

Background on the Hearing before the „Federal Constitutional Court“ in the Case of Sports Betting

On the 8th of November 2005, the German Federal Constitutional Court (Bundesverfassungsgericht) will hear the parties and concerned associations and at this occasion will discuss the issue of sports betting comprehensively in public for the first time. The case concerns a betting agent's complaint about the infringement of the constitution (case-no. 1 BvR 1054/01).

Apart from this specific case, the hearing will put to test fundamentally the whole set of regulations and provisions regulating sports betting in Germany. This becomes obvious as not only the states and the state lottery companies, but also the bookmakers' and sports betting associations (such as the DVB, VEWU and IfeB) will be heard on the topics to be discussed before the Federal Constitutional Court. On the issue of gambling addiction concerned associations (such as the DHS and fags) will be heard, whereas the German Sports Association (Deutscher Sportbund) and the German Football League (Deutsche Fußball Liga) will be heard on the issue of sports financing. In addition, in several preliminary proceedings end of last year and beginning of this year, the Federal Constitutional Court's reporter in the case, Prof. Dr. Bryde, referred to this upcoming decision as a landmark decision. A fundamental clarification of the open questions should be reached.

The hearing is based on the following case: The complainant operates as a bookmaker in Munich and holds a license for horse betting. In 1997 she filed for a license for operating

oddset bets with the city of Munich (Landeshauptstadt München). Alternatively she filed for a license for acting as a agent for foreign operators. The city of Munich refuse to grant a license. The bookmaker filed suit against this decision, but failed up to the Federal Administrative Court (Bundesverwaltungsgericht). In its decision of 2001, the court declared that licensing private operators for sports betting were not possible, neither in accordance with federal nor state law (with the exception of horse-betting explicitly exempted by the RWG). Instead state law reserved the operation of sports betting to the state. Excluding private operators was justified by the need to channel people's playing instincts, in order to prevent pathological gambling (and as a consequence thereof financial collapse), by the need to avoid concomitant criminality and to ensure the due operation of such games.

The complainant filed constitutional complaint against this decision. She claimed the violation of her constitutional right of choosing one's profession established in Art. 12 para. 1 of the German Constitution (Grundgesetz), the principle of equal treatment, Art. 3 para. 1 (GC) and Community Law. Sports betting does not constitute an undesired activity in society. A reason for upholding the state monopoly on sports betting does not exist. The reasons for justifying the monopoly were not satisfactorily demonstrated. For the rest, a private sports betting supply already existed due to the four licenses in place issued under the GDR regime (shortly before reunification). The prohibition of private sports betting operation was disproportional as well, since the aim of the prohibition could not be reached effectively by this measure. Sports betting can easily be concluded by internet with foreign operators. On community law level, the financing of social projects may only be a side effect, but not the main reason of upholding a monopoly. Thousands of state operators' offices affiliated in the German Lotto and Toto Block (Deutscher Lotto- und Toto Block) and the efficient

marketing of the state ODDSET offer clearly showed the unfoundedness of the argumentation. By the way, the Federal Administrative Court pointed out the unproportionality of such restrictions in the case of aggressive advertisement for state offer. At the same time the unequal treatment compared with private companies owned by the state and with operators of horse betting was not objectively justified.

By scheduling a (not very common) oral proceeding the 1st Senate of the Federal Constitutional Court proved to be interested in a very serious examination of the arguments. As already mentioned before, not only the complainant, but also the city of Munich as directly involved authority, as well as the Federal Government, the state of Bavaria and other states as well as concerned associations will be heard.

The schedule shows the importance the court attributes to the different aspects of the case. Half of the time intended for the hearing, that is 120 out of 245 minutes is attributed to examining the proportionality. After formalities (15 min.) and a general statement (20 min.) the court will discuss the first step in the first point to be examined, that is the scope of protection of the right to choose one's profession and the law of sports betting (50 min.) After the main part, the question of proportionality, the court will then discuss the particularities of the procurement of sports betting (40 min).

In the course of this examination the Federal Constitutional Court will first discuss the practical experiences with the state betting offer and the defence of addiction and gambling (50 min). So the state operators all but exemplary behaviour with regards to gambling addiction is under the microscope. During earlier trials they had argued to fight addiction by a bad offer for their customers, especially regarding the quotas. This argument is not quite compatible with the state operators' massive and striking advertisement and their introduction of new gambling products such as "Keno" and "Quicky". Further points up for discussion are customer

protection and averting dangers (40 min.) as well as the financing common welfare (30 min.), sports typically included. The sports associations fearing the discontinuation of this „shadow budget“ have already complained fiercely.

Community law questions, also invoked by the complainant, are not on the agenda. This is due to the distribution of functions between the European Court of Justice and the German Federal Constitutional Court. The German Constitutional Court exclusively interprets constitutional law, whereas the European Court of Justice prevails in the interpretation of Community Law. Nonetheless, the court will surely refer to the European Court of Justice's landmark decision of the 6th of November 2003 in the Gambelli case. This hearing before the Constitutional Court can hardly be imagined without the Gambelli decision. During a very similar examination of Community law the ECJ expressed fundamental doubts as to the justification for the exclusion of private operators and as to the proportionality of such a monopoly. The Constitutional Court will now also test the proportionality.