

The Game „Millionaire by Call“ is Illegal Gambling and therefore constitutes Unfair Competition [key:FLAGS_ISA]

Article by Attorney-at-law Alice Wotsch

The Court of Appeal of Düsseldorf (Oberlandesgericht Düsseldorf), in its decision of the 23rd of September 2003 (case-no.: I – 20 U 39/03) had to deal with the following question: Does the operation of a game, which consists of the players calling an (expensive) premium telephone number in which every thousandth, ten-thousandth, hundred-thousandth and millionth caller would win illegal gaming in terms of Art. 284 German Criminal Code and does this constitute unfair competition?

The game „Millionaire by Call“ was subject matter of the proceedings. The decision is very interesting in the view of classifying games as games of skill or games of chance, as the caller who got through had to answer a question in addition in order to win the price.

The Court of Appeal, unlike the first instance court, is of the opinion that the game „Millionaire by call“ constituted a public game of chance in terms of Art. 284 Criminal Code and therefore constituted unfair competition in terms of Art. 1 Act against Unfair Competition old version (Art. 3 new version).

As the Court of Appeal observes, the distinction between (legal) games of skill and games of chance is especially difficult in cases where a player chosen by chance takes part in a quiz in order to win a prize. The opinion presented by the defendant during the proceedings assumed that an emphasis

on gaming, away from skill, could not be established and that the possibility of winning was therefore not mainly dependent on chance. The Court of Appeal did not follow this opinion, but instead followed the opinion of Eichmann/Sörup (MMR 2002, 142) that it was sufficient to assume a game of chance, if overcoming the first level of the game was dependent on chance. The Court of Appeal explicated that it could not make a difference, whether one operated a pure game of chance or whether one „saddled“ another game of skill on top.

The Court of Appeal misjudges as the game in question has to be seen as a whole, when classifying it as a game of chance or a game of skill. The decisive aspect is, whether a game as whole is mainly dependant on chance. If one would follow the arguments of the Court or Appeal shows like „Wer wird Millionär“ or „Das Quiz“ would also fall under the term of public game of chance in terms of Art. 284 German Criminal Code, since there the candidates are also selected by a random generator after sending in an e-mail, a postcard or after calling.

Furthermore, the Court of Appeal assumes that telephone charges cannot be regarded as mere „entry costs“ but as „stake“. This stake was not to be neglected as one could not only count the costs of a single telephone call (EUR 1,83) but had to consider the costs of several calls which surpassed the limit of what could be regarded as a „negligible amount“. However the court does not specify neither the number of telephone calls to be assessed nor does it mention a precise limit for a „negligible amount“.

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