of Bavaria was obliged to take a new decision on the application by Wettcorner, under consideration of the court's legal opinion, which regarded the notification of 20th May 2005 as violating European Law.*

Nevertheless, *the local authorities of the state capital Munich, in their notification of 05th July 2006, prohibited Wettcorner from accepting, procuring and operating sports bets, as the necessary licence does not exist."* In the preliminary investigation initiated (concurrently), the Amtsgericht (Local Court) of Munich issued a search and seizure order against the Munich accepting offices of Wettcorner on 03rd August 2006.

Contrary to the opinion held by Hecker, Horak and Sievers quoted above, the LG of Munich I says with regard to the **unlawfulness** of the Local Court decision, that the addressee of the provision of § 284 StGB, i.e. the "unsound soldier of fortune from the EU" according to Sievers, could still not fathom out, even **after** the March decision by the BVerfG, whether or not he renders himself liable to prosecution in spite of a valid EU sports betting licence. Therefore, there was no legal difference between a sports betting case taking place before the March 2006 decision by the BVerfG and one taking place after 28th March 2006. Contrary to Hecker's above mentioned opinion, the LG of Munich I considers the basic principles, or the concerns from the point of view of community law expressed by the BVerfG in its April 2005 decision respectively, to be relevant in as far as they argue against the applicability of § 284 StGB for state-licensed EU bookmakers.

Therefore: The state's battle against the windmills will regrettably take some more time. This futile fight is particularly regrettable as it has an unsavoury aftertaste of untrustworthiness: Suddenly, only after the admonishing hint by the BVerfG, it is not all about money for the lottery companies, but – ONLY as far as sports bets are concerned – about the fight against an enemy yet to be investigated: sports betting addiction. The fact that betting addiction and other dangers in connection with (online) gambling do exist, may not be denied nor may the obligation by the legislator to protect consumers as best they can from provable dangers. A spokesman for the British Secretary for Culture, Media and Sport stressed, for instance, during an interview for the International Herald Tribune on 27th October 2006, that a complete ban of private (online) gambling – as in the USA – only drives consumers to an uncontrollable, criminal underworld of gambling.

> *"We believe that tough regulation is a better approach than a free-for-all or prohibition," Anthony Wright, a spokesman for Tessa Jowell, the secretary for culture, media and sport, said Friday. "We will be looking to secure agreement to the principles for international standards of regulation."*

> *Wright's comments echo remarks attributed to Jowell that were reported in The Financial Times on Friday. She, too, alluded to the U.S. prohibition of alcohol from 1920 to 1933, saying the move to ban online gambling could lead to the creation of* ***"modern-day speakeasies," driving Internet gambling underground and into the control of criminals.***

Conclusion: It is not the (controlled) opening of the market, but a total ban of internet gambling in Germany that would be the unsound solution which would put the illegal (unlicensed) as well as the sate-owned soldiers of fortune at an advantage and would protect consumers only inadequately.

ii. Blocking as effective means against EU sports bets providers?

A report of Prof. Michael Rotert, CEO of eco, the association of German internet enterprises, Cologne and president of EuroISPA, european. Internet Service Provider Association, Brussels.

English summary

Prof. Rotert outlines, that plans of the German government to block foreign providers of sports bets, will neither work nor will they be in the economical interest of the state.

Once introduced, the possibility to block websites might by abused by competitors to block the opponent's website and it would finally lead to a surveillance state.

From the legal perspective, blocking measures would be absolutely disproportionate at present, considering the inconsistent case law as regards the admissibility of private providers.

German Version

So schnell die EU neue Richtlinien verabschiedet bzw. entwickelt, die an manchen Stellen sogar für doppelte und dreifache Regulierung sorgen können, so schleppend erfolgt die Umsetzung in einzelnen Mitgliedstaaten. Allen voran hier natürlich Deutschland, wo Föderalismus und Staatsverträge noch zusätzlich für erschwerte Bedingungen sorgen. Damit meine ich weniger die Umsetzung der Justiz bzw. Verwaltung, sondern die erschwerten Bedingungen für die Internetindustrie ganz allgemein.

Hiervon besonders betroffen sind die Unternehmen, die neue Dienste im Internet anbieten möchten. Kommt dann noch Staatsprotektionismus dazu, entstehen schnell Situationen, wo E-Commerce im Internet unter Umständen sogar verboten wird. Besonders kritisch für die gesamte Internetindustrie wird es dann, wenn kommerzielle Inhalte von Providern in Deutschland auf Anbieterbasis oder gar abhängig vom Bundesland durch die Internet Service Provider geblockt werden sollen – wohlgemerkt, keine kriminellen oder gar anstößigen Inhalte. Eine derartige Verfahrensweise dämpft nicht nur die wirtschaftliche Entwicklung des Internet, sondern schädigt darüber hinaus noch den Wirtschaftsstandort Deutschland. Genau in diese Kategorie der kriminellen und schädlichen Inhalte sollen jetzt

die Anbieter von internetbasierten Sportwetten gesteckt werden, um bestehende staatliche Anbieter zu schützen! Dabei bezieht sich der Protektionismus sogar noch auf die Erhaltung überflüssiger Monopole aus fadenscheinigen Gründen und dies wird dann zusätzlich zu den Wettanbietern auf dem Rücken der Internetindustrie ausgetragen. Zusätzlich ist der Wirtschaftsstandort Deutschland insbesondere für die Internetindustrie jetzt nicht unbedingt das Schlaraffenland! Die Länder diskutieren, dass die Landesmedienanstalten die Internet-Angebote der Sportwettenanbieter mit technischen Mitteln blocken.

Warum sollte ein global agierender Internet-Service-Provider (ISP) sich in Deutschland niederlassen, wo doch schon ausschließlich in Deutschland agierende nationale ISP ihre Probleme haben, die unterschiedlichen Anforderungen an z.B. Jugendschutz etc. in den verschiedenen Ländern unterschiedlich zu behandeln? Sieht man sich die Globalität und die Technik des Internet etwas genauer an, so wird man feststellen, dass die meisten der angedachten Mechanismen weder greifen noch für irgendwelche Veränderungen sorgen werden. Es ist schon fast rührend, mit anzusehen, wie verzweifelt versucht wird, die Ordnung und Regulierung existierender Medien und Kommunikationskanäle auf die moderne Internettechnologie zu übertragen. Die einzigen Beteiligten, auf die man dabei in der Regel zugreifen kann, sind die Internet-Serviceprovider und die haben mit den Inhalten meist gar nichts zu tun. Bei einem Datendurchsatz von 60 Gigabit/sek (entspr. ca. 5 Mio. DIN A4 Seiten pro Sekunde), gemessen am deutschen Zentralknoten, bei dem ca. 200 Provider zusammengeschlossen sind, können Inhalte weder erkannt noch aussortiert werden. Also verlangt man von den Providern, die Zugriffe auf einzelne Seiten im Internet zu blockieren[1]. Die Internetindustrie in Europa und explizit auch in Deutschland wehrt sich vehement gegen Sperrungsverfügungen ganz allgemein. Hauptgrund dafür ist die Tatsache, dass eine wirksame, vollständige Sperrung von Internetinhalten technisch nicht möglich ist. Trotzdem sollen die Provider auch noch haftbar gemacht werden können, falls die Sperrungen umgangen werden!

[1] Der Zugriff auf einzelne Seiten im Internet erfolgt über die entsprechende „www-Adresse", die im Browser angegeben wird, oder über Suchmaschinen geliefert wird. Ein weltweites System zur Zuordnung derartiger Namen zu physikalischen Netzadressen sorgt dann dafür, dass die Seite adressiert werden kann. Diese Netzadressen werden von einigen Tausend Rechnern verwaltet, die weltweit verstreut sind. Ein Provider kann nun diese Adresse auf seinem Verwaltungsrechner sperren, aber der Benutzer kann jeden beliebigen, auch ausländischen Verwaltungsrechner bei sich eintragen, der diese Namensauflösung dann vornimmt. Mit einer Sperre wäre aber in jedem Fall nicht nur eine Seite gesperrt, sondern je nach Unterbringung der gesamte Webauftritt einer Firma oder gar die Webpräsenz von vielen Firmen, falls diese unter einer physikalischen Adresse zusammengefasst sind, was eher die Regel als die Ausnahme ist. Damit entsteht dann auch zusätzlich die Haftungsproblematik für den Provider!

Aber es gibt auch eine gesellschaftliche Sicht derartiger Sperrungsverfügungen: Wie soll sich die Gesellschaft mit Inhalten im Internet wirkungsvoll auseinandersetzen, wenn diese geblockt werden? Das einzig vernünftige und zukunftssichere Verfahren wäre eine Filterungsmöglichkeit des Benutzers und bei jugendgefährdenden Inhalten zusätzlich geeignete Maßnahmen zur Altersverifikation. Daneben würde Selbstregulierung der Internetindustrie oder in manchen Fällen auch Ko-Regulierung zusammen mit benutzerautonomen Filtermöglichkeiten die wirtschaftliche und soziale Entwicklung deutlich fördern. Prinzipiell gilt natürlich, dass illegale Inhalte am Besten gleich an der Quelle gestoppt werden sollten, aber die hierfür notwendige internationale Harmonisierung der Gesetze wird schon aus unterschiedlichen kulturellen Belangen (z.B. Playboy in arabischen Ländern) nicht durchsetzbar sein. Im Übrigen kann und wird sich kein Provider gegen einen richterlichen Beschluss zur Blockierung wehren, auch wenn er weiß, dass es nichts bringt.

Letztlich stellt sich auch die Frage, auf welche rechtliche Grundlage eine solche Sperrungsverfügung gestellt werden kann. Gerade vor dem Hintergrund der eigentlichen Untauglichkeit der Blockierung und angesichts des doch erheblichen Eingriffs in die grundgesetzlich geschützte Informationsfreiheit dürfte es schwierig werden, eine Blockierung rechtlich wasserdicht zu begründen. Hinzu kommt bei privaten Wett- und Glücksspielangeboten im Internet die grundsätzlich ungeklärte Frage nach deren Zulässigkeit. Solange weiterhin zahlreiche Gerichte das Staatsmonopol für verfassungs- und europarechtswidrig erklären und damit zumindest den im EU-Ausland lizenzierten Anbietern ein Tätigwerden in Deutschland ermöglichen, wären Sperrungsverfügungen völlig unverhältnismäßig.

Welche Schlussfolgerungen lassen sich daraus ziehen?

- Das Internet und die Internetanwendungen können und werden sich weiterentwickeln, möglicherweise eben unter dem Ausschluss von Deutschland, was die Arbeit der staatlichen Stellen hier eher erschwert. Einzelne Anbieter von E-Commerce Lösungen auszuschließen sorgt nicht nur für die Abwanderung von Arbeitsplätzen in andere Länder, sondern wirft viele weitere soziale und rechtliche Fragen auf, die der Internetindustrie erläutert werden müssen.

- Die Sperrung wirtschaftlicher Inhalte, auch wenn sie nicht funktioniert, ist der sichere Weg in den totalen Überwachungsstaat. Wie beim Mautsystem werden mit Sicherheit dann auch andere konventionelle Wirtschaftszweige auf die Idee kommen, dass es ja ganz einfach ist, sich die Konkurrenz im Internet vom Leibe zu halten. Interessenkonflikte sind vorprogrammiert, wenn man den ISP zum Hilfssheriff für Strafverfolgung und Durchsetzung wirtschaftlicher Interessen des Staates macht.

Der Titel dieses Artikels beinhaltet die Frage nach Glückspielangeboten im Internet; die Antwort auf diese Frage könnte eigentlich kurz und knapp lauten: Ja aber nur durch staatliche Stellen! Alle anderen Anbieter werden – egal wie – kaltgestellt.

iii. Netherlands: Amendment of the Gaming Act: analysis of aims and objections

Justin Franssen, Advocaat/Attorney-at-law, Van Mens & Wisselink, Netherlands

On 20 September 2006, the Parliament voted for a temporary amendment to the Gaming Act of 1964, which grants an exclusive license to Holland Casino to offer remote gaming. Revenue earned on this new monopoly will be entirely for the benefit of the national treasury.

The law can only be obstructed as a last resort by the First Chamber. Will the First Chamber be influenced by the severe critique from the Council of State and the European Commission on the law? A preparatory hearing at the First Chamber is scheduled for 7 November 2006. So what exactly are the critical comments from the Council of State and the European Commission?

The position of the Dutch Government

In the Explanatory Memorandum (30 362 no. 3) it is evident that the Netherlands' government strives, inter alia, towards providing an alternative to the illegal games of chance supplied via the internet. Moreover, in pursuit of its aim of providing an alternative to foreign games of chance, the government also aims to call a halt to money being drained away to other member states. In survey reports prepared in 2003 and 2004, the Netherlands' government draws the conclusion that participation in games of chance through new media sources is on the continual increase.[1] The Netherlands' government estimates the amount spent on internet gaming at €144 million per annum. This projected figure makes no distinction between illegal, non-regulated gaming, and the regulated games of chance from other member states, thereby ignoring the basic principle of mutual recognition of the scope of protection afforded by other member states. Purportedly, Dutch players are insufficiently assured of adequately safe payment transfers, distribution of prizes and other forms of consumer protection.

The government also maintains that the objectives of the gaming policy, namely combating gambling addiction, consumer protection and the prevention of criminality, necessitates an exclusive licence for operating games of chance via the internet, as a dependable alternative to illegal websites. Once again, the government fails here to differentiate between the illegal and non-regulated supply of addictive 'short-odds' games of chance, against which consumers have little protection, and the regulated supply of

[1] Report 'Internet Gaming', Motivaction, December 2003 and 'Gaming via New Media', Motivaction, December 2004.

relatively harmless games of chance (such as foreign (state) lotteries), under which Dutch citizens do enjoy equally sufficient consumer protection.

Regarding the effectiveness and proportionality of the law

The government holds the notion that augmentation of the Dutch gaming market will lead to further supply, in other words over and above the existing supply offered by Dutch operators of games of chance. The government further believes that an increase in the number of (monopolised) national games of chance is wholly reconcilable with its fundamental policy of channelling games of chance, under its premise that the policy is de facto aimed at reducing participation in games of chance, and is actively restrictive in both word and deed.

In the meantime the third Motivaction report,[2] commissioned by the Netherlands Gaming Control Board, illustrates that participation in games of chance via the internet has actually diminished, and that there is no evidence of any truly problematical behaviour. Moreover, the introduction of a state monopoly on internet gambling will give rise to an entirely new pool of players who currently do not play games of chance via new media. Motivaction even goes as far as to suggest that as many as 535,000 Dutch citizens are expected to partake in this new supply of games. Motivaction further goes on to conclude that it is far from certain whether participation in illegal games of chance will indeed slacken, or whether Dutch citizens will switch to the new source of games provided by the Dutch State. Based on the Motivaction report, it can be concluded that the introduction of a monopoly will lead to a significant stimulation of gambling (as opposed to the reduction contemplated), and that scientifically speaking, there is nothing whatsoever to indicate that setting up a monopoly will induce any positive substitution effect. The scientific research carried out by Motivaction therefore correctly questions the effectiveness and proportionality of the setting up of an interactive gaming monopoly. There are sound indications that the objectives of the gaming policy cannot be realised by implementation of the restrictions currently proposed. On the contrary, the introduction of an on-line monopoly will fail to contribute towards a consistent and coherent reduction of gaming activities as required by the European Court of Justice in the Gambelli case. Furthermore, the Netherlands' government has provided neither statistics nor other proof that participation by Dutch citizens in the regulated gaming supplied by other member states is harmful (for example, remote participation by the Dutch in the British National Lottery), or even more harmful than participation by Dutch citizens in a similar game in the Netherlands. The European Court of Justice ruled, inter alia, in the Lindman case that such

[2] 'Games of Chance via new Media', Motivaction, December 2005. 3. C-42/02

evidence is required if (discriminatory) measures are implemented in violation of the EC-treaty.

Licensing issues

In the Explanatory Memorandum, the legislator states that the decision to award the temporary licence to the state-run Holland Casino was based, inter alia, on the fact that Holland Casino is already supervised by the Government, is said to have experience in gaming via the internet and maintains sound responsible gaming policies. Holland Casino obtains the sole right to operate games of chance via the internet ('e-gaming'). Other domestic and foreign candidates will have no possibility whatsoever to obtain the licence. If the internet is used purely as an alternative for sales and a communication channel for existing gaming products, for which an off-line licence has already been issued, this, according to the Netherlands' government, qualifies as 'ecommerce' and not 'e-gaming'. Ecommerce is currently permitted by a number of national monopolies, such as 'De Lotto' and the 'Staatsloterij'. Moreover, in the case of e-commerce, interested national and foreign candidates are excluded from the allocation of the licence, even after expiry of, for example, the five-year licence held by De Lotto. The same holds true of all (expiring) Dutch gaming licences.

The fact that potential interested candidates from other member states are excluded from the allocation or renewal of (gaming) licences seems in violation of the basic principles of antidiscrimination, transparency and competition, as embodied in the Treaty of Rome and case law of the European Court of Justice (Gambelli ruling), and cannot be justified by compelling reasons of public interest.

Is the law discriminatory?

From the Explanatory Memorandum, it is also possible to discern that residents outside the Netherlands, after physical registration in the Netherlands, have access to cross-border participation in games of chance, through information society instruments. This is no different from the current supply of ecommerce by other Dutch gaming monopolists. De Lotto and the Dutch State Lottery have already created the (passive) possibility for cross-border participation by individuals residing outside the Netherlands. Nonetheless, the Netherlands' government upholds the view that any gaming provider in other Member States commits an offence if Dutch players are not excluded from cross-border participation. Indeed, with the introduction of the amended gaming laws (pursuant to article 1 preamble and under (c) of the Betting and Gaming Act), participation by Dutch citizens in any internet gaming other than that provided by the Dutch State constitutes a criminal offence. This seems disproportionate and manifestly discriminatory.

Criticism by the European Commission

By Notification 2005/0388/NL pursuant to Directive 98/34 EC (Notification Directive), the European Commission has drawn up an extremely critical response to the Netherlands' legislative proposal.

Violation of Article 49 EC Treaty

The European Commission asserts that the proposed article 27(m), in conjunction with article 1 preamble and under (a) of the Netherlands Gaming and Betting Act, has an extraordinarily broad scope of action, since these provisions provide a general ban on the use of information society services to provide the opportunity to compete for prizes or premiums, whereby winners are selected through chance, unless an (exclusive) licence has been granted. It is further asserted that the combined effects of the proposed articles 27(m) and 27(o) prevent licensed service providers established in other member states from complying with such requests made at distance and at the individual request of Dutch citizens. The Commission is of the opinion that the proposed legislative amendment forms a (further) restriction on the terms of Article 49 of the EC Treaty.

Monopoly (interactive) gaming as a fund-raising instrument

The European Commission asserts that it is apparent that the Netherlands' government is primarily concerned with the loss of income (estimated by the government at €144 million in 2004) that now flows to illegal and foreign services providers. The prevention of the draining away of monies abroad does not form an objective justification for the obstruction of the free movement of services. The substantial emphasis placed by the Netherlands' government on filling its coffers is also apparent from the tremendous advertising campaigns which the state gaming operators (may) make in order to attract new players, and from the projected accrual of approximately half a million new Dutch gamblers upon the introduction of the new state monopoly, and also from the explicit acknowledgement of the Netherlands' government that the increase in gaming tax is a financing measure.

Repudiation of the principle of mutual recognition

With respect to the contention made by the Netherlands' government, namely that the new provisions on games of chance provided on the internet serve to offer a reliable alternative to nonregulated supplies, the Commission states that gambling and gaming services in all 25 member states are regulated, aimed at the protection of common public interests. The Commission deems it unnecessary to restrict all cross-border gaming activities marketed by licensed service providers in other member states, since providers in other member states are also subjected to adequate monitoring.

Monopoly is not effective

Furthermore, the Commission correctly notes that an independent committee of experts in the Netherlands, the Working Group Betting and Gaming Act, has presented the conclusion that a restriction on the number of providers does not curb criminality and illegality. Hence, the proposed monopoly is not only disproportional and unreasonable, but is also ineffective and unsuited to achieve the policy's objectives. The Commission states literally: 'In view of the foregoing the Commission is of the view that the restrictions ensuing under the proposed new provisions in article 27 (m+n) of the Betting and Gaming Act cannot be justified by compelling reasons, nor can they be deemed to be proportional to the intended aim.'

Criticism by the Council of State

On 19 August 2005 and in a further report, dated 7 November 2005, the Council of State has also voiced criticism on the law.

The Council of State observes that in numerous legal scholarly publications, comments have been made with respect to the manner in which the Netherlands' gaming policy is applied in practice. The Council raises questions regarding the consistency of the Netherlands' policy and alleges that the legislative proposal possibly compromises the credibility (in terms of Gambelli) of the Netherlands' policy. On the one hand, Netherlands' gaming is being enlarged, whilst on the other hand, gaming providers are being placed at a disadvantage. The Council also wonders, notwithstanding that the new monopoly is of a temporary nature, whether this complies with the laws on competition, given that the sole licensee, the state-run Holland Casino, is given a head start on any competitors that may later be admitted.

With regard to the proportionality of the proposed measures, the Council of State wonders whether the choice of licensee is justifiable in light of the fact that also, other potential providers (both from the Netherlands and other member states) are equally able

to comply with the requirements laid down by the Netherlands' government. It is stated by the Council of State, in following the European Commission: '(...)It is highly conceivable that other potential providers, established in the Netherlands or in other EU member states, are equally able to meet these requirements. The question therefore rises whether confinement to this one provider does not unjustifiably sideline providers from other Member States (who could equally be subjected to adequate monitoring), thereby infringing the free movement of services as described in article 49 of the EC Treaty.'

iv. New State Treaty on Gambling – Consequences for the private gambling industry

Attorneys-at-Law Dr. Wulf Hambach and Konrad Miller, LL.M., Hambach & Hambach, LLP

In the aftermath of the fundamental decision of the German Federal Constitutional Court on private sports betting in March 2006, the Prime Ministers of the German Lander decided by majority to preliminarily retain the monopoly on games of chance including sports bets. The details of this monopoly will be regulated in a new lottery state treaty which shall come into force at the beginning of 2008, i.e. within the time-limit set by the Federal Constitutional Court. In August 2006, a **first draft** was presented, which prohibits e.g. all gambling including sports betting, casino operations (including poker) and lotteries via TV or Internet channels. The scope of these provision was kept wide and would, therefore, have put an end to some of the state gambling services in their traditional distribution channels. For instance, telecasting of the state lotteries numbers' drawing on TV as well as bulk mailings for class lotteries would no longer be permissible. If the planned provisions had come into force, they would have lead to considerable economic loss for the state providers. In order to avoid these consequences, the Prime Ministers of the Lander, on the occasion of their meeting on 19th and 20th October, agreed to implement certain exemptions from the general ban on advertising and provision via TV and Internet for state providers.

The **revised draft dating from 25th October** (available in German at http://www.stk.niedersachsen.de/master/C28438787_L20_Do_I484.html) stipulates accordingly

- that certain charitable offers may be exempted from the ban on TV advertising, if they are traditionally presented on TV;
- that the Lander may allow certain casinos and lotteries to be offered via Internet.

Moreover, the former prohibition on bulk mailings was deleted without substitution.

These exemptions in the revised draft fail to comply with the EU legal standards and constitutional requirements. It appears that providers will be swamped out of the market, without implementing the restrictions on state providers, which are necessary if the monopoly is retained. In view of these impudent plans, the **EU Commissioner for Internal Market and Services, Charlie McCreevy**, reacted immediately and unambiguously. In an interview with the German magazine "Spiegel" (edition of the 23rd October 2006), he stated that he will definitely not accept the official result of the prime ministers conference. The Commission already considers the current provisions to be in breach of Community Law. **According to McCreevy, the plan of the German Lander to further**

strengthen and expand these restrictions is not in any way feasible. He announced that, if necessary, he is prepared to fight the infringement complaint against Germany to the last instance. Generally speaking, the rules for private and state providers should be the same.

After a lengthy period of reluctance, it appears that private gambling providers will have significant backing from the Commission. If the Prime Ministers of the Lander keep to their recent plans, the provisions are unlikely to last very long. The German state would also risk extensive claims for damages.

At present, it is **still not clear if the draft will come into force in 2008 at all**. Its final adoption is arranged for December 13th 2006 at a further meeting of the prime ministers. After that, every single parliament of the federal states will have to approve the new treaty. However, there is considerable discussion at both Lander and federal level regarding the retention of the monopoly, e.g., the co-governing conservative party (CDU) in Schleswig-Holstein recently pleaded again for an immediate liberalisation of the German lottery market (press release number 376/06 from 27th October 2006), referring to the non-conformity of the draft with European and national legal requirements. In addition, various representatives of media companies and industry as well as sports clubs are in favour of a regulated liberalisation of the market (for instance under www.kein-monopol.de). Hambach & Hambach, is also actively lobbying against the ratification of the Treaty in co-operation with the Remote Gambling Association (RGA). Given the current political discussion, it is still possible, that there will be at least one Parliament dissent and that the State Treaty will therefore not come into force.

Meanwhile, even the strict state monopolists have recognised that the monopoly is not the correct long-term solution for the regulation of the German gambling market. The draft state treaty accordingly contains a time-limit of approx. four years duration. Sooner or later liberalisation will thus most certainly come along. The same probably applies to all other EU member states. Britain also intends to license private online-casinos in addition to private sports betting providers, which are already licensed. **Thus, the situation in Europe is not in any way comparable to the situation in the United States of America which is characterised by strict protectionism**. The tactics of the United States are possible in spite of international trade agreements since such agreements are hard to enforce. Within the EU such excesses will be prevented by the "guardians of the treaties", the European Commission and the European Court of Justice.

v. Will EU cartel law overthrow the German gambling monopoly?

Decision of the Federal Cartel Office approved

Attorneys-at-Law Dr. Wulf Hambach and Konrad Miller, LL.M.,
Hambach & Hambach, LLP

On 23rd October 2006 the Higher Regional Court Düsseldorf approved all of the major points of a decision of the German Federal Cartel Office of 23rd August 2006. As a consequence, the German state-run lottery companies will now be obliged to accept lottery tickets from private intermediaries. The court pointed out that the new state treaty on lotteries, which the German Länder is drafting at the moment, will also have to comply with European cartel law. The German monopolists announced that they intend to appeal the decision to the Federal Court of Justice.

The decision of the Federal Cartel Office contains rather positive statements for private gambling providers. The court stated that it considered the state-run lottery companies to be operating in furtherance of their own economic interests rather than in furtherance of the state in general. The court also found that the active addiction prevention measures, as specified in the sports betting decision of the Federal Constitutional Court, were not in place. The existing private ticket acceptance points which are licensed by the state were also considered to be acting in their own economic interests and seeking to gain as many customers as possible.

It should be borne in mind that European cartel law also applies to restrictions enacted in national rules which seek to protect the German monopolists against private providers from other EU countries. Eventually, the German gambling monopoly is therefore likely to be found invalid because of an infringement of European cartel law. The Administrative Court of Gießen also appears to share this opinion. In a press release of 25th October and various corresponding decisions, the court pointed out that the findings of the Cartel Office must also be considered in proceedings concerning gambling services, which are genuinely private (as opposed to services by intermediaries who arrange the sale of state-run products).

Just like the statement of EU Commissioner for Internal Market and Services, Charlie McCreevy, regarding the plans of the German Länder (cf. page 21), the decisions of the Federal Cartel Office and of the Higher Regional Court of Düsseldorf set down clear boundaries for the German state monopoly. The hypocritical conduct of the state providers fails to comply with EU law. Since it is clear that the state-run gambling services are themselves motivated by financial interests, the monopolists cannot hide behind their

alleged protective function and claim that they operate to prevent addiction. Thus, EU cartel law will play its part in the battle against the German gambling monopoly, to the benefit of private providers.

vi. EU Commission makes further inquiries into the gambling sectors of Member States

Attorney-at-Law Dr. Wulf Hambach and Sarah Madden, Hambach & Hambach LLP

The study on the gambling sector in the European Union, conducted by the Swiss Institute of Comparative Law on behalf of the European Commission, confirms that there is considerable variance between the national laws and regulations in the Member States. The Study also found that these laws and regulations often lead to restrictions to the freedom to provide services and the freedom of establishment guarantees that are incompatible with existing EU Law. This also applies to the German part of the study, which is also based on the observations of Hambach & Hambach (appendix 5, p. 1761).

There are currently 10 infringement proceedings pending against 9 Member States pertaining to restrictions on the provision of gambling services. New infringement proceedings were initiated against Austria and France while a second set of proceedings were brought against Italy. These are in addition to proceedings initiated in April of this year against Denmark, Finland, Germany, Hungary, Italy, the Netherlands and Sweden (as reported in Betting Law News 06/05, 07/05 and 01/06). All proceedings relate to sports betting though the complaint against Austria also concerns the provision of casino services and discrimination on grounds of nationality. In these cases, the Commission wishes to verify whether the measures in question are compatible with existing EU law.

Official requests for information on national legislation restricting the provision of sports betting services have been sent to all Member States concerned. The letters of formal notice are the first step in an infringement procedure under Article 226 of the EC Treaty, where formal contact is made between the Commission and the Member State concerned. The decision to send letters of formal notice to Member States has been made on foot of complaints made by a number of service providers and on information gathered by Commission staff. The Member States in question then have two months in which to respond. The response has to adopt a position on the points of fact and of law.

Although the Commission has already received responses from some Member States, it is unlikely that any official decision on the next stage against these will be taken before the end of this year, though contact continues to be made with them at an operational level.

Depending on the response from the Member State, the Commission will decide to either not to proceed with the infringement procedure or to address a "reasoned opinion" to the Member State, setting out the reasons why it considers there to have been an infringement of Community law and calling on the Member State to comply with Community law within a specified period. If the Member State fails to comply with the

reasoned opinion, the Commission may decide to bring the case before the European Court of Justice.

Perhaps some Member States will recognise that their restrictions on sports betting services are in breach of Community Law and bring their national legislation into line. Infringement proceedings are regularly resolved at the "reasoned opinion" stage. If this is not the case with regard to these gambling sector infringement proceedings, the Commission will be forced to "go all the way to the last instance" as Commissioner McCreevy is quoted as saying in an interview in the German Spiegel Magazine on the 23/10/2006. However, due to the Commission's limited power in this area and the cumbersome nature of infringement proceedings, "going all the way" will take a long time. It is conservatively estimated that infringement proceedings against a member state to the final instance for restrictions on sports betting would take a minimum of five years and most probably longer. As there are already Italian and German cases before the European Court of Justice, an outcome to these is likely before there is any conclusion to the Commission's proceedings.

vii. Guest Authors in this issue

Justin Franssen

Justin Franssen reports in the Betting-Law-News on the development of gaming law in the Netherlands (see the issues 09|2005 and 03|2006).

Justin Franssen, a former casino dealer, studied law and continental philosophy at the universities of Leuven (B), Maastricht and Amsterdam. He works at Van Mens & Wisselink attorneys in Amsterdam where his practise is focussed on gaming and gambling related issues. He is involved in the leading past and pending post-Gambelli litigation in The Netherlands, publishes on the subject matter (three editions of the Internet Gambling Report, Casino Lawyer) and is a frequent speaker at international conferences (IMGL, EIG, European Gambling Briefing, Virtual Gaming Forum etc.). Mr Franssen is the Dutch General Member of the International Masters of Gaming Law and a member of the International Association of Gaming Attorneys.

Professor Michael Rotert

In 1991 Prof. Rotert was a founding member of the Internet Society. In 1993 Prof. Rotert founded one of the first ISPs in Germany (Xlink). In 2000 he was appointed Senior Vice President for research and development at KPNQwest. Afterwards he was Managing Director of several Service Providers. He currently runs his own company for LI consulting and security.

He holds a degree in economics from the University of Karlsruhe and achieved his professor degree in 1999 from the University of Technology, Karlsruhe. He is chairman of eco (www.eco.de) the internet service provider association of Germany since 2000. He was Consultant to the EC as well as to the US Depart. of Commerce in various internet related projects and he is actively involved in various Organizations fighting Cybercrime (e.g. Industry Speaker of the German delegation of the G8 Cybercrime group).

Prof. Rotert has been a board member of EuroISPA EIIG (www.euroispa.org), Brussels - the European Internet Service Provider Association - and was elected President in September 2003.

viii. Our Information

Hambach & Hambach compiled a statement for the Bundesverband der digitalen Wirtschaft (Federal association of eCommerce) on legal aspects of advertising for online sports betting. The statement can be downloaded in German language at www.bvdw.org/wissenspool/empfehlungen.html

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The 9th edition of the Internet Gambling Report has been published! Attorneys-at-Law Dr. Wulf Hambach and Dr. Hendrik Schöttle are co-authors. For more information, please visit www.casinocitypress.com/OnlineGaming/InternetGamblingReport

★

Dr. Wulf Hambach will speak at the following up-coming conferences:

29. November 2006 / London – GB
Excellence in Gaming Law (ATEonline)

24. Januar 2007 / London – GB
„The changing landscape of gambling in Europe" (ATE/ICE)

8. Februar 2007 / Trier – Germany
Competition Law and Gambling (ERA – European Association for the Study of Gambling)

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Dr. Wulf Hambach is now a member of the International Association of Gaming Attorneys (IAGA)

★

We would like to inform that Dr. Hendrik Schöttle has recently become a tutor for the training of solicitors specialising on IT law (Fachlehrgänge für die Ausbildung zum Fachanwalt für Verwaltungsrecht).

ix. Editorial Details

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Responsible editor
RA Dr. Wulf Hambach

Haimhauser Str. 1
80802 München | Munich
Germany
Fon: +49 89 389975-50
Fax: +49 89 389975-60
E-Mail: info@ra-hambach.com
www.betting-law.com

Editors
RA Dr. Wulf Hambach
RA Claus Hambach
RA Andreas Gericke
RA Dr. Hendrik Schöttle
RA Konrad Miller, LL.M.
RA Dr. Michael Hettich
Sarah Madden

Guest Authors
RA Justin Franssen
Thietmar Hambach
Jens Leinert
RA Quirino Mancini
Martin Oelbermann
Prof. Michael Rotert
RA Dr. Walter Schwartz
RA Thibault Verbiest