

County Court of Heidenheim: Art. 284 StGB is not applicable to cross-border sports betting offers

County Court of Heidenheim: Art. 284 StGB is not applicable to cross-border sports betting offers – commented on by Martin Arendts, M.B.L.-HSG, Attorney-at-Law

The Administrative Court of Heidenheim has recently ruled on the cross-border offering of sports bets in a penal case and dealt with the facts and the legal position extensively (decision of August 19th 2004, case-no. 3 Ds 42 Js 5187/03). The Administrative Court emphatically denies culpability in terms of Art. 284 StGB. The court explains:

„Art. 284 StGB as the only criminal offence in question is not applicable in this case, since applying it would constitute a disproportional interference with the freedom of establishment and the freedom to provide services of the C. GmbH (and the accused co-operating with the C. GmbH that are both ensured by the EC-Treaty).“

In the following text the court points to the restriction of the basic freedoms not being justified given the „extreme increase of the gaming offer“ as well as to the „massive advertisement“ for the state gambling offer. After debating the legislation materials- and goals the court reaches the following conclusion:

„The court assumes that monopolising sports bets with fixed odds by the legislator of Baden-Württemberg is predominantly not due to reasons of public safety, but at least to the same degree, motivated by fiscal interests.

Furthermore, that the problem of interferences with the right

to provide services and the right of establishment as well as the right to choose one's profession were not even rudimentarily expounded, as equally so little as the question on how to formulate these interferences with consideration without falling short of reaching the credible goal of limiting the dangers associated with gambling. It is not the function of jurisdiction to ex post undertake discretionary and prognostic decisions instead of the legislator."

In view of the unity of the legal system the court appropriately refuses to regard Art. 284 StGB „as such“ that is isolated from the state's provision.

„Holding the state monopoly in Baden-Württemberg to be incompatible with Community Law, and at the same time excluding the question of culpability in terms of Art. 284 StGB, is not permissible. Rather state- and federal legislation has to be regarded as a unity. In the case that one would only consider the state provision to be incompatible with Community Law, and at the same time continue to apply Art. 284 StGB, this would mean referring the citizens to sue for a license without basis in common law in a tedious administrative lawsuit with uncertain success, meanwhile forcing them to renounce to their rights until the end of the lawsuit. From the point of view of freedom and rule of law, such an approach is inappropriate; since it would allow to the state legislator to rest on the current provisions of the law on sports betting, and would evidently be contrary to the ECJ's request. From a Community Law point of view, federal law, state law, penal law and police law have to be regarded as a unity. At the same time the interaction of these laws leads to a consistent interference with citizens' rights.“

This decision almost does not need any further explanation. From our point of view there is not any doubt that the European Court of Justice sees the problem in the same way. The Federal Court of Justice's defence line, upholding Art. 284 StGB „as such“ is not tenable.