

# The Federal Constitutional Court's Decision in the Case of Sports Betting

Due to numerous interpretations and misconstructions, in addition to our live report from Karlsruhe, we would again like to present the facts and point out the legal and economic consequences of yesterday's decision of the Federal Constitutional Court (Bundesverfassungsgericht).

## 1. The Facts

### What did the Federal Constitutional Court decide?

The state monopoly in its current form was clearly held to be unconstitutional. Fiscal reasons, even such as the promotion of sports, can not justify the state monopoly. The current legal situation and exercise is not compatible with the German Constitution.

The state monopoly can only be justified by effectively fighting gambling addiction – which has not been practised by the state operators so far.

The law governing sports betting must be reconsidered and amended until the end of 2007. The amendments do not necessarily have to be implemented by the German states, but may also be implemented on the federal level. The Federation is competent as the case of sports betting does not only concern police law, but also commercial law.

The legislator may choose between two ways to regulate sports betting. He may either keep the state monopoly, but with clear limitations for marketing and sales, or he may liberalise the market by opening it up to private operators (thus abandoning the state monopoly).

Advertising for ODDSET, the sports betting offer of the state operators, is prohibited for the future, instead only factual information is allowed.

In the meantime, according to the Federal Constitutional Court, operating and conveying sporting bets may be prohibited.

### **What did the Federal Constitutional Court „not“ decide?**

The Court did not decide on the question of culpability. During the transition period the decision regarding Art. 284 German Criminal Code („illegal gambling“), a provision accessory to administrative law, is left to the criminal courts.

The Constitutional Court could not and did not have the competence to decide on Community law. The primacy of Community law still applies. Nonetheless, the court noted, that operating and conveying sports betting was approved by Community law and could therefore not be reserved to the public authorities. For the rest, the court cited the ECJ's /Gambelli/ decision and pointed out that verifying the justification of the state monopoly according to the German Constitution had to be conducted parallel to the verification according to Community law.

## **2. The Consequences of the Decision**

### **More Uncertainty than before the Decision**

In the short run, that is during the „transition period“, until the implementation of new legal regulations, the legal situation for bookmakers and betting operators active on the market has become more uncertain than it was before the decision. While betting acceptance offices have been tolerated by police authorities so far, we are probably going to see more prohibition orders in the near future. This uncertainty also poses serious problems to numerous IPO candidates

(especially chains of betting acceptance offices) as one can hardly judge the sustainability of their business model.

There will not be any ?rampant growth? of private operators and bookmakers as feared by state operators. Conversely, the state operators are forced to withdraw their whole gaming advertisement. Even sponsoring the World Cup should give rise to numerous problems.

A growing conflict between national German law and Community law, often neglected by German courts and authorities, becomes apparent. Prevailing Community law – unlike the Act on the Federal Constitutional Court (Bundesverfassungsgerichtsgesetz) – does not provide for temporary regulation. Therefore, in my opinion, the current legal situation in Germany – despite the Federal Constitutional Court's requirements (prohibiting advertisement for the state betting offer) – remains incompatible with Community law.

Prohibition orders and criminal proceedings will therefore probably fail due to the prevalence of Community law (by the latest when the ECJ is going to have to decide a German case or an infringement procedure against Germany). Therefore the legal conflict will continue – but only fiercer.

### **Clarity for „old“ cases?**

For pending cases one has to point out the Court's statement as to the unconstitutionality of the current legal situation. Therefore, in my opinion, prosecution regarding all present cases can be ruled out. The court has left it to the courts to decide on prosecution regarding cases arising during the „transitional period“ only. In my opinion, preliminary and criminal proceedings have to be suspended.

Irrespective of the prevalence of Community law, all decisions, whether of administrative authorities or courts, based on culpability according to Art. 284 German Criminal Code are unsustainable.

## **Implementing the Constitutional Court's requirements**

We can only hope that the legislator – despite the explosive fiscal and political topic – will not take full advantage of the amply assessed transition period. The Court pointed out both alternatives because of its respect for the legislator. Being inefficient as well as pushing customers towards uncontrolled internet betting operators a „castrated“ monopoly with limited sales and prohibition of advertisement would probably only pretend to constitute a real option. As the Court raised the bar this high, the state offer would not be able to survive on the market.

Regarding the chaos of different state implementation acts, a federal act would be the „cleanest“ solution. Such a Federal Gambling Act could provide consistent uniform licensing criteria for private operators compatible with Community law. The 16 German state legislators are probably not capable of doing so.

## **Reorganising the entire gambling legislation?**

In my opinion, the consequences of the decision for the gambling market will be dramatic in the long run. Ultimately a state monopoly comprehending all forms of gambling can only be justified by fighting gambling addiction, the only common welfare criteria left. In this context the Constitutional Court pointed out that the danger of addiction is far higher for gambling machines and casino games than for sports betting. These were much more transparent than other games of chance. The danger of fraud were lower with bets.

Ultimately this can be understood as a call for amending the laws regarding gambling machines. The advertisement run by state lotteries so far should be unconstitutional in the light of the Constitutional Court's remarks. Following the Court's reasoning, one has to call either for a reduction of state advertisement to a constitutional extent or for allowing

private operators to the market in this context as well.