Hessian Administrative Court of Appeal revises its decision of February 2004: A setback for the liberalisation of the German gambling market?

„Interdicting procuring Oddset-sporting bets by private operators is legal – Hessian Administrative Court of Appeal revises its Jurisdiction“ – What is the background of this information?

To come to the point: The press department of the Administrative Court of Appeals could surely have chosen the headline of this very extensive decision more carefully. The „Rhein-Main“ newspaper has chosen a clearer title: „No Community Law on Channel Island“. The Isle of Man, whereon the bookmaker was established in the case, unlike Jersey, does not belong to the Channel Islands, but to the „Irish Sea“. Nonetheless the decision referred to the question of applicability of Community Law to operators from the isle of man.

The Administrative Court of Appeals of Kassel has revised and cancelled its decision of February 9th 2004 (the decision of the Administrative Court of Kassel of June 24th 2004 was revised) since the Administrative Court of Appeals of Kassel in its decision of February mistakenly assumed that the Isle of Man belonged to the EU . The Administrative Court of Appeals did not decide that the procurement of sports bets could generally be forbidden by the authorities.

In fact the Isle of Man is „only“ directly responsible to the

British Crown, and therefore a dependent territory with Home Rule („crown dependency“): The Island therefore is neither a part of the UK of Great Britain and Northern Ireland (which is nonetheless competent for defence and foreign policy), nor a Crown colony (like Gibraltar) and as such, not a member of the European Union. According to Art. 299 VI c EC-Treaty parts of the Community Law are applicable to the Islands in the Irish Sea (e.g. the tariff union and therefore the free movement of goods. The right to a free offer of their services and the free choice of the place of establishment within the Union granted to its citizens and corporation by Community Law, is indeed not applicable to the Isle of Man.

The Administrative Court of Appeals points out the following in the decisive part of its decision:

> *„The Administrative Court has – on the basis if the applicant's contract in the present amendment procedure – rightly found that the provisions of the EC-Treaty on the freedom to provide services and the freedom of establishment are not applicable to agreements reached in Art. 2 sentence 2 and Art. 6 of the protocol Nr. 3 of the isle of man where the company M. is established. (…) Granting the right to the freedom of establishment, and the right to the freedom to provide services to companies of the named type is therefore dependent on whether, as a matter of principle, a physical person holding the citizenship of the member state in which the company is established may invoke these rights. According to the specials January 22nd 1972 this is not the case for citizens of the Isle of Man.“*

In the following, the Administrative Court of Appeals of Hessia comments on the problem on whether sporting bets as a matter of principle have to be classified as games of chance or games of skill (what is of crucial importance to the

applicability of Art. 284 German Penal Code). In conclusion the Administrative Court of Appeals follows the prevailing opinion classifying sporting bets as games of chance. The arguments of the court, that there were not enough scientific conclusions as to the relation between elements of chance and elements of skill regarding Oddset-games are however not convincing in this context. If the Administrative Court of Appeals comes to the conclusion that a final classification could only be reached on the basis of experiences with Odsset-sporting bets for lack of adequate scientific evidence, in my opinion it should have decided differently. The Administrative Court of Appeals had done well making a difference between the sporting bets offered at this time, examining whether the element of chance or the element of skill was more important for each particular sporting bet.

In assume that sporting bets will be offered that are merely to be qualified as games of chance. Rightly the Administrative Court of Appeals mentiones exotic sporting events like the results of the football league of Slovakia, Japan or the USA or the results of the 3rd Scottish division (although are certainly experts to be found for this game, too). The Administrative Court of Appeals, on the other hand, should have reached the conclusion that there are necessarily sporting bets which have to be qualified as games of skill, since they are dependent on the amount of information and the experience of the betting customer. This is especially the case for the outcome of Bundesliga games and those of other important European soccer leagues.

The Administrative Court of Appeals also addresses the element of „providing facilities“ in terms of Art. 284 I StGB insofar as it finds this pre-condition to already be fulfilled if the betting office makes available tables, professional journals, televisions, computers or similar items to make available information on the sporting events. From a penal law point of view, this seems to be a constitutionally problematic pre-

displacement of liability to prosecution. Professional Journals are meant to provide the betting customer with information that does not keep the bet from being a pure game of chance.

As a result one can summarize: In fact the present decision does not concern the question of whether the procurement of sporting bets to an operation licensed in the EU is legal or not. The state monopoly on gaming was not again examined on its conformity with Community- and Constitutional law. In fact the court only found that procuring sporting bets to betting operators outside the EU was illegal since these operators did not hold a public license in terms of Art. 284 German Penal Code. This decision therefore does not help neither the advocates of liberalisation nor the „monopolists“.