

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

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>“: <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/...durchschnittsspieler/>“: <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.