

# Cross-border transmission of sports betting within the European Union is not punishable

A controversy between German criminal courts and administrative courts seems to arise. As we already mentioned in our Newsletter (German Gaming Law update no. 45), the Court of Appeal of Munich (Oberlandesgericht München), in its decision of appeal of 26 September 2006 (case-no. 5 St RR 115/05), affirmed that the transmission of sporting bets was not liable to prosecution under the current legal situation, whereas the Bavarian Administrative Court of Appeal (Bayerischer Verwaltungsgerichtshof) believes not to be bound by this criminal law assessment (decision of 4 October 2006, case-no. 24 CS 06.2229).

The Bavarian Administrative Court of Appeal is of the opinion that the criminal decision only affected a „particular single case“. It thereby misjudges the significance of the criminal decision of the Court of Appeal of Munich that extensively dealt with the hitherto jurisprudence of the (now dissolved) Bavarian Supreme Court (Bayerisches Oberstes Landesgericht), explicitly giving it up as obsolete due to the legal situation after the Gambelli decision. Numerous acquittals and suspensions of proceedings have been the consequence.

In addition the Bavarian Administrative Court of Appeal thinks that the decision of the Court of Appeal of Munich exclusively concerned „old cases“ before the Federal Constitutional Court's fundamental decision of 28 March 2006. The criminal courts and the public prosecution services think differently on this subject. As we already mentioned in our newsletter „German Gaming Law updated“ no. 48, preliminary investigations

against sports betting agents have been suspended, explicitly invoking the decision of the Court of Appeal of Munich. For the rest, several attachment orders against betting shops have meanwhile been overruled.

The Bavarian Administrative Court of Appeal's legal opinion is untenable with regard to the decision of the Court of Appeal of Munich. In its decision of 26 September 2006 the Court of Appeal of Munich repeatedly clarifies that the current legal and factual situation is not compatible with Community law and that this appraisal applies to „new“ cases after the Federal Constitutional Court's decision as well:

- „The requirements set forth by Community as well as constitutional law for the limitation of freedom to provide services and the freedom to choose one's profession are not fulfilled on the basis of the current legal situation in Bavaria.“
- „On the basis of the ECJ's Gambelli decision of 6.11.2003 in connection with the Federal Constitutional Court's decision of 28.3.2006 and on the basis of the current legal situation in the Free State of Bavaria it has to be assumed that the County Court's opinion that a bookmaker's license issued in accordance with the national provisions of a Member State had to be considered as a public license in terms of Art. 284 German Criminal Code, is not objectionable.“
- „A national provision, such as Art. 2 and 3 of the Bavarian State Lottery Act (Bayerisches Staatslotteriegesetz), reserving the operation and the transmission of lotteries and bets exclusively to the state, thereby excluding the private operation and transmission of bets on a commercial basis, constitutes a restriction of the freedom to provide services and the freedom of establishment in accordance with Articles 43 and 49 EC Treaty. With regard to the decision of the Federal Constitutional Court of 28.3.2006 (NJW 2006,

1261) it has to be assumed that Art. 2 and 3 of the Bavarian State Lottery Act of 29.4.1999 are not only incompatible with Art. 12 German Constitution (Grundgesetz), but in particular – at least currently – are in breach of Articles 43 and 49 EC Treaty, since the imminent restrictions of the freedom of establishment and the freedom to provide services are neither justified by imperative reasons of the public good nor are they apt to implement the goals they are aimed at.“

- „The Federal Constitutional Court’s declaration of incompatibility is not only based on establishing a deficit in regulation, but on determinations as to the actual form of the state betting monopoly. Both conclusions concern as well as establish the primacy of Community law in the Free State of Bavaria. If, according to the reasons of the Federal Constitutional Court’s decision of 28.3.2006, the requirements of German constitutional law and those of Community law formulated by the ECJ run parallel and therefore the requirements of Community law correspond to those of Constitutional law (decision of the Federal Constitutional Court, margin no. 144) in consequence the provisions of the Bavarian State Lottery Act in their current form are clearly in breach of Articles 43 and 49 EC Treaty.“
- „Accordingly in appeal it is not objectionable that the County Court currently assumes that the license granted to the Company U. Ltd. in Great Britain for exercising its activity as a bookmaker, unfolds its validity in the Free State of Bavaria as well with the consequence that the transmission of sporting bets conducted by the accused in his betting shop did not take place „without public license“ and therefore does not come under Art. 284 para. 1 German Criminal Code.“

Therefore one has to assume that internal market cross-border operation and the transmission of sporting bets to a bookmaker

licensed and continuously supervised by an authority in another Member State is not punishable, until a completely new constitutional law and Community law proof legal framework is adopted in Germany.

For the rest, contrary to the unfounded view of the Bavarian Administrative Court of Appeal, adequate measures in order to satisfy the Federal Constitutional Court's requirements, such as guaranteeing the protection of minors and restricting advertisement for the state betting and gaming offer (which the Free State of Bavaria would have to state and prove in accordance with the ECJ's Lindman decision).

According to several tests conducted (cp. German Gaming Law updated no. 39), in approximately 80% of the cases minors were able to place a bet for the state betting offer in an acceptance office (more than 4.000 in Bavaria alone). According to Nielsen Media Research GmbH, the expenses for advertising the state betting offer „ODDSET“ have been increased by more than 70% in the time period between April and July 2006 compared with the previous year. The Free State of Bavaria as the responsible body of the State Lottery Administration (which is significantly „supervised“ by the Bavarian Ministry of Finance) clearly acts in breach of Community as well as constitutional law. Bavaria is only consequent when it comes to pursue private operators in order to protect its own unattractive offer.