

Taking stock of legislative activities – ½ year of the State Treaty on Gambling: a financial and legal blessing or a Waterloo for the German Federal States and the charities?

A report by Attorneys-at-law Claus Hambach and Dr. Wulf Hambach

Approximately ½ year have now gone by. As is customary for newly established governments, this period of time is sufficient to take stock of the success or failure of the route taken by a government or – in this case – of the success of a law. This is because the “legislative period” of the State Treaty on Gambling surprisingly also is 4 years and – just as a government – a law can also be overthrown before the end of this period. Regarding the route taken by the Merkel government: “Should, for instance “Golden TV Productions” in 2016 produce its big TV movie “Angie – a Chancellor’s fateful years”, we already now know what the tenor will be for 2005/2006: Initially: Pain after the elections were almost lost. After that, a change to harmonious pictures – rapprochement between the Conservatives and the Social Democrats and Angela Merkel as the phoenix from the ashes. Cinderella turns into the most popular head of government ever in the Federal Republic of Germany.”

Let us now move to the question: How does ½ year of the State Treaty on Gambling “feel”.

The law was announced as a “court-proof solution”, and thus as a legal blessing. Flashback: As late as 15 Mar. 2007, the legal counsel for the German Lotto- und Toto-Block, Dr. Manfred Hecker, declared during a hearing before the state Parliament of North-Rhine Westphalia (quote from the official minutes of the hearing before the Parliament on the topic of gambling):

“Let us initially turn to a monopoly which is based on an irreproachable legal foundation. Such a monopoly, contrary to the present situation, is court-proof. This means that it will be possible to prevent illegal providers by means of administrative law, civil law and also criminal law from offering, operating and brokering their illegal services in the German market.”

Let us initially turn to the **financial consequences** for the private gambling industry in Germany on the one hand and for the State Operators on the other hand:

In a press release from the 10th of June 2008 the German Internet Industry Association **BITKOM** focuses on the current private Internet Betting industry. This sector is booming especially in times when Europe’s leading soccer nations meet in Switzerland and Austria. According to a new marketing study **2,2 million Germans are betting in the internet on a regular basis**. Approximately 700.000 Germans are betting on the UEFA European Championship Tournament. According to BITKOM Vice-President Achim Berg these figures indicate that the private i-betting business is booming in Germany!

Let’s turn to the state operators:

The former Minister of Finance and the Interior for the State of Schleswig-Holstein, Ralf Stegner, obviously just like the decision-makers in the other Federal States, was of the opinion that the maintenance of the state monopoly in the area of sports betting and lotteries is indispensable for

charitable purposes. Mr. Stegner, in the final parliamentary debate regarding the State Treaty on Gambling on 13 December 2007 in Kiel, still said – quote:

“...At the same time, the maintenance of the state monopoly continues to secure the state’s income from lotteries and sports bets, which is used for charitable purposes such as sports, culture and social projects...”

The Prime Minister of Schleswig-Holstein, Peter Harry Carstensen, also could only justify his “giving in” – contrary to his personal opinion – regarding the draft of the State Treaty on Gambling with financial interests:

“At present, there are no legally safe alternatives to ensure the income from gambling for charitable purposes.”

(compare:

<http://www.ftd.de/politik/deutschland/224566.html?mode=print>)

Less than four months later, a report on the State Treaty on Gambling in the newspaper Kieler Nachrichten was fittingly titled

“Gambling: Is the State the loser?”.

This is because even now a massive reduction in gambling turnover for the first quarter of 2008 must be recorded for the state-run providers. The news met with a divided response among the members of the parliamentary parties in government. “What we feared would happen is now actually happening”, declared the member of parliament for the CDU, Hans-Jörn Arp, who had been fighting vehemently against the State Treaty. For the Chairman of the State’s FDP parliamentary party, Wolfgang Kubicki, it is a **“financial catastrophe”**.

On the figures:

„Wir kämpfen ums Überleben“ („Now we fight to survive“) says Günther Schneider in an Financial Times Deutschland interview from **9th of June 2008**. The CEO of one of the leading **State Lotteries NKL** (www.nkl.de) complains that since the enactment of the ITG not even half a year ago his **revenues dropped more than 25 %** (annual revenue in 2007: 437,5 Mio. Euro). The reason is as simple as death bringing for the State providers: State Lotteries in Germany are not allowed to sell and advertise their lottery tickets via Internet, TV or telephone anymore. *„Mit dem Telefonmarketing haben wir unseren wichtigsten Werbeweg verloren“ („Telephone marketing was the most important contribution channel for us. There is no way to gain new customers if you are not allowed to attract customers with your gambling products“).*

Gross earnings of the gambling houses are down 10 per cent, Oddset's turnover collapsed by up to 50 per cent. For the KENO-bet, the reduction amounted to 30 per cent, Lotto on Wednesday and on Saturday each had to record losses of approx. 11 per cent of their turnover. Thus, altogether about 8 million Euro of turnover have been lost since January, said Mr. Kubicki after inspecting the parliamentary query (Drucksache 16/2007) at the end of April 2008.

The Bavarian Ministry of State also had to take criticism from the Highest Bavarian Court of Auditors. This institution, in its annual report for 2007 (in German) in particular states that an examination of the marketing organisation and of the cost structures of internet marketing is overdue. This is because the state-run lottery administration subsequently expanded and improved sales continuously through the internet. For instance, additional personnel was employed specifically for the gambling offers on the internet, and several million Euro were invested into software and hardware. Between 2001 and 2006, this distribution channel developed very successfully, as can be seen from the following overview:

Development internet business

As the internet offers up until recently were blocked in Bavaria and most of the other Federal States in 2007, the lottery administration calculates that turnover will be down by approx. 50 million Euro for the last year. According to the Court of Auditor's estimate, this alone would lead to reduced income (net proceeds and lottery tax) for the State of Bavaria amounting to 20 million Euro. A few days ago, Lotto Bayern resumed its offers through the internet. The justification provided in this context of the alleged fight against addiction will not be very credible against this background.

The reasons for the huge reductions mainly are massive restrictions on advertising and marketing, which is what the independent ifo-insitut already predicted at the end of 2006 in a comprehensive study on gambling. The self-imposed shackles will most probably lead to further losses in turnover for the state-run providers, and to an expansion of the black market, if the monopoly is obstinately maintained without taking into consideration the actual circumstances (also see: TIME Law report by Prof. Dr. Dr. Schneider).

Legal consequences for the Federal States

"At this point, I do not wish to respond in detail to the concerns regarding European and constitutional law expressed against the State Treaty on Gambling by the Parliamentary Scientific Service and by others...". This was the reply to the legal concerns given by the Minister of the Interior of Schleswig-Holstein in the Parliament's final debate on the State Treaty on Gambling at the end of 2007. The Parliamentary Scientific Service had raised considerable legal concerns in case of an implementation, based on a study by Prof. Dr. Johannes Caspar dated 11. October 2007, which – had it been considered reasonably – could only have led to a rejection of the new law. The legal weaknesses have also already been recognised by numerous German administrative courts.

The non-compliance with constitutional and community law of

the State Treaty on Lotteries has not only been confirmed by the European Commission, but – since the beginning of this year – also by more than a dozen German administrative courts. Under the title *„A black day for the State Treaty on Gambling“* the law firm Hambach & Hambach reported as early as in January 2008 that the **Administrative Court of Schleswig – just like the EU Commission – considers that EU law is being violated and that the Court submitted to the ECJ questions under European law regarding the new sports betting monopoly.** Since the beginning of the year, the main proceedings of several law suits were suspended, also by the highest administrative courts of the Federal States, against the background of these preliminary ruling procedures. Hambach & Hambach has also recently been able to obtain a positive decision for a private provider of sports betting agent in a main proceedings before the Administrative Court of Freiburg, and thus a suspension of the State Treaty on Gambling for this client.

The Court's arguments are a downright slap in the face for the new distribution concept of the German Lotto- und Totoblock: During the hearing, the Court reached the conclusion that the state supervision did not even dictate a marketing concept for the state-run provider, that no advertising guidelines had been created and that the receiving offices would continue to work on a commission basis. The receiving offices – accessible to the public – continue to present a danger for youth protection, just as had been criticised by the Federal Constitutional Court in 2006. The court states among other things:

“A sports betting agent (betshop) who transfers bets to an EU-licensed operator does not act illegal in the sense of Art. 284 of the German Criminal Code (illegal gambling) as the new Interstate Treaty on Gambling breaches EU law. Therefore the authorities cannot base an administrative prohibition order on the violation of criminal law.”

Thus, the VG of Freiburg for the first time held that a sports betting broker also has the right to broker sports bets at fixed odds for providers holding a licence in another EU country, without having to obtain permission by an authority in Baden-Württemberg.

The Federal State's failure to implement advertising guidelines and the unrestrained fuelling of the passion for gambling by the state-run operators inevitably lead to an examination by the courts. For instance, the queues in front of the lottery shops known from the past have recently come to an abrupt end through a decision by the Higher Regional Court of Munich dated 22 April 2008. In a case against the Federal State of Bavaria, the Court prohibited advertising for a lottery jackpot in three cases. The slogans "play along" and "Lotto ... current jackpot: approx. 18 million Euro" were held not to comply with the requirements set by the State Treaty on Gambling for the advertising for the operation of lotteries. This was reported by the Wettbewerbszentrale (central office for the prevention of unfair competition), an inter-branch and independent institution of the German economy, which had initiated the proceedings.

However, it is not just the private (online) providers of sports bets who criticise the implementation of the new State Treaty, but also large German advertising vehicles such as the football club VfB Stuttgart, who initiated a court clarification of the advertising prohibition for BWin. Friedhelm Repnik, boss of the Toto-Lotto-Gesellschaft of Baden- Württemberg, defends the state betting monopoly and considers a clarification by the courts as initiated by the club to be "simply indecent", as he said in a recent interview with Südwest Aktiv. During the same interview, Mr. Repnik, when asked what the advertising prohibition would mean with regard to the addiction potential, replied – quote:

"We no longer advertise in a stimulating way, but only provide information."

The state-run providers now themselves exploit what the private providers have been banned from, i.e. perimeter advertising in the football stadiums.

Conclusion

The first half of the year 2008 have been disillusioning for the advocates of the gambling monopoly. This is because in reality we are rather seeing the beginning of the end of this short-lived law. We may even see BWin banners in the Allianz Arena during the next Bundesliga season, instead of lottery "information" provided by the state.