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

The Latest Legal and Political Developments on the German Sports Betting Market

A Report by Dr. Wulf Hambach, Hambach & Hambach Attorney at Law

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
bidding 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 blocking 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.
**ii. Proposed Legislative Restructuring of Gaming Law, based on the Sports Betting Regulation**

- A Proposal by Dr. Wulf Hambach and Dr. Michael Hettich, attorneys at law

**Aims of the New Regulation**

One of the main priorities of the new gaming law regulation should be to protect the interests of the common good. This is regularly mentioned in the decisions of the German Federal Constitutional Court and the European Court of Justice in connection with the liberalisation of the gambling market. The main aspects of this are prevention of gambling addiction, the proper and transparent operation of gaming (based on the idea of transparency in the Law of New Media), the prevention of associated criminality (e.g., the referee scandal in Italy and the Hoyzer-betting scandal with Oddset in Germany) as well as the protection of youth and consumers. Given the level of profit generated, the desire to continue to develop popular sports with revenue from the organisation of gambling (in particular, from sports betting) must also be considered.

To realise the aims of the new gaming law regulation, it may be off assistance to draw upon research findings, especially those regarding the prevention of addiction, as well as the experiences of (both state and private) gambling organisations. In order to avoid going outside the scope of *Betting Law News*, the focus of this article will be on the topical discussion regarding the availability of sport betting services in Germany, which are provided by private providers available over the Internet.

**Regulations that may offer Guidance**

A gaming law regulation de lege ferenda has to do more for youth protection and the prevention of addiction as well as the orderly conduction of games than e.g., the Bavarian sports betting law could. The German Federal Constitutional Court has already, in considerable detail, outlined deficits in the implementation in Bavaria in its decision (case no: 1 BvR 1054/01) of the 28/03/2006 (see, the report “Questions in place of Clarity: The Decision of the German Federal Constitutional Court on Sports Betting” in the *02/06 edition of betting law news*). Due to the fact that the laws, which regulate the state gambling monopoly, are short and imprecise, there has been a development of gambling practises, which border on unconstitutional. In so far as existing regulations may be drawn upon to assist in the drafting of a new consolidated law, the focus must be on sports betting laws, which provided for licenses for private providers (e.g., in Brandenburg), prior to the introduction of the State Lottery Treaty (which proscribed a general state monopoly for sports betting). Regulations in other gaming sectors, which already allow private
providers (e.g., the current Casino Law in Lower Saxony and Baden-Württemberg or the regulations in the State Lottery Treaty regarding the organisation of smaller lotteries), might also be of assistance. Other EU countries, where there have been efforts to liberalise gambling law, or where there are successful liberalised systems, may provide useful insight for Germany (e.g., the U.K. Gambling Act 2005).

**Legal Framework regarding the Organisation of Gambling on the Internet**

Before the detailed implementation of the aims of regulation can be discussed, there should be some consideration of the legal framework that is necessary for the organisation of gambling on the Internet.

Because cross-border provision (within Germany) is possible, only unified legislation at federal level makes sense. Where Internet participation is possible, the territorial limitation of legislation to individual federal states is not feasible and can only be achieved through disproportionate expenditure. In the past, fruitless measures were made to prevent participation in the 2002/2003 operated Online-Roulette Hamburg by players from other federal states. The new regulation of sports betting law, whether by a federal law or a state treaty concluded between the states, enables the creation of unified national legislation.

A logical consequence of such unified regulation would be that only one regulatory authority be responsible within the Federal Republic for the issuing of licenses and the monitoring of gambling organisations. This would be strongly advisable in order to avoid diverging decisions and the tendency of operators to apply to the authority with the most lax system. Furthermore, licenses from EU countries must have nationwide validity because of the possibility of cross border participation.

Even the wording of the criminal law provision of §§ 284 et seq. StGB (German Criminal Code) „Anyone who, without an official license, … organises a game of chance …“ is not precise enough because European licenses are not explicitly mentioned. One possible solution would be to accept all licenses issued in the EU as “official licenses” within the meaning of §§ 284 et seq. StGB or to regulate possible restrictions to the freedom of services guarantee solely administratively. In the former case, the wording could be: “Anyone who ... organises a game of chance ... without a license of an EU authority”. In the latter case, the wording would have to be: „Anyone who organises a game of chance ... without an official license, as is necessary under a German law ...“. Therefore, provisions must be included in the individual administrative laws for the recognition of licenses from EU states, which justify the inevitable restrictions of the freedom of services guarantee that
arise. Alone due to the necessary detail and consolidation, the criminal law cannot sufficiently do this.

**Application Procedure and Supervision**

Items, which have already been discussed, include the requirement for a license and the determination as to whether it is the federation or the states that are responsible for this area. The federal administrative law to be created to regulate the organisation of sports bets on the Internet should also include a written application procedure and rules regarding appeal procedures as well as a legal and professional monitoring body. A key part of the new regulation will be the conditions to be satisfied for the granting of a license. This will have considerable influence on the protection of the youth and consumers, the prevention of addiction as well as the orderly organisation of games and the prevention of associated criminality.

It should not be underestimated that the involvement of crucial authorities, e.g., a Ministry of the Interior, would mean a more successful implementation of the priorities of the regulatory law than if a Ministry of Finance was assigned this task, which has also been considered. An appeal procedure, which would go the next superior authority, would serve to relieve the courts. This is in consideration of the large number of applications, which are expected from abroad.

The need for a special legal and professional supervisory body arises from the complexity of the gambling matters, which can only be dealt with by specialists, who's independence must be ensured, particularly because of the high revenue which can be generated with such a license.

While the primary function of the legal and professional supervisory body would be to supervise the correct issuing of licenses, the supervisory body would also continue to carry out supervision to ensure that the providers do not just fulfil the above requirements, such as e.g., the prevention of addiction, to organise sports betting at the time of application but continue to do so on an ongoing basis. Annual audits are just as essential as the possibility of unannounced special audits.

It has become apparent, through the Hoyzer-betting scandal and the biggest football betting scandal in Italy (there is a state sports betting monopoly in Italy too), that the existing state monopoly on gambling is not capable of sufficiently monitoring its own betting service and betting events. The scandal in Italy revealed particularly grave weaknesses in the monitoring of betting events. According to newspaper reports, Giovanna Melandri (Minister for Sport and Youth in the Government of Romano Prodi)
considers extensive reform to be necessary. “Italian football and all European football needs new regulations” said Giovanna Melandri in an interview with the Tagesspiegel newspaper. Following the many corruption scandals in European football causing damages of millions of euros, the “de-railed football industry” must be brought “back on track” explained the 44-year old. In connection with this, Melandri referred to an initiative of the English Government, under which ministers and sports organisations are required to prepare guidelines for the areas of betting, player agencies, and under-age players. In relation to this, I would like to draw your attention to the exemplary DFB (German Football Federation) betting conference in 2005, which dealt with similar guidelines. The aim specified for this betting summit was to examine the possibility of cooperation between the betting sector and sports organisations, particularly with regard to forming an agreement about the introduction of a common early warning and reaction system to prevent game manipulation (see, Betting Law News 3/05 and 04/05). This system has been running successfully in German football since the German Bundesliga season 2005/2006. It must, however, be emphasised that this must be continually expanded and further extended in order for it to remain efficient. This is a major challenge, which must be taken on politically and not just by betting organisers and football functionaries. It would be desirable that e.g., a German Federal Gaming Supervisory Body (see, the article: Betting Law Experts call for a moderate Opening of the German Sports Betting Market in the Berliner Rundschau) would be set up to coordinate and monitor such security networks.

Requirements to be satisfied by all potential Providers

In the discussions to date, the measures to be undertaken by gambling organisers have been limited to the provision of information and a reduction in advertising, about which there has been a great deal of discussion. A legislative regulation only allowing for the provision of information and prohibiting any actual advertising (which also stipulated that references to the dangers of gambling and the names of help organisations would have to be provided) would indeed make sense but this would not be enough. It is more important that there is a precise regulation of the course of the game and monitoring of gaming behaviour. Organisation over the Internet provides many options in this respect, e.g., a limited ban could be imposed where a certain loss is made in proportion to a certain period of play. Equally, in addition to the option of a gaming ban, a permanent ban could be imposed after a certain limit is exceeded, where there is a lack of evidence as to the financial capacity of the player. A regulation of the quotas at which bets are offered is to be balanced in order to keep the incitement to gamble under control.

The regulation of quotas would also have the positive associated effect of limiting ruinous competition and preventing breach of regulations by organisers shortly before insolvency.
To guarantee the orderly conduction of games, the personal and professional requirements of organisers and their businesses should be set at high standards. Alongside the proof of long-term financial ability, in the form of a definite investment capital and a corresponding business plan, there must also be proof of personal reliability by a police clearance certificate and by examination of previous business conduct. As evidence of professional competence, relevant references must be submitted. At the very least, the employees connected with the organisation of games must have relevant competence in the gambling sector.

Given that the admission of private providers creates, for the first time, the chance to put the protection of players ahead of fiscal interests, the new regulation should also take account of the fact that there is sure to be insufficient protection of the youth by state monopolies (e.g., Oddset in Bavaria) in the future.

Methods of Control

A transparent system, which allows the supervisory authority online inspection of the course of the game and the payout models, together with rights regarding on-site inspection, could enable the ongoing control of the compliance by the organisation with the above requirements.

The legislatively proscribed option of imposing conditions and the option of repealing the lucrative license at any time would provide sufficient encouragement (other than has been the case for the state monopoly to date) for private organisers to prevent manipulation and fraud, which disadvantage players. The supervisory authority would also be authorised to issue prohibition orders.

Licenses should only be awarded for a certain period (e.g., 4 years) so that the best concept is always implemented. The selection criteria must always be determined in detail. The protection of players is to be the criterion with the highest weighting. The best prevention of addiction, protection of youth and prevention of manipulation concept must be considered paramount. It is only where there is comparability between applicants on this front that better financial capabilities or greater experience should be taken into account.

An actual quota in the form of an absolute maximum of licenses would not be necessary if the regulation was in the form outlined. A quota would also be difficult to justify as a restriction of the freedom of services guarantee. The high standard set by the licensing requirements will sufficiently limit the number of successful applications.
**Tax System and Development of Sports**

Even if private providers are allowed access, fiscal interests cannot be ignored. Given the enormous profit margins, which can be made through the organisation of sports betting, it is entirely justified to introduce a special sports betting duty in addition to the standard tax obligations, which every company bears. This additional tax could be used for a particular social purpose, e.g., the development of popular sports. It would not be advisable to introduce a standard higher tax rate for sports betting organisations. There is greater general acceptance of a duty levied for a particular purpose and this would also better preserve the principle of equal treatment.

A look across the English Channel reveals one good possible method for resolving the German gaming tax system: By implementing an intelligent tax system for private gaming providers, with a relatively low tax burden, the State could certainly benefit from the pleasant side effect of higher tax revenue. A 2005 report on the English gaming tax year 2004 shows that “competition instead of monopoly and reduction in taxes instead of crippling tax duties” can lead to an increase in revenue. This Report, which was submitted to, and discussed, in the English parliament in 2005 is also worthy of discussion here. This is because the HMRC-Report shows that in 2004, the British state took in 1.421 billion pounds sterling in 2004 (over 2 billion euro, 2.046) in gaming taxes. What is noteworthy is the comparatively low tax rate, which is attractive for businesses. Since the British gaming tax reform in 2003 (decrease (↓) in the tax rate to 15% of gross profit (bets placed minus winnings paid out)), gaming tax revenue has increased by 5.5% (from 1.347 to 1.421 billion pounds sterling). These figures show that, if there is liberalisation and a balanced tax system is introduced at the same time, the state does not have to worry about drastically decreased tax revenue or its effect on sport, culture, etc.

**Conclusion**

The new regulation of gaming law should be taken as a historic chance to create a new economic sector and associated employment as well as to considerably reduce the dangers connected with gambling for players.

By implementing a balanced gaming and sports betting (tax) system, the German State has the chance of introducing an effective regulatory instrument to protect German consumers and at the same time – as has happened in e.g., Great Britain and Austria – generating lucrative tax revenue.
iii. Betting-Law-News from the Netherlands

An article by guest author, Justin Franssen, Dutch lawyer, Van Mens & Wissellink, Amsterdam

Recent developments in The Netherlands:

Litigation between Holland Casino and Ministry of Justice

State casino operator Holland Casino - in a joint effort with the city of Amsterdam and Rotterdam - sued the national government for not allowing a second Holland Casino facility to be located in the cities Amsterdam and Rotterdam. On 16 June 2006 the Administrative Court of Rotterdam rendered a negative ruling for Holland Casino and the cities of Rotterdam and Amsterdam. The parties now have the option to appeal this matter before the "Afdeling Rechtspraak Raad van State", (Council of State) which is the highest instance court in Administrative law matters. At this stage it is unknown if any of the parties have appealed yet. Some observers called the litigation of Holland Casino against the government as remarkable:

Holland Casino obtained its monopoly purely to execute the restrictive Dutch casino gaming policy set out by the Dutch government and the government justifies the casino-monopoly because it is supposed to be the best instrument to have a tight grip on the industry. With this step Holland Casino seems to aim to undermine the restrictive gaming policy of the government who does not allow more casinos in one city.

Pending Appeal case Compagnie Financiere Regionale vs Ministry of Justice
(aka Breda Court Case)

In the first instance main proceedings decision the Breda Administrative Court ruled in December last year that the casino license application from a French private operator (despite the legal monopoly of Holland Casino) could not be dismissed because the Dutch gaming policies do not comply with European law, notably with the criteria set out by the European Court of Justice in the controversial Gambelli case. Holland Casino decided to join the government in the appeal case against CFR and very recently it rendered its written submission to the Council of State Court to be continued. Like in many other European jurisdictions such as Germany and Italy, The Netherlands joins the ranks of countries were conflicting post-Gambelli decisions are rendered.
Temporary exclusive on-line gaming license for Holland Casino

A suggested (new) on-line gaming monopoly for Holland Casino received critique from The Council of State, The European Commission and from the private industry. The law will probably be debated in Parliament on 5, 6 or 7 September. There are indications that amendments will be tabled to the effect to allow more licensees than just Holland Casino. Should this amendment make it to the Chamber than the law needs to be redrafted entirely. We feel the Minister of Justice Mr Donner takes a considerable risk by granting an new monopoly to Holland Casino. In other Member States of the Union this has lead to fierce litigation and action of the European Commission:

In a French case initiated by Casino Groupe Partouche it fights the on-line gaming monopoly granted to Francaise de Jeux. In Sweden litigtion is pending regarding the on-line poker monopoly that was granted to Svenska Spel excluding other interested parties from the licensing process. It is to be expected that Holland will be next in line should the government continue to execute its plans to extend the Holland Casino monopoly on-line.
Alert Memo

Mini-Liberalisation/Deregulation of Gaming & Betting Services in Italy

On 30 June 2006 the Italian Council of Ministers enacted a Law Decree ("LD") entailing an early mini-budget to cut its deficit by an ambitious €11.2bn.

In presenting the LD to the media Mr Romano Prodi, the Prime Minister, announced far-reaching liberalisation economic measures in many sectors including legal and professional services, taxi licences, some medicines now tradable in supermarkets, class actions available to consumer associations and other interest groups, etc.

One the of the domestic industry sectors also substantially affected by the mini-budget is gaming & betting where provisions were introduced aimed at liberalising and somehow deregulating the offer of the relevant services.

Article 39 of the LD, entitled "Measures to tackle illegal gaming" delegates the gaming regulator ("AAMS") to implement the secondary legislation by no later than 31 December 2006 concerning, among others, the following services:

Interactive peer-to-peer remote betting on fixed odds

- Real-money remote skillgaming
- Offer of betting services other than horse racing by operators based in any EU and EFTA countries and even in other countries provided they comply with the reliability requirements to be set by AAMS
- Launch of a licence tender to launch a total no less than 7000 new land-based gaming shops and kiosks throughout the territory
- Fresh regulation of the offer of remote gaming services (including real-money skillgames) subject to payment to AAMS of a fee of no less than €200,000

Tax-wise, the DL provides that with respect to skillgames the applicable rate is 3% of the wagered sum while for bets other than horse racing and peer-to-peer interactive betting, effective as from 1 January 2007 the following rates will apply:
• If the fixed odds bets net turnover recorded over the 12 preceding months is in excess of €1,850mln, 3% per each bet up to 7 possible outcomes and 8% per each bet with +7 possible outcomes

• If the fixed odds bets net turnover recorded over the 12 preceding months is in excess of €2,150mln, 3% per each bet up to 7 possible outcomes and 6.8% per each bet with +7 possible outcomes

• If the fixed odds bets net turnover recorded over the 12 preceding months is in excess of €2,500mln, 3% per each bet up to 7 possible outcomes and 6% per each bet with +7 possible outcomes

• If the fixed odds bets net turnover recorded over the 12 preceding months is in excess of €3,000mln, 2.5% per each bet up to 7 possible outcomes and 5.5% per each bet with +7 possible outcomes

• If the fixed odds bets net turnover recorded over the 12 preceding months is in excess of €3,500mln, 2% per each bet up to 7 possible outcomes and 5% per each bet with +7 possible outcomes

The DL will enter into force on the day of its publication in the Official Legal Gazette and will have to be converted into law by the parliament within 60 days therefrom.

Given the crucial deficit-slashing goal pursued by the above mini-budget measures to bring Italy back in line with the EU parameters, it is expected that the Prodi-led centre-left ruling coalition will fully back and approve the DL in due course even if the very narrow parliamentary majority numbers do not allow to rule out possible setbacks and counter-lobbying coups.
The « Française des Jeux » sentenced for prompting persons aged under 18 to gamble

In the legal framework of a bone of contention between the FDJ and the Syndicat des Casinos Modernes de France, the Court dealing with trade disputes pronounced, on the 12th of June 2006, a summary judgment that, on the rebound, gave new obligations to the FDJ regarding its site accessibility to surfers under 18.

The bone of contention comes from the publication, on the 11th of April 2006, of a press release on the FDJ, wherein the company claims that “its site is only accessible to French residents aged more than 18”, that “the weekly stake is limited (500 €)” and that “the gambler’s huge gains are directly paid into their bank account and not into a gambling account”.

The Syndicat des Casinos Modernes de France takes the matter to court, claiming the existence of an obvious illicit confusion “resulting from the unfair competition related to the misleading advertisement marring this press release, that says that “the (FDJ) site is only accessible to French residents aged more than 18” while surfers under 18 are allowed to consult it”.

In the summary judgment, the judges dismiss this argument. The Court points out that it is true that people under 18 are allowed to access the site, but they cannot participate in the advertised gambling.

The 11th of April press release, issued on the Internet, is obvious advertisement. Its wording is ambiguous because readers may be mislead on the extent of the site accessibility : they may believe that only people aged more than 18 are allowed to view it and gamble, while people under 18 may also view the site, even if they are not allowed to not gamble.

So the mistake induced by this ambiguity only regards the site accessibility, and not the services offered on site by the FDJ as it is certain that only people aged more than 18 are allowed to gamble.

The misleading advertisement targeted here consequently doesn’t fall within the provisions of the L article 121-1 in the Consumption Code, since it doesn’t affect any of the elements of the services concerned by the text, and in particular the “Terms of use”.

An article by guest author, Thibault Verbiest, Law Firm ULYS, Brüssel/Paris
Nevertheless, the Syndicat des Casinos Modernes de France doesn’t stop here. It points out that the 17th of February 2006 Decree n°2006-174 forces, from now on, the FDJ (as well as the PMU*) “to be watchful not to prompt people aged under 16 to gamble”.

According to the judges, “it is obvious that the website notably aims to prompt the reader to gamble. Since it is accessible to people under 16, it prompts them to gamble notwithstanding the provisions of this text”.

The Court consequently remarks that “the illicit opening of the website to people aged under 18 is a manifest disturbance for the Syndicat, considering that gambling amateurs reading the 11th of April press release may be mislead on the FDJ legality of behaviour regarding people under 18, and so favour the FDJ services”.

The judges thus command the FDJ to stop the diffusion of the press release during 6 months within a deadline of 24 hours following the notification of the summary judgment.

If this case only ends with a press release withdrawal, it will also have deeper consequences. The summary judgment may lead to understand that the FDJ website itself prompts people under 16 to gamble. An access control mechanism (known to be very difficult to implement, if we think of the existing jurisprudence in the field of pornographic sites) should be installed in order to limit the access of people under 18 to this message. It is very likely that this forthcoming obligation should eventually apply to each and every gambling and online betting website.
vi. Case Study of Privatisation & Liberalisation of State-Controlled Gambling Markets

An article by guest author, Martin Oelbermann, MECN GmbH, London

The increased focus on reducing gambling opportunities (rather than expanding sales) and the hard-to-control Internet gambling offers make the lives difficult for state-controlled operators. As a result, the strategists in many state lotteries and operators have begun thinking about future scenarios. This fact combined with tight state budgets makes a growing number of state shareholders to see the regular contribution to state budgets makes a growing number of state shareholders to see the regular contribution to state budgets in jeopardy and prompt them to consider liberalization and privatization of their gambling operations.

Recent and ongoing privatizations, such as those of the Greek OPAP and the UK tote, show that this is not just idle speculation. Furthermore do 73% of experts surveyed in a recent MECN survey expect that the number of privatized state lotteries will continue to increase in the near future and experts see some statecontrolled operators’ worth already reaching several billion USD.

There are plenty of case studies, which show the potential of privatization and liberalization including operators in all continents. We would like to focus on the two most known European examples: UK tote and the Greek OPAP.

Case study UK National Lottery – A state lottery run by a private company In 1994 the British National Lottery Commission (NLC) called for bids in a licensing process for the British lottery industry. The NLC is charged by the National Lottery Acts of 1993 and 1998 with issuing the license to operate the national lottery to one company only. In the 1994 call for bids the Camelot Group plc, which had been established that same year, was victorious over rivals such as Richards Branson’s Virgin Group. Since then Camelot as licensee has entered into a contract with the NLC because in the second round of licensing in 2000 Camelot also was granted the license for the next seven years, until 2009. The Camelot Group is a private company that is answerable to the British parliament and regulated by the NLC. Camelot is owned by a consortium of private and state companies; the ownership is structured as follows: Cadbury Schweppes, De La Rue, Thales Electronics, Fujitsu Services, and Royal Mail Enterprises each own 20%.

While in 1994 eight companies put in bids for the license for the UK National Lottery, when the second license was to be granted in 2000, only two companies applied. This led the British government to introduce a proposal in 2003 to increase competition for future licenses. Among other things, the government proposed to move away from granting a
single license and instead to empower the NLC to offer several licenses, each for different areas of the lottery, for applicants to compete for. The expiration terms for each of the licenses would also vary. In November 2004 the committee for culture, media, and sports published a report on the reform of the national lottery. This report argued for closer examination of the consequences of adopting a model involving several licenses to be competed for. Further study, however, led the British government to conclude that it was better to retain the current system since it met all requirements sufficiently. Accordingly, the government focuses on making the competition more effective and to draw more applicants for the third licensing competition in order to achieve the highest possible proceeds for charity.

Currently competitors are gearing up for the bidding process for the next license period. Camelot is again seen as the favorite for a renewal, but several other firms are likely to challenge Camelot. Among the challengers are again Richard Branson’s Virgin Group and betting heavyweight Ladbrokes in cooperation with technology provider Intralot.

**Case study Greek betting and lottery operator OPAP – Partly privatized and publicly traded; the value of the shares held by the Greek state has risen from ca. USD 1.1 billion to almost USD 4.8 billion.**

OPAP was founded in 1958 to organize and operate the national football pools PROPO. In subsequent years OPAP was also granted the exclusive right to offer numerical lottery and other sports betting games. Until 1999, the company operated as a non-profit organization but then OPAP was listed on the Athens Exchange in April 2001.

OPAP paid the sum of Euro 323 million to the Greek state for a license that is valid for twenty years (until 2020). Since OPAP holds the exclusive license in Greece, the company can offer, operate and manage not only certain lottery and betting games but also any new sports betting products subject to government’s approval. In addition, the company has the right to operate and manage all lottery products approved by the Greek government.

As a nonprofit organization, OPAP was exempt from corporate taxation, but this changed after it became a société anonyme. Since then, the company has been paying the usual taxes on corporate profits; tax in 2003: Euro 147 million, in 2004: Euro 266 million. Additionally the value of the shares held by the Greek state (51%) has thus risen from ca. USD 1.1 billion to almost USD 4.8 billion.

Currently, its share ownership is structured as follows: the state is the principal shareholder with approximately 51% of shares, and the remaining shares are traded publicly. As of May
2005, the government will be allowed to further reduce its stake in OPAP to 34%. About 31% of shares are held by institutional, generally foreign, investors.

More information in special report

The text is an extract of the report “Privatisation of state-controlled gambling operators”. The study completed by MECN and coauthors like the investment bank Sal. Oppenheim analyzes the privatization of statecontrolled gambling businesses. The study also includes the results of MECN’s survey of more than 90 industry experts who offered their unique insights and assessments. The study can be obtained at MECN.
On pop-up blockers and commercial gaming procurers

Five-digit court fees and the threat of an administrative fine of 250,000 € due to the violation of distance contract law – judgement by the Higher Regional Court (OLG) of Düsseldorf of 13th April 2006, ref: VI-U (Kart) 23/05

RA Dr. Hendrik Schöttle, Hambach & Hambach Lawyers

Betting and gaming law is not the only legal area online providers in the gaming trade must deal with. The current legal disputes mainly concern the questions as to “whether” and “how” private providers are to be admitted – in particular in the area of sports betting. However, the present decision by the OLG of Düsseldorf shows that, beyond the scope of these questions, the implementation of IT law, in particular of distance contract law, plays an ever more important role (on obligations in the field of distance contract law for lottery syndicates, see also OLG of Karlsruhe of 27th March 2002, ref: 6 U 200/01, MMR 2002, 618 et seq.)

These court proceedings concerned the website of a provider procuring customers for a Dutch provider of system lotteries. This provider had initially unsuccessfully been sent a so-called warning notice (a special instrument of German competition law). In the court proceedings following this, which were conducted through two instances, the provider in the end was ordered to implement the obligations of distance contract law – and threatened with an administrative fine to the amount of 250,000 €.

Provider is responsible for the suppression of information due to a pop-up blocker

Whoever intended to conclude a gaming contract on the provider’s website was shown the contract information and participation conditions in a separate pop-up window during the registration process. In the meantime, many browsers have started using so-called pop-up blockers, which do not display such windows or which make the display subject to the user’s consent. In the case in hand, the pop-up window containing the legally required information was not displayed. According to the court’s opinion – which furthermore assumed that presently approx. 50% of all users have installed a pop-up blocker – this does not meet the legal requirements.

Providers displaying important, legally required information in a pop-up window, should change this kind of display in order to comply with the specifications of the OLG of Düsseldorf.
Distance contract law information obligations in the State Treaty on Lotteries do not violate Constitutional nor European Law

The provider had also neglected to comply with the information obligations stipulated in the State Treaty on Lotteries (LotterieStV). Pursuant to § 14 section 2 No. 3 sentence 2, the procurer,

before the conclusion of the contract, has to indicate clearly and comprehensibly in written form the amount to be forwarded to the gambling operator for the participation in the game, as well as, immediately after the procurement of the gaming assignment, to inform the customer of the identity of the operator.

The provider did not itemise the final price in such a way. However, he submitted that the quoted provision could not be applied, as it violated community law and constitutional law. The court did not follow this reasoning. It denied a violation of anti-trust law regulations from the EC Treaty, which had been argued by the provider. It held that the provision did not dictate cartel agreements by the gaming procurers, nor did it facilitate such agreements.

The decision might be different for § 14 section 2 No. 3 sentence 1 of the LotterieStV, which obliges commercial gambling procurers to forward to the operator at least two thirds of the sums taken in from the players for the participation in the game. In this, the court saw a possible restriction of competition for demand between the Federal States or the state lottery companies respectively in the area of the commercial procurement of gambling. However, as the question was not decisive in this case, the court left it unanswered. As the provision on the itemisation of prices could be separated from the remaining provisions, a violation of European law did not come into consideration.

The examination of a possible violation of the German Constitution was denied by the court with regard to the Federal Constitutional Court’s exclusive competence of rejection. However, the various specialised courts are not inhibited from providing interim protection before the decision by the Federal Constitutional Court, to be obtained in the course of the main proceedings. This does not foreclose the decision in the main proceedings.

General indication of expiry of the right of withdrawal inadmissible

Moreover, the court held that the provider’s information on the right of withdrawal was not sufficient. The provider had explained in the information on the right of withdrawal that the user in principle was entitled to a right of withdrawal. However, it said that this right would expire at the time of the acceptance of the order, as the provider in this case
had already made “initial arrangements with regard to the execution of the service obligation assumed” – in other words: as the provider had already started his activities.

The judges held that this information does not comply with the requirements set by the German Civil Code (BGB) and the Decree on Information Obligations in the BGB (BGB-InfoV). They stated that this wording suggested that the customer, after the conclusion of the contract, has no further opportunity to withdraw his declaration, as the execution of the contract is commenced immediately. However, this does not comply with the current legal situation. This is because, pursuant to § 312d section 2 No. 2 BGB, the right of withdrawal only expires if the provider has started the execution of the service before the end of the withdrawal period with the customer’s expressed approval or if the customer himself has brought about this execution. However, such approval cannot be agreed upon in General Terms and Conditions; rather, it must be declared expressly.

**Conclusion**

In the field of entertainment media, legal disputes are no longer exclusively about questions on the admissibility of such services. The competition has found out that, beyond these questions, the specific design of the internet offers can now also be put to the test.

The decision shows that the implementation of internet offers complying with legal requirements is not a static process which is carried out once and then completed for good. Even though the display of information in pop-up windows was unproblematic only a few years ago, this is not valid any more with the increasing spread of pop-up blockers. In particular, if such mechanisms are activated as a standard (instead of having to be activated by the user), the inexperienced user cannot be expected, according to the OLG of Düsseldorf’s decision, to recognise that a pop-up has been suppressed. The party responsible for the correct display of information is not the user, but the provider of this information.

This evaluation might, however, be revised again in the foreseeable future. Only a few years ago, many courts held that it was unreasonable to let a user of a website scroll in order to reach the link to the provider identification. In the meantime, there is a prevailing insight that a user with average experience is familiar with the basic functions of the browsers – which includes scrolling through several screen pages – and can also be expected to do so (on this topic, see our report on the OLG of Brandenburg’s judgement in Betting-Law News 01|2006, iv.). In a few years time, the situation might be similar with regard to the configuration of a pop-up blocker.
Last but not least, the OLG’s judgement also shows that tailor-made internet offers must also be accompanied by tailor-made legal solutions. The “standards” of E-Commerce law – such as the provider identification – were not discussed in the decision. The reason for this can only be that these were to be found on the provider’s website. However, this is not sufficient in each individual case. The provider had obviously overlooked the information obligations pursuant to § 14 section 2 No. 3 sentence 2 LotterieStV – which admittedly are hardly known. The, above all, financial consequences which this negligence may have, have been shown by the decision. The 100,000 € of dispute value used as a basis by the court, can quickly trigger five-digit sums for court and lawyers’ fees alone.
Justin Franssen reports in the Betting-Law-News on the development of gaming law in the Netherlands (see the commentary “Dutch Courts finds the Dutch casino monopoly not compliant with the Treaty of Rome and European Commission suggests that proposed Dutch Internet gaming monopoly is disproportionate” in issue 09|2005).

Justin Franssen, a former casino dealer, studied law and continental philosophy at the universities of Leuven (B), Maastricht and Amsterdam. He works at Van Mens & Wisselink attorneys in Amsterdam where his practise is focussed on gaming and gambling related issues. He is involved in the leading past and pending post-Gambelli litigation in The Netherlands, publishes on the subject matter (three editions of the Internet Gambling Report, Casino Lawyer) and is a frequent speaker at international conferences (IMGL, EIG, European Gambling Briefing, Virtual Gaming Forum etc.). Mr Franssen is the Dutch General Member of the International Masters of Gaming Law and a member of the International Association of Gaming Attorneys.

Quirino Mancini

Quirino Mancini is Partner at Sinisi Ceschini Mancini, a general practice firm with offices in Rome, Milan, Genoa and Republic of San Marino. He assisted several Internet and land-based casinos, gaming houses and sports betting agencies in connection with their Italian operations and market entry projects, as well as advising on the related local marketing and advertising campaigns. Mr Mancini has been directly involved in the flotation of some of the largest online gaming companies on the London Stock Exchange. Mr Mancini is a regular speaker at conferences and annual expos such as the Global Gaming Expo (Las Vegas), the European Internet Gaming Conference (Barcelona), the Virtual Gaming Forum (London). He is an author of several articles and papers in authoritative gaming law publications as well as a contributor to various worldwide gaming law handbooks and Internet gambling reports.
Mr Mancini is Member of the editorial boards of the World Online Gambling Law Report and World Sports Law Review. He is also a Fellow member: International Masters of Gaming Law, International Association of Gaming Attorneys, Sports Lawyers Associations, International Bar Association.

**Thibault Verbiest**

Thibault Verbiest is a founding partner of the [Law Firm ULYS](http://www.lawfirmulys.com) with offices in Belgium and France. He is a member of the Bars of Brussels and Paris, specialised in gaming and information society law. He is professor at the University of Paris I Sorbonne, former chairman of the federal agency Internet Rights Observatory, and General Member for France of “International Masters of Gaming Law”. The Law Firm ULYS is one of the leading gaming law firms in Europe, representing major European casino groups and bookmakers.

**Martin Oelbermann**

is partner at the [Media & Entertainment Consulting Network (MECN)](http://www.mecn.de). In this function he is responsible for areas such as Gaming/Gambling, Mobile Entertainment, and Paid Content. He has led many projects within in the industry and headed the development of studies like “Betting Exchanges – the eBay of the betting industry” or “The EU and its impact on state-licensed monopolies” and is a regular speaker on renowned industry conferences.

Prior to joining MECN, he was Media Practice Lead at Sapient. Before that, he was working with the Boston Consulting Group where he spent most of his time focusing on industries such as media and telecommunications. Afterwards he was co-founder of The Launch Group, a German e-consulting firm being acquired by Sapient.

Martin Oelbermann studied business administration and economics at the University of Mannheim, The National University of Singapore and the University of Massachusetts/Amherst.
Our Information

We are pleased to announce that our Hambach & Hambach team has been enlarged by attorney Konrad Miller, LL.M. and attorney Dr. Michael Hettich.

Konrad Miller, LL.M

studied law in Cologne, London and Berlin, specialising on European law, comparative law and international private law.

During his apprenticeship to the Bar, he specialised on media law and also worked in the legal department of an international Internet service company. Following the second state exam, he completed an international LL.M. degree in IT and telecommunication law in Hannover and Glasgow (European Legal Informatics Study Programme – EULISP).

After this, he worked as a scientific assistant to Jörg Tauss (Member of the German Parliament) on the subcommittee New Media in the German Parliament. Between 2004 and 2005 he worked as a legal adviser for the "Centre of Expertise E-Commerce for Liberal Professions" (comecom) funded by the German Federal Ministry for Economic Affairs and Employment. Most recently, as a scientific assistant at the University of Bielefeld, he worked as project manager for the EU-Project "Joint Network on European Private Law", which is responsible for the development of the "Common Principles of European Contract Law".
Dr. Michael Hettich

Attorney Dr. Michael Hettich is specialised on German Gambling Law. His doctorate's degree on "New Issues of the Public Gaming Law" ("Neue Fragen des öffentlichen Glücksspielrechts") was published in Germany in 2006. His work deals with constitutional aspects of the state monopoly and with European and international legal issues of national and international services for gambling. He already focussed on administrative aspects of internet law, when working as scientific assistant at the chair of Prof. Dr. Heckmann at Passau University and during his apprenticeship to the Bar with the international law firm Clifford Chance in Frankfurt. Thereby he created the basis for consulting in the field of online gaming services. Until 2005, Dr. Hettich was working for the international law firm Nörr Stiefenhofer Lutz.
Editorial Details

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The Betting Law Newsletter has been registered with the national ISSN centre for Germany (ISSN 18617441).

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