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The legality of '50 cent' gambling

A regional court in Germany recently ruled that an online raffle was an illegal 'game of chance', even though its participation fee was 50 cents - which makes the online raffle admissible under the German Interstate Broadcast Treaty (RStV). Dr. Wulf Hambach and Susanna Münstermann, of Hambach & Hambach, discuss the differentiation between the RStV, the German Interstate Treaty on Gambling and the German Criminal Law - a process that the court should have undertaken to reach its decision - and examine the legality of '50 cent' gambling.

Sweepstake competitions are a popular source of income for TV channels even though they have been accompanied by legal discussion since their start¹. An expressed regulation could be reached in section 8a of the Rundfunkstaatsvertrag of 1 September 2008 (RStV - Interstate Broadcasting Treaty)².

It seems that the discussion regarding the legality of comparable sweepstake competitions on the internet (e.g. rtv.de, digibet.tv, swoopoo.de) now follows on seamlessly. The LG (Landgericht - Regional Court) of Cologne³ recently had to deal with a case of online raffle and classified it an illegal game of chance even though the price was limited to 50 cents per ticket. The Court would have had to discuss the differentiation between a sweepstake competition under sections 8a, 58 subsection 3 RStV and a game of chance under section 3 subsection 1 Glücksspielstaatsvertrag (GlüStV - Interstate Treaty on Gambling)⁴, which, however, it failed to do. In order to define the term 'game of chance', it would have been necessary to discuss court decisions on section 284 StGB (German Criminal Code).

Rules for sweepstake competitions on the internet

Why is this regulation also applicable to online sweepstakes?

In its decision dated 7 April 2009, the LG of Cologne assumed that the game was a 'game of chance' and left the question unanswered as to whether the internet offer which was the subject of the proceedings could, in principle, fall under the scope of application of section 8a RStV, which states that sweepstake competitions with a participation fee of up to 50 cents are admissible⁵. The online raffle

would be encompassed by the scope of application of section 8a RStV as this regulation is also applicable to telemedia.

While the RStV applies to the operation and dissemination of radio and television broadcasting, and only partially to telemedia, section 58 subsection 3 RStV states that section 8a RStV is applicable *mutatis mutandis* to 'comparable telemedia' (which are directed to the public). As almost all telemedia are directed at the public, it must correctly be assumed that practically all relevant cases of sweepstake competitions on telemedia will be encompassed⁶.

The maximum of 50 cents and the LG Cologne decision

The statutory regulation in section 8a RStV states that sweepstake broadcasts and sweepstake competitions are admissible, and that a maximum of 50 cents may be charged for participation in such games. At the same time, the provision intends to improve the protection of participants. Statutory requirements are defined in detail in the articles of the bylaw of the association of the Länder Media Authorities⁷.

The LG of Cologne's decision clearly shows that it would have been desirable for the legislator to have set rules for the known problem of multiple participation.

The LG of Cologne accused the provider of the raffle of having designed the game in such a way as to incite the players to purchase more than one ticket. The Court also objected to the fact that the sum actually paid as a fee for participation is left to the participant's discretion, as he can choose how many tickets to purchase. This means that the decisive point for the Court was that the stakes are accumulated, so that up until the decision of winning or losing, more than 50

cents may be spent. Finally, the Court voiced the concern that, in case of a different interpretation, 'any game of chance could in the future be organised without a licence, also on the internet, provided that the respective basic stakes are restricted to €0.50 and that gradual increases of the chances of winning by payment of additional stakes of €0.50 each are possible'.

This line of argumentation, as well as the lack of a detailed discussion of the wording, the contents of the articles of the association, court decisions and legal literature, creates the impression that the Court reached its decision above all in view of the desired outcome. Neither the RStV nor the articles of the association provide for a prohibition of multiple participation.

The LG of Cologne would furthermore have had to consider that neither the invitation to participate several times nor the repeated payment of the 50 cent stakes, nor the request for payment of higher stakes automatically lead to the offered sweepstake competition turning into a game of chance.

A violation of the requirements of section 8a RStV and the articles of association 'merely' would lead to an administrative fine in accordance with section 13 of the articles of the association.

The decision as to whether the violation leads to the offers having to be classified as a game of chance under section 284 StGB and section 3 subsection 1 GlStV⁸, however, requires a discussion of existing court decisions and legal literature regarding the interpretation of the term 'game of chance' in section 284 StGB, which we shall provide below.

The payment of 'stakes, which are higher than 'entirely insignificant'' is a decisive criterion for the delimitation against mere entertainment games

Games of chance under section 284 StGB

A person is liable to punishment under section 284 subsection 1 StGB, if they operate a game of chance without an official licence.

The term 'game of chance' is not defined in a statute but according to case law the agreed prize must represent a benefit which is 'not entirely insignificant', and the player must make a more than insignificant financial sacrifice in order to have the chance of winning⁹. This means that according to the prevailing opinion in legal literature and case law regarding the interpretation of the term 'game of chance', the payment of 'stakes, which are higher than 'entirely insignificant'' is a decisive criterion for the delimitation against mere entertainment games¹⁰. As the prohibition of games of chance is intended to protect the participants from financial loss, 'substantial stakes' rightly are a necessary element of the offence¹¹.

What is an insignificant financial sacrifice?

A 'significance limit' has not been precisely defined by the courts. Some decisions state absolute limits, such as 49 cents per participation¹², others set relative limits, such as a worker's average income per time unit of play, or the costs of an entertainment event of the same duration¹³. While there is no consensus regarding the exact amount of this sum, a very low sum is often being used for the determination of an absolute standard¹⁴. The bottom limit in this context are the telephone and postage costs¹⁵.

Some courts and a growing number of legal authors are of the opinion that games where the entertainment element is clearly decisive and where the expenses for the participants are not higher

than for other forms of entertainment (e.g. price of a cinema ticket), do not fall under the scope of application of section 284 StGB¹⁶.

This opinion is correct, as the determination of the 50 cent limit, which was fixed on the basis of the postage of a post card for the typical participation in sweepstake competitions, was probably made for reasons of practicability. It would be correct to assume that a game is not a game of chance in the sense of section 284 StGB if the sum of 50 cents has been exceeded, while an overall assessment of the offer shows that the entertainment purpose of the game is at the forefront, and that a danger to the participants' assets can be excluded.

What about multiple participation?

For the issue of multiple participation in TV sweepstakes, the majority of the courts assume that such games are still sweepstake competitions, free of criminal liability, even if several calls are made¹⁷.

The LG of Freiburg supports this opinion, as the 'broadcasting station itself (...) does not have a direct influence on how often a participant dials the provided number. The game stakes as a whole are defined by the caller's actions, and are insignificant for the individual call. Furthermore, each call gives the participant a new chance in return for the small fee due for each individual call¹⁸'. The LG of Munich left this question unanswered, but remarked that multiple participation may lead to 'a sum which would exceed the significance limit¹⁹'.

When evaluating multiple participation, it must therefore be rightly taken into consideration that on the one hand, a responsible

consumer makes a new autonomous intentional decision with regard to each new telephone call, which cannot be allocated to the disadvantage of the organiser²⁰ and that on the other hand, the passion for gambling may not be exploited, irrespective of whether many small individual sums are put at stake consecutively or at the same time²¹.

As a conclusion, it can be stated that the discussion regarding the admissibility of multiple participation only perpetuates the basic dispute regarding the 'not entirely insignificant stakes' and consequently the above conclusion can also be used for solving this problem.

Neither one-off stakes nor multiple-participation may endanger the participants' assets. A one off stake of 50 cents does not represent a danger to the participant's assets, even when applying the absolute standard. However, the assumed practicability for the courts and authorities cannot justify an inflexible limit, as such a limit is not apparent for those who apply the law.

Rather, the decisive issue should be whether the offered games may actually result in a danger to assets. This also applies to the evaluation of multiple-participation. An overall assessment would also have to include the question as to what extent the provider actually incites the participants to spend excessive sums, and to what extent the participants act on their own responsibility. Furthermore, the entertainment element of the games, the participants' control possibilities and potential measures to be taken by the organiser in order to protect the participants must also be taken into consideration.

The LG of Cologne would therefore have had to discuss

whether there is the danger that a participant in the online raffle may lose his assets by repeatedly purchasing tickets. Whether the offers may nevertheless lead to a danger to assets would have had to be discussed, taking into consideration the customer's behaviour and also the above-mentioned criteria.

Uniform interpretation of the term 'game of chance'

The LG of Cologne could not have reached a different conclusion when examining the term 'game of chance' in the context of the GlüStV. The term 'game of chance' is defined in section 3 subsection 1 sentence 1 GlüStV. According to this, a game is a game of chance if, within the framework of a game, a fee is requested in return for obtaining a chance to win, and if the decision on winning mainly, or predominantly, depends on chance. The wording of this definition is almost identical to the definition developed by the courts for the term 'game of chance' under section 284 StGB²². The only difference is that section 3 subsection 1 sentence 1 GlüStV uses the general term 'fee' instead of the term 'stakes'.

A different interpretation of the terms 'fee' and 'stakes', and thus of the term 'game of chance' in section 284 StGB on the one hand and in section 3 subsection 1 sentence 1 GlüStV on the other hand, would contradict the structure of the statute²³. The OVG (Oberverwaltungsgericht - Higher Administrative Court) of Berlin-Brandenburg²⁴ correctly points out that the term 'game of chance' is used in a provision, the elements of which, are linked to administrative decisions and depend on the lack of an administrative licence. Against this background, it cannot be assumed that the legislators of the Länder had the intention of

expanding the necessity of obtaining a licence beyond the level set by the Federal legislator in its criminal law provisions.

Conclusion

The LG of Cologne regards TV sweepstakes as being in a grey zone of what is still admissible and fears that any game of chance could be organised on the internet under the veil of the 50 cent limit.

In this context, the court fails to see that neither section 8 a RStV nor the articles of association prohibit multiple participation. The provider must, however, anticipate an administrative fine pursuant to section 13 of the articles of association if he invites participants to participate more than once, or if he does not comply with the 50 cent limit. Violations of these prerequisites will, however, not automatically lead to criminal liability under section 284 StGB, nor to a violation of section 4 subsection 1, subsection 4 GlüStV.

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1. See Albert/Müller, MMR 2004, issue 12, V.

2. Staatsvertrag für Rundfunk und Telemedien (Rundfunkstaatsvertrag - RStV - Interstate Treaty on Broadcasting and Telemedia) dated 31 August 1991, amended by Art. 1 of the Zehnter Staatsvertrag zur Änderung rundfunkrechtlicher Staatsverträge (Tenth Interstate Treaty on the Amendment of Interstate Treaties on Broadcasting Law) dated 19 December 2007 (see GBl. dated 18 June 2008). Now in the version of Art. 1 of the Zwölfter Staatsvertrag zur Änderung rundfunkrechtlicher Staatsverträge (Twelfth Interstate Treaty on the Amendment of Interstate Treaties on Broadcasting Law) dated 18 December 2008 (see GBl. dated 27 March 2009), in effect as of 1 June 2009.

3. LG of Cologne, judgment dated 7 April 2009 - 33 O 45/09, the decision is accessible on the internet under

http://www.justiz.nrw.de/nrwe/lgs/koeln/l_g_koeln/j2009/33_O_45_09urteil20090407.html (as per: 22 June 2009).

4. Staatsvertrag zum Glücksspielwesen in Deutschland (Interstate Treaty on Gambling in Germany), Gesetz- und Verordnungsblatt für das Land Hessen (Law Gazette for the Land of Hesse), Part I, 20 December 2007, p. 841.

5. Section 8 a was included into the Rundfunkstaatsvertrag in the 10th Rundfunkänderungsstaatsvertrag (Amending Interstate Treaty on Broadcasting) and came into effect as of 1 September 2008.

6. Liesching, Gewinnspiele im Rundfunk und Telemedien, Gutachten 2008, p. 121; Bolay, K&R 2009, issue 2, p. 91 et seq., 96.

7. Satzung der Landesmedienanstalten über Gewinnspiele und Gewinnspielsendungen (Articles of Association of the Länder Media Authorities regarding sweepstakes and sweepstake broadcasts) dated 23 February 2009, accessible under www.alm.de (as per: 22 June 2009).

8. On the uniform interpretation of the term 'game of chance', see III. below.

9. BGH, resolution dated 29 September 1986 - 4 StR148/86, BGHSt 34, 171 et seq., 176.

10. Eser/Heine, in: Schönke/Schröder, StGB Kommentar, 27. edition 2006, § 284 par. 5; Fischer, StGB Kommentar, 56. edition 2009, § 284 par. 3 et seq., holding a different view: VG of Wiesbaden, judgment dated 20 March 2007 - 5 E 1713/05 - quoted from juris.

11. Odenthal, GewArch 2002, 315, 316.

12. OLG of Munich dated 22 December 2005 - 6 W 2181/05, MMR 2006, 225, 226.

13. OLG of Cologne, judgment dated 19 February 1957 - Ss 417/56, NJW 1957, 721 et seq.

14. Fischer, StGB Kommentar (footnote 16), § 284 par. 5, Dismissing decision by the StA of Munich I dated 21 April 2004 - 124 Js 12258/03: Postage and telephone costs; OLG of Hamm, JMBl NW 1957, 251, stakes amounting to 1 DM per game were regarded as 'significant'; following the same line of argumentation, taking into consideration the inflation rate, costs of living and the higher general standard of living, Eichmann/Sörup (MMR 2002, 142) think that a sum of €2.50 is adequate, while Kleinschmidt (Gewinnspiele in Deutschland und der Europäischen Union, p. 22) calculates a sum of €1.89; OLG of Düsseldorf, judgment dated 23 September 2003 - I-20 U 39/03 - quoted from juris, the costs of a service telephone number amounting to 3.60 DM/minute are 'significant'.

15. LG of Munich, resolution dated 28 July 2005 - 17 HK O 13392/05; OLG of

Munich; resolution dated 22 December 2005 - 6 W 2181/05. However, an increasing number of legal authors hold the opinion that postage costs cannot be a standard for the significance of an 'asset', as they do not represent a benefit for the organiser but for a third party. Rather, in case of added value services, it is a logical consequence that the sum to be considered as stakes is not the entire telephone costs, but rather only the part of the sum which the organiser of the game receives.

16. OLG of Cologne, judgment dated 19 February 1957 - Ss 417/56, NJW 1957, 721; AG of Wiesbaden, resolution dated 9 August 2005, GewArch 2005, 485 et seq.; holding a different view: OVG of Magdeburg, resolution dated 29 August 2005 - 1 M 297/04 - quoted from juris.; Odenthal, GewArch 2002, 315, with further references; Wohlers, in: Kindhäuser/Neumann/Paeffgen (editors), No-mos Kommentar StGB, vol. 2, 2. edition 2005, § 284 par. 12; Groeschke/Hohmann, in: Hefendehl/Hohmann (editors), Münchener Kommentar zum Strafgesetzbuch, vol 4, 2006, § 284 par. 8; holding a different view, for instance, Hoyer, in: Rudolphi/Wolter (editors), Systematischer Kommentar zum Strafgesetzbuch, 6. edition 1999, § 284 par. 6, who wants to generally take the sum of 40 DM as a basis, oriented at section 142 StGB.

17. LG of Freiburg dated 12 May 2005 - 3 S 308/04; OLG of Munich dated 22 December 2005 - 6 W 2181 - quoted from juris; dismissal decision by the Staatsanwaltschaft dated 21 April 2004 - Js 12258/03; holding a different view: OLG of Düsseldorf, judgment dated 23 September 2003 - I-20 U 39/03, whereby in this case, the participants were invited to 'phone towards' the winning number.

18. LG of Freiburg, judgment dated 12 May 2005 - 3 S 308/04, quoted from juris; The Staatsanwaltschaft (public prosecution) Munich I dismissed proceedings against 9Live, giving the same reasons.

19. LG of Munich, resolution dated 28 July 2005 - 17 HK O 13392/05.

20. Albert/Müller, MMR 2004, issue 12, V; Eichmann/Sörup, MMR 2002, 142, 145.

21. Liesching (footnote. 7), p. 41 et seq.

22. BGH, judgment dated 18.4.1952 - 1 StR 739/51, BGH St 2, 274, 276; BGH resolution dated 29 September 1986 - 4 StR 148/86, BGH St 34.171 et seq., 176; Fischer, Beck'scher Kurz-Kommentar Strafgesetzbuch und Nebengesetze, 56. edition 2009, § 284 par. 4; Eser/Heine, in: Schönke/Schröder (footnote 16), § 284 par. 5.

23. OVG of NRW, ZfWG 2008, 204 par.

8 - quoted from juris; OVG of Koblenz, resolution dated 21 October 2008 - 6 B 10778/08.

24. OVG of Berlin-Brandenburg, resolution dated 21 April 2009 - OVG 1 S 203.08.