

Administrative Court of Berlin once again grants relief from judicial execution to a sports betting agent

The Administrative Court of Berlin (Verwaltungsgericht Berlin) has once again expressed fundamental constitutional objections against the Interstate Treaty on Gambling (Glücksspiel-Staatsvertrag) and thus granted relief from judicial execution to a sports betting agent (decision of 5 May 2008, case-no. VG 35 A 108.08). The agent, represented by ARENDTS ANWÄLTE (www.gaminglaw.de), may thus continue to transfer sports bets to a private bookmaker, state licensed in Malta, an EU member state.

The Administrative Court thus continues its jurisprudence of now granting relief from judicial execution after the transitional period, set by the Federal Constitutional Court (Bundesverfassungsgericht) in its landmark sports betting decision of 28 March 2006, expired at the end of 2007. In proceedings for amendment (pursuant to sec. 80 par. 7 of the regulations governing administrative courts, VwGO), the court has recently granted relief from judicial execution against a prohibition order dating back to the year 2007 (decision of 2 April 2008, case-no. VG 35 A 52/08), a decision it refused to render last year.

The new decision pertains to a prohibition order of 6 March 2008, issued on the basis of the new Interstate Treaty on Gambling and the relevant implementation act of the State of Berlin (AG GlüStV). In its decision, the court argues the current diverging jurisprudence very comprehensively and

voices severe doubts as to whether the new provisions provided a constitutional authority for the prohibition order. According to the court, the state sports betting monopoly constituted a severe interference with the private sports betting operators' and agents' freedom to choose their profession and could probably not be justified. In view of the drastic constitutional objections, there was no need to discuss an infringement of the freedom of establishment and the freedom to provide services, as guaranteed by the EC Treaty, anymore (p. 34).

The exclusion of private sports betting operators constituted a material interference with the freedom to choose one's profession. According to the doctrine of substantiality the (parliamentary) legislator did not only have to enact a legal basis for the monopoly, but sufficient structural and legal specifications (as demanded by the Federal Constitutional Court in its fundamental sports betting decision of 28 March 2006) as well. The legislator was obliged to enact at least the basic structure as to type and customisation of sports bets. The regulation as demanded by the Federal Constitutional Court must not be left to the executive (p. 10).

Total consistency was now necessary after the expiration of the transitional period (p. 7). Therefore, there was no room for an additional transitional period as provided for by sec. 25 (1) of the Interstate Treaty on Gambling. After the expiration of the transitional period one now had to take a holistic look at the entire gambling sector (p. 32). However, there were only rudimentary substantial criteria as to type and customisation of the sports bets. Moreover it was not apparent that the legislator acted on the distribution of sports bets in accordance with the requirements set forth by the Federal Constitutional Court. Sports bets were continued to be marketed as "an everyday merchandise" (as expressly criticised by the Federal Constitutional Court). In particular the Administrative Court has a critical view on the tight net

of receiving offices. In this respect, no re-organisation of this legal and factual structure as criticised by the Federal Constitutional Court was apparent (p. 13).

In addition, there were considerable doubts, whether the requirements for players' protection were sufficiently respected in adopting and structuring the monopoly. Stake ceiling was not provided for by law (p. 27). Finally, doubts still persisted as to whether financial interests were not continued to be pursued by this re-organisation. After all, fiscal interests were pointed out as being material during the legislative procedure.

The Administrative Court of Berlin does not consider it necessary to mandate conditions in order to grant relief from judicial execution, as recently ordered by the Administrative Court of Kassel (followed by the Administrative Court of Trier) and the Administrative Court of Munich (cf. German Gaming Law updated no. 99 and 100). Specific dangers really emanating from the operator or the agent could be addressed by issuing a prohibition order under trade law (p. 37).

The Administrative Court of Berlin also granted relief with regards to the high administrative fee (EUR 2.000,-). The requirements for charging the fee were not fulfilled. Upon summary examination, the court did not find a case of illegal gambling.