

District Court of Cologne: Gambelli Criteria have to be taken into Consideration

One more district court has explicitly refused to speak out a punishment for cross-boarder provision of sporting bets in accordance with Art. 284 German Criminal Code. The District Court of Cologne (Landgericht Köln) in its decision of April 21st 2005, case no. 105 Qs 80/05) points out the importance of community law and the necessity for German courts to take into consideration the „Gambelli Criteria“. The district court explicates that

„the penal provision of Art. 284 German Criminal Code in conjunction with the Sports Betting Act of North-Rhine Westphalia in view of the ECJ's Gambelli-decision of Nov. 6th 2003 (case-no. C 234/01) is not compatible with Community Law and therefore not suitable as legal basis for the punishment of the accused. The State Act on Sports Betting of North-Rhine Westphalia requires a businessman offering sporting bets in the state of North-Rhine Westphalia to be licensed as a gambling enterprise, which is only possible if the applicant is a public body corporate. The accused could therefore not have obtained such a license.

In the Gambelli decision, the ECJ explained that in case the bookmaker was established and licensed in another Member State such a provision constituted a restriction of the freedom of establishment guarantee and of the freedom to provide services guarantee provided for by community law.“

The district court then refers to the constitutional requirements mentioned before and the fact that German courts are bound to the jurisdiction of the ECJ by arguing:

„In this context the Federal Court of Justice In its decisions

of August 28th 2004 and December 15th 2004 (1 BvR 1446/04 and 2495/04) clearly established that the ECJ's Gambelli-decision and the legal questions resolved therein were binding for German courts. Thus it appears that the Hessian Administrative Court of Appeal (GewArch 2004, 153) as well as the Administrative Court of Appeal of Saxony (decision of December 12th 2004, case no. 3 BS 405/03) subscribed to this view and within their preliminary proceedings gave priority to upholding the business."

After these correct comments by the courts, the legal opinion expressed by many regulatory authorities arguing that the Gambelli criteria did not need to be taken into consideration and that the States could establish their own criteria in order to protect the State Monopoly cannot be reasonably upheld.