

The new Interstate Gaming Treaty – All's well that ends well?

1. Introduction

In its third attempt it should now be successful: the revised law ("Glücksspieländerungsstaatsvertrag") shall implement the legislator's objectives definitely, legally secure and in line with the constitution as well as with European law: regulation of the market, protection of the consumers against gambling addiction and securing government revenue, even though seven private licensees will be given a slice of the pie. Not only in view of the present opinion of the European Commission of July 18, 2011 on the revised draft it remains doubtful whether these and further objectives will be achieved.

Of course the revised law is discussed intensively in legal terms. It won't take long until every question will be discussed from different views which, of course, only experts will be able to understand: does the revised law comply with European and Constitutional law, does the law comply with national and European anti-trust laws, why are only seven licenses granted, do the licences need to be announced, if the revised law does not comply with European law does this fact lead to a total inapplicability (even in respect of competition and criminal law), is the online market comparable to the offline market, are casinos given preferential treatment, what about commercial gambling halls, who can be made liable (online and offline), are bets on horse racing sports bets, is poker a game of chance and if so, why are profits taxed, what happens to online poker, do the tax rates have choking effects, is internet blocking proportional, can there be different regulations within one member state, what happens to GDR licences, etc? To the existing hundreds of

articles and opinion and thousands of proceedings, more will be added in the near future.

The whole debate on legal issues overlooks the real centre of attention: the market and consequently also the consumer who is very affine to the internet and uses the internet as a matter of course in professional and private life. The question arises whether this consumer is protected by the revised law or whether he can be reached at all.

2. Internet use in Germany

The Internet can no longer be removed from everyday's life. A steadily growing demand and increasing use within the total population and among young adults is illustrated by the following examples:

- Around 19.7 million Germans are signed up Facebook (cf. <http://facebookmarketing.de/userdata/>). This corresponds to around 37 % of young internet users over 14 years.
- German mobile phone users downloaded around 900 millions of mobile applications – briefly called apps – to their mobile phones. This means that the number of app-downloads has more than doubled in comparison with the previous year (plus 112 %)
- The Germans spent around 390 millions in 2010 for downloads to stationary and mobile PCs, 49 % more than in 2009
- Around 20 million Germans use the internet in conjunction with their hobbies. This corresponds to 39 % of the German internet users over 14 years.
- Already 7 million Germans use videophoning via services like Skype. Internet compatible TVs increasingly allow Internet telephony.
- 19 million Germans look for medical advice on the internet.
- 9 million Germans order medication online. The number of authorized internet pharmacies is constantly rising.

Currently there are 2.560.

- 12 million Germans buy movies on the internet.
- 27 million Germans purchase products by auction.
- 10 million Germans buy PC games on the internet.
- 27 million Germans use online banking services.
- Every fourth internet user has already had experience in online-dating

Source: Bitkom, see http://www.bitkom.org/de/markt_statistik/64000.aspx.

And the reality shows that a “internetisation” of everyday’s life has already taken place. Especially young people are online nearly all the time. One might consider this to be right or wrong, the facts however must not be ignored.

3. Previous influence of the regulation on online gambling

From January 1, 2012 everything should change. As of that date, online betting will only be possible to a limited extent and with only a few licensed providers with worse odds. Online poker as it is known by the users today will no longer exist.

In order to assess the likelihood of this scenario it is worth taking a closer look at the previous legal and actual development.

a) Historical facts

In March 2006 the Federal Constitutional Court decided that the old Lottery Interstate Treaty was unconstitutional. Further to this judgment the Interstate Gambling Treaty came into force on January 1, 2008, despite all concerns expressed in the legislative procedure. Since 2008 it is imperative to combat compulsive gambling which until then was only discussed marginally. In addition to that, protection of minors and players shall be ensured, the desire to play shall be channelled and the risk of fraud as well as other related delinquency shall be averted. And finally the revenues accruing from the state’s monopoly shall be secured. Since

then one can hear and read every day in nearly all media that one should play lotto but at the same time playing lotto includes a danger of gambling addiction.

This attempt of regulation has failed, too. As is well known, the ECJ stated in autumn 2010 that the Interstate Gambling Treaty violates European law. The objective of the Treaty to combat the dangers of gambling is not pursued by the state in a consistent and systematic manner.

b) The development of the online market

During the whole time there have been a lot of debates and disputes in literature and in Civil, Administrative and Criminal Courts whether the legal provisions are lawful and whether they can be applied. Thereby, Courts and jurisdictions arrived at contradictory decisions. After 10 years of working and advising in the field of online-gaming the author got the impression that the outcome of a lawsuit was mainly depending on place and date of the decision as well as on the competent jurisdiction.

Despite of the uncertain legal situation and perhaps supported through this situation, the online market in Germany has developed positively. The internet user probably has not understood the purpose of the provisions. Anyhow, he has not accepted them. The user continues to play, and if necessary he plays at operators which are not licensed in Germany, often referred to as "illegal" providers. The much-cited Goldmedia-Survey "Gambling market Germany 2015" revealed an impressive market development: the gross gaming revenue of the whole online market increased on an annual average of 30 % from 2005 to 2009, on the online poker segment even 35 % annually (<http://www.goldmedia.com/presse/newsroom/gluecksspiel-in-deutschland.html>). The German online poker market is meant to be the largest or the second largest market of the world although this market should not exist.

The human being obviously wants to gamble, online as well as offline. He gambled despite the ban. And it is clearly evident that this will not change as of January 1, 2012. The stated political aim to channel the natural desire to gamble and to make use of this desire in order to ensure an effective prevention of gambling addiction as well as to secure state's influence and participation has failed. Especially the internet ban had no relevant channelling effect, and certainly not towards German offers. In fact, companies, staff, ad budget, direct taxes and profit taxes are outsourced abroad. It appeared that users who are affine to the internet refused to be influenced by printed paper which at the same time is extremely controversial and which is considered to be illegal by many experts.

c) Internet blocking

The restriction of telecommunications secrecy by internet blocking mechanisms as set forth in sec. 9 of the new draft will not lead to significant changes. The past as well as the experience of other countries show that internet bans are useless and can easily be bypassed by users. Those who enter „internet blocking circumvention“ at google one or two clicks later can watch instructions on YouTube how internet blocking mechanisms can be circumvented easily within seconds. Each new blocking technology leads to new circumvention possibilities and services, which are made public through blogs, search engines or Facebook friends. The Internet was created to overcome intermittent communication channels. The unreflected adoption of regulatory approaches from the offline world therefore often is doomed to failure.

It is amazing that it has just been recognized in Germany that the law which should establish blocking mechanisms to combat child pornography is unsuitable. Nevertheless, the new State Treaty on Gambling shall be secured by internet blocking. This is neither technically working nor to be accepted by the population. An effective technical blocking of gambling

providers in the German Internet would require a very intensive monitoring of all Internet traffic. Among other things encrypted connections (eg VPN tunnels) which are used in the course of today's corporate communications would have to be prohibited. There is a real doubt that this is proportionate. One can also ask whether this attempt to monitor the Internet with methods of totalitarian states is worthy of a modern democracy. Latest news from Iran, for example, about the introduction of a censored local Internet should rather discourage than inspire.

d) Interim Results

Previous attempts by the legislators to regulate the online market have not reached their objectives. Moreover, tax revenue on income taxes and transactional taxes could not be saved. Technology, jobs and taxes have left the country. The consumer continues to play abroad on regulated or unregulated services. Only those who anyhow do not play online are protected from something that they are not endangered.

4. Conclusions

□□The author does not fail to notice that it is a difficult task to balance the various objectives and interests in a federal state and to consider constitutional law, antitrust law and European legal requirements at the same time.

□□However, experience shows, that the approach adopted so far has not proved successful. The regulations have neither protected the consumer nor secured revenues. The consumer is left alone in the absence of acceptable alternatives and revenues disappear abroad. It must therefore be asked why the previously failed approach shall be continued with some minor modifications within the new Interstate Gaming Treaty. Citizens will neither accept nor understand it. The user will seek to find the way to play at operators in Europe and outside Europe and gambling addiction is not combated.□□

What could work are reasonable rules that do not go too far with regard to regulatory or tax purposes. In particular in the context of online issues absolute standards do not apply. It is preferable both in terms of the user's protection and the state's revenue situation, to direct a large number of consumers to licensed and appropriately regulated operators with market-oriented tax rates than a small number of users to a small number of highly regulated and taxed providers.

□□The review should also take into account the experiences and models from abroad, instead of continuing unflinchingly on the present path, particularly since more and more European countries rely on models as implemented in Italy, France or Denmark. Germany will not succeed in establishing artificial boundaries on the internet or turn back the clock to the last millennium.□□

Keeping in mind the interests of the consumer and the long-term protection of public revenues another failure should be avoided. Even the lottery monopoly would not survive a renewed failure of the regulation.

□□It is to be hoped that the latest postponement of the signing of the new State Treaty on Gambling resulting from the Commission's criticism will be used to review once more whether the regulations still fit into the present and whether there are realistic chances of achieving the desired objectives. Those who support the current draft should also reflect on the consequences of repeated failure. Hence, a more pragmatic approach should be chosen that takes into account foreign experiences as well as the realities and functionality of the Internet.