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1. Foreword by Prof Dr. Dres. h.c. Hans-Jürgen Papier, former President of the German Federal Constitutional Court, on Streinz/Liesching/Hambach, Kommentar zum Glücks- und Gewinnspielrecht in den Medien (Commentary on Betting and Gaming Law in the Media)

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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.

2. Bundesliga Manager Game ("Fantasy League") is Not a Game of Chance - Notes on the Decision BVerwG 8 C 21.12

by *Dr.Stefan Bolay* and *Alexander Pfütze, LL.M.*, lawyers Hambach & Hambach Rechtsanwälte

In its judgment of 16 October 2013 (8 C 21.12), the Federal Administrative Court (BVerwG) decided that a so-called Bundesliga manager game is not to be classified as a game of chance under the Inter-State Treaty on Gambling (GlüStV). This leads to chances for media companies and sports associations to offer similar sports manager games without causing conflict with gaming law regulations.

In this specific case, a media company offered a Bundesliga manager game on its website, in the form of a "Fantasy League", and advertised this game accordingly. In return for payment of EUR 7.99, participants were able to put together a fictitious team from the players of the first German football league. Through further payments (of EUR 7.99 in each case), the participants were able to increase the number of their teams to a total of ten, whereby every third fictitiously assembled team could be put together free of charge. After registration and payment, the object of the game was for the participants to select their teams for each match day. At the end of the match day, the selected players were awarded points by the organiser, these being based on the actual evaluation of these players by sports journalists. The evaluation matrix served to distribute material and monetary prizes to the best participants. At the end of each month, material prizes were given to the best players, small monetary prizes were paid out at the end of the first and second half of the season respectively, and monetary prizes were paid at the end of the season for the overall ranking. The winner (“Super Manager”) received a cash prize of 100,000 euros.

The BVerwG endorsed the view held by the Baden-Württemberg Higher Administrative Court (VGH) that the football manager game offered in Baden-Württemberg via the internet, without a licence during the 2009/2010 Bundesliga season, was not a game of chance as defined in the GlüStV. The standard for the court’s assessment is section 3 (1) 1 of the GlüStV, which defines a game of chance as a game "during which a payment is demanded in exchange for a chance of winning, and where the decision on winning or losing completely or predominantly depends on chance."

The BVerwG judgment is worth noting for a variety of reasons:

First of all, it will probably end for the time being the discussion regarding the uniform definition of the term "game of chance" in criminal and administrative law. Up until now, it had been controversial among the courts and legal scholars whether the term "game of chance" as used in the GlüStV is identical with the term as used in the German Criminal Code (StGB).[1] This relates in particular to the question as to whether or not the term "remuneration" under the GlüStV is wider than the term "more than insignificant stakes" as used in the StGB. The term "game of chance" in criminal law only comprises the significant sum which must have been paid in direct expectation of the possible prize, in contrast to a mere participation fee. The BVerwG, following the VGH's statements, has now held "that the element of remuneration for purchasing a chance of winning pursuant to section 3 (1) 1 of the GlüStV corresponds to the concept of stakes for a game of chance under section 284 of the StGB, at least in as far as it requires that the chance of winning originates from the remuneration itself."[2]

Secondly, the element "stakes" or "remuneration" is delimited against the mere "participation fee". Pursuant to the BVerwG, it is necessary that "the payment of the remuneration as such already leads to the chance of winning or possibility of losing". The Court held that this is not the case "if the chance of winning or possibility of losing is only caused by further circumstances, such as the conduct of other players or the activities of the player himself/herself".[3] Accordingly, the BVerwG in the specific case decided that the required necessary connection between payment of the remuneration and the chance of winning or possibility of losing did not exist. "It is not the payment as such which results in a chance of winning, but only the subsequent conduct of the participant and his/her competitors. The chance of winning therefore is not opened up through the fee-based registration, but only if and when the participant decides to take part in the gaming action and to invest the required time during the match season. This decision is taken independently of the payment of the remuneration. Furthermore, the participant can at all times exit the game without having an incentive to try an compensate for a loss of assets. Under no circumstances will

[1] Regarding the current status of discussion, see *Bolay/Pfütze*, in: Streinz/Liesching/Hambach, Glücks- und Gewinnspielrecht in den Medien 2014, § 3 GlüStV, par. 2 et seq.
[2] BVerwG, K&R 2014, 217 (218), par. 22.
[3] BVerwG, K&R 2014, 217 (218), par. 25.

he/she be paid back the registration fee."[4] The statements given by the Court at first instance appears to point to the relevance of elements of skill; however, the BVerwG explicitly left open the issue of games of skill, and obviously merely evaluates the players' "activities" within the framework of the distinction between stakes/ participation fee, thus justifying through this the fact that the "direct connection" between the stakes and the decision on winning no longer exists. The BVerwG seems to confirm its approach in a subsequent decision in which it held that participation fees for a poker tournament where the winners were given the right to participate free of charge in a generously prized poker tournament did not constitute stakes with relevance under gaming law.[5] It remains to be seen whether or not this line of legal argumentation regarding the element "mere participation fee" will, in the future, be clarified further.

Thirdly, the considerations regarding the "spirit and purpose" as well as the statements relating to constitutional law can clearly also be interpreted as a teleological interpretation and limitation in scope of the term “game of chance”, with the result that "harmless" games of chance are excluded from the area of application of the GlüStV and the StGB.[6] The Court ultimately clarifies that sanctioning under the GlüStV or even the StGB ist not required if the protective purposes set out in section 1 of the GlüStV are not put at risk by the relevant game. For these cases, a "regulation under trade law" would be sufficient, taking into consideration the principle of proportionality.

Ultimately, the judgment has significant practical relevance as it shows options for a (harmless) design of fee-based games providing the chance of winning prizes, which results in such games not being covered by the scope of application of the GlüStV. These options could be used by classical gaming providers, but also by advertising companies, media houses or sports associations.

[4] BVerwG, K&R 2014, 217 (219), par. 28.
[5] BVerwG, judgment of 22 January 2014, court ref.: 8 C 26.12 (not yet published).
[6] BVerwG, K&R 2014, 217 (218 et seq), par. 26 et seq.

3. The 4th Anti-Money-Laundering Directive and Online Gaming Customer Identification for Online Games of Chance Beyond the Risk-Based Approach

By *Maximilian Riege*, lawyers Hambach & Hambach Rechtsanwälte

On 11 March 2014, the European Parliament passed the 4th Anti-Money-Laundering Directive (AMLD).[1] From a gaming law perspective, a particularly important aspect is the comprehensive inclusion of gaming providers as the addressees of the Directive. Changes regarding the identification obligations for online games have caused criticism.

The draft by the European Commission for the 4th Anti-Money-Laundering Directive[2] had provided for a uniform threshold of EUR 2000 for identification obligations for all providers. This applies indiscriminately to terrestrial and to online gaming providers.

The version of Art. 10 (1d) of the AMLD, which has now been passed, will - depending on the type of game - lead to different requirements with regard to customer identification. Whilst terrestrial casinos are only required to identify their customers above a transaction threshold of EUR 2000, and other gaming providers only need to do so if the paid winnings exceed EUR 2000, the same obligation applies to online gaming providers as early as "upon the commencement of the business relationship".

Just as the revision of the German Anti-Money-Laundering Act (GWG), the different treatment of online games is justified with the allegedly high money-laundering risks associated with online gaming.[3] In other words: online games are said to be particularly prone to money-laundering activities, whilst terrestrial casinos and other types of gaming are considered to be less suitable in this respect.

However, this assumption is in contrast to scientific studies and chooses the wrong starting point for the combat of money laundering in the area of gaming. The type of game - whether lotteries, sports bets, casino games or poker, and whether online or offline - is of merely subordinate significance for money-laundering risks. The deci-

[1] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP7-TA-2014-0191%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN.
[2] http://europa.eu/rapid/press-release_IP-13-87_en.htm.
[3] See BT-Drs. 17/10745, 2 et seq.

sive aspect, rather, is the question of whether or not the gaming offers are regulated or unregulated.[4]

Lower Money-Laundering Risks for Regulated Gaming

As early as 2009, Levi, in his study on "Money Laundering Risks and E-Gaming A European Overview and Assessment“ found that regulated online gaming has hardly any relevance for money-laundering activities. Levi even described the allegation that online gaming is particularly prone to money-laundering, as a myth.[5] Levi's view has recently been confirmed by a study compiled on behalf of TüV Austria Trust IT GmbH. The renowned experts in the area of the combat of money laundering and gaming regulation, Prof. Dr. Dr. h.c. mult. Schneider, Prof. Dr. Dr. Peren and Prof. Dr. Clement, examined the subject "Online Poker: Potential Money Laundering and Its Prevention".

The results of both of these studies are unambiguous. On the one hand, money laundering in the area of regulated online gaming requires significant efforts, and is thus unattractive under economic aspects.[6] On the other hand, remaining (residual) risks can be controlled through a "coordinated package of measures"; in this context, Perent/Clement suggest a 10 point plan.[7]

From a criminal's perspective, money laundering must be worthwhile, i.e. must be economically attractive. Incriminated funds, i.e. funds from criminal activities, are intended to be laundered in order to be re-introduced into the regular economic cycle. Otherwise, proceeds from criminal transactions are of hardly any use for criminals. Furthermore, the money-laundering process is only successful if the funds to be laundered can be re-introduced into the regular economic cycle (so-called integration) after their placement, without too much depreciation loss through the processes applied in order to disguise their origin (so-called layering).[8] Amounts below EUR 2000 have proven to be irrelevant in view of the efforts associated with the money-laundering activities.

[4] *Riege/C. Hambach*, in: Streinz/Liesching/Hambach, Glücks- und Gewinnspielrecht in den Medien 2014, Vorb GWG, par. 8 et seq.
[5] *Levi*, Money Laundering Risks and E-Gaming (2009), 26.
[6] *Schneider*, Online Poker: Mögliche Geldwäsche und deren Prävention (2013), 8.
[7] *Peren/Clement*, Online Poker: Mögliche Geldwäsche und deren Prävention (2013), 125.
[8] For the 3-phase model, see *Herzog*, in: Herzog: Geldwäschegesetz (2010), Introduction par. 7 et seq.

Furthermore, it is particularly easy to monitor the threshold value for deposits and payments especially in the online sector, due to the necessary use of bank transfers or electronic means of payment, excluding the use of cash. The carving up of sums, so-called smurfing,[9] in order to circumvent the threshold value, is thus far more complicated than in the terrestrial area. [10]

Providers' Internal Security Measures

In addition, all gaming transactions can be stored and examined (almost) in real time with regard to anomalies, within the framework of internal security measures taken by the providers, in addition to the registration of the transaction sums, and the payment methods used by the player.[11]

Insofar, the (anonymous) introduction of laundered funds into the regular economic cycle can de facto be prevented, especially for regulated online gaming, through a combination of internal security measures taken by the provider, the restriction of permitted deposits and pay-out methods and sums, as well as the full identification of the customer at the time of a pay-out request.[12]

Section 9a of the German Anti-Money-Laundering Act (GWG)[13] as well as sections 5 et seq. of the Schleswig-Holstein Decree on the Licensing of Gaming (GGVO) already provide for such measures. Schleswig-Holstein furthermore imposes upon every regulated provider the obligation to install a so-called SAFE server, a mirror server which stores and makes accessible to the competent supervisory authorities all data with gaming relevance (including the transaction data).[14]

This is logical under a number of aspects. On the one hand, storing data creates an additional deterring effect against money-laundering and fraud activities in connection with regulated online gaming. On the other hand, the corresponding criminal ac-

[9] *Herzog,* in: Herzog: Geldwäschegesetz (2010), Introduction par. 8.
[10] *Riege/C. Hambach*, in: Streinz/Liesching/Hambach, Glücks- und Gewinnspielrecht in den Medien (2014), Vorb GWG, par. 9.
[11] *Riege*, in: Streinz/Liesching/Hambach, Glücks- und Gewinnspielrecht in den Medien (2014), §9a GWG, par. 4 et seq.
[12] *Riege/C. Hambach*, in: Streinz/Liesching/Hambach, Glücks- und Gewinnspielrecht in den Medien (2014), Vorb GWG, par. 13.
[13] *Riege*, in: Streinz/Liesching/Hambach, Glücks- und Gewinnspielrecht in den Medien (2014), §9a GWG, par. 5 et seq.
[14] Hambach/*Riege*, in: Streinz/Liesching/Hambach, Glücks- und Gewinnspielrecht in den Medien (2014), §§ 4, 5 GlüG SchlH, par. 53 et seq.

tivities become unattractive because the discovery risks for criminals as well as the expenses for money-laundering activities are increased significantly. Furthermore, the supervisory authorities can easily verify compliance with regulatory requirements by the regulated gaming providers. Finally, the financial supervisory authority is provided with a reliable calculation basis for the collection of taxes from the regulated providers.

Customer identification vs. channelling

Appropriate identification measures are important to ensure a functioning regulation of gaming. This means that a graded, i.e. actually "risk-based" identification process, is required. If identification standards at the commencement of customer registration are too high, the cumbersome regulation endeavours of the last few years with the aim of attracting players to the regulated market (the so-called channelling of customer demand) could be undermined. Under aspects of regulatory law, high identification obstacles for customers at the beginning of the registration process may even be counter-productive.[15]

Gaming-associated risks can only be controlled within a regulated market. The channelling of customer demand is a basic requirement for the protection of players and minors, addiction prevention, the combat of money laundering and crime as well as, not least, the generation of tax revenue. If customers, who in principle, are willing to register are lost in the unregulated market due to the lack of a registration process, the other regulatory objectives can no longer be achieved.[16]

In unusual agreement, the authors of the Inter-State Treaty and of the Schleswig-Holstein Gambling Act, stress the special significance of channelling customer demand for the other objectives of gaming regulation, even though they draw different conclusions.

With regard to the 4th Anti-Money-Laundering Directive, this therefore initially results in two possible routes to a solution:

[15] *Riege*, in: Streinz/Liesching/Hambach, Glücks- und Gewinnspielrecht in den Medien (2014), §9b GWG, par. 16.
[16] Hambach/*Riege*, in: Streinz/Liesching/Hambach, Glücks- und Gewinnspielrecht in den Medien (2014), §§ 1-3 GlüG SchlH, par. 11 and 25 et seq.

On the EU level, corresponding changes to the AMLD could be agreed during the pending trilogue of European Parliament, European Commission and European Council, in order to prevent an unnecessary and, with high probability, counter-productive identification burden for the regulated online gaming providers at the beginning of customer registration.

On the national level, the competent supervisory bodies of the member states could alleviate the regulatory situation by using the option provided for in Art. 2 (1) No. 3f) of the draft Directive, which is to permit national exceptions from the identification obligation for online gaming, after coordination with the EU Commission. In this context, it would, for instance, be an option to introduce graded identification requirements depending on the sum paid in, a limitation of the permitted payment methods, and payout restrictions.

In particular, in the area of online gaming, a (basic) identification of the customer using his/her account data and/or the used EC or credit card will probably suffice for payments up to certain thresholds, whether at a uniform level of EUR 2000 or with lower minimum amounts. In addition to this, the customer's (mobile) telephone number could be inquired and verified. The pay-out of funds from a player account should, however, always only take place after a full identification of the customer, and should only be made into a bank account or onto a credit card registered in his/her name.[17]

The identification process at the beginning of customer registration for regulated online gaming providers must not be done to the detriment of the channelling of customer demand into the regulated and thus state-controlled market. Therefore, it will be decisive for the success of the combat of money laundering under the 4th Anti-Money-Laundering Directive, but also for the success of the regulation of (online) gaming as a whole, whether or not workable solutions for customer identification can be found which comply with the other objectives of gaming regulation.

[17] *Riege*, in: Streinz/Liesching/Hambach, Glücks- und Gewinnspielrecht in den Medien (2014), § 9b GWG, par. 17.

4. In-House News

Dr. Wulf Hambach will speak at the following upcoming events:

23 Apr. 2014 – 25 Apr. 2014
IMGL Spring Conference
San Diego | USA
Organiser: IMGL

02 May 2014 – 03 May 2014
CRM Event Sylt
Sylt
Organiser: CRM-Event Series

08 Jul. 2014 – 10 Jul. 2014
World GES 2014
Barcelona | Spanien
Organiser: Terrapinn

29 Oct. 2014 – 31 Oct. 2014
IAGA International Gaming Summit 2014
Philadelphia | USA
Organiser: IAGA

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The New Gaming Law Regime

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

The Editors

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

Up-To-Date Practical Solutions

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

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5. Editorial details

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