

First Impressions of the Hearing before the „Federal Constitutional Court“ in the Case of Sports Betting

As expected, an „exchange of blows“ took place between the supporters of the state monopoly and the private operators at the hearing on the 8th of November 2005 before the German Federal Constitutional Court (Bundesverfassungsgericht). The Bavarian under-secretary Schmid warned against a „rampant expansion“ of private operators in the year of the football world cup. The canalisation and containment of peoples' gaming instincts could only be guaranteed by an exclusive state offer. The complainant, a Munich based bookmaker, and the bookmakers' associations supporting her, on the other hand, referred to the fiscal avidity by which the state monopoly was instrumentally motivated. In the view of this contradictory state behaviour with regards to the protection objective, the proceeding was about restoring the credibility of the states.

During the exchange of the (mostly well-known) arguments taking most of the time of the hearing which lasted until after 6 o'clock p.m., one could get a good impression of the Federal Constitutional Court's appreciation of the case. Four of the eight judges of the 1st Senate deciding on the complaint posed quite critical questions to the complainant, the city of Munich, the free state of Bavaria and the concerned associations, notably the bookmakers', the sports and the gambling addiction associations.

Initially the court raised the question, whether there was a sufficient legal basis for the state betting monopoly. An thorough examination of whether the state monopoly is the appropriate and necessary means was necessary.

Funds for the common welfare did not necessarily have to be generated by a state monopoly but could be raised by other means such as taxes and dues instead. Additionally one had to question the legitimacy of the goal.

After a first exchange of arguments, the Federal Constitutional Court expounded the problem of the relation between state law and the federal law provision of Art. 284 German Criminal Code (Strafgesetzbuch). After all, this provision ought to be the substantive provision for this case. The Bavarian State Lottery Act as the basis of the case, at least by its wording, did not govern the state monopoly. It only governed the operation of sports betting by the Free State of Bavaria without ruling on the operation of private operators. Therefore it could be questioned, whether the state legislator had definitely ruled on the state monopoly at all.

Subsequently the court asked the question whether the regulation of sports betting did not concern commercial law and therefore did not fall under federal competence. This was negated by representatives of the Federal Government since regulatory aspects preponderated. A discussion on the states' margin in respect to regulation and discretion in the view of the federal provision of Art. 284 Criminal Code took place.

The issue of addiction prevention and the states' behaviour was a very important part of the discussion. The Free State of Bavaria was not able to give an answer on the court's question on what the supervision of state operators looked like. The state lottery administration (supervised by the Bavarian Ministry of Finance) in the person of its president Mr. Horak informed the court that its submissions were approved by the ministry. For the rest, an „addiction flyer“, referring to the federal agency for health education, was printed and available in all receiving offices.

Regarding advertisement for the state betting offer the reporter of the of the Federal Constitutional Court, Prof. Dr.

Bryde, referred to illegal product placement on TV. From the court's point of view the aggressive advertisement of state operators was not as much a problem as the circumstance that gambling was presented as normal and socially adequate (which does not fit the argument of gambling being socially unwanted).

The gambling addiction associations appeared very critical, towards state as well as towards private operators. A common standard for all operators had to be implemented. A flyer was certainly not sufficient. The state operators did not respond to the offer of printing an addiction prevention agency's telephone number on the lottery ticket. The „Swiss way“ of creating an independent supervisory authority was reasonable. Players with problems could be detected and kept from further playing. The possibility of self suspension and a limitation of the stake should be required.

In the afternoon, the subjects consumer protection and prevention of dangers to the public were discussed controversially. The court asked questions about the traditional images of the bookmaker profession and modern conditions. Following up the explanations of the gambling addiction associations the court asked, whether a liberalisation, which would cause an increase in betting opportunities, did not pose a treat to the public.

With regards to financing public welfare the court questioned the reasonableness of excluding pecuniary interests. Which profession could be exercised without any earnings?

After finally discussing the particularities in conveying sports betting, the court accorded the word to the complainant for a final remark. She referred to her application she had filed eight years ago and to the fact that she was probably the only bookmaker in Germany not having conveyed any sporting bet showing respect of the court's decision. She was now „in the red“ because of choosing the „straight way“.