

# **Court of Appeal of Munich enjoins the Free State of Bavaria from illegal gambling advertisement**

## **State monopoly operator in breach of Interstate Treaty on Gambling**

Wettbewerbszentrale (Centre for Protection against Unfair Competition) recently won a court suit in the second instance against the Free State of Bavaria who offers sports betting and games of chance commercially via its State Lottery Administration (Staatliche Lotterieverwaltung), which is a member of Deutscher Lotto- und Totoblock, the cartel of the monopoly operators. The Court of Appeal of Munich (Oberlandesgericht München) enjoined the Free State of Bavaria from unfair advertisements with regard to three different circumstances (decision of 22 April 2008, file-no. 29 W 1211/08 – not yet final).

According to the holding of the Court of Appeal of Munich, the advertisement challenged by Wettbewerbszentrale, which contains statements like “Join the game” and “Lotto ... current Jackpot: about 18 Mill. Euros”, unduly pushes the amount to be won in each following draw to the fore.

Such an advertisement is in breach of sec. 5 (1) of the Interstate Treaty on Gambling (Glücksspiel-Staatsvertrag). Pursuant to this provision, in order to avoid the character of an incitement, advertisement for public games of chance must be confined to information and education on the options of taking part in games of chance.

Relating to this decision, attorney-at-law Dr. Andreas Ottofüllung of the Centre for Protection against Unfair

Competition explains: *“It clearly shows that the Free State of Bavaria as operator of the lottery did not comply with the principles of advertisement set up by himself. The state cannot justify the monopoly on lotteries with the need to protect the citizens from gambling addiction on the one hand side and on the other hand boldly incite to participate in games of chance himself.”*

The authorities' pleading that the state lottery operators had substantially adjusted and retrenched their advertisement in view of the requirements set forth by the Federal Constitutional Court, is obviously not tenable in view of this decision. There is not only a clear regulatory deficit (as accurately pointed out by the Administrative Court of Berlin), but also a serious enforcement deficit remaining. Contrary to the requirements set forth by the Federal Constitutional Court, there is no independent supervision of the state operators, by which the monopoly operators' illegal behaviour could be controlled.

The reasoning of the Court of Appeal of Munich for this decision have now been published (MD 2008, p. 709 et seq.). With regards to the Free State of Bavaria's unfair advertisement practices the court explains:

*“The newspaper advertisement pushes the amount to be won in the next draw to the fore as an eye catcher. Information other than this circumstance accounting for the particular attractiveness of a participation in the game is only provided in considerably smaller script. There is a blatant imbalance between highlighting the amount to win and mentioning the danger of addiction and the low probability of winning, which does hardly show up in comparison. This imbalance of the advertisement, which results from one-sidedly highlighting the chance of a particularly high win, provides an increased incentive to participate in the lottery for people addressed by the advertisement. The informative and educational content which is allowed pursuant to sec. 5 (1) Interstate Treaty on*

*Gambling is clearly only second to the presentation as advertisement with incitement to participate. This is in breach of sec. 5 (1), 5 (2) sentence 1 Interstate Treaty on Gambling.*

*The two other forms of advertisement (billboard and cover ads) have the character of the forbidden form of incitement even more, as they do not even contain minor disclaimers pointing to circumstances against the participation in the game, but places the amount to be won in a unique position. Doing so they are even in breach of no. 2 of the requirement of the directive for the prevention of- and fight against gaming addiction (Annex to the Interstate Treaty on Gambling), pursuant to which the information about the jackpot is to be combined with an information on the probability of winnings and losses. (...)*

*Regarding the advertisement on the cover of the magazine, one has to add, that, when assessing the determining general impression that the advertisement has on the relevant public it addressed, one has to consider the design of the rest of the cover – in particular the title “Join the game” also designed as an eye catcher – as well. Together with the title held in form of a command, highlighting the possible win does not only incite to participate in the game but also has a requesting effect.”*