

Commentary

Hambach & Hambach Law Firm

New Decision by the BGH (German Federal Court of Justice) on Betting Law: Legal History or U-Turn?

A Commentary by Attorney-at-law Dr. Wulf Hambach, Hambach & Hambach Law Firm

Munich 14 Feb. 2008: Today, the I. Zivilsenat (first division for civil matters) at the Bundesgerichtshof (German Federal Court of Justice) dismissed in four cases action filed by state-run gambling providers (among others Westlotto) against private sports betting providers holding GDR and EU licences (among others bwin). In its press release, the BGH headlined: “Old cases of offering and operating sports bets do not constitute a violation of competition”. Initial press reports state that “the flood of law suits against providers of sports bets was thrown out on Thursday by the Bundesgerichtshof (BGH)”.

In its 2004 decision, the previous instance, the OLG (Higher Regional Court) of Hamburg had made reference to the so-called “Schöner Wetten” decision of the BGH and had stated in the headnote:

*“The **only** basis for the evaluation of the question of a violation of competition is **the lack of a domestic licence**. The question as to **whether** the applicable **provisions** of the laws of the respective Federal State are **unobjectionable under European law** and/or whether the process of issuing licences is actually being conducted free of discrimination, **is not decisive**, at least from the point of view of competition law. (Court’s headnote).”*

Now, in its most recent press release dated 14 Feb. 2008, the BGH states as follows:

*“(…) the previous instances had held that the prohibition of illegal gambling, enforced by penalties, does not violate European Community law nor German Constitutional Law. (...) **The Bundesgerichtshof has not assented to this evaluation**. The landmark decision by the Bundesverfassungsgericht (Federal Constitutional Court) dated 28 March 2006 (1 BvR 1054/01) is said to mean that the state betting monopoly in Germany, in the legal and actual form it had taken during the decisive period of time before 28 March 2006, represented a disproportionate interference with the freedom of profession of persons interested in professional activities of this kind, this therefore being inconsistent with Art. 12 paragraph 1 GG (Grundgesetz – German Constitution). At the same time, it represented an unjustified restriction of the freedom of establishment and the free movement of services guaranteed under Art. 43 and 49 EC. **Due to the state betting monopoly’s inconsistency with the Constitution and with Community law** during the period of time before the judgment of the Bundesverfassungsgericht on 28 March 2006, **Section 284 StGB** (Strafgesetzbuch – German Criminal Code) **could not be applied to the offering of sports bets in the cases to be decided here**, where acts carried out in the years 2003 to 2005 are to be considered (so-called “old cases”).”*

This means that, while the BGH in the “Schöner Wetten” decision in 2004 expressly demanded a German betting licence in order to exclude the applicability of Section 284 StGB, it now abandons this principle and turns to Community law.

Thus, if the new state treaty on gambling also violated Community law, an EU licence would be sufficient to exclude the applicability of Section 284 StGB, and thus a violation of competition. And a lot speaks for this inconsistency with EU Community law:

In the letter to the German Federal Government initiating infringement proceedings against the German Federal Government, the EU Commission states among other points that Sections 284, 285 and 287 violate the free movement of services guaranteed under Art. 49 EC.

Furthermore, a violation of the German gambling monopoly against Art. 43, 49 EC is being examined by the European Court of Justice, after referral of this question to the ECJ by the VG (Administrative Court) of Schleswig in a decision achieved by the law firm Hambach & Hambach.

The new decision by the BGH has far-reaching significance beyond competition law and beyond the so-called "old cases". The highest German court for civil matters unambiguously subjected the central provision of the entire gambling law to the priority of application of Community law. This also is of decisive importance for the legal situation under the new state treaty, a fact which has also been confirmed by the European Commission in its most recent letter.

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