State Monopoly v. The Private Sector: Complete Article

The lingering sound left by the German Constitutional Court's oral hearing (8th of November) on the constitutionality of the state's sports betting Monopoly.

A report by Attorneys at law, Dr. Wulf Hambach and Andreas Gericke

Karlsruhe/Munich 8-10 November 2005. There has hardly ever been an event so eagerly awaited by the national and international gambling industry as the oral hearing in the case (1 BvR 1054/01) before the German Constitutional Court on November 8th.

„**I am sure that bets will also be taken on the outcome of these proceedings**" were the words of the Constitutional Court judge Prof. Dr. Bryde as he – acting as court reporter – spoke to the first senate, the parties to the proceedings as well as the audience in the full public gallery of the Constitutional Court.

This remark was one of many heated comments made by the judges as they heard the proceedings.

The Laws in Question

During the legal discussion, where the court considered the compatibility of those regulations in question with the constitution, Bryde J. referred to the German constitutional rights of freedom of work (Art. 12 s1 of the German Constitution), the prohibition of discrimination (Art. 3 s1 of the German Constitution) and the corresponding regulations in European law: Art. 12 (the prohibition on discrimination) and Art. 49 (the freedom of provision of services) which correspond with the German notion of freedom of profession

were both cited.

The bookmaker (complainant) had wanted to operate within the confines of the law, as later became apparent in the „consideration of the rights“ concerned. For 8 years they have struggled as providers of private sports betting, progressing through the various court instances seeking their rights and indeed „without in the meantime providing one single sports betting service“. Now their accounts are all in the red.

The hearing

The complainants doubted the credibility of the state itself, because of the legal situation surrounding sports betting. In his reply to this, the Bayern Secretary of State denounced the notion of a possible liberal market model. However, Schmid did concede that „there is a need for improvement“ of the current monopolistic regulations. There needs to be consideration of the education of addicts, the protection of young people as well as warning of the dangers of gambling.

During the subsequent debate on the legal situation surrounding sports betting law, as well as on the freedom of profession of sport betting providers (or brokers, as the case may be) it became clear that the Senate was rather critical of the state monopoly. At the end of the discussion on whether the state actually works to combat gambling addiction, the Senate declared a „blatant breach of the prohibition on contradictory state behaviour“.

In its state Lottery Law, under which they wanted to show the legality of the state monopoly, the Bavarian legislative had clearly adopted a „right of assessment“ (Einschätzungsprärogative) of § 284 of the German Criminal Code (GCC). However, the Senate stated that no such interpretational elbowroom exists under German law.

Bryde J. asked the expert professor Lärche, called by the Bavarian state government, about his understanding of the

interrelation between § 284 GCC and the state gambling law. Here it turned out that the Bavarian State Government was proceeding on the basis of the prohibition under § 284 GCC. Even at this early stage in the hearing, one could not overlook the fact that the Senate doubted the constitutionality of the Bavarian gambling law (i.e. the prohibition of private sports betting activities in Bavaria).

The Senate went on to question the legislative competence of the states. That in turn raised the question as to why the regulation of sports betting does not actually come under business law. If that was the case, the federal state would be competent to concretize sports betting laws with legislation. After initial hesitation the representative of the Bavarian State Government cited public order reasons which allegedly necessitate regulation under state law necessary.

Thereafter, the proportionality of the legal regulation was examined with regard to the limiting of the desire to gamble and the suppression of gaming addiction.

In light of the nationwide operation of 25.000 agents (where tickets may be purchased and games may be played) of the state gambling providers (Note: In Germany there are substantially more Lotto and Toto agents than post offices) the question begs, whether the fight against gaming addiction is the actual motive for the creation of a state monopoly: If private providers were to enter the sports betting market, would citizens then be endangered by the market expansion strategies of the private providers? In order to form a monopoly, the court stated that an examination of the suitability of such a draconian regulation would have been necessary by the Bavarian State Government.

However, such an examination was avoided at the time. The representatives of the state monopoly could clearly argue why the liberalization of the market and the consequent occurrence of private sports betting would allegedly lead to an increased

danger of gambling addiction.

On enquiry by Gaier J. as to how the management of the lottery might be supervised, Secretary of State Schmid referred to the legal supervision by the Bavarian finance ministry for public order reasons.

The gambling operator's slogan „Who doesn't play, has already lost" posed difficulties for the state operators. This advertising statement – according to the Senate – did not demonstrate the alleged social undesirability, which might constitute grounds for the setting up of a monopoly.

In the subsequent discussion by professor Kühne, a representative of the German Association of Bookmakers, he stated that the canalisation of the desire to play and gambling addiction in the case of sports betting were at issue. An addiction might be indeed attributed back to factors, which have an influence on people. However additional factors attributing to sports betting addiction are not for discussion at present.

Proportionality as regards consumer protection and the prevention of danger in the area of sports betting

Here it was discussed, how if the market was opened up, consumer protection (or protection from danger) would be realised. The complainants noted the possibility of external supervision, as is the case in the area of business law. Personal prerequisites such as information duties and the need for transparency „which allow the healthy development of a private sports betting enterprise" were also discussed. Finally, the private operators might also be interested in a reliably supervised sports betting market.

Thereafter the court examined and discussed the proportionality of the restriction in relation to preventing danger posed by the private distribution of sports bets. The court looked for a concept, which was both sustainable and

compatible with the Constitution, which could under certain circumstances justify such a restriction. On another point, Hoffmann-Riem J. raised the question of how excessive expansion of sports betting over the internet and through other mediums might be reasonably restricted.

At this point of the hearing it was once again clear that the judges were concerned with the consequences of the subsequent opening-up of the market, as opposed to the consequences of the need to first remove the monopoly. If the market were opened up, how would an excessive growth in the number of providers be limited, within the legal confines of the constitution?

It was noted to the members of the senate that this matter would still need to be clarified in the future: none of the submissions from either side could convince the Senate of a solution, which was both unobjectionable and constitutional.

Whereas the complainant suggested the possibility of the regimentation of both the Race Betting and Lottery Acts (possibly supplemented by postal and media law conditions and restrictions), the other side referred to the pre-existing „Oddset control system“ as well as the way in which the personal supervision mechanism is practiced at the agencies. This system was questioned by the representatives of the complainants, due to its practical shortcomings – as the state supervision system could be bypassed, for example by the multiple placing of bets. In addition, the system fails to adequately protect youngsters.

Furthermore the different individual regulations were explained, not only those from the Race Betting and Lottery Act, but also those from the control system and how it works at present in the 25.000 agencies offering the Oddset game.

Proportionality between funding and the common good

Whereas the complainant suggested the alternative possibility

of funding the public welfare with taxes (similarly to in the Race Betting and Lottery Act), the granting of licences and eventual extra duties, professor Böser, as the representative of the interests of state providers, made reference to the specific funds, which are available under the state law guidelines.

It became particularly clear through the repeated requests of the Senate for simple legal guidelines from the states as to how the specific funds are regulated, that the existing system of the Senate does not suffice: under the present regulations the use of the received funds in the public interest should result from the corresponding regimentation in the Budget law and the consequent parliamentary allocation of funds by way of the budget. Evidence of a regulation of „direct application“ by the states, as requested by Bryde J. leaves all the representatives of the states culpable.

Summarizing, Steiner J. noted that it might not actually be possible to use the funds from the state gambling „budget“ directly in the interest of the public good.

This was followed by submissions from the German Sports Association (DSB) and the German Football League (DFL) as to their present financial situation.

Here the German Sports Association (DSB) referred to the fact that some of the State Sport Associations are financed up to 100% by the proceeds of the state lottery events and thus if the market were to be opened up, and the monopoly system left behind, they could be left without sufficient financial means.

Dr Summerer, a representative of the German Football League (DFL), referred to the possibility of an alternative financing of sports associations. As measures will have to be taken to facilitate a better economic use of the activities of associations in the future – e.g. the DFL could be granted particular „presenter/organiser“ rights (including protection,

commercial and scheduling rights).

The Provision of Sports Betting and Its Special Features

At the end of the oral hearing, the court discussed the special considerations as regards the provision of sports betting services. Whereas the complainant referred to the current essentially „factual“ toleration for the provision of betting, the other side warned against such a recognition – directly against the background of a provision on the Internet and the distribution to non-German providers.

A representative of the Complainant referred to the non-uniform application of the notion of a distributor in the German legislative. To arrive at the notion of a „provider“ in the sense of §284 GCC, over a wide interpretation of the notion of a distributor, would clearly contravene the requirement of certainty of Art. 103 Para. 2 of the German Constitution.

With regard to the permitting of the distributors – i.e. those licensed in the European Economic Area – a representative of the European Betting Association clarified the need for a conceptual division to be made between the distribution of sports bets and the rest of the gambling sector.

Conclusion

In the opinion of Dr. Wulf Hambach, the German Constitutional Court displayed a clear tendency toward a (partial) opening up of the market.

The conformity of the regulations of the Free State of Bavaria in its Bavarian Lottery Law to the constitution were clearly questionable, as was the adequacy of the other current regulations, on which the current state monopoly is based. Also the discussion of the fiscal matters, in particularly relating to the use of the funds generated by the state monopoly, raised questions which the advocates of the monopoly

could not conclusively answer.

However one could recognize the concern of the court as regards the dangers of gambling addiction and that the regimentation of a liberal sports betting market could have negative consequences.

In spite of, or just as much because of unsatisfactory proposals for example what would be done if sports betting was incorporated into a system under bookmaker control under the Race Betting and Lottery Act, might be – according to the court – a warning to the private providers against rash measures. In considering this point, parallels may be drawn with the current UK Gambling Bill 2005, which regulates the British gambling law in a proper and modern manner (including regulations on interactive gambling).

That judge Papier as a judge of the senate as well as president of the Federal Constitutional Court (!) and judge Bryde as the court reporter in the proceedings as well as two judges are part of the eight-strong decision panel suggests that the decision will be in favour of an opening up of the market. Why? In the past, both judges have shown a sceptical attitude towards a state monopoly.

Several months before the oral hearing, Byrde J. asked numerous administrative authorities to refrain from making orders against private betting office operators in advance of the decision of the Federal Constitutional Court. If the constitutional judge had assumed that the (EU) cross border distribution of sports betting to sports betting operator licensed in another EU member state constituted the offence of illegal gambling – due to the lack of an official license under § 284 of the German Criminal Code – then he would not have undertaken this unusual step.

Papier J. dealt intensively with the German gambling some time ago. Papier J. considered the state gambling monopoly, in

particular, in light of German constitutional law (esp. freedom of profession) rather critically. Papier J. is the author of „Staatliche Monopole und Berufsfreiheit – dargestellt am Bespiel der Spielbanken“ (State Monopoly and freedom of profession – illustrated by way of the casinos as example). In this very detailed 1997 piece, Papier J. comes to the outcome that the monopoly development in the casino area constitutes a breach of the freedom of profession right under Art. 12 para. 1 of the German Constitution if the casinos are laid out under private law. Overall there are indications of a liberalization. However the extent of such a liberalization cannot yet be anticipated due to the complexity of the gambling law area. If the Federal Constitutional Court actually calls an end to the game of the sports betting monopolists in Germany after seven years (1999 „ODDSET – The sports bet from Lotto“ was introduced), the question is: when this will happen. Many experts would expect an ultimate decision to be made early next year. If the final whistle, i.e., the judges decision will take place before the start of the FIFA World Cup on the 9th of June , 2006 remains to be seen – as our so called „football king“, Franz Beckenbauer, would say: „Watch this space“.