Online Gambling Provider under the Laws' Scrutiny against Money Laundering – Sec. 9c para. 4 GwGErgG as a Federal mean to establish the Residualmonopoly

§ 9c Abs. 4 GwGErgG und die Fortschreibung des Residualmonopols der Länder

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Zusammenfassung

Nach § 9c Abs. 4 des Ergänzungsgesetzes zum Geldwäschegesetz (GwGErgG) vom 18.02.2012 sind Online-Glücksspielanbieter, die ihren Sitz nicht im Geltungsbereich dieses Gesetzes haben, verpflichtet, zu überprüfen und sicherzustellen, dass ein Zahlungsdiensteanbieter dem deutschen „Identifizierungsstandard" genügt. Lediglich in einem solchen Fall wird es dem Online-Glücksspielanbieter gestattet, diesen Zahlungsanbieter in die Vertragserfüllung einzubinden. Die vorliegende Abhandlung geht zunächst der Frage nach, ob durch diese Vorschrift das Residualmonopol der Länder fortgeschrieben wird. Anschließend wird dargelegt, dass europäische Anbieter von E-Geldprodukten, die in anderen EU-Mitgliedstaaten niedergelassen sind und in diesen die dortigen rechtlichen Geldwäscheregulierungserfordernisse erfüllen, nach sekundär- und primärrechtlichen Maßstäben auch ohne die zusätzliche Erfüllung der Spieleridentifizierungsvorgaben des § 9c Abs. 4 GwGErgG als Zahlungsdiensteerbringer für das Online-Spiel in Deutschland zuzulassen sind.

I. Introduction

On the occasion of the opening of the online gaming market by the Glücksspieländerungsstaatsvertrag ("GlüÄndStV"), the obligated parties of the GwG has been extended onto online gaming providers by introducing the amendment act to the German act against money laundering (Ergänzungsgesetz zum Geldwäschegesetz (GwGErgG)), especially sec. 9a–d GwGErgG. According to sec. 9c para. 4 GwGErgG online gaming providers have to ensure that associated payment services providers who are not located in Germany have verified the identity of all participants who maintain a payment account or a payment card. Otherwise no transactions may take place. Therefore the Parliament of the Federal Republic of Germany (Deutscher Bundestag) has enacted obligations imposed on online gaming providers to safeguard technically rather specific identification requirements for payment services providers under sec. 9c para. 4 of the GwGErgG.

II. Impact of sec. 9c para. 4 GwGErgG on online gaming providers

As the authors have already pointed out, sec. 9c para. 4 GwGErgG imposes, inter alia, the obligation on online gaming providers established outside Germany to safeguard that their clients' identity is secured according to the technically rather specific identification requirements for payment services provided for by German law.[1] If the wording of sec. 9c para. 4 GwGErgG was interpreted literally, electronic money products that have been developed and designed to safeguard e-trade security especially in the EU internal market would be excluded despite their digitally sophisticated monitoring and identification tools to protect consumers, combating and preventing black market and money laundering operations.

Since there is currently no electronic money product which satisfies the technically rather specific equivalence criteria and identification requirements for payment services under sec. 9c para. 4 GwGErgG according to the German Federal Ministry of Finance, even if its provider is operating from and regulated by another Member State under the terms of Directive 2009/110/EC,[2] the implementation of the GwGErgG leaves banktransfers and creditcards as the only possible payment methods. Those are both more costly and result in long buy-in and verifying periods due to the time delay compared to modern electronic money payments making them less attractive for providers, as well as for their clients. The German online gaming offer would suffer a significant competitive disadvantage compared to foreign offers and black market games. The payment methods possible according to sec. 9c para. 4 GwGErgG are barely suitable for the Internet and establish a highly unattractive offer. Due to the failure of the amendment act to the German act against money laundering to enable an effective online identification procedure under real time conditions necessary to provide a practically attractive online gaming service, the "technical specifications" under sec. 9c para. 4 GwGErgG may amount to an obstacle to "the smooth functioning of the internal market" (recital 3 of Directive 98/34/EC[3]). Ultimately an implementation of the rule oriented strictly to the wording of sec. 9c para. 4 GwGErgG might hinder the issuing of concessions to private online gambling providers altogether due to the lack of an attractive offer. Even if less strictly applied, the rule precludes the channeling effect the GlüÄndStV seeks for.

1. Sec. 9c para. 4 GwGErgG as a hinderance to issuing concessions to online gaming providers

By limiting the payment methods, sec. 9c para. 4 GwGErgG impairs the attractiveness of online gambling. Nonetheless attractiveness is essential for achieving one of

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1 *Koenig/Meyer*, K&R 2013, 17 ff.

2 Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC, O.J. L 10.10.2009, p. 7–17.

3 Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, O.J. L 204, 21.7.1998, p. 37–48.

the core goals of sec. 1 GlüÄndStV: to canalize the gambling activities in legal channels in order to prevent black market gaming and associated risks. Online gaming providers are directly committed to this goal. Therefore sec. 9c para. 4 GwGErgG institutes a mean for the competent authorities to refuse issuing concessions to online gaming providers by referring to the impact of the rule on the attractiveness of their offer.

Sec. 10 para. 1 S. 1 GlüÄndStV stating that the federal states of Germany have to provide a sufficient gaming offer in order to attain the goals of sec. 1 GlüÄndStV (provision of security) accentuates the problematic impact of sec. 9c para. 4 GwGErgG on the online gaming sector. This provision should be persued by issuing concessions to private gaming providers. In case of those failing to ensure the attainment of the goals of sec. 1 GlüÄndStV the German federal states have to persue those goals by offering attractive gaming opportunities themselves ("Residualmonopoly").[4]

On the one hand, due to sec. 10 para. 1 GlüÄndStV, private online gaming providers become integral components of this provision of security of the federal states and system of the Residualmonopoly by obtaining a concession, on the other hand the referring of the provision of security to the goals of sec. 1 GlüÄndStV establishes the obligation of the German federal states to replace any inefficient offer of private online gaming providers with their own efficient, that is to say, attractive, offer.

Therefore sec. 9c para. 4 GwGErgG not only limits possible payment methods by de facto banning foreign payment providers, but impacts the attractiveness of online gaming offers. The latter might be used to refuse issuing concessions to private online gaming providers.

Sec. 9c para. 4 S. 1 GwGErgG actually works as a mean for the federal states to establish the Residualmonopoly.

2. Competence issues

The federal states of Germany obtain the authority to regulate online gaming issues. By implementing sec. 9c para. 4 GwGErgG as a de facto obstacle for issuing online gaming concessions, the federal Government overstepped the borders of its authority and in fact undermines the intended market opening of the GlüÄndStV. The regulation functions as a mean for the federal states to establish the residualmonopoly.

3. Precludance of the channeling effect

If sec. 9c para. 4 GwGErgG is less strictly applied, it still precludes the channeling effect the GlüÄndStV seeks for. Since there is currently no electronic money product which satisfies the technically rather specific equivalence criteria and identification requirements for payment services under sec. 9c para. 4 GwGErgG, issuing concessions to private online gaming providers currently stipulates an obligation to use German payment service providers. De facto the principle of privity of contracts is limited and foreign payment service providers are discriminated against. From a financial and technological point of view the German market for payment service providers is foreclosed to foreign development, a lack of innovative impulses as well as factual omission of the market opening due to the lack of an attractive market is to be expected.

4. Sec. 9c para. 4 GwGErgG as a mean to realize the residualmonopoly

However strictly applied, sec. 9c para. 4 GwGErgG will result in establishing the residualmonopoly. By causing this effect, the federal Government as the not competent authority to regulate online gaming has created a mean to refuse the issuing on concessions and prevent the market opening for online gaming.

III. Unjustifiable mean

Even as sec. 9c para. 4 GwGErgG interacts with the GlüÄndStV as a mean to establish the residulamonopoly, with all its associated complications, the norm itself cannot be justified according to EU-law principles.

As the German State Amendment Treaty on Gambling (Glücksspieländerungsstaatsvertrag der Länder, which entered into force on July 1, 2012) has already been subjected to the notification procedure with regard to its online bans and concessionary restrictions according to Directive 98/34/EC in 2011/2012, the "technical specifications" of equivalence criteria and identification requirements for payment services under sec. 9c para. 4 GwGErgG are likewise to be scrutinized under the notification procedure.

In its communications of March 20, 2012 (notification 2011/0188/D;SG(2012) D/50777) and of December 7, 2012 (notifications 2012/519/D and 2012/520/D; C (2012) 9376) the European Commission held that the German authorities failed to demonstrate the coherency and proportionality required to restrict the free movement of online betting services under Article 56 of the Treaty on the Functioning of the European Union (TFEU).

The Commission emphasized the fact that due to the lack of information provided by the German authorities, it was not in a position to assess the compliance of the German State Amendment Treaty on Gambling and the planned switchover of Schleswig-Holstein to the system of online bans under the State Treaty with the requirements of a proportional, consistent and systematic approach under EU-law.

1. The notification procedure under Directive 98/34/EC as amended by Directive 98/48/EC (rules governing information society services)

Due to their restrictive impact on online services, the obligations imposed on online gaming providers to safeguard technically rather specific identification requirements for

4 Comp. *Koenig/Bovelet*, ZfWG 2011, 236, 237 f.

payment services providers under sec. 9c para. 4 GwGErgG, as well as the corresponding internal market restrictions on payment services providers, are subject to the notification procedure and the stand still requirements according to Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations as amended by Directive 98/48/EC[5] namely rules specifically governing Information Society Services.

For the notification purposes of Directive 98/34/EC, Article 1 para. 2 defines technical specification as *"a specification contained in a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product"*.

Due to the failure of the amendment act to the German act against money laundering to enable an effective online identification procedure under *real time* conditions necessary to provide a practically attractive online gaming service, the "technical specifications" under sec. 9c para. 4 GwGErgG may amount to an obstacle to "the smooth functioning of the internal market".[6]

Thus, sec. 9c para. 4 GwGErgG contains rules on information society services within the meaning of Article 1 para. 5 of Directive 98/34/EC as amended by Directive 98/48/EC namely rules specifically governing information society services.

2. The openness to innovation approach according to the e-money Directive 2009/110/EC

The amendment act to the German act against money laundering is not adapted to the *effet utile* of the openness to innovation approach according to Directive 2009/110/EC on the taking up, pursuit and prudential supervision of the business of electronic money institutions. The openness to innovation principle is underlined in recital 8 of Directive 2009/110/EC:

"(8) The definition of electronic money should cover electronic money whether it is held on a payment device in the electronic money holder s possession or stored remotely at a server and managed by the electronic money holder through a specific account for electronic money. That definition should be wide enough to avoid hampering technological innovation and to cover not only all the electronic money products available today in the market but also those products which could be developed in the future."

"In addition to issuing electronic money", Article 6 para. 1 of Directive 2009/110/EC entitles electronic money institutions *"to engage in any of the following activities"*, which are listed in lit. a) to lit. e).

According to Article 6 para. 1 lit. a) electronic money institutions are entitled to provide *"payment services listed in the Annex to Directive 2007/64/EC"*.

Article 4 para. 3 of Directive 2007/64/EC ("payment services Directive 2007/64/EC") defines a "payment service" as "any business activity listed in the Annex".[7]

The second bullet point of para. 3 in the Annex includes the *"execution of payment transactions through a payment card or a similar device"*, the latter clearly without requiring a payment account for the transaction.

By contrast, sec. 9c para. 3 GwGErgG requires that the payment transaction is routed via an established payment account.

Thus, the German legislator has not implemented correctly Article 6 para. 1 lit. a) of the e-money Directive 2009/110/EC depriving the *execution of payment transactions through a payment card or a similar device* of its innovation effect, i.e. a transaction not routed via a payment account as a technological product innovation in the sense of recital 8 of Directive 2009/110/EC.

In addition, Article 6 para 1 lit. e) *("business activities other than issuance of electronic money")* also strengthens the openness to innovation approach.

However, the obligations imposed on online gaming providers to safeguard technically rather specific identification requirements for payment services providers under sec. 9c para. 4 GwGErgG have an extremely restrictive impact on electronic money services.

The de facto ban has even been admitted by the German Federal Ministry of Finance during the legislative process.

According to the Federal Ministry, not a single electronic money product provided from another Member State would currently satisfy the equivalence criteria and identification requirements for payment services under sec. 9c para. 4 GwGErgG.

3. The forthcoming regulatory approach under a fourth anti-money laundering Directive pursuing (de lege ferenda) a more risk-based and a better targeted approach to assess effectively existing risks

Furthermore, according to recital 24 of Directive 2009/110/EC:

"This Directive introduces a new definition of electronic money, the issuance of which can benefit from the derogations in Articles 34 and 53 of Directive 2007/64/EC. Therefore, the simplified customer due diligence regime for electronic money institutions

5 Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, O. J. L 217, 05.08. 1998, p. 18–26.

6 Recital 3 of Directive 98/34/EC.

7 Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market, O. J. L 319, 05.12. 2007, p. 1–36.

under Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing should be amended accordingly".

This amendment process of Directive 2005/60/EC ("third anti-money laundering Directive")[8] is currently on its way.

Following the amendment announcement of recital 24 of Directive 2009/110/EC, the Commission has brought forward a proposal for a fourth anti-money laundering Directive *"accommodating changes to the international standards in order to incorporate more **risk-based** elements which should allow **a more targeted and focused approach** to assessing risks and applying resources to where they are most needed"* and in order *"to ensure a more comprehensive coverage of the gambling sector"* (IP/12/357).[9]

In the light of the above mentioned Commission's observations addressed to the German authorities in the notification procedures no. 2011/0188/D, no. 2012/519/D and no. 12012/520/D according to Directive 98/34/EC with regard to the lack of *risk-based* informations necessary to assess the EU-law compliance of the German State Amendment Treaty on Gambling, inter alia of its online bans and restrictions, the mere *abstract* risk assumptions taken by the German legislator under sec. 9c para. 4 GwGErgG contravene the Commission's observations as well as the forthcoming fourth anti-money laundering Directive's regulatory approach pursuing (de lege ferenda) a more risk-based and a better targeted approach to assess effectively existing risks instead of abstract risk assumptions.[10]

The redundance of the obligations imposed on online gaming providers to safeguard identification requirements for payment services providers under sec. 9c para. 4 GwGErgG becomes particularly obvious with regard to the strict identification and authentication prerequisites already imposed on license holders under the German State Amendment Treaty on Gambling as well as with regard to the State Treaty's betting limits of € 1.000/month.

Instead of duplicating safeguards against money laundering, the German legislator should pave the way to ensure a more comprehensive and coherent regulatory coverage of the gambling sector in line with the forthcoming fourth anti-money laundering Directive.[11]

4. The identification requirements under sec. 9c para. 4 GwGErgG as „stricter provisions" adopted or retained in force by Member States according to Article 5 of the third anti-money laundering Directive 2005/60/EC

The obligations imposed on online gaming providers to safeguard technically rather specific identification requirements for payment services providers under sec. 9c para. 4 GwGErgG, as well as the corresponding internal market restrictions on payment services providers, qualify as *"stricter provisions"* Member States may adopt or retain in force to prevent money laundering under Article 5 of the third anti-money laundering Directive 2005/60/EC.

However, these non-harmonised *"stricter provisions"* adopted or retained in force by Member States according to Article 5 of Directive 2005/60/EC have to comply with the principles of coherency and proportionality under EU-law as required to restrict the free movement of (online betting and payment) services under Article 56 TFEU.

According to consistent case-law of the Court of Justice of the European Union (ECJ), activities which consist in allowing users to participate, for remuneration, in gambling constitute "services" within the meaning of Article 56 TFEU.[12]

Services, including payment transactions, fall within the scope of Article 56 TFEU where at least one of the providers is established in a Member State other than that in which the service is offered.[13]

The obligations imposed on online gaming providers to safeguard technically rather specific identification requirements for payment services providers under sec. 9c para. 4 GwGErgG, as well as the corresponding internal market restrictions on payment services providers, qualify as *"stricter provisions"* adopted or retained in force to prevent money laundering under Article 5 of the third anti-money laundering Directive 2005/60/EC.

These non-harmonised *"stricter provisions"* amount to restrictions imposed on online gaming and payment services providers hindering their free movement of services guaranteed by Article 56 TFEU and, therefore, have to be justified under the terms and conditions of the principles of coherency and proportionality established in the consistent case-law of the ECJ.

Thereunder, the obligations imposed on online gaming providers to safeguard strict identification requirements for payment services providers under sec. 9c para. 4 GwGErgG, as well as the corresponding restrictions on payment services providers limiting the cross-border supply of their services, are subjected to the requirements of a proportional, consistent, coherent and systematic approach.

8 Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, O.J. L 309 of 25.11.2005, p. 15–36.

9 See Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (COM/2013/045).

10 See Article 11 no. 2 of the Proposal:*Member States shall ensure that obliged entities apply each of the customer due diligence requirements set out in paragraph 1, but may determine the extent of such measures on a risk-sensitive basis.*

11 See to the revision of the EU Framework on the prevention of money laundering in general *Langlois*, eucrim 3/2013, p. 96–98.

12 ECJ, joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07, ZfWG 2010, 332 ff. – *Markus Stoß u. a.*, para. 56; Case C-275/92, [1994] ECR I 1039 – *Schindler*, para. 25 and Case C-67/98, [1999] ECR I 7289 – *Zenatti*, para. 24.

13 ECJ, Case C-67/98, [1999] ECR I 7289 – *Zenatti*, para. 24.

According to the ECJ, any national restriction of the free movement of services, which does not comply with the proportionality and coherency test, is to be judged as *inapplicable.*[14]

The ECJ judgment of September 15, 2011 (Case C-347/09, *Dickinger&Ömer)* clearly allocates the burden of proof to the Member States to supply all essential evidence that the measures do indeed comply with the requirements deriving from the principles of proportionality and coherency:

"In this connection, it is the Member State wishing to rely on an objective capable of justifying the restriction of the freedom to provide services which must supply the court called on to rule on that question with all the evidence of such a kind as to enable the court to be satisfied that the measure does indeed comply with the requirements deriving from the principle of proportionality (Stoß and Others, paragraph 71)."[15]

"It should be recalled in this connection, in particular, that national legislation is appropriate for ensuring attainment of the objective relied on only if it genuinely reflects a concern to attain it in a consistent and systematic manner. It is therefore for the referring court to satisfy itself, having regard inter alia to the actual rules for applying the restrictive legislation concerned, that the legislation genuinely meets the concern to reduce opportunities for gambling and to limit activities in that area in a consistent and systematic manner (see, to that effect, Stoß and Others, paragraphs 88, 97 and 98)."[16]

At least, Germany has not satisfied the Member States' burden of proof to supply all essential evidence that the cross-border payment services restrictions are indeed strictly necessary and coherent:

According to these ECJ case-law parameters, the obligations imposed on online gaming providers to safeguard strict identification requirements for payment services providers under sec. 9c para. 4 GwGErgG, as well as the corresponding cross-border restrictions on payment services providers, do not comply with the principles of coherency and proportionality.

Due to the failure of the amendment act to the German act against money laundering, and in particular of sec. 9c para. 4 GwGErgG, to enable an effective online identification procedure under *real time* conditions necessary to provide a practically attractive online gaming service to consumers, the obligations imposed on online gaming providers to safeguard technically rather complicated identification requirements for payment services amount to an obstacle for instant transactions preferred by the vast majority of online consumers.

Sec. 9c para. 4 GwGErgG *neglects market realities*, i.e. the failure of acceptance of the use of electronic ID cards and of electronic signatures by online consumers, while identification procedures through traditional offline ID cards do neither enable real time nor near time transactions.

The same reasoning applies with regard to sec. 9c para. 3 GwGErgG requiring that the payment transaction is routed via an established *payment account.*

Consequently, the spontaneously incentive driven average online consumer will evade the identification (and payment account) procedure imposed on licensed gaming providers under sec. 9c para. 4 (para. 3) GwGErgG by gaming on online sites of grey or hard core illegal black market providers, and thereby, deprive the EU anti-money laundering policy of its practical effect. Therefore the intended channeling effect as a core goal of the gaming market regulation, sec. 1 GlüÄndStV, is negatively impacted and an unattractive gaming offer, which does not meet EU-law is created.

Furthermore, the payment account and identification requirements imposed under sec. 9c para. 3 and 4 GwGErgG do not take into account in proportional and coherent terms the well established fact that all operations performed on electronic media can be tracked in order to detect problematic or suspicious operations, in particular black market and money laundering operations. This has been confirmed by leading experts during a workshop set up by the European Commission in course of the public discussion on its Green Paper on online gambling in the single market:

"Overall, the access to online gambling products does not appear to have given rise to problem development or addiction at a higher rate than in the offline environment".[17]

Furthermore, numerous technical tools are (only) *digitally* available to protect players, combating and preventing black market and money laundering operations.

Technically sophisticated digital tools are by far more effective in an online than in an offline modus.[18]

The Rapporteur of the European Parliament, *Jürgen Creutzmann*, has presented the Internal Market and Consumer Protection Committee (IMCO) report on online gambling, which has been voted by the Parliament on November 15, 2011.

The IMCO report emphasizes the ECJ case law and underlines that

14 ECJ, Case C-409/06, ZfWG 2010, 407 ff. – *Winner Wetten*, para. 69; Cases C-316/07, C-409/07, C-410/07 and C-358/08, C-359/08, C-360/08, ZfWG 2010, 332 ff. – *Markus Stoß u. a.*, para. 115; Case C-347/09, ZfWG 2011, 403 ff. – *Dickinger&Ömer*, para. 32; Cases C-338/04, C-359/04 and C-360/04, ZfWG 2007, 125 ff. – *Placanica*, para. 63.

15 ECJ, Case C-347/09, ZfWG 2011, 403 ff. – *Dickinger&Ömer*, para. 54.

16 ECJ, Case C-347/09, ZfWG 2011, 403 ff. – *Dickinger&Ömer*, para. 56.

17 Conclusion of the Workshop on Online Gambling: Detection and Prevention of Problem Gambling and Gambling Addiction 25 May 2011 in Barcelona, p. 2. Available at: http://ec.europa.eu/internal_market/gambling/docs/workshops/workshop-ii-conclusions_en.pdf.

18 Conclusion of the Workshop on Online Gambling: Detection and Prevention of Problem Gambling and Gambling Addiction 25 May 2011 in Barcelona, p. 2.

"the internet is simply a channel for offering games of chance with sophisticated technologies that can be used to protect consumers and to maintain public order".[19]

In this sense, Professor Dr. *Michael Levi* (Professor of Criminology at Cardiff University) contradicts in a written statement of October 18, 2012 the basic assumption of sec. 9c para. 3 and 4 GwGErgG, i.e. the myth that online gambling is particularly related to money laundering risks:

"There is a risk of money laundering in e-gaming, as there is in almost every transaction that we undertake. However that risk is significantly less than the risks from off-line gambling because it is extremely difficult to launder more than a thousand euros in this way without disproportionate effort, and moreover, there is more traceability in such transactions than there is in many other mechanisms by which one could launder money. I was using this to dispel the myth that e-gambling was particularly risky, especially in Europe where there are stronger controls over e-wallets and cards than in America, where it is easier to use these as a method of laundering."

Taking account of the risks inherent in any gambling service, especially those risks caused by operators from third countries not licensed within the EU or EEA and, therefore, not adhering to regulated standards, rigid online identification and authentication procedures imposed under gambling law are better adapted to combating black market and money laundering operations than the restrictions imposed under sec. 9c para. 3 and 4 GwGErgG. The latter neglect market realities and incline the average online consumer towards an evasion of the identification and payment account procedure by gaming on online sites of black market providers, and, thereby, deprive the EU anti-money laundering policy of its practical effect.

IV. Conclusion

If the wording of sec. 9c para. 4 GwGErgG was interpreted literally, the norm would cause the possible online gaming to be an unattractive one, due to slow working banktransfers and creditcards being the only possible payment methods instead of real time payment methods. This impact of the norm renders the market opening for online gaming providers illusory and de facto results in realizing the residual-monopoly of sec. 10 para. 1 GlüÄndStV. This effect can only be prevented by interpreting Sec. 9c para. 3 and 4 GwGErgG, according to EU-law principles, in a way that the restrictions imposed under the norm, i.e. the payment account and identification requirements, do not apply to services, including payment transactions, within the scope of Article 56 TFEU where the providers are established and regulated in another EU Member State. Despite the ambiguous wording of sec. 9c para. 3 and 4 GwGErgG, the German legislator has accepted this interpretation according to EU-law in its explanatory statement.

19 See no. 6 of the report on online gambling in the Internal Market. Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2011-0342+0+DOC+XML+V0//EN.

II. ANMERKUNGEN

(Wieder-)Vereinigung des Glücksspielbegriffs

– Anmerkung zu BVerwG, Urteil vom 16.10.2013 – 8 C 21.12 –, ZfWG 2014, 95 ff. –

Annotations on BVerwG, judgement of 16 October 2013 – 8 C 21.12 –, ZfWG 2014, 95 ff.

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Summary

The German Federal Administrative Court (Bundesverwaltungsgericht – BVerwG) had to address the question as to whether a so-called football manager game (in this case: "Fantasy League") is to be classified as a "game of chance" as defined in the Inter-state Treaty on Gambling (Glücksspielstaatsvertrag – GlüStV). The central issue was whether the sum of EUR 7.99 to be paid (for up to seven times) by the participants had to be treated as "stakes" with relevance under gaming law, or as a "participation fee" which would not be relevant under aspects of gaming law. The BVerwG held that "stakes" require a direct connection between payment of the monetary sum and obtaining the chance of winning, which does not exist in a football manager game. In this context, the BVerwG also clarified a question which had been in dispute for years, namely whether the concept of "games of chance" under the GlüStV is broader than the concept of "games of chance" under the Criminal Code (Strafgesetzbuch – StGB), by stating that both concepts are to be understood to be uniform. Another interesting aspect is that, as it were, the BVerwG carried out a risk assessment of the fee-based football manager game in dispute, oriented along the lines of the protection purpose of the prohibition norm under gaming law. This can definitely be understood to be a teleological interpretation and limitation in scope of the term "game of chance" to such games which actually pose a risk for players and minors, in particular as the BVerwG makes reference to the German Trade Regulations (Gewerbeordnung – GewO) with regard to the possibilities of regulating fee-based games.

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Einleitung

Das Urteil des BVerwG vom 16. Oktober 2013 (8 C 21.12) wird teilweise bereits als „Meilenstein in der glücksspielrechtlichen Judikatur" eingeordnet.[1] Das BVerwG sei „auf dem besten Wege, das Glücksspielrecht in Deutschland umzugestalten, wenn auch außerhalb der gesetzgeberischen Intentionen".[2] Nach anderer Ansicht verbiete sich „eine Generalisierung der Entscheidung (...) da sie in wesentlichem Maße auf den tatsächlichen Feststellungen des Berufungsgerichts beruht".[3]

„Bahnbrechend" ist das Urteil in der Tat, und zwar aus mehreren Gründen. Erstens wird ein jahrelanger Streit (erst einmal) beendet, nämlich der Streit um den einheitlichen Glücksspielbegriff im Straf- und Verwaltungsrecht (dazu unter 1.). Zweitens wird der glücksspielrechtlich relevante Einsatz bzw. das glücksspielrechtlich relevante Entgelt von der bloßen Teilnahmegebühr abgegrenzt (dazu unter 2.). Drittens wird die Abgrenzungsdiskussion um das „harmlose Glücksspiel" oder besser Unterhaltungsspiel im gewerberechtlichen Sinne, das sich zwischen genehmigungspflichtigem / nicht erlaubnisfähigem Glückspiel und erlaubnisfreiem (Werbe-) Gewinnspiel befindet, neu belebt (dazu unter 3.).

1. Einheitlicher oder divergierender Glücksspielbegriff?

Ein Glücksspiel liegt nach § 3 Abs. 1 S. 1 Glücksspielstaatsvertrag (GlüStV) vor, wenn im Rahmen eines Spiels für den Erwerb einer Gewinnchance ein Entgelt verlangt wird und die Entscheidung über den Gewinn ganz oder überwiegend vom Zufall abhängt.[4]

Umstritten ist bzw. war, ob der Glücksspielbegriff des GlüStV identisch ist mit dem Glücksspielbegriff des Strafgesetzbuchs (StGB).[5] Der Streit macht sich insbesondere an der Frage fest, ob der Begriff des „Entgelts" iSd GlüStV weiter geht, als der Begriff des „nicht nur unerheblichen Einsatzes" iSd des StGB. Hinsichtlich des strafrechtlichen Glücksspielbegriffs ist anerkannt, dass nicht jedes Entgelt zum strafrechtlich relevanten Einsatz führt, sondern nur ein erheblicher Betrag, der in Abgrenzung zur bloßen Teilnahmegebühr in notwendigem Zusammenhang mit dem und in Erwartung auf den möglichen Gewinn geleistet werden muss.[6]

Das BVerwG hat diesen Streit nun (erst einmal) beendet, indem es grundsätzlich von einem einheitlichen Glücksspielbegriff ausgeht, der sich an den für das Strafrecht entwickelten Maßstäben orientiert.[7]

2. Einsatz / Entgelt oder Teilnahmegebühr / Mitspielberechtigung?

Das BVerwG stellt klar, dass ein glücksspielrechtlich relevanter Einsatz / relevantes Entgelt nur vorliegt, wenn „die Gewinnchance gerade aus dem Entgelt erwächst". Entgegen der Vorinstanz ist es aus Sicht des BVerwG aber keine Voraussetzung, dass das Entgelt gerade „zur Finanzierung der Gewinne" erfolgt. „Stattdessen genügt es, wenn ein unmittelbarer Zusammenhang zwischen Entgelt und Gewinnchance besteht". Nicht der Gewinn, nur die Gewinnchance müsse sich aus der Entgeltzahlung ergeben. Daran fehlt es, wenn mit der Entgeltzahlung „lediglich die Berechtigung zur Teilnahme erworben wird", wodurch eine „Teilnahmegebühr" und damit kein Entgelt / Einsatz iSv GlüStV und StGB vorliege.[8]

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1 *Ruttig*, Kommentar zu BVerwG 8. Senat, Urteil vom 16.10.2013 – 8 C 21/12 (Bundesligamanagerspiel), K&R 2014, 2019.

2 *Ruttig*, K&R 2014, 2019, wobei man sich nicht zuletzt auch aufgrund der Kritik von allen Seiten, beispielsweise der *EU Kommission* (Ausführliche Stellungnahme der Kommission im Notifizierungsverfahren v. 18.7.2011, C (2011) 5319 und Reaktion der Kommission zur Notifizierung 2011/0188/D v. 20.3.2012, SG (2012) D/50777) oder der *Monopolkommission* (BT-Drs. 17/10365, 21 f. und 45 ff.) bzw. des *EuGH* (verb. Rs. C-316/07, C-358/07 bis C-360/07, C-409/07 und C-410/07, Slg. 2010, I-8069 – Markus Stoß ua; Rs. C-46/08, Slg. 2010, I-8149 – Carmen Media; Rs. C-409/06, Slg. 2010, I-8015 – Winner Wetten) durchaus fragen kann, inwieweit nachvollziehbare und realitätsnahe gesetzgeberische Intentionen in der deutschen Glücksspielregulierung der letzten Jahre überhaupt sichtbar wurden.

3 *Deiseroth*, Super-Manager-Internetspiel (2009/2010) kein erlaubnispflichtiges öffentliches Glücksspiel, Anmerkung zu: BVerwG 8. Senat, Urteil vom 16.10. 2013 – 8 C 21/12, jurisPR-BVerwG 5/2014 Anm. 4.

4 Nicht eingegangen wird im Folgenden auf die Frage der Zufallsabhängigkeit, da diese mangels Entscheidungserheblichkeit nicht thematisiert wurde. Vgl. zur Abgrenzung zwischen Geschicklichkeits- und Glücksspiel mit vielen Beispielen: *Hambach/Liesching*, in: Streinz/Liesching/Hambach, Glücks- und Gewinnspielrecht 2014, § 284 StGB, Rn. 41 ff. sowie speziell zur Sportwette: *Bolay/Pfütze*, § 3 GlüStV, Rn. 21 ff.

5 Für einen weiterreichenden Glücksspielbegriff des GlüStV: VGH München, ZfWG 2011, 417; VGH Kassel, ZfWG 2011, 425; *Dietlein/Hüsken*, in: Dietlein/Hecker/Ruttig, Glücksspielrecht, 2. Aufl. 2013, § 3 Rn. 5; *Hüsken*, Das Verhältnis zwischen glücksspielstaatsvertraglichem Glücksspielbegriff gemäß § 3 Abs. 1 GlüStV und rundfunkstaatsvertraglichem Gewinnspielbegriff gemäß § 8 a Abs. 1 RStV – Echte Konkurrenz oder kollisionsloser Gleichauf?, ZfWG 2009, 153 (155 ff.); *Ruttig*, Gewinnspiel oder Glücksspiel – Machen 50 Cent den Unterschied?, WRP 2011, 174 (176 f.).
Für einen einheitlichen Glücksspielbegriff: VGH Mannheim, ZfWG 2012, 279; OVG Koblenz, ZfWG 2009, 413 (415) und letztendlich auch BGH, Urteil vom 28. September 2011 – I ZR 93/10 – Rn. 66, indem er darauf abstellt, dass Teilnahmeentgelte von höchstens 0,50 € (...) glücksspielrechtlich unerheblich sind und somit auf den strafrechtlichen Glücksspielbegriff mit Erheblichkeitsgrenze rekurriert; *Bolay/Pfütze*, in: Streinz/Liesching/Hambach, Glücks- und Gewinnspielrecht 2014, § 3 GlüStV, Rn. 2 ff.; *Blaue*, Der Glücksspielstaatsvertrag und dessen Evaluierung aus Sicht des privaten Rundfunks, ZUM 2011, 119 (120 f.); *Bolay*, Glücksspiel, Glücksspiel oder doch Gewinnspiel – Einheitlichkeit zwischen straf- und glücksspielstaatsvertraglichem Gewinnspielbegriff, MMR 2009, 669 (671); *Hambach/Münstermann*, 50-Cent-Gewinnspiele: Im TV erlaubt, im Internet verboten?, K&R 2009, 457 (461); *Liesching*, 50 Cent-Games im Internet und im Rundfunk – Straf- und ordnungswidrige Glücksspiele oder zulässige Medien-Gewinnspiele?, ZfWG 2009, 320 (321 f.); *Lober/Neumüller*, Verkehrte Gewinnspielwelt?, MMR 2010, 295 (297).

6 Der BGH (Beschluss vom 29. September 1986 – 4 StR 148/86 –, BGHSt 34, 171 - 180, Kettenbriefaktion) definiert den Einsatz wie folgt: *Darunter wird jede Leistung fallen, die erbracht wird in der Hoffnung, im Falle des Gewinnens eine gleiche oder höherwertige Leistung zu erhalten, und in der Befürchtung, daß sie im Falle des Verlierens dem Gegenspieler oder dem Veranstalter anheimfällt. Allerdings muß es sich dabei wegen der notwendigen Abgrenzung zum bloßen Unterhaltungsspiel um einen Einsatz handeln, der nicht ganz unbeträchtlich ist (v. Bubnoff in LK, 10. Aufl. § 284 StGB Rdn. 6 f.).*

7 BVerwG, ZfWG 2014, 95, Rn. 22: *Zu Recht geht der Verwaltungsgerichtshof davon aus, dass das Tatbestandsmerkmal des Entgelts für den Erwerb einer Gewinnchance gemäß § 3 Abs. 1 Satz 1 GlüStV sich mit dem des Einsatzes für ein Glücksspiel im Sinne des § 284 StGB jedenfalls insoweit deckt, als verlangt wird, dass die Gewinnchance gerade aus dem Entgelt erwächst.* (Unterstreichung durch den Autor).
BVerwG, ZfWG 2014, 95, Rn. 25: *Daraus folgt auch für den ordnungsrechtlichen Glücksspielbegriff, dass sich bereits aufgrund der Zahlung des Entgelts die Gewinnchance oder die Verlustmöglichkeit ergeben muss.* (Unterstreichung durch den Autor).

8 BVerwG, ZfWG 2014, 95, Rn. 22.

Von Dr. Stefan Bolay, München

Nach dem BVerwG muss sich „bereits aufgrund der Zahlung des Entgelts die Gewinnchance oder die Verlustmöglichkeit ergeben". Daran fehle es, „wenn erst weitere Umstände wie etwa das Verhalten von Mitspielern oder Aktivitäten des Spielteilnehmers selbst die Gewinnchance oder Verlustmöglichkeit entstehen lassen. Für den erforderlichen unmittelbaren Zusammenhang zwischen der Zahlung des Entgelts und der Gewinn- oder der Verlustmöglichkeit genügt nicht schon, dass die Zahlung die Berechtigung zur Teilnahme am Spiel vermittelt"[9].

Danach liegt kein Einsatz/Entgelt sondern eine Teilnahmegebühr/Mitspielberechtigung vor, wenn der Spieler nicht (nur) eine Gewinnchance kaufen kann (wie z. B. ein Los oder einen Lotterieschein), sondern (auch) eine Teilnahmeberechtigung, die ihm über einen gewissen Zeitraum das Mitspielen erlaubt, an dessen Ende aber (wie bei Los oder Lotterieschein) die Gewinnentscheidung und die (Nicht-)Realisierung der Gewinnchance stehen.

Nur konsequent ist es daher, dass das BVerwG in einer Folgeentscheidung auch die Gebühr zur Teilnahme an einem Poker-Qualifikationsturnier, dessen Gewinnern die unentgeltliche Teilnahme an weiteren Turnieren eröffnete, bei welchen größere Gewinne in Aussicht gestellt wurden, als Teilnahmegebühr und nicht als Einsatz/Entgelt gewertet hat.[10]

Festzuhalten bleibt trotz dieser Konsequenz, dass die Abgrenzung zwischen Entgelt/Einsatz und Teilnahmegebühr/Mitspielberechtigung und die dadurch folgende Bejahung oder Verneinung eines Glücksspiels mitunter schwierig ist und zu einer abwägungsabhängigen Einzelfallentscheidung wird. Letztendlich steht hinter der Abgrenzung zwischen Entgelt/Einsatz versus Teilnahmegebühr/Mitspielberechtigung wohl schon eine teleologische Reduktion des Glücksspielbegriffs (hierzu sogleich auch unter 3.): Denn je weiter die Zahlung des Spielers am Anfang des Spiels von der letztendlichen Gewinnentscheidung am Ende des Spiels entfernt liegt, desto „harmloser" ist das Spiel mit Blick auf mögliche Sucht- und Vermögensverlustgefahren; und desto weniger ist es notwendig, das jeweilige Spiel unter das restriktive Regime des Glücksspielrechts zu fassen.

3. Verbots- und strafwürdiges Glücksspiel? Teleologische Reduktion und Verhältnismäßigkeitsprüfung

Das BVerwG verdeutlicht anhand der Gewerbeordnung (GewO), die vom Grundsatz der Gewerbefreiheit ausgeht und auch entgeltliche Spiele regelt, die keine Glücksspiele sind, dass allein „diejenigen ‚anderen' Spiele im Sinne des § 33 d Abs. 1 Satz 1 GewO, die Glücksspiele im Sinne des § 284 StGB sind (...), der Regelung durch den Landesgesetzgeber im Rahmen seiner Kompetenz für das Ordnungsrecht überlassen (bleiben)".[11] Damit greift das Glücksspielrecht „subsidiär" und nur für strafrechtlich relevante, und aufgrund ihrer Gefährlichkeit streng zu regulierende „Glücks"-Spiele, die folglich dem Ordnungsrecht und nicht dem Gewerberecht unterfallen müssen.

So führt das BVerwG wörtlich aus: „Die ordnungsrechtliche Regelung dient nach § 1 GlüStV dazu, die Spielsucht zu bekämpfen, den Jugendschutz zu gewährleisten und vor Begleitkriminalität zu schützen. Dieser Zweck erfordert nicht, über einen Einsatz hinaus auch eine bloße Teilnahmegebühr in den Tatbestand einzubeziehen. (...) Selbst der Beklagte hat in der mündlichen Verhandlung bestätigt, dass von dem Fußballmanagerspiel für die Spieler keine Suchtgefahr ausgehe."[12] Und weiter: „Vor dem rechtsstaatlichen Gebot der Verhältnismäßigkeit sind die Beschränkungen durch den Glücksspielstaatsvertrag nur gerechtfertigt, soweit sie zur Bekämpfung der genannten Gefahren geeignet, erforderlich und verhältnismäßig sind."[13]

Diese Ausführungen sind nichts anderes als eine teleologische Reduktion und Korrektur des Glücksspielbegriffs am Maßstab des Verhältnismäßigkeitsprinzips: Ein Glücksspiel iSd StGB und des GlüStV liegt nur dann vor, wenn die Gefahren drohen, wegen derer diese Spiele verboten bzw. streng reglementiert sind. Sind die „spezifischen Sucht-, Betrugs-, Manipulations- und Kriminalitätsgefährdungspotentiale" (vgl. § 1 S. 2 GlüStV) nicht ersichtlich, so liegt kein Glücksspiel im Sinne des GlüStV vor. Die Spiele können gewerberechtlich geregelt werden.

4. Fazit

Die Entscheidung ist bahnbrechend, da sie den Glücksspielbegriff auseinandernimmt und auf ein ordnungsrechtlich notwendiges Maß zusammenstutzt. Wer sich „sklavisch" an den Feststellungen des VGH Baden-Württemberg (Urteil vom 23. Mai 2012 – VGH 6 S 389/11) und an den Vorgaben des BVerwG orientiert, kann nicht nur Bundesliga-Managerspiele, sondern auch (Online-)Pokerturniere[14] oder andere Spiele grundsätzlich außerhalb des Anwendungsbereichs des StGB und des GlüStV veranstalten.[15] Um tatsächliche Rechtssicherheit insbesondere für „harmlose" Varianten von (Online-)Spielen zu schaffen, müsste allerdings der Gesetzgeber oder ggf. die Exekutive handeln.[16]

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9 BVerwG, ZfWG 2014, 95, Rn. 25.

10 BVerwG, Urteil vom 22. Januar 2014, Az.: 8 C 26.12 (noch nicht veröffentlicht).

11 BVerwG, ZfWG 2014, 95, Rn. 24.

12 BVerwG, ZfWG 2014, 95, Rn. 26.

13 BVerwG, ZfWG 2014, 95, Rn. 27.

14 BVerwG, Urteil vom 22. Januar 2014, Az.: 8 C 26.12 (noch nicht veröffentlicht).

15 So zutreffend, wenn auch als fatal kritisierend: *Ruttig*, K&R 2014, 219. Relativierend, da auf eine Einzelfallentscheidung absteliend, die man allerdings nach hiesiger Auffassung in der tatsächlichen und rechtlichen Ausgestaltung sklavisch nachahmen kann: *Deiseroth*, jurisPR-BVerwG 5/2014 Anm. 4.

16 So könnte man beispielsweise § 5 a der Spielverordnung (SpielV) mitsamt der Anlage zu § 5 a an die heutigen Realitäten des modernen (Online-)Spiels anpassen. Die Anlage zu § 5 a SpielV befreit durch genaue Vorgaben an den Spielablauf harmlose Zufallsspiele von einer gewerberechtlichen Genehmigungspflicht, beispielsweise Ausspielungen auf Volksfesten. Oder man fügt im Umfeld des § 33 d GewO einen Genehmigungstatbestand für Online-Spiele ein, die keine Glücksspiele sind. Vgl. zur Diskussion der Anwendbarkeit der GewO auf Online Spiele: *Bolay*, Internet-Geschicklichkeitsspiele – Zulassungsfrei, durch den RStV beschränkt oder nach der GewO genehmigungspflichtig?, ZfWG 2010, 88 ff.; *Hüsken*, Die verwaltungsrechtliche Zulässigkeit von Gewinnspielen im Internet, GewArch 2010, 336 ff.; *Spindler*, Online-Spiele auf dem Prüfstand des Gewerberechts, K&R 2010, 450 ff.