

# **Administrative Court of Osnabrück: German Criminal Provisions are neither applicable to operators nor to brokers of sporting bets**

Administrative Court of Osnabrück: German Criminal Provisions are neither applicable to operators nor to brokers of sporting bets – reports Wulf Hambach, attorney-at-law with ARENDTS ANWÄLTE

After the “ghost of Gambelli” showed up in Baden-Württemberg the last time (we reported on both decisions of the Administrative Court of Karlsruhe in edition No. 10 of our newsletter), the requirements set forth by the “Gambelli-decision” were now implemented by a state of the northern part of the republic.

The administrative court of Osnabrück (case-no. 2 B 60 / 03) in its decision of May 27th 2004 extensively expressed itself on the applicability of Art. 284 German Criminal Code to private operators and brokers of sporting bets:

“For the applicant and its contractual partner (...) the prohibition of operating sporting bets without a public license provided for in both provisions (Art. 284 German Criminal Code and Art. 16 Lower Saxony Lottery Act) and the resulting indirect restriction of its economic activity in the Federal Republic of Germany as a Member State of the EU most probably represent an interference with the freedom to provide services and the freedom of establishment granted by Art. 49 to 55i and 43 to 48 respectively (...) ECJ, decision of November 6th 2003 – C-243/02 – “Gambelli”, GewA 2004, page 30 and

following; ECJ-decision of October 21st 1999 – C 67/98 – “Zenatti”, GewA 2000, page 21 and following.

(...) though the (...) interference with the applicant's contractual partner's freedom to render services and the freedom of establishment may be justified for reasons of public policy, public security or public health, according to Art. 46 paragraph 1 of the EC-Treaty or for reasons of overriding reasons relating to the public interest (compare ECJ-decision of October 21st 1999, No. 31).

Such conditions presumably do not apply here (...) There are drastic doubts that the conditions should apply here, or, in other words, that the legal monopoly attributed to the state and the confinement of conveying sporting bets to state licensed locations is really intended to protect potential customers from financial exploitation by the event as well as from the economic dangers resulting from excessive participation in sporting bets and that the generated revenues can be regarded as mere accessory effect.

This again suggest grounds that the defendant may not invoke the blanket clause of Art. 11 NGefAG in connection with Art. 284 German Criminal Law and Art. 16 Lottery Act of Lower Saxony successfully, since the prosecution of the applicant as broker of sporting bets would constitute an equal interference with the named freedoms of the company D.”

It is important to note, that the Administrative Court characterizes the so far prevailing upper court jurisprudence as not being up-to-date anymore. Considering the latest overall judgements, the judgement rendered by the administrative Court of Appeals of Lower Saxony in 2003 should be obsolete, reasons the Administrative Court of Osnabrück.”

One can only hope, that the Administrative Court of Appeal of Lower Saxony judges the recent decisions the same way.