The spirits that I called…

A year-end retrospective of the State Treaty on Gambling from the point of view of legal economics

Year after year at Christmastime, the movie "Scrooged", based on Charles Dickens' story "A Christmas Carol", flickers across the screens in Germany. In this US comedy, the unscrupulous and stubborn TV producer Frank (Bill Murray), is visited in succession by three ghosts – the ghosts of the past, present and future. The three mirrors Frank is shown by the ghosts do not show anything positive, and at the end of the film they bring him to repentance.

Let us now take the liberty of holding a mirror to the much-discussed State Treaty on Gambling and its advocates, and of taking stock.

The mirror of the past:

Before the State Treaty on Gambling took effect, in particular the 16 lottery companies of the Federal States rendered homage to the new regulation as the bringer of salvation. The website Lotto.de, for instance, stated during the ratification phase of the State Treaty on Gambling in 2007:

> *"With the State Treaty on Gambling, politicians consistently implement the requirements set in the fundamental judgement by the Bundesverfassungsgericht (German Constitutional Court) on 28 March 2006. The regulation of gambling in Germany thus is strictly oriented to the objective of player protection.* ***The companies of the Deutsche Lotto- und Totoblock welcome the fact that the heads of government of the Federal States consistently move forward on this path. The State Treaty has become effective as of 1 January 2008, and leads to legal certainty*** *(compare http://www.lotto.de/kommerzialisierung3.html.)."*

On the other hand, substantial losses in turnover for the state-run providers already began to show before the new State Treaty became effective. On 19 October 2007, the newspaper Berliner Morgenpost, for instance, published the headline "Berlins Bundesliga-Sportclubs sind massiv gefährdet" ("Berlin's Bundesliga clubs are in serious danger"), and summarised the Federal States' intention of implementing the State Treaty as follows:

"The political fight of the German Federal States against gambling addiction, and the private competition for the state monopolies on the gambling market, will prove to be expensive for the Berlin budget, and will – sooner or later – jeopardise the financing of various sports clubs, art events and social projects."

The mirror of the present:

After a period of only one year "the welcome" extended to the State Treaty on gambling obviously seems to turn into regret. For instance, Hans-Peter Schössler, head of Lotto Rheinland-Pfalz, against the background of expected turnover reductions for Lotto Rheinland-Pfalz of approx. 50 million Euro, demanded **"a "clean competition" between private and state-run gambling providers."** **(see http://www.az-badkreuznach.de/region/regional.php?oid=4308080). In other words: "let's get rid of the State Treaty on Gambling and bring in a liberal system." Schössler's indirect demand for a reasonable competition model in the area of gambling is understandable, not only in view of the decline in turnover (according to the Deutsche Lottoverband (German lottery association), the Federal States may face reductions in income due to the State Treaty on Gambling amounting to 5.5 billion Euro by 2011, see: http://www.welt.de/wams_print/article2874493/Das-Spiel-verdorben.html; also on this topic: "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?”

The EU Commission is also known to lack enthusiasm in this German legislation.

“Brussels objects to re-drafting of German betting monopoly“ was the headline in the newspaper ”DIE WELT“ in a report on 28 November 2008, which continues as follows:

> *“The controversial State Treaty on Gambling has caused a great deal of annoyance in Brussels. The EU Commission’s legal service issued a remarkably clear statement against the State Treaty on Gambling, in a German case before the European Court of Justice (ECJ). A brief to the ECJ which has been made available to “DIE WELT” states that thus, German politics in the area of gambling are fundamentally inconsistent, so that the criteria of coherence and consistency, determined by the European Courts, are not being fulfilled. This open criticism on the European level shows that the Treaty, effective only since the beginning of 2008, and therefore the safeguarding of the monopoly of state-run providers of gambling, is on unsteady ground.”*

The mentioned brief by the Commission to the ECJ relates to proceedings conducted by the Gibraltarian online gambling provider Carmen Media (represented by the law firm Hambach & Hambach) before the Verwaltungsgericht (VG – Administrative Court) of the German Federal State of Schleswig-Holstein. Carmen Media’s objective: To obtain recognition of its valid EU gambling licence against the background of the fact that the State Treaty on Gambling violates Community Law, and is therefore not applicable. At the beginning of 2008, the VG decided to suspend the proceedings and to refer the decisive questions regarding European law to the ECJ for a preliminary ruling.

Looking at the submission decision by the VG of Schleswig Holstein, it becomes clear that the Commission shares the VG’s opinion. During the hearing in January 2008, the presiding judge expressed her legal opinion that a state monopoly in the area of sports bets can only be justified with the objective of combating gambling addiction if **all** legal regulations and actual implementations by a Member state in the **entire** gambling market – not only the provisions on which the sports betting and lottery monopoly are based – form a systematic and consistent set of regulations. In this context, the judge made a very graphic comparison: If a state prohibition or monopoly on wine and beer was justified with a reference to the dangers of alcoholism, it would hardly be understandable if hard liquors continued to be freely available (see also PM von Hambach & Hambach vom 31.1.2008. This graphic comparison has its reasons: In 2007, the ECJ decided in the Rosengren case on the Swedish monopoly on the sale of alcohol that a state monopoly cannot be justified by the combat against addiction if the sales quantities of the addictive substances are unlimited (judgment dated 5.6.2007, in case C-170 (Rosengren, ECR 2007, I-4071), par. 44-47). Transferring this to "lottery addiction" (if such a thing existed), which would not be directly linked to a substance, this would mean that the state would have to introduce a quantity restriction on the addictive product "lottery". A person potentially in danger of "lottery addiction" would, for instance, only be allowed to fill in one lottery ticket per week, and would be blocked from taking part in the other lottery draws. The participation in state lotteries without a quantity restriction, as practised today, would therefore be illegal.

Coming back to the EU Commission: In the mentioned statement, it reaches the conclusion that the State Treaty on Gambling violates higher-ranking Community law due to the incoherence of the German gambling regulations. Should the ECJ follow this opinion, German courts would have to cease application of the regulations which violate European law. In this case, the VG in Schleswig Holstein would be forced to decide on the validity of Carmen Media's EU licence in Germany, without taking into consideration the prohibition of private providers resulting from the State Treaty on Gambling. In paragraph 43 of the brief concerned, the Commission furthermore suggests to the ECJ that mere discretionary decisions by an authority would also violate community law if all licensing prerequisites were fulfilled. This means that if the VG after the ECJ decision came to the conclusion that the regulations restrict the freedom to provide services as set out in Art. 49 EC Treaty in an unjustified manner – for instance because the monopoly system in Germany in itself is inconsistent, i.e. incoherent – it could either determine that Carmen Media may directly operate in Germany on the basis of its Gibraltarian licence, or that the discretion to be exercised by the gambling supervisory authority (in this case: the Ministry of the Interior of Schleswig Holstein), would be reduced to zero if all licensing prerequisites were fulfilled, which would mean that Carmen Media could commence legal operations in Schleswig Holstein. This inevitably means that the current flood of lawsuits against the gambling monopoly would be decided in favour of the private providers, which would overthrow the monopoly for good.

Should politicians in the German Federal States continue to stubbornly adhere to the State Treaty on Gambling, in spite of the fact that some lottery companies start to show better judgment and in spite of the current legal chaos, there will be a show down before the ECJ and, after that, before the VG of Schleswig Holstein. In an article published recently in the magazine Europäische Zeitschrift für Wirtschaftsrecht, "Gelten die Grundfreiheiten auch für Geld- und Glücksspiele?" (Translation: Do the fundamental freedoms also apply to games for money and games of chance?), we deal with a Portuguese case submitted to the ECJ, which is in a more advanced stage than the German cases regarding time and procedure. Can conclusions be drawn from this case for the German cases?

Prior to this, we shall deal with a topic which already formed the centre of criticism by the EU Commission in the infringement proceedings initiated against Germany at the beginning of 2008 (on this topic, see: http://www.betting-law.de/cms/cms/front_content.php?idart=373) : The question regarding the **enforceability of the internet prohibition in section 4 subsection 4 ITG 2008**. In the letter of formal notice (infringement proceedings No. 2007/4866), the Commission states as follows: *"The prohibition of games of chance on the internet is not suitable in order to reach the intended objective, as it is almost impossible for the German authorities to enforce such prohibition."*

Is this regulation a "weak link" in the State Treaty on Gambling? If this is the case, the spirits called by the advocates of the State Treaty on Gambling with its controversial passing at the end of 2007, will soon put an end to the nightmare, and will call a new spirit: horrendous damage claims by private gambling providers (such as Carmen Media) against the Federal States and thus against the already hard battered taxpayer.

The mirror of the future:

A monitored – i.e. not insidious – liberalisation of the (internet) gambling market (see also "Proposed Legislative Restructuring of Gaming Law, based on the Sports Betting Regulation") has already become reality in Italy and Spain, and will soon also be introduced in France (see the following articles by our Italian, Spanish and French cooperation partners). This will not only provide the players or consumers with the opportunity of choosing from a variety of strictly supervised, legal online gambling offers, but will also – as was the case in Italy – fill the state's OWN (!) coffers with money from gambling. This money is not only urgently needed for the long overdue establishment of an effective nationwide and structured system for the combat of addiction and crime in the area of (online) gambling, but is also required to ensure the continued support of charitable sports and cultural events in the future.

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