

# The Federal Constitutional Court's first Decision since „Gambelli“ – Consequences in Practice

**The Federal Constitutional Court's first Decision since „Gambelli“ – Consequences in Practice – commented on by Martin Arendts, M.B.L.-HSG, Attorney-at-Law.**

A few days ago the Federal Constitutional Court rendered its first decision concerning sports betting after the ECJ's Gambelli decision (decision of August 2004, case-no. 1 BvR 1446/04). With this decision, the Federal Constitutional Court repealed a decision rendered against agents of sports bets by the Administrative Court of Appeal of Münster for violating effective legal protection granted by Art. 19 par. IV German Constitution (GG).

The Administrative Court of Appeals had denied effective legal protection to the plaintiff by disregarding the principles of effective legal protection (that is effective legal control) postulated by the Federal Constitutional Court. The Administrative Court had not met the requirements of the special importance of basic rights concerned, nor did it meet the requirements for effective legal protection. The plaintiff could not be expected to first conduct protest proceedings, and if necessary the following court trial.

From my point of view, the Federal Constitutional Court in this way gives a broad hint that in its view the freedom to choose one's profession, notably concerned by the gambling monopoly, has to be increasingly (in practice often for the first time) examined by the authorities and the courts (especially in the major proceedings).

The courts must keep in mind the constitutionally guaranteed right to effective legal protection in civil- and penal cases as well. In penal- and competition procedures I consider it to be illegal to require bookmakers and agents of sports bets to conduct a licensing procedure, as long as the operation according to the opinion of the authorities referring to common law (without recourse to Constitutional- and Community law) is not licensable.

From a Community Law point of view it is interesting to notice the Federal Constitutional Court's reference to the ECJ's Gambelli decision. The Federal Constitutional Court explains that the Gambelli decision lead to a change in circumstances in terms of Art. 80 par. 7 sentence 2 Administrative Procedure Act (VwGO). The authorities'- and even the Bavarian Court of Appeal's opinion that the Gambelli decision had not changed anything cannot be upheld in view of the decision rendered by the Federal Constitutional Court.

By the way that the Federal Constitutional Court assumes that the examination on the basis of the criteria postulated by the ECJ has to be conducted in preliminary procedures as well (see reasons, no. 8), the Administrative Court of Appeal should have considered the substantial material brought forward by the plaintiff. From my point of view not the „pipe dreams“ articulated in some preamble (the argument invoked by the Bavarian Court of Appeal), but only the real market expansion strategy and the aggressive advertisement of the state gambling operators in its legal effect can be decisive. This view, now also shared by the Federal Constitutional Court, complies with the ECJ's established practice that considers the examination of national provisions in the light of Community Law.