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TIME Law News

The Latest

- **Online Gambling News**
  Enforcement Update
- **Online Game News**
  Virtual Goods and Loot-boxes
- **Data Protection News**
  GDPR Update
- **AML News**
  5th EU AML Directive
- **Tax News**
  The success model

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Content

Online Gambling News

1. Mission (im)possible: Enforcement against Online Gambling in Germany!

By Dr Wulf Hambach, Founding Partner at Hambach & Hambach law firm

These two events just don't fit together:

First event:

Kiel state parliament, September 2017: The government coalition in Kiel overturns the Second Inter-State Treaty on Gambling (GlüStV) and announces reforms in line with market conditions.

Minister of the Interior Grothe: "Formal prohibitions did not lead to the players using orderly and supervised offers. We must no longer try to control internet gambling with analogue instruments from the past millennium." Source: https://www.shz.de/17869246

Second event:

Beginning of November 2017: Jan-Philipp Rock, Local Court judge from Hamburg, gives the news show "Tagesschau" an interview and casually declares from his courtroom, with his white unbuttoned shirt wide open, that the search for the correct enforcement authority is over. Judge Rock explains the execution possibilities so understandably that even regular viewers of the children's TV-programme "*Die Sendung mit der Maus*" would have no further questions here. Just take a list of a few gaming providers licensed nationwide in Germany, above all state-run providers. All other online gaming providers are illegal (= blacklist). Background: As the requirements of sec. 284 of the Criminal Code (*Strafgesetzbuch*, StGB) (organisation of illegal gambling) are met, a chain reaction could be triggered: sec. 261 StGB (money laundering), sec. 134 BGB (all contracts with EU-licensed gambling companies are void due to the legal prohibition, so that the players themselves could reclaim their losses). This story was gratefully taken up by SPIEGEL and a guide to supposedly 100% risk-free gambling was presented: "How easy it is to get rid of your gambling debts" http://www.spiegel.de/spiegel/onlinekasinos-so-wehren-sich-spieler-a-1185546.html.

Back to the list: So give this white list to the banking supervisory authority, which in turn distributes "the list" to all banks. And if a bank refuses to pull the internet

payment transaction plug from the entire European gaming industry, BaFin personally will rap their fingers.

At this point, a reader trained in legal history may ask the following question:

The central norm of criminal law in the area of gambling, sec. 284 StGB, celebrates a milestone birthday next year, namely the 100th anniversary! And: although online casino offers have been available on the German market for more than 20 years (!), the search for criminal law decisions against online casino operators is not only tedious, but in vain.

Why? Why, in contrast to German administrative law, are there not hundreds of gambling court decisions before German criminal courts?

Judge Jan-Philipp Rock does not answer that question. But perhaps this is also very practical - because judgments that do not exist don't have to be mentioned. However, one might expect a judge to explain why there is a black hole here and why thousands of online gaming providers and millions of German players are not being handcuffed and locked away in the Santa Fu prison.

But wait! You know this from the library: If you can't find a certain work on the shelf, the search term is wrong. A quick think and a change of shelves or, in our case, a change of procedure. What comes before a criminal sentence? Correct, the public prosecutor's preliminary investigation or - in court - the preliminary proceedings in which it is examined whether the main proceedings in criminal matters can be opened at all.

And indeed, you can find what you are looking for if you have insights into criminal investigation files in connection with sec. 284 StGB and EU-licensed online gambling. The problem: As a civil judge, Judge Rock has no access to criminal investigation files, but the author of the article as a criminal lawyer does:

There indeed have been isolated criminal charges against players and organisers from the European internet gaming market, which have been legally reviewed by the public prosecutor's office and, in some cases, by the courts. The civil judge Rock will not like the result at all, because it causes his so perfect legal house of cards, about which Tagesschau and SZ reported as closely as TV-judge Barbara Salesch from the courtroom, to collapse completely, and his legal string of pearls to tear:

The following examples from our more than 10 years of consulting experience show why there has in fact NOT been a single conviction of an online player or provider for violating the central provisions of gambling criminal law, sec. 284 et seq.:

Example 1: Charges against Maltese online casino provider / public prosecutor's office Trier = dismissed

As recently as at the end of 2017 an initial indictment against a Maltese gaming provider was withdrawn by the public prosecutor's office in Trier following a notice by the criminal court. For many years now, this provider, who is well-known in Germany, has been offering online casino games. The reason given by the public prosecutor for the suspension of criminal proceedings regarding a violation of sec. 284 StGB was that it was held to be doubtful whether German criminal law would be applicable at all. The public prosecutor's office was even able to rely on high-court jurisdiction given by the Federal Court of Justice (*Bundesgerichtshof*, BGH).

Example 2: Authorities tax hundreds of EU licensed online gaming operators without prosecuting them for gambling offences

Well over 100 online gaming providers without German licences are officially registered with the relevant tax authorities and are taxed by German tax authorities for billions (!) - and not reported to the police, but tolerated by the authorities. (Reason: see example 1).

In accordance with the criminal-law principle of legality, according to which in Germany there is an obligation on the part of the criminal prosecution authority (public prosecutor's office, police and tax investigators) to open an investigation procedure if it becomes aware of a (possible) criminal offence, only one logical conclusion remains: it is assumed that the core provisions of German gambling criminal law are not applicable.

Example 3: Poker = skill game

The toleration of, for instance, online poker in Germany also becomes clear when it comes to the taxation of poker players: Here, too, practice shows that criminal proceedings against professional poker players in cases of omitted tax declarations are taken up only because of tax evasion, but not because of participation in illegal gambling. The Tax Court (*Finanzgericht*, FG) Münster also sees poker as a game of skill. As the FG does not assume that the relevant activity is to be classified as gambling, criminal liability due to participation in illegal (online) gambling is ruled out: http://www.timelaw.de/de/2017/03/09/zfwg-fg-muenster-poker-ist-ein-geschicklichkeitsspiel-auch-fuer-den-durchschnittsspieler/

Ergo: Gambling law and its supervision are in the middle of a realignment. Just like in football: If the players and the game system fail permanently, there are always two camps. The camp of the micro-reformers ("basically everything should remain the same") and the camp of the honest reformers ("everything must be rethought and for this we need new concepts").

In fact, a complete system change has to be made here in order to find the way back to the road to success of "effective governmental control of a market-oriented range of products and services".

The honest reformer trio Klinsmann/Löw/Bierhoff undertook a fundamental reform of German football, which reached down to its roots and brought Germany out of the football doldrums and finally forged it into world champions with Löw and Bierhoff. The governing coalition in Hesse has understood the system errors in German gambling law and is calling for an honest reform that goes to the root of gambling regulation:

The Hessian state parliament takes note of the fact that the Schleswig-Holstein parliament decided on 22 September 2017 not to ratify the Second Amending Inter-State Treaty on Gambling (2nd GlüÄndStV) and that the North Rhine-Westphalian state government subsequently announced that it will not do so either. In the absence of the necessary consent of all federal states, the 2nd GlüÄndStV can therefore not come into force.

The Hessian parliament regrets that the 2nd GlüÄndStV was anyway only a minimal consensus of the federal states. There also are legal concerns about possible discrimination against providers who are not supposed to receive a provisional sports betting licence.

A fundamental reorientation of the GlüÄndStV, which is now to be pursued, should comprehensively regulate the gaming market, ensure reasonable player protection and effectively combat illegal gambling and the black market. As a result of the past regulation, 98% of the stakes placed on the online gaming market are illegal.

Even if judge Rock wouldn't admit it today: The new central authority, which will monitor online gambling in a broad but well-organised form, will also be extremely efficient at the executive level, following the Danish, English or, as far as I'm concerned, the Spanish model, and will do so without attempting to pull a plug which in reality does not exist.

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2. Conference excerpt to Fantasy Sport Games from the Gaming Law & Culture Conference Lüneburg

By Robert Schippel LL.M., Senior Associate at Hambach & Hambach law firm

The Gaming Law & Culture Conference took place on 16/17 November 2017. In the context of a presentation on online gambling law there were also references to Fantasy Sport Games as online offers in the overlap area to gambling law.

Fantasy Sport Games are sports manager games where players compile together a fictional team (with avatars of real players) and compete against other players with their virtual teams. The competition is decided on the basis of the sporting achievements of the real player, for whose individual achievements (such as goals, shots on goal, penalties, parades, etc.) Fantasy points are awarded (or deducted). Fantasy Sport Games have a huge fan base in North America, especially as they are established there as a game of skill. The participation in Fantasy Sport Games is also possible in the context of commercial offers against payment, whereby then money profits can be obtained depending on the precise play form of the game.

In Germany, this phenomenon has up to now not been an issue of comprehensive legal evaluation. For the first time, the Timelaw newsletter and a contribution to the European Journal of Gambling (ZfWG 2016, 412 et seqq.) were dedicated to the subject. The contribution in the European Journal of Gambling has currently distorted the legal assessment of these fantasy sports games. The author of the article assumes that Daily Fantasy Sports - Games that refer to a specific match day - represent bets and are considered as illegal gambling. Key message is that Daily Fantasy Sports should be gambling due to the limitation of a match day. Classic Fantasy Sports, however, because of the duration of the game over a longer period of time, should be no gambling. In doing so, the author tries to draw a relation to the "super-manager" ruling of the Federal Administrative Court (judgement of 16.10.2013 – Case No. 8 C 21.12, ZfWG 2014, 95).

During the presentation on gambling law, similar to recognized games of chance (such as lotteries and sports betting) or entertainment games, also Fantasy Sport Games were legally assessed. The current general appreciation of Fantasy Sport Games in practice is probably an assessment as a game of chance that is not permitted according to the direction of the Interstate Treaty on Gambling.

However, in the context of a case-by-case analysis, the skill element of Fantasy Sport Games must always be acknowledged: When compiling the team, it is ultimately a matter of knowledge of the participants with regard to players and their current developments or capabilities. As a result, in a mere subsumption

under the legal definition of gambling, randomness should be negated - precisely because of the prior knowledge. In addition, the other requirements are also to be considered: the decision does not depend on a singular event (as in a gambling law sports betting), but on the combination of a fictitious team and the performance of the athletes chosen for the team in several, real sporting matches. It should always be noted that such fictitious cadres must always consist of several, real teams, which speaks as well in favour of a degree of necessary skill to predict the performance of this fictitious team.

The legal discussion on this is far from complete, hence this topic will accompany this field of law in the coming years.

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3. Loot-boxes as a regulatory object of the German Interstate Treaty on Gambling?

By Robert Schippel LL.M., Senior Associate at Hambach & Hambach law firm

Loot boxes (this means virtual boxes) are like virtual items popular within online games. The background to the additional purchase of virtual items is the desire of many players to acquire equipment or skills and save time with it.

However, in contrast to other virtual items, the acquisition of loot-boxes is moved in the vicinity of the gambling law, due to two characteristics: first, an element of chance is assumed, because only by opening the virtual box a player finds out which virtual item he has just purchased. Second, an element of gambling is presumed, because the acquisition of individual outstanding virtual goods (through the acquisition of loot-boxes) is dependent on appropriate probabilities.

Therefore loot-boxes have no appreciation with games of chance and gambling law, because of the following:

- In the first place it is to be determined that loot-boxes cannot fulfill the first condition for a game of chance, because the prospective asset (the box with its virtual item) is not a prize with a (real world) value.

- Because of sales (of virtual items or in-game currency) with real-world currency (as part of real money trading) there can be a stake (as a part of a game of chance), especially when the used real-world currency is more than 0,50 EUR or due to multiple missions a multiple of this amount results. But this is the only possible fulfilled condition for loot-boxes as games of chance.

- Games of chance are characterised by the fact that there is a hope to receive an equal or higher quality performance in return. It is customary that loot-boxes contain at least one virtual item. But as long as a commitment is made, according to which which one item is always included in the virtual box, the condition of the complete loss of the stake is not present.

- If there is at least one virtual item included, there is also no coincidence, which means that the last condition for a qualification as a game of chance is missing.

Due to the aforementioned arguments loot-boxes cannot be a game of chance. However, even though to date mostly reasons speaking against the applicability

of gambling law are visible, there are still voices, who want to attain virtual contents by means of loot-boxes as gambling due to the probabilities. But such chances of winning appear at the second stage of a gambling procedure, after the previous first stage, namely the clarification of the question whether there is a game of chance at all. Therefore, these voices pass the discussion.

Regarding these arguments loot-boxes cannot be a regulatory object of the German gambling regulation. But this depends on a case-by-case analysis of the design of every individual online game.

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4. Gambling appraisal of virtual goods trading in online games

By Robert Schippel LL.M., Senior Associate at Hambach & Hambach law firm

Virtual goods trading in online games is comparable to online casinos. A German daily newspaper surprised in August 2016 with this thesis on its online expenditure. Although virtual weapons or equipment have no real value, these are traded for some four-digit euro amounts on appropriate platforms. In 2016 in Germany alone, sales of 659 million EUR were measured for in-app purchases or sales of virtual goods, which are seen as a natural part of the revenue models of online games.

So far, this issue has been addressed only little in the legal literature. In an editorial in the European Journal of Gambling Law 2015 (ZfWG 2015, 409 et seqq.) the author legally argued that the use of virtual currencies in online games in social networks is equivalent to classic gambling.

In an article in the European Journal of Gambling Law 2017, pages 481 et seqq. the most common form of online games, namely those that are designed as an entertainment game and do not combine monetary gain with the gaming experiences, is examined. As long as there is no aiming at a monetary gain, investments in virtual goods or acquisitions - which cannot be converted into real value on the same platform - are irrelevant under gambling law. The secondary market, where a substantial portion of virtual goods trading takes place, does not constitute a game of monetary value. Even though virtual goods trading is presented in the form of gambling simulations (as a lucky wheel in an online game, which decides on the chance of winning virtual goods), this is not a case of gambling law.

Even during the investigation of known phenomena (such as in-app sales, gold farming and cheatbots) the result is, that they are not relevant under gambling law.

Online games which are opened to money profits, profit distributions or kick-backs, based on the trade or transactions of virtual goods, are different. As a result, a financial performance component is added, which leads to the result that an online game would be aimed at a monetary gain. If the two other prerequisites of gambling exist, gambling could then be assumed, simply because of trading with virtual goods.

A similar article in the November issue of CR 2017, pages 728 et seqq. also deals with the subject, but focuses more on the demarcation of games of skill to gambling and examines aspects of the most common form of market online games under gambling law.

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5. Data Protection Summary

By Dr Stefanie R. Fuchs, Senior Associate and Robert Schippel LL.M., Senior Associate at Hambach & Hambach law firm

On May 25th, 2018 the General Data Protection Regulation (EU) 2016/679 („***GDPR***") will become effective and from then on will be directly applicable in all Member States of the EU.

The GDPR aims at improving the transparency and the rights of the data subjects. These improvements are to be achieved by

- new documentation and accountability obligations;
- extended information obligations and new consumer rights;
- data collection and processing shall be strictly restricted to the absolutely necessary extent in the future.

⇨ Operators should therefore adapt their data protection operations, policies and declarations to the new requirements set forth by the GDPR and evaluate whether all data collections and processing are in fact necessary. They should further assess whether they meet the new documentation and accountability requirements.

But the GDPR shall also improve the enforcement as well. For this reason it contains higher fines. Authorities may impose administrative penalties of up to EUR 20,000,000.00 or 4% of the world wide turnover of a company – whatever sum is higher. Further, the possible enforcement measures are extended. The same applies to the collaboration between the authorities of the Member States. The GDPR foresees a new mechanism for joint decisions of several authorities of different Member States and for a joint enforcement. This mechanisms is likely to lead to a more efficient and exacerbated enforcement.

However, the most important novelty is the regulation in Art. 3 GDPR on the territorial scope. Pursuant to this article the GDPR will not only apply if a company has a branch in the EU, but also if goods or services are offered to data subjects in the EU or if their personal data is processed in connection with the monitoring of their (online) behaviour (market place principle). This means that also companies without an establishment in the EU must comply with the GDPR in case they also offer goods or services to data subjects in the EU or use tracking or analytical tools as far as personal data of data subjects in the EU is collected and/or processed thereby.

Despite the in principle of a direct and uniform application of the GDPR in all Member States, it does not only contain several regulation tasks to be fulfilled by the Member States, but also dozens of opening clauses according to which Member States may implement deviating regulations. Due to the fact that the GDPR does not contain any rules as to the scope of application of the national laws which is why Member States are free to implement the market place principle and thereby to also make controllers seated in other EU Member States subject to their national laws may lead to deviating data protection requirements in the different Member States. We therefore advise to controllers to deal with the national laws of all Member States from where they collect and process personal data.

We strongly advise that all operators should use the last 100 days before entry into use of the GDPR for the adaption of their data processing operations and policies to the requirements of the GDPR.

If your company needs help with this task, please feel free to contact our data protection team (Dr Stefan Bolay, Dr Stefanie Fuchs, Robert Schippel and Daniel Feuerbach). They will be happy to assist you.

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6. Consequences of the 5th AMLD

Dr Stefanie R. Fuchs, Senior Associate at Hambach & Hambach law firm

A. Novelties brought by the 5th AMLD

The most important novelties for all obliged entities are that

- There are stricter KYC- and transaction monitoring duties, especially where transactions involve high risk third countries;
- The registers of beneficial owners shall be made accessible for the public and the registers of all Member States shall be connected and all data contained therein shall be accessible for all competent authorities ("CAs") and financial intelligence units ("FIUs") of all Member States;
- The coordination and collaboration between the CAs and FIU of the Member States is deepened and strengthened, especially with regard to a faster and easier exchange of information;
- Art. 43 will be adapted to the General Data Protection Regulation (EU) 2016/679 ("GDPR"): the processing of personal data for purposes of the prevention of money laundering and terrorist financing shall be considered to a matter of public interest, and hence be considered to be undertaken on the legal basis of Art. 6 par. 1 lit. e) GDPR – anyways, the obligation to implement a data protection strategy for the processing of personal data for AML/CTF-purposes remains in place;

The material scope of application of the 5th AMLD is expanded to providers engaged in exchange services between virtual currencies and fiat currencies, to custodian wallet providers as well as to persons storing, trading or acting as intermediaries in the trade of works of art, if the transactions amounts to EUR 10,000.00 or more.

Besides, the 5th AMLD mainly aggravates the AML-obligations of credit institutes and financial services provider in order to restrict anonymous transactions and increase the traceability of transparency and transactions. Apart from anonymous accounts and anonymous passbooks, also anonymous safe deposit boxes will be prohibited. Member States shall put in place centralized automated mechanisms, such as central registries or central electronic data retrieval systems, which allow the identification, in a timely manner, of any natural or legal persons holding or controlling payment accounts identified by IBAN, and safe deposit boxes held by a credit institution within their territories. Those centralized automated

mechanisms of all Member States shall be connected and accessible for all CAs and FIUs of all Member States. The same applies to the real estate-registers of the member States in order to allow the identification in a timely manner of any natural or legal person owning real estate.

B. Further adaption process and transposition into national laws

The 5th AMLD still needs to be formally adopted by the legislating EU-institutions and published in the Official Journal of the European Union. It will enter into force on the 20th day following this publication. Member States will need to transpose it into national law within 18 months after this entering into force.

C. Transposition of the 4th AMLD into German law

The transition period for the implementation of the 4th AMLD only expired on 26 June 2017. In Germany the implementation took place in the new Anti-Money Laundering Act (Geldwäschegesetz neue Fassung, „***GwG n. F.***"). It has expanded the material scope of application and has provided for several new obligations to be observed by companies obliged according to it, especially with regard to identification, verification, ongoing customer-due-diligence, documentation and transparency obligations as well as the announcement of an Anti-Money Laundering Officer. Further, the GwG n. F. has significantly increased the number of administrative offences (regulations whose breach is punishable with a fine) to nearly 70 cases as well as the amount of fees which the competent regulatory authority may impose in cases of serious breaches (up to EUR 5 Million or 10% of the total turnover which the corporation or partnership has made in the business year preceding the decision of the regulatory authority). Thereby the liability risks have been tightened. Moreover, "naming and shaming" has been introduced for non-compliance with anti-money laundering duties.

Unfortunately, the territorial scope of application of the GwG n. F. has remained unclear. There is a risk that the GwG n. F. may be applied to all online gambling providers addressing their offer to German customers – irrespective of whether they possess a German license or not. However, in our legal opinion the country-of-origin-principle applies. This means that to our legal mind the GwG n. F. is only applicable to gambling operators which either have their seat or at least a subsidiary or a branch in Germany. This opinion is supported by publications of Prof. Koenig whom we have worked together with concerning this question for a support of our corresponding lobbying measures.

Gambling operators solely established in another EU-country such as Malta without a seat, subsidiary or branch in Germany do not fall within the territorial scope of application of the GwG n. F. in our view. To them only the national law

transposing the 4th AMLD of the EU-country where they are established applies in our judgment. Thus, they have to make changes necessary according to the implementation in their country of origin.

Therefore, to our legal mind, the GwG n. F. is no suitable instrument to act against unregulated gambling operations on the internet. In our opinion, contrary to the assumption of German regulators, it may not be used as a legal enforcement basis where efforts under the Inter-State Treaty on Gambling have failed. The German regulator should rather provide for an adequate legal framework for legal online-gambling offers to reduce money-laundering risks. The combat of money laundering is not possible without a coherent and adequate regulation for legalized offers. We will continue our efforts for the inaction of such a regulation for legalized offers in the upcoming month.

The same applies to our efforts for a sufficient realization of the risk based approach ("***RBA***") which has not been reached by the GwG n. F. in our opinion. The regulations for the player identification in the GwG n. F. have remained to be very complicated and impracticable. Also the requirements to verify the identity between card holders, bank account holders and players unnecessarily restricts payment measures and make payments unnecessarily complicated rather than following a RBA. We will keep on doing our best for our clients to promote the establishment of a proper balance between necessary anti-money laundering requirements on the one side and a sufficient flexibility for the economy for the execution of the risk analysis and risk assessment of the offers marketed by companies and the establishment of corresponding internal anti-money laundering guidelines and procedures on the other side within the course of the process for the implementation of the 5th AMLD.

Anyway, the further developments have to be observed carefully which we will of course do for our clients. We will keep you up to date on all relevant developments.

D. Advise for steps to be taken now

There is a possibility that a future licensing regime in Germany may require anti-money laundering compliance as per the then current version of the GwG as a licensing condition, which would mean that online-gambling providers who are granted such a future license will need to fulfil all duties arising of it. In light of this aspect as well as with regard to the risk that authorities may apply the GwG n. F. to all online-gambling providers, also such seated in other EU countries, which has certainly increased after the paradise papers and the latest judgment of the federal administrative court, we advise to all online-gambling-providers, besides complying with the regulations of its country of origin, to at least consider the following:

- The implementation a player identification process compliant with the GwG n. F. to conduct a preliminary player identification prior to the opening of a player account by means of an electronic copy or a copy send in written form of a passport containing a photo of the owner with which the domestic passport and identification obligation may be fulfilled as well as a process to conduct a complete identification without undue delay after the establishment of the contractual relationship.

- The demanding of information on the card holder from the credit or payment institute on a random basis for all transfers initiated by the player to the player account by means of payment cards with or without credit limit which exceed EUR 25.00 per transfer or EUR 100.00 per calendar month in case of several transfers, but which do not exceed EUR 1,000.00, and for all transfers conducted by the gambling provider to a payment card of a player (with or without credit line). Your acquirer may help you with that by demanding that information on your behalf.

- The compliance with the new ongoing customer due diligence obligations with regard to PEPs

- The implementation of a retention and deletion process and an according policy, which is not only necessary for the compliance with the GDPR, but also for the compliance with the new compulsory retention and deletion period for the documentation pursuant to the GwG n. F.

  For further details please see below under F.

E. Risks if the aforementioned is not followed: higher fines as well as "naming and shaming"

The GwG n. F. significantly increases the number of administrative offences (regulations whose breach is punishable with a fine) to nearly 70 as well as the amount of fees which the competent regulatory authority may impose. In case of serious, repeated or systematical breaches fines of up to EUR 5 Million or 10% of the total turnover which the corporation or partnership has made in the business year preceding the decision of the regulatory authority may be determined. Thereby the liability risks are tightened.

Moreover, the regulatory authorities shall publish final measures and incontestable fine notices which they rendered due to a breach of the GwG n. F. or decrees enacted on its basis after the information of the addressee of the measure or fine notice. In the publication the kind and character of the breach as well as the legal and natural persons and partnerships responsible for the breach shall be announced. Thereby a "naming and shaming" is introduced for non-compliance with anti-money laundering duties.

F. In Detail:

In the following succeeds a detailed description of the amendments recommended above under D.

I. Implementation of a compliant player identification process

The obligation of online-gambling providers to preliminarily identify the player prior to the creation of an account and to completely identify them without undue delay thereafter was already in place according to the old version of the GwG ("***GwG a. F.***") which expired on 25th June 2017. However, the regulations have partially changed in the GwG n. F. and are now less clear. Moreover, the exemption possibility to apply to the BaFin for a liberation from this identification obligation contained in sec. 16 para. 7 GwG a. F. does no longer exist in the GwG n. F.

The GwG n. F. regulates that due to the fact that the player is not present in case of online-gambling providers, the complete identification may either take place electronically without undue delay after the establishment of the contractual relationship by means of

- an electronic identification pursuant to sec. 18 identity card act (Personalausweisgesetz) or pursuant to sec. 78 para. 5 of the German residence act;

- a qualified electronic signature within the meaning of Art. 3 no. 12 of the Regulation (EU) No. 910/2014 of 23 July 2014 on electronic identification and trust services for electronic transactions on the internal market or an electronic identification system notified in accordance with Art. 8 para. 2 lit. c) in connection with Art. 9 of this Regulation; or

- by means of another suitable procedure which guarantees a security level which is comparable to an examination of documents provided on-site (e.g. the post ident or schufa-ident procedure).

The demanding of additional documents, data or information which originated from credible, trustworthy and independent sources and are suitable for the identification such as electricity bills or utility cost bills is no longer explicitly admitted. Whether the demanding of such additional documents will still be admissible in the future for the execution of a compliant complete identity verification, therefore remains to be seen.

II. Demanding of information on the card holder from the credit or payment institute on a random basis

The obligation of online-gambling providers to secure that payments of players may only be conducted

- By the execution of a payment transaction by means of
    - direct debit,
    - a bank transfer, or
    - a payment card which is issued on the name of the player, and
- from a payment account which has been established on the name of the player with a credit institute, a payment institute or an e-money institute

already existed under the GwG a. F. However, there was a possibility to apply to the BaFin for an exemption from this obligation. This exemption possibility does no longer exist. Anyway, the GwG n. F. contains a bagatelle reservation pursuant to which online-gambling providers may abstain from the obligation to verify the identity between the credit card holder and the player if it is guaranteed that the payment for the participation in a game for a single transaction does not exceed EUR 25.00 and for several transactions within one calendar month EUR 100.00. The same applies to payments from gambling providers to players.

The Federal Ministry of Finance has published guidelines for the interpretation of the GwG a. F. together with the gambling supervisory authorities. Those guidelines say that the regulation in the GwG a. F. wanted to ensure that money transferred to player accounts or that are transferred from the player account in fact originate from the respective player and are refunded to him/her. For this reason, gambling providers shall implement a mechanism which allows to conduct an identity comparison of the paying or payment receiving person on the one side and the player on the other. Further, the interpretation guidelines say that payments of an amount of EUR 1,000.00 and more triggered by the player to the player account are unproblematic because with those payments a complete data set with information on the payment principal has to be transferred to the receiver together with the bank transfer. In cases of money transfers of amounts of less than EUR 1,000.00 by the player or of transfers from the gambling provider to the player the information on the card holder must be demanded from the credit or payment institute on a random basis. The choice of the random tests shall be based on a catalogue with criteria which especially identifies customers with an increased risk (amount of the transaction, nationality of the player or residency in a non-cooperating state/off-shore center etc.).

For sec. 16 para. 4 sentence 1 GwG n. F. contains the same wording as sec. 9c para. 3 GwG a. F. it is possible in our view to use the interpretation guidelines on the GwG a. F. also for the GwG n. F.

III. New ongoing customer due diligence obligations with regard to PEPs

The GwG n. F. implemented a new, extended definition of politically exposed persons (PEPs) and brought modifications concerning the treatment of PEPs with regard to the execution of ongoing customer-due-diligence obligations.

1. New definition of PEPs

The definition of PEPs has been extended. The broadened scope of application of this term according to the GwG n. F. especially also explicitly covers persons holding important public offices below the national level the political weight of which is comparable to the importance of national offices. Moreover, members of the leading bodies of political parties have been included in the definition as well as members of the European Commission.

2. Modifications concerning the treatment of PEPs after their resignation from their important public offices

Pursuant to the GwG a. F. a PEP who has not held an important public office for at least one year was not considered to be a PEP any longer. This has changed in sec. 15 para. 7 GwG n. F. according to which the obligated entities shall in case of former PEPs for at least 12 months after the resignation from an important public office of the former PEP consider the risk which is specific for PEPs and shall undertake adequate risk oriented measures for so long until it may be assumed that this special risk does no longer exist. Hence, there is no automatism any longer that a former PEP is no PEP anymore after the expiry of 12 months after the resignation from the important public office. In the future, a concrete risk assessment shall be undertaken after the expiry of 12 months in every single case whether there still is a special risk or not.

IV. New retention period for the documentation

Pursuant to the GwG a. F. the documentation on the fulfilment of the obligations arising of this act as well as other documentation on business relations and transactions had to be stored for at least five years. Hence, such documentation could be stored for longer than five years. According to the GwG n. F., the documentation on the fulfilment of the obligations arising of this act as well as other documentation on business relations and transactions shall be stored for five years and thereafter be destroyed without undue delay. The retention-period

starts with the end of the calendar year in which the business relationship terminates.

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7. Consent in Germany: Now is the chance to implement a successful taxation for online-gambling!

By Claus Hambach LL.M., Founding Partner at Hambach & Hambach law firm

I. Has the time come for a genuine regulatory and tax reform?

The small gambling reform (merely abolishing the limitation to 20 sports betting concessions and maintaining the ban on online-casino-games) is officially doomed because not all German states have ratified the new version on time. Therefore, the former Interstate Treaty on Gambling 2012 ("**GlüStV 2012**") **continues to be in effect**, at least officially.

However, the GlüStV 2012 has not only been heavily criticised by the EU Commission, the Court of Justice of the European Union, the German Monopolies Commission, various German courts and the most respected EU-Law experts but also by the German States themselves. As early as in a press release from 2016, the Ministry of Interior of Hesse officially branded the **GlüStV 2012** as a **failure**, calling for a reform to also regulate online-poker and casino. The core argument: 98% of the German Online gambling market is formally illegal. Meanwhile, Hesse has been followed by further States such Schleswig-Holstein and North Rhine-Westphalia, see announcement of the decision by the Hesse governing parties for a large-scale gambling reform in Germany dated **22 January 2018**.

⇨ **Now is the time for a successful large-scale regulatory and therefore also tax reform!**

II. What does "successful" taxation for online-gambling mean?

Some describe "successful" as implementing an **unviable taxation system** in order to protect the status quo. The reason is obvious: A taxation which is too high makes the offer prohibitive, so called "*tax blocking*". This aim is mainly shared by land-based operators such as the State lottery monopolists and casinos who believe that their business can be protected from other competitors this way.

The characteristics of such an unviable tax environment are oligopolistic structures and a big black market where customers mainly play with unregulated operators outside the EU who do not pay any tax. Some examples: Austria with an unviable taxation of online casinos of 40% on GGR, or France with 8.5% tax on all bets placed is a success story only for the black market.

Others describe "successful" as a **competitive taxation system** compared to other regulated EU-markets. Competitive means that the tax rate must be low enough to attract online operators from abroad to apply for a license in Germany and actually pay tax instead of operating on the black market.

The characteristics of such a completive tax environment are a small black market which results in more tax payers and therefore higher tax income for the states. This goes along with a better protection of the players and a growth of the local value chain such as advertising. Recent example: UK with a tax of 15% on GGR.

⇨ **Experience in other jurisdictions show: A competitive taxation will turn out as a success for all involved parties.**

III. Suggestion for a suitable gambling tax

As early as in 2013, tax expert Prof Englisch criticised the tax regime for online gambling in Germany. If the gambling tax is too high, it will be difficult to channel demand into the regulated market. Studies show that it is possible to provide tax incentives that **push out the black market** and cause 90% of the demand to be channelled into the regulated market within five years. Therefore, the right balance needs to be found between the different purposes of a new regulation: i.e., on one hand, a successful channelling of the black and grey market into a white market for which the law must provide a regulation attractive enough for a licensed operator to reach the customers enough (suitable license and advertising regulations and competitive taxation) and, on the other hand, a strong regulation in order to sufficiently protect customers from potential gambling-related risks.

1. Aspects of EU Law have to be considered

According to the CJEU, restricting private gambling operators with means such as state monopolies, internet gaming bans, limited licenses etc. **must not primarily serve fiscal interests**. In particular, grounds such as maximising public revenue, protecting the market position of existing (esp.: state-run) operators, ensuring revenue cannot constitute justifying public-interest activities.

Other public policy reasons (e.g. ban of games believed to create 'problem players') are acceptable only if implemented **consistently**, rather than concealing economic interests.

Furthermore, taxes / duties must **not**, in themselves, have the effect of **barring market access** for private operators within the EU/EEA, undermining an (apparent) liberalization of the market.

⇨ **The gambling act of the Federal State of Schleswig-Holstein (SH) which regulated online sports bets, casino and poker games with a tax rate of 20% on GGR, passed the EC notification process in 2011 without any complaint (in contrast to the current GlüStV 2012 which prohibits online casinos and provides for a very high sports betting tax of 5% on stakes).**

2. Tax base and tax rate

Essentially, two alternatives for determining the tax base are being applied to the taxation of gambling services:

- **Gross gaming revenue ("GGR")**
- **Stakes (player "turnover")**

Germany`s taxation is currently **inconsistent** in this regard. Sports bets (5%) and lotteries (16.6%) are taxed based on stakes. A gambling duty of 20% on GGR applies, on the other hand, to online-casino-games according to the SH Gambling Act. And for electronically supplied gambling services that are not sports bets and lotteries, 19% VAT applies on NGR (GGR excluding VAT).

Experience in other jurisdictions and in Germany has shown that …

…Tax on stakes

- Encourages operators to seek high profit margins on given stakes;
- Makes regulated gaming unattractive for operators and players, reducing at the same time its overall market share;
- Is unsuitable / unconstitutional in sectors with high payout ratio;
- Often turns out to be a much higher overall tax burden than taxes based on GGR;
- Provides no political transparency regarding effects for operators (tax applies even in case of a loss of profit);

…Tax on GGR

- Aligns operator`s interest in a high gross profit and fiscal interest in high tax revenue;
- Has less impact on gambling 'price' and the winning odds respectively because operators tend to pass on the tax burden to the customer;
- Results in a higher market share for regulated gambling and therefore higher revenues;
- Is flexible because it can be levied on all types of games.

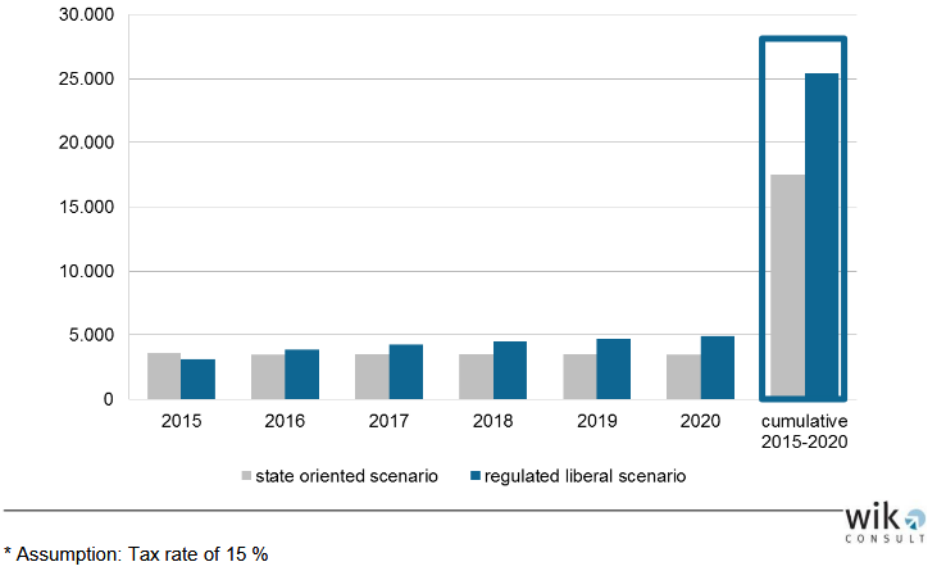
The tax rate varies enormously not only between the different member states but also between the different gaming products within the same jurisdiction. Using the example of sports bets: Malta applies 0.5% on the stakes, Austria 2%, Germany 5%, and France 8.5%.

Only relatively few countries, such as France and most German states, still maintain taxes on the stakes. The EU-wide trend shows that most jurisdictions, such as UK, Denmark, Spain, Italy, Greece and the German State of SH, levy taxes based on GGR. In 2014, the **UK** (the biggest gaming market in Europe) implemented a new **15% point-of-consumption tax** on all gross profits.

3. Recent study shows the way to success

In its study "Bettertainment – Economic significance and potentials in compliance with consumer, data and youth protection" the renowned WIK-Institute predicts that an estimated 37 billion Euros in additional revenue and about 8.5 billion Euros in tax revenue would be generated along the convergent value-added chain in a five-year timeframe until 2020 by implementing a market-oriented regulation of the German gambling market, in accordance with the objectives of the GlüStV 2012, particularly with an effective protection of consumers, youth and data and a tax rate of **15% on GGR**.

Figure 5: Tax revenues from gambling market in 2015 – 2020 in different regulatory scenarios (million €)



* Assumption: Tax rate of 15 %

IV. And the winners are …

The WIK Institute has identified the balance between the different purposes of a new regulation: The study proposes - in contrast to the failed current regulatory framework - a **market- and target-oriented regulation for the gambling market in Germany (e.g. 15% taxation on GGR for online casino, poker and sports bets)** on the one hand, **and** accompanied on the other hand by **strict regulatory obligations for the protection of consumers, youth and data**.

All involved parties would **profit** from such a market-oriented regulation, in particular:

- In a five-year timeframe until 2020, about **8.5 billion Euros in additional tax revenue** would be generated for the **German Federal States**,
- An estimated **37 billion Euros** in additional revenue for companies along the convergent value-added chain from business sectors such as
  - **Banking and finance**
  - **Telecom**
  - **Communication infrastructure & IT**

- **Software applications,**
- **Authentication systems**
- **Advertising, marketing and sponsorship**

– **More jobs in Germany** in the above mentioned industries,

– **Effective protection of consumers**, youth and data is therefore demonstrably superior to a continuation of the current regulatory structure.

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8. Press release: After the failure of the "Inter-State Treaty on Gambling"– Quo Vadis "Bettertainment[1] Industry"

- Top-class panel at Spobis provides first efficient solution approaches to escape from the dead-end road

- Basis: constructive dialogue with the DVTM "Think Tank":

Bonn, on 31 January 2018

The discussion in Germany regarding a new alignment of the gambling sector, in particular its online sales forms, has been going on for years.

Against this background, DVTM organised a panel on 30 January during SPOBIS, Europe's largest sports business congress. On this panel, Clemens Hoch (head of the Rhineland-Palatinate State Chancellery), Dr Christioph Niessen (Chairman of the Board and CEO of the North Rhine-Westphalia state sports association Landessportbund Nordrhein-Westfalen) and Renatus Zilles (Chairman of the DVTM e.V. board), hosted by moderator Uwe Proll (editor-in-chief and publisher of Behörden Spiegel), discussed the consequences of the current failure of "gambling regulation" and the possible design of efficient solution approaches.

The panel participants agreed that a regulated market has to be established in Germany soon, in order to be able to distinguish between legal and illegal offers, and in order to obtain legal and planning security for all parties involved in the value-added chain. Also, sports and many other social groups may be brought on board as beneficiaries, for instance based on a clearly defined sports/licensing levy.

Mr Hoch lamented in particular the failure of the 2nd Amending Inter-State Treaty on Gambling (2. GlüÄndStV) and the lack of enforcement of the current ban. He expressly praised the planned role of North Rhine-Westphalia as the moderator of a new regulatory discussion, during which the establishment of an effective supervisory institution with improved digital technology, as well as, subsequently, an abolition of bans, should be the issue of consultations.

Mr Zilles reminded the participants that at present, a current or potentially planned enforcement may not only delay but even endanger the achievement of

[1] "Bettertainment" includes in particular: sport betting, poker & casino and online lotteries. It also stands for a "convergence strategy" along the entire value-added chain with the objective of achieving overall economic benefits.

the common aim of a uniform and EU-compliant large-scale solution for the entire "Bettertainment Industry". Against the backdrop of the political discussions and the considerations regarding other solutions, he warned against potentially undesirable developments.

Dr Niessen stressed that, in particular for sports betting, the ban in Germany cannot be reconciled with the strong advertising presence, in particular in the context of football. A new, major coup aimed at a quality-orientated regulation is necessary, as none of the objectives of the past inter-state treaties on gambling that pursued a quantity-orientation has been reached.

The "Think Tank" of the German Association for Telecommunications and Media (DVTM) has prepared a position paper on this topic which presents in the core theses the necessity of a fundamental and consistent overall regulation, demands the establishment of legal markets, discusses the generation of additional tax revenue whilst at the same time safeguarding public interests, and endorses a forceful control and supervisory system. The DVTM "Think Tank" advocates the short-term commencement of a constructive dialogue in order to jointly master the challenge in the form of a win-win situation for all parties involved.

The members of the "Think Tank" are Dr Ing. e.h., Dr jur. h.c. Wolfgang Clement (Minister President of NRW and former Federal Minister for Economic Affairs and Labour), Dr Detlef Eckert (Global Policy Affairs at Huawei Technologies Co. Ltd., former Director of the European Commission), Dr Iris Henseler-Unger (Director and CEO of WIK GmbH and CEO of WIK-Consult GmbH, former Vice President of the BNetzA), Dr Karl-Heinz Neumann (Senior Advisor WIK-Consult GmbH, former Director and CEO WIK GmbH / WIK-Consult GmbH), Dr h.c. Hans-Joachim Otto (lawyer and notary, Member of the German Parliament and former Parliamentary State Secretary for the Federal Minister of Economic Affairs), Prof. Dr Wolf-Dieter Ring (lawyer, former President of the Bavarian Centre for New Media, Bayerische Landeszentrale für neue Medien), Peter Schaar (Chairman of the European Academy for Freedom of Information and Data Protection (Europäische Akademie für Informationsfreiheit und Datenschutz), former Federal Commissioner for Data Protection and Freedom of Information), Prof. Dr Norbert Schneider (former Director of the NRW State Institute for Media, Landesanstalt für Medien NRW), Prof. Dr Patrick Sensburg (Member of the German Parliament, CDU parliamentary group, Chairman of the NSA Investigation Committee), Dr Georg Serentschy (internationally operating consultant, former head of the Austrian telecommunications regulatory authority RTR and chairman of BEREC), Prof. Dr Helmut Thoma (founder of RTL Television, Chairman of the Supervisory Board of freenet AG, media consultant), Dr Michael Vesper (former Vice Minister President NRW, former Chairman of the Board of the German Olympic Sports Confederation, DOSB).

The association **Deutscher Verband für Telekommunikation und Medien e.V.** (DVTM) is the central interface and indispensable expert for the companies

involved in the value-added chain of telecommunications, media and energy. Its members are service providers, network, service and internet providers, resellers, technical service providers, media and publishing companies as well as consulting and debt collection companies with national and pan-European operations. The objective of the association is to create a future-oriented, innovative and competitive telecommunications and media market, that reconciles the interests of consumers, politics and the economy.

The more than 40 members of the association voluntarily operate within the framework of the Kodex Deutschland für Telekommunikation, Medien, Energie und „Bettertainment", a code for telecommunications, media, energy and "bettertainment". The code commission, accompanied by a prominently staffed advisory board, drafts acknowledged industry standards and enables members to actively participate in designing the market, thus strengthening the principle of self-regulation. The DVTM was born out of the industry association for the voluntary self-control of telephone value-added services (Fachverband Freiwillige Selbstkontrolle Telefonmehrwertdienste, FST) that had been founded as early as 1997. The association's name was changed to DVTM in February 2011.

DVTM Deutscher Verband für Telekommunikation und Medien e.V.,
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Renatus Zilles (Chairman of the Board), Markus Schunk (CEO),
E-mail: renatus.zilles@dvtm.net, markus.schunk@dvtm.net,
Internet: www.dvtm.net

In-House News

9. Hambach & Hambach awarded by WHÒs WHO Legal 2018

"Hambach & Hambach is a leading German firm that specialises in telecommunication, internet media and entertainment law. The founding partners of the firm are highlighted in this year's research.

***Wulf Hambach** is a 'really well known' practitioner who is internationally recognised as a leading expert in gaming and gambling law.*

*„**Claus Hambach** is 'a top name for gambling law matters' who is widely respected for his extensive expertise in gaming tax law."*

Source: WHO'SWHOLEGAL GERMANY 2018

10. Hambach & Hambach Team News

We are pleased to announce that **Robert Schippel** joins our team as Senior Associate since 1 January 2018. He supports our law firm in the following areas:

- Gaming Law
- Advertising law (UWG, GlüStV, gaming advertising guidelines)
- eCommerce and mCommerce
- IT Law
- Anti-Money Laundering Law
- Youth and Data Protection Law

Before joining Hambach & Hambach, Robert Schippel worked six years as an Legal Counsel for a state-run lottery company. While working for those he completed 2017 his masters degree on information technology law at the university of Oldenburg.

We are pleased to announce that **Maximilian Kienzerle** joins our team as Associate since 31 July 2017. He supports our law firm in the following areas:

- Gambling Law
- General Administrative Law
- International and European Law

Maximilian Kienzerle studied law at the University of Konstanz and the University of Ottawa with a specialization in European Union law. He passed his First State Examination in 2015. Following this, he spent parts of his legal traineeship (Referendariat) at Stolzenberg, a well-known corporate law firm specializing on press and media law, and at the Brussels office of leading German law firm Redeker Sellner Dahs. He passed his Second State Examination in Munich.

11. Recommendation for Literature

Commentary on Betting and Gaming Law in the Media

1st edition 2014,
published by Verlag C.H. Beck, Munich

Editors: Streinz/Liesching/Hambach,

Authors from Hambach & Hambach law firm:
Dr Wulf Hambach, Claus Hambach LL. M.,
Dr Stefan Bolay, Dr Bernd Berberich

For further information please click here.

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.

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.

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.

12. Former President of the German Federal Constitutional Court, Prof. Dr Dres. h.c. Hans-Jürgen Papier: Foreword to the handbook for judges on German Gaming Law

Source: Kommentar zum Glücks- und Gewinnspielrecht in den Medien (Commentary on Betting and Gaming Law in the Media), 1st edition 2014, published by C. H. Beck, Munich

No other area of public law has experienced a similarly far-reaching and rapid development in recent years as has the field of betting and gaming law, not least including, above all, the law governing sports bets. This was due to a variety of reasons, based in part on technological development, but also on legal considerations, under aspects of EU law as well as constitutional law. Online media and the offers contained in these media naturally are no longer constrained by national borders, and in particular, not by the state borders within the federalist structure of Germany. EU law and the European Court of Justice's case law which bindingly interprets this law, but also German court decisions (not least by the Federal Constitutional Court (BVerfG)), furthermore gave important impulses towards a reform of German betting and gaming law. Recent legislation in this area, has, in particular, been shaped by decisions handed down by the European Court of Justice with regard to the "coherent" structuring, and by the Federal Constitutional Court regarding the consistent and congruous pursuit and implementation of the protection principle and protection level chosen by the legislator. All of the above reasons have changed the entire legal field of betting and gaming law - which had originally been characterised primarily by the public administrative monopoly - into a strongly liberalised legal area which, however, and probably just for this reason, still continues to raise important specific questions of EU law, national constitutional law, administrative law and criminal law. This means that this area of law has turned into a virtual treasure trove for practical legal problems which is enriched by the fact that in the Federal Republic of Germany, and in the various federal states which have overriding competence for this area of law, there is no continuous and uniform legal regime. Due to its major factual and financial significance, the online area is focused upon here. The commentary thus satisfies a strong desire on the part of the affected commercial circles as well as of those who have to implement this important and interesting area of law by applying it in practice.

Hans-Jürgen Papier

For further information on this legal commentary, please click here.

13. Team Hambach & Hambach

Dr Wulf Hambach

Founding Partner

- Law of the digital economy
- Regulatory Law
- Gaming and gambling Law
- Community Law
- Regulatory and License Affairs

Claus Hambach LL. M.

Founding Partner

- Gambling Taxation (VAT, Sportsbetting Tax, Gambling Duties etc.)
- Gaming and Gambling Law
- Criminal Law
- Litigation

Dr Stefan Bolay

Salary Partner

- Media and Entertainment
- E-Commerce, Competition
- Trademark and Copyright Law
- IP/IT
- Administrative Law (in particular Gambling Law)

Dr Bernd Berberich

Salary Partner

- Betting and Gambling Law
- General Administrative and Enforcement Law
- European Union Law and Constitutional Law
- Criminal Law

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- (EU) Regulation and Public Commercial Law
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- Electronic Payment Services
- IP/IT
- Advertising Law
- Sports Law
- Youth and Data Protection Law
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- IT
- Data Protection

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