

Administrative Court of Cologne refers German sports betting case to the European Court of Justice

There are more than 2.000 cases regarding the cross-border provision of sports betting pending before German courts at the moment. The cases are about the freedom to provide services and the freedom of establishment granted by the EC Treaty and their collision with the state monopoly for sports betting currently in effect in Germany. A German court has now, for the first time ever, asked the European Court of Justice (ECJ) for its opinion on this in accordance with Article 234 EC Treaty. In its Gambelli decision of 2003, the ECJ had already established the relevant criteria regarding this conflict.

The Administrative Court of Cologne (Verwaltungsgericht Köln), in its decision of 21 September 2006 (case-no: 1 K 5910/05), would like to know whether national provisions (in this case the provisions regarding the North-Rhine Westphalian state monopoly) can be applied for a transitional period despite their violation of the freedom to provide services and of the freedom of establishment. Background to this reference for a preliminary ruling was a decision of the Administrative Court of Appeal of North-Rhine Westphalia (Oberverwaltungsgericht Nordrhein-Westfalen, decision of 28 June 2006, case-no. 4 B 961/06) which, despite establishment of a violation of Community law, had „invented“ a sort of „transitional period“ in opposition to the settled case law of the ECJ invoking the direct and immediate applicability of the freedoms granted under Community law (q.v. German Gaming Law updated, no. 36). Other Administrative Courts, like the Bavarian Administrative Court of Appeal (Bayerischer Verwaltungsgerichtshof), had

argued in a similar way, affirming closing orders against foreign operators' betting shops on the basis of the current state monopoly. The Administrative Court of Cologne obviously does not consider this practise in violation of Community law to be tenable.

The ECJ will probably clarify the substantial questions in the upcoming Placanica et. al. decision (Cases C-338/04, C-359/04 and C-360/04), further developing the „Gambelli Criteria“, that is the reasons justifying the limitation of Community freedoms by a state monopoly. The questions raised by the Administrative Court of Cologne amend the questions already discussed in the hearing of 3 October 2006 before the ECJ regarding effective legal protection against national provisions in violation of Community law (Case C-432/05, Unibet v Justitiekanslern). This case deals with interim legal protection in particular. The ECJ will have to decide whether interim legal protection, based on Community law, shall be granted against a national provision in violation of Community law (q.v. German Gaming Law updated, no. 44).

With regard to the new German case, the ECJ will probably not come to a decision within the next two years and therefore will decide this case after its Unibet decision and long after the transitional period provided for by the German Federal Constitutional Court (according to its 28 March 2006 decision, a new legal framework must be passed until the end of 2007). The decision will nonetheless serve as a obviously very much needed clarification, since important representatives of the German states publicly declared not to observe „Italian“ decisions (that is Gambelli, Placanica & Co.). They deeply misunderstand the importance of the preliminary ruling procedure which results in a decision on Community law, not on national law, clarifying the (also in Germany) directly and immediately applicable Community law situation. The upcoming ruling of the ECJ should have material impact on future claims for damages by EU bookmakers and their agents, massively

affected by the numerous closing orders in Germany. Due to the courts' and the authorities' violation of Community law, they can claim damages, including those for loss of profit, in accordance with the settled case law of the ECJ (q.v. German Gaming Law updated, no. 32).

The questions submitted to the ECJ by the Administrative Court of Cologne:

1. Can Articles 43 and 49 EC Treaty be interpreted in a way that allows national provisions for a state monopoly, not contributing to a coherent and systematic limitation of the betting activity in accordance with the decision of the Court of 6 November 2003 – Case C-243/01 („Gambelli decision“), therefore containing not justified limitations of the freedom of establishment and the freedom to provide services as guaranteed under Articles 43 and 49 EC Treaty, exceptionally to be applied for a transitional period despite the principle of direct and immediate applicability of Community law?

2. In case the first question is affirmed: Under what conditions can such a transitional period be regarded as admissible and how is such a transitional period to be assessed?