

In the Aftermath of the Decision of the German Federal Constitutional Court on Sports Betting

It was hoped that the decision of the German Federal Constitutional Court (BVerfG) would put an end to the uncertainties surrounding the German sports betting market. From an examination of the legal situation regarding the sports betting monopoly, before and after the March-decision of the German Federal Constitutional Court (Case no. 1 BvR 1054/01), it would almost appear that things have been worsened by the decision.

In an article in the Berliner newspaper, some months after the decision of the German Federal Constitutional Court, even the German Federal Minister for Justice, Brigitte Zypries, admitted that there are many uncertainties as to the legality of private bookmakers. Therefore, "a stable legal practice is not yet ascertainable".

The request from the German Federal Constitutional Court to refrain from implementing orders for closure until its decision, at the earliest, did at least create a degree of interim stability in the legal situation. Now, however, the legal situation has become even more ambiguous than before for both state and private providers. This is because everybody is acting on the basis of his individual interpretation of the decision. Recent indications even suggest a tendency towards liberalisation.

The prime ministers of the states recently decided that they wished to retain the monopoly and to bring a new state treaty, signed by all of the prime ministers, into force by the 13th

of December 2006. This semblance of common and consistent action is dismaying: There are many indications that there will not be an effective agreement regarding a state lottery and sports betting treaty. Representatives of the states of Rhineland-Palatinate, Baden-Württemberg and Schleswig-Holstein have already stated that they do not consider the monopoly to be the appropriate solution to the current uncertainty. There is also increasing media support for liberalisation. On the 4th of July, the rather conservative Frankfurter Allgemeine newspaper (FAZ) wrote the following, regarding the Conference of Prime Ministers, in favour of a monopoly:

„The decision is not only wrong, it is destructive. Instead of retaining the monopoly, it is high time, that private providers are also allowed measured access – with clear guidelines regarding youth protection and financial security – to the billion euro sports betting industry. Reality has moved on faster than the prime ministers: The monopoly is dead.“

The German **media world** is also strongly and vehemently opposed to a state sports betting monopoly. On the 3rd of July 2006 there was a meeting of representatives of ARD, ZDF, state media institutes and private broadcasting companies (VPRT) in Berlin to discuss how to deal with television advertising for private sports betting. The state media institutes pointed out that the bringing of proceedings against the private broadcasting companies would constitute a supervisory measure, which means that it would be an infringement in the freedom of broadcasting guarantee of the operator. To infringe this guarantee, there must be an unambiguous legal situation. Such an unambiguous legal situation is not currently in existence. The Director of the State Media Institute of North-Rhine Westphalia, Norbert Schneider, defended the decision not to prohibit sports betting advertising. He even defended it against the Government of North-Rhine Westphalia, which was openly of the opposing viewpoint. In a letter to Prime Minister Jürgen Rüttgers, Schneider rejected the accusation of

seeking only to protect the interests of the private broadcasting companies: «This accusation – which I consider to be wholly unfounded – is made by organisations that have lived from and promoted sports betting for decades.» Schneider warned of the legal risks of prohibition, namely, claims for damages made by television providers. This warning is not without foundation. According to European Court of Justice (ECJ) jurisprudence, claims for damages can be made where profits are generated in connection with infringements in European law. Following the decision of the German Federal Constitutional Court in March and the initiation of infringement proceedings against Germany by the EU-Commission, it is clear that the state monopoly is in breach of European law. Furthermore: Despite the assertions by the state provider, Oddset, that the guidelines of the German Federal Constitutional Court regarding advertising restrictions and youth protection have already been implemented, the reality of the situation is much different. An example of this is youth protection, which was emphasised by the Federal Constitutional Court. Oddset is attempting to prevent use of its services by minors by means, which several courts have already deemed insufficient. Up until the end of June we were able to successfully register the player “Test Test” and to place bets with a state lottery company in his name. This cannot be regarded as a secure identity check. If a national court or the European Court of Justice was to conclude that the legal situation specified by the Federal Constitutional Court has not been achieved, this could work out very expensive for the German State.

Developments also appear to be going in the opposite direction at **federal level**. The FDP-federal parliamentary party recently proposed a restructuring of the law regarding sports betting in order to secure sports financing and other common good resources. The differing treatment of this issue at federal and state level as well as the parallel developments at each level may be surprising; this can however be explained by the

fact that the Federal Constitutional Court left several issues open, including who would be responsible for the new regulation. According to the Karlsruhe decision both the federation and the individual states could be responsibly for this.

The **sporting associations** also object to the blockading by the states because they fear this will lead to the discontinuation of subsidies in the long-term. The law appears to be taking a back seat. Private providers rightly defend themselves against it by citing European and constitutional law. Private providers have also had some recent successes on this front: Amongst numerous successful proceedings in interim legal proceedings as well as in criminal law proceedings, the Administrative Court of Munich – including in a case brought by a client of Hambach & Hambach – decided that a sports betting provider, operating on the basis of an Austrian license, must fundamentally have the option of doing business on the German market (Administrative Court of Munich, Decision of the 7/06/2006, Case no.: 16 K 05.2296). In a recent decision, the Administrative Court of Cologne went against the decision of the next instance court, the Administrative Court of Appeal of North Rhine Westphalia (Administrative Court of Cologne, Decision of the 6/07/2006, case no.: 1 K 9196/04). The Administrative Court of Cologne decided that the distribution of sports bets to another EU-country is permissible. In an important decision (Decision of the 26/06/2006 – 1 Ss 296/05) the Administrative Court of Appeal of Stuttgart recently decided that a betting shop operator distributing bets to an EU bookmaker could not be punished because of the legal chaos existing in Germany. In the decision, it was stated that: *„the risks involved in an extremely ambiguous legal situation, as has been created here by the authorities and courts,] [may not be imposed entirely on those subject to the norm. [...] In a legal state, a deed can only be punished if the party concerned could have identified it as a punishable deed beforehand. The decision went on to*

say: In 2 decisions the ECJ stated that it had considerable doubt as to the proportionality of the culpability for infringements of the state betting monopoly as long as the primary aim remains the generation of revenue rather than the prevention of addiction."

To conclude: Instead of spending time temporarily solidifying the doomed and disintegrating monopoly – which, due to the German Federal Constitutional Court guidelines, holds little prospect of success for any party, whether economically, under public order law, or otherwise – it would be far better to consider allowing for the regulated licensing of private provider alongside state providers. This would be equitable for all parties.

In the next article, Dr. Wulf Hambach and Michael Hettich, who completed his doctorate on gambling law, put forward suggestions for the new regulation.