

French Council of State refers question of compatibility of a betting monopoly with Community law to the European Court of Justice

In addition to the references of two Dutch supreme courts (cf. German Gaming Law updated, no. 106 and 107), the French Council of State (Conseil d'État), in its capacity as France's supreme administrative court, has referred questions regarding the compatibility of a betting monopoly with Community law to the European Court of Justice (ECJ) for preliminary ruling (order of 9 May 2008, decision no. 287503).

The proceedings were initiated by the Malta based bookmaker ZETurf (Zeturf Limited), who sought revocation of a statutory instrument (decret no. 97-456 of 5 May 1997), which establishes a monopoly for the horse betting provider Pari Mutuel Urbain (PMU), founded in 1930, from the competent French Ministry of Agriculture. The bookmaker ZETurf, state licensed in Malta, an EU member state, argued that the betting monopoly was incompatible with Community law. As the Ministry of Agriculture showed no reaction, ZETurf filed action against this implicit refusal with the Conseil d'État on 25 November 2005.

ZETurf's action has to be seen against the backdrop of the decision of the Tribunal de grande instance de Paris which, by decision of 8 July 2005, prohibited this bookmaker from accepting horse bets. This prohibition which was affirmed in the appeal, was repealed by a fundamental decision of the

Court of Cassation (Cour de Cassation) of 10 July 2007, in particular reasoned on the basis of Community law.

The Council of State (Conseil d'État) has now decided to refer the question of compatibility of the French horse betting monopoly with Community law to the ECJ in accordance with Art. 234 EC Treaty. In this respect, the Conseil d'État asked the ECJ two questions. In essence, the Council of State inquires whether the freedom to provide services guaranteed in Art. 49 and 50 of the EC Treaty is to be interpreted to the effect that it precludes a national legislation which establishes a monopoly regime in favour of a single provider, that is meant to combat crime and protect public order in a more efficient way than by less interfering action, if that regime is accompanied by a dynamic commercial policy on the part of the operator, so that a satisfactory reduction in gaming opportunities is not achieved. One aspect of this question is the necessity to be assessed as part of the proportionality test, that is the examination into alternatives to the monopoly legislation and the question as to less interfering action (considering the Rosengren decision, discussed at the oral hearing in the Case "Liga Portuguesa"- C-42/07). Another already critical point is the question whether a monopoly is legally tenable, where a monopoly undertaking, such as the economically very successfully acting operator PMU, does by no means limit gaming opportunities but seeks to increase its turnover instead. In addition to this, with his second question referred for preliminary ruling, the Conseil d'État asks whether, when assessing the justification of the impairment of the freedom to provide services, one had to take into consideration the online-offer alone or all forms of distribution.

In view of the now 16 pending proceedings for preliminary ruling relating to bets and games of chance (including three referred by national supreme courts) as well as numerous upcoming actions in infringement proceedings (after the first

action against Spain for discriminatory taxation of winnings resulting from games of chance), one can now expect the ECJ to comprehensively clarify the legal questions raised.

Questions, referred to the ECJ by the Council of State:

- Are Articles 49 and 50 of the Treaty establishing the European Community to be interpreted as precluding national legislation which has established a system whereby off-course horserace betting is managed exclusively by a single, non-profit-making operator where, although that system appears to fit the purpose of combating criminality and thus of protecting public order more effectively than would less restrictive measures, it is accompanied by a dynamic commercial policy on the part of the operator, in order to neutralise the risk of unauthorised gambling networks emerging and to channel bettors towards the lawful offer, that does not, in consequence, fully achieve the objective of reducing gambling opportunities?
- Is it appropriate, in order to determine whether national legislation such as that in force in France, which has established a system whereby off-course horserace betting is managed exclusively by a single, non-profit-making operator, is contrary to Articles 49 and 50 of the Treaty establishing the European Community, to assess the impairment of freedom to provide services solely from the point of view of the restrictions placed on offering on-line horserace betting, or is it appropriate to take into consideration the entire horserace betting sector in whatever form it is offered and is accessible to bettors?