

# worldsportslawreport

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# DFL's licensing system for fixture lists: analysis

The Deutsche Fußball Liga (DFL - German football league) has recently announced that it intends to set up a licensing regime for the commercial use of its fixture lists, allowing it to recoup money from unauthorised users, such as gambling operators. This decision must be seen in light of the fact that the regulation of gambling in Germany remains uncertain and confused. Gregor Lentze, Founding Partner of Lentze Stopper Rechtsanwälte, examines whether the protection of such fixture lists from commercial use can be justified under German law and outlines the current status of German sports betting laws.

Two facts may well illustrate why German sports feel uncertain about the current legal status of sports betting in Germany: On the one hand, the operation and promotion by private sports betting operators has been prohibited in Germany. On the other hand, despite such prohibition, every year an estimated 95% of sports bets in Germany are placed with private sports betting operators located outside of Germany and offering their services via the internet from abroad (such as Malta and Gibraltar). The economic effect for clubs and others is twofold; no revenues can be generated from sponsorship deals and no statutory contributions are received from such operators. One has to take this into account when looking at the Deutsche Fußball Liga's (DFL - German football league) decision to set up a licensing system for the commercial use of its fixture lists, especially for the use of fixture lists for sports betting.

## Rights to fixture lists

So far, the use of fixture lists has not been the subject of a licensing system in Germany. In July 2011, the DFL announced that, as of January 2012, any commercial use of the fixture lists of the Bundesliga (and also the 2. Bundesliga) will require a written licence from the DFL, and that the DFL will legally act against any unauthorised commercial use of its fixture lists, in particular for sports betting and online information services. The DFL has also clarified that this will not affect any non-commercial editorial use. As this is a newly adopted licensing policy and, as such, this matter has not been clarified by any court in Germany, this has raised the question as to what rights subsist in the fixture lists for the DFL under German law.

## Statutory event right

In general, German law does not provide event organisers with protection under any statutory 'event rights', as it is the case in France, for example, according to the Code of Sport (Art. L. 331-1). The enactment of such protection right has been and will be the subject of various lobbying efforts by different event organisers, as they are the ones that invest in the event while at the same time they are not able to fully protect their legal rights arising from such investment. However, no such legislation has been introduced in Germany, meaning that the DFL may not exercise any statutory protection rights relating to its fixture lists.

## German Copyright Act

The DFL and other event organisers have to rely upon protection under the German Copyright Act (GCA). § 87a GCA contains a *sui generis* database right as introduced in Article 7 of the EU Database Directive 96/9/EC. However, in line with the position taken by the European Court of Justice (ECJ) in respect of the scope of protection of this right<sup>1</sup>, it cannot be assumed that § 87a GCA grants the DFL any database protection rights which may be used to prevent third parties from using the fixture lists for commercial purposes.

§ 4 (2) of the GCA gives copyright protection for database works (the so-called 'database copyright') as introduced in Article 3 of the EU Database Directive 96/9/EC. The DFL's fixture lists may enjoy protection as database works pursuant to § 4 (2) GCA if the fixture lists qualify as an 'intellectual creation' of the DFL pursuant to § 2 (2) GCA. In other words, it solely depends on the underlying process by which the DFL creates the fixture lists. The

criteria set forth in the Football Dataco. vs. Stan James case<sup>2</sup> by the UK courts will be substantially the same as those to be applied by German courts. A court will have to assess whether the selection and arrangement of the fixture list data include specific skills and judgment, whether the process is one where everyone would come up with the same answer and whether the data can be distinguished from a mere collection of data (like a telephone book) that includes no discretion and intellectual input of the DFL.

#### Process of fixture list creation

The creation of the fixture lists basically includes three steps: Firstly, the DFL recognises all external factors, e.g. the FIFA calendar, national holidays, collision with other major events, security considerations, special club interests and non-availability of a stadium as well as the dates of the season, the Cup games and the winter break as agreed between the DFL and the Deutsche Fußball Bund (DFB - the German football association). Secondly, the DFL considers all internal factors to ensure a balanced and fair allocation of home and away matches for all teams, considering the interests of various stakeholders. Thirdly, all matches will then be allocated to a certain round and then, four to six weeks before, to a certain match day of such round. Considering this complex and comprehensive process, it seems very difficult not to come to the conclusion that the DFL's process constitutes an 'intellectual creation' according to § 2 (2) GCA. Based on this, the DFL may rely on database copyright protection under § 4 (2) GCA and, on this basis, prevent the unauthorised commercial use of the fixture lists by third parties.

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#### **Sports betting laws**

The legal environment for sports betting in Germany is currently all but clear and has caused enormous legal and economic uncertainties for everyone involved.

#### State Treaty on Gambling

Sports betting and its regulatory laws lie within the responsibility of each the 16 German States, meaning that all States must agree on a common position to ensure consistency across Germany. In the past, the 16 German States have agreed on a State Treaty on Gambling

('Glücksspielstaatsvertrag'). Each of the States has operated their own public lottery entity also offering sports bets. Not surprisingly, the State Treaty mainly aimed to protect the monopoly of public sports betting entities, which was also justified with the statutory contributions paid by such entities to the German sports.

Things have changed since 2006. The initial State Treaty, in simple terms, allowed sports betting by public operators and prohibited sports betting by private operators. The Federal Constitutional Court in 2006 ruled that the State Treaty was a violation of German constitutional law and EU law, namely the right of professional freedom (Berufsfreiheit) as well as the rights of free rendering of services (Dienstleistungsfreiheit) and freedom of establishment (Niederlassungsfreiheit) according to EU-Law (art.49/56 AEUV). The Constitutional Court requested the governments to adopt new legislation by 31 December 2007.

#### Revised State Treaty (2008)

The revised State Treaty on Gambling came into force on 1 January 2008. It maintained the prohibition of private gambling operators and imposed higher restrictions on public gambling

operators. No sales over the internet were permitted and severe limitations on the promotion of sports betting services were established. For example, sponsorship of clubs, sports properties or media advertising were prohibited. Claims were brought to the European Court of Justice (ECJ), which in September 2010 ruled that the revised State Treaty also violated EU-law principles.

#### New State Treaty (2011)

Following this, 15 of 16 German States have developed a new State Treaty, which was submitted to the EU Commission earlier this year. The State Treaty intended to allow advertising on team shirts and advertising boards and to open the market for private operators on a very limited basis - i.e. only for a maximum of seven gambling operators, with no selection criteria specified. Further, the State Treaty imposed a commission of 16.66% of the gross revenues, limited certain types of bets, prohibited betting via the internet and banned media advertisements. In July 2011, the EU Commission notified the German Government that the new State Treaty also was not in compliance with EU law, mainly arguing that the restrictions were not reasonable and would in fact not allow private operators to establish a sustainable and attractive business concept. The States are now in the process of revising the State Treaty again, as a new law must in place by January 2012.

The 16th state, Schleswig-Holstein, chose to follow a separate route and, on 15 September 2011, adopted a new sports betting law, which comes into force in March 2012. It will allow an unlimited number of private operators and sales via shops and online, to which a commission of only 20%

of the profits will apply. Media statements predicting 'Las Vegas on the Baltic Sea' are surely exaggerated, but it will be very interesting to follow the co-existence of the State law in Schleswig-Holstein and any other interstate treaty or prohibition enacted by the other 15 German States.

#### Court decisions

Subsequent to the ECJ's negative decision on the revised State Treaty in September 2010, court decisions on sports betting have been issued almost bi-weekly. Unfortunately, the courts decided in a very inconsistent manner, which has further aggravated the uncertainty on the market. Some courts ruled that private operators still may not offer services or act as a sponsor of sports properties. Others ruled that, based on the ECJ ruling, private operators were no longer banned from operations in Germany. In fact, while some clubs are now legitimately sponsored by private sports betting operators, others have been threatened with sanctions by courts or other authorities for the same.

#### Conclusion

Neither politics nor courts are currently able to provide a reliable legal basis for the German sports betting market. The DFL has taken the right step by announcing the setting up of a new licensing system for the legal protection of its fixture lists. At present, this is the most effective and only possible way of benefiting from the growing revenue from the sports betting business for the DFL and its clubs. No one can expect the DFL, the DFB or the clubs to watch the commercial exploitation of rights affiliated to their own properties any longer, without directly or indirectly benefiting from it. It will be of great interest

to observe as to when and how the German States and the courts applying the new laws will be able to create a consistent and reliable legal environment for sports betting in Germany. In the meantime, watching sports betting deals being implemented in Germany remains almost as unforeseeable and exciting as watching the matches themselves.

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1. Case C-444/02 Fixtures Marketing Ltd v Organismos Prognostikon Agonon Podsfairou; Case C-2302 British Horseracing Board Ltd v William Hill Organisation Ltd.
2. Football Dataco. Ltd. (and others) vs. Stan James (Abingdon) Ltd. And others, [2010], EWHC 841 (Ch). See also 'Sporting Data: Rights in sporting data after Football Dataco v Stan James' by Nick Fitzpatrick and John Cloke in World Sport Law Report Volume 8 Issue 6, June 2010.



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