

# **Administrative Court of Appeal of Schleswig-Holstein grants temporary relief against an order of prohibition**

With its decision of 2 January 2007 (file no. 3 MB 38/06), the Administrative Court of Appeal of Schleswig-Holstein (Oberverwaltungsgericht Schleswig-Holstein) dismissed the Free and Hanseatic City of Lübeck's appeal against a decision of the Administrative Court of Schleswig-Holstein and also granted protection to a sports betting agent. The Administrative Court, in its decision of 23 August 2006, had followed the agent's petition for relief and restored the suspensive effect of the agent's objection against the prohibition order of the City of Lübeck. According to the Administrative Court, the agent could invoke constitutional law as well as Community law principles.

Community law is material to the Administrative Court of Appeal as well. In particular, the court points out that punishability of transferring sporting bets to a private operator in accordance with Art. 284 German Criminal Code was more than doubtful after the ECJ's Gambelli decision of 6 November 2003. The outcome of the main proceedings was therefore correctly judged as open.

The required consideration of the interests at stake turns out in favour of the agent. The Administrative Court of Appeal can not see why the private operators' continued activity until the end of this year (the end of the transition period set forth by the Federal Constitutional Court) should lead to an endangerment of concerns of the public good. The "additional

harmful effects" are not identifiable to the Administrative Court of Appeal. In the view of the year long practise of state lottery operators and the activity of private operators on the market, already the Administrative Court was incapable of identifying such dangers.

Commentary: It is to be welcomed that, after the Administrative Court of Appeal of Saarland, a further Administrative Court of Appeal sides with Community law and disagrees with the open suspension of Community law by the Administrative Court of Appeal of North-Rhine Westphalia. The Administrative Court of Appeal of Schleswig-Holstein correctly points to the fact that the Federal Constitutional Court did not examine the question of a possible violation of Community law by the state monopoly for sports betting. The alleged punishability of transferring sporting bets is highly problematic (as the Federal Court of Justice now pointed out). The only justification left over for a ban, the alleged "negative effects" of private agents, are evidently not seen as sustaining. In fact the state operators have not cared for the protection of minors or for fighting gambling addiction so far, reasons that are now often advanced for justifying the state monopoly. With regard to Community law, especially with regard to the ECJ's Lindman decision, the state has to prove that negative effects can exclusively be faced or met by a monopoly (without milder means such as sanctions or supervisory measures being suitable).