Administrative High Court (BVerwG) defends monopolistic structure of the casino-business

Like sporting bets and lotteries, the operation of casinos is regulated by state laws as well. The licensing of public casinos is based on the pre-constitutional „law on licensing public casinos“ of July 7th, 1933 and the „regulation on public casinos“ of July 27th, 1938. These provisions were integrated into state legislation and in the meantime were partly replaced by new state laws on casinos. In most states casino legislation provide for state owned companies or state authorities as concessionaire exclusively, creating a state casino monopoly. In some states casinos may also be operated by private businesses under strict supervision, though.

By its decision of February 24th, 2004 concerning the problem of constraining licensing for private casinos the BVerwG affirmed the prevailing case-law. Accordingly the states may strongly limit the issue of casino licenses in their respective laws. Thus the state of Saarland were allowed to impose these restrictions in its law of Aug. 8th, 2004. The provision allowing for two licenses only were to be considered justified. Furthermore the state of Saarland were allowed to issue those licenses exclusively to state owned providers, allowing them to open (an unlimited number) of branches. In these branches so called „small games“ (fruit machines etc.) may be offered.

It is more than doubtable though, whether the policy of allowing the opening of an unlimited number of branches is really suitable to „control people’s playing instincts“ (the states main argument).

The decision becomes notable by one specific fact: the applicant’s plaint not having received a license for operating a casino was not dismissed on substantial but on formal grounds. The BVerwG did not even admit appeal against the lower instance (OVG Saarland OVG Saarland: Decision of November 21, 2003 (3R 7/02)), because the case was not be attributed essential significance in terms of Art. 132 II VwGO (Administrative Procedure Act); since prevailing case-law justifying monopoly-like restraints for casinos as lawful had not changed.

Using this tactics, the administrative high court avoids a problem the lower instance discussed on 22 pages: that is whether state has enough legal arguments to defend its gambling- respectively casino monopoly. This avoidance tactics of the administrative high court are even more astonishing in the light of its decision of 2001 (decision of March 28th 2001 – 6C 2/01).

There the administrative high court held that a critical revision, whether the arguments for restraining the German gambling market „were based on appropriate considerations“ had to take place after a reasonable period of time. The Gambelli-decision having enormous effect on the German jurisdiction (see the decisions of the Hessian administrative court of appeal, the administrative court of Stuttgart, the county court of Heidenheim, the county court of Bremen and the county court of Recklinghausen and last but not least the district court of Munich, on which we reported in our last issues) should have given enough reason to the highest German administrative court to such a critical revision. Invoking the formerly rendered high court jurisdiction does not prove a high level of persuasiveness.