

The Draft of a new Interstate Treaty on Lotteries

The Federal Constitutional Court, in its sports betting decision of 28 March 2006 (case-no. 1 BvR 1054/01), declared the present state monopoly to be unconstitutional and urged the „legislator“ (that is the federation or the states respectively) to pass new legislation until the end of 2007. The Federal Constitutional Court named two alternatives: the licensing of private operators or a state monopoly strictly aimed at containing gaming addiction and betting fervour.

The new draft of Interstate Treaty on Lotteries in Germany (LottStV-E), which was published beginning of September, clearly focuses on maintaining the state monopoly. This draft, dated 22 August 2006, should undergo fundamental changes in the course of the upcoming negotiations, though. The decision of the Federal Cartel Office (which more or less corresponds to the British Monopoly and Mergers Commission) of 23 August 2006 (case-no. B 10-148/059) and the serious anti-trust law and Community law related objections, named therein in particular, have not been considered yet. In addition, the question arises, whether the states are formally competent for legislating on issues like the complete ban of games of chance over the internet, which goes far beyond regulating issues of police law. Despite the good will shown, as regards content, the draft goes far beyond Constitutional- and Community law requirements. The last word has therefore probably not been spoken yet.

The draft as a matter of fact is not a „comprehensive draft“ governing all forms of games of chance in accordance with the requirements set forth by the Federal Constitutional Court and the European Court of Justice. It is rather a „small coin“ which is meant to uphold the status quo in as much as possible on the basis of the requirements set forth by the Federal

Constitutional Court. The draft is based on the Interstate Treaty on Lotteries, effective since 1 July 2004, tightens it on several issues (ban on advertisement, ban of internet offers, information about problem gambling etc.) and is supposed to replace it on 1 January 2008.

Slot machines – due to the states' lacking legislative competence on the issue – keep being governed by the Industrial Code (Gewerbeordnung). The new Interstate Treaty on Lotteries is therefore not meant to be applicable on them. Bets are now expressly covered (which, due to the lack of express naming, is disputed under the current version). Delimitation of the scope of the treaty with regards to the Act on Horsebetting and Lotteries (RWG) is unclear as one of the subjects to be covered under the new Interstate Treaty on Lotteries according to Art. 3 para. 4 are „bets for money“ (which should include all kinds of society bets).

In view of the lack of a regulation covering all forms of games of chance and the completely different implementing statutes regarding the present Interstate Treaty on Lotteries, evidence suggests the need for a homogenous and coherent regulation by a Federal Gaming Act. The Federal Constitutional Court, in its fundamental decision, expressly held, that the Federation had the legislative competence therefore. Only a federal Legislation will prevent legal uncertainties and a completely different interpretation of the present legislation by the individual states. Such a Gaming Act would also facilitate adapting national legislation to upcoming changes in European legislation.

The draft often cites the requirements set forth by the Federal Constitutional Court. In particular it makes reference to the goals of preventing gaming- and betting addiction and of guaranteeing youth -and customer protection. Whereas the Federal Constitutional Court called the operation and the transmission of sporting bets an accepted profession not reserved to the state on an European level, the draft keeps

trying to redefine the offer of games of chance as a sovereign task. This perception cannot be upheld in view of the settled case law of the ECJ and the cited decision of the Federal Cartel Office, both expressly denying the concept of a sovereign task.

In the context of a „further development“ of the current Interstate Treaty on Lotteries the draft provides for massive changes in some aspects. The term of „operator“, in contrast to the penal provision of Art. 284 German Criminal Code, is being defined very broadly. The transmission of state offered games of chance is already subject to licensing (Art. 4 para. 1 LottStV-E). Thinking this out consequently, this means, that all approximately 26.000 unlicensed betting offices for the state gaming offer, would need a license in the future.

The draft succinctly declares, that the operation and the transmission of public games of chance in the Internet is prohibited (Art. 4 para. 4 LottStV-E). Betting during a running sports event as well as betting by SMS are being prohibited as well (Art. 21 para. 2 sentence 2). Such a widely held ban will surely not pass a thorough verification on the basis of Constitutional- and Community law. The ban of online-offers in particular is not apt for „shut out“ internet offers from other EU Member States (which seems to be impossible for technical reasons already). In addition there is no factual reason for regulating the two distribution channels differently.

Advertisement is supposed to be limited rigorously. Advertisement must be limited to „an information about the possibility of participating in a game of chance“ (Art. 5 para. 1 LottStV-E). It may not have an „inviting character“. Art. 21 of the draft expressly bans shirt- and perimeter advertising for sports betting. This discrimination has no factual grounds and will probably not pass a verification by the courts.

According to Art. 6, operators and agents must develop a „social concept“ in order to urge players to conduct „responsible gaming“. It is amended by Art. 7 postulating miscellaneous information duties. Information about the risks of addiction and the possibilities of counselling and therapy have to be provided. Slips must hold the same information as well (para. 2).

According to the draft, games of chance may only be offered by the states, by public bodies corporate or by privately organised companies, whose majority shares are held by public bodies corporate, ultimately again the state itself (Art. 9 para. 2). Only the licensing for lotteries and draws (therefore, obviously not for bets) of non-profit operators is possibly conceivable (Art. 14 para. 1 Nr. 1 LottStV-E refers to Art. 5 para. 1 Nr. 9 of the Tax Act on corporation).

Upholding the state monopoly by this regulation is untenable with regards to Community law. Potential operators from other EU Member States are clearly being discriminated compared to national state-owned enterprises. It is incomprehensible, why sports betting (with a very low risk potential) should be exclusively reserved to the state.