TIME Law News

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Latest developments in German and International Law of the TIME-Industries Telecommunication - IT - Media & Entertainment

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1. The EC´s Recommendation on Consumer Protection

By Dr. Wulf Hambach, partner at Hambach & Hambach Law Firm, Munich and Dr. Alan Littler, Kalff Katz & Franssen Attorneys at Law, Amsterdam

Monopolies and gambling. For some, they are natural partners. For others, the idea that the organization of gambling should be restricted to monopolies, State or otherwise, is completely incomprehensible. It is news to no one that the Court of Justice of the European Union ("CJEU") has been the battleground for this debate, mainly arising out of preliminary references from national courts, where stakeholders have sought to demarcate their interpretation of what the free movement principles entail for online gambling.

The EC's Recommendation

The EC has also been drawn into this debate. Its involvement takes one of two forms. First, the EC is able to open infringement proceedings against Member States who it believes are in breach of EU law. This weapon, however, relies upon the interpretation of EU law, which in this case is primarily determined by reference to CJEU case law. Secondly, the EC has sought to engage a broader range of stakeholders than Member States and those with legal standing in preliminary references. This commenced with the March 2011 Green Paper consultation, following which the EC identified five priority areas for action in its October 2012 Communication, *Towards a comprehensive European framework on Online Gambling*. One such priority area is the "protection of consumers and citizens, minors and vulnerable groups" from which the first Recommendation originates, namely the *Recommendation of 14 July 2014 on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online* (the "Recommendation").

Under the infringement procedure, the EC has taken aim at restrictions to the free movement of services, which can encompass exclusive licences for gambling services. Relying upon CJEU case law, it has found monopolistic regimes to be compatible with the internal market. Equally, however, it continues to question the compatibility of some monopoly regimes. Whether this will result in regulatory change remains to be seen. Ultimately, a Member State may manage to satisfy the EC that measures have been taken to align the regulation of the monopoly with free movement law. Alterna-

tively, a new regulatory regime may be introduced, opening up an otherwise closed market to a degree of competition.

But what of recommendations? Can they have an impact on the sustainability of monopolies? The Recommendation aims to establish a "high level of protection of consumers, players and minors" whilst specifically noting that it does not interfere with the competence of Member States to regulate online gambling services. As a legal act recommendations lack any binding force. The provisions themselves within the Recommendation are broadly framed, and at no instance is the notion of a "high level" defined, which again underlines the fact that Member States' regulatory competence is not interfered with. Moreover, Member States are not excluded from upholding measures which seek to give effect to aspects of consumer protection that the Recommendation does not cover.

However, CJEU case law establishes that monopolies are only justifiable when they uphold a "particularly high level of protection[1]", accompanied by a legislative framework which enables the monopolist to pursue consumer protection objectives in a consistent and systematic manner "by means of supply that is quantitatively measured and qualitatively planned by reference to the said objective[2]". The CJEU has also been detailed in its judgements regarding advertising by monopolists and commercial communications.

So, could the EC point to an absence of a specific approach to upholding a high level of consumer protection amongst the regulatory requirements applicable to a specific monopolist, so as to say that the applicable regulatory regime does not give rise to a high level of protection? And therefore the monopoly, along with its associated restrictions to the free movement of services, does not amount to a justified restriction to the free movement of services? In short – no. The Recommendation states that it "does not interfere with the right of Member States to regulate gambling services"[3]. Nevertheless, some Member States may fear that it will amount to a source of soft pressure.

Whilst the EC is not the only voice national regulators and authorities need to be aware of, but the domestic judiciary in each Member State may turn to its recommendations. In brief, although recommendations do not confer rights on individuals

[1] Case C-212/08 Zetruf Ltd. V. Premier Minister.
[2] Case C-316/07 Markus Stoß.
[3] Recommendation 1(2).

"national courts are bound to take them into consideration in order to decide disputes submitted to them"[4]. It is not inconceivable that a domestic judge will attempt to draw upon these recommendations in national proceedings. This may raise the spectre of creeping Europeanisation of gambling policy.

Germany's response

In Germany, it seems that the EC may have somehow offended the Federal States. This could explain why the Recommendation, which contains useful regulations regarding the protection of players and minors, has been rejected by the Federal Council of Germany in its report of 10 October 2014 (printed matter 424/14).

In its response to the EC, the Federal Council of Germany stated that *"there is no need for a harmonisation of online gambling and that the member states can solely decide – in line with the subsidiarity principle and according to their own cultural, social and socio-political views and traditions – what is necessary to protect consumers from the specific dangers which result from games of chance."*

It is obvious that the report of the German States is a tit-for-tat response to the initiative of the EC. A likely explanation is that Germany is frustrated as the aims of the Interstate Treaty on Gambling ("ITG"), in particular with respect to consumer protection, have not been met. More than two and a half years after the adoption of the new ITG, sports betting licences have yet to be issued, whilst the blocking system for compulsive gamblers (known as "OASIS") is not operating at the national level due to legal and technical issues. Furthermore, the attempts to implement financial blocking methods to interrupt the payment flows of illegal gambling offers have backfired. Studies have shown that its implementation is technically not feasible, would breach German data protection laws,[5] and that financial blocking is simply not as effective as its supporters would hope.[6] In the end, even financial blocking will not suffice to camouflage the enforcement deficits of an outdated monopolistic regulatory regime. In consequence, all the efforts of the States to combat the black market have failed. Accordingly, Germany is, now more than ever, a candidate for new EU infringement proceedings due to the States' failure to channel consumer demands.

[4] Per Case C-322/88 Grimaldi v. Fonds des maladies professionelles ("Grimaldi"), at Paragraph 18.

[5] See https://www.datenschutzzentrum.de/artikel/860-Datenschutzrechtliche-Bewertung-der-Regelungen-zum-Financial-Blocking-zur-Verhinderung-illegalen-Gluecksspiels-im-Internet.html.

[6] See summary of the Norwegian Gaming and Foundation Authority: https://lottstift.no/wp-content/uploads/2011/12/Summary-payment-blocking.pdf.

In contrast to the ITG, the Gaming Reform Act of Schleswig-Holstein ("GRA") was always open to the Recommendation. In 2012/2013 the Ministry of the Interior of Schleswig-Holstein had already granted 48 licences to gambling providers before the GRA was partially withdrawn: 25 online sports betting licences and 23 licences for online casino games and online poker. The licences are valid for a period of six years. Most of the gambling providers have already started their business under the Schleswig-Holstein licences. The GRA and the Executive Order regarding the Licensing of Gaming Operations and Sales ("GGVO") already fulfil the requirements of the EC. In particular, the GGVO contains detailed requirements regarding:

- the registration of players (sect. 5);
- the limits and blocking mechanisms (sect. 8);
- the blocking and closure of gaming accounts (sect.10);
- and the protection of players and minors (sect.13).

Thus, the GRA gives rise to non-discriminatory regulation of online gambling that is in line with the Recommendation. Licence holders who have activated their licences and started conducting business under the Schleswig-Holstein licences can be confident that they hold licences which comply with EU law.

Hopefully, the German States will reconsider their reaction and see the Recommendation of the European Commission as a gift and not something to cause offence.

The provisions within the Recommendation should benefit Member States in understanding what is required in achieving a high level of protection for consumers so as to justify the presence of a monopolist in their national market. If Member States ignore the Recommendation, then infringement proceedings will be the only way of forcing Member States to achieve the necessary channeling of consumer demand and robust consumer protection.

For more information please click here.

2. Law-Games: Poker-Players Acquitted and Online-Casino-Players Convicted – What applies to Online-Players?

Published on January 11, 2015

Report by German lawyers *Dr Wulf Hambach* and *Claus Hambach, LL.M.* – Hambach & Hambach Law Firm

The judicial mess relating to the question of legality of online gambling is growing. The District Court of Munich has recently announced in its press release that players, who participate in the unlicensed online gambling in Germany, would render themselves liable to the criminal prosecution. Thereby the Court referred to its judgment of September 26, 2014 (Case No. 1115 Cs 254 Js 176411/13). However, this judgment will not withstand the appeal to the Regional Court of Munich:

I. The regulatory situation in gambling industry is unclear, the criminal one – more than ever:

This is remarkable, because for several years legislative, administrative and judicial authorities have been trying to bring legal clarity to the legal matters of gambling law as part of a special administrative law. Outside of the District Court of Munich they have been discussing for more than 10 years, whether gambling in Germany may only be organized by the state or also by private parties over the Internet. Courts and legal experts in Germany and Europe disagree on the conformity of the German restrictive gambling regulation with the EU law. In 2006 the Federal Constitutional Court of Germany declared the German Inter-State Treaty on Lotteries of 2004 and its monopoly system to be unconstitutional. In 2010 the European Court of Justice (indirectly) declared the German Inter-State Treaty on Gambling of 2008 to be contrary to the EU Law and thus inapplicable. In the meantime, the German Inter-State Treaty on Gambling of 2012 is valid, but the applicability of its regulations is even more unjustifiable than of its previous versions (about the dispute, for example: Streinz / Liesching / Hambach, Glücks- und Gewinnspielrecht in den Medien, Einführung, Rn. 1 ff.).

In contrast, the District Court of Munich nonchalantly suggests, that everyone could find out the criminality of online gambling “with the simplest research in the Internet” (Recital 29), and that there had been the legal clarity on the gambling regulation in Germany since the adoption of the German Inter-State Treaty on Gambling of 2008. Only before 2008 “there had been, in fact, an unclear and inconsistent

regulation, which was harmonized by the Inter-State Treaties on January 1, 2008 and further by the new Inter-State Treaty of 2012" (Recital 35).

The District Court of Munich itself confirms the incorrectness of such point of view in another paragraph. So, Recital 28 of the Judgment states: "sports betting monopoly of the state was subsequently repealed by the European Court of Justice". Here, the Court refers to the Inter-State Treaty on Gambling of 2008 and to the Judgments of the ECJ of September 8, 2010 (Case No. C-46/08 – Carmen Media; et al), where the ECJ put it straight, that the GlüStV 2008 (regarding its monopoly regulations) had been inconsistent with the European Law. Insofar it was simply erroneous of the District Court of Munich to suggest that the situation in the gambling law had been clarified in Germany since 2008.

II. Foreign licenses lead to the exclusion of the criminal liability.

There are obvious reasons why an online casino player has never been sentenced in Germany before, despite there are millions of participants. So, famous penologists come to the clear conclusion that gambling licenses in other countries may be sufficient to exclude the criminal liability:

It is stated in one of the most important commentaries on the Criminal Law (in Germany) (Schönke/Schröder/Heine/Hecker, § 284 StGB, Recital 30) that already "according to the wording of Para 284 Section I, no German license shall be necessarily available". Moreover, the criminal liability can also be excluded, if the provider holds a license in another country, where the license requirements are comparably high, as they would have been according to the German regulations. The penologists are talking here about the elimination of the "criminal energy" due to the existing EU license and thus support the providers and their customers.

So, a few years ago the District Court of Bayreuth in its unpublished judgment had correctly acquitted an online poker player of such accusation, which was even confirmed in the second instance by the Regional Court. The District Court of Munich, however, found that there was no "official German license" and suggested: „On the other hand, a British license is not sufficient to make gambling "legal" (compare with Recital 26). Instead of this suggestion, the Court should have examined, whether the British license of the provider, where the convict played, actually meets the requirements of consumer protection in Germany or not, and whether the supervisory authority in Gibraltar actually controls the provider less reliable

than a comparable German authority would have controlled. For example, the Court did not examine, whether or not the provider had applied for a German license within the concession proceeding for sports betting or even held an online casino license of Schleswig-Holstein.

This did not happen. Instead, the District Court of Munich supports the necessity and justification of criminal liability by polemical suggestions instead of legal facts, such as “the danger that the single player (…) will be stripped of his money (…) by dubious operators”.

III. The principle of legal certainty and in dubio pro reo principle forbid the conviction.

The number of German online casino players is counted in millions. According to a SPIEGEL report, already in 2013, they placed in Internet casinos over 17 billion Euros in bets, with an increasing tendency.

Due to the legal uncertainties outlined above, up to this case none of millions of German online players has been convicted of participation in illegal gambling. This can be found out with a simple Internet research.

Neither provider, nor players recognize, what is now “allowed” and what not. It is, however, evident in criminal law, because the principle of legal certainty applies: the requirements for the criminal liability and its follow-up consequences shall be specified so precisely, that the norm addressee could anticipate, whether his conduct is punishable and, at least, whether there is a risk of a punishment.

And the District Court of Munich itself points out, that there is no certainty regarding criminal liability of participation in the online Black Jack over the Internet, as it states in Recital 27, “that the participation in Internet casinos with games of chance is punishable at least under the formal consideration”.

Thus, the requirement of a “formal” consideration implies, that there are also different approaches, according to which the criminal liability is excluded. The court misjudges exactly these points of view (question of the current inconsistency of German regulations on gambling with EU Law; question of recognition of foreign licenses). Insofar, the court at least should have had doubts on the accused’s guilt and should have not imposed on him the own “formal consideration” of the legal situation.

The statements of the Court in Recital 30 also set alert. According to it, “even a layman knows the difference between sports betting and a game of chance like Poker or Black Jack”. This statement shows, that the Court itself is not aware, that sports betting is qualified in Germany as a “game of chance”.

IV. Perspectives.

Numerous online providers from Gibraltar and Malta have received from the Ministry of Interior of Schleswig-Holstein licenses for offering online casino. Furthermore, they fulfilled the minimum requirements for the sports betting concession, whereby they proved their reliability. Even if one should reject the impunity of providers with a strongly regulated Gibraltar License, the “in dubio pro reo” principle, which stringently leads to the acquittal, should at least apply to the players. Therefore, the Regional Court will need to correct the judgment of the District Court of Munich in favor of the player.

3. German Federal Court: Betting as Sales Promotion not illegal Gambling

By: Dr. Stefan Bolay, salary partner at Hambach & Hambach

Summary

The German Federal Administrative Court (Bundesverwaltungsgericht – BVerwG) had to address the question as to whether a socalled "weather forecast bet" as a sales promotion of a furniture store is to be classified as a "game of chance" as defined in the Interstate Treaty on Gambling (Glücksspielstaatsvertrag – GlüStV). Participating in the bet was subject to the purchase of furniture with a minimum value of EUR 100. The price consisted in the refund of the purchase price in the event of rain on a specific day and place in the future. The court had to decide whether the precondition to participate in the bet, i.e. the obligation to buy products, led to a game of chance because the purchase price for the products contained a so called "hidden stake". The BVerwG judged that the purchase of furniture was not only the economic focus of the transaction, but also the customers' primary concern; as such, participating in the game was only an add-on. Further, the BVerwG denied a "hidden stake", since there was no evidence that the furniture shop had increased the prices for its products to finance the sales promotion. In the end, a game of chance cannot be construed if the participants cannot lose anything from an objective perspective.

For more information please click here.

4. DVTM announces Hambach & Hambach as a new member

Düsseldorf/Munich, October 2014

In October 2014 Hambach & Hambach law firm was announced new member of the German Association for Telecommunication and Media, DVTM. DVTM represents a number of companies participating in the value chain telecommunication and media. Among those companies there are service providers, network operators, resellers, technical service providers, media and publishing companies as well as consulting and collecting agencies. Members include: British Telecom (Germany), RTL Interactive, PokerStars.de and Tipico Co. Ltd. It is the primary aim of DVTM to ensure and enlarge a functioning and competitive tele-communication and media market which is in dialogue with all market participants.

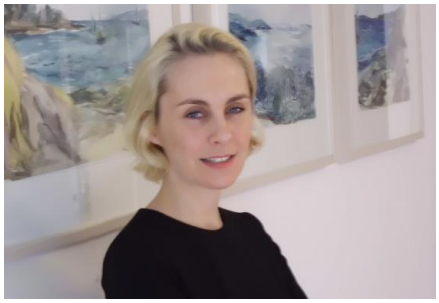
DVTM focuses on the convergent regulation of media and telecommunication services which trusts in the self-regulation of market participants and stakeholders. As part of this commitment to responsible self-regulation DVTM's members act voluntarily in the frame of DVTM's Code of Conduct (Germany) for Telecommunication and Media.

As highly specialized Law Boutique with main focus on legal advice in the German and international TIME-sectors (Telecommunication – IT – Media & Entertainment Law) Hambach & Hambach strongly supports the idea of convergent regulation, especially with regard to the online gaming market. Hambach & Hambach realizes its convergent advice e.g. via its close cooperation with Supervision Authorities in Telecommunication, Media, Gaming and Banking (ePayment) to help operators start their German business smoothly.
Hambach & Hambach is proud of being member of the DVTM community and about adding gaming related issues to DVTM's agenda. As a strong team DVTM and Hambach & Hambach aim at bringing forward gambling regulation reform in Germany.

For more information on DVTM please click *here*.

5. In-House News

Catharina Overbeck, Associate, lawyer and journalist joins Hambach & Hambach team



Catharina Overbeck

Before joining Hambach & Hambach Catharina Overbeck served as legal counsel for a fashion startup in Berlin. During her legal traineeship (Rechtsreferendariat) she worked in the media policy department of RTL Deutschland media group, the state media authority Berlin-Brandenburg, and with Prof. Dr Christian Schertz, a renowned expert in media and press law where she gained experience with media and telecommunication legislation as well as press and regulatory law.

Ms Overbeck studied law at the Humboldt-University of Berlin with a focus on media law. Before she decided to study law, she worked as a journalist for RTL Television and ProSiebenSat.1 Media AG in Cologne and New York City.

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New Publication:
Kommentar zum Glücks- und Gewinnspielrecht in den Medien
(Commentary on Betting and Gaming Law in the Media)

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The New Gaming Law Regime

has been in force since 2012. It has partially liberalised the gaming market and relaxed the state monopoly on gaming. In future, up to 20 (online) licences are intended to be issued (also) for providers of sports bets. In addition, 48 new online gaming licences from Schleswig-Holstein are also considered. The new commentary explains all provisions with relevance for betting and gaming law in the media, in particular, with a focus on private gaming offers in broadcasting and telemedia.

The Editors

Prof. Dr Rudolf Streinz, Prof. Dr Marc Liesching, RA and Dr Wulf Hambach, RA and all authors are reputed experts in gaming law, through practical experience and scientific publications.

Up-To-Date Practical Solutions

can above all be found by corporate counsel and lawyers advising gaming providers. Responsible officials at supervisory, regulatory and public prosecution authorities as well as judges and university lecturers will also profit from this work.

For further information, please click here.

6. Editorial details

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