

Has the Hessian Administrative Court of Appeal's decision already broken up the state monopoly on gambling in Germany?

Has the Hessian Administrative Court of Appeal's decision already broken up the state monopoly on gambling in Germany? – A report by Wulf Hambach, lawyer with Arendts Anwälte.

The decision of the Hessian Administrative Court of Appeal described in the last edition has definitely attracted a great deal of attention all over the world and has joggled the state monopoly on gambling.

Not only the „Tagesschau“ (the most widely regarded evening news on German TV) but also many print media like the „Tageszeitung“ (TAZ/Berlin), whose journalist Mathias Liebig interviewed my colleague Arendts and me, discussed the decision (see www.taz.de/pt/2004/03/06/a0269.nf/text).

Especially abroad one's attention was drawn to the latest legal development on the German gambling market. Even media in the U.S. reported. Thus the US-American internet – magazine „Interactive Gaming News“ (IGN) showed interest in the latest developments in Germany and published an interview conducted by its editorial journalist Robert van der Gaast with us.

Reactions in Germany range from euphoria to stubbornness.

While „yahoo-news“ as well as „Webtipp.de-News“ published the headline „court topples state monopoly on gambling in Hesse“, the Hessian minister of the interior Volker Bouffer (CDU [Christian Democratic Party]) expected „a correction of this

decision in the main proceedings“ (according to an information given by the administrative court in Kassel, these are not pending yet), arguing that the Administrative Court of Appeal's decision was „contrary to rulings of other German courts“.

The words of the Hessian judges and the press had hardly been noticed by many enterprising agents and bookmakers, when a wave of hundreds of „applications for the licensing of bets“ especially for foreign bookmakers hit the German authorities. The rumour quickly spread that the competent authority had to affirm the applicant's application after a summary check of his credibleness. This affirmation were sufficient in order to convey bets to foreign bookmakers.

The decisive question therefore is: has the state monopoly on gambling really been toppled? Is the authorities' attitude to forward „application affirmations“ based on a similarly mistakable as well as momentous misunderstanding like foremost the words of the former GDR government spokesman Günter Schabowski?

Flashback: It happened on the 9th of November 1989. At 18:57 during an international press conference Günter Schabowski, member of the polit bureau, nervously reads from „a piece of paper somebody handed to me“ as he later acknowledged, a decision the council of ministers had presumably made a few minutes earlier stating: „private tours abroad may be applied for without any preconditions (such as having the statute of a relative). Authorisation will be granted quickly. Permanent leaves may take place at all offices of transit at the boarder to the Federal Republic and Berlin (West).“

On request he declared that this became effective immediately. This news had not been authorized by the government of the GDR, but spread quickly throughout Honecker-Land and inevitably lead to the fall of the wall respectively to the fall of the „government monopoly“.

The answer to the delicate question will bring many domestic agents' and foreign bookmakers' imagination fired by the previous story down to earth. For: The answer is simply „No“.

Even if the mentioned rumour should be true (although the competent authorities in Kassel as well as the Hessian ministry of the interior denied this kind of procedure), „application affirmations“ do not constitute a valid legal authorisation for conveying sporting bets. Art. 1 V Hessian Sporting Bet Law reads as follows: „Lotteries and sporting bets arranged by the state of Hesse may only be conveyed professionally in receiving offices authorised by the state of Hesse.“ Receiving offices authorised by the state of Hesse are not those opening on the basis of an application affirmation. From a legal point of view the „application affirmation“ is to be considered as a non-binding information without legal consequences. It does not constitute an administrative act in terms of Art. 35 Administrative Procedure Act and does therefore not have legal effect.

As outlined in our last newsletter, such an administrative act, which authorises the conveying of bets abroad can only be sought the following way: In the absence of legal regulations regarding the authorisation of private betting agents or bookmakers in all 16 German states the only way left is to apply for authorisation with the highest state authority (the ministry of the interior) invoking constitutional law (especially the right to free exercise of one's profession granted by Art. 12 of the Constitution) and EC – law (the freedom of establishment, the freedom to provide services and the prohibition of discrimination of citizens of other Member States). In order to be heard by the ministry of the interior, established legal opinion on the interferences with Constitutional- and the Community Law must be provided.

In his essay „The development of Community Jurisdiction on gambling and its impact on the German lottery market“ published in the magazine for European business- and tax law

(EWS 2002, 416, 424), the head of the University of the Saarland's European Institute Prof. Dr. Thorsten Stein attributes good odds to this way. Regarding the restriction of the freedom to provide services he states:

„In case a justification and proportionality are being negated, every foreign provider must be licensed for authorised domestic gambling. Once she (the front against the opening of the gambling market) starts easing, the basic freedoms and the prohibition of discrimination granted by Community Law will apply to gambling as well signifying that every foreign provider has to be licensed for domestically authorised gambling under the same conditions as well, even if the revenues after profit distribution flow abroad.“

With foreign providers being licensed in Germany this will definitely mean the end of the state monopoly in gambling. Until foreign bookmakers will finally be licensed in Germany some battles will have to be fought before the courts.

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Freigegeben für [key:IC].

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