

This World Cup year 2006 may cause a breakthrough for M-Commerce and MGambling in Germany

New technology, old law?

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Not so long ago, business conquered cyberspace. It is just 10 years since the first online-only gambling service went online. Recently M-Commerce (M-Gambling) has been shaping up alongside E-Commerce (eGaming).

With the progressive technological development of mobile devices such as PDAs, Handhelds and Smartphones, M-Commerce seems to have been given another chance. After the internet and mobile hype at the beginning of the century died down and other technologies such as WAP or UMTS unmistakably flopped (perhaps unable to emerge from a niche market) it seems to be time to take a closer look at this market.

J2ME, the Java platform for mobile devices, represents a growing basis for Java applications on mobile phones, PDAs and Smartphones. Symbian OS, an operating system for mobile phones, can already be regarded as an industry standard because of its availability across different models. There has also been a range of other developments, which have ensured that the writing of sophisticated software applications for mobile devices does not lie only in the hands of the manufacturers, but is also under the control of cross-platform and third party suppliers. Devices which support such standards are rapidly spreading : M-Commerce is not just a question of technical feasibility but rather is waiting to

develop as a new, growing market.

The advantages of M-Commerce over an Internet-based market are clear: the services are accessible anywhere, most notably when there is no internet access nearby. Moreover, a market segment has been developed which does not operate by internet access, but rather by mobile telephone.

Whether M-Commerce is a new medium is debateable. However, M-Commerce is not a lawless area. But as always, laws find application, in other ways than those envisaged at the time they were enacted. Many of the regulations, which apply to the mobile market deal specifically with Internet matters, e.g., the Distance Selling Law and the provisions on „tele-services“ (The Tele-services Law and the Tele-services Data Protection Law). This creates difficulties, particularly with regard to the extensive advisory and information duties. On a normal website numerous special instructions will usually be clearly laid out.

Consent forms can be given to the customer in the browser without too much delay and can be confirmed by e-mail. But how can a full identification of the service provider be accommodated in a text message? How can a consent form be made to conform to data protection regulations? In order to give consent in line with the data protection regulations must the user break off an established GSM connection, wait for an SMS and answer this SMS before he can use the service? Case-law suggests that a link to the operator's identification information must be shown on the first page of the site – does this also apply to a device with a screen resolution of 128 × 128 pixels as is usual for mobile phones?

It is clear that the application of the above regulations is problematic. Some practices could be taken from the world of Internet law without alteration but it is unthinkable that some of the other regulations could be used without adjustment. Still it is too early to risk a prediction as to

which requirements the courts will decide to apply to a service so that it may conform to the law. One such requirement however can be predicted: With the increasing importance of M-Commerce, pressure between competitors will increase. In turn, the safe keepers of competition law will be called into action; in other words, the legal harmless-ness of the application of the of E-Commerce regulations will not only be a figurehead for potential customers, but also a shield against unauthorised and expensive pre-litigation proceedings brought by competitors for anti-competitive behaviour.

Unfortunately in Germany there is no uniform operation of the regulations, as is the case under the British Gambling Bill 2005, which comes into force this year and includes extensive regulations on remote gambling. It would be a mistake to ask for further legal regulation in Germany in this way, as the regulatory minefield of Consumer Protection in E-Commerce and M-Commerce is already complex enough. It would be preferable, if the jurisprudence would work out clear requirements for providers of M-Commerce services – even though this is anything but easy given the contradictory and labyrinthine legal situation.

The E-Commerce marketplace as regards “mobile gaming” provides an interesting perspective to the Online-Gaming market. Sports betting is available on mobile devices, where the event takes place but where there is no internet access available – in stadiums, pubs and also in the living room. It remains to be seen, how the market – both the provider and the customer – might react to these possibilities.

In the area of M-Commerce (i.e. M-Gambling) legal uncertainty prevents a clear growth forecast. At the beginning of 2005, the British market research institute Jupiter Research published a report suggesting that the European market for mobile sports betting will experience strong growth. A turnover of only \$ 110m in 2004 should increase to USD 3bn by 2009. Jupiter Research forecasts that the turnover of mobile

services such as lotteries, sports betting and casino games worldwide will increase tenfold from €2bn in 2005 to USD 19.3bn in 2009. The British management consultancy firm Informa Telecoms & Media (ITM) declared the European M-Betting market to be an area of growth – the European mobile sports betting market alone should experience annual growth of 140 %. In 2010 ca. 200 million people are expected to use their mobiles to bet.

The state gambling provider in Germany is clearly aware of these figures: On the 16th of December 2005 it was announced that the state gambling provider, Toto-Lotto Niedersachsen, now cooperates with the private sports betting provider for mobile valueadded services net mobile AG, in order to „gradually build up the scope of mobile betting“. In light of the potential imminent liberalisation of the German gaming market, the state gambling providers clearly did not wish to leave this promising market segment unoccupied.

Conclusion: If one wants to ensure medium-term market prospects for M-Commerce (MGambling), it is advisable to have already entered the market. It is also necessary – now, rather than later – to watch out for cruel legal snares, which are always a threat when the Law plays catch-up with current technological developments. Failure to do so could be costly, not only in the medium-term but also in the short term.

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