

State Treaty on Gambling – Legislator demands the impossible

A panel of experts, organised in Cologne by the TÜV Rheinland and Hambach & Hambach Law Firm on 3 Dec. 2007, was able for the first time to unambiguously prove with scientific support that insurmountable technical obstacles stand in the way of the practical implementation of the projected German State Treaty on Gambling.

Many past reports held that the State Treaty on Gambling violates constitutional and European law; for instance, EU Commissioner Charlie McCreevy is at present preparing proceedings against Germany based on a violation of the regulations of the State Treaty against European law – even before the Treaty has come into effect. Up to now, however, the legislator and the public discussion have neglected to involve technical experts in the debate. This is not understandable at all, as a regulation which cannot be implemented in practice cannot be upheld from the legal point of view either, as Dr. Wulf Hambach (Hambach & Hambach Law Firm) stated.

This neglected technical discussion has now been made up for by an expert panel under the auspices of the TÜV Rheinland. Mr. Rolf vom Stein (COO TÜV Rheinland Secure iT GmbH) described the technical limits of internet censorship (keyword: ban on internet gambling), while Prof. Dr. Thomas Harmann-Wendels (managing director of the Institute for Banking Economy and Banking Law at the University of Cologne) provided information on the economic and technical obstacles connected with the interruption of payment streams (so-called financial blocking) which at present is intended to be provided for. Prof. Michael Rotert (Chairman of the Board of

ECO; President of EuroLSPA) and Lawyers Dr. Michael Hettich and Susanna Münstermann (Hambach & Hambach Law Firm) supplemented these technical details with explanations on internet service providers, on the legal consequences of the technical impossibility of implementing the requirements stipulated in the State Treaty on Gambling, and on an alternative model for regulating the subject. The detailed results of the expert panel were as follows:

- It is not possible to completely block an internet site (as requested, for instance, for the implementation of the draft State Treaty on Gambling).
- Financial streams and individual payment transactions in connection with gambling cannot be controlled by credit institutions based in Germany without the danger of damages for the German banking industry amounting to billions.
- Measures by the legislator intended to block free internet trade and financial streams are problematic, not only because of the question of legislative competence. Rather, they are disproportionate and not sufficiently specific. The lack of a debate with regard to the technical and economic problems involved results in a factual impossibility of implementing the legal requirements. Thus, the internet service providers and banks affected by potential prohibition orders will be able to claim unlawfulness of the provision and request payment of damages amounting to millions.

The internet expert Rolf vom Stein (COO TÜV Rheinland Secure iT GmbH) puts it in a nutshell:

“The attempt to block the internet contradicts technical reality. The internet treats any form of censorship as an error, and will find ways to bypass it.

All established methods for the blocking of websites are complex and technically fragmentary. Also, blocking measures

can be prevented or bypassed very easily by new technical developments (Web 2.0), through simple modifications by the providers or sometimes even through steps taken unawares by the users."

Banking expert Prof. Dr. Hartmann-Wendels, director of the Institute for Banking Economy in Cologne, talking about the so-called financial blocking provided for in the State Treaty, reached the simple but truthful conclusion:

- *"A method with which the affected banks and credit card companies could determine reliably and under application of empirical values whether the payment transaction concerned is connected with (il)legal gambling, does not exist. The attempt to evaluate each and every payment transaction under gambling law provisions through specific controls would lead to costs amounting to several billion Euro, and would impair the smooth flow of global payment transactions.*
- *As a comparison, it is interesting to look at the effects of the Money Laundering Act, which led to the documentation of 20 million cash deposits and cash payouts in 1994. The prosecution authorities only followed up 0.0036% of these cases. The costs for this documentation incurred by the savings bank sector alone amounted to 128 million DM."*

This means that it has to be anticipated now already, that the objectives listed in the State Treaty on Gambling (fight against addiction, protection of under-age players, exclusion of illegal offers, prevention of consequential and accompanying delinquency) cannot be reached. As online offers provided from abroad cannot effectively be suppressed, the only solution will be – as in Great Britain – to contrast these offers with an appealing, approved range of offers which haul players out of anonymity and illegality, and provide for better protection.

Just as in other areas, consumer protection can be reached through education. In a regulated gambling market, minors and pathological players could be excluded from participating through age verification systems or player bans. Many gambling providers could be led out of the legal gray area, and could be supervised, while illegal offers would be easily recognisable for the consumers due to the lack of a permission.

The expert panel agrees: With the new State Treaty on Gambling, the legislator would demand the impossible from the ISP companies and banks concerned, from the legal and from the technical point of view!