

A VIEW OF EUROPEAN GAMBLING REGULATION FROM THE PERSPECTIVE OF PRIVATE OPERATORS

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1 Gambling – The Last Reservation for Monopolies in the European Union?

In the European Union barriers to national markets and national monopolies are gone. This concerns not only cassis and wine, but also complex and incorporeal products and services you cannot touch, but you have to trust. Financial products and services (which might pose serious financial dangers to customers) can now easily be offered in all Member States with a 'European passport' (thereby expressly confirming the country of origin principle). Consumer protection is dealt with by strict and very detailed regulation. If you look at the Financial Services Action Plan (FSAP) of the European Commission,² the completion of an integrated internal market for financial products and services seems to be becoming closer. Financial products are increasingly offered in cross-border situations. Even old-established monopolies, like state monopolies for postal services and telecommunication, are by-gone or bound to vanish thanks to the European Union.

Yet is it really the case that all barriers to cross-border services and all national monopolies are really gone? Unfortunately not. A turnover of several billion Euros in lotteries, sports betting and all other kinds of gambling (among them gaming machines, scratch cards and poker) – indeed a very large and steadily growing business segment – remain in the hands of such state monopolies. Most of the European lottery and sports betting market is dominated by monopolies that realise a yearly turnover of more than Euro 50 billion. Only a few Member States allow private operators to offer sports betting, the United Kingdom being

1 The author expresses his personal opinion on the subject.

2 Communication from the Commission – Implementing the framework for financial markets: action plan, COM(1999)232, 11 May 1999.

the one with the longest tradition (and with several publicly listed companies). Even fewer Member States allow private operators to offer online casinos (e.g. Malta).

The European Court of Justice ('ECJ') already held 1994 in its *Schindler* decision³ that the importation of promotional material for a lottery and tickets into one Member State with a view to the participation by residents of that Member State in a Lottery operated in another Member State relates to a service within the meaning of Article 49 the EC Treaty. Since 1994 the ECJ has confirmed several times that gambling services are, of course, economic activities within the scope of the EC Treaty, the gambling market is at present far away from forming a real internal market. There are highly fragmented regional and national markets and regional and national monopolies for games of chance or special forms of gambling (lotteries, gaming machines, sports betting etc.). In some Member States, the state itself is offering gambling products or has mandated a state-authorised (and mostly state-owned or state-controlled) operator to do so. While upholding its monopoly, these Member States are trying to bar foreign private operators (and sometimes even state-authorised operators) from other Member States access to the market.

Under Community law, this is quite problematic. Not only the freedoms to provide services and the freedom of establishment are restricted. This behaviour is also problematic with regard to the competition rules of the EC Treaty, especially when state operators are acting 'in concert' or as a hard-core cartel, and with regard to the regulation of state aids and state monopolies. The German Federal Court of Justice, in its *Faber* decision,⁴ already held a few years ago that the cartelising of state operators in the Deutscher Lotto- und Toto-Block ('DLTB') was problematic. The German Cartel Authority (Bundeskartellamt)⁵ recently pointed out that the remaining private competition had to be protected. According to the Cartel Authority, the Deutscher Lotto- und Toto-Block must not dictate conditions of the distribution of lottery materials.

3 Case C-275/92, *Her Majesty's Customs and Excise v. Gerhart Schindler and Jörg Schindler*, [1994] ECR I-1039.

4 Bundesgerichtshof, decision of 9th March 1999 – KVR 20/97, GRUR 1999, 771.

5 www.bundeskartellamt.de/wDeutsch/index.shtml

2 Barriers against the Cross-Border Offering of Gambling Services by Private Operators

2.1 Member States vs. Private Operators

While technical barriers are gone thanks to the Internet, in addition to pre-existing legal barriers, new ones have been constructed, mainly to protect national monopolies (and the proceeds from these monopolies to the exchequer or for good causes). In recent years, there have been several cases where criminal proceedings have been initiated against licensed operators who were established in one Member State and offered services in another Member State (one against Stanley International Betting Ltd and its Italian agents leading to the famous *Gambelli* decision of the ECJ⁶). Bank accounts of Austrian bookmakers were frozen in Germany based on the argument that offering cross-border sports betting from Austria to Germany constitutes 'illegal gambling', a serious criminal offence.⁷ Some public prosecutors were even ordered by the Ministry of the Interior to disregard the *Gambelli* decision and initiate criminal proceedings against managers of foreign bookmakers and also against owners and even normal employees of betting shops in Germany. With regard to betandwin, a listed company, the public prosecution service argued that giving away footballs and football t-shirts with a logo of this licensed bookmaker already amounts to a criminal offence, as advertising 'illegal gambling' is punishable.⁸ According to German law, even customers are committing a criminal offence according to Article 285 of the German Criminal Code. Procedural measures were taken against several hundred German customers by the public prosecution service (forcing their banks to give evidence about the identity and address of the customer), although there is no published case where a customer was finally convicted.

6 Case C-243/01, *Criminal Proceedings against Piergiorio Gambelli and Others*, [2003] ECR I-13031.

7 Art. 284 para. 1 German Criminal Code (Strafgesetzbuch) postulates that anyone holding an unlicensed game of chance incurs a penalty. The degree of the penalty varies from a fine to imprisonment for up to five years for commercial (that is for profit seeking) purposes. The punishable act is not gambling itself, but enabling others to gamble by operating, holding or making gambling available. Protective purpose is the public control of gambling respectively of the commercialisation of the natural passion of gaming.

8 Art. 284 par. 4 German Criminal Code. According to this provision anyone advertising for public gambling incurs a penalty ranging from a fine to one year imprisonment. The provision of Art. 284 para. 4 German Criminal Code requires that a gambling business without 'administrative license' is being advertised for. The Bundestag stated in the legislative materials that this provision is meant to prevent 'foreign gambling operators from conducting their advertising activities on the German market by third parties resident in Germany'.

Under national law gambling is quite often seen as morally questionable and socially undesirable. The German Federal Court of Justice once argued: 'The legal and moral order dislikes gambling.' This approach is somehow questionable. Recent studies show that 70-90% of the adult population has made use of gambling services in some way or another. Most people seem to enjoy playing and also playing for money. Sports betting can be entertaining and has become a normal leisure activity for quite a lot of people.

Not only morality, but also financial reasons do play a role. Money from gambling is traditionally used for 'good causes'. This has the notion of a 'sin tax' for an undesirable, but – alas – popular activity. However, this money, economically a kind of monopoly dividend, would have otherwise been derived from tax. It is my impression that it sometimes looks like a shadow budget not thoroughly controlled or not controlled at all by parliament (as in the case of tax money whose use can be easily traced). Good causes also blur the boundaries and the justification of public policy. The use of such revenues casts doubt over the real motives of national legislators and state operators behind maintaining a monopoly. The reduction of gambling opportunities is perhaps a front for more politically sensitive motives.

2.2 State Operators vs. Private Operators

Apart from the existence of national monopolies, also state operators are trying to bar foreign operators. The DLTB,⁹ from my point of view a hard core cartel, is preventing cross-border offering with all means. Alongside intensive political lobbying members of the DLTB sued almost all private operators from other Member States who were targeting German residents, invoking unfair competition and breach of trademarks arguments. On the 26 November 2003, for example, Ladbrokes was forced to close down its German language internet sites, following a judgement in favour of Westlotto, the state gambling operator of North Rhine-Westphalia. The same happened to William Hill. Both bookmakers can no longer accept bets or wagers from German residents. Ladbrokes also had to fight in Dutch courts.

Over the last years, obviously fearing a fall of the monopoly (correctly the monopolies of the 16 German states), the DLTB trademarked all relevant terms, like 'Lotto' and 'Toto' (which are simply abbreviations of the generic terms 'lottery' and 'totalisator'). The German Federal Court of Justice (Bundesgerichtshof) recently upheld the cancellation of the trademark 'Lotto'.¹⁰ It also found the

9 An association of the 16 German state operators and state-authorised gambling operators, legally a partnership under the German Civil Code (Gesellschaft bürgerlichen Rechts). See www.lotto.de

10 Bundesgerichtshof, decision of 19 January 2006 – I ZB 11/04.

advertisement slogan used by the Free State of Bavaria¹¹ 'Oddset, the sporting bet with fixed quota, only by Lotto' to constitute misleading advertisement, pretending that sports betting was only offered by the state operators, and forbade it.¹²

2.3 Lobbying by Private Operators

Nevertheless, the cross-border provision of gambling services, especially sports betting, has become more and more important. Millions of Europeans are already playing online and placing their bets on the Internet or in betting shops ('data transmission centres' as in the *Gambelli* decision¹³), which are acting as agents for a licensed bookmaker in the UK, Gibraltar, Austria or Malta. Customers of private operators are attracted by better odds, lower commissions and/or higher winnings compared to games offered by state monopolies.

Private operators have also decided to take action at the political level. Industry organisations, like the European Betting Association (EBA),¹⁴ founded in 2004, and the Remote Gambling Association (RGA),¹⁵ have started to lobby the European and national institutions as the state operators and their associations, like the European State Lotteries and Toto Association, have done over the last decades. They are also fighting new restrictive national legislation, like section 66 of the Italian Finance Act 2006 which is aimed at making it even more difficult for foreign operators to enter the Italian gambling market.¹⁶

Reacting to the market foreclosure, several private operators and also associated services (media, sports, charity and tourism) have submitted complaints to the European Commission. The complainants alleged that the relevant Member State has not complied with Community law by separating the national market from the internal market and effectively prohibiting the freedom to provide services. Verifying these complaints, the Commission as 'Guardian of the Treaty' opened infringement procedures against Denmark and Greece in 2004. The Commission has sent letters of formal notice and delivered reasoned opinions. On 4 April 2006, the European Commission has sent letters of formal notice to seven EU Member States (Denmark, Finland, Germany, Hungary, Italy, the Netherlands and

11 One of the German states which offers gambling directly by a public authority, the Bayerische Staatslotterieverwaltung.

12 Bundesgerichtshof, decision of 28 October 2004 – I ZR 59/02.

13 Supra note 6.

14 See www.eu-ba.org

15 See www.rga.eu.com

16 See EBA News Release, *Entering into force of the Italian Finance Act 2006 – The Italian State introduces once again illegal restrictions on the national gambling market – Green light for the Commission to put an end to these violations* (26 January 2006). Available at www.eu-ba.org/downloads/EBA_pressrelease_ItalianFinanceAct06_26.01.2006.pdf (accessed on 10 April 2006).

Sweden), requesting information on national legislation and measures restricting the supply of sports betting services.¹⁷ The Commission will use the information to review its compatibility with the free movement of services. The Commission will check in particular whether the restrictions on the free movement of services are justified by the protection of the general interest and whether the measures are proportionate and non-discriminatory. The Commission has for sometime examined the situation, based on complaints by several bookmakers who were effectively barred from entering various national markets.

With regard to the EFTA Member State Norway the situation has developed even further. The EFTA Surveillance Authority decided to take the Norwegian Government before the EFTA Court, considering that the granting of a gaming machine monopoly to its State controlled operator Norsk Tipping would violate European Economic Area (EEA) law (which also grants the freedom to provide services). The Surveillance Authority brought an action against Norway on 13 March 2006, after the Norwegian government had failed to comply with a reasoned opinion of the Authority.¹⁸

3 Case Law by the European Court of Justice and the Status Quo

3.1 No Secondary Legislation

While gambling has become a highly controversial political topic, gambling is still not regulated by secondary Community law (directives and regulations). Although gambling was included, albeit with a temporary derogation, in the Commission's proposal for a Services Directive,¹⁹ it was ultimately removed following the first plenary reading of the European Parliament.²⁰ Also gambling was excluded from the Directive on Electronic Commerce.²¹

17 European Commission Press Release (IP/06/436) *Free movement of services: Commission inquires into restrictions on sports betting services in Denmark, Finland, Germany, Hungary, Italy, the Netherlands and Sweden* (4 April 2006). Available at: <www.europa.eu.int/rapid/pressReleasesAction.do?reference=IP/06/436&format=HTML&aged=0&language=EN&guiLanguage=en>.

18 Case E-1/06, EFTA Court, Action brought on 13 March 2006 by the EFTA Surveillance Authority against the Kingdom of Norway.

19 Commission Proposal for a Directive of the European Parliament and the Council on services in the internal market, COM(2004) 2 final, 13 January 2003.

20 European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on services in the internal market (COM(2004)0002 – C5-0069/2004 – 2004/0001(COD)) 16 February 2006.

21 Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), O.J.

So, at present, there is no European gambling regulation, but only case law with regard to the freedoms provided for by the EC Treaty and criteria developed by the ECJ. This means that the country of origin principle does not apply to gaming operators, although the ECJ, in its *Gambelli* decision, referred to the regulation entailing controls and penalties in the Member State of establishment of the bookmaker.²²

3.2 The Criteria of the European Court of Justice

In its *Zenatti*²³ decision the ECJ held that the Member States were authorised to regulate their gambling market themselves. But the ECJ did not give the Member States a free hand to completely monopolise their gambling markets thereby excluding providers from other Member States. The ECJ rather held that it is the discretion of the national authorities to restrict licensing as long as this does not constitute a form of discrimination and to judge whether these restrictions are necessary because of imperative reasons of general public interest.

In its *Zenatti* and *Gambelli* decisions the ECJ indicated the kind of reasons which do and which do not justify such restrictions. In this context the ECJ explains that restrictions are only permitted as far as they are justified by imperative requirements in the general interest, be suitable for achieving the objective which they pursue and not go beyond what is necessary in order to attain it. Furthermore, invoking public order reasons was not possible, as far as state authorities incited and encouraged consumers to participate in gambling to the benefit of the public purse. Restrictions on the freedom to provide services are acceptable from the point of Community law only to the extent that they are linked with the regulatory and protective policies the Member States apply because of the specific risks of gambling. Economic grounds are not included among the grounds under Article 46 EC or among the overriding public interest considerations which may justify restricting a freedom guaranteed under the Treaty. A fall in revenue cannot justify restrictions on the freedom to provide services.

3.3 Application of the Criteria on the State Operators

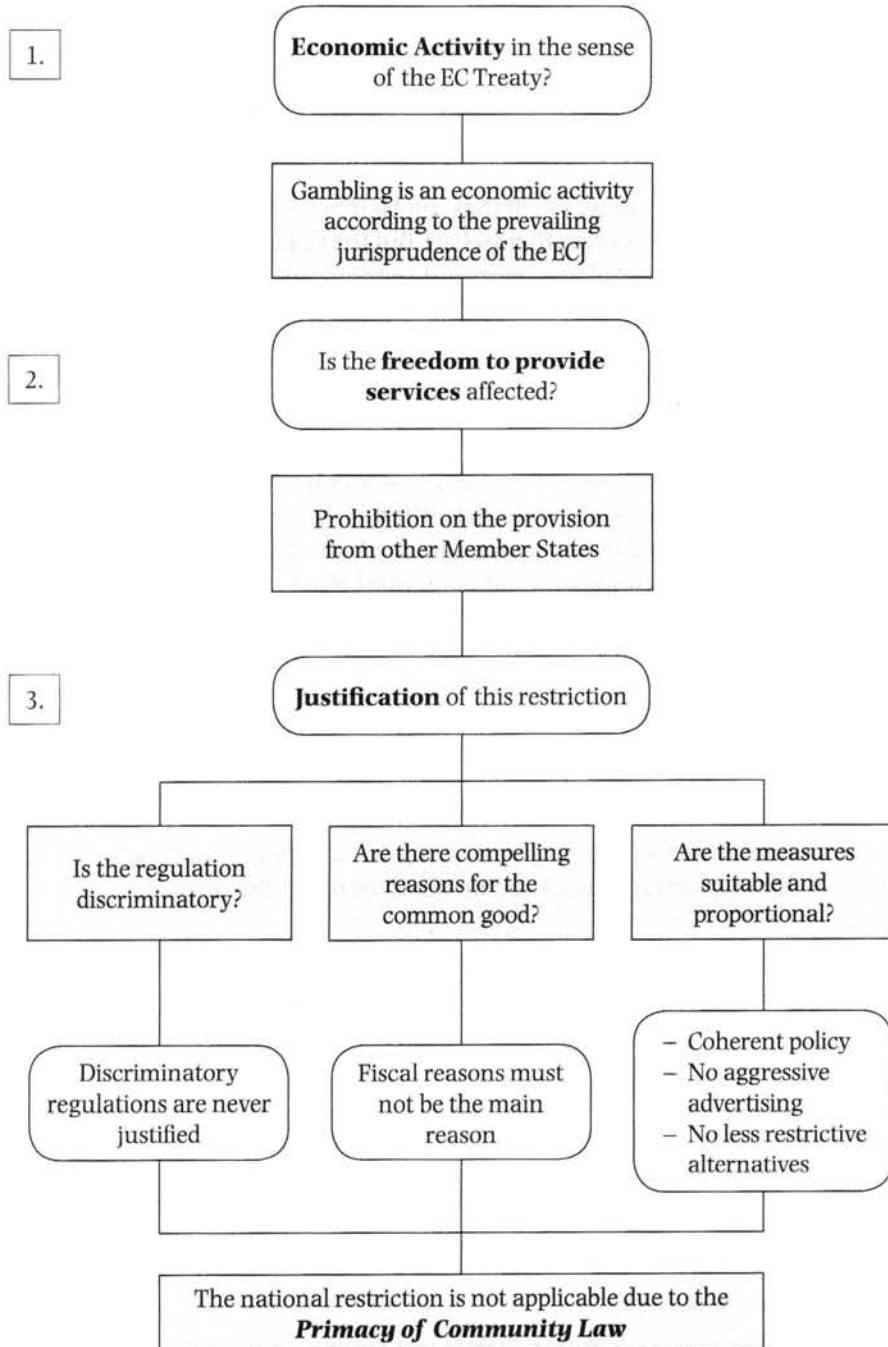
Most state and state-authorised lotteries and betting operators posted growing turnover and profit figures over the last decades. However, this fact alone does not prove that the state operators actively encourage gambling activities. Also advertising, product innovation, expansion to new sales channels (e. g. the

2000 L 178/1.

²² Supra note 6, at para. 74.

²³ Case C-67/98, *Questore di Verona v. Diego Zenatti*, [1999] ECR I-7289.

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distribution of gambling products in supermarkets and at fuel stations) have to be taken into consideration.

Most state operators market their gambling products as a normal leisure activity. The German Federal Constitutional Court, in its decision of 28 March 2006, expressly pointed to this inconsistency.²⁴ Over the long term, all state operators have increased their turnover and thus the overall amount of money spent by customers on gambling has grown.²⁵ The state operators enlarged their offer constantly by offering new products. New customer groups were addressed.

Advertising by the state gambling providers is substantial, and can be greater than that of private operators. In Germany, more than 2% of the turnover is being spent for advertising ODDSET (including sponsoring). Advertising campaigns of the state operators mostly target non-gamblers or casual gamblers. The commercials try to motivate ordinary citizens. Analysing the advertisement for the state gambling products, the German Federal Constitutional Court, in its earlier hearing in the same case on 8 November 2005, referred to illegal product placement on TV. From the Court's point of view the aggressive advertisement of state operators was not as much a problem but more the fact that gambling was being presented as normal and socially acceptable (which does not fit the argument of gambling being socially undesirable).

State operators also use all available distribution channels. In Germany, there are almost 27,000 *Annahmestelle*²⁶ (in comparison there are only about 12,000 post offices in Germany). Customers can use the Internet or a mobile phone to place bets or wagers.

In conclusion: Nearly all state operators have, at least in some respect, gone too far and allowed turnover/profit-orientation to predominate over their key objective of limiting and controlling gambling.²⁷ In the Italian market for example, lottery operators are publicly traded companies focusing above all on shareholder value and most likely not on the limitation of gambling.²⁸

This inconsistency means that the restrictions of the basic freedoms of the EC Treaty cannot be justified. Several national courts have held that Member States with monopolies did not care about the real reduction of gambling opportunities.

24 Bundesverfassungsgericht (Federal Constitutional Court), 28 March 2006, 1 BvR 1054/01.

25 Media & Entertainment Consulting Network (MECN), *The European Union and its Impact on State-Licensed Gambling Monopolies – Do gambling monopolies still focus on limiting gambling behaviour or will they lose their status as monopolies?* (Munich/London, 2004), p. 23.

26 Where customers can purchase the gambling products of the state operators.

27 Supra note 25, p. 33.

28 Supra note 25, p. 33.

In 2005, the Administrative Court of Breda ruled that the State monopoly held by Holland Casino was in breach of Article 49 EC Treaty.²⁹ The Court considered that the Dutch state does not carry out a policy aimed at protecting customers and highlighted the lack of consistently reliable recent research on gambling addiction, as well as the intensive marketing policy of Holland Casino. The Dutch State cannot rely on the general interest argument to justify restrictions and to make it impossible for private operators to access the Dutch market. Therefore, the Court ordered the Dutch State to reassess the licence application of the French casino group, notably in light of the *Gambelli* decision.

The consistency test, in terms of German constitutional law, has also been used by the German Federal Constitutional Court in its recent landmark decision on sports betting.³⁰ Fiscal reasons were found to be irrelevant in upholding a monopoly, both under Community law and German constitutional law.

The decision of the Federal Constitutional Court will probably change the gambling market quite dramatically in the longer run, although the state monopoly was upheld for a transitional period. However, the state monopoly in its current form was clearly held to be unconstitutional. Fiscal reasons, even for the promotion of sports, cannot justify the state monopoly. The current legal situation and exercise was held to be incompatible with the German constitution. The regulation was not coherent and sports-betting was effectively marketed as a 'generally harmless leisure activity', this being mainly motivated by (irrelevant) fiscal reasons.

According to the Constitutional Court, the state monopoly with regard to sports betting can only be justified by fighting gambling addiction effectively – something that has not been practised by the state operators thus far.

Instead of declaring the act at the centre of the case – the Bavarian Act on Lotteries (Bayerisches Staatslotteriesgesetz) – to be null and void, the Federal Constitutional Court ordered the legislator to change the law. The law governing sports betting must be reconsidered and amended before the end of 2007. The legislator may choose between two ways to regulate sports betting. It may either keep the state monopoly, but with clear limitations for marketing and sales, or it may liberalise the market by opening it up to private operators (thus abandoning the state monopoly).

Until then ODDSET, the sports betting offering of the state operators, must not advertise anymore, but the state operators may only report factually on the state betting offer. The state operators are also not allowed to introduce new products.

²⁹ Rechtbank Breda (Administrative Court of Breda), *Compagnie Financière Régionale v. Ministers van Justitie en Economische Zaken*, 2 December 2005, LJN AU7389 / 03/1868 WET.

³⁰ *Supra* note 25.

Initially, state operators were pleased with the decision, since they hoped that politicians were committed to maintaining the monopoly. The state operators rightly expected that the states would try to close down the existing betting shops collecting bets for private operators (mainly from Austria, Malta, Gibraltar and the UK). In my opinion, the consequences of the decision for the gambling market will not be so enjoyable for the state operators in the long term. Ultimately, a state monopoly accommodating all forms of gambling (except betting on horse races), as in Germany, can only be justified by preventing gambling addiction, the only common welfare criteria left according to the decision of the Federal Constitutional Court. Following the Constitutional Court's reasoning, one has to call either for a reduction in state advertising (with only the bare information about the product to be promoted to customers) or allow private operators access to the market.

4 European Gambling Regulation – Quo Vadis?

Clearly, securities regulation (mentioned above) is decades ahead of a European regulatory framework for gambling. This is strange as some gambling products, like spread betting and financial bets, are comparable with financial products and insurances. The interest paid on a special savings account which depends on the number of goals a football club scores appears to be a form of sports betting.³¹ At the moment, there is no mature and thoroughly worked-out legal concept for the regulation of gambling services on the European level.

In the present era of globalisation, national monopolies are out-dated. Recent case law has shown that outlawing private operators will not work in the longer run. There is a simple truth about betting and other forms of gaming: you can make it illegal, but you cannot make it unpopular. Prohibiting all private operators also poses a quite practical problem. You can only regulate (and effectively tax, which is sometimes even more important for the state) what is legal.

Monopolies probably would also not be able to survive in the market, if the state operator really had to comply with the *Gambelli* criteria (consistency of public policy, no discrimination, proportionality of restrictions). From my point of view, the German Constitutional Court pointed out the alternative of a very restricted monopoly mainly because of its respect for the legislator. Being inefficient as well as pushing customers towards Internet betting operators, a 'castrated' monopoly with limited sales and a prohibition on advertising would probably only pretend to constitute a real option. As the Federal Constitutional

³¹ HypoVereinsbank, a German bank owned by Unicredit, offers such an account. The interest depends on the number of goals FC Bayern München scores.

Court raised the conditions this high, the state offer would not be able to survive in the market.

If you look at financial services, highly regulated services can be offered in a very competitive and reliable way. However, a prerequisite for this is a level playing field for all operators. Liberalisation of the gaming market would benefit the customers. Competition would mean higher pay-outs. Customers would also be encouraged to have a closer look at the products and to compare between the different ones on offer.

The funding of good causes and sports is not necessarily jeopardised. Private companies could raise even more money for good causes by being more cost-efficient. Opening the market to well-regulated competition between Community licensed operators may provide a more diverse and plentiful range of funding opportunities.

From my point of view, the main aim should be to safeguard honest and fair gaming. The 'Swiss way' of creating an independent supervisory authority seems reasonable. The German Constitutional Court also argued for an independent authority. The Constitutional Court did not seem to be comfortable with the idea that the finance minister was really willing to reduce gambling opportunities (and revenues for the exchequer).

So, from my point of view, a change of the status quo is inevitable. The European Union might play a decisive role. It is unlikely that Member States will adopt, on their own initiative, fair betting regulations in the near future. So the European Commission should propose harmonised rules in this field, which would meet the same consumer protection and public order objectives as under exclusive rights systems. With harmonised rules betting and gaming can be conducted in a fair, crime-free and socially responsible way.