



**The Inter-State Treaty on Gambling and the implementation of the prohibition of gambling on the worldwide web – nothing is (im) possible... by Dr Wulf Hambach, Founding Partner and Susanna Münstermann, Senior Associate, Hambach & Hambach.**

**THE INTER-STATE TREATY** on Gambling (Glücksspielstaatsvertrag) and the prohibition of online gambling aim, at least on paper, at steering the natural gaming urges of the population along well-ordered and supervised paths. That is why gambling supervisory authorities, access providers and banks are being faced with the question of whether the Inter-State Treaty on Gambling is the legal basis for “cutting off the communication and economic channels used” via blocking orders against access providers (ISP blocking) concerning (EU-licensed) online gambling offers or prohibition orders against banks (financial blocking).

But such a regulation is necessary in order to achieve a “court-proof solution”, as declared by the legal counsel for the German Lotto und Toto-Block, Dr Manfred Hecker, during a hearing before the state Parliament of North-Rhine Westphalia:

“Let us initially turn to a monopoly which is based on an irreproachable legal foundation. Such

a monopoly, contrary to the present situation, is court-proof.

“An issue that comes up repeatedly is Internet gambling, which could also be prevented (particularly services by foreign providers, including those outside Europe) by cutting off the communication and economic channels used. This is because the firms based abroad need to communicate through the Internet and Internet service providers in order to make contact with the players.” (Unofficial translation, quote of the official minutes of the hearing, 15.3.2007)

It seems as if the Inter-State Treaty on Gambling provides the gambling supervisory authority with the power to prohibit banks from being involved in payments relating to illegal games of chance and access providers from cooperating regarding access to unauthorised offers of games of chance according to Section 9 Subsection 1, Sentences 2, 3, 4 and 5.

Is it possible to filter payments and websites? Who is liable for wrong decisions? May uninvolved third parties be obliged to act as deputies in order to monitor the legally disputed state monopoly? That's reason enough to consult the experts.

**EXPERT OPINION**

Under the patronage of the Verband der Deutschen Internetwirtschaft e.V. (eco) (Association of German Internet Businesses), in cooperation with the law firm Hambach & Hambach, an experts' conference was held on March 26, 2009, dealing with the legal and technical demands of blocking orders for the purpose of implementing the state gambling monopoly.

Prof. Michael Rotert, Chairman of the eco board, referred to a letter from the German Federal Government to the European Commission and said that the phrase stating that “ISPs and banks will accept this as justified on their own accord, and will

support the German States in the implementation of their politics" has led to considerable irritation. He explained that the state gambling monopoly is questionable from his point of view. Private providers are excluded for reasons of addiction prevention, whilst the monopolists are permitted to advertise the high jackpot sums on state-run television networks during prime time viewing on a Saturday evening.

As announced by Prof. Rotert, the expert lecturers were able to explain why neither blocking orders against ISPs nor prohibition orders against banks issued by the gambling supervisory authorities can be used as a means to implement the Inter-State Treaty on Gambling:

- There is no statutory basis for blocking orders against ISPs. The relevant provision in the Inter-State Treaty on Gambling is not a statutory authorisation.
- From the technical point of view, blocking of Internet sites is simply impossible. Legal and attractive online gambling offers provide the best level of protection.
- Blocking of online gambling offers involves considerable liability risks, as it is difficult to draw the line between illegal offers and legal online games of chance, legal games of skill and legal entertainment games and also because the state monopoly most probably is unconstitutional and contrary to European law.
- Prohibition orders against banks based on the Inter-State Treaty on Gambling are also contrary to constitutional and European law.

#### CAUSE FOR REGULATION

Mr. Schaeffer (Chief Security Analyst, TÜV Rheinland Secure iT GmbH) gave a pictorial description of the structure of the Internet and came to the conclusion that the possibilities of bypassing blockings and censorship are endless, as the very idea of the establishment of the Internet was for it to bypass blockings independently. Blockings will only contribute to improved concealment of the networks. Online gambling should not be prohibited, but rather regulated. Providing attractive up-to-date offers which are continuously refined, will intercept the users and prevent their migration to illegal offers.

Attorney at law Dr. Hambach (Founding Partner, Hambach & Hambach Law Firm) explained from the point of view of gambling law why there are substantial liability risks involved with the blockings. In addition to the pending infringement proceedings and preliminary proceedings against the German gambling monopoly before the European Court of Justice – which is why licensed EU providers should not be blocked – other questions regarding differentiation remain difficult. Therefore, horse betting, games of skill and games with low stakes must not be blocked on the Internet, nor must mere entertainment games. The inconsistent German gambling law should be harmonised on the Federal level, and a gambling supervisory authority should be established which monitors the offers by private providers on the Internet.



Prof. Dr. Ohler (University of Jena, Chair for Public Law, European Law, Public International Law and International Commercial Law) gave a lecture on the topic "Capping of the flow of funds – monitoring by order of the gambling supervisory

consideration?"

The Bavarian Referent for gambling and father of the Inter-State Treaty on Gambling, Dr. Thomas Gößl, attended the Munich Gaming Conference on April 1, 2009, dealing with "Games on the Internet: Raffle, Gamble, Online Game – Challenges for the

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authorities", and expressed substantial doubts based on constitutional and European law. Banks as uninvolved third parties may only be called upon to provide support in cases of the so-called "polizeilicher Notstand" (public emergency). From Prof. Dr. Ohler's point of view, the combat of illegal gambling cannot suffice to justify such public emergency. Also, the fact that the criteria for an automated filtering have not been defined, the lack of regulations in the Inter-State Treaty on Gambling in comparison with the act on money laundering, and concerns based on European law make it clear that the statutory regulation is inadequate.

Finally, it appears that the regulations of the Inter-State Treaty on Gambling were sewn in a great hurry and were solely governed by the political will. The evaluation and revision of its "big brother" in the USA, the Unlawful Internet Gambling Enforcement Act (UIGEA), clearly shows the weakness of these kinds of regulations. Instead of an efficient and automatic filtering, nothing more than a "know your customer" questionnaire remains due to the necessary differentiation between land based and online, licensed and illegal gambling offers.

#### MATTER OF OPINION

Are the conclusions of the experts correct? Can banks and access providers rely upon the fact that all legal and technical concerns are taken into

Protection of Minors".

Dr. Gößl expressed the wish that one may accept the Inter-State Treaty on Gambling and the stop sign on the Internet, so that finally, calm is restored in the German gambling market. In his opinion, there are no reasonable doubts with regard to constitutional or European law. Other participants of this panel discussion, like Mrs Sabine Frank (Freiwillige Selbstkontrolle Multimedia-Diensteanbieter/Organisation for the voluntary self-control of the Internet), pointed out that several European Court of Justice decisions, dealing with the German sportsbetting monopoly, are still expected. Mr Prof. Schneider (ZAK (Commission for admittance and surveillance – commissioner for program and advertisement, Düsseldorf) formed the important view that a prohibition that cannot be enforced, leads to a loss of credibility.

Therefore, consumer restrictions cannot be placed on the Internet and blocking orders against some providers will not prevent the German consumer from gambling online. For the protection of consumers and minors one has to reproach the legislator with the total loss of a state controlled offer. It is unavoidable to reform the gambling law by creating a federal gambling law and a federal supervisory authority in order to steer the natural gaming urges of the population on the Internet along well-ordered and supervised paths. ■