

Federal Court of Justice expresses doubts about the punishability of transferring sporting bets

The Federal Court of Justice (Bundesgerichtshof) expressed substantial doubts about the punishability of transferring sporting bets. With decision of 29 November 2006 (file no. 2 StR 55/06), the Federal Court of Justice therefore annulled the conviction of the accused sports betting agent by the District Court of Frankfurt am Main (Landgericht Frankfurt am Main). The District Court had accused the agent of committing the crime of illegal gambling in accordance with Art. 284 German Criminal Code by transferring sporting bets without a licence to a London based company, which (only) holds an UK license.

The Federal Court of Justice provides the following reasoning:

“The contested decision is subject to doubts with respect to the Federal Constitutional Court’s decision of 28 March 2006 – 1 BvR 1054/01 (NJW 2006, 1261) – regarding the unconstitutionality of the Bavarian sports betting monopoly – and various decisions of the European Court of Justice (in particular its decision of 6 November 2003 – Case C 243/01 Gambelli – regarding the violation of Community law by Italian sports betting provisions). For further details reference is made to the statement of the Federal Prosecutor in its brief of 28 June 2006 and the described practise of the Hessian prosecutors to dismiss criminal proceedings in similar cases.”

In the brief cited by Federal Court of Justice, the Federal Prosecutor argued that it was questionable whether “criminal law could serve to enforce a state monopoly that is in violation of German constitutional law as well as Community

law". In addition, the Federal Prosecutor referred to the reasoning of the Court of Appeal of Stuttgart (Oberlandesgericht Stuttgart) in its decision of 26 June 2006 (file no. 1 Ss 296/05) which stated that the risk of extremely diverging and in part contradicting jurisprudence of criminal courts and administrative courts did not have to be carried out at the expense of a citizen.

Commentary: Considering the decision of the Federal Court of Justice, it seems now to be clarified with regard to criminal law that the cross-border transmission of sporting bets is not subject to punishment. Since not only the Federal Court of Justice but other Courts of Appeal (of Munich and Stuttgart), District Courts (of Ratisbon, Munich, Ravensburg, Essen, Berlin and others) as well as scores of County Courts (of Bielefeld, Munich, Ratisbon, Essen, Biberach and others) decided against classifying the transfer of sporting bets as a punishable offence after the sports betting decision of the Federal Constitutional Court of 28 March 2006, punishment should be excluded due to the lack of guilt at least. Art. 284 German Criminal Code is not applicable due to the primacy of Community law, if the bookmaker, to whom the bets are transferred to, is licensed in his country of origin.