

Administrative Court of Kassel: State Licensing Provision on Gambling is unconstitutional

Administrative Court of Kassel: State Licensing Provision on Gambling is unconstitutional – by Martin Arendts, M.B.L.-HSG, Attorney-at-Law.

The Administrative Court of Kassel has recently declared the state licensing provisions on gambling to be unconstitutional (decision of June 24th 2004, case-no. 2 G 701/04).

According to the Administrative Court of Kassel, a state law provision according to which the state has the exclusive right to operate sports betting is not compatible with constitutional law, even if the freedom to provide services and the freedom of establishment (art. 43 and 49 EC-Treaty respectively) were not touched. In fact the provision is to be regarded as unconstitutional because of its violating Art. 12 I of the German Constitution (Freedom to choose one's profession).

In the case decided Community Law was not applicable since the bookmaker's establishment was on the Isle of Man (and therefore outside the European Economic Area). The court of the major proceedings ruling on the preliminary decision of the Hessian Administrative Court of Appeal (we already reported), reasons as follows:

„The fact that the defendant as a procurer of sports bets therefore cannot invoke the freedom of establishment and the freedom to provide services granted by Community Law since he procures the sports bets of an operator not established in the area of application of the freedom of

establishment and the freedom to provide services, does not have any impact on the Hessian Administrative Court of Appeal's assumption that the provision of Art. 1 paragraph 1 SpW/LottoG (law on sports bets and lotteries) which exclusively entitle the state of Hesse to operate sports bets is not compatible with prevailing law and therefore in connection with Art. 284 StGB and Art. 11 HStGG does not constitute a legal basis for the contested notice. Since, in the opinion of the court, the same reasons that lead the Hessian Administrative Court of Appeal to assume a violation of Art. 1 paragraph 1 SpW/LottoG against Community Law, also lead to the assumption that Art 1 paragraph 1 is in violation of the freedom to choose one's profession granted by Art. 12 German Constitution. (...).

The situation is not any different regarding the freedom to choose one's profession in terms of Art. 12 paragraph 1 GG (German Constitution). In this case, limiting the freedom to choose one's profession can be justified by outstandingly important public policy. Nonetheless, according to the jurisdiction of the Federal Administrative Court, such justification fails when undesirable gambling as called for by Art. 284 StGB, is in contradiction with the state's operators' behaviour, by extremely expanding gambling offers with aggressive advertisement (Federal Administrative Court, decision of March 28th 2001 – 6 C 2.01, BVerfGE 114, 92).

In in this case, one reaches the conclusion – as the Hessian Administrative Court of Appeal did in its decision of February 9th 2004 – that the operation and advertisement for Oddset-bets in Hesse has reached an extent which leads to the justification for limiting rights granted by the EC-Treaty by installing a state monopoly and its protection by penal law to become inapplicable, the same must be true for justifying the limitation of the freedom to choose one's profession as granted in Art.12 paragraph 1 GG.“

The only reason, the Administrative Court did not bring the

case before the Federal Constitutional Court in accordance with Art. 100 paragraph 1 GG, is that the case was considered to be a matter of preliminary legal protection. The courts charged with the main proceedings in contrast will – in our opinion – have to examine the constitutional objections and bring those relevant questions before the Federal Constitutional Court.

The days of the states' gambling monopoly are therefore numbered, not only from a Community Law point of view, but also from a Constitutional Law point of view.