

Finland after the Gambelli Decision of the ECJ: Opinion on the decision of the Finnish Supreme Court on the conformity of the Finnish criminal law provisions (similar to Art. 284 StGB) with European law

What does this decision mean for the future of German gambling law ?

In its decision of the 24th of February 2005 (KKO: 2005: 27), which has now been issued in a certified translation, the Finnish Supreme Court (FSC) dealt with the compatibility of the Finnish Lottery Law with the jurisprudence of the ECJ; in particular, its exclusive right to organise gambling and the criminal law protection of this exclusivity in light of compatibility with Art. 49 of the EU Treaty.

The following aspects of the decision make clear that it is doubtful that the FSC decision will have an effect on German gambling law:

1. Different circumstances in comparison with „Gambelli“

To begin with, it is to be pointed out that the FSC decision was based on national facts only. The registered office of the operative gambling company is located on the Åland-Island, an autonomous Swedish speaking, Finnish province, where the gambling server was also located. The court assessed purely

inland Finnish facts.

The court's judgement is therefore not comparable with the circumstances concerned in the Gambelli Decision. In that decision, it had to be decided whether possibilities to partake in gambling could be offered in a certain member state (Italy), where the gambling was originally offered on the Internet by a company with its registered office in another member state. The decision of the FSC (Island province/mainland of the same country) was not based on "border-crossing" (inland/other EU/EEA country) circumstances. Therefore, the court made clear (para. 24. of the decision) that Art. 49 of the EC Treaty was not applicable to the concrete circumstances as the case concerned the offer of a service, which was generated inside of Finnish territory, i.e., only inland legal relations were concerned.

2. Facts of the Inland Discrimination

In examining the facts of the case (para. 27 ff), the FSC also dealt with the question as to whether the restriction of the legal Finnish betting system to an exclusive right (and the proscribed criminal probation for disregarding this exclusive right) could lead to a discrimination against the provider from Aland (i.e., a national) in the case at hand.

The defence submitted by the private operator was rejected by the court due to different facts of the case in this area as well:

Whereas the primary focus in Gambelli was on the legality of a bidding process in the sense that it should be applied in the same way to nationals as to providers from other member states, the basis for the decision in the present case is different. This case involved an examination as to whether the restriction on access to the market was justified.

3. Legality of the Restriction

In relation to this issue, the FSC examined whether there were convincing reasons in the interest of the common good to justify the restriction to the freedom of provision of services (e.g., provision of lottery) as proscribed by the national provisions. The accurate determination of these convincing reasons should be carried out under legal consideration of the extent of the protection – with sufficient liberty to make discretionary decisions. Even this examination of the national legislative decision is purely a question of fact which is to be measured against the individual aims set and their implementation. Referring to the Gambelli Decision (para. 69) the court stated that a member state, which encourages consumers to take part in gambling or betting and gains state revenue through this, cannot rely on combating gambling addiction as justification. The decision of the FSC is also based on the parallel decision of the ECJ in the Läärä case (case no. Rs. C-124/97), which is why the court did not (again) undertake a more exact examination of the restrictive provisions in the concrete case of the lottery „Oy Veikkaus Ab“. It is clear that the result of the examination of the Finnish facts by the FSC can have absolutely no effect on a decision in another member state (in particular, in Germany).

4. Upcoming Developments and Conclusion

The parallels initially assumed between the present case and the outstanding other decisions in other member states are purely superficial. Under closer examination, it becomes clear that the circumstances of the case as well as the final grounds for the decision of the FSC do not lend themselves to use in reasoning in a concrete case other than the one at hand and therefore, cannot be submitted by the state gambling providers – as often happens – as a suitable defence in court proceedings.

Whether, in Germany, one would also come to the result that

the income of the exclusive provider is only a side effect of the main aim, namely controlling gambling addiction under examination of the admissibility of the objectives, remains open until the court decision. On the whole, it is likely that the exclusive right of the state gambling organisers would be (correctly) rejected.