

TIME Law News

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

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Editorial

2016 - the decisive year for the Inter-State Treaty on Gambling (GlüStV)

By Dr. Wulf Hambach, Co-Founder Hambach & Hambach law firm

In mid-January 2016, a new initiative in the area of gambling policy by the Green coalition party in Schleswig-Holstein caught attention. A press release published by the parliamentary party of the Green party in the SH state parliament advocates the abolition of the ineffective ban on online gambling, asking all federal states to take up on a more realistic regulation of gambling using the model from the federal state of Hesse. Attempts at revising online gambling in Germany are not entirely new. The headwind which usually is to be anticipated for such initiatives in the field of law politics in Germany is massive, and may even tear apart acts or entire gambling supervisory authorities - as can be seen when looking at the example of Schleswig-Holstein. The reason for this: The power nodes for the maintenance of the gambling monopoly - namely the Deutsche Lotto- und Totoblock and its permanent advisers and experts - have established a powerful organisation; opponents among their own ranks are roped back in with a great deal of patience - as in the case of Hesse. In mid-January 2016, the time had come yet again to reject calls for an adjustment of German gambling legislation.

However: How can you argue for the maintenance of the status quo, i.e. the GlüStV, if the problems are in the tooth roots and these are so badly damaged due to negligent treatment that the tooth may have to be pulled?

The deep-rooted problem - which the advocates of the GlüStV have been denying - is buried in European law. The probability that the tooth may now have to be pulled and the GlüStV restored entirely in emergency surgery, is high: The EU Commission is obviously just round the corner with infringement proceedings, the European Court of Justice, based on the Advocate General's opinion, will probably decide that the GlüStV violates EU law, the administrative court (VG) of Wiesbaden which is responsible for the proceedings regarding sports betting licenses will reach the same conclusions in the main proceedings as in the summary proceedings, i.e. it will decide that the GlüStV violates EU law. In 2016, Hesse with its CDU/Green party government will follow its mandate and implement the coalition agreement, namely to "restore" the GlüStV in the light of European law. Similar political agreement across party borders has up to now only been known from the CDU and FDP in SH. Other federal states where CDU, Green party or FDP are voted into the government in 2016 may

take up on the Hesse reform clause. So, coming back to the question: What organisational measures is the Deutsche Lottoblock taking in order to once more destroy these reform attempts with strong headwinds?

In mid January, the responsible experts and representatives of the state lottery companies reconvened - armed with as many as three expert opinions and the former head of the Hamburg government, Ole von Beust.

Conclusion: The GlüStV complies with EU law after all, states **Prof. Dr. Ulrich Halter, University of Freiburg** and “the doubts regarding compliance with EU law of the German lottery monopoly are unfounded.” Haltern suggests a line of argumentation which goes beyond the current restriction to market aspects - gambling addiction, black markets and associated crime are market imperfections. Another aspect which is at least similarly decisive is the deep rooting of German lottery legislation in historically developed, religiously founded and morally and culturally justified attitudes and decisions in society. He believes that the European Court of Justice (ECJ) is very open to this and extends an invitation to follow this line of argumentation; this invitation now merely has to be accepted. “If one finally talked about these social aspects of legislation, it would become a lot more obvious how much social legitimation and legal justification the German monopoly has.” Moreover, games such as online poker, live bets, but also social games with the characteristics of games of chance are too dangerous and should continue to be prohibited.

Therefore: Online players in Germany, in contrast to those in France, Spain or Denmark, should snap shut their laptops and block their smartphones for online games and flee from the uncontrollable gambling addiction, if possible to the dear old lottery counter. “May I have a lottery ticket and a bar of chocolate, please.” This would be the purest form of channelling the gaming instinct for the common good! Also, legal remedies should be excluded for European providers: No Higher Administrative Court (VGH) of Hesse, no ECJ, no complaints to the EU Commission - the purest form of legal concord!

Coming back to the request by the Green party for the abolition of ineffective bans on online games and the Hesse model which does not provide for a limitation of the number of online gaming licenses or products, but rather a qualitative selection of online gaming providers using strict but up-to-date criteria: This qualitative approach has real chances in 2016, as a digital generation (digital nature) has long since grown up that uses digital social networks where people also play against each other -

whether in the form of eSport tournaments, ePoker tournaments or virtual football manager games (Daily Fantasy Sports). EU member states with a future-oriented regulation of online games are already dealing with new hybrid gaming and finance platforms (e.g. binary slots) or 3D casino games. This is the reality! What is left to be done is to define the correct rules of the game - the Green party, CDU but as a matter of course also the FDP will probably see to that in the near future. On 25 February, the largest internet industry association in Europe, eco, will discuss new options of online gaming legislation across party borders, with state and federal politicians as well as domestic and foreign experts.

Outlook:

The GlüStV will certainly be beyond recognition after the pending treatment. Gaming rules oriented towards consumer protection may even be taken from the consumer protection code of the DVTM media association which was passed 2015, and which is supported by renowned consumer protection groups.

And: State-run lottery companies should not fear the abolition of ineffective bans with a simultaneous introduction of technically appropriate gaming rules. A peaceful coexistence of state-run and private providers would not be entirely new - in particular in Europe. So: Be brave!

1. Criminal review of secondary online lotteries

By Prof. Dr. Hans Kudlich and Dr. Bernd Berberich, Senior Associate Hambach & Hambach law firm

Summary

Secondary online lotteries offer bets on the outcome of other, mainly traditional state-run lotteries. Their prize scheme is based on the „primary lottery“. As the providers of such secondary lotteries are usually located abroad and do not have a German lottery license – but a permission to operate from another EU Member State – the question of criminal liability under Sections 284 ff. of the German Criminal Code arises. Even the applicability of the German Criminal Law is problematic. Following a recent judgement of the Federal Court of Justice on Section 86a of the German Criminal Code, the better argument can be made for rejecting such applicability. This, however, is not in line with the previously prevailing opinion on online gambling. Nevertheless, when looking closely at the criminal liability, the applicable section is Section 287 rather than Section 284, as the course of the secondary lotteries, their risks and potential addictions are linked to the primary lotteries. This assessment corresponds with the position of the courts on commercial betting groups which have no contractual connection to the provider of the primary lottery.

Regarding the element of the offence „without permission of a public authority“ it can be concluded that the lack of such permission cannot be held against the providers as far as the permission cannot be obtained with reasonable effort due to an unlawful regulatory situation. Such an unlawful situation can be seen for the gambling industry as a whole. There are in particular the insufficient enforcement of appropriate measures regarding the regulation of highly addictive gambling machines, the strict state monopoly in lotteries (which cannot be explained on the basis of the Inter-State Treaty on Gambling), the incoherent regulation on the absolute online ban and the arbitrary determination of the maximum number of licenses for sports betting. If, for these reasons, impunity of the organiser is assumed, this also applies to affiliates of the organiser and to the players due to the accessoriness of participation, especially as there is no provision for the area of lotteries that equals Section 285 of the German Criminal Code.

For more information on ZfWG please click [here](#)

2. Cooperation Arrangement between the gambling regulatory authorities of the EEA Member States concerning online gambling services – Germany should take the chance

By Tobias Klemm – Associate Hambach & Hambach law firm

In order to improve the cross-border cooperation between their gambling regulatory authorities, 21 EEA Member States entered into an EU-backed cooperation arrangement during a meeting in Brussels on 27 November 2015. Due to information about potential terrorist attacks and a security lockdown in Brussels, all other Member States stayed away from the meeting. However, they announced that they will enter into the arrangement at the earliest possible date.

The arrangement was received positively by online gambling companies, because it is aimed at simplifying their work across several countries and might lead to lower regulatory costs. The key element in the process to achieve this is to establish a framework, in which the authorities share information. Under the arrangement, one authority can issue a request for cooperation with another authority and legally share the information needed on the relevant gambling operator. This includes information such as market data, new games, results of studies and surveys, and international issues. Furthermore, the cooperation covers the organization of gambling, its supervision, enforcement and compliance with applicable laws and regulations within respective jurisdictions, including the protection of consumers and players, the prevention of money laundering and fraud, and the integrity of bets.

The arrangement can be placed in the context of the initiatives of the European Union in the field of online gambling. Its underlying idea goes back to the Belgian presidency and the European Council's 'Conclusions on the framework for gambling and betting in the EU Member States.' Since then a lot has happened, with its Green Paper 'Online-Gambling' the European Commission initiated a consultation process, which may give rise to legislative developments. In this connection, the Commission made concrete political and legal proposals in its Communication 'Towards a comprehensive European framework for online gambling,' and set up an 'Expert Group on Gambling Services.'

However, most of the Expert Group's efforts received too little support, because some Member States, including Germany, view it only as a platform for the exchange of information and experiences, and not as a political entity. The Member State are

not very willing to grant the competence on this subject to the European Union does not have.

Unfortunately, it is therefore possible that this arrangement will share the same destiny. Firstly, it is called 'arrangement' and not 'agreement,' which implicates its voluntariness. Secondly, the arrangement explicitly states that it is 'non-binding.'

However, with its intention e.g. 'to identify and share best practices in relation to for example player protection, technological tools for effective regulation and responsible gambling measures,' the arrangement could be a first step towards a comprehensive cross-border framework for online gambling in Europe and even encourage Germany to modernize its regulation of the gaming sector. One should never abandon hope.

3. Key Elements of the 4th Anti-Money Laundering Directive No. 2015/ 849 (EU) and its General Implementation until 2017

By Linda Ziehms, Senior Associate Hambach & Hambach law firm

After several years of partially controversial discussion, the 4th Anti-Money Laundering Directive No. 2015/ 849 of the EU (4th AMLD) entered into force on 26 June 2015. Consequently, EU Member States have to transpose the 4th AMLD into national law by 26 June 2017.

Recasting the existing EU Anti-Money Laundering regime based on recommendations of the Financial Action Task Force (FATF)¹ the EU Member States have committed to, the 4th AMLD emphasises again the necessity to apply a multi-level Risk Based Assessment (RBA) founded on a multi-level evidence driven identification and categorisation i.e. of money laundering risks for the respective businesses and professions of the “obliged entities” (OE). The said multi-level RBA will be prepared by an analysis conducted by the EU Commission jointly with the European supervisory authorities EBA (banking sector), EIOPA (insurance sector) and ESMA (financial and securities markets). Based on this joint analysis, the EU Commission is instructed to provide the Member States with the respective findings and recommendations to give material guidance to the Member States and the national obliged entities for their respective required national analysis and measures to effectively counteract Money Laundering risks in specific business situations. How severe such risks are finally evaluated by the public authorities on EU and national level will depend on the cooperation of the OEs to describe their specific business situations also in comparison of other sectors covered by the 4th AMLD. Since there are no European supervisory authorities for the gambling sector (yet) the said cooperation of the respective OE is and will be essential for a evidence based and balanced RBA.

However, the RBA mechanism set forth in the latest AML Directive does not aim or provide for a full harmonisation but sound common minimum standards for effectively preventing money laundering and terrorist financing within the EU. This clear move away from an out-dated box ticking, policy driven AML approach will allow Member States to adopt or retain in force stricter provisions within the limits of EU law, e.g. with respect certain sectors, transactions, provision of information or

¹ FATF Recommendations dated 16 February 2012

customers. As reasonable and legitimate as such opening clause may be in terms of flexibility to adapt EU law to national specificities it cannot the risks of misuse by a Member State cannot be ruled out, i.e. to restrict cross-border trade by exceptions to the so called territoriality principle² generally applied in EU AML legislation.

Whether the aforementioned legitimate goals of the 4th AMLD could be reached will strongly depend on the national legal implementation and application in the Member States honouring the principles of coherence and commensurability to avoid over-regulation and economical misallocation of resources.

The 4th AMLD generally extends the personal scope of the new European AML regime to all gambling operators, i.e. in the online gambling sector, as newest OEs in order to harmonise the relevant national legal frameworks with respect to regulated and non-regulated gambling within the EU. Furthermore, as several studies³ have shown, promoting and extending regulated gambling increases the necessary efforts and transaction costs from a criminal's perspective and thereby makes it less attractive for money laundering activities. However, with the exception of casinos, Member States may exempt providers of certain gambling services based on the results of risk assessment.⁴

The key material elements of the 4th AMLD address geographic, customer and transaction risk at different levels and different timely stages of the Customer relation. Related to gambling operators this means the following duties:

- **Customer Due Diligence (CDD) when establishing the business relation to a customer ("know your customer", KYC)**, i.e. online gamblers, by general checking and verification of the customer's identity and verification, reporting to responsible authorities)
- CDD in the course of continued business relations, e.g. regular KYC checks without a cause or in case of noticeable problems, recording of respective findings and reporting to responsible authorities, IT based monitoring of cash or online transactions of the gambler),

² Article 38 of 4th AMLD

³ Levi, Money Laundering Risks and E-Gaming, (2009); Bonner Institut für Glücksspiel, Online Poker (2011), Schneider/ Perent/ Clement, Online Poker: Mögliche Geldwäsche und deren Prävention (2013),

⁴ Article 2 of 4th AMLD

- Organisational duties of the gambling operator, e.g. appointment of an AML Officer and implementation of an independent internal audit unit each with direct reporting line to the management bodies, implementation of IT based monitoring and risk management systems, reporting to responsible authorities.

The German AML legislation in the Light of the Key Elements of the 4th AMLD

The compliance in Germany with the key elements of the 4th AMLD offers a mixed picture:

Many of the material key elements described above are already covered by the latest amendments of the *Geldwäschegesetz* (German AML and CTF Act, GwG) in August 2015. In addition to general due diligence and operational requirements stipulated for all OEs, sections 9a to 9c constitute specific compliance rules for - licensed - online gambling providers and agents of online gambling services with very limited exception⁵. Oriented on the globally applied model of AML stages namely Placement, Layering and Implementation of illegally generated funds⁶, the GwG requires for effectively preventing (potential)

- **Placement activities:** a graded identification of the online gamblers and a risk matrix comprising of KYC profiles and scores,
- **Layering activities:** implementation of IT based monitoring and risk management systems, regular KYC checks without a cause or in case of noticeable problems, recording of respective findings and reporting to responsible authorities, transfer of funds on legally permitted methods of payment⁷ after identification of the online gambler only,
- **Integration activities:** ensuring transparency of payment flows, cooperation with banks offering payment and e-money services and card providers.

However, the current limitation of the methods of payment is stricter than the requirements of the 4th AMLD. Furthermore, a RBA of the GwG with respect to online gambling is only rudimentarily perceivable if at all. There is no evidence-based categorisation of the risk exposure of the various types of online gambling such as

⁵ Section 16 para. 7 GwG

⁶ Placement relates to inserting illegal funds, layering relates to hiding the illegal origin of the inserted illegal funds and integration relates to the reinvestment of illegal funds into legal assets, e.g. real estate, securities.

⁷ see section 9c GwG

e.g. online poker in comparison to sport betting with respect to manipulation or pathological gambling.

Even more complex and inconsistent with the goals and principles of the 4th AMLD is the personal scope of the GwG due to the specific scattered picture of granted licences for gambling operators under the regime of the *Glücksspielstaatsvertrag* (Interstate Treaty on Gambling) and the still applicable, more liberal *Gesetz zur Neuordnung des Glückspiels* (Gaming Reform Act) of the Federal Land Schleswig-Holstein. Whereas i.e. online poker is (still) prohibited under the *Glücksspielvertrag*, a limited number of respective licenses have been granted in Germany under the latter law and are valid until 2019.⁸ In addition, business activities of online poker providers licensed by another EU Member State in Germany as one of the biggest online gambling markets worldwide are tolerated though.

In order to avoid a shadow economy for various types of online gambling, to apply an effective, coherent and also risk-based national legal regime in Germany as required by the 4th AMLD, and last, but not least, contribute to a level playing field within the EU, the German *Länder* (Federal States) as responsible legislators are well-advised to follow a broader approach on licensing online gambling providers. Current concerns against regulating of further types of online gambling as allegedly prone to money laundering activities could be addressed by duly considering the available evidence on risk exposure provided by various studies and the complementary implementation of technical measures (e.g. only one account per online gambler per provider, transaction limits, implementation of KYC principles for all methods of online payment) to be easily monitored by external auditors such as the *Technische Überwachungsvereine* (Non-Profit Technical Inspection Bodies).⁹

⁸ For details see e.g. Hambach/ Riege, „Confused:the state of online gambling in Germany“, World Online Gambling Law Report (August 2012), „Germany: the hottest candidate for infringement proceedings?“, World Online Gambling Law Report (March 2013)

⁹ see for details footnote 4

4. Investing in the UK Gambling Industry

By Julian Harris and Bahar Alaeddini – Harris and Hagan

The gambling industry offers a wealth of different opportunities for investors to choose from in Great Britain. In this article we explore the headline risks and issues that need to be managed when investing and how to address the risks.

1. “The unknown unknowns”

There are no sure bets. An investor will never know everything about the company, but the investor needs to know enough to make an informed decision regarding an investment, including whether the company has the right licence or if there any reason why they would not be granted the right licence. The Gambling Commission (the “Commission”) does its due diligence on a company applying for a licence to ensure it is suitable by applying five key factors when assessing suitability: identity and ownership, finances, integrity, competence and criminality. We recommend that investors apply these factors in doing their own due diligence.

It is worth noting that the Commission will investigate investors, personally, if they reach certain thresholds. If an individual holds 3% equity or voting power or more he will need to be named and his DOB provided. If an individual holds at least 10% equity or voting power he will need to provide a detailed personal declaration, known as an Annex A application. If the investor is backed by other investors, he will need to consider with his lawyers the extent to which they are investigated; this will be assessed on a case by case basis.

2. Bad reputation

If the company is already licensed by the Commission, it could have a bad reputation with the regulator. The reputation with the Commission is very important because without a licence one cannot trade. This risk can be minimised by finding out as much as possible from asking around in the industry, reviewing the Commission’s sanctions register and reviewing correspondence with the Commission to assess the tone. It is therefore important to have a feel for the company’s relationship with the Commission and dealing with a company that considers regulatory compliance as important.

3. Regulation

Quite simply, the company needs robust processes to comply with legal/regulatory requirements in all jurisdictions in which it operates. Failures have consequences in the home jurisdiction as well as the target jurisdiction as regulatory or enforcement action are both reportable elsewhere. Technical systems can and do fail; for example, they could fail to block play from the US, or fail to detect money laundering or problem gambling signs. Regulation in itself is not a risk, but continually changing regulation, particularly in relation to online gambling, could result in regulatory breach, sanction and damage to the company's reputation, if it does not foster the right attitude or approach to regulation. The only ways to address these risks entail engaging with the Commission, knowing when to seek advice and engaging the services of reputable service providers.

4. Social responsibility

This is a key area for Commission. Around 73% of adults in Great Britain gamble at least once a year, and the vast majority to do responsibly. All operators have a shared responsibility to help players gamble responsibly by not spending more money or time than they can reasonably afford. The Commission does not want to stop operators from being successful. However, recent public scrutiny has meant that the industry must step up its efforts in social responsibility to prove it can be "trusted". There is no substitute to complying and offering socially responsible products.

5. Change

The gambling industry in Great Britain is a highly competitive, rapidly advancing and open market. The market develops rapidly as a reaction to technological advances and customer demand to keep them loyal. Now more than ever, customers expect exciting and engaging experiences at the click of a button. The open legal landscape in Great Britain means that licences are available for almost everything so competition will follow swiftly in the wake of any innovative new product or clever initiative. The openness of the market may mean that it is difficult competing in a fiercely competitive industry.

With all that said, investing in this space undeniably offers a wealth of opportunities, which come with great rewards. Risk is a natural part of business and gambling more than anything else involves risk at its very core; the key to success is how the risk is managed.

5. In-House News

Linda Ziehms, Senior Associate, Lawyer and Head of New Issues and CSK Frankfurt joins Hambach & Hambach team



Linda focuses her legal advice in particular on e-payment and money laundering and the following areas:

- Securities Law / Securities Deposit Law
- Capital Market Law
- Banking Supervision Law
- AML Law / Compliance

Linda Ziehms studied law at Freie Universität in Berlin and holds an MBA of Mannheim Business School. Since 1998, Linda is authorised as an Attorney-at-Law in Germany since 1998. She was partially working for the supra-local law firm v. Moers & Kollegen in Berlin.

Besides her main occupation with Clearstream Banking AG, Frankfurt (Group Deutsche Börse) as Director heading the New Issues team responsible for the admission of German and international securities since 2008, Linda supports Hambach & Hambach as freelancer since late 2015. Linda joined Deutsche Börse Group in 2001 as Legal Counsel responsible for advising Clearstream Banking AG and Eurex Clearing AG in legal and strategic matters. Furthermore, she participated in national and international boards dealing with the cross-border holding and settlement of securities. Between 2004 and 2008, Linda was as national expert a member of the EU Legal Certainty Group on Cross-border Securities Holdings and Settlement.

To date, Linda participates in a market expert group of AFME dealing with legal and operational barriers in cross-border trading and settlement of Exchange Traded Funds within the European Union. In addition, she is member of a DIN working group dealing with standards in the securities industry.



Dr Wulf Hambach will speak at the following upcoming events:

02 February 2016

World Regulatory Briefing

London | UK

Host: Clarion Events

20 Apr 2016 – 22 Apr 2016

IMGL Spring Conference 2016

San Francisco | USA

Host: International Masters of Gaming Law

03 February 2016

IMGL Masterclass London

London | UK

Host: International Masters of Gaming Law

05 Jul 2016 – 07 Jul 2016

World Gaming Executive Summit

Barcelona | Spain

Host: Terrapinn

13 Apr 2016 – 14 Apr 2016

iGaming Forum 2016

Stockholm | Sweden

Host: iGaming Forum

If you would like to meet Wulf on any of these events then please contact Nicole Tonelli to make an appointment (n.tonelli@timelaw.de).

Claus Hambach, LL.M. will speak at the following upcoming events:

02 February 2016

World Regulatory Briefing

London | UK

Host: Clarion Events

03 February 2016

IMGL Masterclass London

London | UK

Host: International Masters of Gaming Law



Bettertainment – Economic impact and potential compliance with consumer, data and youth protection



WIK-Consult has conducted a study on behalf of the German Association for Telecommunication and Media (DVTM) about „Bettertainment" - Economic impact and potential compliance with consumer, data and youth protection.

The study critically analyses the current regulatory framework and proposes a market and target oriented regulation for the gambling market in Germany accompanied by strict regulatory obligations for the protection of consumer, youth and data.

You can find more information concerning the study as well as download possibilities [here](#)



Awards



Hambach & Hambach receives another recommendation for WHO is WHO Legal

For 2016 Hambach & Hambach receives another recommendation for the area **“Sport & Entertainment Analysis” for WHO is WHO Legal Germany.**

After 2013 **Wulf** was now once again selected as “Most Highly regarded Individual” for the “Sport & Entertainment Analysis” 2016 area:

“Wulf Hambach is a media and gaming law specialist who impresses clients with his “depth of expertise and experience”.

This year also **Claus Hambach** was honoured as “Most Highly regarded Individual” for this area:

Claus Hambach focuses his practice on contract, criminal and anti-money laundering law relating to the gaming industry and is praised for his “bespoke solutions” and “detailed advice”.

Read more [here](#)



Events



Hambach & Hambach is recommending the [eco Symposium “The Future of Digital Gambling – New State Control?”](#) on 25 February 2016 in Berlin.

Find more information in the extra flyer attached to the newsletter and [here](#)

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

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Editors: Streinz/Liesching/Hambach,

Authors from the Hambach & Hambach law firm:

[Dr Wulf Hambach](#), [Claus Hambach, LL.M.](#), [Dr Stefan Bolay](#), [Yasmin Sirch](#), [Maximilian Riege](#), [Dr Bernd Berberich](#), [Alexander Pfütze, LL.M.](#)

The New Gaming Law Regime

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

The Editors

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

Up-To-Date Practical Solutions

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

For further information, please click [here](#)

6. Editorial details

TIME Law News offers gratuitous information on current events in European and international gaming law. Hambach & Hambach do not accept any liability for the accuracy of the contents of TIME Law News. Please note that TIME Law News is only meant to serve as a source of information and can under no circumstances replace legal advice by a lawyer.

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Responsible editor

Dr Wulf Hambach
Haimhauser Str. 1
80802 München

T +49 89 389975-50
F +49 89 389975-60
E info@timelaw.de
www.timelaw.de

Editors

Dr Wulf Hambach¹
Claus Hambach, LL.M.¹
Yasmin Sirch¹
Dr Stefan Bolay¹
Dr Bernd Berberich¹
Maximilian Riege¹

Tobias Klemm¹
Linda Ziehms¹

Guest authors

Santiago Asensi²
Bahar Alaeddini²
Dr. Bremer¹
Univ.-Prof. Dr Englisch
Justin Franssen²
Harry Ashton²
Tony Coles²
Justin Franssen²
Thietmar Hambach
(Journalist)
Prof. Dr Gunter Heine
Nina Henningsen²
Nadya Hambach²
Julian Harris²

Univ.-Prof. Dr
Christian Koenig, LL.M.
Jens Leinert²
(Dipl.-Kaufmann)
Dr Alan Littler²
Quirino Mancini²
Nick Nocton²
Martin Oelbermann
Dr Simon Planzer²
Prof. Dr Christoph Ohler
Prof. Michael Rotert
Prof. Dr Kurt Schelter
Prof. Dr Friedrich
Schneider

Andreas Schultheis
Prof. Dr Gerald Spindler
Dr Walter Schwartz²
Dr Arthur Stadler²
Rolf vom Stein
(Dipl.-Geophysiker)
Dr Thomas Talos²
Dr Clemens Thiele²
Frank Tolboom²
Thibault Verbiest²
Garron Whitesman LL.M.,
LL.B., B.A.²
Prof. Dr. Hans Kudlich

¹ German Lawyer

⁴ German Tax Adviser

² Attorney-at-Law

³ Solicitor