

# Full Prohibition on Internet Gaming in Germany – Mission Impossible!

In several decisions concerning clients of Hambach & Hambach, the Administrative Court of Munich has followed the EU Commission and the Bavarian Administrative Court of Appeal in deciding in favour of private eBookies. Aside from general legal considerations, it is primarily technical problems that have motivated these decisions against local restrictions on Internet sales.

*A Report by Attorneys-at-law, Dr. Wulf Hambach, Konrad Miller, LL.M and Karsten Schneidewindt*

At a hearing in the North Rhine-Westphalia Parliament on the 15th of March 2007, Dr. Manfred Hecker, who regularly represents the State Lotteries, said the following:

*“Let us turn our attention towards creating a legally sound monopoly. Contrary to the current situation, such a monopoly would be lawful. This means that it would be possible to use administrative, civil and criminal law to prevent illegal providers from marketing, operating or distributing their illegal services on the German market.*

*An issue that comes up repeatedly is Internet gambling, which could also be prevented (particularly services by foreign providers, including those outside Europe) by cutting off the communication and economic channels used. This is because the firms based abroad need to communicate over the Internet, providers and Internet service providers in order to make contact with the players. By introducing a clear legal system, we could put a stop to this.”*

(unofficial translation)

At the gaming symposium hosted by the University of Hohenheim on the 29/06/2007, the gaming specialist for the federal state of North Rhine-Westphalia, Georg Nagel, followed the usual argument that gambling on the Internet can best be combated with an absolute Internet ban. Further arguments put forward by Nagel, one of the persons responsible for the Draft State Gambling Treaty, provoked a loud murmur in the audience. This was particularly because Prof. Dr. Christian Pohl, Professor for media technology, information management and business studies at the college, Rheinhold-Würth-Hochschule of the Hochschule Heilbronn, in Kützelsau, raised the following issue: It is not understandable that the planned State Treaty prohibits those very sales methods – as opposed to offline casinos, amusement arcades and lottery shops – which best ensure the protection of the youth and the prevention of gambling addiction through Internet technical identification and the potential for monitoring of the players. In response, Nagel remarked – to the astonishment of both the inquirer and the audience – without going into detail that the medium of Internet seemed a bit suspicious to him.

However, recent legal and political developments suggest that this will not be that easy.

In the 05/2006 edition of Betting Law News, we pointed out the technical difficulties associated with preventing access to foreign websites from within Germany. The current **Draft State Treaty on Gambling ( Glücksspiel-Staatsvertrag)** contains a general prohibition on online gaming brokerage. In order to implement this prohibition, the Treaty also provides for the issue of suspension orders to German Internet service providers.

On the 22nd of March 2007, the **EU Commission** issued an opinion against Germany in which it determined that the prohibition on the online operation and brokerage of gaming (contained in § 4

subsection 4 of the Draft) was not compatible with the **freedom of services guarantee** provided for under **Article 49 of the EC-Treaty**. The Commission primarily based its conclusion on the following factors:

- That the general prohibition on gaming on the Internet is not a suitable method for achieving the aims set i.e., preventing gambling addiction and protecting youth;
- That the general prohibition was disproportionate as other milder methods could be used to achieve the aims, such as registration with stringent conditions and a restriction on game stakes;
- That the Federal Republic of Germany does not have any data, studies or appraisals to support the theory submitted i.e., that there exists an actual risk of gambling addiction on the Internet in Germany.
- That the Draft is neither consistent nor appropriate for combating gambling addiction as it applies to lotteries and sports betting but does not apply to games of chance that pose a far higher risk of gambling addiction, such as slot machines and horse betting.

However, this harsh critic has not yet driven the majority of federal state prime ministers to consider a revision of the State Treaty on Gambling. If the Draft comes into force without amendment, it will immediately be subject to legal challenges from the Commission and private operators before national and European courts.

Aside from the general legal considerations regarding the lack of suitability or necessity of the proposed general prohibition on online gaming, there are also considerable **technical factors** that would hinder local restrictions of online services in Germany:

- First, a future general online prohibition couples with **blocking measures** could be **easily circumvented** because

of the decentralised structure of the Internet (see the 05/2006 edition of Betting Law News for further information).

- Secondly, it is also **technically impossible for the gaming operator to localise the exact location of the user.**

In the latest court decisions, this second aspect is central to the court's reasoning. The **Bavarian Administrative Court of Appeal**, in its **Decision of the 07/05/2007**, determined that a prohibition of the Internet service for players from the federal state of Bavaria was illegitimate because the prohibition was not technically enforceable and would therefore be impossible for the sports betting provider (and addressee of the prohibition order). The Court determined:

*“that although there might theoretically be several different methods to determine the location of an Internet user, a practical enforcement of this is currently not possible or would involve a disproportionate level of difficulty as technology is not yet sufficiently developed.”*

The **Administrative Court of Munich** went even further than the decision of the Bavarian Administrative Court of Appeal. In several recent decisions of the 17th of April 2007 (concerning clients represented by Hambach & Hambach, case no. E.g., M 16 K 07.255) the Court indicated that it had no legal objection to (at least) the provision of online sports betting from another EU-Member State by a holder of a EU-license. The negative decisions of the Respondent – the Free State of Bavaria – were repealed and returned to be decided again. In making their decision, the Respondent should consider the following:

*“Whether and to what extent [the service operated from abroad] is to be accepted, namely, if it is not technically possible to exclude solely players from Bavaria from*

accessing the Internet betting service on the foreign Internet site of the sports betting provider (see Administrative Court of Ansbach, Decision of 14/12/2006 – case no. AN 4 S 06.3253 [editorial note: this is the very decision that was affirmed in the above-mentioned decision of the Bavarian Administrative Court of Appeal]).

*It is also to be examined whether the denial of a license to operate online sports betting from a location in another member state – as is the case here – leads to the Plaintiff, in practise, no longer being able to use her authorisation from a member state because a reliance on the authorisation from another member state to operate online sports betting from a location in that EU member state would automatically lead to an infringement of Bavarian law, thereby rendering the authorisation of the EU member state worthless, which would create a situation which conflicts with European law.”*

This means that in making their decision concerning the recognition of the EU-foreign license in Bavaria, it is not to be excluded that the Government of Upper Bavaria will have to:

*determine that at least a portion of the online sports betting service offered is legitimate.*

The conclusions of the Administrative Court of Munich are consistent. It is absolutely impossible for providers from other countries in the EU to take account of the particular conditions in each individual German federal state and to implement various local restrictions in their Internet services. The Bavarian Administrative Court of Appeal has since specifically confirmed this latter point. **For cross-border issues, the Federal States’ competence, and their restrictive policy in the area of sports betting (keyword: “State Treaty on Gambling and Prohibition on the Internet”), have therefore led to a direct collision with the freedom to provide services guaranteed by European law.**

Why?

The ECJ has determined as a basic principle for all kinds of services: According to settled case-law, where measures taken are justified on the basis of an exception provided for in the Treaty, it must be established that those measures **do not go beyond what is objectively necessary for the aim to be achieved** (ECJ, Commission of the European Communities versus French Republic, judgement dated 11th March 2004, C-496/01, par. 68). The necessity of restrictions for reasons of consumer and youth protection, as well as for the avoidance of consequential and accompanying delinquency is rejected by the EU Commission by making reference to the sports betting decision given by the BVerfG (German Federal Constitutional Court), as milder measures exist for the achievement of this aim:

**Compliance with these could be ensured by making them subject to prior approval and control by the authorities, applying the measures of economic supervision (compare further request by the EU Commission dated 21st March 2007, par. 31; for details on the possibilities of supervision, compare the paper *“Proposed Legislative Restructuring of Gaming Law, based on the Sports Betting Regulation”* by Lawyers Dr. Wulf Hambach and Dr. Michael Hettich, Law Firm Hambach & Hambach in Betting-Law-News 03/06).**

This has also been confirmed recently by the VG (Administrative Court) of Gießen:

From the **statutory point of view**, the introduction of state supervision of registration, execution and actual configuration of betting offers would – similar to gaming arcades in § 33 i Gewerbeordnung (German Trade Act) – be **unproblematic**. (Decision by VG of Gießen dated 7th May 2007, 10 E 13/07, p. 16).

In the judgement given by the **VG of Munich (M 16 K 07/532)**,

and delivered to Lawyers Hambach & Hambach on 5th July 2007, **the Court makes direct reference to the ECJ**, who, in its Placanica decision (par. 62), holds:

***If such restrictions – which a state betting monopoly would undoubtedly constitute – do not meet these requirements, Art. 43 and 49 EC Treaty would preclude any national regulation containing criminal law sanctions or an exclusion from the regulated market. The blanket exclusion from the market goes beyond what is necessary in order to achieve the objective of preventing operators active in the betting and gaming sector from being involved in criminal or fraudulent activities.***

One factor must not be forgotten: EU bookmakers (such as in the case decided by the VG of Munich) are subject to strict and comprehensive supervision in their countries of origin (for instance Great Britain or Austria), so that a proper execution of their offered services is guaranteed, among others with regard to the protection of players and the prevention of gambling addiction. The result from the principle of mutual recognition is that supervisory and sanctioning measures in the provider's country of origin must be taken into account.

This has also been confirmed by the **EFTA Court** in its so-called **Ladbrokes Judgement** dated 30th May 2007. Pursuant to this, foreign providers may request the issue of a licence, if a restriction is not justified; such licences must be issued subject to the requirements applicable for domestic applicants. However, **according to the EFTA Court's statement, even the requirement of a licence itself is disproportionate if the company already holds a licence in its state of origin, and if the documents of proof necessary in order to obtain such licence coincide with those requested in the host state** (Judgement by the EFTA Court dated 30 May 2007, E-3/06, par. 55 et seq.).

Present administrative practice, however, does not take

licences from other EU countries into consideration at all. Nor are milder measures even contemplated. As stated by the EFTA Court in par. 62, authorities, but also legislators, are obligated to examine whether milder measures could be applied. The restrictions against sports betting providers from other EU countries therefore represent an unjustified breach of the freedom to provide services guaranteed under Article. 49 of the EC Treaty.

**This dogged legislative and administrative practice in Germany may therefore turn out to be very expensive for the individual Federal States, the Federal Republic and, last but not least, for the taxpayer!**

The disputes between the **USA** and several WTO-countries (including the EU) are a prime example of the unpredictable consequences that occur when an Internet prohibition on gambling is insisted upon in spite of all warnings: As a result of impeding access by foreign Internet gambling providers, the USA now faces **claims to the amount of 3.4 billion US – Dollars** from Antigua and Barbuda. In order to avoid another negative WTO-decision, the USA has removed “gambling and betting” from the scope of the GATS-Treaty without further ado. However, the US cannot resolve the issue that easily – **Japan, India and the EU** are now **claiming compensation** for this removal of online gambling from the GATS Treaty (see International Herald Tribune of the 20th of June 2007 “U.S. faces growing pressure over online gambling”, available under <http://www.iht.com/articles/2007/06/20/business/gamble.php>). Further developments will be eagerly awaited. It recently became known that the claims brought on foot of the new Internet gambling prohibition by the EU against the USA, could be far higher than the WTO-claims brought by the Caribbean States. This is because: Compared to Antigua and Barbuda, a far greater number of online gaming operators licensed in the EU are now affected by the US-ban. In the article, “EC seeks

compensation for US internet gambling ban”, which appeared in the June-edition of the WordOnlineGamblingLawReport, it was stated that:

*“Sanctions sought by the (EU-) Commission are likely to exceed the annual trade concession of 3,443 billion sought by the government of Antigua and Barbuda, because of the number of remote gambling operators based within the European Union that have been forced to withdraw from the US”*

Simply prohibiting is one thing but – given this threat of monetary sanctions – issuing an illegitimate ban is an entirely different matter.

To return to Germany: It can only be hoped that the prospect of a clampdown by the EU-Commission as guardian of the (EU-) Treaties, together with the fact that national courts have repeatedly decided against restriction attempts, will encourage a turnaround in politics and administration before its too late.

It has to be clear to everyone: Nobody can be expected to achieve the impossible.

A final word on the issue that “A gambling monopoly protects the State from losing income from gaming stakes to other countries via the Internet”: It is not only the German monopoly that holds this fear, this fear of losing revenue via the Internet is shared by the Austrian monopoly. However, this fear is without any merit, as was reported in the Austrian daily newspaper, “Die Presse”, print-edition 04/07/2007. The article was based on a recently published Austrian study by the Market Research Institute, Marktforschungsinstitut Kreuzer, Fischer & Partner:

*“The market researchers, who conducted an extensive study based on data from Casinos Austria, private providers, the EU, gambling associations, bookmaker associations and*

chambers of commerce, reached one main conclusion: If the State no longer wants to put up with losing money to illegal gaming, it must liberalise at least part of the market, including the online area, where the monopoly cannot be enforced anyway. (...). **“Through liberalisation gaming will be legal and controlled”**, argued Kreutzer in response to Casinos Austria’s repeated claim that only the monopoly could ensure the protection of players.“