

Questions in place of Clarity: The Decision of the German Federal Constitutional Court on Sports Betting

A Report by Attorneys at law, Dr. Wulf Hambach and Dr. Hendrik Schöttle, Hambach & Hambach

There has seldom been so much confusion in the wake of a decision of the German Federal Constitutional Court in Karlsruhe. At ten o'clock yesterday morning, shortly after the announcement of the decision, headlines such as „Kick-off for Private Providers“ (Manager Magazin), „Sports Betting Monopoly is Unconstitutional“ (Sport1.de), and „In Principle, the State Monopoly on Oddset-Sports Bets remains Permissible“ (FAZ.net), started appearing, as well as many other newspapers titled „The Sports Betting Monopoly is to be retained for the Moment“. The farthest from the truth was probably an announcement, which appeared on the website of an East German radio station: „This Morning the Federal Constitutional Court decided that in the future, Private Betting Shops must also be allowed to provide Sports Bets“. However, it wasn't just in the media that confusion reigned; even betting specialists were left with many questions.

Now that the murmurings in the press have settled, what are we left with?

The court decided that the state sports betting provider in its current condition may not be used to justify the retention of the state monopoly and is unconstitutional. It is left to the legislature to decide, whether it wishes to liberalise the market or retain the monopoly. The Karlsruhe judges stated that new legislation must be introduced by the 31st of December

2007. There are two possible scenarios of what will emerge in the next 21 months:

The first possibility is that the legislature will retain the betting monopoly and provide for this in the legislation. In connection with this, the Federal Constitutional Court emphasised the following:

„If the legislature wishes to retain the betting monopoly, this retention must be consistently based on the aims of combating betting addiction and limiting the fervour of betting.“

If the legislature should decide on this option, things are going to become more difficult for Oddset (the German state provider of sports betting): According to the court, only advertising, which serves informative and explanatory purposes will be permissible. There must be active provision of information on the dangers of addiction, merely having this information in store is not sufficient. Each of the individual services must seek to combat addiction and protect players.

As such, Oddset must suspend its sponsorship of the FIFA Football World Cup 2006 without delay, i.e., immediately and suspend all further aggressive advertising measures (e.g., the 15 sponsoring contracts with 15 of the football clubs in the 1st division of the Bundesliga). Furthermore, the Internet provision by Oddset is also affected by this Federal Constitutional Court decision:

„Based on the fact that the law requires that any betting provision be directed at the combating of betting addiction and the restriction of betting fervour, the lawfulness of allowing participation in betting via the Internet service of the State Lottery Administration is also to be questioned. The representatives of the State Lottery Administration themselves stated that it was not possible to effectively implement youth protection measures (which are a particularly

important element of the prevention of addiction) with regard to this method of sale. The same applies to the use of text messages, which make sports betting possible via mobile phone at any time and from any place“.

In connection with this, we would like to draw your attention to our last newsletter 1 | 2006, in which we suggested that the legitimacy of the provision of betting via text message and mobile phone questionable.

The restrictions laid down by the Federal Constitutional Court are unlikely to provide the framework under which Oddset can be commercially viable – the judges have left no doubt but that they mean their restrictions seriously. An independent watchdog, the prohibition of advertising other than advertising, which does more than merely inform, together with the prohibition of sales channels, which do not have sufficient regard for the protection of players and the youth – such as Internet, text message, TV – are all factors, which would radically curtail the current operation of the state providers. The expansive commercial strategy followed to date would also have to be discontinued.

The other option for the legislature is to surrender the monopoly and to liberalise the sports betting market. In that case, private providers would have to be permitted to get a 'slice of the cake'. Whether this cake would remain so big if the monopoly is retained is anything but certain.

However, this is exactly what Bavaria plans. »We must now improve things«, said the Permanent Secretary of Bavaria, Georg Schmid, in Karlsruhe, who is in favour of a retention of the monopoly. The lawyer representing the complainant, a Munich bookmaker, phrased this more clearly: „The end has come for the state hypocrisy.“

Oddset regards the decision as a positive one: „We welcome the Federal Constitutional Court's decision that it considers a

state monopoly, on principle, suitable for combating the dangers of gambling addiction." said Erwin Horak, President of the State Lottery Administration of Bavaria, which conducts transactions on behalf of all 16 state companies of Oddset. „We are going to analyse the conditions imposed by the Court and implement these as soon as possible.“ was stated in the opinion, but this was without providing any further detail as to how this should be done.

The question is whether Oddset will actually be commercially viable if it thoroughly follows this policy – it is a long time since the monopoly has been as tightly controlled as it is to be according to this latest decision. On the one hand, private providers have been legally active on the German market for many years with Licenses from the former GDR. On the other hand, the number of international providers on the Internet is growing all the time – this is an area, which Oddset must now vacate. This means that Oddset will not only lose market segments in the future but will have to give up this market in its entirety and make do with activities in niche areas.

Others limited to such niche areas include the Online Casino Wiesbaden, which possesses a state license for provision of its services but is very restricted by the conditions and may only operate on a regional level. The number of players, who stray onto the site is relatively low. Such a business model does not constitute any serious competition for big international providers.

Even if the situation initially appears different, there is much in favour of a sports betting law, which also enables private providers to apply for licenses under a licensing procedure and thereby provide sports bets in Germany. On the one hand, it is not possible to effectively prevent the Internet provision of sports bets, rather this can only be kept in control by regulation. On the other hand, Oddset would be far less limited in its operation if there was a

liberalisation of the market. Although this alternative has not yet been discussed in the press, it is the more likely solution. This is because it is hardly conceivable that Oddset would completely withdraw from the sports betting business merely in order to satisfy the requirements of a new law providing for the retention of the sports betting monopoly. In connection with this, it should not be forgotten that if Oddset was to withdraw, the holders of GDR-licenses, such as e.g., Betandwin, would immediately fill any gaps left behind and that there would be private sports betting providers who did not have to comply with these restrictions. This fact must be taken into account by the legislature before it decides against a liberalisation of the market. There are also other unresolved questions. The court decided that a new regulation was conceivable at federal or state level. This raises practical questions: The Federation is responsible for economic law, while the states retain the competence for police law. In other words: Under economic law, an opening of the market lies within the competence of the Federation. Under police law, a restrictive regulation of the monopoly would lie within the competence of the states. But who will decide what direction will be taken?

It also remains to be seen how long it will be until this decision is made. The judges ruled that the commercial operation of sports bets will continue to be "regarded as prohibited" until a new regulation is introduced. However, it will remain up to the criminal courts to determine whether a provider is culpable for doing so.

Irrespective of how the legislature decides – the Federal Constitutional Court yesterday demanded an immediate implementation of its requirements, which will have to take place, whether a liberalisation or a state monopoly is to result. The State providers will now have to start taking down the posters for the World Cup, which have just been hung up.

All in all, it should be clear that there are no grounds for

the elation of Oddset regarding the possibility of the further retention of the state monopoly, as communicated though the press. The retention of the monopoly can be better equated with the relapse of Oddset into the stone-age of sports betting. After all, it is not Oddset or the sports betting legislature that writes the laws of the sports betting market, rather the sports betting market itself, whether this be the German, the European or the global market. In today's media age, a sports betting provider under such strong operative limitations would have severe difficulties surviving.

Bets can now be taken: Will the legislature decide in favour of or against a liberalisation of the sports betting market?