Contents

i. This World Cup year 2006 may cause a breakthrough for M-Commerce and M-Gambling in Germany ................................................................. 2

ii. Hambach & Hambach obtain decision in the Upper Administrative Court of Baden-Württemberg ........................................................................ 5

iii. Dutch Courts finds the Dutch casino monopoly not compliant with the Treaty of Rome and European Commission suggests that proposed Dutch Internet gaming monopoly is disproportionate ........................................................................... 7

iv. Using E-Commerce Law to build Confidence? .............................................................................................................................. 11

v. Info .......................................................................................................................................................................................... 12

vi. Editorial ................................................................................................................................................................................ 13

vii. Legal Details and Contact Information .................................................................................................................................................. 14
This World Cup year 2006 may cause a breakthrough for M-Commerce and M-Gambling in Germany

New technology, old law?

A Report by Attorneys-at-law Dr. Wulf Hambach and Dr. Hendrik Schöttle, Hambach and Hambach

Not so long ago, business conquered cyberspace. It is just 10 years since the first online-only gambling service went online. Recently M-Commerce (M-Gambling) has been shaping up alongside E-Commerce (eGaming).

With the progressive technological development of mobile devices such as PDAs, Handhelds and Smartphones, M-Commerce seems to have been given another chance. After the internet and mobile hype at the beginning of the century died down and other technologies such as WAP or UMTS unmistakably flopped (perhaps unable to emerge from a niche market) it seems to be time to take a closer look at this market.

J2ME, the Java platform for mobile devices, represents a growing basis for Java applications on mobile phones, PDAs and Smartphones. Symbian OS, an operating system for mobile phones, can already be regarded as an industry standard because of its availability across different models. There has also been a range of other developments, which have ensured that the writing of sophisticated software applications for mobile devices does not lie only in the hands of the manufacturers, but is also under the control of cross-platform and third party suppliers. Devices which support such standards are rapidly spreading: M-Commerce is not just a question of technical feasibility but rather is waiting to develop as a new, growing market.

The advantages of M-Commerce over an Internet-based market are clear: the services are accessible anywhere, most notably when there is no internet access nearby. Moreover, a market segment has been developed which does not operate by internet access, but rather by mobile telephone.

Whether M-Commerce is a new medium is debateable. However, M-Commerce is not a lawless area. But as always, laws find application, in other ways than those envisaged at the time they were enacted. Many of the regulations, which apply to the mobile market deal specifically with Internet matters, e.g., the Distance Selling Law and the provisions on ‘tele-services’ (The Tele-services Law and the Tele-services Data Protection Law). This creates difficulties, particularly with regard to the extensive advisory and information duties. On a normal website numerous special instructions will usually be clearly laid out.
Consent forms can be given to the customer in the browser without too much delay and can be confirmed by e-mail. But how can a full identification of the service provider be accommodated in a text message? How can a consent form be made to conform to data protection regulations? In order to give consent in line with the data protection regulations must the user break off an established GSM connection, wait for an SMS and answer this SMS before he can use the service? Case-law suggests that a link to the operator’s identification information must be shown on the first page of the site – does this also apply to a device with a screen resolution of 128 x 128 pixels as is usual for mobile phones?

It is clear that the application of the above regulations is problematic. Some practices could be taken from the world of Internet law without alteration but it is unthinkable that some of the other regulations could be used without adjustment. Still it is too early to risk a prediction as to which requirements the courts will decide to apply to a service so that it may conform to the law. One such requirement however can be predicted: With the increasing importance of M-Commerce, pressure between competitors will increase. In turn, the sure keepers of competition law will be called into action; in other words, the legal harmless of the application of the of E-Commerce regulations will not only be a figurehead for potential customers, but also a shield against unauthorised and expensive pre-litigation proceedings brought by competitors for anti-competitive behaviour.

Unfortunately in Germany there is no uniform operation of the regulations, as is the case under the British Gambling Bill 2005, which comes into force this year and includes extensive regulations on remote gambling. It would be a mistake to ask for further legal regulation in Germany in this way, as the regulatory minefield of Consumer Protection in E-Commerce and M-Commerce is already complex enough. It would be preferable, if the jurisprudence would work out clear requirements for providers of M-Commerce services – even though this is anything but easy given the contradictory and labyrinthine legal situation.

The E-Commerce marketplace as regards “mobile gaming” provides an interesting perspective to the Online-Gaming market. Sports betting is available on mobile devices, where the event takes place but where there is no internet access available – in stadiums, pubs and also in the living room. It remains to be seen, how the market – both the provider and the customer – might react to these possibilities.

In the area of M-Commerce (i.e. M-Gambling) legal uncertainty prevents a clear growth forecast. At the beginning of 2005, the British market research institute Jupiter Research
published a report suggesting that the European market for mobile sports betting will experience strong growth. A turnover of only $110m in 2004 should increase to $3bn by 2009. Jupiter Research forecasts that the turnover of mobile services such as lotteries, sports betting and casino games worldwide will increase tenfold from €2bn in 2005 to $19.3bn in 2009. The British management consultancy firm Informa Telecoms & Media (ITM) declared the European M-Betting market to be an area of growth – the European mobile sports betting market alone should experience annual growth of 140 %. In 2010 ca. 200 million people are expected to use their mobiles to bet.

The state gambling provider in Germany is clearly aware of these figures: On the 16th of December 2005 it was announced that the state gambling provider, Toto-Lotto Niedersachsen, now cooperates with the private sports betting provider for mobile value-added services net mobile AG, in order to „gradually build up the scope of mobile betting“. In light of the potential imminent liberalisation of the German gaming market, the state gambling providers clearly did not wish to leave this promising market segment unoccupied.

Conclusion: If one wants to ensure medium-term market prospects for M-Commerce (M-Gambling), it is advisable to have already entered the market. It is also necessary – now, rather than later – to watch out for cruel legal snares, which are always a threat when the Law plays catch-up with current technological developments. Failure to do so could be costly, not only in the medium-term but also in the short term.
Hambach & Hambach obtain decision in the Upper Administrative Court of Baden-Württemberg

The Baden-Württemberg Administrative Authority suffers another setback – this time at the Upper Administrative Court in Mannheim (case no. 6 S 1947/05). Where sports bets are concerned, it is well known that the administrative authorities take drastic steps – unfortunately without regard to law and order

A Report by Attorneys-at-law Dr. Wulf Hambach and Claus Hambach

Private sports betting distributors, who distribute sports bets to organisers in other EU countries have long been a thorn in the side of the state. This is because they are competition to the state sports betting provider ODDSET and in doing so rely on their constitutional rights and European law guarantees, freedom of establishment and freedom of services. However, the administrative authorities are increasingly finding themselves on the losing side. The reason for this is the many decisions in favour of private operators, in particular from the criminal and administrative courts. Furthermore, the Federal Constitutional Court has already requested numerous authorities to refrain from instituting any enforcement measures against the sports bet distributors in advance of the seminal decision expected at the start of 2006.

As a result the administrative authorities are now increasingly relying on the classical public order law, such as e.g., building regulations, the food safety regulations as well as the additive and pricing regulations. Exemplary are the scandalous proceedings brought by the Administrative Authority of Heilbronn against caterers in that area. The authority withdrew the pub license from a Baden-Württemberg pub manager and demanded that he close his premises. The decision was justified solely on the basis that he might have distributed sports bets in the past. The decision was declared to be for immediate execution (§ 80 para. 2 No. 4 VwGO). The law firm Hambach & Hambach filed an objection to this administrative act on behalf of the pub manager and applied to the Administrative Court of Stuttgart for the suspension of the closure order.

As the Administrative Authority clearly feared that there was insufficient justification for the immediate execution of the order, it submitted further reasons to justify the withdrawal of the pub license, such as e.g., the lack of a solenoid gas valve as well as the lack of a safety appliance for a CO2-holder in the store room etc.. The pub manager was set a deadline to remedy these defects. When this deadline had expired the Administrative Court of Stuttgart decided to reject suspending the order (case no. 15 K 1563/05).

However, the Upper Administrative Court of Baden-Württemberg overruled this decision. The Upper Administrative Court stated that there were sufficient reasons submitted on
behalf of the pub, which dispelled the idea that a particular danger was posed by the operation of the pub until the conclusion of the main proceedings. In contrast with the previous instance court and the submissions of the administrative authorities, the Upper Administrative Court considered that a cessation of the pub to be unnecessary. Why: the cessation of the pub would be a serious violation of the freedom of profession guarantee of the pub manager.

**Conclusion:** The Administrative Authority of Heilbronn had already been renounced by the court in the decision of the 8th of December 2005 (see Betting-Law-News 7/05) and told to only bring proceedings for immediate closure of betting shops where there was proof of **concrete** danger to the common good. If the administrative authorities now consider that they can dodge this by relying on other – non sports betting – dangers without closer examination, this crude proceeding is unlikely to stand up to legal examination.
iii. Dutch Courts finds the Dutch casino monopoly not compliant with the Treaty of Rome and European Commission suggests that proposed Dutch Internet gaming monopoly is disproportionate

Judgement of 2 December 2005 CFR vs. The Dutch State

An article by guest author, Justin Franssen, Dutch lawyer, Van Mens & Wissellink / Amsterdam

In a main proceedings judgement of 2 December 2005 the Administrative Court of Breda rendered a landmark post-Gambelli judgement in the proceedings between the Compagnie Financière Régionale B.V. (hereinafter: “CFR”) against The Ministry of Justice and the Ministry of Economic Affairs (hereinafter: “the State”). The decision of the Breda Court can be qualified as no less than a historic victory for the supporters of the principles enshrined in the Treaty of Rome, notably articles 43 and 49 of the Treaty. After various Dutch interlocutory Courts and one main proceedings Court found the Dutch gaming legislation and policies to be compliant with the so-called Gambelli criteria in several cross-border internet gambling cases, the Breda Court ruled that the State monopoly on (casino) gambling is not effective and there is no specific evidence as to substantiate that the restrictive casino legislation is coherent and consistent.

In the case at hand CFR applied for a license to operate a casino in the Dutch municipality of Bergen op Zoom. The application of CFR was rejected mid 2003 given the legal State monopoly of Holland Casino which is a 100% State owned foundation operating 12 casinos in The Netherlands. Furthermore the State referred to the jurisprudence of the European Court of Justice and concluded that the restrictive casino licensing system is compliant with this jurisprudence.

CFR lodged an appeal with the Administrative Court against the decision of the State and a first hearing was held on 29 September 2004. After the hearing, the case was reopened by the Court on 21 December 2004 and a series of additional questions were asked of the State (please note the similarity in approach by the District Court of Arnhem in the main proceedings case between De Lotto and Ladbrokes in which the Court rendered an interlocutory judgement and asked the Ministry of Justice for comments following the Courts’ initial critical assessment of the Dutch gaming policy). The State submitted a written Statement on 4 February 2005 and CFR provided the Court with its replies on 31 March 2005.

CFR reasoned that the restrictive casino monopoly goes against the principles set forth by the ECJ in the Gambelli judgement in which the ECJ hardened its stance on the proportionality principle and demanded a factually substantiated consistent coherent
gaming policy from the Member States when restricting the fundamental freedoms enshrined in the Treaty of Rome.

The Court rules that Member States in principle do enjoy a wide margin of discretion as to how to regulate its respective gaming markets but the restrictions need to be coherent and consistent and the restrictions need to be justified by overriding principles of general interest such as fraud prevention and player protection. The State reasons that the casino monopoly is required and effective as this allows the State to intervene directly and to control the activities of Holland Casino.

The Court respects this viewpoint of the State but also refers explicitly to the “suitability test” as set out in paragraph 66 and 67 of the Gambelli judgement as an explicit additional requirement set by the European Court of Justice. Other than all previous post-Gambelli judgements by the Dutch Courts, the Breda Court derives from the ECJ jurisprudence that a factual assessment of the circumstances should be made.

In answering the Courts’ questions the State takes the position that it cannot be held responsible for the excessive marketing budgets of the State operators. The Court feels that this reasoning is in clear conflict with the position of the State that a legal monopoly allows the State a maximum and effective control over the activities of a State operator such as Holland Casino. The Court feels that the State can be held accountable for not intervening in the intensive marketing campaigns of Holland Casino. The State tolerated the fact that Dutch consumers were stimulated and encouraged to participate in casino gambling.

The Court further rules that the policies of the State seem rather contra productive and no evidence is provided by the State that substantiates the envisioned effect of its policy decisions. At the time of the decision of the Court there is not even reliable or recent research available on gambling addiction.

Furthermore the Court rather critically assesses the plans of the State to further expand the offering of Holland Casino with two additional licenses as research has clearly shown that expansion of legal casino offering has negligible effects on illegal offering (substitution effects). Furthermore the State reasons that a further expansion of Holland Casino does not have a severe effect on the growth of problem gambling but the Court fiercely reacts that such reasoning is fully based on assumptions and that this is not in any way substantiated by facts.

The Court concludes that the restrictive casino monopoly does not comply with the principles of consistency and coherency as set forth in the Gambelli judgement and
abrogates the administrative decisions from the State and orders the State to fully reassess its decisions. Should the State remain not able to provide a motivation of governmental policies based on facts in this new decision then the Court will declare the casino monopoly contrary to article 49 (freedom to provide services) of the EC Treaty.

Conclusion
As in various other Member States such as Italy and Germany it seems that Holland is the next jurisdiction were evident conflicting post-Gambelli judgements are being rendered. The author feels that action on EC level is required to clarify the situation as simply excluding gambling from the Service Directive does not eradicate the ongoing conflicting post-Gambelli interpretations in various national Courts. The European Commission should also press ahead with a wide variety of betting related infringement procedures against Holland but also against Germany, France, Spain, Hungary, and Italy. Furthermore this judgement might prove to have a certain effect on the pending Dutch civil and administrative litigation on the legality of cross border internet gaming as well as on the proceedings regarding the discriminatory allocation mechanisms of (exclusive) Dutch gaming licenses initiated by various UK betting operators.

European Commission expresses fierce critique on proposed Internet gaming monopoly for Holland Casino (A copy of the reaction (English and Dutch) of the European Commission can be obtained via the author):

Recently, a proposal for a new title in the Dutch Gaming Act of 1964 was sent to the Parliament. The new suggested law provides modifications to the Act on games of chance and contains temporary provisions on games of chance via the Internet. In effect the Ministry of Justice envisions granting Holland Casino a three-year license to exclusively operate interactive games of chance.

The proposal of the law received critique from the private slot machine industry, the Counsel of State (“Raad van State”) -a consultative body in the legislative process- as well as some serious and fundamental critique from the European Commission.

First and foremost the private slot machine industry recently expressed its concerns and anger. It argues that the Ministry of Justice promised the slot machine operators a similar temporary internet gaming license as will be issued to Holland Casino. The slot machine industry feels that the Ministry of Justice does not comply with alleged earlier promises made to the industry and places Holland Casino in an unfair advantageous competitive position with the private industry, as Holland Casino will favour first mover advantages. So far, it remains to be seen if litigation will be initiated by the industry to force the Minister
to reassess the suggested monopoly for Holland Casino and if the Parliament indeed backs
the law when it comes up for vote in 2006.

The Council of State expressed some concerns regarding European law issues in its advice
to the legislator. The Council feels that, given the proportionality principle, the limitation
to a single operator should be reconsidered. In the Explanatory Memorandum the
legislator explains that the justification for the choice to grant a monopoly to Holland
Casino is that strict controls can be exercised on Holland Casino as it is a reputable State
operator with a proven track record in effective player protection, fraud prevention etc.
The Council of State remarks that it is equally possible that other operators, both foreign
and domestic can also meet these requirements. The Council of State questions if the
limitation to a single (Dutch) operator does not impede on the rights of other reputable
EU operators to obtain the exclusive license and therefore infringes upon the principles
enshrined in article 49 of the EC Treaty.

The European Commission is much more aggressive in its comments pursuant to Directive
98/48/EC. The Commission qualifies the legislation as not being compliant with article 49
of the EC Treaty. It explicitly refers to the Gambelli judgement and concludes from the
Explanatory Memorandum accompanying the proposed legislation that it “appears […] that
the Dutch Government is mainly concerned by the lost revenues (estimated by the
government to be 144 million euro in 2004 which goes to (illegal and) foreign service
providers”. According to case law of the ECJ it is clear though that the funding of the State
coffers cannot in itself be regarded as an objective justification for a monopoly.

The Commission continues: “The Commission has not identified valid justifications why the
Dutch legislator might believe that it is necessary to restrict all cross-border gaming services
offered by licensed suppliers legally established in another Member State where they are
subject to appropriate controls […] In view of the Dutch Government’s ambition to combat
crime the Commission notes that an independent Dutch Expert Committee, the Werkgroep
Wet op de Kansspelen, which had a mandate to evaluate the relevant Act and its effects,
concluded that the limitation of the number of providers did not prevent criminality and
illegality. […] (see “Nieuwe ronde, nieuwe kansen”, The Hague, 8 March 2000, p 2)

The Commission concludes with the following revealing analyses: “In conclusion, the
Commission points out that the restrictions emanating from the new proposed provisions
of the Act on games of chance, do not appear to be justified by this overriding reason.
Neither do the restrictions seem to be considered proportionate to the Stated aim”
iv. Using E-Commerce Law to build Confidence?

Twelve-point-recommendation catalogue published by the German Association of Digital Commerce (Bundesverband der Digitalen Wirtschaft) for online providers

A report by Attorneys-at-law Dr. Wulf Hambach and Dr. Hendrik Schöttle, Hambach & Hambach

Anyone who deals with E-Commerce law is confronted with a vast catalogue of requirements, which range from information duties, down to the last detail, to organisational measures and the necessity of obtaining numerous consents from the customer. Most of the time, it is only the threat of fines and the risk of civil law proceedings, which cause firms to implement the extensive obligations.

Now the Confidence Working Group, to which the German Association of Digital Commerce belongs, has published a recommendation catalogue, which – as the name of the working group suggests – focuses on confidence-building measures. This is because there is still a major lack of confidence on the part of those who decline to take part in online commerce. According to the Chairman of the E-Commerce section, Roland Fesenmayr (OXID eSales GmbH), “Confidence is as ever the most important basis for online trade. Anyone who does not take this seriously risks losing much potential.” In doing so, it is mainly simple things, which have to be considered by the online provider in order to increase confidence (and thereby, sales).

If one scans the list of requirements, which the Working Committee considers to be of confidence-building effect, the whole thing reads as a foray into IT law. First, is the Provider Identification (Anbieterkennzeichnung, required under the Tele-services Law, similar to an “Impressum” – legal information and contact details), then product and price transparency (requirements under the Distance Sales Law), while data protection and the consumer’s right of revocation are mentioned.

Even if many regulations are not particularly sensible in their definition as duties, it can be seen that a professional Internet appearance can not do without a basic structure of technical, information and security elements. The Recommendation Catalogue by the German Association of Digital Commerce has now shown that the legal and commercial interests are not as far apart as might first appear. Anyone who operates in line with the recommendation catalogue and also ensures legal compliance by carrying out their Internet law duties kills two birds with the one stone: He doesn’t just protect himself from civil competition law proceedings and fines, he also – in face of increasing pressure from competition – ensures consumer confidence, which can quickly be turned into a commercial advantage.
In November 2005 Attorney-at-law Dr. Wulf Hambach was elected General Member for Germany of the International Masters of Gaming Lawyers (IMGL – www.gaminglawmasters.com). The IMGL is a non-profit association of attorneys, gaming regulators and gaming executives dedicated to the education, advancement of the gaming law profession and exchange of professional information concerning the local and global practice and development of all aspects of gaming law.

★

We are delighted to be able to welcome the Dutch lawyer Justin Franssen (franssen@vmw.nl) as a guest author of „Betting-Law-News“. Justin Franssen will keep you up to date on developments in Dutch gambling law.

Justin Franssen (franssen@vmw.nl), 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.

★

Our Betting-Law-News newsletter and our website, www.betting-law.com, will now provide you with information on the latest developments in IT law as well as on betting and gaming law.
vi. Editorial

Many people expected the decision of the Federal Constitutional Court on sports betting to be made this year. These hopes were disappointed, we were only able to describe our impressions of the oral hearing which took place on the 8th of November 2005 in Karlsruhe (we reported on this in our Betting-Law-News of the 10/11/2005). The start of the year 2006 will be accompanied by much uncertainty regarding the future of sports betting in Germany. However, we would like to take a quick look behind the scenes and – in the sense of a horoscope for 2006 – allow you to see what might happen:

In 1997 Prof. Dr. Hans-Jürgen Papier, President of the Federal Constitutional Court and Chairman of the first senate, the senate which will decide on the sports betting monopoly, opined on the compatibility of the gaming monopoly with the constitutional freedom of profession guarantee. Even back then he considered it to be inconsistent for the state to collect the total revenue from the operation of casinos through a protected monopoly, even though this was alleged to be connected with social or societal policy aims:

*This perception of an "exculpation " through nationalisation and socialisation is too easy to see through and superficial and is therefore an ineffectual attempt to turn a financially motivated monopoly into an administrative monopoly with greater constitutional regard.*

He came to the following conclusion:

*The foundation of a public monopoly for the operation of a casino infringes the constitutional right of freedom of profession (Art. 12 para. 1 of the German Constitution) of existing or potential private operators.*

We leave it up to you to draw your own conclusions on the continuity of the German sports monopoly.

*We wish you a pleasant Christmas Season and a Happy New Year 2006.*

*Your Betting-Law-News Team*
Legal Details and Contact Information

Betting-Law-News keeps you up to date of events concerning European and International gambling law free of charge. Hambach & Hambach does not accept any liability for the correctness of the contents of Betting-Law-News. Please note that Betting-Law-News serves solely for information purposes and cannot replace legal advice under any circumstances. A reproduction (republication) is only allowed if the source and contact details are named.

The Betting-Law-Newsletter is registered at the ISSN Centre for Germany (ISSN 18617441).

Editor (responsible for the publication):
Attorney at law Dr. Wulf Hambach

Editorial Staff:
Attorney at law Dr. Wulf Hambach
Attorney at law Claus Hambach
Attorney at law Andreas Gericke
Attorney at law Dr. Hendrik Schöttle
Legal Assistant Sarah Madden

Haimhauser Str. 1
80802 Munich
Germany

Tel: +49 89 389975-50
Fax: +49 89 389975-60
E-Mail: info@ra-hambach.com
www.betting-law.com