

Freedom of profession of sporting bet agencies: Decisions of the Federal Constitutional Court coming up this year

What will the year 2005 bring for bookmakers and sports betting providers?

Perhaps a breakthrough to a liberalisation of the betting market is not (yet) in store but the clarification of several important questions certainly is. Fundamental decisions, which will have a dramatic effect on the sports betting and gaming market, are pending at a European and German level as well as internationally:

- At WTO level, the Antigua v. USA dispute is entering the second and decisive round, following the lodging of an appeal against the “panel report” by the USA at the beginning of January. An April decision is to be expected.
- At EU level, the European Court of Justice (ECJ) will, in a “Gambelli II” decision, look into the legitimacy of penalising the (EU) cross border provision of sporting bets (Case No. C-338/04 “Placanica”). In view of the diverging national jurisprudence, the ECJ should, once again, concretise the “Gambelli criteria. The breach of Treaty proceedings against Denmark, Greece and potentially Germany, should bring further clarification.
- At EFTA level, following the “Reasoned Opinion” of the EFTA Surveillance Authority against Norway, a decision should be reached by the EFTA Court. It will be interesting to see whether the Surveillance Authority considers the “Gambelli

Criteria" to apply to the entire gambling market (in the Norwegian case, to gaming machines).

· The most important decisions for Germany will be those made by the Federal Constitutional Court (BVerfG). It has announced that it will conduct a "comprehensive clarification of the legal situation" with regard to the provision of sports bets. This policy decision will be resolved in the constitutional complaint proceedings 1 BvR 1054/01 which have already been pending for several years. Furthermore, the Federal Constitutional Court (BVerfG) must decide on a large number of urgent proceedings (Eilverfahren) brought regarding the measures taken by the regulatory authorities.

The year will be exciting. We will keep you up to date on the decisions (as well as on their legal and economic consequences).

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In recent weeks, the regulatory authorities, supported by the state interior ministers, have been proceeding solidly against sporting bet providers. The authorities are justifying this, in particular, by alleging that the Gambelli Decision has not changed anything and in any case has absolutely no relevance for Germany. Follow the decision of the Federal Constitutional Court on the 26th of August 2004, which we have reported on, this reasoning has become invalid.

The Federal Constitutional Court (BVerfG), in several signed letters from the Federal Constitutional Court judge with special responsibility for the case, Prof. Dr. Bryde, indicated that there would be a fundamental decision on the question of the admissibility of the provision of sporting bets. In 2005, a decision on the constitutional complaint proceedings which have been pending for several years will bring about a "comprehensive clarification of the legal

situation”.

To emphasise the importance of the pending decision, the addressees of this letter, regulatory authorities proceeding against sporting bet agencies, were, in December 2004, expressly requested to refrain from enforcing measures “for the time being”.

In a further letter in February 2005, the Federal Constitutional Court (BVerfG) goes a step further. In this, the regulatory authorities are expressly requested to refrain from enforcing measures until it has ruled upon the Application for a Provisional Order.

In our opinion, fundamental remarks are to be expected from the Federal Constitutional Court on the freedom of profession (Art. 12 of the German Constitution – Grundgesetz) of the sports betting providers (as well as the affected bookmakers). The Federal Constitutional Court (BVerfG) will also have to look into the “Gambelli Criteria” on freedom of services and restrictions to it.