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# Gambelli and Gambling

## Recent Developments of Gambling Law in the European Union



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## GAMBELLI AND GAMBLING

### Recent developments of Gambling Law in the European Union

In Germany, as in all other member states of the European Union (EU), gambling is subject to regulatory approval. Without such approval, operating gambling services is illegal and may lead to both criminal and civil law prosecution. However, the requirements for obtaining such approval differ substantially from state to state. The possibility of gambling through the Internet raises the question to what extent such laws must be harmonized in order to comply with basic principles of the EU, e.g. whether a resident company of the UK could offer Internet gambling services in Germany without the approval of the German regulator.

With the recent “Gambelli decision”, the European Court of Justice (ECJ) had to decide on this very subject (decision of November 2003). This newsletter outlines whether the Gambelli decision in fact will lead to an opening of the European market for cross-border gambling services.

#### I. GERMAN GAMBLING LAW

Gambling operations in Germany has been a de facto state monopoly since the early 1900s. It is a criminal offense *to publicly organize or to run a game of chance or to make the equipment therefore available without the permission of a public authority* (Sec. 284 (1) of the German Criminal Code - StGB). Even *advertising for a public game of chance operated without permission* is a criminal offence (Sec. 284 (1) StGB, which was issued in 1997 in order to prosecute those aiding the “Online Casinos” located outside of Germany and the EU to enter the market through advertising on local platforms and channels).

A “game of chance” in this context is defined as game in which (i) the player has to pay a stake, (ii) the outcome is mostly depending on chance and (iii) the individual skills have only a minor importance. The public permission will be granted by the relevant authorities of the German states (Länder) since gambling law is within their responsibility.

Beside the sanctions of a criminal offense, Sec. 284 StGB also has an impact through the law of unfair competition. Committing a criminal offenses in the regular course of trade is considered as unfair competition. Licensed competitors (e.g. official casinos) and consumer associations might require unlicensed companies to refrain from advertising illegal gambling services. To avoid a civil lawsuit, such infringers are also obliged to agree on severe contractual penalties which fall due in the case of further infringements. Furthermore the infringer has to reimburse all legal fees of the plaintiff.

#### II. THE GAMBELLI-DECISION

Mr. Gambelli was an Italian gambling agent who accepted bets through the Internet on behalf of UK gambling operators. The Italian prosecutor accused Gambelli and some other 130 gambling agents of illegally operating gambling without a license. In Italy, only state entities are eligible for such a license. The Italian district court presented the case to the ECJ, because the judge saw a possible conflict of the relevant Italian statute with basic principles of the Treaty of the European Community (EC Treaty: Art. 43 – Freedom to Provide Services and Art. 49 – Right of Establishment).

With its Gambelli decision, the ECJ in fact confirmed the concern of the Italian court and considered the relevant Italian statute as in violation of the EC Treaty. According to the ECJ, it violated the Freedom to Provide Services and the Right of Establishment within the EU if a UK company is not allowed to offer gambling services in Italy without permission from the Italian state. However, the ECJ did not generally qualify a state monopoly in gambling to be in conflict with EU-law. Whenever a member state justifies a state monopoly or a severe license policy with serious grounds of general interest (protection of the public, avoidance of addictive behavior, fight of deceptive gaming machinery), the violation of the Freedom to Provide Services and the Right of Establishment is justified. The Italian Government failed to emphasize such reasons in the relevant state law. The primary purpose of the Italian statute was to ensure funds for the public budget. According to the ECJ, such a mere financial motivation is not sufficient to restrict the market in such an intense manner.

### III. IMPACT OF THE GAMBELLI DECISION

#### General

Even after the Gambelli decision, EU-member states may fully regulate gambling as long as the law only applies to national service providers, because EU law does not apply in such internal issues. However, with respect to cross-border gambling offers, such restrictions will only prevail if the protection of the general public is their primary purpose. Otherwise, the principle of Free Trade of Services may overrule such national statutes. Furthermore, it is to be expected that if gambling is operated under a valid license of a EU member state, consequently the advertising of such operation must be permitted throughout the EU as well.

#### The “*Schöner Wetten*” Decision of the German Supreme Court

Despite the Gambelli decision, the German Supreme Court (BGH) does not yet fully share a liberal view on advertising for “European” gambling services. In the so-called *Schöner Wetten* decision (*nicer betting*), the BGH assessed the German interdiction of gambling without a state license (Sec. 284 StGB) still to be valid (decision of April 2004). According to the BGH, the German legislator justified the state monopoly with the protection of the public. Nonetheless in this particular case, the BGH denied the liability of an online-newspaper which was accused of unfair competition because of having unlawfully advertised for gambling through a hyperlink to an Austrian online betting agency in an online article. In the light of the freedom of the press, the doubts whether, after the Gambelli decision, cross-border advertising for gambling was still unlawful were serious enough not to condemn the publisher.

#### Other opinions

Based on the Gambelli case, the district court of Munich (Landgericht München I) went even further and ruled that a foreign EU license shall be deemed as “permission” in the sense of Sec. 284 (4) StGB, as long as such services are only advertised in Germany. The standpoint of the BGH to sustain the state monopoly was highly criticized in legal reviews. Since the German state-controlled gambling industry itself highly invests in advertising for lotteries, betting and gambling, the protection of the public seems only to be a minor purpose. However, a more “European” interpretation of the gambling law through the BGH or a final guidance from the ECJ in regard to the German jurisdiction remains to be expected.

As a consequence, cross border gambling offers by other EU operators should force the German legislators to allow gambling under less severe conditions in order not to lose the turnovers of this industry and to ensure compliance with EU laws.

### IV. CONCLUSION

- Even under the Gambelli decision, for the time being the German state monopoly prevails. Both offering and advertising for gambling is still being pursued; a risk of civil and criminal liability remains.
- However, in the light of the Gambelli decision, both addressing the German audience by gambling providers, holding an EU license, as well as advertising such offers in Germany should be legal.
- Among the EU-member states, there are different levels of gambling restrictions and permission policies. Gambling operators might make use of this diversity.

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